

The London School of Economics and Political Science

**Human Rights from the Great Depression
to the Great Recession:**

The United States, economic liberalism and the shaping of
economic and social rights in international law

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ABSTRACT

This thesis takes a 'law in context' and 'history of ideas' approach to examining the emergence, elaboration and evolution of 'economic and social rights' as human rights, including how and why they came to be included in the international human rights regime. The central thesis is that economic and social rights have been fundamentally shaped by the economic context and economic theories of the times in which they emerged and were elaborated. I have argued these rights emerged, and were elaborated, in times of economic crises, as part of a (liberal) challenge to liberal legal and economic orthodoxies. This thesis suggests that one important strand of the history of human rights lies in struggles within 'western' liberalism over rights, freedom and the role of the state in the economy.

Challenging other histories of human rights, the first part of this thesis shows how the phrase 'human rights' emerged as part of a challenge to 'property rights' and laissez-faire constitutionalism in the United States during the Great Depression, shaped by the theories of the legal realists, institutional economists and later by economic Keynesianism. The second part, drawing on newly discovered archival material, charts an untold story of how these US conceptions profoundly influenced the nature and scope of 'economic and social rights' during the drafting of the 1948 Universal Declaration of Human Rights (UDHR) and the 1966 International Covenant on Economic, Social and Cultural Rights (ICESCR). The third part shows how economic and social rights were later elaborated by the UN Committee on ESCR, again in the context of economic crisis and again as a challenge to economic (neo)liberalism, this time shaped by heterodox economist, Amartya Sen. However, some of the key theoretical insights that shaped these rights during the Great Depression have been lost, in ways that circumscribe their power to challenge economic (neo)liberalism and the 'constitutionalisation' of austerity in our own Great Recession.

DEDICATION

I dedicate this work to my parents, David Way, Nesta Parker and Ian Parker with love and gratitude, and to the memory of Marie-Helene Way.

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Human Rights from the Great Depression to the Great Recession:

The United States, 'western' liberalism and the shaping of economic and social rights in international law

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1. INTRODUCTION

'The peoples of the world, shaken by two world wars and a ruinous depression within a short 25 years, had discovered that neither peace nor freedom were possible to man in an industrial society without economic security. The ... extension of economic rights to man without depriving him of his traditional rights of free speech, religion, assembly, and fair trial poses the dominating question of the next 100 years. Because it is inseparable from the attainment of peace, the question will occupy the center of the national and international political stage. To leave social and economic rights out of a modern bill of rights would be to stage Hamlet without the Dane.'

John R. Ellingston, Full Employment Act of 1945: Hearings¹

1.1 Histories of human rights, ESCR and economic crisis

In his sweeping revisionist history of human rights, Samuel Moyn flamboyantly argues that the phrase 'human rights' (as opposed to 'rights of man' or 'natural rights' or other formulations) entered the English language 'unceremoniously, even accidentally' in the 1940s in the wake of the second World War II.² He contends that 'Human rights entered history as a throwaway line, not a well-considered idea',³ and crudely posits that it was only as the result of President Franklin D. Roosevelt (FDR)'s 'careless phraseology'⁴ that the phrase appeared in war-time rhetoric of the 1941 Atlantic Charter and the 1942 UN Declaration. Blithely dismissing much historical evidence on the 1940s,⁵ he declares that: '[a]s before in FDR's Four Freedoms speech, the phrase entered not with a bang, but only in passing'.⁶ And with hubristic panache, Moyn continues that '[i]t seems unlikely that FDR – who apparently inserted the sentence in the final revision of the [UN] declaration – could have meant to introduce something *conceptually new*'.⁷ Human rights, Moyn insists, appeared in the 1940s only by 'accident'.

Dismissing many histories of human rights as little more than 'hagiography', Moyn further asserts that reading World War II and its aftermath as the 'essential sources of human rights as they are now understood is misleading'.⁸ He dismisses the period of the 1940s as irrelevant for the history of human rights, anachronistically asserting that 'human rights as they are now understood' can only trace their antecedents back to the 1970s (or 1977 to be more precise!). But his argument rests rather narrowly on the assumption that what is new about 'human rights' is that they extend above and beyond the state, so the state can be held accountable by a supra-national entity. For Moyn, the 'central event in human rights

¹ Ellingston 1945, 1249.

² Moyn 2012, 44.

³ Ibid., 51.

⁴ Ibid., 52.

⁵ Key relevant works on human rights history in the 1940s include Simpson 2001; Glendon 2001; Brucken 2013; Whelan 2010; Anderson 2003a; Borgwardt 2007.

⁶ Moyn 2012, 49.

⁷ Ibid., 49 My italics. Moyn also argues that, although the 1948 Universal Declaration of Human Rights was an heroic achievement of diplomatic consensus, what is more interesting is why it remained so peripheral after that; why, as an NGO leader observed at the time, human rights 'died in the process of being born'.

⁸ Ibid., 45.

history is the recasting of rights as entitlements that contradict the sovereign nation-state from above and outside rather than serve as its foundation'.⁹ Thus Moyn sees histories that focus on other episodes or different definitions as failing to capture the 'essential' nature of human rights.

Indeed, referring to the allegedly sudden and 'accidental' appearance of the phrase 'human rights' in the 1940s, Moyn declares that '[i]t is astonishing that no evidence has been discovered to explain why and when the phrase appeared as it did', suggesting that this lack of evidence is because the 'search is based on the mistaken assumption that what is now so meaningful could not have emerged by accident'.¹⁰ While strangely continuing to insist on this '*accident*', he himself notes that the 'first serious circulation' of the phrase in the English language occurred during the 1930s in the United States when it was used as a phrase 'in support of New Deal reform'. Yet he dismisses this evidence as unimportant, on the peculiar basis that critics of US President Franklin D. Roosevelt, from both the right and the left, struggled to (re)appropriate this phrase, leaving the term 'human rights' with no agreed definition.¹¹ Moyn also briefly acknowledges that during the 1940s in the international sphere, 'especially after William Beveridge's report urging a post-war world of guaranteed work and higher standards of living', the meaning of 'human rights' became 'synonymous with the central wartime promise of the Allied leaders for some sort of social democracy'.¹² But rather than exploring why this was the case, and the implications for the history of human rights, Moyn quickly leaves these meanings behind in search of a definition of 'human rights' that more closely fits with his own.

It seems odd however to deem these episodes as irrelevant, when surely the struggles over the definition of the term in that time might be important for the history of 'human rights'? Perhaps unpicking the strands of this definitional struggle over 'human rights' in Roosevelt's time might yield some useful insights? My own intuitions, developed while reading the history of the Great Depression to better understand our contemporary Great Recession, drove me to explore this period as significant for study of economic and social rights. This thesis therefore starts by exploring these specific episodes of the history of human rights that Moyn glosses over, looking at the evidence as to when and why the phrase 'human rights' appeared as it did. I show that teasing apart the struggles over the definition of the phrase 'human rights' in the 1930s in the era of the Great Depression (and not only as it emerged in the war-time context of 1940s) should be central to our understanding 'human rights', and especially to our

⁹ Ibid., 13.

¹⁰ Ibid., 49.

¹¹ Ibid., 49–50 He argues that while Roosevelt supporters invoked 'human rights' in relation to the New Deal, there was competition over the term from the political right, when Herbert Hoover decried the New Deal for its interference with human rights in 1934, while from the political left, socialists criticized Roosevelt for saving capitalism and trampling on the human rights of workers.

¹² Ibid., 52.

understanding of how and why so-called ‘second generation’ economic and social rights¹³ came to be included in the ‘international bill of rights’.

Indeed, I suggest that - very far from being an ‘*accident*’ or the result of ‘careless phraseology’ - the phrase ‘human rights’ was deliberately and strategically forged in the New Deal era, in the context of a struggle against economic *laissez faire* constitutionalism and the struggle to establish new ‘economic and social rights’ on an equivalent basis to ‘older’, more established liberal rights to property and freedom of contract. Thus, in my reading of the history of human rights (contra Moyn’s reading), what emerged as ‘human rights’ in the 1930s and 1940s, was not only a new conception of state responsibility to a supra-national body (although that definition was already quite clearly there by the 1940s, most notably in the work of Hersch Lauterpacht¹⁴). Rather I show, in the first part of my thesis, that what put the ‘human’ in ‘human rights’ was precisely the elaboration of new set of ‘economic and social rights’ that sought to challenge liberal legal and economic orthodoxies and sought to ‘humanise’ the economy through a stronger role for the state in protecting people against the abuses and vicissitudes of ‘free’ markets. This marked a radical shift in the liberal conceptualisation of the relationship between the state and its citizens that occurred at that time, setting the groundwork for the post-war shift towards ‘embedded liberalism’.¹⁵

My larger thesis traces the *emergence, elaboration and evolution* of ‘economic and social rights’ as human rights in the modern international human rights regime. In particular, my research aims to set the emergence and elaboration of these norms in their historical and economic context, to illuminate how and why these rights emerged and what this might add to our contemporary understanding of economic and social rights. My central research questions were:

- 1) How and why did ‘second generation’ economic and social rights come to be included in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights?
- 2) How have these rights been shaped by their economic context and the economic theories of the times in which they emerged and have later been elaborated?

Although the emergence of these ‘new’ rights in the international human rights regime marked a distinct epistemological break with the classical western liberal rights-based tradition, it is historically inaccurate to assume, as much of the contemporary human rights literature still tends to do, that economic and

¹³ By ‘economic and social rights’, I refer to the human rights enshrined in Articles 22-28 of the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights. I mean the same when I use the short form acronym ‘ESCR’.

¹⁴ See Lauterpacht 1945.

¹⁵ Ruggie used this term to describe the shift in the post-war liberal consensus that sought to ‘re-embed- markets in their social context, following Polanyi who had warned of the earlier ‘dis-embedding’ of markets from social, religious and political controls. Ruggie 1982; Polanyi 1944; Marxist scholars by contrast read this shift as a compromise between the interests of capital and labour, see Harvey 2005.

social rights were included in the modern international human rights regime only on the insistence of the socialist states.¹⁶ It is also incorrect to insist that ‘western’ countries such as the US have always rejected ideas of economic and social rights, or what Craven called the ‘ideological conflict between East and West’ was so clear cut.¹⁷ In fact notions of ‘second generation’ economic and social rights also emerged within ‘western’ liberalism, and their inclusion in the drafting of the UDHR and the ICESCR owes a substantial debt to the support of ‘western’ states, including the United States. Indeed, as I argue below, one significant strand of the history of economic and social rights lies in Roosevelt’s New Deal liberalism and his re-definition of ‘rights’ and (economic) freedom - ideas which came to influence the drafting of the international human rights treaties, under the leadership of Roosevelt’s wife, Eleanor Roosevelt.¹⁸

As I show in the second part of the thesis, economic issues – and indeed issues of ‘economic security’ and ‘economic rights’ – which were high on the domestic agenda of the US during the 1930s and 40s - became a critical part of the international agenda at the end of the war in 1945.¹⁹ After the economic devastation of the Global Depression and the experience of total war, establishing institutions to guarantee ‘freedom from fear and want’ became central to the construction of the international architecture of a stable post-war order, just as establishing state obligations towards economic and social rights became central to the framing of human rights in the 1948 Universal Declaration on Human Rights (UDHR).

While many histories of the emergence of the international human rights regime of the twentieth century have been written,²⁰ few have focused specifically on the emergence of economic and social rights²¹ and fewer still have fully analysed the emergence of these rights within their economic context. Much of the literature on the drafting history of economic and social rights focuses narrowly on the drafting of the International Covenant of Economic, Social and Cultural Rights (ICESCR) in the period between 1949 and 1966, without looking back at the drafting of the UN Charter or the UDHR.²² It also tends to set the history of ESCR against the political context of the heightening of the tensions of the Cold War, contributing to a marked tendency to read the increasing US resistance to economic and social rights in this period, as evidence that the US has *always* rejected economic and social rights.²³ If we look at this

¹⁶ See Whelan and Donnelly 2007.

¹⁷ Craven 1995, 8.

¹⁸ Glendon 2001.

¹⁹ Borgwardt 2007.

²⁰ There has been a recent explosion of the literature on the history of human rights. See for example, Hunt 2008; Lauren 2003; Morsink 1999; Simpson 2001; For a recent revisionist thesis, see Moyn 2012; For a review of the recent historiography of human rights and debates over the ‘essence’ or ‘origins’ of rights, see Alston 2013.

²¹ A notable recent exception includes Whelan 2010; Roberts also includes a chapter on ESCR in his recent history of the international bill of rights, but since he concentrates on the later 1940s without looking back earlier, he focuses largely on US opposition to ESCR rather than the more nuanced history addressed in this thesis - see Ch 6 Roberts 2015.

²² Whelan for example examines the *travaux préparatoires* of the ICESCR in detail but does not look in detail at the travaux of the UDHR, missing key linkages between the two, see Whelan 2010.

²³ As Craven did, see Craven 1995.

history over a broader period of time however, it becomes clear that the US has not always resisted ESC rights, and that ‘western’ liberal theories of rights have not always precluded possibilities of these rights.²⁴ The insistence that economic and social rights arise only out of socialist thought, rather than also out of liberal thought, is an incomplete, and partial, history of these rights.

This thesis offers a new perspective by setting the emergence, elaboration and evolution of economic and social rights in their economic context, and by extending the analysis over a broader period of time, tracing not only the *travaux préparatoires* of the UDHR and the ICESR, but also a ‘pre-history’ of economic and social rights (as these rights emerged within ‘western’ liberalism in the context of the United States) as well as a ‘post-history’ (as they evolved in the later jurisprudence of the UN Committee on Economic, Social and Cultural Rights (CESCR) after it was established in 1987). In drawing out this longer history with an economic lens, and on the basis of new primary material from the UN and US archives, this thesis throws new light on the history of human rights, relevant for a fuller appreciation of the drafting process and for a deeper understanding of the instruments.

One central argument of this research is that ‘economic and social rights’ emerged in the United States during the Great Depression of the 1930s as part of a challenge to classical laissez-faire constitutionalism, shaped first by the theories of the legal realists and the institutional economists (the first ‘law and economics movement’) and then by the theories of Keynesian economists. These ideas were then transmitted to the international level, influencing the drafting of the UDHR and ICESR in a number of significant ways (including with respect to Keynesian roots of the concept of ‘maximum available resources, and the exclusion of the right to property from the international bill of rights). I then contrast this with how economic and social rights evolved in the jurisprudence of the CESCR after 1987, again in the context of the economic crisis, and again as part of a challenge to economic (neo)liberalism²⁵, first in the crises of structural adjustment of the 1980s and then in the crisis of 2008 Great Recession, this time shaped by heterodox economist, Amartya Sen. Recovering these debates helps to illuminate the philosophical underpinnings of economic and social rights, as they have emerged in liberal thought. A secondary argument however is that many of the insights of the earlier period have been lost in this later period in ways that circumscribe the power of ‘economic and social rights’ to challenge economic (neo)liberalism and the ‘constitutionalisation of austerity’ in our own Great Recession.

My work engages with the literature on the history of human rights, particularly with histories that look at the emergence of economic and social rights as international human rights. An article by Whelan and Donnelly, and Whelan’s more detailed history that it draws from, covers some of the ground I cover here, including challenging the ‘myth of western opposition’ to economic and social rights.²⁶ However,

²⁴ This question is explored in more depth in this thesis, but see also the debate between Whelan and Donnelly 2007; Kirkup and Evans 2009; Kang 2009; Whelan and Donnelly 2009b.

²⁵ The concept of ‘neoliberalism’ is touched on in Section 4 of this thesis, but for an overview see Harvey 2005.

²⁶ Whelan and Donnelly 2007; Whelan 2010.

Whelan does not put this history in its economic context nor looks at how economic theories shaped the conceptualisation of the rights over time. And while Whelan looks in detail at the *travaux préparatoires* of the ICESCR, he never looks back at the *travaux* of the UDHR, missing a crucial piece of evidence on the US position that I unearthed in the UDHR archives, which would have strengthened his own argument, and which proves that the US had an impact on the drafting of ESCR that is far greater than commonly understood.

Borgwardt's history also covers some of this ground, linking the emergence of the phrase of 'human rights' to Roosevelt's conception of 'economic and social rights' and the Depression era economy.²⁷ Borgwardt posits that the 1941 Atlantic Charter, the 1942 Declaration of the United Nations and the 1945 UN Charter amounted to a 'bold attempt on the part of Roosevelt and his foreign policy planners to internationalize the New Deal'.²⁸ However, Borgwardt only covers Roosevelt's war-time rhetoric on 'human rights' over the period between 1941-1945, missing (like Moyn) Roosevelt's earlier use of the term 'human rights' in the 1930s. In addition, although Borgwardt sets her history of human rights against the economic context of the Great Depression, Jason Scott Smith suggest there is a gap in her analysis as she treats the New Deal in vague and sweeping terms as a 'cognitive style' that results in a 'short-changing of economic issues.'²⁹ He points out that she manages to (mis)describe the Harvard economist Alvin Hansen 'as an opponent of pump-priming when in fact he was a leading advocate of the Keynesian theory' suggesting in turn that she 'patently misunderstands Keynesian economic theory'.³⁰ While this may have been merely an editorial error,³¹ it is true that Borgwardt goes into little depth on Keynesianism. By contrast, this thesis looks in greater detail at economic theories, including tracing the impact of Keynesianism on the emergence of economic and social rights and how Keynesian ideas fed into the drafting of the UN Charter and the international human rights instruments.

Brucken also provides an excellent new, and very detailed history on the US position on human rights in the 1940s,³² but he focuses largely on the legal history, detailing for example the impact of the American Law Institute and the Commission for the Study of Peace on the US official position as drafted by the State Department lawyers. But, because he focuses less on the economic context, he misses the contributions of economic institutions such as the National Resources Planning Board (NRPB) and how their bill of 'Our Rights and Freedoms' also influenced the US position and ends up overemphasising the dominant narrative of the United States as being consistently against economic and social rights.

²⁷ Borgwardt 2007, 8.

²⁸ Ibid., 3.

²⁹ Smith 2006, 2.

³⁰ Ibid.

³¹ See the source reference to Alvin Hansen in Borgwardt 2007, 137.

³² Brucken 2013.

In engaging on economic issues, my work also seeks to reflect on contemporary debates in the literature on human rights and economics, and the ‘foundational tensions’ between them.³³ It further aims to reflect on debates on the relationship between human rights and ‘neoliberalism’ or ‘market fundamentalism’. There are two readings of this relationship in the current literature - one sees ESC rights as acting as an effective counternarrative or civilizing force against economic neoliberalism,³⁴ while a second, opposite reading, sees human rights as complicit in the spread of the market system across the globe.³⁵ Indeed, ‘[i]t is increasingly common to claim that international human rights law is a neoliberal phenomenon.³⁶ But as Moyn has pointedly suggested, it ‘is a long way from historical ‘coincidence’ or companionship ... to actual causality and complicity.’³⁷

Moyn himself is completely dismissive of human rights offering any robust political resistance to neoliberalism, since ‘human rights idioms approaches, and movements’ do not strive to address inequality, and ‘human rights offer [merely] a minimum of protection where the real significance of neoliberalism has been to obliterate the previous limitation of inequality.’³⁸ Thus, he bombastically proposes human rights ‘stick to their minimalist tasks’ in part to ‘avoid drawing fire for abetting the stronger companion of their historical epoch.’³⁹ Yet Moyn nonetheless recognizes that a more careful history of this relationship needs to be written. He cites Mary Nolan’s comment that there ‘is no single relationship between human rights and market fundamentalism across countries and types of rights’⁴⁰ noting that the same observation applies across time: ‘The history of [...this] distant companionship remains to be written.’⁴¹

It is this task then that my work takes on, tracing the history of this relationship through the emergence, elaboration and evolution of economic and social rights from the Great Depression to the Great Recession.⁴²

³³ See for example Salomon and Arnott 2014; Branco 2009; Reddy 2011; Balakrishnan and Elson 2008a; Balakrishnan, Elson, and Patel 2010; Elson and Balakrishnan 2011; Dowell-Jones 2004b; Seymour and Pincus 2008; Uvin 2014.

³⁴ See generally O’Connell 2007; Kinley 2009.

³⁵ Marks 2013; Brown 2004; Whyte 2017a.

³⁶ Moyn 2014, 147.

³⁷ *Ibid.*, 150. Rather caustically remarking that ‘Marxists such as Wendy Brown, Susan Marks and others have offered indeterminate and unsubstantiated claims that do not suffice to plausibly elevate the chronological coincidence of human rights and neoliberalism into a factually plausible syndrome.

³⁸ *Ibid.*, 151.

³⁹ *Ibid.*, 151.

⁴⁰ Moyn 2014 citing ; Nolan 2011.

⁴¹ Moyn 2014, 159.

⁴² Moyn has also more recently taken on this task, though in a far less detailed way, as I reflect on in my conclusion. See Moyn 2018.

1.2 The surprising influence of the United States on the UDHR and the ICESCR

One of the original contributions of this research is based on my archival research into the primary materials in the *travaux préparatoires* of the UDHR and the ICESCR, where I unearthed a significant document which is mysteriously absent from other histories of human rights.⁴³

This document was a proposal made by the United States in July 1947 entitled “*United States Suggestions for Articles to be Incorporated in an International Bill of Rights*”.⁴⁴ It sets out in detail a range of suggested civil and political rights, but also a full catalogue of economic, social and cultural rights - providing clear evidence of positive early support of the US administration for the inclusion of economic and social rights in the UDHR.

Yet oddly, this July 1947 US proposal (and a similar proposal from June 1947) is absent from contemporary histories of human rights, including ‘definitive’ histories of the UDHR such as that by Morsink, as well as detailed histories of the ICESCR.⁴⁵ It is even missing from ‘exhaustive’ commentaries on the ICESCR such as those by Craven and Sepúlveda.⁴⁶ Even stranger, is that the wording and provisions of this 1947 US text, is closer in content to the 1966 ICESCR than to the 1948 UDHR. A number of concepts and phrases that were later to become part of the lexicon of the ICESCR, such as the ‘right to the highest attainable standard of health’ and the concepts of ‘maximum available resources’ and ‘progressive realization’ that came later to be enshrined in Article 2.1 of the ICESCR, appear to have roots in this 1947 US proposal. What makes this 1947 text historically significant then, is not only that it belies standard assumptions about the US position on ESC rights, but also because substantial parts of the 1947 US wording on provisions on economic, social, and cultural rights came to be reflected in the 1966 ICESCR.

To find out more detail about this US proposal, I travelled to the US National Archives in College Park, Maryland, to explore the internal US government files covering the US drafting position during the drafting of the UDHR. In the archives, I found the background to this document, including a set of brief position papers on each of the rights to be included in the UDHR as well as the official instructions sent to Eleanor Roosevelt for her role on behalf of the US in the drafting process. In analysing these US archives alongside the UN archives, I found that the US position on ESCR was far more nuanced than standard narratives suggest, that there were differences amongst the US delegation and its advisers, and that the US position in fact shifted quite significantly over the short period of the drafting of the UDHR between 1947 and 1948 in response to both domestic and international pressures.

⁴³ See Way 2014 This is also the subject of section 3.2.1 of this thesis.

⁴⁴ UN Doc E/CN.4/21, *Drafting Committee on An International Bill of Rights, 1st Session: Report of the Drafting Committee to the Commission on Human Rights*, July 1, 1947. The *US Suggestions* can be found on pages 41-47 of this document.

⁴⁵ See for example Morsink 1999; Whelan 2010.

⁴⁶ Craven 1995; Sepúlveda 2003.

This document sits at the heart of my research which traces the story of this US proposal through the drafting process of the UDHR and the ICESCR, but also backwards and forwards through history. Drawing on this original research, I show how the United States played a far larger role in shaping 'economic and social rights' than is commonly understood, including in framing the nature and scope of ESC rights in the ICESCR, with a particular influence over the phrasing and meaning of Article 2.1 of the ICESCR.

1.3 Methodology: Human rights in economic context

This thesis takes a 'law in context' and 'history of ideas' approach to examining the emergence, elaboration and evolution of 'economic and social human rights within the modern international human rights regime. It aims to set 'economic and social rights' against the economic context in which they emerged and were elaborated - to juxtapose human rights and economic context – not to draw any strict causal links or correlations, but rather to see whether anything new can be drawn from this juxtaposition.

It combines historical and archival research, with theoretical analysis of dominant ideas governing public philosophy, human rights and economics in different times and how these interrelate. It is necessarily interdisciplinary, drawing on the literatures of history, law and economics. As this work 'has less to do with legal method and more with the actors whose words and deeds are at the centre of the analysis'⁴⁷, my materials are not primarily case law, but draw from primary sources such as speeches, press articles, materials from US Government and UN archives, as well as the secondary literature to capture how issues were defined and debated at the time these rights emerged and were elaborated.

For the historical research on the emergence of economic and social rights in the 1930s, I made use of primary sources from press articles available in ProQuest, as well as secondary literature. For their elaboration in the 1940s, I carried out significant research delving into the UN and US archives. I used online archives wherever possible, but visited physical archives where documents were unavailable online. For the UN primary sources, I drew on the online archives of the *travaux préparatoires* of the UN Charter (UNCIO negotiations), the UDHR and the ICESCR, including documents of the UN Commission on Human Rights, the Economic and Social Council and the General Assembly, but I also visited the physical UN repositories at the UN in both Geneva and New York. For the US primary sources, I made substantial use of online US archives, including the US *Department of State Bulletin* and the *Foreign Relations of the United States* (FRUS), and also visited the physical archives at the US National Archives at College Park, Maryland.

⁴⁷ Ackerman 2005, 17.

For the more modern analysis of the elaboration of the rights from 1987 onwards, I used the online repositories of materials of the UN Committee on Economic, Social and Cultural Rights in their interpretation of the rights including their General Comments, Statements, Concluding observations and reports on their Days of Discussion. For the overarching economic context, I made use of secondary material from histories of economic thought as well as histories of the New Deal era, and more recent literature, to interweave the history of the modern human rights regime its economic context from the Great Depression and the Great Recession.

A key challenge in my work centred on historiography, and the contested nature of histories of human rights, as well as histories of the New Deal, given often conflicting accounts of the same data as they are interpreted through different framing concerns. The legal historian Fisher has raised the tension that afflicts intellectual history between the concern that there ‘no full, unmediated, objective access to the past is possible’, yet ‘there is such a thing as the past, and not all historical interpretations are equally true to it.’⁴⁸ The only way around this tension he suggests is to be reflexive and to recognise that all history is to some degree perspectival – ‘the manner in which the historian approaches and interprets the past is influenced by her own concerns and by the concerns of the community and period in which she lives’.⁴⁹ Fisher outlines four competing methodological approaches to intellectual history: structuralism, contextualism, textualism and new historicism – and suggests that textualists in particular contend that intellectual history should ‘become more openly perspectival and acknowledge that there are many plausible interpretations of any given document.’⁵⁰ They also allow for more of a dialogue between the present and the past which ‘liberates histories to ask of old texts frankly anachronistic questions – questions that pertain to the historian’s current concerns and would have meant little to the authors of those texts.’⁵¹ I saw my own work as openly perspectival with presentist concerns –recovering some of the insights of the era of the Great Depression in order to reflect on our own Great Recession.

In terms of methodology, I followed the approach of Quentin Skinner and the ‘Cambridge school’ of history.⁵² Skinner has argued forcefully against the practice of understanding (philosophical) texts ahistorically, as if they contain universal concepts unchanging over time. Rather he calls for the radical contextualisation of texts and concepts; as a historian of ideas, he demands that ideas are located in the historical context in which they emerged and were elaborated.⁵³ He argues that a full understanding of a text ‘can never be achieved simply by studying the text itself’, as philosophers (and human rights lawyers) often tend to do⁵⁴, but requires an understanding of the context of the time in which the texts were

⁴⁸ Fisher 1996, 1087.

⁴⁹ Ibid.

⁵⁰ Ibid., 1065.

⁵¹ Ibid.

⁵² See Skinner 1969.

⁵³ Ibid., 58.

⁵⁴ Ibid., 104.

written. Further, he argues that concepts or texts should be understood not simply in terms of what they ‘mean’, but by what they were ‘doing’. Building on John Austin’s theory of ‘speech acts’, which holds that all speech is an act that aims to serve a particular purpose, Skinner asks of historical texts: What were their authors doing in writing them? Who were they arguing against? What change were they trying to effect?⁵⁵

I incorporated this approach into my work by asking of the actors and the texts in this story: What were they arguing against? Who or what was their target? What assumptions were they attacking? What were they aiming to change? What language were they using and what did this mean at the time? And how might our own understanding of their actions or work shift if we look at the context in which they were undertaken? Thus I asked for example: What were the institutional economists of the ‘first law and economics movement’ arguing against? What was Roosevelt trying to do when he called for a ‘re-definition of rights’? What was Keynes doing when he called for ‘full employment’? What ideas were the Committee on Economic, Social and Cultural Rights challenging in their early elaboration of the rights and how did they do this? Keeping these questions in mind made it easier to grasp complex texts of economic and legal theory, and demanded understanding their political intent.

Skinner makes the further important point that it is not enough to simply read off the ‘meanings’ or ‘doings’ from the economic and social context in which arguments were made or texts written. He argues it is critical also to ‘situate the text in its linguistic or ideological context’ linking it to other texts ‘written or used in the same period’.⁵⁶ He demands that we look not only at context, but also at the ‘linguistic conventions’ that governed at the time - that is the linguistic and intellectual contexts in which the new ideas arose and the arguments on which the authors sought to have some impact. Skinner thus speaks of the ‘wider linguistic context’ of utterances: the language conventions determining the expressions dominant at a particular time. He suggests this may require looking at the ‘pre-history’ of the concept, that is, at the historical period that precedes the emergence of the concept.⁵⁷ Skinner suggests that this contextual and linguistic approach can ‘free us to re-imagine [concepts] in different and perhaps more fruitful ways’.⁵⁸

Skinner’s approach to placing texts not only in their historical context but also in their linguistic context, proved fruitful for my research. One striking example was that it pushed me to revisit the meaning of the strange phrasing in ICESCR Article 2.1 on the use of the ‘maximum available resources’. As I was reading other texts ‘written or used in the same period’ (as Skinner suggests), I found this same phrase emerging across other texts also shaped by the discursive context of economic Keynesianism. By situating the ICESCR (and the Universal Declaration which preceded it) within the historical context of

⁵⁵ Skinner and Skinner 1978.1:xiii.

⁵⁶ Tully gives a step by step explanation of Skinner’s analysis, Tully 1989, 9–16.

⁵⁷ *Ibid.*, 9–16.

⁵⁸ *Ibid.*

the Keynesian era in which these human rights documents emerged, and linking this to other contemporaneous texts and their 'linguistic conventions', I found evidence to suggest that, at least in its very initial formulation (in the 1947 US proposal mentioned above), the meaning of 'maximum use of available resources' was linked to Keynesian demands for the 'full employment' - that is, the 'maximum use' of all available resources (so 'men and machines' were not left idle). This is significant since this not only challenges the apparent prosaicness of the literal meaning of these words, but it suggests that the idea of the 'maximum use of available resources' was not initially aimed as a limiting clause for the implementation of economic and social rights (in accordance with limited available resources) as it is commonly understood today. Rather it was entirely the opposite - it was an exhortation for governments to intervene in the economy to spend more, to ensure the 'maximum use' or 'full employment' of all available unemployed resources. It was, in other words, an exhortation to avoid austerity, to avoid strict balanced budgets - in short, to adopt counter-cyclical Keynesian fiscal policies. The text (at least in its first incarnation) was 'doing' something very different from how it is now interpreted.

However, I also show below how this economic understanding of the phrase - and even an awareness of this debate - quickly became lost and obscured in the international negotiations over the UDHR and the ICESCR as lawyers and diplomats took over from economists in the drafting process. In my review of the *travaux préparatoires* of the UDHR and the ICESCR, I found that it was a futile task to search for any 'original' meaning of a word or phrase in the negotiated international agreements, as multiple voices and multiple meanings competed to be heard, and no 'original' meaning of any word can be found except where there is a clear negotiation and a definition that is clearly recorded. Nonetheless even as this Keynesian meaning appears to have been quickly lost, reading the phrase 'maximum available resources' with a Keynesian eye unsettles our contemporary interpretation of Article 2.1 and offers important insights worth recovering today for insights into our own economic crisis. It also shows how it is important to reflect reflexively on how legal texts are shaped by the linguistic or discursive contexts in which they emerge, and analogously, how our own reading of the text is shaped by our own discursive context and disciplinary eye.

Given my focus on this thesis on particular phrasings and on linguistic context, I use a (somewhat unconventional) approach of underlining words in my text and in quotations to trace and highlight particular phrasings. I emphasise here then, that all the underlined text in this thesis marks my own emphasis, not the emphasis of the authors themselves. I clarify this here to avoid repeating this in every citation.

I would also clarify that in this thesis, I look at 'economic and social rights' as a group or 'category' of rights as they emerged in international law. I do not look at the detailed histories of the different specific rights, such as the right to education, right to health or labour rights. Rather I focus on how and why this 'category' of rights emerged as international 'human rights' at the international level in UDHR and the

ICESCR. In taking this approach, I have placed a particular focus on exploring the nature and scope of ESCR - including a special focus on Article 2.1 (which marks this category of rights as distinct from civil and political rights) and looking at the common elements that define the nature and scope of these rights in the Committee's work, including the concepts of 'minimum core', the obligations to respect, protect and fulfil the rights, and the criteria of availability, accessibility, acceptability, quality etc. (the 'AAAQ' criteria). As my focus is on the history of these rights within the context of (economic) liberalism, I also place a special focus on how these rights challenged the classical liberal rights, particularly the 'absoluteness' and 'primacy' of the right to property.

As noted above, my work is also limited in exploring only one particular 'facet' of the history of these rights.⁵⁹ By approaching this history through the lens of its economic context, I have not been able to look at this history through the lens of race (which animates many recent histories, including the brilliant recent history of Carol Anderson⁶⁰). Nor have I been able to examine this history through the lens of gender, nor of class and Marxism. Even though I cover some elements of the 'right to work' in relation to my work on Keynesianism, I was not able to also explore the important and (far longer) history of labour rights and I have omitted many important historical episodes even those relevant to the time (such as the massive labour unrest that characterised the early New Deal era).

In covering such a long period of time from the Great Depression to the Great Recession, I have thus had to leave out many other key 'facets' of this same history. I have limited the scope of this research in order to maintain a focus, but this is certainly not because I see these other episodes and lenses as less important facets of this same history of human rights. Indeed, the more histories I read, the more I realise how little I know, and the more this makes me think of the parable of the 12 blind men describing an

elephant, each touching a different part of the same beast. This history then attempts to tell just one part of a far larger story, without denying other genealogies or other histories of human rights. My focus is to pay particular attention to how the fundamental shifts within liberal theories of rights, and the struggles within legal and economic theory regarding the nature and role of state intervention in the economy, form one important facet of the story of economic and social rights.

⁵⁹ As Alston warns, the 'enterprise of human rights consists of too many distinct facets to be reduced to one or two variables' (2077) and 'human rights does not consist of a single idea' (2079). 2013, 2077–2079.

⁶⁰ Anderson 2003a.

1.4 Outline of the thesis

After this introduction, the first part of this thesis, challenging Moyn's revisionist assertion that 'human rights' emerged in the 1940s by *accident*, argues that the phrase 'human rights' emerged in the 1930s as part of a very deliberate challenge to liberal 'property rights' and laissez-faire constitutionalism in the United States during the Great Depression. I show how the new 'economic and social rights' were shaped first by the theories of the legal realists and institutional economists and later by economic Keynesianism. The story starts with an overview of the legal realists and the institutional economists who made up what Hovenkamp has called the 'first great law and economics movement' and what Fried calls the 'progressive assault on laissez-faire'.⁶¹ I then show how these ideas influenced President Franklin D. Roosevelt, who called for a 're-definition of rights' and a new constitutional economic order from his 1932 election campaign onwards, campaigning against 'do nothing government' by challenging laissez faire economics and the primacy granted to the classical liberal rights of life, liberty and property, culminating in what Ackerman has called the 1936 'constitutional moment' and the 1937 'switch in time' of the US Supreme Court. Faced with another major economic recession that started in 1937, I then explore how Roosevelt's 'new' rights came to be increasingly influenced by Keynesian economic theory, largely through the work of his National Resources Planning Board, culminating in Roosevelt's 1944 economic bill of rights and a draft 1945 Full Employment Bill that aimed to 'constitutionalise' Keynesian, anti-austerity fiscal policy as a duty of the (federal) government.

The second part then traces how these domestic US conceptions then fed into the international level, through the 1945 UN Charter commitments to ESCR, larger freedom and full employment, and the placing of human rights squarely in the economic and social responsibilities of the new international organisation. Drawing on the original archival material mentioned above, I then trace further how these US conceptions profoundly influenced the nature and scope of 'economic and social rights' as they emerged during the drafting of the 1948 UDHR and the 1966 ICESCR, including examining the Keynesian roots of 'maximum available resources' and exploring why the right to property was included in the UDHR but left out of both of the binding Covenants. I suggest that formalising ESCR in the international human rights instruments was an attempt to 'freeze' the New Deal vision of ESCR and 'embedded liberalism' into (international) law. However, I also show how this was strongly contested in the US domestic context, with standard conservative tropes that ESCR (and thus Roosevelt's rights) were alien and un-American and of communist influence, and I describe the eventual reassertion of the classical liberal rights to life, liberty and property and the re-emergence of (neo)classical economics and

⁶¹ Hovenkamp 1990; Fried 1998.

(neo)liberalism, culminating in Reagan's 1987 economic bill of rights, with four freedoms designed precisely to reverse Roosevelt's.

The third part then shows how these rights were later elaborated by the UN Committee on ESCR, again in the context of economic crises and again as a challenge to economic (neo)liberalism, first in the context of structural adjustment and later of the 2008 global financial and economic crisis. I show how the Committee elaborated Article 2.1 in the context of structural adjustment, trying to prevent all-out retrogression by establishing a 'minimum core', and how the 'respect, protect and fulfil' framework implicitly contested the (neo)liberal 'minimal state' and the primacy of 'negative' rights. Finally, I look at the AAAQ framework and show how the Committee's early conceptualisation of the rights was influenced by the heterodox economics of Amartya Sen, including his concepts of entitlement, capabilities and 'human development'. However, I argue that many of the key theoretical insights that shaped these rights during the Great Depression have been lost, in ways that circumscribe their power to challenge economic (neo)liberalism, leaving ESCR a 'powerless companion' in the 'constitutionalisation of austerity' in our own Great Recession.

Ultimately, I show that the modern international human rights regime emerged in the post-war era not only as a response to the Holocaust or the experience of total war, but also as a response to the human misery of the Great Depression and its global impacts. I show how 'economic and social rights' became international human rights, not only as an afterthought or on the insistence of socialist states, but because they were also central to shifts within 'western' economic liberalism.⁶² What was new about 'human rights' was not merely their appeal to a supra-state, international power, but a new conception of the (economic) responsibilities of the state towards its citizens. I also seek to show that ESCR have emerged and been elaborated in times of economic crises, shaped by the theories of heterodox economics⁶³, as part of a consistent (liberal) challenge to economic (neo)liberalism.

⁶² For definitions and a detailed overview of the twentieth century shift in western (economic) liberalism from classical liberalism to 'reform liberalism', see Starr 2008; See also Brinkley 1998; Brinkley 1996.

⁶³ I define 'heterodox economics' as in opposition to orthodox neoclassical economics - for a discussion, see Dequech 2007; For a discussion in the human rights context, see Salomon and Arnott 2014.

2. EMERGENCE: ECONOMIC AND SOCIAL RIGHTS IN THE UNITED STATES

2.1 The Great Depression, the New Deal and ‘new rights’ in the United States

Against Moyn’s assertion that ‘human rights entered history as a throwaway line’ through Roosevelt’s ‘careless phraseology’ in the 1940s, this section details how President Franklin Roosevelt first called for a ‘re-definition of rights’ and came to use the phrase ‘human rights’ in the 1930s during the Great Depression, as part of a deliberate strategy to challenge to ‘classical laissez faire constitutionalism’ and to construct a new ‘economic constitutional order’. I show how Roosevelt’s ‘new’ rights challenged the classical rights to life, liberty and property, adding new ‘economic and social rights’ to a revised list of liberal rights that he called ‘human rights’. While Moyn suggests that ‘no evidence has been discovered to explain why and when the phrase appeared as it did’ and that the ‘search is based on the mistaken assumption that what is now so meaningful could not have emerged by accident’⁶⁴ this section shows that, to the contrary, there is much historical evidence that suggests the emergence of ‘human rights’ in the New Deal era was very far from being an ‘accident’. The fact that this understanding of ‘human rights’ may not fit with Moyn’s own definition of the phrase, does not make it a less important part of their history.

This section of the thesis sets the emergence of economic and social rights in the United States in the context of the deep economic crisis of the Great Depression of the 1930s and the profound shift this precipitated in classical liberalism. I first show how much of the groundwork for the emergence of ideas of ‘economic and social rights’ (in liberal thought in the United States) was laid in the ‘progressive assault on laissez-faire’⁶⁵ at the turn from the nineteenth to the twentieth century by the American legal realists and institutional economists, a group which Herbert Hovenkamp described as ‘the first great law and economics movement.’⁶⁶ I then show how these ideas came to influence Roosevelt’s ‘redefinition of rights’ and the construction of the New Deal, culminating in the ‘greatest conflict of economic and constitutional philosophy of the times’ during the 1936 ‘constitutional moment’.

The next section then explores how, after a precipitous fall into another severe recession in 1937, the Roosevelt administration came to be increasingly influenced by the economic theories of John Maynard Keynes. The conceptualisation of Roosevelt’s ‘new rights’ also came to be grounded in Keynesian economic theory through the work of Roosevelt’s ‘National Resources Planning Board’ (NRPB), culminating in Roosevelt’s 1944 ‘Second Bill of Rights’, and in an attempt to ‘constitutionalise’ Keynesian economic planning in the draft Full Employment Bill of 1945.

⁶⁴ Moyn 2012, 49.

⁶⁵ Fried 1998.

⁶⁶ Hovenkamp 1990.

2.2 Challenging classical liberal rights and constitutional laissez faire

2.2.1 Roosevelt and the influence of the legal realists and institutional economists

This story starts then with the ideas of the legal realists and the institutional economists and their attack on the ‘constitutionalisation’ of laissez-faire liberalism in both law and economics at turn from the nineteenth to the twentieth century. I first argue that, just as the legal realists sought to challenge the deductive formalism of ‘law as science’ and its apolitical pretensions, the institutional economists sought to challenge a similar trend towards ‘economics as science’ and attempts to cast economic laws as inexorable, apolitical ‘laws of nature’. Both criticised law and economics as increasingly unrealistic and irrelevant to the changing circumstances of the times. I suggest below that both the legal realists and the institutional economists were attacking formalism, but many of them were attacking more than that; they were attacking *what was being formalised*. They were attacking the formalisation, ‘naturalisation’ and constitutionalisation of laissez-faire liberalism, and the ‘naturalness’ and privileging of very restricted notions of classical liberal rights grounded in an absolute right to property and a derived right to freedom of contract.⁶⁷ It was an attack as Horwitz has pointed out, against attempts to ‘freeze’⁶⁸ particular ideas into unchanging legal doctrine and inexorable economic laws.

In the face of the empirical brutality of industrialisation, the massive concentration of economic power and the ravages of increasing inequality, the legal realists like the institutional economists (following the ‘progressives’ before them) sought to show that the law, like the market, was not natural, neutral or even necessary - both were historically contingent, socially constructed and mutually constitutive. The laws of economics - and the distribution of wealth and power they implied - were not natural and inexorable but were socially constructed and thus could be changed - by changing the institutions or ‘working rules’ of the economy. ‘Natural’ rights were not natural and ‘laissez-faire’ was a myth, since so-called ‘free’ markets were shot through with all sorts of coercion, most obviously the coerciveness of massive economic power of corporations and less obviously the coercion of the state through the enforcement and privileging of the peculiar rights to property and liberty of contract, to the exclusion of other kinds of rights. These theorists thus challenged laissez faire liberalism, economic power and economic inequality, opening up new ways of thinking about rights, and setting the groundwork for the emergence of concepts of ‘economic and social rights’ within ‘western’ economic liberalism.

I then trace how these ideas came to be reflected in Roosevelt’s ‘redefinition of rights’ and in the legislative and administrative project of the New Deal of the 1930s, arguing that the New Deal in turn was partly an effort to shift *what was being formalised* through the ‘constitutionalisation’ or at the least the legislation of, different legal and economic rules and institutions, constraining markets and reflecting the

⁶⁷ See generally Horwitz 1992; Hovenkamp 1990; Fried 1998; Singer 1988.

⁶⁸ Horwitz 1992, 259.

wider shift towards ‘embedded liberalism’. I show how this culminated in what Ackerman has labelled the 1936 ‘constitutional moment’, and document how the press labelled this at the time as ‘the greatest conflict of constitutional and economic philosophy’, characterising Roosevelt’s challenge as a stark conflict between ‘human rights versus property rights’. I also show how, while Roosevelt put this constitutional conflict at the centre of his 1936 election strategy, he chose not to directly attack the US Supreme Court (despite their overturning much of New Deal legislation as ‘unconstitutional’), but rather went after an organization called the ‘American Liberty League’, set up to protect the classical economic and legal orthodoxy. It was only after Roosevelt won by a massive landslide in the 1936 election, that he more directly challenged the Supreme Court in his 1937 ‘court-packing plan’, precipitating the infamous ‘switch in time that saved nine’ that marked a long-term shift in the Supreme Court’s constitutional philosophy, changing the direction of its judgements on New Deal legislation from 1937 onwards.

The legal realists and the institutional economists - the ‘First Great Law and Economics Movement’

While American Legal Realism has been caricatured and even ridiculed as the ‘gastronomic theory’ of law, given Jerome Frank’s irreverent assertion that a judge’s decision could be determined by what he had for breakfast as much as by the ‘law’⁶⁹ - the legal realist movement was in fact a profoundly unsettling challenge to contemporaneous legal orthodoxy that continues to have unsettling implications today. Although much of the legal literature sees legal realism as confined to the period between 1920 and the early 1930s on the basis of Karl Llewellyn’s rather idiosyncratic branding of the ‘movement’,⁷⁰ I follow the wider definition adopted by Horwitz which includes a broader swathe of important American jurists from Supreme Court judges, Holmes to Brandeis to Cardozo and Frank, others such as Wesley Hohfeld, and the institutional economists, especially Richard T. Ely and John R. Commons, as well as Robert Lee Hale and Adolph A. Berle, covering a significantly longer period from approximately 1880 to 1930.⁷¹ American legal realism was not, as Horwitz has pointed out, ‘a coherent intellectual movement’ and nor was it emblematic of a ‘consistent or systematic jurisprudence’,⁷² but it did have one key unifying thread, which was a broad attack on ‘legal formalism’ – or what Oliver Wendell Holmes acidly called ‘legal theology’⁷³ and Jerome Frank later labelled ‘legal fundamentalism’.⁷⁴

⁶⁹ As cited in Friedrich 2007, 131.

⁷⁰ See Llewellyn 1931; Horwitz suggests that the 1930-31 academic debate between Karl Llewellyn and Roscoe Pound led to a rather narrow framing that distorted the subsequent historiography of legal realism Horwitz 1992, 171.

⁷¹ Horwitz 1992, 182–3 Note the dominance of white males represented here - feminist arguments provide a different critique of liberalism, but not one I focus on here.

⁷² *Ibid.*, 169.

⁷³ Holmes in his *Common Law* suggested that Langdell was the ‘greatest living legal theologian’, cited in Horwitz 1992.

⁷⁴ See Frank and Bix 2008.

This 'legal formalism' is often characterised as that of Christopher Columbus Langdell, (appointed Dean of Harvard Law School in 1870) who argued that law should be seen as a science with the library of case law as its workshop,⁷⁵ although somehow its principles should be based on the cases that were 'right' rather than the cases were 'wrong'.⁷⁶ Jerome Frank, in his irreverent style, contrasted 'legal realism' with 'legal Bealism' after Joseph Beale (a member of Harvard Law School faculty from 1890-1937) who had called for laws based on the 'purity of doctrine', free from the 'warping of bad precedent'.⁷⁷ The underlying jurisprudential premise was that 'there is such a thing as the one true rule of law, which being discovered, will endure, without change' and that judges should base their decisions on this unchanging rule of law.⁷⁸ Gilmore acerbically suggests that this concept of law had acquired such an 'extraordinary hold' on the legal and popular mind at the beginning of the twentieth century, that Benjamin Cardozo's 'hesitant confession' in his 1921 book *The Nature of Judicial Process* 'that judges were, on rare occasions, more than simple automata, that they made law instead of merely declaring it' was 'widely regarded as a legal version of hard-core pornography'.⁷⁹

Many of the legal realists by contrast, suggested the judicial decisions should be understood sociologically, rather than relying on illusory *deductive* principles of law, that they should allow for the creativity of judges in the face of change, based on *inductive* analysis of concrete social reality and empirical evidence available from sociological and statistical data about the actual harms caused in particular cases.⁸⁰ Decisions should also take account of the likely consequences of legal decisions, through an understanding of the social contexts in which the legal rules would operate.⁸¹ In other words, the 'law in action' and pragmatic, sociological reasoning was just as, if not more, important than the 'law in books' or reasoning from legal precedent. Holmes was already suggesting this in 1897 in his *Path of the Law* where he declares:

It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past.⁸²

Institutional economics was similarly engaged in a 'revolt against formalism' that took place in economics, more or less at the same time that it was taking place in the law, between around 1880-1930. The

⁷⁵ See address by Langdell to Harvard Law School Association in 1886, cited in Gilmore 1977, 125.

⁷⁶ *Ibid.*, 125.

⁷⁷ See Frank and Bix 2008.

⁷⁸ Gilmore 1977, 43.

⁷⁹ *Ibid.*, 77.

⁸⁰ The 'Brandeis brief' for example went beyond the case law, including a wide range of statistical information and reports on the harms caused by particular practices such as child labour or long working hours or industrial accidents.

⁸¹ Interestingly, this emphasis on the consequences of the law, led to the emergence of the Chicago style 'law and economics movement' of Posner et al, even though this movement is diametrically opposed in its precepts to the critical approach of the legal realists and the institutional economists here. For a critical discussion, see Kennedy 2002.

⁸² Holmes 1897, 12.

institutional economists were made up by young American scholars after World War I, but drew heavily on the earlier turn-of-the-century economists such as Thorstein Veblen and John R. Commons.⁸³ Like legal realism, institutional economics cannot be described as a coherent intellectual movement, and nor was it a systematic set of approaches to studying economics, but it similarly represented a profound challenge to contemporaneous economic orthodoxy. Its key unifying thread was the challenge to the increasingly formalistic and mathematical doctrines in economics⁸⁴ which institutionalists saw as ‘unrealistic’. ‘Economic formalism’ was understood as the reductionist project of orthodox economic analysis using abstract deductive reasoning to derive a particular set of axioms that could then be formalised – mathematically - and generalised as universally applicable and unchanging in all contexts and all times.⁸⁵

The institutionalists disparaged the classical economists as being ‘extraordinarily incurious as to what was actually going on’⁸⁶ and argued that this classical doctrine rested on assumptions that bore little relation to reality. The institutionalists called for *inductive* analysis of the institutions of the actually existing economy, rather than the sterilities of static equilibrium theory. Drawing from the earlier German historical school, they emphasised the dynamics of change, and the ‘need to use empirical data (rather than abstract ideas) to ground economic theories, and the necessity of paying particular attention to human institutions’.⁸⁷ Drawing also from the earlier studies by Veblen, the institutional economists paid particular attention to the social construction of institutions and the ways in which they exercised economic power. Following John R. Commons, they also focused closely on the legal-economic nexus and the peculiarly legal construction of economic institutions.⁸⁸ Together with the legal realists, these economists made up ‘the first great law and economics movement.’⁸⁹

Revolting against the laws of laissez faire liberalism

Under classical liberalism, it was assumed that state was the main threat to the individual through its potential to abuse its coercive power, and thus the role of the law was to set limits on the power of the state. In *laissez faire* economic liberalism, this idea was extended to suggest that the state should be limited and refrain from abusing its power by avoiding arbitrary interference in the private sphere of the economy – including interfering with the so-called ‘natural’ rights to liberty and property.⁹⁰ Classical economic liberalism (then, as now) was grounded in the notion of the ‘self-regulating market’ which, if left free from interference by the state, would automatically create a harmony between individual interest and

⁸³ Mercurio and Medema 1998, 102.

⁸⁴ Tabb 2002.

⁸⁵ Mercurio and Medema 1998.

⁸⁶ *Ibid.*, 103.

⁸⁷ *Ibid.*

⁸⁸ See e.g. Commons 1924.

⁸⁹ Hovenkamp 1990.

⁹⁰ See e.g. DeMartino 2002; Fried 1998; Fine 1964.

social welfare through the operation of an ‘invisible hand’.⁹¹ In this view, the unhindered operation of the market would automatically result in the best possible outcome - both in terms of the most efficient distribution of resources, and in terms of the most ‘just’ distribution of resources – since it results from the neutral operation of neutral market forces (as opposed to coercive redistribution by the state).⁹²

Under the ‘marginalist revolution’ that occurred at the end of the nineteenth century, it was also argued that the competitive market would pay labour an amount exactly equal to the value each individual added, so in the absence of monopoly, wages could never be unjust.⁹³ It was argued that since free markets operated by voluntary exchange, they could never be coercive. Any economic power that might exist through monopoly was assumed away since it would always be automatically dissipated by the workings of competition in the market mechanism. The state should refrain from interfering with the operation of this market mechanism, which would operate perfectly in the absence of interference, and any form of state intervention (regulation or redistribution) which would likely have unexpected and unjust consequences.⁹⁴

At the turn from the nineteenth to the twentieth century, the classical economists sought to cast the laws of economics as ‘natural’ and discoverable like the laws of physics – and argued that it was the duty of the state to allow the operation of these immutable, inexorable economic ‘laws of nature’. Classical economic theory, in works such as Herbert Spencer’s 1851 *Social Statics* and 1891 *Justice* (where Spencer coined the expression before Darwin of the ‘survival of the fittest’) grounded this version of liberalism in the sacredness and inviolability of the rights of property and the freedom to exchange that property.⁹⁵ As Kennedy points out, the classicists emphasised the ‘naturalness’ of existing institutions, the ‘freedom’ of economic processes – and they spent little time providing actual sociological or economic evidence for their claims, but rather spent time seeking to convince readers of the naturalness of the existing economic order, the ‘sacredness’ of property, the ‘absoluteness’ of property and contract rights and the ‘justice’ or ‘fairness’ of the ‘natural outcomes’ of the workings of these ‘free’ processes.⁹⁶

At that time however, this form of classical liberalism was increasingly under pressure in the face of brutal economic conditions and rapidly rising inequality. In the midst of rapid industrialisation and the consolidation of enormous corporate economic power in industry and finance combined with cut-throat

⁹¹ Waligorski 1990 especially Ch.2.

⁹² Ibid.

⁹³ This challenged and ‘disproved’ the Marxist labour theory of value. Fried 1998.

⁹⁴ DeMartino 2002 especially Ch.2 and 3.

⁹⁵ Spencer 1851; Spencer 1891.

⁹⁶ Kennedy writes that ‘The basic message of the whole was very simple: there were laws of economic life, analogous to the physical laws of nature, the natural operation of those laws brought about just outcomes; most of the proposals of social reformers involved coercive modifications of those outcomes and could only work if economic laws were somehow suspended. So long as they continued in operation, the egalitarian impulse to redistribute wealth by manipulating the legal system inevitably involved both injustice and a counterproductive reduction in total wealth.’ Kennedy 1984, 957.

competition, social tensions were running high. Daily life was hard and workers faced long hours, low wages, and often dangerous industrial accidents and unsanitary conditions— trade unions had started to challenge employers for better working conditions and wages, and social reformers were calling for changes to improve living conditions. Throughout the period from 1880-1930, which was wracked by economic crises, there was an ebbing and flowing in administrative and legislative attempts to challenge the power of large corporations and to provide more rights and benefits to working people, but this faced powerful resistance - including resistance of the federal and state courts in the United States, which overturned much social legislation on the basis of its ‘unconstitutionality’. As the ever-insightful Holmes dryly observed in 1897, ‘people who no longer hope to control the legislatures, [...] look to the courts as expounders of the constitutions and in some courts, new principles have been discovered outside the bodies of those instruments, which may be generalized into acceptance of economic doctrines that prevailed about fifty years ago.’⁹⁷

One case that has long served as a lightning rod of the legal realist debate is that of *Lochner v. New York* (1905) of the US Supreme Court. In that case, the Supreme Court ruled unconstitutional the 1895 New York State Bakeshop Act which limited the working hours of bakers to 60 hours per week for health reasons. Despite receiving evidence that workers were required to work excessive hours in appalling sanitary conditions that severely affected their health, the Court struck down the regulation, on the basis that the workers had freely entered into their work contract, and the state and the law had no business meddling with people’s right to buy and sell their own labour under conditions of ‘freedom of contract’:

‘There is no reasonable ground, on the score of health, for interfering with the liberty of the person or the right of free contract... Nor can a law limiting such hours be justified a health law to safeguard the public health, or the health of the individuals.... Section 110 of the labor law of the State of New York, providing that no employees shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day, is an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and, as such, it is in conflict with, and void under, the Federal Constitution.’⁹⁸

Justice Holmes’ in his (1905) minority dissent criticised the Court’s reading of the freedom of contract as a ‘perversion’ of the meaning of liberty in the fourteenth amendment, one that reflected *laissez faire* economic theory. He argued that the Court had decided the case on the basis of ‘an economic theory which a large part of the country does not entertain’ and that the ‘Fourteenth Amendment does not enact M. Herbert Spencer’s *Social Statics*’, insisting that ‘[A] Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*.’⁹⁹ Critical scholars, such as Duncan Kennedy, have pointed out that ‘freedom of contract’ is not expressly protected in the Constitution, thus the Court ‘invented’ this right of freedom of contract by reading it into the ‘due process clause’ – reflecting the ‘right-wing judicial activism’ of the Court during

⁹⁷ Holmes 1897, 10.

⁹⁸ *Lochner v. New York*, (1905), 61-64.

⁹⁹ Holmes, J. ‘Dissenting Opinion’, *Lochner v. New York*.

the ‘Lochner era’.¹⁰⁰ Holmes at the time warned against the Court’s constitutionalisation of *laissez faire*, not because he was particularly progressive (he wasn’t), but rather because he did not believe that one particular set of logical axioms could ever resolve fundamental conflicts over legal theories or values.¹⁰¹ Holmes insisted that ‘General propositions do not decide individual cases’ reflecting the reaction against general deductive propositions and anticipating the challenge to legal formalism. In his 1897 *Path of the Law*, he argued that ‘The danger of which I speak... is the notion that a given system, ours, for instance, can be worked out like mathematics from some general axioms of conduct’.¹⁰²

Writing in the context of rapid industrialisation and the rising inequality that was generating such social struggle, the legal realists, like the institutional economists, took forward this revolt against *laissez faire* constitutionalism, reacting at the moves of the judiciary to strike down social legislation. More than attacking formalism then, they were attacking *what was being formalised*. They were also doing more than that – they were setting the groundwork for a new vision of rights and (economic) liberalism, by challenging the central tenets of classical *laissez faire* liberalism. While the legal realists attacked the tenets of ‘classical legal thought’, the institutional economists attacked the key tenets of ‘classical economic theory’.¹⁰³ In particular, they challenged the apparent neutrality and ‘naturalness’ of *laissez faire* principles. They showed that, despite the efforts of the legal and economic orthodoxies to present the state and the law as neutral, in fact both the state and the law were heavily implicated in structuring the ‘working rules’ of the economic game through the ways in which they coercively enforced private power - and the state and the law were thus heavily implicated in the distribution of wealth and economic power. Aside from the explicit references in Holmes’ dissent, these themes can be seen across a range of legal realist writings, including for example, those of Roscoe Pound, Walter Wheeler Cook, Morris Cohen and John Dawson and the writings of the institutional economists Robert Hale and John R. Commons.¹⁰⁴ All of these worked in different ways to challenge classical liberalism, its peculiar legal institutions of property and contract, and the inequalities of wealth and power that these institutions were so manifestly producing.

Their work undercut the key tenets of the classical liberalism by showing how the state, through its peculiar legal institutions coercively created markets in ways that were historically contingent and socially constructed, and thus could be changed. They also argued that the assumed neutrality of these institutions was a myth - Robert Hale for example showed that it was the particular kinds of legal rules

¹⁰⁰ Kennedy 1984.

¹⁰¹ Holmes’ view was that it was the duty of judges to weigh and balance the different interests and values involved. Giving an example of a conflict between interests, he argues that ‘if anyone thinks that it can be settled deductively, or once and for all, I can only think he is theoretically wrong, and that I am certain that his conclusion will not be accepted in practice *semper ubique et ab omnibus*’ Holmes 1897, 14.

¹⁰² *Ibid.*, 14.

¹⁰³ Duncan Kennedy explained ‘Classical legal thought supposed the classical economists’ claim that the outcome of economic processes was ‘natural’ and thus that ‘equality does not figure among the legitimate goals of the legal system’, Kennedy 1984, 956–957.

¹⁰⁴ See for example, Pound 1909; Cook 1918; Cohen 1927; Dawson 1947; Hale 1923; Hale 1943; Commons 2009; Commons 1934.

enforced by the state that determined the distribution of income and wealth. Commons also argued that ‘the economists have taken the laws of private property for granted, assuming that they are fixed and immutable’, when such laws are in fact, and should be understood, as ‘changeable’ as the rules of property have a ‘profound influence on the production and distribution of wealth.’¹⁰⁵ To suggest then that judges and the law should not be involved in decisions of distributive justice, was to fundamentally deny that judges and the law were already thoroughly implicated in the extant distribution of wealth, through their enforcement of the peculiar institutions or ‘entitlements’ of property and contract.

From this perspective, *laissez-faire* was a myth and free markets were not really ‘free’; they were shot through with the coercion of the state, by its enforcement and privileging of these rights to property and liberty of contract - institutions that were historically specific, developed and designed to support the market economy.¹⁰⁶ This insight worked to break down the sharp distinction between the public and private spheres, arguing that the state was fundamentally implicated in all ‘private’ transactions.¹⁰⁷ *Laissez-faire* did not and could not exist because the market was not ‘self-regulating’, it was regulated by the state through the law of property and contract.

John R. Commons’ work on the legal-economic nexus showed how the law and markets were mutually constitutive, and how the state itself determined the ‘working rules’ of the economic game, thus structuring apparently ‘free’ markets and their outcomes. Private power was largely constituted and enforced by the public power of the state through the law – Commons even argued that the state itself ‘consists in the enforcement by physical sanctions of what private parties might otherwise endeavour to enforce by private violence.’¹⁰⁸ From this perspective, the liberal dichotomy between state and market was false and the issue was not one of more or less government, or more or less interference in the economy, but rather a political question of ‘how the ubiquitous authority of government is to be exercised within the economic system: who is to be exposed to the coercion of whom, and to what extent’.¹⁰⁹

As Morris Cohen noted ‘...in enforcing contracts, the government does not merely allow two individuals to do what they have found pleasant to their eyes. Enforcement, in fact, puts the machinery of the law in the service of one party against the other.’¹¹⁰ Or as John Dawson put it, the doctrine of *laissez-faire* left ‘individuals and groups [free] to coerce one another, with the power to coerce reinforced by the agencies of the state itself’.¹¹¹

¹⁰⁵ Commons 1934, 51.

¹⁰⁶ Horwitz 1992.

¹⁰⁷ See Singer for an extension of this argument, Singer 1988.

¹⁰⁸ Commons 1934, 751.

¹⁰⁹ Medema 2002, 107. My italics.

¹¹⁰ Cohen 1933, 562.

¹¹¹ Dawson 1947, 288.

The realists challenged empty notions of formal equality in the context of unequal economic power between powerful employers and their workers. Writing on *Adair v. United States* (1908) in which the Supreme Court again relied on the notion of ‘freedom of contract’ to strike down legislation to limit ‘yellow-dog’ contracts (which prohibited workers from joining a union),¹¹² Roscoe Pound despaired at how the Court could insist on ‘freedom of contract’ and on the essential equality between the massive railroad corporation and individual workers ‘in the face of practical conditions of inequality.... Why is the legal conception of the relation of employer and employee so at variance with the common knowledge of mankind?’¹¹³ Writing on *Ritchie v. People* (1895) when the Supreme Court of Illinois struck down a statute limiting working hours for women and children in factories and workshops (to make it unlawful for employers to force employees to work 16 hour days),¹¹⁴ Commons cited an opinion piece published in the *Chicago Times Herald* which declared: ‘There is a ghastly sort of irony in the attempt of the Supreme Court to explain or excuse its decision upon the plea that it is protecting the rights of the weak individuals with labor to sell’.¹¹⁵

Many of these theorists thus suggested that the notion of formal equality presupposed by the courts completely ignored the manifest inequality between workers and employers. When the courts argued that workers entered freely into the yellow-dog contracts, the court was clearly failing to reflect on the extent to which workers were acting from necessity rather than from choice, in the context of their massively unequal bargaining power. The realists suggested then that, in their formalistic pretence of protecting the freedom of both sides, the courts’ insistence that the state refrain from interference in cases such as *Lochner* or *Adair*, was an obfuscation of their privileging of the rights of the stronger party against the weaker party. Laissez faire principles simply meant leaving the powerless at the mercy of the powerful, and the courts prohibited the state to intervene to assist the powerless.

As Commons argued, the issue was not one of freedom per se, but whose freedom; ‘that is: freedom for the employers to command employees to work 16 hours per day versus freedom for the employees from injurious commands of their employers.’¹¹⁶ In such decisions, the courts were making a political choice between competing interests and conceptions of liberty. As John Dawson noted, there was a choice between a ‘freedom of the ‘market’ from external regulation’ or the freedom of individuals achieved through ‘regulating the pressures that restricted individual choice’ through concepts such as duress.¹¹⁷ The relevant question was not whether or not there was regulation (as clearly the enforcement of property and contract constituted regulation, just as much as any limitations on those rights would constitute

¹¹² *Adair v. United States*, 208 US 161 (1908). The majority opinion argued that ‘employee and employer have equality of right, and that any legislation that disturbs that equality is an arbitrary interference with the liberty of contract, which no government can legally justify in a free land’.

¹¹³ Roscoe Pound (1909) ‘Liberty of Contract’ collected in Fisher III, Horwitz, and Reed 1993, 31.

¹¹⁴ *Ritchie v. People* (1895) 115 Ill. 98, 40 N.E. 454

¹¹⁵ As cited in Dawson 2002, 48.

¹¹⁶ *Ibid.*, 48.

¹¹⁷ Dawson 1947, 266.

regulation). The relevant question was the ‘rules of the game’ and how those rules or institutions structured whose interests and rights were being protected and what distribution of power was being enforced.

Although classical theory assumed that only state power was coercive, with the increasing concentration of economic power, it had become clear that private power could be equally, if not more, coercive. The rising power of corporations was a particular concern of the classic 1932 work, *The Modern Corporation and Private Property*, by Adolphe Berle and Gardiner Means (who were later both to become key actors in the Roosevelt administration) which looked at the rise of the corporation through an economic and legal lens, concerned that ‘the power attendant upon such concentration has brought forth princes of industry’ and the separation between ownership and control had eliminated some of the traditional controls on that power.¹¹⁸

These theorists challenged *laissez faire* by focusing on economic power and economic inequality, in ways that began to conceive of the possibility of protecting individuals against corporate power, using state power to secure freedom of individuals from coercive market power rather than freedom of the market from the state. It was not the market, or the corporations, that were in need of protection from the state, it was the workers and ordinary people who needed protection from market power. Thus, rather than it being the duty of the state to protect the *laissez faire* workings of the inexorable, economic ‘laws of nature’, it should be the duty of the state to use, what Galbraith later called its ‘countervailing power’,¹¹⁹ to protect the weak and powerless against private economic power. The liberal duty to refrain from interference in the market economy was a myth, as the state was already systematically intervening in the economy; what was important was the duty to change the ‘working rules’ and institutions of the economy. This began then to shift notions of the role of the state in the economy, as well as to open up new ways for thinking about rights.

Revolting against the construction of particular rights as ‘natural’ rights

The legal realists and institutional economists were not socialists, they were liberals - but they were seeking a new kind of liberalism and a law and economics that, as Pound famously exhorted, put the ‘human factor in the central place.’¹²⁰ As liberals, they were not against the right to property *in toto*, rather they were attacking the ‘absoluteness’ that was granted to the right to property and the derived right to free exchange, at the expense of any other kinds of rights. They challenged the ‘naturalisation’ and ‘constitutionalisation’ of very peculiar, and historically contingent, notions of rights of property and contract, which had emerged out of natural law doctrine, and were now being presented as ‘natural’ rights beyond the reaches of legislative limitations. Pound, for example criticised Herbert Spencer’s invocation

¹¹⁸ Berle and Means 1968, 4.

¹¹⁹ Galbraith 1956.

¹²⁰ Roscoe Pound (1909) ‘Liberty of Contract’ collected in Fisher III, Horwitz, and Reed 1993, 31.

of the inviolability of rights of property and the right of free exchange of that property as ‘natural rights’ in Spencer’s 1891 *Justice*, as relying on an outdated natural law jurisprudence that tried to present those rights as absolute and inherent, regardless of actual legislation.¹²¹

Holmes had also pointed out that not all rights could or should be traced back to conceptions of absolute property rights or freedom of contract.¹²² He suggested that the insistence of classical legal thought on maintaining the fiction of neutrality through insisting on the freedom of contract of both parties in cases such as *Lochner*, amounted to an avoidance of the recognition that economic struggles involved a conflict of rights, with legal rights on both sides of the struggle – the legal rights of the employers were in conflict with legal rights of the workers. For Holmes, this implied the need to recognize rights of both parties and to consciously choose between these conflicting rights, through a conscious balancing process, rather than through the unarticulated prejudices of legal orthodoxy.¹²³

Robert Hale argued that, while the right to property is a negative right against the state for the property-holder, it is not only a negative right against forcible dispossession; it is also a positive right that uses the coercion of the state to protect the property-holder against any non-property holder that might need or wish to use the property.¹²⁴ For those who are non-owners of property this is extremely coercive, as if the non-owner has no land on which to produce food, the law ‘coerces him into wage-work under penalty of starvation’, regardless of the type of wage-work or the coerciveness and unfairness of the demands of any particular employer – the worker is hardly ‘free’ not to work in the industrial age. More heretically, Hale even suggested that state power might be used to limit the bargaining power of powerful and to create greater bargaining power and ‘freedom’ for the powerless:

‘.. by judicious legal limitation on the bargaining power of the economically and legally stronger, it is conceivable that the economically weak would acquire greater freedom of contract than they now have-- freedom to resist more effectively the bargaining power of the strong, and to obtain better terms.’¹²⁵

The institutional economist, John R. Commons argued that classical notions of rights based on Locke’s ‘life, liberty and property’ had become outdated since the Lockean proviso was evidently no longer applicable – ‘... in the nineteenth century, [...] those who did not have rights of property could move west and get them. It is missed in the twentieth century when those who are short on rights are compelled to make terms with those who have them’.¹²⁶ Commons even suggested that in the context of industrialisation, with no Lockean proviso, there is no choice but to work, and thus he suggested that ‘the right to work’ should have the status of a property right, with compensation for injuries and the loss

¹²¹ Ibid, 32.

¹²² Holmes 1897.

¹²³ This was then the precursor to ideas of the ‘balancing test’. Ibid.

¹²⁴ Hale 1923.

¹²⁵ Hale 1943, 627.

¹²⁶ Citing Commons’ 1918 address to the American Economic Association, Dawson 2002, 53.

of employment - and he put this theory into practice by drafting the first legislation on workers compensation in Wisconsin (which later served as inspiration for New Deal legislation).¹²⁷ Indeed, Commons was even an early progressive era proponent of the right to work as a ‘human right’, stating in his 1893 that:

‘The right to work, for every man that is willing, is the next great human right to be defined and enforced by the law’¹²⁸

Applying Wesley Hohfeld’s nuanced categorisation of rights and duties, Commons further argued that rights could not be reductionistically derived from the rights of property and contract, but were made up of very different ‘legal rights, duties, liberties and exposures’ enforced by the state.¹²⁹ The ways in which rights were legally defined in particular times and particular places thus determined the ways in which markets worked. So-called ‘free’ exchange was fundamentally determined by the ways in which these legal rights were allocated, which structured each party’s bargaining power, and thus fundamentally shaped distributional outcomes. Initial legal entitlements would determine the distribution of wealth and power.¹³⁰ However, because the state created the rights through the law, these institutions, or ‘working rules’, were contingent and could be changed to produce different distributional outcomes.

These challenges to the ‘naturalness’ of property rights, to the illusion of ‘freedom of contract’ for those without bargaining power, and the recognition of the coercive nature of ‘private concentration of economic power’¹³¹ gradually opened up to a reworking of ideas of rights within the liberal tradition, on the basis that ‘Rights... [and] liberty of the individual must be remolded from time to time’¹³² to meet the changing economic reality and the changing political or economic threats to individuals.

I argue then that the theorists of what Hovencamp has called the ‘first great law and economics movement’ were attacking the formalisation, ‘naturalisation’ and constitutionalisation of laissez-faire liberalism and the primacy of the classical liberal rights to property and liberty (understood as freedom of contract). They were suggesting that legal institutions, nor the market, were natural, neutral or even necessary – both were historically contingent, socially constructed and indeed mutually constitutive. The laws of economics – and the distribution of wealth and power they implied - were not natural and inexorable but were socially constructed and could thus be changed. Designing and creating new ‘institutions’ or ‘working rules’ of the economy could shift the balance of power for a more equal distribution of wealth. At the same time, ‘natural’ rights were not natural and *laissez faire* was a myth. In the face of the economic power and economic inequality inherent in laissez-faire constitutionalism, these

¹²⁷ Harter 1962.

¹²⁸ Commons 1893, 80.

¹²⁹ Commons 1934, 751.

¹³⁰ Cf my later discussion of Amartya Sen.

¹³¹ Lewis 1946.

¹³² Judge Brandeis cited in 1997, 21.

theorists challenged the role of the state in enforcing these rights and suggested that the state could enforce new kinds of rights, institutions or ‘entitlements’. These ideas, which set the groundwork for the emergence of economic and social rights, came to be reflected in Roosevelt’s ‘re-definition’ of rights and the legislative and administrative project of the New Deal of the 1930s.

The influence of the legal realists and institutional economists on Roosevelt’s ‘new’ rights and the New Deal ‘constitution’

Against the backdrop of the Great Crash of 1929 and the Great Depression and mass poverty and unemployment that followed it, Franklin D. Roosevelt won the United States presidential election of November 8 1932 in a landslide against his opponent, the Republican President Herbert Hoover. After the election of Roosevelt, many of the influential legal realists and institutional economists of these earlier intellectual debates (and their disciples) became key actors in the legislative and administrative project of Roosevelt’s New Deal of the 1930s. Progressive lawyers and economists schooled in the ideas of the legal realists and of the institutional economists flooded into the administration and were able to put their ideas into practice. Massive legislative and economic change was made in the first 100 days of the administration that sought to instantiate a new legal and economic orthodoxy - the New Deal was effectively an attempt to fundamentally change *what was being formalised* in the materialisation and legislation (if not constitutionalisation) of a new (more ‘human’) liberal orthodoxy.

Although, historians of the New Deal have argued that it was not consistently underpinned by any economic philosophy,¹³³ a number of scholars have detailed how many of the ideas of the institutional economists and legal realists shaped much of the New Deal thinking on rights, as well as the legislative and administrative efforts to establish new ‘institutions’ – including unemployment insurance, workmen’s compensation, Social Security, labor laws, the regulation of public utilities and plans for health insurance.¹³⁴ John R. Commons’s pioneering practical experiments in Wisconsin served as an influential model for New Deal experimentation,¹³⁵ and Commons’ students, such as Edwin E. Witte, Arthur J. Altmeyer and Wilbur Cohen played leading roles in the Roosevelt’s Committee on Economic Security, developing the federal Social Security programme and drafting the 1935 Social Security Act¹³⁶ which aimed at ‘protecting the individual against the major economic hazards of modern life’¹³⁷.

Adolph Berle and Rexford G. Tugwell became members of Roosevelt’s original ‘Brains Trust’ and Wesley Mitchell came to play a leading role in Roosevelt’s National Resources Planning Board, as did Gardiner Means (a leading advocate of the ‘structuralist’ or ‘planning’ approach that influenced the early New Deal

¹³³ Hofstadter 2004; Milkis 2002.

¹³⁴ See for example Sunstein 2004; Reagan 1999; Barber 1996; Frederic S. Lee and Samuels 1992; Milkis 2014.

¹³⁵ Rutherford 2001.

¹³⁶ *Ibid.*, 182.

¹³⁷ Frances Perkins, *The Task that lies ahead*, Report of the Committee on Economic Security, Washington, December (1934)

and sought to ‘restructure’ the institutions of the economy). Berle and Means’ 1932 classic book, *The Modern Corporation and Private Property* also influenced the intellectual grounding of the New Deal. Felix Frankfurter and his ‘boys with their hair on fire’, including Tommy Corcoran and Benjamin Cohen, became central to the drafting of New Deal legislation (and both Berle and Cohen were also later to play a key role in the US State Department’s engagement in drafting the international bill of rights).¹³⁸

Many of the concerns of the legal realists and the institutional economists can be seen reflected in the political speeches and ‘fireside chats to the people’ of Franklin Roosevelt during the 1930s and 1940s. Coming to power amid the devastation of the Great Depression, Roosevelt’s election campaign challenged the failures of President Herbert Hoover to address mass unemployment and misery that afflicted millions of Americans. The Great Crash of 1929 (which wiped out the savings of much of the population) and the Great Depression that followed (which left more than a quarter of the population unemployed and millions queuing up in breadlines and soup kitchens across the United States), was widely blamed on the rampant speculation of rapacious bankers, as was the concentration of economic power and the deepening inequality during the ‘Gilded Age’ of the 1920s.

Roosevelt ridiculed the *laissez-faire* philosophy of Hoover’s ‘hear-nothing, see-nothing, do-nothing Government’¹³⁹ as spectacularly failing to prevent the rampant speculation on the stock markets that produced the 1929 Great Crash, and for spectacularly failing to save people from despair and hunger in its aftermath. He excoriated the ‘economic royalists’ who descended on Washington to beg for government help out of the depression, despite their claims to support *laissez faire* policies – ‘The same man who tells you that he does not want to see the government interfere in business.... is the first to go to Washington and ask [for help]’¹⁴⁰ And he defied the view that it was the duty of the state to allow the inexorable operation of the immutable, inexorable economic ‘laws of nature’.

‘Our Republican leaders tell us economic laws--sacred, inviolable, unchangeable--cause panics which no one could prevent. But 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.’¹⁴¹

From 1932, at the start of his election campaign, and onwards Roosevelt called for a ‘redefinition of rights’, a new ‘economic constitutional order’ and an ‘economic declaration of rights’. In a 1932 campaign speech, reportedly drafted mostly by Adolph Berle,¹⁴² he insisted that ‘The task of statesmanship has always been the re-definition of these rights in terms of a changing and growing social order.’¹⁴³ In that

¹³⁸ Brinkley 1996; Brucken 2013.

¹³⁹ Roosevelt, ‘Speech at Madison Square Gardens,’ October 31, 1936.

¹⁴⁰ Roosevelt, ‘Speech to the Commonwealth Club, San Francisco, CA,’ September 23, 1932.

¹⁴¹ Roosevelt, ‘I Pledge You—I Pledge Myself to a New Deal for the American People’, Address Accepting the Presidential Nomination at the Democratic National Convention in Chicago,’ July 2, 1932.

¹⁴² Kennedy 2005, 123.

¹⁴³ Roosevelt, ‘New Conditions Impose New Requirements upon Government and Those Who Conduct Government, Campaign Address, Commonwealth Club in San Francisco, California,’ September 23, 1932. *My italics.*

speech, Roosevelt challenged the classical liberal rights to life, liberty and property, recasting the right to life: 'Every man has a right to life; and this means that he has also a right to make a comfortable living'. He also challenged the primacy of property rights, calling for the regulation of the speculators, financiers and the 'princes of property', and reminding everyone that property rights were a creation of government. Echoing Berle's academic work, he warned that 'industrial combinations had become great uncontrolled and irresponsible units of power within the State' and 'if the process of concentration goes on at the same rate, at the end of another century, we shall have all American industry controlled by a dozen corporations.... Put plainly, we are steering a course toward economic oligarchy, if we are not there already.'¹⁴⁴ Rather than it being the duty of the state to protect the laissez faire workings of the inexorable, economic 'laws of nature', he emphasized the duty of the state to challenge the economically powerful corporations and the financial system that had created the crisis, and to act to protect ordinary people.¹⁴⁵

Berle himself explained in 1933 that the New Deal was conceptually based on a 'recognition of the fact that human beings cannot indefinitely be sacrificed by millions to the operation of economic forces' and that it would use the 'counterbalancing' power of the state against corporations to 'grant to every one economic security, a chance for self-fulfilment and a right to live'.¹⁴⁶ Roosevelt also called for expanding the narrow conception of liberal freedom, emphasizing that 'Necessitous men were not free men (sic)' and called for a 'greater freedom' that would integrate the idea of economic security:

'I am not for a return to that definition of liberty under which for many years a free people were being gradually regimented into the service of the privileged few. I prefer and I am sure you prefer that broader definition of liberty under which we are moving forward to greater freedom, to greater security for the average man than he has ever known before in the history of America.'¹⁴⁷

As Foner argues, Roosevelt self-consciously appropriated and re-described ideas of liberty and (economic) freedom. He abandoned the term 'progressive' and chose to use the term 'liberal' instead to describe his programme, transforming the conception of liberalism 'from a shorthand for weak government and laissez-faire economics into belief in an activist, socially conscious state, an alternative both to socialism and to unregulated capitalism'.¹⁴⁸ He recast the idea of 'freedom' and juxtaposed a vision of liberty, or 'greater freedom' with the older notion of freedom of contract which only served the interests of the 'privileged few'. But rather than replacing the liberal, individualist rights, the New Dealers' 'constitutional revolution', proposed adding 'new rights' to the list of classical rights for a more expansive vision of freedom.¹⁴⁹ Forbath points out the right to work was also at the heart of Roosevelt's vision of economic security and part of the 1935 Social Security Act that sought to guarantee the 'opportunity to

¹⁴⁴ Ibid.

¹⁴⁵ See also Sunstein 2009.

¹⁴⁶ Berle 1973, 89.

¹⁴⁷ Roosevelt, 'Fireside Chat,' September 30, 1934.

¹⁴⁸ Foner 1999, 203–4.

¹⁴⁹ Forbath 2001.

make a living - a living decent according to the standard of the time'. Roosevelt re-described the role of the state to include 'inescapable obligations' to 'protect the citizen in his right to work and his right to live'.¹⁵⁰

As Milkis has also argued: '...an understanding of rights dedicated to limiting government gradually gave way to a more expansive understanding of rights, requiring a relentless government identification of problems and the search for methods by which these problems might be solved.'¹⁵¹ Although these 'new rights' never reached the status of constitutional rights in the US,¹⁵² this was part of what Sunstein has called a 'crucial national judgement made during the Depression: the individual rights, properly conceived, included not merely the common law catalogue of private interests, but also governmental protection against many of the harms and risks of the market economy.'¹⁵³

However, Roosevelt faced increasingly vociferous opposition from anti-New Dealers who charged him with 'making 'a vast shift' away from the 'American concept of human rights'¹⁵⁴. Frequently finding against the administration, the US Supreme Court also overturned much early New Deal legislation, as the struggle over the New Deal became increasingly a struggle over the definition of 'rights' and the definition of 'freedom', especially 'economic freedom' within the Depression economy.

2.2.2 The 1936 Constitutional moment: 'human rights' versus 'property rights'

Between 1933 and 1936, the Supreme Court issued at least six major rulings holding New Deal legislation unconstitutional, largely on the basis of their violation of the 'constitutional' precepts of the right to property and the right to freedom of contract, although their judgements were usually framed more obliquely through notions of 'due process' and the 'commerce clause.'¹⁵⁵ It was not until after overwhelmingly winning the 1936 election, when Roosevelt threatened his 1937 'court packing'¹⁵⁶ plan if

¹⁵⁰ Ibid., 182.

¹⁵¹ 2002, 60 Milkis challenges the conventional wisdom that the New Deal was bereft of a guiding intellectual philosophy.

¹⁵² Sunstein 2004.

¹⁵³ Sunstein 1997, 351.

¹⁵⁴ Herbert Hoover, 'The Challenge to Liberty,' *The Saturday Evening Post*, September 8, 1934, Volume 207, Number 10 edition, 12.

¹⁵⁵ Goldstein details these as: *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935) (invalidating a section of the National Industrial Recovery Act); *Railroad Retirement Board v. Alton Railway Co.*, 295 U.S. 330 (1935) (invalidating the Railroad Pension Act of 1934); *Schechter Poultry Corp. v. U.S.*, 295 US 495 (1935) (holding much of the National Recovery Act unconstitutional); *Louisville Joint Stock Land Bank v. Radford*, 295 U.S. 555 (1935) (striking down the Frazier-Lemke Farm Bankruptcy Act of 1934); *United States v. Butler*, 297 U.S. 1 (1936) (holding unconstitutional the Agricultural Adjustment Act of 1933); *Carter v. Carter Coal Co.*, 298 U.S. 238 (1936) (holding unconstitutional the Bituminous Coal Conservation Act of 1935). See Goldstein 2012.

¹⁵⁶ Roosevelt threatened to 'pack' the court by increasing the number of justices from nine to fifteen. Ackerman suggests that Roosevelt may have modeled his plan on the 'Lords-packing' of the UK Prime Minister in response to the Lord's veto of Lloyd George's people's budget of 1909. Ackerman 2005, 319.

the Supreme Court continued to defend the principles of laissez-faire constitutionalism¹⁵⁷ that the ‘nine old men’ of the Supreme Court began to shift away from the old legal and economic orthodoxy and stopped striking down New Deal initiatives on the basis of their ‘unconstitutionality’.¹⁵⁸

As Forbath has argued however, much of the debate over the New Deal ‘constitutional philosophy’ took place not within the Supreme Court itself, but within Congress, in the executive branch and the broader public sphere.¹⁵⁹ With increasing intensity after the *Schechter* decision against the National Recovery Administration¹⁶⁰ despite the persistence of high unemployment, some members of Congress started to call for constitutional amendments that would integrate New Deal philosophy explicitly in the Constitution. Congressman Maverick for example suggested that ‘the time has come to extend the Bill of Rights to embrace such guarantees as ‘the right to honest work’, an industry-wide ‘minimum standards of hours, wages and fair competition’, and the like.’¹⁶¹

Roosevelt was however wary of trying to ‘constitutionalise’ his new rights, demanding rather that the Supreme Court practice judicial restraint and not obstruct democratic legislation. Forbath suggests that the New Dealers, like the legal realists and progressives before them, were convinced that ‘rights should be understood in terms of social context and social policy, redeemed and defended through legislative deliberation and enactment’, but that they should be ‘kept out of the hands of the legalists and formalists’.¹⁶² To do otherwise would give the judges and the courts the opportunity to define these rights in terms of their ‘inherited and hostile judicial constructions of those very provisions.’¹⁶³ The New Dealers still however worked to counter the ‘old Constitution’s account of economic liberty with a new one’ and increasingly framed their public policies in terms of ‘new’ economic and social rights, and institutionalised a new role for the government in New Deal legislation.¹⁶⁴

By the time of the 1936 election, Ackerman has controversially argued that Roosevelt brought the choice directly to the people, asking them to choose between the constitutional philosophy of the Supreme Court and the constitutional philosophy of the New Deal, in what Ackerman calls the 1936 ‘constitutional

¹⁵⁷ Ackerman 1993, 26.

¹⁵⁸ I will not address here the reasons for the Court’s ‘switch in time’, but for an overview of different theories, including the thesis that ‘constitutional revolution of 1937’ was not really a revolution at all, but rather a doctrinal evolution that occurred between 1934 and 1942, see an overview in Kalman 2005.

¹⁵⁹ Forbath 2001.

¹⁶⁰ *A.L.A. Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935). This case involved a small poultry-slaughtering business in New York charged with violating the minimum wage, maximum hours and sales practice provisions of the NRA code on poultry, which was overturned when the Supreme Court invalidated the regulations as an invalid use of Congress’ power under the commerce clause – which had the far larger implication of rendering the New Deal’s 1933 National Industrial Recovery Act, unconstitutional.

¹⁶¹ Forbath 2001, 177.

¹⁶² *Ibid.*, 175.

¹⁶³ *Ibid.*

¹⁶⁴ *Ibid.*, 165.

moment'.¹⁶⁵ Ackerman argues that Roosevelt gave the people a clear choice between a Republican definition of liberty 'tightly linked to principles of limited government, freedom of contract and private property' versus a New Deal definition that 'modern freedom could only be achieved through the state and not against it', and it was 'with such questions ring in their ears, Americans went to the polls - and gave Roosevelt and the New Deal Congress the greatest victory in American history.'¹⁶⁶ Thus the New Dealers, in this 'crushing victory in the Presidential and Congressional elections of 1936.... claimed a mandate from the People for their activist vision of American government.'¹⁶⁷ And he suggests that even though the New Dealers did not formally amend the Constitution, the Court's later 'New Deal opinions have operated as the functional equivalent of formal constitutional amendments.'¹⁶⁸

However, this element of Ackerman's thesis has been widely challenged, particularly since Roosevelt avoided directly confronting the Supreme Court in his 1936 election rhetoric. Goldstein has proposed a more nuanced view of this thesis – he argues that Roosevelt certainly did make this stark choice over constitutional philosophies the centre of his 1936 election campaign, not by directly taking on and attacking the Supreme Court, but rather by campaigning instead against a recently established conservative organisation, the American Liberty League. From this perspective, the 1936 election was a dispute not between the President and the Court, but between the President and the Liberty League.¹⁶⁹ The Liberty League served a perfect proxy for the Court, as its distinctly conservative philosophy centred around re-establishing the primacy of property rights and freedom of contract, providing a clearer target than the more legally complex decisions of the Court. It was also a much easier political target.

Goldstein points out that the popular constitutional rhetoric of the 1936 presidential campaign differed from the ways in which lawyers discussed constitutional doctrine, just as it differed from the details of the landmark decisions of the Supreme Court of the time. 'To lawyers and law professors, the central constitutional issues of the 1930s addressed the breadth of the Commerce Clause and General Welfare Clause and the degree of deference owed to Congress over the reasonableness of federal laws.' This did not mean however that the simpler, popular debate was not a debate over constitutional philosophy. And, as I show below, this debate came to be characterised in the press at the time, as a debate over 'human rights versus property rights'. As the *New York Times* foresaw already in 1934, the clash between the Liberty League and the New Deal was to 'precipitate the greatest conflict of constitutional and economic philosophy of the times'.¹⁷⁰

¹⁶⁵ Various critics have disputed Ackerman's thesis that the public effectively ratified the constitutional philosophy of the New Deal during the 1936 election, with historian William Leuchtenberg suggesting that Roosevelt did not mention the Court and at most the 1936 election should be understood as accepting a mandate in favour of 'big government' but without any constitutional basis. Leuchtenberg 1999.

¹⁶⁶ Ackerman 2005, 310.

¹⁶⁷ Ackerman 1993, 24.

¹⁶⁸ Ibid., 26.

¹⁶⁹ Goldstein 2012, 5.

¹⁷⁰ 'Capital expects Smith move next in Liberty League' *New York Times*, August 27, 1934, cited in Ibid., 19.

The American Liberty League's crusade against Roosevelt's 'new' rights

The American Liberty League was set up in August 1934, by extremely wealthy and powerful business leaders, including the Du Pont family, Alfred P. Sloan, president of General Motors, Edward F. Hutton chairman of General Food and J. Howard Pew, president of Sun Oil, as well as a range of conservative, anti-Roosevelt Democrats including Jouett Shouse, John Raskob, John David and Alfred E. Smith.¹⁷¹ Its explicit purpose was to defend the 'traditional' rights and liberties guaranteed by the Constitution – and to challenge the constitutional validity of the New Deal.

The Liberty League emphasized that its objective was to 'to teach the duty of government, to encourage and protect individual and group initiative and enterprise, to foster the right to work, earn, save and acquire property, and to preserve the ownership and lawful use of property when acquired.'¹⁷² Its first statement of principles also appealed to religion, comparing the Tenth Commandment and with the Fifth Amendment of the US Constitution - 'The one reads: 'Thou shalt not covet thy neighbor's house', while the other reads: 'No person shall be deprived of life liberty or property without due process of law; nor shall private property be taken for public use without just compensation'.¹⁷³

At its launch in 1934, Roosevelt immediately publicly ridiculed the League – suggesting it was a church devoted to upholding only two of the Ten Commandments and its tenets seemed to be 'Love thy God, but forget thy neighbour', and suggesting that the wealthy men of the League loved their property but little else. The *Wall Street Journal*, like other press articles at the time, recorded Roosevelt as criticising the Liberty League for laying 'too much stress on property rights and too little on human rights.'¹⁷⁴

Between 1934 and 1936, the League organised to defeat Roosevelt through a massive public campaign to 'educate the American public on the evils of the New Deal'.¹⁷⁵ It vociferously attacked the 'radical, socialistic and un-American values' of the New Deal through 135 pamphlets, newsletters, legal reports, speeches and radio addresses, attacking Roosevelt personally, as well as the constitutional validity of the New Deal. In advance of the 1936 election, the Liberty League built up more financial resources and more staff in Washington than the Republican party itself. Rudolph records that between August 1934 and November 1936, the League made the front page of the *New York Times* thirty-five times, and in the

¹⁷¹ Ibid., 13–14.

¹⁷² 'League is formed to scan New Deal, 'Protect Rights' *The New York Times*, August 23, 1934.

¹⁷³ 'American Liberty League Pamphlet 'American Liberty League: A Statement of Its Principles and Purposes,' September 10, 1934.

¹⁷⁴ *Wall Street Journal*, 28 August 1934. See also e.g. *The Christian Science Monitor*, 25 August 1934. I looked at the transcript of Roosevelt's press conference at the time, and he did not use the words 'human rights' at that moment (although he did later), suggesting that it was the press that first characterized this as popular constitutional rhetoric.

¹⁷⁵ Goldstein 2012, 20.

absence of strong and organized Republican campaign in the election, the press looked to the Liberty League for opposition to New Deal legislative proposals.¹⁷⁶

Its key message was articulated in terms of a commitment to individual liberty and economic freedom, protecting ‘natural’ rights especially the right to property and calling on the state to refrain from interfering with economic liberties and allow the operation of ‘natural’ economic laws. It warned that American constitutional values were under attack¹⁷⁷ and that the New Deal threatened to ‘destroy the essential features of our government’ and ‘substitute Americanism with Totalitarianism.’¹⁷⁸ The League’s ‘Lawyers Vigilance Committee’ participated directly in litigation against the New Deal legislation, with its legal briefs combating the ‘new and virtually unlimited powers of regulation.’¹⁷⁹

The Liberty League also tried to (re)appropriate concepts of economic freedom and (re)define Roosevelt’s use of ‘human rights’ again in terms of property rights: ‘[e]conomic freedom was the foundation of all other liberties’¹⁸⁰ and that ‘human rights and property rights are inseparable and the right to own property is among the most important of human rights.’¹⁸¹ One Liberty League pamphlet articulated rights as the ‘natural’ rights given by God: ‘The Constitution affirms that certain rights are *reserved* to the people, that is to say, are recognized to have been in the possession of the people *before* the establishment of Government’ arguing that recent (New Deal) laws ‘are absolutely in violation of all of our previous concepts of individual liberty and constitutional rights.’ But ‘Each day, thank God, our courts are rescuing us from these assaults on our human rights’.¹⁸²

Goldstein suggests that it was easy for Roosevelt’s campaign team to make the Liberty League ‘the villain in a grand constitutional drama’. The fact that it was founded and funded by millionaires like the Du Ponts, powerful economic actors widely blamed for the Great Depression but also seen to be benefiting from the theories of unpopular ‘let-alone’ laissez faire economics, left the Liberty League vulnerable to public criticism. In the absence of any obvious concern with the massive social dislocation and economic distress caused by the Great Depression, the Liberty League’s message failed to resonate with the ‘common man’ (sic) whose rights they were nonetheless supposedly fighting for.¹⁸³ Throughout the 1936 election campaign, Roosevelt took every opportunity to ridicule the League and to portray the Republicans as their servants. Roosevelt’s Campaign Director, James Farley, even declared that the

¹⁷⁶ Rudolph 1950, 21.

¹⁷⁷ See, e.g., American Liberty League pamphlet by Raoul E. Desvernine, *The Principles of Constitutional Democracy and the New Deal*, Doc. No. 52 at 3 (July 11, 1935) (declaring that we ‘do not doubt that [the nation’s] fundamental and characteristic precepts are being now seriously threatened.’).

¹⁷⁸ Desvernine, *Americanism at the Crossroads* cited in Goldstein 2012, 29.

¹⁷⁹ *Ibid.*, 33.

¹⁸⁰ Carl W. Ackerman, *The Test of Citizenship*, American Liberty League Doc. No. 61 at 10 (1935), cited in Goldstein 2012..

¹⁸¹ Jouett Shouse, *Democracy or Bureaucracy?*, American Liberty League Doc. No. 14 at 19 (1935), cited in *Ibid.*

¹⁸² ‘American Liberty League Pamphlet, No. 35 ‘Human Rights and the Constitution’ Speech of R.E. Desvernine,’ May 16, 1935, http://kdl.kyvl.org/catalog/xt7wwp9t2q46_32_4?

¹⁸³ Rudolph 1950, 23–25.

Liberty League should be called the ‘American Cellophane League’ because ‘first, it’s a Du Pont product and second, you can see right through it’.¹⁸⁴ Roosevelt’s Director of Press operations, Charles Michelson, elaborated later that the campaign had decided to keep the Liberty League ‘before the public... as the symbol of massed plutocracy warring on the common people.’¹⁸⁵

In his 1936 State of the Union address, although he didn’t mention it directly, Roosevelt’s attack on ‘entrenched greed’ was widely understood to be a direct attack on the Liberty League, as he set out the constitutional debate:

‘You, the members of the Legislative branch, and I, the Executive, contended for and established a new relationship between Government and people..... It goes without saying that to create such an economic constitutional order, more than a single legislative enactment was called for.

To be sure, in so doing, we have invited battle. We have earned the hatred of entrenched greed... They seek the restoration of their selfish power. Yes, there are still determined groups that are intent upon that very thing. Rigorously held up to popular examination, their true character presents itself. They steal the livery of great national constitutional ideals to serve discredited special interests.¹⁸⁶

As Goldstein points out, Roosevelt in this speech offered a point by point rebuttal of the Liberty League’s assertion that the regulatory powers of the (federal) government conflicted with individual liberty and state’s rights.¹⁸⁷ While the Liberty League emphasized that the Constitution served to protect people from the tyranny of the state, especially the federal state, Roosevelt contended that the Constitution should serve also to protect people against the tyranny of economic power and economic exploitation. When the Liberty League countered with a well-received speech from anti-Roosevelt democrat, Al Smith, which was initially perceived to have weakened Roosevelt, campaigners for Roosevelt managed to turn this around, acerbically pointing out how Smith delivered his speech in a resplendent ballroom to wealthy businessmen, including twelve members of the Du Pont family with the press estimating that the wealth of the Liberty League leaders at the dinner exceeded more than one billion dollars. Goldstein argues that it was the public turn against the Liberty League and its philosophy that contributed to Roosevelt’s massive win at the polls.

Roosevelt won the election with a landslide victory, carrying 46 out of 48 states, over 98% of the electoral vote and more than 60% of the popular vote. Accepting the Democratic nomination as Presidential candidate on June 27 1936, he again was assumed to be attacking the wealthy members of the Liberty League, when he stated that the task of government was to challenge the ‘economic royalists’ who limited economic freedoms:

¹⁸⁴ Ibid.

¹⁸⁵ Charles Michelson, ‘Democratic Strategy Is Told by Michelson’, *New York Times* November 15, 1936.

¹⁸⁶ Roosevelt, ‘Annual Message to Congress,’ January 3, 1936.

¹⁸⁷ Goldstein 2012.

‘...the privileged princes of these new economic dynasties, thirsting for power, reached out for control over Government itself. They created a new despotism and wrapped it in the robes of legal sanction. In its service, new mercenaries sought to regiment the people, their labor, and their property.

For too many of us the political equality we once had won was meaningless in the face of economic inequality. A small group had concentrated into their own hands an almost complete control over other people's property, other people's money, other people's labor — other people's lives. For too many of us life was no longer free; liberty no longer real; men could no longer follow the pursuit of happiness...Against economic tyranny such as this, the American citizen could appeal only to the organized power of Government.

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. 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.’¹⁸⁸

Although Roosevelt himself did not immediately frame his ‘new’ rights to work and to live as ‘human rights’, as I show below, the press at the time did start to use the phrase ‘human rights’ to distinguish Roosevelt’s rights from the Liberty League’s ‘property rights’. Roosevelt himself also eventually started to use the phrase ‘human rights’ in this context from 1936 onwards, well before his war-time invocation of this phrase in the 1940s.

Popular constitutional philosophy - debating ‘human rights’ versus ‘property rights’ in the press

In his history of human rights, Moyn refers to the explosion of the use of the phrase ‘human rights’ in the *New York Times* in 1977 as significant evidence of the emergence of the concept at that point in time.¹⁸⁹ Borgwardt by contrast, in her history of the first appearance of the term ‘human rights’, argues that, if there were an exact moment when the term human rights acquired its modern meaning, this must date to Roosevelt’s wartime rhetoric on human rights, and notably the signing of the ‘Declaration by the United Nations’ in 1 January 1942 (and she identifies the meaning of the term as extending beyond traditional political rights to include a vision of economic justice, as well as encapsulating the domestic and international relevance of New Deal principles).¹⁹⁰ As evidence, she notes that the *New York Times Index* for 1936 contains no reference to ‘human rights’ at all, and finds only two relevant articles in the index for 1937 on property rights and on labour rights (with a gradual growth in the number of index references after which show how the use of the phrase was well under way by the end of the war.)

My own research suggests however that the phrase ‘human rights’ was in frequent use in the press and popular rhetoric in the 1930s well before its wartime usage in the 1940s, with press articles frequently summarising this ‘constitutional conflict’ in terms of ‘human rights’ versus ‘property rights’.¹⁹¹ It may

¹⁸⁸ Franklin D. Roosevelt, ‘Acceptance Speech for the Renomination for the Presidency, Philadelphia, Pa.,’ June 27, 1936.

¹⁸⁹ Moyn 2012, 4.

¹⁹⁰ Borgwardt 2007.

¹⁹¹ It was beyond the scope of my research to undertake a full quantification, but even a rapid search on the phrase ‘human rights’ and related phrases carried out in ProQuest *Historical Newspapers* generated over 40 results between 1934 and 1937.

not yet have made its way into the NYT index, but it was in frequent use in articles - it was even 'in the air' as one letter to the press complained "Through the intellectual fog which blankets the land, we hear the sounding phrase 'Human Rights before property rights.'"¹⁹² This appears to be partly as, before he was later discredited, the catholic priest and campaigner Charles E. Coughlin put the 'supremacy of human rights over property rights' as the core purpose of his National Union for Social Justice¹⁹³.

However, the phrase 'human rights versus property rights' also became shorthand for Roosevelt's New Deal rights as part of the 'greatest constitutional conflict of economic and constitutional philosophy of the times'. The question 'Shall human rights supersede property rights?' was noted in the press as one of the fundamental issues at stake in the 1936 election.¹⁹⁴ Indeed, by the time of the 1936 elections, the press was even reporting that Western New York Young Republicans were urging the Republican party platform to 'place human rights above property rights, but should not lose sight of property rights'¹⁹⁵ - although the Republican Party Platform of 1936 did no such thing, arguing rather that the New Dealers insisted on passing laws 'contrary to the Constitution', and that people's rights and liberties were 'today for the first time threatened by the Government itself.'¹⁹⁶

Roosevelt himself was clear that the New Deal was aimed at challenging legal and economic orthodoxies, and this would necessarily have to be through the law. In an open letter seeking the support of an important labour leader of the time, Major George L. Berry, Roosevelt wrote: 'we have endeavoured to correct through legislation certain of the evils in our economic system....' And 'I have implicit faith that we shall find our way to progress through law'. He recognised that it was certainly not the 'wage earners who cheered when the laws were declared invalid [by the Supreme Court]' and emphasised the need 'to preserve human freedom and enlarge its sphere', 'to prevent forever a return to that despotism which comes from unlicensed power to control and manipulate the resources of our Nation' to work for 'the same ideal - the restoration and preservation of human liberty and human rights'.¹⁹⁷ In committing the labour vote to Roosevelt, Berry responded: 'It is my judgement that the workers, who constitute the great overwhelming majority of our citizens, will not tolerate the return of a leadership in political or economic life who contemplate or think or practice the philosophy of human rights being subordinate to property rights'.¹⁹⁸

After Roosevelt's overwhelming win in the 1936 election, even the British press was reporting this as a win for human rights over property rights. Writing in the British *Observer*, Lord Lothian (who later

¹⁹² Letters, *The Hartford Courant*, 5 February 1935.

¹⁹³ As described in the *New York Times*, 5 May 1935.

¹⁹⁴ See 'Issues at stake in the Election' *The New York Amsterdam Times*, 31 October 1936.

¹⁹⁵ *Daily Boston Globe*, 23 February 1936.

¹⁹⁶ Republican Party Platform of 1936, 9 June 1936.

¹⁹⁷ 'Roosevelt letter to Berry,' *Washington Post* 11 August 1936.

¹⁹⁸ 'Berry Asserts Labor will safeguard gains', *New York Times*, 8 September 1936

became British Ambassador to the United States) remarked that even in the midst of the failures of some of his measures (such as the NRA) and the Supreme Court declaring them unconstitutional, Roosevelt ‘never swerved from his central faith that in crisis the State must save the citizen’ and ‘never ceased to denounce the iron law of *laissez-faire*, that property rights must come before human rights.’¹⁹⁹ He suggested that this did ‘not mean that America is going Marxist’, but it did mean that the United States would expand ‘public enterprise..., diminish by taxation the share taken by the rentier,expand social services and endeavour to make sure that every citizen has a chance to work and make a decent living thereby.’ The 1936 election Lothian concluded was ‘no longer a vote against Hoover; it was a vote for the New Deal, for the ending of *laissez-faire* and the era of unbridled capitalism in the United States.’²⁰⁰

While Roosevelt kept his focus on the American Liberty League during the 1936 election campaign, after the election the judges of the Supreme Court were not to escape an attack. After Roosevelt’s massive electoral win, he proposed in February 1937 the ‘Judicial Procedures Reform Bill of 1937’, generating a constitutional crisis in what came to be called his ‘court-packing plan’. Explaining this plan (which Ackerman suggests may have been inspired by the ‘Lords-packing’ by the UK Prime Minister in response to the Lord’s veto of Lloyd George’s budget²⁰¹) Roosevelt argued that this would be more effective than any constitutional amendment. In his March 9 *Fireside Chat*, he emphasised that his administration had ‘begun a program of remedying those abuses [of power] and inequalities to give balance and stability to our economic system to make it bomb-proof against the causes of 1929’ Crash, but that the Courts had ‘cast doubts on the ability of the elected Congress to protect us against catastrophe by meeting squarely our modern social and economic conditions’. Ever ‘since the rise of the modern movement for social progress through legislation, the Court more often and more and more body asserted a power to veto laws passed by Congress’. He explained that, while the Democratic party had proposed a constitutional amendment to challenge the Court’s interpretations and enable the government ‘to regulate commerce, protect public health and safety, and safeguard economic security’, it would take months or years to get an amendment and then more months and years to get it through Congress. And he was afraid that even if it was passed, a conservative judiciary might mis-interpret it:

Even if an amendment were passed.... Its meaning would depend on the kind of Justices who would be sitting on the Supreme Court bench. An amendment, like that rest of the Constitution, is what the Justices say it is rather than what its framers or you might hope it is.’²⁰²

Roosevelt’s ‘court-packing plan’ was not well-received by the political class, though in the press this constitutional conflict was again characterised in terms of ‘human rights versus property rights’. For example, at the height of the sit-down strike wave and major labour unrest that were rocking the

¹⁹⁹ ‘Roosevelt’s Epic: A Tremendous Mandate, Lord Lothian, *The Observer*, London 8 November 1936.

²⁰⁰ *Ibid.*,

²⁰¹ Ackerman 1993, 319.

²⁰² Franklin Roosevelt, *Fireside Chat 46, March 9, 1937*. See also *Ibid.*, 327.

country,²⁰³ the press recorded how the labour movement strongly backed the court-packing plan, repeatedly accusing the Court of putting property rights before human rights. Reporting on a Carnegie Hall labour rally, the press recorded complaints against the ‘judicial lame ducks’, ‘usurpers of power’, ‘impeders of progress’ and the ‘one-time corporate lawyers whose judicial point of view was one with the ‘vested interested which have ever held human rights less sacred than property rights’ – and that the nine old men were ‘blind to the fact that a new generation had repudiated their outworn economic and social philosophy’ and were interpreting the Constitution ‘as an antique protection of the vested few instead of a modern document for the liberation of all the people.’²⁰⁴

Supporting the court-packing plan, United States Senator Robert M. La Follette of Wisconsin also ‘ridiculed the idea that the founding fathers wished to prevent the State of New York from enacting a Minimum Wage Law for Women’.²⁰⁵ Others suggested that ‘recent American jurisprudence was literally unintelligible except upon the assumption that the Constitution intended that judges should permanently safeguard the rights of property as understood in the age of *laissez faire*’.²⁰⁶ Henry Ward Beer, President of the Federal Bar Association of New York, was also reported as insisting that corporation lawyers were opposed to the plan because it represented ‘a fight for human rights over property rights’.²⁰⁷ Meanwhile US Senator Robinson, also supporting Roosevelt, argued that the Court had ‘become economists’:

‘Since [in many cases], the United States Supreme Court has departed from anything related to a fixed body of law except by the most tenuous thread, and has become a body engaged in the practice of economics, it becomes highly relevant to know just what kind of economic theories the members of that court hold.’²⁰⁸

In March 1937 however, in what came to be called ‘the switch in time that saved nine’, the balance of the Supreme Court shifted suddenly as Associate Justice Owen Roberts switched sides to strike down the Court’s earlier judgement in *Adkins v. Children's Hospital* (which had held that minimum wage laws were a violation of the Fifth Amendment’s ‘due process clause’) and to uphold the constitutionality of Washington state's minimum wage law in *West Coast Hotel Co. v. Parrish*. This was to be the first case in a long-term shift. As Kennedy points out, Roosevelt ‘lost his battle to expand the Court, but won the war for a shift in constitutional doctrine.’²⁰⁹ Ackerman suggests by the early 1940s, the new ‘New Deal jurisprudence of the Supreme Court had ‘not only rejected leading decisions of the old regime, like *Lochner v New York*... [But] transformed *Lochner* into a symbol of an entire constitutional order that had

²⁰³ See for example Fine 1991.

²⁰⁴ ‘American Labor Party Back Plan to Liberalise the Courts’ *Christian Science Monitor*, 25 March 1937

²⁰⁵ *ibid.*

²⁰⁶ Supreme Court Usurps Rights of Legislators, by the British socialist Harold J Laski, *The Washington Post*, 10 February 1937

²⁰⁷ ‘Beer Backs Court Plan’, *The New York Times*, March 14, 1937.

²⁰⁸ ‘Senator Robinson’s Reply to Senators Glass and Borah on Court Change Plan’, *The New York Times*, March 31, 1937.

²⁰⁹ Kennedy 2005, 335.

been thoroughly repudiated by the American people.²¹⁰ Roosevelt's 'human rights' had thus triumphed over that 'the iron law of *laissez-faire*, that property rights must come before human rights'.²¹¹

2.3 Challenging classical laissez-faire economic orthodoxy

2.3.1 The 1937 Roosevelt Recession and the influence of Keynesian economic theory

By March 1937 then, Roosevelt had apparently won the 'greatest conflict of economic and constitutional philosophy of the times', but by mid-1937 he was facing another problem. After a marked economic recovery up until then, in the spring of 1937 the American economy suddenly experienced another sharp downturn. Economic output collapsed and unemployment jumped back up from 14.3% in May 1937 to 19% by June 1938.

It was after this precipitous fall into another severe recession - and not long after the 1936 publication of the John Maynard Keynes' *General Theory of Employment, Interest and Money* - that the Roosevelt administration came to be increasingly influenced by the economic theories of Keynesianism.²¹² Conceptions of Roosevelt's 'new rights' came to be grounded in Keynesian economic theory culminating, through the work of Roosevelt's 'National Resources Planning Board' (NRPB), in Roosevelt's 1944 'Second Bill of Rights', and in an attempt to 'constitutionalise' Keynesian economic planning in the draft 1945 Full Employment Act.

In the section below, I first explore Keynes' economic theory, arguing that Keynes' argument for 'full employment' was not merely an attack on classical laissez faire economic orthodoxy, it was an attack on free-market capitalism for *its failure to make the maximum use of available resources*. In the context of massive unemployment, Keynes argued that free markets were clearly not ensuring that all resources were efficiently and fully employed. He saw mass unemployment and idling factories as an inefficient waste of resources; 'Let us be up and doing, using our idle resources to increase our wealth'²¹³ he argued and, if the private sector could not or would not spend or invest enough to ensure the 'full employment' of all available resources, then the state should step in to fill the breach. Keynes' 1937 'General Theory' produced a paradigm shift in orthodox economic theory, challenging classical prescriptions of fiscal

²¹⁰ Ackerman 2005, 26.

²¹¹ 'Roosevelt's Epic: A Tremendous Mandate, Lord Lothian, *The Observer*, London 8 November 1936.

²¹² Note that Brinkley has suggested that this Keynesianism (with its arguably conservative aim designed to restore and preserve capitalism) limited, rather than took forward the critiques of the earlier focus in the Roosevelt administration on institutional and structural reform. See generally, Brinkley 1996; But see also Rutherford and Desroches 2008.

²¹³ Keynes 1936, 150.

conservatism, balanced budgets and austerity and advocating government intervention in the so-called 'free market' economy.

I then trace how Roosevelt's 1944 'Economic Bill of Rights' drew from a new bill of rights proposed by an agency in his administration, the National Resources Planning Board (NRPB), which first outlined a set of economic and social rights in its reports and pamphlets of between 1941 and 1943. I show how the NRPB conceived of 'economic and social rights' as a bundle or 'package' of rights deemed essential for the post-war domestic context, which should be 'progressively realised' through an integrated approach of a full employment policy linked together with a deepening of social security programmes. Far from being considered costly, with a Keynesian framing, the implementation of this bundle of rights were seen as self-sustaining and, indeed, essential to ensuring the stability of the economic and political system. Austerity was seen as a waste of resources. Keynesianism was considered more conservative than the earlier institutionalism, but it challenged the dominant economic view of the need for fiscal responsibility and balanced budgets, charging that counter-cyclical government spending was critical to 'saving capitalism from itself' by securing full employment and protecting people against the endemic instabilities of the economic system.

Surprisingly, as I will also develop further in later sections, the evidence suggests that it was the NRPB's advocacy of the concepts of 'progressive realisation' and the (maximum or) 'full use of resources' that later inspired US proposals on economic and social rights in the negotiations over the Universal Declaration, and which eventually resulted in Article 2.1 of the International Covenant. I later suggest then, that it was through a circuitous route of this Keynesian impact on US planning for the national and international order and through early US interventions in the drafting of the UDHR, that these phrases were to enter the lexicon of economic and social rights as they became international human rights.

John Maynard Keynes: the 'most eminent economist' of the twentieth century

Rather self-deprecatingly, and disingenuously for someone who took, according to his contemporary rival, Friedrich Hayek, 'a certain puckish delight in shocking his contemporaries',²¹⁴ Keynes compared himself a 'Cassandra' who 'could never influence the course of events in time'²¹⁵. Yet, he became influential precisely for his prescience in predicting in his *Economic Consequences of the Peace* that the terrible terms of the Versailles Peace Agreement would push Germany and its people into despair and into the hands of fascism and war. Already predicting the Second World War he wrote in 1919: 'Men will not always die quietly'²¹⁶

²¹⁴ Caldwell 1995, 229..

²¹⁵ Keynes and Royal Economic Society 1984.

²¹⁶ John Maynard Keynes, *The Economic Consequences of the Peace*, 2005, originally published in 1919.

But it was for his 1936 book, *The General Theory of Employment, Interest and Money*, and his devastating attack on the classical economists as ‘Candides’ (because they ‘teach that all is for the best in the best of all possible worlds provided we will let alone’²¹⁷) that Keynes was to have most influence, with his ‘new economics’ eventually coming to dominate economic policy-making from the Great Depression in the 1930s until the beginning of the 1970s. As J.K. Galbraith argued, with the *General Theory*, Keynes dealt a ‘lethal blow’ to classical conclusions and the publication of his book was an ‘event in the history of economics comparable in significance to the publication of the *Wealth of Nations* in 1776 and the first edition of *Capital* in 1867’.²¹⁸

Keynes’s impact was profound in the midst of the Great Depression, because he challenged ideas of ‘do nothing’ government and set out an economic case for urgent government action to pull economies out of Depression. Contrary to the classical economists who argued that free markets were self-regulating and tended naturally towards equilibrium in the absence of state interference Keynes (believing, like Marx, that capitalism was intrinsically unstable) countered that there was no automatic equilibrium, so governments could and should intervene in the economy. While the classical economists counselled governments to stand back and wait for the depression to work itself out (over the long run), Keynes counselled more government spending especially in times of economic crisis – ‘The boom, not the slump, is the right time for austerity’ he argued. In the long run, everyone would be dead, so it was simply not possible to follow *laissez faire* prescriptions and leave people starving in the streets.

Ultimately Keynes’ work provided ‘the first widely accepted economic justification capable of supporting expanded public intervention in the economy’.²¹⁹ Keynesianism was nonetheless a broader intellectual movement than Keynes himself alone, as there were many economists who ‘pre-Keynesed Keynes’ during the 1920s and 1930s and many further elaborated these ideas in both the US and the UK, as well as elsewhere, after the publication of *General Theory*.²²⁰ And in many senses, the reality of the Great Depression, and the prolonged mass unemployment and evident poverty and suffering that it caused, had already forced governments to start taking action – regardless of the prescriptions of formal economic theory. As Bailey suggested in relation to his influence on the US, ‘Keynes was not the inspired prophet of a new mystical theology. He was the great verbalizer and rationalizer of a theoretical attitude which was being forced, by the cold facts of the depression experience, upon a number of European and American economists.’²²¹

²¹⁷ Keynes 1936, 28.

²¹⁸ Galbraith 1991, 227.

²¹⁹ Ibid., 55.

²²⁰ Bailey 1950, 14. Other economists who could also have been an influence on ‘Keynesianism’ include the Polish economist Michael Kalecki, the Swedish economist Gunnar Myrdal, and British contemporaries and colleagues of Keynes, such as Richard Kahn – see Tabb 2002, 133.

²²¹ Bailey 1950, 18.

Keynes' argument for positive state action to secure 'full employment' was significant as an attack on classical economic theory and on 'laissez-faire economic liberalism', but I also argue below that it was more than that – it was an attack on *the failure of 'free markets' to make the maximum use of available resources*. As Bailey explained, writing in 1946, notably using the phrase 'maximum utilisation of resources':

'Keynes' *General Theory*, one of the great watersheds in the history of economic thought, was an attack upon the 'classical' and 'neoclassical' economic thought that the free market capitalistic economy was a self-adjusting mechanism which tended to produce a condition of full employment and maximum utilisation of resources...[Classical theory] was a neat theory, but to many it seemed hardly adequate to meet the demonstrated facts of life in the Britain of the twenties and thirties and the America of the thirties, where, theory or no theory, a vast amount of involuntary unemployment existed and the economic system showed few signs of moving automatically toward the full utilization of resources.²²²

Challenging 'natural rights' and revolting against the formalisation of 'automatic equilibrium'

Keynes had long argued against 'do nothing' prescriptions of orthodox economists in times of economic crisis, and their belief that markets would eventually automatically self-adjust - in his 1923 *Tract on Monetary Reform* he insisted that that: 'Economists set themselves too easy, too useless a task if in the tempestuous seasons they can tell us that when the storm is past, the ocean is flat again.'

He was an admirer of the earlier institutional economists, including of John R. Commons²²³ and like them, challenged ideas of 'natural liberty' and 'natural rights'. In his 1926 essay on 'The End of Laissez Faire', for example, he had challenged ideas of 'natural liberty' and classical postulates of the 'invisible hand', suggesting dramatically that: 'There is no design but our own... the invisible hand is merely our bleeding feet moving through pain and loss to an uncertain... destination.²²⁴ In addition, he insisted that:

'It is *not* true that individuals possess a prescriptive 'natural liberty' in their economic activities. There is *no* 'compact' conferring perpetual rights on those who Have or on those who Acquire. The world is *not* so governed from above that private and social interest always coincide. It is *not* so managed here below that in practice they coincide. It is *not* a correct deduction from the principles of economics that enlightened self-interest always operates in the public interest.'²²⁵

Like the institutionalists and their 'revolt against formalism', Keynes was deeply critical of the increasing formalism and mathematisation of economics as a discipline, and the idea that economics could find inexorable natural or mechanical laws. He criticised 'mathematical charlatany' and the idea that economics could be a value-free science like physics, arguing that 'economics is essentially a moral science and not a natural science. That is to say, it employs introspection and judgements of values.'²²⁶ He argued that economics could not be reduced to simple mathematical models that bore little relation to reality,

²²² Ibid., 16 my italics.

²²³ Tabb 2002.

²²⁴ Keynes 1928, quoted in Waligorski 1997, 41.

²²⁵ Keynes 1926 Section IV, first paragraph.

²²⁶ Letter from Keynes to Roy Harrod, July 4 1938, cited in Waligorski 1997, 152.

and (sounding relevant still today) suggested: ‘Too large a proportion of recent ‘mathematical’ economics are mere concoctions, as imprecise as the initial assumptions they rest upon, which allow the author to lose sight of the complexities and interdependencies of the real world in a maze of pretentious and unhelpful symbols.’²²⁷ He sought to show that the *a priori* assumptions of classical economics bore little relationship to reality, arguing that the classical model was a special case that did not reflect ‘the economic society in which we live, with the result that its teaching is misleading and disastrous if we attempt to apply it to the facts of experience.’²²⁸

Keynes’s target in his 1936 *General Theory of Employment, Interest and Money*, was what he termed ‘classical economic theory’, which he understood as the broad sweep of orthodox economic thought from Smith and Ricardo onwards, which had counselled mostly minimal state intervention in the economy.²²⁹ But Keynes’ target more precisely was to unsettle what had come to be called by his time ‘neoclassical economic theory’, which was formalising the precepts of classical laissez-faire liberalism into mathematical models centred on an assumption of an automatic tendency to equilibrium.²³⁰ He suggested that belief in ‘some law of nature’ guaranteeing full employment and optimal use of resources was ‘nonsense’, arguing against the classical economists who had long tried to force the facts of the real world to fit the theory:

‘The classical theorists resemble Euclidean geometers in a non-Euclidean world who, discovering that in experience straight lines apparently in parallel often meet, rebuke the lines for not keeping straight as the only remedy for the unfortunate collisions which are occurring. Yet, in truth, there is no remedy except to throw over the axiom of parallels and work out a non-Euclidean geometry. Something similar is required today in economics. We need to throw over... the classical doctrine and to work out the behaviour of a system in which involuntary unemployment in the strict sense is possible.’²³¹

Challenging the ‘natural’ tendency of free markets to achieve ‘full employment’

After the long years of mass unemployment during the Depression in the 1930s, and his earlier experience of a long period of stubborn unemployment in the UK in the 1920s in the aftermath of the First World War, Keynes, faced with the self-evident fact of ‘men without jobs and factories not producing,’ pilloried the belief of the classical economists in the impossibility of involuntary unemployment and mocked the

²²⁷ Keynes 1936, 187.

²²⁸ *Ibid.*, 9.

²²⁹ Galbraith points out that the great classical economists, Adam Smith and David Ricardo, were not ‘laissez faire fundamentalists’, as they did see a regulatory role for the state, but Keynes’ target was rather their more fundamentalist mathematically minded nineteenth century ‘neoclassical’ descendants. However, he also suggests that Keynes included the classical and neoclassicals as he did not see a sharp break between them. See Galbraith 1991, 227 note 9.

²³⁰ Keynes himself clarified that he understood that the term ‘classical economists’ was invented by Marx to cover David Ricardo and the pre-Ricardian economists, whereas he Keynes used the term ‘the classical school’ to refer to the post-Ricardian economists – including J.S. Mill, Marshal, Edgeworth and Pigou. See Keynes 1936, 9 note 1.

²³¹ *Ibid.*, 17.

classical faith in the automatic tendency of the market to ensure the full employment of all available resources:

‘To suppose that there exists some smoothly functioning automatic mechanism of adjustment which preserves equilibrium if only we trust to methods of *laissez-faire*, is a doctrinaire delusion which disregards the lessons of historical experience without having behind it the support of sound theory.’²³²

For Keynes, the assumption of the classical economists that the economy would always self-adjust to an equilibrium of full employment was simply wrong as evidenced by the facts on the ground:

‘.. It is not very plausible to assert that unemployment in the United States in 1932 was due either to labor obstinately refusing to accept a reduction of money-wages or to its obstinately demanding a real wage beyond what the productivity of the economic machine was capable of furnishing.... These facts from experience are a *prima facie* ground for questioning the adequacy of the classical analysis.’²³³

But to make his case, Keynes could not merely present the empirical evidence – that had never been enough to produce a paradigm change in economics. Rather Keynes had to challenge the theoretical underpinnings of classical theory. This required challenging an arcane but central theoretical tenet of classical economics – Say’s Law. This ‘Law’ named for the economist Jean-Baptiste Say (1767-1832), was a counterintuitive assumption that Keynes pithily summarised as the faith that supply creates its own demand.²³⁴ It encapsulated a supply-side belief that, out of the act of production (supply), enough demand would always be automatically generated that would be sufficient to purchase the total supply of goods produced. Thus, in classical theory, it was theoretically impossible to have general overproduction of goods in the economic system, and concomitantly impossible to have a shortage of purchasing power (or aggregate demand). Economists held to the truth of Say’s Law by assuming that periods of depression or recession were merely temporary fluctuations of the business cycle, from which the economic system would always automatically self-adjust back to the fundamental equilibrium. And partly because of its counterintuitive nature, this peculiar notion of Say’s Law ‘became the index of decent sophistication in economics. It was the ultimate test by which reputable scholars were distinguished from frauds and crackpots, those of vulnerable mind who could not or would not see how obviously production created its own demand.’²³⁵ But Keynes sought to take this assumption on, arguing to the contrary that there could be a shortage of demand, particularly in *aggregate*, and it was precisely this lack of aggregate demand that produced the persistence of the unemployment. He turned economics on its head by arguing that the economy was driven by demand, rather than by investment, and that without sufficient demand, the economy could get stuck at what he called an ‘underemployment equilibrium’.²³⁶

²³² Keynes 1941 cited in Borgwardt 2007, 107.

²³³ Keynes 1936, 13.

²³⁴ *Ibid.*, 23.

²³⁵ Galbraith 1991, 76.

²³⁶ The fact that Keynes still uses the idea of equilibrium demonstrates how he didn’t fully escape his training in marginalist economics, as his theory was still based on a different kind of equilibrium – he summarised this as a

Keynes also saw mass unemployment and idling factories as an inefficient waste of resources; ‘Let us be up and doing, using our idle resources to increase our wealth’²³⁷ he argued and, if the private sector could not or would not spend or invest enough to ensure the ‘full employment’ of all available resources, then the state should fill the breach. As he sets out at the beginning of his *General Theory*, he saw his book as being about asking ‘what determines *the actual employment* of available resources’ and saw ‘*available* resources in the sense of the size of the employable population, the extent of natural wealth and accumulated capital equipment’,²³⁸ so that to him the maximum use of available resources would mean full employment not only of people, but also of factories and other available natural resources. He challenged the classical assumption of the automatic use of the maximum of available resources:

‘It may well be that the classical theory represents the way in which we should like our economy to behave. But to assume that it does is to assume our difficulties away.’²³⁹

Contra the classical economists, he suggested that the economy: ‘...seems capable of remaining in a chronic condition of subnormal activity for a considerable period without any marked tendency either towards recovery or towards complete collapse. Moreover, the evidence indicates that full, or even approximately full, employment is of rare and short-lived occurrence.’²⁴⁰ Keynes’ argument then was that government could and should intervene in the economy to ensure full employment, or in other words, to ensure the maximum use of available resources. This fundamentally challenged the laissez faire notions, since it argued that free markets were failing to achieve the full and efficient use of all available resources. Governments could and should intervene in the economy to smooth out and compensate for the intrinsic instabilities of free market capitalism. The state should invest enough to bring an end to unemployment and ensure the economy was operating with the maximum use of all available resources. These ideas were later translated into more specific calculations for a ‘full employment budget’.

Keynes also fundamentally challenged the classical view that governments should balance their budgets at all times, never spending more in revenue than was received in taxes. Keynes argued that austerity, or cutting back government spending, in the midst of a depression or a recession would push the economy further into the underemployment equilibrium from which it might never recover. The only way to jolt the economy back to life would be for governments to spend more, to stand in for the private sector that could not or would not invest to create jobs, in order enable consumers to spend and to generate the ‘effective demand’. In the midst of a depression, this might mean governments spending money they

‘long struggle of escape’ from his economic training. Ultimately however, the familiar terms were probably more persuasive for economists as his theory wasn’t entirely foreign to existing theory – although this also enabled his theory to be quickly translated into the mathematical models he abhorred, producing what Joan Robinson called the ‘Bastard Keynesianism’ of the neoclassical synthesis in the sense that its very mathematisation lost the central elements of Keynes.

²³⁷ Keynes publicly discussed his new ideas in 1928, see Wapshott 2011, 57.

²³⁸ italics in the original Keynes 1936, 10.

²³⁹ Ibid., 28.

²⁴⁰ Ibid., 159.

didn't have but this did not matter; budgets could move into deficit in a recession and into surplus in a boom. It was thus an argument for counter-cyclical deficit spending in times of economic crisis and for balancing the budgets over a longer time horizon to smooth out the booms and busts and instabilities of the economic system. As Galbraith summarised for Keynes' philosophy:

‘The essentials of his case were simply and forthrightly designed to release anti-depression policy from its classical constraints. The modern economy, he held, does not necessarily find its equilibrium at full employment; it can find it with unemployment – the underemployment equilibrium. Say's Law no longer holds; there *can be* a shortage of demand. The government *can and should* take steps to overcome it. In a depression, the precepts of sound public finance must give way to this need.’²⁴¹

While he did not argue directly for redistribution to the poor and unemployed, and is widely described as an elitist, rather than as an egalitarian,²⁴² Keynes did argue that ‘The outstanding faults of the economic society in which we live are its failure to provide for full employment and its arbitrary and inequitable distribution of wealth and incomes’²⁴³ and, although he did not want to overthrow capitalism, he called for ‘gradually getting rid of many of the objectionable features of capitalism’. He called for government spending to be focused on the creation of jobs, to ensure incomes in the pockets of ordinary people, in the hope that they would spend it to increase ‘effective demand’ to drive the economy.²⁴⁴ In this, his theory followed the earlier ‘underconsumptionists’ who had argued that capitalism's tendency to produce extreme inequalities in wealth was a weakness of capitalism itself, as it left the majority with incomes too low to purchase the goods the capitalists were trying to sell.²⁴⁵ Keynes agreed that wages and incomes were too low – or non-existent in the case of the unemployed – and while his answer was to stimulate employment through government spending (which he called the ‘socialisation of investment’), he also saw the need for additional policies for increasing people's incomes:

‘I should support at the same time all sorts of policies for increasing the propensity to consume. For it is unlikely that full employment can be maintained, whatever we may do about investment, with the existing propensity to consume. There is room, therefore for both policies to operate together; - to promote investment and, at the same time, to promote consumption....’²⁴⁶

Keynesian *economic* theory thus provided an *economic* justification for state intervention in the economy, but it also opened the way for a justification of other redistributive *social* policies (including the welfare state along the lines suggested in 1942 by William Beveridge),²⁴⁷ as these policies could be justified in terms of increasing the ‘propensity to consume’ or in other words, increasing the amount of money in

²⁴¹ Galbraith 1991, 222.

²⁴² Skidelsky 2009; Skidelsky 2000.

²⁴³ Keynes 1936, 233.

²⁴⁴ Waligorski states that Keynes considered himself a ‘new liberal’ and describes Keynes as a transitional figure in reform liberalism, who transformed the liberal approach to public economic policy setting the agenda for more than a generation and providing a target for conservative criticism for 60 years. Keynes supported a reformed capitalism but rejected laissez-faire in favour of ‘deeper freedoms’ Waligorski 1997 ch.3.

²⁴⁵ Brinkley 1996.

²⁴⁶ Keynes 1936, 202.

²⁴⁷ Marcuzzo details how Keynes engaged with Beveridge on his 1942 report. Marcuzzo 2010.

ordinary people's pockets.²⁴⁸ In his aim to 'save capitalism from the capitalists', he saw this as central to the survival of capitalism:

'Whilst therefore, the enlargement of the functions of government, involved in the task of adjusting to one another the propensity to consume or the inducement to invest, would seem to a nineteenth century publicist or to a contemporary American financier to be a terrific encroachment on individualism, I defend it, on the contrary, both as the only practicable means of avoiding the destruction of existing economic forms in their entirety and as the condition of the successful functioning of individual initiative.'²⁴⁹

Thus his theory was considered both revolutionary and reactionary at the same time. It was considered revolutionary by economists in its profound challenge to the classical laissez faire precepts of economic theory, and by conservatives who deemed it an attack on the underpinnings of capitalism itself. But for socialists and many progressive theorists, it was seen as thoroughly reactionary in its hope to save capitalism from itself, despite its admission of the intrinsic instabilities of 'free market' capitalism.

2.3.2 Post-war planning, the NRPB and Roosevelt's 1944 'Second Bill of Rights'

Keynes (whose ideas had developed well before the publication of his 1936 classic) was in direct contact with the Americans right from the start of the Presidency of Franklin Roosevelt. In 1933, he wrote '*An Open Letter to President Roosevelt*' urging him to set an example for the world by trying 'new and bolder methods' within 'the framework of the existing social system', suggesting that otherwise 'rational change will be gravely prejudiced throughout the world, leaving orthodoxy and revolution to fight it out'. He urged '[t]he objective of recovery is to increase the national output and put more men to work', calling for a government expenditure to stimulate 'purchasing power' by taking on debt rather than charging new taxes and by accelerating capital expenditure so at least 'the country will be better enriched by such projects than by the involuntary idleness of millions'.

However, President Roosevelt, like many of his advisors in the US Treasury, was still convinced on coming to power in 1933 that balanced budgets were sounder economic policy²⁵⁰ and was slow to challenge the balanced-budget orthodoxy that most orthodox economists prescribed.²⁵¹ For most of his first term, the administration did borrow heavily and expanded public spending, but Roosevelt insisted that this was only on an 'emergency basis' and that he would return to balancing the budget as soon as was feasible. After the 1936 election, three years of relative improvement in the economy and a sense that the economic crisis was over, (and reacting to virulent criticism from Republicans) Roosevelt resolved to finally balance his budget. In 1937, he moved to scale back public spending as well as simultaneously

²⁴⁸ This of course also tied them into an increasingly consumerist economy.

²⁴⁹ Keynes 1936, 238.

²⁵⁰ Nasar 2012, 323.

²⁵¹ Brinkley 1996, 234.

introducing a new payroll tax, bringing the federal budget into virtual balance.²⁵² But almost immediately, the economy was thrown back into recession - unemployment levels suddenly exploded back up and the ‘depression came roaring back with a vengeance’.²⁵³

After a young, but influential, economist in the administration, Laughlin Currie, in a paper entitled ‘Causes of the Recession’ explained the 1937 recession in Keynesian terms, this became ‘the central document in the battle for new federal spending’²⁵⁴ and the administration expanded public spending again, this time challenging the opposition’s insistence on the need for a balanced budget with Keynesian economic theory. As Roosevelt explained in a 1938 radio address that ‘in a sincere effort to bring Government expenditures and Government income into closer balance’, he had made a mistake by decreasing government spending, and although it would cost now to get out of the recession, government spending was necessary and justified:

‘Lost working time is lost money. Every day that a workman is unemployed, or a machine is unused, or a business organization is marking time, it is a loss to the Nation. Because of idle men and idle machines this Nation lost one hundred billion dollars between 1929 and the Spring of 1933, in less than four years.’²⁵⁵

By the later 1930s, as Rutherford has pointed out institutionalist ideas on planning as a solution to economic crises and business cycles faltered within New Deal thinking and came to be replaced by Keynesianism.²⁵⁶ As Bailey argued at the time, ‘the 1937 recession came to be explained on the basis, not that government spending had failed, but that it had not been tried on sufficient scale. Budget balancing as a goal came to be discredited, and a vast literature began to grow around the idea that public borrowing for the purpose of increasing investment and consumption would so raise the national income that the increasing debt burden could be carried with relative ease.’²⁵⁷ In addition, in this context, the

‘redistribution of income through steeply graduated income taxes, inheritance taxes, and undistributed profits taxes, came to be recognized, not simply as a matter of social justice, but as a positive economic good – since as Keynes had pointed out, high income groups save proportionately more (and consequently spend proportionately less) of their income than low income groups.’²⁵⁸

²⁵² Nasar 2012, 331.

²⁵³ Ibid.

²⁵⁴ Brinkley 1996, 97.

²⁵⁵ Franklin Roosevelt, Fireside Chat 50, April 14, 1938.

²⁵⁶ Rutherford 2001.

²⁵⁷ Bailey ‘Economic Ideas and Political Brokers’ collected in United States Congress Senate Committee on Labor and Public Welfare 1964, 2194.

²⁵⁸ Ibid.

Roosevelt's National Resources Planning Board and promotion of the 'full use of available resources'

It was Roosevelt's National Resources Planning Board (NRPB) that was to take these Keynesian ideas forward, developing America's equivalent to the UK's 'Beveridge plan', and eventually linking these ideas to Roosevelt's conception of economic and social rights.

The NRPB was a small agency that grew out of an earlier National Planning Board established in 1933 at the beginning of Franklin Roosevelt's New Deal administration to carry out studies and policy proposals on a wide range of issues related to social and economic trends for long-range planning purposes.²⁵⁹ In 1939, as the Second World War was breaking out in Europe, the NRPB was moved directly into the Executive Office of the President and by November 1940 and - in the context of rising fears that the end of the war might bring another economic depression as the end of the first world war had - Roosevelt tasked the NRPB with developing proposals on how to prevent a post-war economic depression.²⁶⁰

Although the NRPB's earlier thinking had been closely aligned with the economic institutionalists and structuralists, including Wesley Mitchell and Gardiner Means, after the 'Roosevelt Recession' of 1937 the NRPB had shifted towards Keynesianism.²⁶¹ With the increasing involvement of leading economist, Alvin Hansen – later labelled the 'American Keynes' - it became 'one of the great centers of Keynesian thinking', with Keynesian policies profoundly influencing its reports and policy proposals.²⁶² As Brinkley suggests:

'All but unnoticed during most of its ten-year life, the NRPB managed for a brief moment in the midst of the war to articulate a coherent liberal vision of the future, a vision that inspired broad, even rapturous enthusiasm among full-employment enthusiasts and many others.'²⁶³

Many of the NRPB's publications emphasised the need to plan for full employment to avoid another Depression, as well as to avoid another world war in the future. If, as Skinner has suggested, we look at the 'linguistic conventions' of the time, it is also possible to trace the development of Keynesian ideas of the 'maximum use of available resources' through these publications making the link to full employment and the 'full use of resources'.

²⁵⁹ The Board 'was both a reflection of and a contributor to the liberal social thinking of President Roosevelt', Bailey 1950, 26.

²⁶⁰ Reagan 1999; Merriam 1944.

²⁶¹ Reagan 1999; Brinkley 1996.

²⁶² Bailey 1950, 26.

²⁶³ Brinkley 1996, 245.

A pamphlet written by Alvin Hansen in 1941, entitled *After Defense – What?'* emphasised, for example, the need to ensure 'full employment' or the 'full use of our resources' not only to win the peace but to prevent another depression after the war:

'We shall soon have full use of our resources – material and human – to win the war. We will need full use to win the peace. Our people do not intend to let an economic depression, unemployment and 'scarcity in the midst of plenty' ever again threaten our growing standard of living or our economic security. If the victorious democracies muddle through another decade of economic frustration and mass unemployment, we may expect social disintegration and sooner or later, another international conflagration. A positive programme of power-war economic expansion and full employment is imperative....'²⁶⁴

In the same 1941 pamphlet, Hansen emphasized that 'The great problem we face when the war ends is to move over from a system of full employment for defense to a system of full employment for peace; without going through a low employment slump,'²⁶⁵ emphasising the real threat of social unrest if the government failed to act: 'If so we shall be back again in the valley of the depression, and a terrific new strain will be thrown on our whole system of political, social, and economic life. The American people will never stand for this.: Sooner or later they will step in and refuse to let matters work themselves out'.²⁶⁶

Another pamphlet written by Hansen for the NRPB entitled *After the War – Full Employment* also addressed fears that the end of the war would bring another depression – 'The fact is that many people dread to think of what is coming. Businessmen, wage earners, white-collar employees, professional people, farmers all alike expect and fear a post-war collapse; demobilization of armies, shutdowns in defense industries, unemployment, deflation, bankruptcy, hard times....' but 'if appropriate action is taken, there is no necessity for post-war collapse'. Thus, he questioned classical economic precepts on government debt:

'Everywhere it is said, and constantly reiterated, that we must tighten our belts and pay off our Government debt when peace returns. When is it desirable to pay off part of the debt. Certainly not when there is danger of an impending depression... Under certain conditions.... it would be quite unsound policy to retire the debt. Financial responsibility requires a fiscal policy (including governmental expenditures, loans and taxes) designed to promote economic stability. It would be quite irresponsible to cut expenditures, increase taxes, and reduce the public debt in a period when the effect of such a policy would be to cause a drastic fall in the national income. Equally it would be financially irresponsible to raise expenditures, lower taxes, and increase the public debt when there is a tendency towards an inflationary boom.'²⁶⁷

Alvin Hansen argued for a 'compensatory and developmental program' that would avoid the waste of resources, smoothing out the economic cycle through government expenditure. He called for the retention of a progressive tax structure, a reduction in consumption taxes, a program of public improvement projects, an expansion of social welfare spending as well as international cooperation on

²⁶⁴ A copy is available in United States Congress Senate Committee on Labor and Public Welfare 1964, 2056. Cited also in US Government, National Resources Planning Board 1942, 8.

²⁶⁵ Ibid.,

²⁶⁶ Ibid.,

²⁶⁷ United States Congress Senate Committee on Labor and Public Welfare 1964, 2084.

employment for ‘the effective worldwide use of productive resources.’²⁶⁸ Going beyond Keynes, he also called more for a redistributive role of the state²⁶⁹, arguing that government expenditure should be used to address the needs that the market system failed to meet:

‘In the past, we have for the most part permitted the economic order to serve us as best it could on the basis of the automatic functioning of this mechanism. If it gave us good times, we were thankful. If it gave us bad times, we accepted this as an inevitable concomitant of a system of free enterprise operating under the price system. And we allowed the system itself to determine the distribution of the product and the direction of demand.

Half of the population might be housed inadequately in terms of minimum standards of sanitation and health. If the automatic functioning of the mechanism did not create an economic demand for housing, houses necessary to meet those minimum standards were simply not built. A large portion of the population might be quite inadequately fed in terms of minimum nutrition standards. Yet despite the capacity of the system to supply an adequate nutrition standard, if the economic demand were not created through the automatic functioning of the system, nothing was done about it. We looked to the economic order to satisfy the needs, desires, and aspirations of human beings as conditioned by the process of innovation, education, and cultural development. But if those needs were not adequately satisfied, we accepted the result with a stern, ascetic fatalism.’²⁷⁰

Contradicting economic orthodoxies that government spending would displace private sector spending and act as a drag on economic growth, he also argued that, although these programmes were costly, they would eventually pay for themselves as they would generate greater wealth in the economy:

We can afford as high a standard of living as we are able to produce. We cannot afford to waste our resources of men and material... we cannot afford idleness. The idleness of the decade of the thirties was responsible for the loss of \$200 billion of income. The public expenditures required to rebuild America, to provide needed social services, and to maintain full employment can be provided for out of the enormous income which the full utilization of our rich productive resources (material and human) makes possible.

The costs of producing this income are merely payments to ourselves for the work done. There is not—there cannot be—any financing problem that is not manageable under a full-employment income. ...From an income so vast we can raise large tax revenues—large enough to service any level of debt likely to be reached and to cover all other government outlays... it is not necessary or desirable under all circumstances to finance all public expenditures from taxes. Whether taxes should equal, fall short of, or exceed expenditures must be decided according to economic conditions.’²⁷¹

These themes and ambitious policy proposals were also reiterated in statements and speeches by other NRPB members. Charles E. Merriam for example, emphasized that the NRPB’s post-war plans included not only plans to build up the nation’s infrastructure, but also detailed plans on health (including ‘a plan to ensure that every person in the United States receives medical attention he requires in order to maintain bodily health’) on education (with ‘the goal of our educational efforts the 100 per cent provision of training for every child and youth’), and social security (including compensation schemes for work injury of death, unemployment compensation, old age and survivor’s insurance, care for the blind, the handicapped, and dependent children etc.).²⁷² Merriam also emphasized that this would all be based on

²⁶⁸ Ibid., 2110.

²⁶⁹ Tobin 1976, 32.

²⁷⁰ Hansen, ‘The Post War Economy,’ as collected in Seymour 1943, 11.

²⁷¹ Ibid., 12.

²⁷² Merriam 1944.

full employment which would minimize dependency on public welfare, using language on the ‘maximum use of resources’:

‘We propose to plan our national activities so that they will ensure the maximum utilization of our most important resource of all – manpower. If we do so, we may look forward to a minimum of dependency upon general public welfare measures. We wish to use all who are capable of and available for work in our national productive effort.’²⁷³

Merriam also reiterated that government expenditures were necessary, not a waste of resources: ‘Attention given to education, to health, to recreation is not spending, but investment in human resources... Full employment and continuing income are not forms of national waste which must be cut down, but forms of national saving of our basic resources.’²⁷⁴ Merriam further emphasized that ‘The full employment we Americans seek must be, at the same time, free employment, unless we are to accept a new kind of economic slavery and lose those freedoms without which even material prosperity is not worth the price to men who cherish freedom and the dignity of man’²⁷⁵.

The NRPB’s National Resources Development Report of 1942 (transmitted to FDR in December 1941) lists five key objectives, that explicitly calls for ‘full employment’ and the ‘progressive realisation’ of the promises of American life and basic freedoms:

1. We must plan for full employment, for maintaining the national income at 100 billion dollars a year, at least, rather than to let it slip back to 80, or 70, or 60 billion dollars again. In other words, we shall plan to balance our national production-consumption budget at a high level with full employment, not at a low level with mass unemployment.

...4. We must plan to enable every human being within our boundaries to realize progressively the promise of American life in food, shelter, clothing, medical care, education, work, rest, home life, opportunity to advance, adventure, and the basic freedoms.²⁷⁶

The same report argues: ‘...we cannot afford to waste our resources of men (sic) and material. We cannot afford to use them inefficiently. We cannot afford idleness, the idleness of USD 200 billions of income. The public expenditures required to rebuild America, to provide needed social services and to maintain full employment can be provided for out of the enormous income which the full utilization of our productive resources, material and human, makes possible.’²⁷⁷

It also links its five key objectives to a list of nine rights, explaining the need for new rights and freedoms in ways that link to this Keynes-Hansen full employment vision:

²⁷³ Ibid., 45.

²⁷⁴ Ibid., 45–47.

²⁷⁵ Ibid., 36–37.

²⁷⁶ US Government, National Resources Planning Board 1942, 8–9.

²⁷⁷ Ibid., 17.

‘... there should be no unemployment while there are adequate resources and men ready to work and in need of food, clothing and shelter. It is to meet this new turn of events, that the new declaration of rights is demanded.’²⁷⁸

At the time, in the midst of the Second World War (when it was not so much a communist threat on the minds of the planners, but rather the fascist threat from Nazi Germany), Charles W. Eliot, Director of the NRPB, on May 27 1942 suggested viscerally that these rights would give hope at home and abroad:

‘When Hitler surrenders or when he blows his head off, we Americans must know what we are going to do next... The other day, I read in the newspaper a story from Germany which some of you may have seen, about organization and labor under the ‘new order’, which ended with a statement that under the Nazi code ‘nobody has any rights—only duties’. I venture to think that if we can make the realization of our rights seem practical and probable in the United States, we can then use this statement of ‘Our Freedoms and Rights’ to arouse hope and faith among the freedom-loving peoples in the conquered countries and even in the Axis countries. Ideas and hope can be just as effective as bullets in winning battles.’²⁷⁹

‘People who are out of a job are the stuff of which dictatorships are made’: A ‘bundle’ of rights for an ‘American Beveridge Plan’

The NRPB thus came to articulate a clear American conception of economic and social rights vision, expanding Roosevelt’s ‘four freedoms’, and providing much of the inspiration for Roosevelt’s later 1944 ‘Second Bill of Rights’. Indeed, it was the NRPB’s Chair (Frederic Delano) who had first proposed the idea of an ‘economic bill of rights’ to Roosevelt in 1939, expanding on this idea in a 1940 memo to Roosevelt and NRPB members then presented a full proposal for an ‘Economic Bill of Rights’ in person to Roosevelt at his home on June 29, 1941.²⁸⁰ The NRPB’s vice-chair, Charles Merriam, had also outlined the beginnings of this new ‘economic bill of rights’ in his 1941 Godkin lecture on democracy at Harvard.²⁸¹

Between 1941 and 1943, the NRPB published a series of major reports, as well as popular pamphlets, and numerous statements and speeches on proposals for post-war planning, which all set out a commitment to ‘Our Rights and Freedoms’, with its five key objectives and list of nine rights, grounded on Keynesian-style economic policies.²⁸² As noted above, the NRPB’s texts made regular and repeated references to the importance of the ‘full use of resources’, as well as the need for ‘progressive realization’

²⁷⁸ Ibid.

²⁷⁹ Eliot, Charles W. ‘A New Bill of Rights: All Rights Carry Obligations’, May 27, 1942 collected in *Vital Speeches of the Day*, Vol. VIII, 556-557.

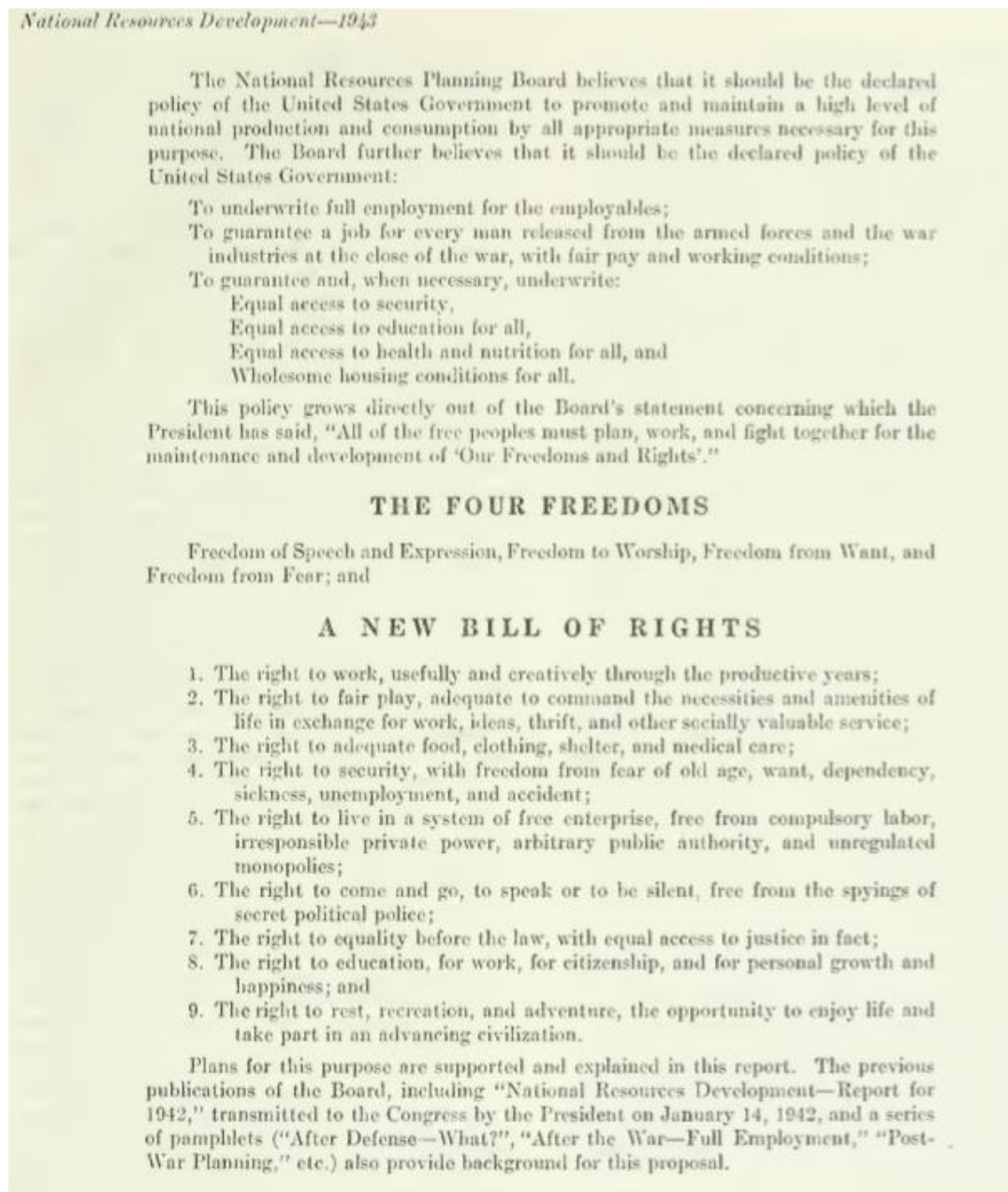
²⁸⁰ Reagan 1999, 218.

²⁸¹ Borgwardt 2007; Borgwardt 2008; Moyn 2018, 79–82.

²⁸² These are reproduced most significantly in the NRPB’s annual reports of 1942 and 1943. They are also printed in NRPB pamphlets including: *After Defense – What?* (August 1941), *After the War – Toward Security* (September 1942), *Post-War Planning: Full Employment, Security, Building America* (September 1942) and reports including ‘Toward the Full use of Resources’ (1940). See also Alvin Harvey Hansen, ‘The Post War Economy,’ in Seymour 1943, 2055.

(which I argue later came to influence the US position in the drafting of the UDHR and appear to be the roots for Article 2.1 of the ICESCR).

Extract from NRPB's National Resources Development Report for 1943, p.3



By far the most ambitious of the NRPB's reports was its National Resources Development Report for 1943.²⁸³ This consisted of two reports that had earlier been presented to Roosevelt in 1941, but in the aftermath of the attack in Pearl Harbour and with his attention taken by international matters in the midst of war, he did not release them to Congress until 1943. The 1943 report included a *National Resources Development Report* which set out plans for post-war resource planning as well as a 400,000-page

²⁸³ US Government, National Resources Planning Board 1943.

long report entitled *Security, Work and Relief Policies* (put together by the English social security specialist, Eveline Burns, then a professor at Columbia University) with a detailed review of existing social assistance policies and recommendations for the future. The depth and breadth of the *Security, Work and Relief Policies* report and its proposals for a post-war social security system meant that it was widely dubbed the ‘American Beveridge Plan’, after the nearly contemporaneous publishing of a report in the UK on social insurance by Sir William Beveridge of the London School of Economics.²⁸⁴

This American report actually preceded the Beveridge report and it was Beveridge that drew on the NRPB’s reports for inspiration for both his 1942 report on social insurance and his 1945 report on full employment, rather than the other way around.²⁸⁵ The primary author of the US report was an English economist, Eveline Burns, who had a doctorate in economics from the London School of Economics and Brinkley records that was some communication between the two efforts, with Beveridge making a well-publicised visit to the United States in May 1943 to publicise his report and meet with members of the NRPB.²⁸⁶ In contrast to the UK report however, the NRPB’s proposals were ‘fully rooted in the full employment concept from the start’²⁸⁷ and grounded on a firm conception of economic and social rights.

Enthusiastically reiterating the NRPB’s list of rights and linking it both to the concept of full employment and Roosevelt’s 1941 ‘Four Freedoms’ and his conception of freedom from fear and want, the 1943 report asked:

‘How can these aims be realized in practice? We know that the road to the new democracy runs along the highway of a dynamic economy, to the full use of our national resources, to full employment and increasingly higher standards of living.’ And that ‘Enough for all is now possible for the first time in our history....[but] there are no automatic devices in our system that will insure fair distribution of income... or guarantee full use of resources.... One of the most important economic facts we have learned in the past decade is that fiscal and monetary policy can be and should be used to foster an expanding economy... It has taken total war to reveal to us the capacity of our production, once it is fully energized... Little vision is required to see that our [economy] can be made to produce plenty for peace as well as plenty for war... We have not yet even approached the limit in our inventive ability and organizational capacity. On the contrary, we have just begun to utilize our vast resources.’²⁸⁸

‘If we can organize and implement our resources and our ideals, we shall witness an unlocking of the latest force of production, ... At last in the history of man’s (sic) upward climb, freedom from want and fear is within his reach.’²⁸⁹

The 1943 report stressed that ‘[o]ne of the most important economic facts we have learned in the past decade is that fiscal and monetary policy can and should be used to foster an expanding economy.’²⁹⁰ And it emphasized the key to ‘winning the war’ and ‘winning the peace’ was full employment – ‘The economic

²⁸⁴ Although the US reports had been completed in 1941 and actually preceded the UK’s Beveridge report. Brinkley 1996, 251; Reagan 1999, 220.

²⁸⁵ Beveridge 1944.

²⁸⁶ Brinkley 1996, 251.

²⁸⁷ Ibid., 251–254.

²⁸⁸ US Government, National Resources Planning Board 1943, 4.

²⁸⁹ Ibid., 7.

²⁹⁰ Ibid., 4.

and social stability of the United States, as of other countries, depends in great measure on our capacity to prevent mass unemployment'.²⁹¹ It set out detailed plans for promoting 'private enterprise' while preventing abuse of economic power (and preventing 'the rise of new industrial oligarchies'), ensuring fiscal policies for full employment, plans for infrastructure development and public construction, and plans for social services and social security, including on education, health, nutrition and medical care, jobs for all, and social security against fear of old age, want, dependency, sickness, unemployment and accident.²⁹² The second report also called for a comprehensive range of social policies from social welfare to public health and education provision, again framed in Keynesian terms – the future would require an 'increasing emphasis on policies aimed at the prevention of economic insecurity through a fuller utilisation of our productive resources including labour, and by more comprehensive measures to improve the health of our people.'²⁹³

The NRPB conceived of its 'Bill of Rights' as a 'bundle' of rights that would be implemented as a package, grounded in a broader macroeconomic policy of full employment. Full employment would keep the cost of social security low, as the vast majority of people would have an income sufficient to afford the necessities of life without the need for a safety net. From this perspective, the new 'economic and social rights' would serve both protect people from the vicissitudes of the inherent instabilities in the market economy, and to reduce those market instabilities, promote both greater growth and higher standards of living for all. It made clear that social security policies were only one part of this broader macroeconomic approach in which the first priority would be that the 'economy must provide work for all who are able and willing to work':

'Full economic activity and full employment are our first need. Stabilizing the income flow through a social insurance system is second. The third requirement is that an adequate general public assistance system provide for those accidental and incidental needs that neither a work program nor an insurance system can supply. But a fourth element is closely related. We have become aware of the need of low-income persons for higher levels of services: access to education, to medical care, to recreation and cultural facilities, to adequate housing and other community facilities... [they must be] made available to all. High national productive efficiency can be achieved only by a wide diffusion of these services.'²⁹⁴

In the face of massive conservative opposition to an ambitious role for the New Deal state (and more explicitly the role of the executive and the federal state), the NRPB was consistently careful to frame social benefits as contributing to higher economic growth, and insisted it was consistent with America's 'system of free enterprise', while unabashedly pressing for a greater government spending and for the better planning in the use the country's abundant 'national resources'. Keynesianism thus provided a

²⁹¹ Ibid., 6.

²⁹² US Government, National Resources Planning Board 1943.

²⁹³ US Government, National Resources Planning Board 1942, 8–9.

²⁹⁴ US Government, National Resources Planning Board 1943, 3.

framework for the NRPB to promote controversial social and economic policies by arguing that they were actually essential to economic growth and essential to the survival of capitalism.

But this was not reactionary enough for the conservative opposition who increasingly harangued the NRPB for its heretical policies of full employment and a full range of economic and social rights. In the aftermath of the publication of the NRPB's 1943 report, it was violently attacked as unrealistic and fiscally irresponsible²⁹⁵ and denounced by conservatives as being 'socialist, fascistic and medieval' all at the same time.²⁹⁶ In part in reaction to its expansive vision of 'Our Freedoms and Our Rights', and in part in reaction to a fear of Roosevelt's efforts to strengthen executive power at the expense of the legislature and the judiciary, a Congress increasingly dominated by anti-New Dealers, eliminated the budget of the NRPB, killing it dead a mere ten weeks after the issue of its 1943 report.²⁹⁷ The grand ambition of the NRPB's list of rights was narrowed down to what eventually became the GI bill of rights (framed as Borgwardt suggests more as a reward than an entitlement),²⁹⁸ with the generous provision of benefits limited to veterans seen as a less controversial measure for easing the post war employment problem.

Roosevelt nonetheless resuscitated the NRPB vision in his January 11, 1944 State of the Union address, outlining a 'Second Bill of Rights under which a new basis of security and prosperity can be established for all', and listing a series of rights which cleaved closely to the inspiration of the NRPB's list of rights. As part of his war-time rhetoric he sought to define these as objectives not only of the post-war domestic order but also the international order.²⁹⁹ As Roosevelt declared:

'We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. 'Necessitous men are not free men.' People who are hungry and out of a job are the stuff of which dictatorships are made. In our day, these economic truths have become accepted as self-evident. We have accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all regardless of station, race, or creed.

Among these are:

- 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;

²⁹⁵ Brinkley 1996, 254.

²⁹⁶ Kloppenberg 2000, 117.

²⁹⁷ Clawson details that the NRPB operated on funds allocated directly by the President and did not have to go to Congress for appropriations, but in its last four years it had to ask Congress for appropriation and 'this opened it up to extensive and often highly critical review by the Congress'. See Clawson 2013, 9.

²⁹⁸ Borgwardt 2007, 139.

²⁹⁹ Roosevelt, "Second Bill of Rights' Speech, State of the Union Message to Congress,' January 11, 1944.

- The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;
- The right to a good education.

All of these rights spell security. And after this war is won we must be prepared to move forward, in the implementation of these rights, to new goals of human happiness and well-being.³⁰⁰

Roosevelt's calls since 1932 for a 're-definition' of classical liberal rights, and a new 'economic constitutional order' thus culminated in this 'Second Bill of Rights', which reflected a call for a decent or adequate standard of living for all (going beyond merely 'minimum standards'³⁰¹) as well as institutionalist concerns to limit monopoly and economic power.

However, in the face of a broadening backlash in Congress that had turned the tide against the New Deal, Brinkley argues however that this ringing commitment of Roosevelt amounted to merely an 'isolated rhetorical gesture'.³⁰² It fell on infertile ground in a moment when, as Brinkley also relates, a new House Special Committee to Investigate Un-American Activities had already launched investigations of liberals and progressive reformers in an attempt to discredit the New Deal, accusing New Dealers of being communists and radicals.³⁰³ He cites As I. F. Stone as warning as early as 1943, the New Deal agencies were already starting to 'commit *hara kiri*' to protect themselves against Congress:

'New Deal agencies are quietly beginning to commit hara kiri as progressive instruments of government... bringing in conservatives and getting rid of progressives... in order to shelter themselves against Congressional inquiry, denunciation, or budget curtailment... One observes a subtle but unmistakable shift of power within the agencies from progressive subordinates to those that are middle-of-the-road or reactionary.'³⁰⁴

2.3.3 The draft 1945 Full Employment Bill: Constitutionalising Keynesian fiscal policy?

The death of the NRPB also did not spell the end of efforts to push for Keynesian economic policy however, as leadership of the discussion of domestic post-war economic policies shifted to the Bureau of the Budget.³⁰⁵ In August 1944, the Keynesian economists in the Budget Bureau set to work on drafting an American white paper on full employment, under the coordination of Alvin Hansen. This sought to establish a formal government responsibility for economic stabilization to address booms and busts through fiscal policy, making an ambitious proposal for a 'Fiscal Authority' - that would operate as an administrative agency for fiscal policy in a similar way to the Federal Reserve Board's power to set monetary policy. The draft report of August 17, 1944 proposed:

'It will be necessary to set up... a national investment board or a fiscal authority to cooperate closely with a joint congressional fiscal committee. The national investment board or fiscal authority should be allowed

³⁰⁰ Ibid.,

³⁰¹ Cf Moyn as discussed in the conclusion. Moyn 2018.

³⁰² Brinkley 1996, 144.

³⁰³ Ibid., 141.

³⁰⁴ Cited in Ibid., 145.

³⁰⁵ Barber 1996, 159.

to adjust and fluctuate the total expenditure so appropriated according to the requirements of economic stability.³⁰⁶

In 1944, the issue of full employment became a critical issue in that Presidential election, with the Democratic National Convention adopting a platform which began with the words: ‘The Democratic Part stands on its record in peace and war. To speed victory, establish and maintain peace, guarantee full employment and provide prosperity...’³⁰⁷ Even the Republican Party did not reject the goal of full employment outright, although it carefully articulated a more conservative view that ‘we shall promote the fullest stable employment through private enterprise’ while explicitly setting out to reject ‘the theory of restoring prosperity through government spending and deficit financing.’³⁰⁸

There were also efforts to ‘constitutionalise’ an obligation of the federal state to ensure ‘full employment’ and to guarantee the right to work. In January 1945, Senator James E. Murray (Democrat of Montana) introduced a draft ‘1945 Full Employment Bill’ to Congress (as S.380). This did not quite go as far as proposing a new Fiscal Authority, but it did aim to entrench the obligation of government to assure full employment, giving the President the responsibility to ensure full employment and to submit a Keynesian-style ‘National Production and Employment Budget’ to Congress each year.³⁰⁹

Murray, the sponsor of the bill, in a symposium organized in December 1945 the American Political Science Review presented it in terms of the need to address destabilising inequality by putting income in the pockets of those who would spend it, warning that a post-war depression would risk the world sinking into another global ‘holocaust’:

‘America has triumphed in the greatest war of all history, but we have yet to face the major enemy at home – unemployment and all the tragic waste and misery occasioned by it... It became apparent in the last depression – and all experts agree – that there is something wrong with the distribution of income in our economy. Purchasing power tends to become clogged and to pile up in idle hoards. Not enough of the income... gets into the hands of those who will spend it...The results are less output, fewer and smaller incomes, a decrease in jobs, slowing down of the wheels of industry, depression, mass unemployment.... This country cannot afford again to go into a depression such as we experienced in the pre-war decade. Mass unemployment would mean discontent, disunity, and an irreparable loss in physical wealth and in moral well-being. An unemployment crisis in America would spread like wildfire throughout the world. It would bring forth dumping, higher tariffs, export subsidies, blocked currencies, and every other new and old type of economic warfare. And this would inevitably wreck our plans for an effective international security organization, turn back the clock of progress, and plunge us into another holocaust of blood, suffering and chaos.’³¹⁰

Murray continued that the bill would require the calculation of an estimated ‘full employment economic budget’ to secure full employment. In a depression when the market failed to secure full employment, ‘it would be the President’s duty to propose stimulation of the economy by actions of the Federal

³⁰⁶ Cited in *ibid.*, 160.

³⁰⁷ Bailey 1950, 41.

³⁰⁸ *Ibid.*

³⁰⁹ Bailey 1950.

³¹⁰ Murray 1945, 1119–20.

Government... (and there) would be a statutory obligation which Congress would be powerless to dodge.³¹¹ The draft Full Employment Bill stated that in the event that budget estimates foresaw that aggregate demand would be insufficient to sustain a ‘full employment volume of production’, the President would be obliged to submit a program to offset this gap. Similarly, the President was instructed to act in a boom to ‘forestall inflationary economic dislocations’, giving a mandate for counter-cyclical fiscal policy where the budget should not be balanced on an annual basis but on a cyclical basis to stabilise the booms and busts of the economy. The drafters of the bill were concerned to prevent a post-war employment problem and, ‘in terms of economic philosophy, they shared in the belief that the compensatory fiscal ideas stemming from the Keynesian-Hansen analysis were sound.’³¹²

Bailey’s definitive and colourful analysis of the legislative battle over the Full Employment bill sets this in the context of the contemporaneous global policy climate,³¹³ as well as domestic fears that the end of the war would bring a return to that mass unemployment, along with shifting conceptions of the role of the state and economic rights:

‘The experience of the great depression forced the federal government to extend its functions and responsibilities. [The] change in public attitude about the legitimate sphere of federal activity in economic affairs, and the public’s broadening conception of economic rights, were necessary prerequisites to, as well as products of, the New Deal of Franklin D. Roosevelt. Without this change, there would have been no Full Employment Bill of 1945.’³¹⁴

As Bailey points out, the draft Full Employment Bill aimed to set out a statement of an economic right and a federal obligation, along with an economic program, and governmental mechanisms for the implementation and enforcement of that program.³¹⁵ The bill committed ‘the federal government to undertake a series of measures to forestall serious economic difficulty – the measure of last resort being a program of federal spending and investment which was to be the final guarantor of full employment; and finally to establish a mechanism in Congress which would facilitate legislative analysis and action, and fix legislative responsibility for the carrying out of a full employment policy.’³¹⁶

Early drafts of the bill had included very clear language on rights and obligations. The December 18, 1944 draft of the bill for example, echoed Roosevelt’s 1944 speech and NRPB language on the right to work, stating that in its Section 2 that: ‘2(a) Every American able to work and willing to work has the

³¹¹ Ibid., 1124.

³¹² Bailey 1950, 45. Brinkley has critiqued the Keynes-Hansen ‘compensatory approach’ as ‘the end of the reform’ since it shifted to a management of business cycles, rather than fundamental reform in the structure of capitalism, see Brinkley 1996; Brinkley 1998. This has also since been critiqued as the root of ‘mass consumption society’, see e.g. Cohen 2003.

³¹³ As Bailey points out, by the end of the war at least 10 countries had incorporated a –right to work’ in their constitutions, and England, Canada and Australia had all produced ‘white papers’ on full employment by the end of the war. Bailey 1950, 11.

³¹⁴ Ibid., 7.

³¹⁵ Ibid., 13–14.

³¹⁶ Ibid..

right to a useful and remunerative job in the industries or shops or offices or farms or mines of the nation [and] 2(b) It is the responsibility of the Government to guarantee that right by assuring continuing full employment.³¹⁷ But much of this language was already watered down by the introduction of the Bill as S.380 on January 22, 1945. While the language of rights retained, the language on obligations was watered down to read not ‘responsibility’, but ‘it is the *policy of the Government*’.³¹⁸ As part of an effort to pre-empt obvious objections in the Senate, overarching introductory text was also added to insist on the ‘policy of the United States to foster free competitive enterprise’.

During the congressional hearings on the Bill, in an interesting link between the domestic full employment discussions, and the simultaneous initiatives to produce draft international bills of rights (for the 1945 UN Charter discussions – as described in the next section), was made by John R. Ellingston, a member of the American Law Institute’s drafting committee on the Statement of Essential Human Rights and a member of the Commission to Study the Organization of the Peace.³¹⁹ Ellingston was asked to speak at the 1945 Hearings on the Full Employment Bill to explain why the right to work was important and why it had been included in the American Law Institute’s Statement of Essential Human Rights.³²⁰

Ellingston explained that, although ‘the United States gives no constitutional recognition to social and economic rights, it has in the last dozen years passed a major amount of legislation to secure such rights to its citizens’ including in the Social Security Act, the Minimum Wage Act and many others. He insisted that rights and freedoms must change ‘with changes in the material conditions of human existence’. Rehearsing arguments that sound familiar today, in his statement, Ellingston emphasised that economic and social rights imposed both positive and negative duties upon the state. Full employment would constitute a directive to the government to take positive action, and although this appeared to clash ‘with the traditional legal habit of looking upon rights as negative, that is as restraints on government’, this was because ‘traditional legal thought has been encouraged to test a right by its immediate judicial enforceability’³²¹. Ellingston argued against this orthodox legal view that assumed only the courts had the authority on defining what rights are (as opposed to the legislative or executive branches of government). He suggested on the contrary that the legislative and executive branches also had an equal role. He further argued that the test of what constitutes a ‘right’ need not be that it is capable of being enforced immediately by the courts, rather he suggested (in a contemporaneous phrase important for its reference to ‘progressive realisation’) that ‘rights’ should also include ‘goals to be progressively realised’.

³¹⁷ Bailey compares the different versions, see *Ibid.*, 57.

³¹⁸ *Ibid.*

³¹⁹ These organisations led two of the leading efforts to draft a bill of rights that fed into the UN Charter and the UDHR. These efforts were also linked with the NRPB’s bill of rights, since Charles E. Merriam co-chair of the NRPB also played a role in the drafting of the ALI’s Statement. See Whelan 2010 ch.2.

³²⁰ Statement of John R. Ellingston on ‘The Right to Work’ in *Full Employment Act of 1945. Hearings*, 1248.

³²¹ *Ibid.*, 1254.

‘The right work, like other social and economic rights cannot be secured overnight. The placing on the state of the duty to see that the right is made effective offers the only guarantee that such purposeful effort will take place.’³²²

Ellingston criticised lawyers for effectively supporting the status quo by not supporting ESCR: ‘The opposition to governmental protection to the right to work... comes in the main from those trained in the law’ as well as those with a ‘traditional fear of government... and government planning’ which might lead to tyranny³²³ Yet he insisted this argument could no longer hold, given the evidence that the government had completely taken over economic production during the war without resorting to tyranny, and had managed to raise the standard of living for millions of families to higher than anything known before.³²⁴ Challenging ‘industrialism’s chronic crisis of want in the midst of plenty, the delivery of multitudes of people to the chaos of insecurity and fear’³²⁵ and ‘the major objection to the provision of government is based on fear of deficit financing’, Ellington called for business to see that ‘permanent prosperity depends upon securing to everyone the right to work. The reason is that mass production simply will not take place without mass consumption. Mass production without mass consumption is a contradiction in terms.’³²⁶ Thus he argued ‘there is perhaps only one thing worse than continued deficit financing by government and that is the incomplete use of our productive men and machines.’³²⁷

In its early stages, the draft Full Employment Bill was warmly welcomed, including by economists, and much positive support for the Bill was expressed during the Senate hearings in summer 1945, with the Senate adopting a revised version of the bill in September 1945. However, Bailey suggests that this was because the conservative business opposition was late to mobilize its forces of opposition.³²⁸ Once the bill arrived in the House of Representatives (introduced as HR 2202 by Congressman Wright Patman of Texas), the opposition mounted, and under increasing pressure from business lobbying, the Republican opposition joined with conservative democrats (the so-called ‘Dixiecrats’ who had little enthusiasm for expanding the role of government after the end of the war³²⁹) to water down the bill, insisting it stop short of a commitment to ‘full employment’ and eliminating much of the mandate for policies to control the ‘national budget’. Their only concession was to allow for the creation of a Council of Economic Advisers, which would not have any operational powers, but could submit reports to Congress.

Some of the increasingly loud opposition to the bill was framed in economic terms, with fears the implementation of the new bill would bring inflation and undermine business confidence.³³⁰ Orthodox

³²² Ibid., 1255.

³²³ Ibid., 1256.

³²⁴ Ibid., 1257.

³²⁵ Ibid., 1258.

³²⁶ Ibid., 1253.

³²⁷ Ibid., 1259.

³²⁸ Bailey 1950, 127.

³²⁹ Ibid., 151.

³³⁰ Ibid., 130–149.

economists, who disagreed with Keynesianism, also insisted that monetarism and monetary stabilization was the better course.³³¹ But other conservative opposition was more virulently ideological, insisting with standard tropes of American conservatism that the Bill was ‘alien’ and ‘un-American’, and that it would lead to totalitarianism or ‘state socialism’ and was based on ‘dangerous’ economic theories. Alluding to the stark warning of Friedrich Hayek’s recently published 1944 book *‘The Road to Serfdom’*, these objections rejected the very possibility of ‘planning’ for economic stability, and described full employment as a road to tyranny, not a free society, linking it to Soviet-style communism. These groups insisted that the Bill was an affront to the freedom of free enterprise – the US Chamber of Commerce for example, insisted in December 1945: ‘This Chamber deplors, and will actively oppose any effort, whether direct or indirect, to substitute for our tried and proven American system of free enterprise either new or old theories of economics, regardless of the sources of the effort or its Utopian objective.’³³² In another diatribe, the Ohio Chamber of Commerce warned that the Bill was ‘[l]abeled in fraud and deception as a bill designed to preserve private enterprise, [but] if enacted, it would be the scaffold on which private enterprise would be dropped to its death.’³³³ Pamphlets from the Committee on Constitutional Government described the Bill as ‘Russian spawn’ that would ‘turn America permanently from constitutional private enterprise toward a system of collectivist statism’.³³⁴

By the time the Bill had passed through both houses and was eventually approved in 1946, all references to rights, obligations and even to ‘full employment’ were dropped, including from the bill’s title. The draft 1945 Full Employment Bill was adopted as the re-named ‘Employment Act of 1946’. The original Section 2 of the bill on rights and obligations became unrecognizable, although the painful redrafting still gives a sense of Keynesian policy in its directive to use all its available resources to ‘promote maximum employment, production and purchasing power’:

‘Sec 2. The Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment for those able, willing and seeking to work, and to promote maximum employment, production and purchasing power.’³³⁵

With the adjective ‘full’ stripped from its title, and commitments on rights and the obligation to engage in Keynesian fiscal policy stripped from its content, the Employment Act of 1946 cleared both houses of Congress in February 1946 and was signed into law by President Truman on 20 February 1946. But the attempt to ‘constitutionalise’ the responsibility of the federal government to spend in times of

³³¹ Barber 1996, 161.

³³² As cited in Bailey 1950, 140.

³³³ Ibid., 141.

³³⁴ Ibid., 145.

³³⁵ Ibid., 228.

recession and save in times of expansion was largely lost. While the 1945 Bill had spelled out the responsibility of the President to prepare a ‘full employment budget’ or more precisely, a ‘National Production and Employment Budget’ with estimates and a program on what investment would be necessary to fill the gap to ensure a ‘full employment volume of production’, the final bill by contrast substantially reduced these responsibilities, calling on the President merely to present an economic report to Congress reviewing the situation of employment, production and purchasing power and a program for carrying out the policy, but without spelling out the details.³³⁶

Raymond Moley, of Roosevelt’s Brain Trust, called the final passed bill the ‘Fool Employment Act,’ and described it as a ‘legislative monstrosity with the body of a wren and the head of a parrot.’ As Barber notes,

‘this outcome was bitterly disappointing to the Keynesians who had set the original ball rolling. . . . the Bureau of the Budget staff seriously considered advising President Truman to exercise the veto. In the end they did not, as although the bill no longer gave a strong mandate, but rather a set of suggestions, they considered that the statute that affirmed governmental responsibility for ‘maximum employment, production and purchasing power’ could still be regarded as an achievement.’³³⁷

Keynesian economic policy nonetheless went on to shape domestic economic policy for the next 30 years. Arguably, Keynes’ approach to taming the instabilities of the market system, and the adoption of a limited social safety net as an ‘automatic stabiliser’ in downturns, along with the retention of progressive forms of taxation, was to produce a period of rapid economic growth in the United States, alongside much lower levels of economic inequality, that lasted from the 1940s until the 1970s.

Keynesian ideas of ‘full employment’ were also to shape visions for the post-war international order in what Borgwardt has termed ‘A New Deal for the world’.³³⁸ Even as Congress worked to water down the draft Full Employment Bill at home, the concept of ‘full employment’, along with Roosevelt’s vision of ‘human rights’ and his ‘larger freedom’ from both fear and want was being etched into the constitution of the post-war international economic and social order: the 1945 UN Charter.

³³⁶ Compare the text of the 1946 Employment Act with the 1945 Full Employment Bill as originally introduced – see Appendices in Bailey 1950.

³³⁷ Barber 1996, 167.

³³⁸ Borgwardt 2007, 11.

3. ELABORATION: DRAFTING OF THE UDHR AND THE ICESCR

Economic issues – and ideas of ‘economic and social rights’ as part of a ‘larger freedom’ and ‘full employment’ - were high on the US domestic agenda and became part of the international agenda at the end of the war in 1945.³³⁹ After the economic devastation of the Great Depression and the experience of total war, establishing institutions to guarantee ‘freedom from fear and want’ ‘for all the men (sic) in all the lands’³⁴⁰ became central to the construction of the international architecture for a stable post-war order, just as establishing state responsibilities towards economic and social rights became central to the framing of the 1948 Universal Declaration.

While many historians, including Morsink, see the birth of the UDHR in the emergence of a ‘shared revulsion against the horrors of the Holocaust’,³⁴¹ I locate the birth of the international human rights regime also in the shared miseries of the global Great Depression, and the urgency to never repeat it.³⁴² Thus Roosevelt’s ideas of human rights and (economic) freedom, understood in terms of an expanded conception of liberal freedom as including both ‘freedom from fear and want’, economic security and full employment, came to be etched into UN Charter and subsequently in the UDHR and ICESCR.

This history explored below shows that, although the inclusion of ‘second-generation’ economic and social rights in the 1948 Universal Declaration of Human Rights did mark a distinct epistemological break with the classical ‘western’ liberal rights-based tradition, it is historically inaccurate to assume, as much of the contemporary human rights literature still tends to do, that economic and social rights were only included in the UDHR only on the insistence of the socialist States. It is also incorrect to insist that ‘western’ countries, such as the United States, have always rejected ideas of economic and social rights.³⁴³ In fact, as I have shown above, one important strand of the history of these rights lies in Franklin Roosevelt’s re-definition of rights. As I explore in more depth below, using previously unexamined archival material, these US conceptions were also to profoundly influence the drafting of the international bill of rights, shaping the nature and scope of economic and social rights in their elaboration as international human rights.

³³⁹ Borgwardt 2007.

³⁴⁰ This phrase comes from the sixth principle of the 1941 Atlantic Charter agreed between Winston Churchill and Franklin Roosevelt, see Ibid.

³⁴¹ Morsink 1999.

³⁴² Although mobilising for war had effectively ended the Depression of the 1930s, there remained deep concerns that the end of the war and de-mobilisation of soldiers and factories would bring mass unemployment again in the 1940s. Many argued that the postwar economic order – on both the international and domestic contexts – had to be organized to stop this from happening. There was also a widespread concern avoid a return to the destructive economic warfare which characterized international relations during the Depression.

³⁴³ Whelan 2010.

3.1 From the UN Charter to the UDHR

3.1.1 ESCR, larger freedom and full employment

Even as Congress was moving to oppose and dismantle much of the New Deal at home, Roosevelt's 'vision of economic and social rights'³⁴⁴ fed into the 1941 Atlantic Charter, the 1942 UN Declaration and the 1945 UN Charter, amounting to what Borgwardt has argued was a 'bold attempt on the part of Roosevelt and his foreign policy planners to internationalize the New Deal', at least at the level of rhetoric if not in practice.³⁴⁵

In his State of the Union address on January 6, 1941, Roosevelt had called for a new world order founded on four 'essential freedoms': the freedom of speech, freedom of worship, freedom from want and freedom from fear³⁴⁶, and that 'Freedom means supremacy of human rights everywhere'³⁴⁷ The Atlantic Charter issued by Roosevelt and Churchill on 14 August 1941 defining the Allied war aims made the expansive rhetorical promise of a peace that would ensure 'all the men (sic) in all the lands may live out their lives in freedom from fear and want'.³⁴⁸ The 1942 Declaration by the United Nations, which set out the basis for cooperation of the Allied nations (signed then by 26 governments), also more explicitly set out the commitment to fight for victory to 'preserve human rights and justice in their own lands as well as other lands'.³⁴⁹

The Roosevelt administration also called for a 'greater freedom' must include political freedom as well as economic freedom understood in terms of protecting people's 'economic security'. As then Secretary of State Cordell Hull declared:

Liberty is more than a matter of political rights, indispensable as those rights are. In our own country, we have learned from bitter experience that to be truly free, men must have as well, economic freedom and economic security – the assurance for all alike of an opportunity to work as free men in the company of free men (sic); to obtain work through the material and spiritual means of life; to advance through the exercise of ability, initiative and enterprise; to make provision against the hazards of human existence... We know that in all countries there has been – and there will be increasingly in the future – demand for a forward movement of social justice. Each of us must be resolved that, once the war is won, this demand shall be met as speedily and as fully as possible.³⁵⁰

³⁴⁴ Borgwardt 2007, 6.

³⁴⁵ Ibid., 3.

³⁴⁶ There is some debate in the literature over the meaning of 'freedom from want', as Roosevelt initially suggested he was referring to the removal of the high protectionist trade barriers that characterized the inter-war period (although he aimed at free-er trade, rather than fully free trade), but Roosevelt also later came to link it to securing the 'standard of living of the American worker and farmer and to guaranteeing that the Depression would not resume at the end of the war. See Foner 1999, 225.

³⁴⁷ Roosevelt, "Four Freedoms Speech' Annual Message to Congress on the State of the Union,' January 6, 1941.

³⁴⁸ 1941 Atlantic Charter, para 6.

³⁴⁹ 1942 Declaration by the United Nations, para 4.

³⁵⁰ 'Address by Secretary of State Cordell Hull on "The War and Human Freedom", July 23, 1942.

By 1944, Roosevelt had put forward his ‘Second Bill of Rights’ in the 1944 State of the Union address. Emphasising that ‘freedom from fear is eternally linked with freedom of want’ he suggested his post-war plans - both domestically and internationally - could be summed up in one word: ‘Security. And that means not only physical security which provides safety from attacks by aggressors, it also means economic security, social security, moral security – in a family of Nations.’ And he explained further, before listing his economic bill of rights:

‘People who are hungry and out of a job are the stuff of which dictatorships are made. In our day, these economic truths have been accepted as self-evident. We have accepted, so to speak, a second Bill of Rights....’³⁵¹

Roosevelt played a key role at the 1944 Dumbarton Oaks Conference and in drawing up plans for an international organization, but he was never to see these plans come to fruition. Less than two weeks before he planned to open the 1945 United Nations Conference on an International Organization (UNCIO), Roosevelt suffered a massive stroke and died suddenly on 12 April 1945, just 12 days before the start of the conference. But his Vice-President, Harry S. Truman, immediately took over the Presidency and pressed ahead with the conference that was held from 25 April to 26 June 1945 in San Francisco.

In many ways, the San Francisco conference served as a eulogy to Roosevelt. Many of the opening speeches paid him tribute, with the representative of Lebanon, Charles Habib Malik (who was later to be a key part of the negotiations over the Universal Declaration of Human Rights) declaring for example: ‘It is impossible, Mr Chairman, to be present here in this gathering without thinking of President Roosevelt... We in Lebanon have deeply grieved his loss. We have come to know that, when freedom and justice were in question, he was sure to be their champion. No greater and more fitting homage can be done President Roosevelt than for all of us, great or small to bend every effort to produce a world Charter embodying the supreme principles he so dearly loved.’³⁵²

US Secretary of State Mr. Edward Stettinius in his address to the first plenary session of the conference recalled ‘We are united above all in the necessity to assure a just and an enduring peace in which the peoples of the world can work together to achieve at last freedom from fear and want’, noting ‘our common understanding that economic security goes hand in hand with security from war’.³⁵³ Stettinius recalled that the purpose of the meeting as ‘writing the constitution of a world organization for the maintenance of peace’³⁵⁴ and recalled how economic issues were important for the prevention of war:

³⁵¹ Franklin D. Roosevelt, ‘‘Second Bill of Rights’ Speech, State of the Union Message to Congress,’ January 11, 1944.

³⁵² UNCIO Doc ‘Third plenary session’, April 28, 1945, Vol I, 251. (*Documents of the United Nations Conference on International Organization, San Francisco*)

³⁵³ UNCIO Doc, ‘First plenary session’, April 26, 1945, Vol I, 123.

³⁵⁴ *Ibid*, 123-124. ‘

“Wide-spread economic insecurity and poverty, ignorance and oppression breed conflict and give aggressors their change. Measures for security against aggression, no matter how effectively contrived, will not alone provide the assurance of last peace. We have also to work effectively in close cooperation together toward rising standards of living and greater freedom and greater opportunity for all peoples of race and creed and color.”³⁵⁵

It was South Africa’s Field Marshal Jan Smuts (ironically given his role in apartheid South Africa)³⁵⁶ who drafted the UN Charter’s preamble, re-emphasizing this need for the UN ‘to promote social progress and better standards of life in larger freedom’.³⁵⁷ In the drafting of the Charter, the representative of New Zealand also (though unsuccessfully) called for the insertion of a clause to define ‘fundamental freedoms’ explicitly in terms of Roosevelt’s ‘Four Freedoms’: ‘All members of the Organisation undertake to preserve, protect and promote human rights and fundamental freedoms, in particular the rights of freedom from want, freedom from fear, freedom of speech and freedom of worship’.³⁵⁸

Like Stettinius, many delegations insisted that the UN address economic and social issues to prevent war. As the representative of India elaborated:

‘It is economic injustice, and even more, social injustice, that has bred for all time in the past the great causes of war, and had led to these great Armageddons. Therefore, in this hour, when nations are going through the rack of conquest and have much more emphasis laid on security and armed strength to prevent aggression, let us not forget for a moment the vast emphasis that has to be laid on the causes that lead to war, economic and social injustice.’³⁵⁹

Egypt concurred: ‘The world has learned by painful experience that economic unrest and social troubles always are at the bottom of international disorders and that the best way to prevent war and maintain peace is to provide the world with a working system of cooperation.’³⁶⁰ The French delegate even suggested that ‘if the Economic and Social Council is successful in its task of preparing the future basis of peace by securing effective international cooperation to insure the rights of man (sic) and to ensure the essential freedoms, then we consider that we will never need the coercive measures which are provided under other parts of the Charter through the Security Council.’³⁶¹

Australia placed a particular focus on international economic cooperation as a key role for the UN, proposing its ‘full employment pledge’.³⁶² H.V. Evatt, then an Australian delegate to the UNCIO, later

³⁵⁵ Ibid, 126. Of course, this soaring rhetoric glossed over the issues of race at home.

³⁵⁶ Mazower casts a skeptical eye at the UN Charter as a means to preserve empire given the role of figures like Smuts given his role in the construction of South Africa’s racial order. See generally Mazower 2009.

³⁵⁷ UNCIO Doc, ‘Preamble to the Charter of the United Nations Submitted by the South African Delegation in Revision of Draft of April 26 1945’ 3 May 1945, Vol III, 467-477.

³⁵⁸ UNCIO Doc ‘Amendments Submitted to the Dumbarton Oaks Proposals (Document 1 G/1) Submitted by the Delegation of New Zealand, Vol III, 486

³⁵⁹ UNCIO Doc ‘Third plenary session’, 28 April 1945, Vol I, 245.

³⁶⁰ Ibid, 235.

³⁶¹ UNCIO Doc, Second Meeting of Commission II, June 11, 1945, Vol VIII, 62.

³⁶² Simma et al. 2002, 899 see also n.14.

explained Australia's position, placing their conception of human rights firmly in the context of 'freedom from want' and 'full employment' in a 1946 article on 'Economic Rights in the United Nations Charter':

'The great threat to human freedoms which we have been combating for five years arose out of and was made possible by an environment dominated by unemployment and lacking freedom from want. The Charter as finally drafted, while placing primary emphasis on security and freedom from fear, also recognizes that there can be no freedom from fear without the observance of fundamental human rights based on freedom from want and on increasing living standards.'³⁶³

Evatt continued that 'The Charter now demonstrates that it is now fully realized that security alone is no guarantee of human rights; the Charter places at the forefront, and as a prior condition of the observance of human rights, the objective of 'full employment'. In the post-war context, Australia's position was that 'without policies of full employment being following simultaneously, there can be no easy solution to national economic problems.' It was Australia's belief that 'full employment, that is the right to work on reasonable terms and under reasonable conditions, is fundamental to any kind of individual freedom... in the absence of full employment there can be little progress in education, health, working conditions, and other social circumstances on which human freedoms depend.'³⁶⁴

While other delegations emphasised that it was critical to include full employment on the theory that if a nation did not maintain full employment it would upset world peace, the US delegation³⁶⁵ was more ambivalent during the San Francisco conference, with its delegation divided on the issue of 'full employment'.³⁶⁶ The US archives show one member of the US delegation remarking, with reference to the contemporaneous domestic debates over the draft 1945 Full Employment Bill, that 'this country is split wide open on the issue of full employment' and another that the phrase 'full employment' was a risk as it would prejudice passage of the UN Charter in the US Senate.³⁶⁷ Other members of the US delegation disagreed however – one arguing that the US could not possibly come out publicly against the concept, since 'the words 'full employment' had become an American idiom, a way of stating a fundamental aspiration' and it would be problematic for the administration to be caught on the wrong side of public opinion, 'on the side of the devil'.³⁶⁸

³⁶³ Evatt 1946, 5.

³⁶⁴ Ibid., 5.

³⁶⁵ Note that as a symbol of the 'bipartisan foreign policy' of that era, the US delegation included US Secretary of State (Edward Stettinius), senior advisor John Foster Dulles, along with Dean Virginia Gildersleeve, Harold Stassen, and Durward Sandifer, but it also included a mix of high ranking Republican and Democratic politicians, including Senators Connally and Vandenberg, Congressmen Taft, Bloom and Eaton. A list of key actors can be found at US Government, FRUS (Foreign Relations of the United States: Diplomatic Papers), 1945. General: The United Nations: The UNCIO, San Francisco, California, April 25-June 26, 1945,' 8.

³⁶⁶ Ibid., Minutes of the Eighth Meeting of the US Delegation, April 11 1945, 261-2.

³⁶⁷ Ibid., Minutes of the Forty-Seventh Meeting of the US Delegation, May 19 1945, 804-6.

³⁶⁸ Ibid., Minutes of the Forty-Ninth Meeting of the US Delegation, May 21 1945, 831.

The American position coalesced in favour of an alternative phrase of ‘high and stable levels of employment’,³⁶⁹ though if that was not possible, then ‘full employment’ should be stated as an aim, but not a function of the organization. John Foster Dulles later remarked that President Roosevelt had endorsed the US position on full employment and was in favour of retaining the words in the Charter, but this should be subject to a domestic jurisdiction clause.³⁷⁰ Senator Vandenberg still feared that it would be difficult for him to support this position, since ‘Sidney Hillman and Henry Wallace... could use this clause to promote their own economic theories’.³⁷¹ With strong opposition from other delegations, led by Australia and New Zealand, the US lost the battle for its phrasing, and ‘full employment’ was included in the Charter, but the US did insist on a domestic jurisdiction clause that would ensure the UN would have no role in supervising domestic US policy.³⁷²

By the end of the negotiations in San Francisco, the final text of the 1945 UN Charter, which set out the aims, purposes and structure of the United Nations³⁷³ promised to ‘save succeeding generations from the scourge of war’, ‘to reaffirm faith in fundamental human rights’ and to ‘promote social progress and better standards of life in larger freedom’. Article 55 (which expands Article 1.3³⁷⁴) called on the international organisation ‘[w]ith a view to the creation of conditions of stability and well-being’, to promote:

- a. Higher standards of living, full employment, and conditions of economic and social progress and development;
- b. Solutions of international economic, social, health, and relation problems; and international cultural and education cooperation; and
- c. Universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language or religion.³⁷⁵

This significantly expanded the vision of the 1944 Dumbarton Oaks proposals, giving the UN a mandate not only to prevent war, but also to maintain peace through economic and social stability, through ensuring 'larger freedom', full employment and 'social progress' as well as human rights. As pointed out

³⁶⁹ Dean Gildersleeve, who was on the drafting committee for that particular section of the Charter was ordered to press for the words ‘high and stable levels of employment’ and did manage to get this into the text of the Subcommittee but this was reversed in the Committee II/3 under pressure from other delegations led by New Zealand and Australia over the US objections. See UNCIO Doc, Seventh Meeting of Committee II/3, May 16 1945, and Tenth Meeting of Commission II/3, May 22 1945, Vol X.

³⁷⁰ US Government, FRUS, 1945 General: The United Nations, Minutes of the Fifty-First Meeting of the US Delegation, May 23 1945, 851.

³⁷¹ Ibid., 855.

³⁷² Ibid., Minutes of the Fifty-Third Meeting of the US delegation, May 25 1945, 886. The clause was to read that ‘nothing contained in Chapter IX can be construed as giving authority to the Organization to intervene in the domestic affairs of member states.’ See also Mitoma 2013; Simma et al. 2002.

³⁷³ The idea for a ‘general international organization’ to secure world peace was born in the midst of the war, and the antecedents of the UN Charter include the adoption of four key documents before this conference – the Atlantic Charter of 1941, Declaration of the United Nations of 1942, Moscow Declaration of 1943 and more particularly the Dumbarton Oaks proposals of 1944.

³⁷⁴ Simma et al. 2002, 44.

³⁷⁵ UN Charter, Art 55.

by Reidel in Simma et al, '[u]nderlying Art 55 is the idea that maintaining international peace and security not only requires banning the use of force in international relations, but also requires actively working for economic stability within and between States.'³⁷⁶ This was very different from the earlier mandate of the League of Nations, which made no link between international peace and economic stability and social well-being, and had no machinery for dealing with economic and social matters. It is also significant that the UN Charter placed human rights firmly within the chapter on the economic and social role of the new international organisation.

3.1.2 Proposals for an international bill of rights

Several years before the San Francisco conference, the Roosevelt administration had already started to prepare a draft international bill of rights, on the basis that 'human rights' should be a necessary aim of the new international organization. After Roosevelt's 'four freedoms' address in 1941, Secretary of State Hull had charged the US State Department's international law specialists with 'fleshing out the president's ideas' and 'to draft a bill of rights that would forever prevent mass human rights violations like those committed by the Axis powers.'³⁷⁷

The State Department's draft of an international bill of rights was completed by 10 December 1942. It was named a 'Declaration of Human Rights' and was annexed to the 'Draft Constitution' for a new international organization that was sent with American negotiators for the Dumbarton Oaks conference of August 1944. The drafters of what came to be the basis for the 1945 UN Charter believed that this 'Declaration' 'should be negotiated and ratified along with the Charter to facilitate the universal attainment of the Four Freedoms'.³⁷⁸

However, at the 1944 Dumbarton Oaks conference, strong resistance from the other Allied powers (as well as some objections within the US administration) had meant the draft was not considered. The 1944 Dumbarton Oaks Proposals annexed no bill of rights, and only included a brief reference to human rights as a purpose of the organization under its Chapter IX on economic and social cooperation, which read: 'With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations, the Organization should facilitate solutions of international economic, social and other humanitarian problems and promote respect for human rights and fundamental freedoms.'³⁷⁹ Much of the literature on the history of human rights suggests that it was this relative lack of a strong focus on human rights for the new organization, that ended up mobilizing governments, civil

³⁷⁶ Reidel 2002, 898.

³⁷⁷ Brucken 2013, 15.

³⁷⁸ Citing Russell's 1958 'A History of the United Nations', Whelan 2010, 42.

³⁷⁹ Dumbarton Oaks Proposals for the Establishment of a General International Organization, October 7, 1944, Ch IX, Section A.1.

society organizations and other actors to push far harder for a stronger human rights role for the UN at the 1945 San Francisco conference.³⁸⁰

In 1945, many different proposals for an international bill of rights were thus put forward in San Francisco. These proposals and worldwide initiatives have been documented extensively in the literature.³⁸¹ What is significant for our purposes here is that almost all the draft proposals included references to economic and social rights. This was true as true of proposals inspired by the liberal rights tradition as it was by those taking a more socialist position.³⁸² Many were still haunted by the experience of the Great Depression, as Ellingston (who helped to draft the ALI's Statement of Essential Rights) observed in 1945:

‘The peoples of the world, shaken by two world wars and a ruinous depression within a short 25 years, had discovered that neither peace nor freedom were possible to man in an industrial society without economic security. The ... extension of economic rights to man without depriving him of his traditional rights of free speech, religion, assembly, and fair trial poses the dominating question of the next 100 years. Because it is inseparable from the attainment of peace, the question will occupy the center of the national and international political stage. To leave social and economic rights out of a modern bill of rights would be to stage Hamlet without the Dane.³⁸³

It was the eminent international lawyer, Hersch Lauterpacht, described as one of the most preeminent international law scholars of the day, who most clearly explained that a shift had occurred even in liberal theories of rights at the time. This had broadened the understanding of ‘economic liberty’ and established the need for a positive, regulatory role of the state including to protect isolated individuals against exploitation by powerful economic forces:

‘... economic liberty, expressed in the theoretical freedom to give or withhold his services, is utterly meaningless because of the overwhelming impact of economic necessity and dependence.... This economic freedom of the many, it will be noted, can in many respects be achieved only by putting economic restraints upon the few. In modern society, economic freedom, conceived as the mere absence of restraints imposed by the State, results in economy anarchy, in exploitation of the weak and isolated individual by economically powerful and organised forces, and in the denial of substantive freedom of contract.’³⁸⁴

Lauterpacht, putting forward his own proposal for an international bill of rights, argued that ‘...the International Bill of the Rights of Man must recognise the connection between political freedom and economic freedom, between legal equality and economic and social equality of opportunity’,³⁸⁵ defining economic freedom in Roosevelt-style terms of larger freedom: ‘Economic freedom in its wider sense includes the effective recognition of the right to work under proper conditions of pay and employment,

³⁸⁰ See Brucken 2013; Mitoma 2013.

³⁸¹ For a good overview, see Simpson 2001; Whelan 2010. These included for example, the proposal of Panama which submitted a bill drafted as the ‘Statement of Essential Human Rights’ by the American Law Institute.

³⁸² See for example Whelan and Donnelly 2007.

³⁸³ Ellingston 1945. 1249.

³⁸⁴ Lauterpacht 1945, 155–56.

³⁸⁵ *Ibid.*, 90.

the right to education... and the right to economic security in case of unemployment, old age, sickness, disablement, and other cases of undeserved want.³⁸⁶

Lauterpacht included two economic and social rights in his proposal for an international bill of rights, and deliberately omitted the right to property and freedom of contract. Leaning on the lessons of the legal realists, he argued against the elision between older ideas of ‘natural rights’ with the new ‘human rights’ – since they had accorded sanctity only to property rights and freedom of contract:

‘.. it was especially in the United States that the ideas of the law of nature and of natural rights were resorted to in an attempt to curb State interference with the rights of private property and with freedom of contract....By reference to the natural rights of man, courts in the United States often declared to be unconstitutional, legislation for securing human conditions of work, for protecting the employment of women and children, for safeguarding the interests of consumers, and for controlling the powers of trusts and corporations. This explains why natural rights have been regarded in some quarters in the United States with suspicion and bitterness and why writers affirming the supremacy of a higher law over the legislature have nevertheless spoken with impatience of the *damnsa hereditas* of natural rights’.³⁸⁷

Thus Lauterpacht excluded the right to property from his draft bill, as it was not a ‘human right’:

‘...in so far as the right to property is conceived as an absolute and inalienable right of man it finds no place in the draft. Deep social and economic changes have intervened since Locke considered property to be the most sacred right of all..... That character of sanctity and inviolability has now departed from the right of property....’³⁸⁸

He also excluded the right to free trade: ‘The freedom to buy and to sell conceived as excluding the power of the State to regulate international commerce by tariffs, restrictions on imports and exports, and other means, has been suggested occasionally as one of the rights to be protected by an International Bill of the Rights of Man, but this cannot really be considered as a “natural right” and would be prejudicial to the major purposes of Bills of Rights.’³⁸⁹

The US State Department’s own 1942 draft, drafted as it was by the Roosevelt administration, also reflected this shift in liberal ideas of rights. The 1942 draft was put together first by a State Department lawyer, Durward Sandifer (later to become one of Eleanor Roosevelt’s key advisors during the drafting of the UDHR), and further developed by a State Department Special Sub-Committee on Legal Problems, which included Adolph Berle and Benjamin Cohen - key architects and the intellectual forces behind New Deal liberalism. This Sub-committee was well aware of other contemporaneous efforts to draft an international bill of rights, including the efforts of Lauterpacht, and the efforts of the American Law Institute and the Commission to Study the Organization of Peace (CSOP) that started in the early 1940s.³⁹⁰ CSOP Chair, James Shotwell also joined the Sub-Committee for some of their deliberations.

³⁸⁶ Ibid., 155.Ibid., 155.

³⁸⁷ Ibid., 37.

³⁸⁸ Ibid., 163.

³⁸⁹ Ibid., 164.

³⁹⁰ Brucken 2013, 38–39.Brucken 2013.

Durward Sandifer was sent to meetings of the American Law Institute which was simultaneously drafting the ALI's 'Statement of Essential Human Rights' (eventually adopted in 1944 and later to have a significant impact on the UDHR).³⁹¹ The drafting also took place contemporaneously with other efforts in the administration, including the efforts of the NRPB, explored earlier.³⁹² This aim of the Special Sub-Committee to draft a 'forceful statement of general principles' that would include both 'traditional rights' and Roosevelt's 'new' rights:

"The aim was to formulate the basic rights of individuals that should be universally respected, even if not formally subscribed to by all states, in a brief and forceful statement of general principles. This should include both traditional rights and certain principles of social and economic justice that were beginning to be regarded as basic. Accordingly, the subcommittee's work related to personal freedoms, property rights, social rights, political rights and procedural rights."³⁹³

The Special Sub-Committee thus debated and decided on the inclusion of economic and social rights, and after a decision to keep the draft bill short, set out the following as the first three articles in the 1942 draft:

US State Department 1942 draft for an international bill of rights (extract, first three articles only)

Article I: Governments exist of the benefit of the people and the promotion of their common welfare in an interdependent world.

Article II: All persons who are willing to work, as well as all persons who through no fault of their own are unable to work, have the right to enjoy such minimum standards of economic, social and cultural wellbeing as the resources of the country, effectively used, are capable of sustaining.

Article III: 1. All persons shall enjoy equality before the law with respect to life, liberty, property, enterprise and employment, subject only to such restrictions as are designed to promote the general welfare. 2. No person shall be deprived of life, liberty or property except in accordance with humane and civilised processes provided by law.³⁹⁴

The way in which these Articles are framed, and the order they are set out appears significant: the first Article emphasises common welfare, the second the right to minimum standards of economic, social and cultural wellbeing (along with a reference to 'resources' that we will explore later) and the third emphasises

³⁹¹ Brucken 2013, 36–37.

³⁹² Charles Merriam of the NRPB was also a member of the ALI Committee. Whelan 2010, 18.

³⁹³ Ibid., 41–42. Citing United States Department of State *Postwar Foreign Policy Preparation: 1939-1945*: 115.

³⁹⁴ I found a copy of this in the US national archives at College Park, MD. Draft of the Legal Subcommittee dated 3 December 1942, found in the files of the US Subcommittee on the Rights of Women, 3/HRW D-78-47, RG 353, Box 110 (see notes in next section on these files).

non-discrimination (equality before the law) in relation to life, liberty, property, enterprise and employment, adding a limitation related to the general welfare (and which I also explore further below).

Rowland Brucken, in his expansive history dismisses the significance of the 1942 draft's Article II as a 'banal summary' of the sub-committee's work on ESCR, and avoids reflecting on why it is included as one of the first articles, or why it is clearly affirmed as a 'right'. Nor does he reflect on the 'non-discrimination' phrasing or the 'general welfare' limitation on the traditionally more absolute rights to life, liberty and property. Whelan in his history by contrast does pick up the significance of the 1942 draft Article II, although he does not explore Article III. He notes also the phrasing on the effective use of resources, briefly suggesting this appears to foreshadow the ICESCR's Article 2.1 on 'maximum available resources'³⁹⁵. However, with respect to this phrasing, Whelan makes an immediate assumption, anachronistically reading back from our contemporary reading of this phrase, that this phrase was even then meant as a 'qualifier' or limitation clause for the rights. Considering that New Dealers such as Berle and Cohen were on the drafting committee, and taking account of the discursive context of economic Keynesianism and the simultaneous drafting of NRPB's list of rights, I hypothesize below that an alternative (Keynesian) reading of this phrase might be more apt – and thus in the following sections, I trace this concept moving forward, including looking in detail at the drafting of Article 2.1 of the ICESCR.

What both scholars show however is that the Legal Subcommittee had already decided that their 1942 draft of an international bill of rights should be a 'Declaration of Human Rights', rather than a legally enforceable agreement, presaging later debates over the status of the rights in the UN Charter and the UDHR. As State Department lawyers, their concerns with the legal enforceability of international rights revolved around whether an international body (or other governments) should have the power to enforce rights in the United States – they were convinced that isolationists in the Senate would reject this outright (as they had rejected Roosevelt's bid to join the 'World Court' seven years earlier³⁹⁶)

The United States did finally agree to support the inclusion of human rights in the 1945 UN Charter, but no Declaration of Human Rights was ever attached. Rather, running out of time at San Francisco, a decision was taken to pass that task to a specialized body, the UN Commission on Human Rights. As I show in the next section, the United States was to have a significant role in that drafting process under the leadership of Eleanor Roosevelt, who was selected to serve as the US delegate and Chair of the Commission on Human Rights.

³⁹⁵ Whelan 2010, 42.

³⁹⁶ Brucken 2013, 34–35.

3.2 From the UDHR to the ICESCR – the *travaux préparatoires*

3.2.1 US influence on the drafting of economic and social rights³⁹⁷

Much of the literature on the history of human rights is dominated by a persistent narrative that the United States consistently argued against the inclusion of economic and social rights in the international bill of rights. As discussed further below, this ‘myth’ of US opposition to ESCR has been contested recently by scholars, notably Whelan and Donnelly as ‘historical revisionism of the worst kind’ that ignores the positive role of the US in promoting economic and social rights.³⁹⁸

In my own research, I found significant new evidence on the US drafting position during the drafting of the UDHR that supports the thesis of Whelan and Donnelly, but goes well beyond it, by drawing on previously unexamined archival sources I unearthed in the UN *travaux préparatoires* and US National Archives. This material sheds important new light on the official US position on economic, social and cultural rights during the drafting of the UDHR over the period between 1947 and 1948, the detail of which is mysteriously absent from contemporary histories of human rights. These archival materials include a July 1947 US proposal unearthed in the *travaux préparatoires* of the UDHR, entitled ‘*United States Suggestions for Articles to be Incorporated in an International Bill of Rights*’,³⁹⁹ which shows that the official position of the United States did support the inclusion of a full range of economic, social and cultural rights in the Universal Declaration – if only for a brief moment in time in mid-1947 and if only in an aspirational Declaration, rather than as legally enforceable rights. This July 1947 US proposal entitled and an earlier June 1947 submission entitled ‘*United States Suggestions for Redrafts of Certain Articles in the Draft Outline*’⁴⁰⁰ were submitted as official US contributions to the UN for the work of the Drafting Committee on an International Bill of Human Rights of the Commission on Human Rights – but have been overlooked by other historians of human rights, as described further below.

As I show below, analysing the UN *travaux préparatoires* alongside detailed US position papers that I found in the US Government National Archives in College Park, Maryland, show the strong early support of the administration for ESCR. They also show that the US position was far more nuanced than standard narratives suggest, that there were differences amongst the US delegation and its advisers, and that the US position in fact shifted quite significantly over the brief period of the drafting of the UDHR between 1947 and 1948 in response to domestic and international pressures. Indeed, the mid-1947 US proposal

³⁹⁷ This section 3.2.1 has been previously published and, starting from the title ‘Myth and Mystery’ below, is quoted verbatim (except for the last few paragraphs) from Sally-Anne Way, “The ‘Myth’ and Mystery of US History on Economic, Social, and Cultural Rights: The 1947 ‘United States Suggestions for Articles to Be Incorporated in an International Bill of Rights,’” *Human Rights Quarterly* 36, no. 4 (2014): 869–97

³⁹⁸ Whelan and Donnelly 2007, 908–910.

³⁹⁹ U.N.Doc. E/CN.4/21, July 1, 1947, Annex C, 41-47, (*Report of the Drafting Committee on an International Bill of Human Rights to the Commission on Human Rights*, hereinafter ‘July US Suggestions’)

⁴⁰⁰ U.N.Doc E/CN.4/AC.1/8, June 11, 1947 (*United States Suggestions for Redrafts of Certain Articles in the Draft Outline*, hereinafter June US Suggestions) .

marked a high watermark in official US support for these rights – a support soon eclipsed by constitutional concerns, conservative reaction and the rising tensions of McCarthyism and the Cold War.

What is most important however about this US July 1947 proposal is not only its significance for the drafting of the UDHR, but more importantly its evident influence on the drafting of the 1966 International Covenant on Economic, Social and Cultural Rights. Substantial parts of the US 1947 wording on provisions on economic, social, and cultural rights reappear in the text of the 1966 ICESCR. Key concepts and phrases that were later to become part of the lexicon of ESC rights, including the concepts of ‘progressive realization,’ ‘maximum available resources,’ and the specific formulation of certain rights such as the ‘right to the highest attainable standard of health’ clearly have their roots in this 1947 US proposal.

Since many scholars who have studied the ICESCR in detail tend to start their analysis from 1949 at the point of drafting the ICESCR, they have missed critical details from the earlier history and the drafting of the UDHR. My history thus links together the drafting of the UDHR and the ICESCR, as well as linking to the earlier emergence of the rights and their later elaboration, charting a different story of the roots and evolution of ESCR.

The ‘myth and mystery of US history on ESCR’

Many scholars writing on international human rights law have long contended, for very different reasons, that economic, social, and cultural rights (ESC rights) were only included in the 1948 Universal Declaration of Human Rights (UDHR) because ‘Third World countries . . . insisted on, and achieved in collaboration with socialist countries at the time, recognition of individual economic and social rights.’⁴⁰¹ Antonio Cassese, too, suggested that ‘it was only in a second stage, given the hostility of the Socialist countries and under strong pressure from the Latin-Americans . . . that the West agreed to incorporate . . . a number of economic and social rights.’⁴⁰² This dominant narrative posits that the ‘West’ supported ‘first generation’ civil and political rights, but has always resisted the inclusion of ‘second generation’ economic, social, and cultural rights including during the drafting of the UDHR. A further persistent narrative also insists that ideas of economic, social, and cultural rights are, and always have been, alien to the liberal individualist, civil and political rights-based tradition of the United States, in ways that continue to draw force from the recent history of the United States administration’s position on ESC rights.⁴⁰³

⁴⁰¹ An-Na’Im 1995, 428–29.

⁴⁰² Cassese 1994, 35.

⁴⁰³ The United States has never ratified the ICESCR and has frequently opposed ideas of economic, social, and cultural rights in its official position at the international level. Alston has chronicled in detail more recent official US opposition over the period between 1980 and 2009 to the International Covenant on Economic, Social and Cultural Rights, which, he quips, has been understood by the US as the ‘Covenant on Uneconomic, Socialist and Collective Rights.’ See Alston 2008; Alston 1990.

In an article in the *Human Rights Quarterly* however, Daniel Whelan and Jack Donnelly challenged this narrative, questioning what they call the ‘myth of Western opposition’ to economic, social, and cultural rights, and arguing that this was an erroneous reading of the history of human rights; indeed, that it was ‘ludicrous’ and ‘revisionist history of the worst kind.’⁴⁰⁴ Countering this myth, Whelan and Donnelly argued that economic and social rights had in fact become central to the thinking of Western welfare states and to the Western vision of the post-war economic order by 1945—including that of the United States. They point to evidence including Franklin Roosevelt’s Four Freedoms and the Atlantic Charter, his 1944 ‘Economic Bill of Rights’ and the positive support of the United States and other Western states for the inclusion of ESC rights in the Universal Declaration, as well as the instantiation of these ideals in the development of welfare states in the UK and, less comprehensively, in the US.⁴⁰⁵

In response to this article, Alex Kirkup and Tony Evans criticized Whelan and Donnelly’s methodology as being too empirical and positivist, suggesting that they take official US support for these rights at face value, without looking at the underlying rationale of the US for promoting human rights (which Kirkup and Evans suggest was to legitimize the expansion of laissez-faire global markets, although they then then argue somewhat inconsistently that conservative groups opposed these rights precisely for their potential threat to laissez-faire).⁴⁰⁶ Kirkup and Evans also challenge Whelan and Donnelly for their assumptions of widespread domestic US support for economic and social rights, highlighting the powerful conservative reaction against these rights, as evidenced by the influential opposition of the American Bar Association (ABA) and the Bricker amendment controversy of the early 1950s.⁴⁰⁷ They also point to earlier US opposition to ESC rights (especially the right to work) during the 1944 Dumbarton Oaks and 1945 San Francisco conferences and the ambivalent position of the US in the drafting of the human rights instruments⁴⁰⁸ (although, as Whelan and Donnelly later correctly pointed out, there are a number of inaccuracies in Kirkup and Evans’ use of archival sources).⁴⁰⁹ In another critique of Whelan and Donnelly, Susan Kang similarly suggests that, despite rhetorical elite support for economic and social rights in the drafting of the human rights instruments, this was not a settled political question in 1945 and that commitments to these rights and to welfare states merely reflected a historic compromise that co-opted labour and other social movements into the capitalist system.⁴¹⁰

While these critiques provide important reflections that serve as a corrective to taking rhetorical elite support for these rights at face value, it is interesting nonetheless that, despite focusing on the role of the

⁴⁰⁴ Whelan and Donnelly 2007, 908–910.

⁴⁰⁵ Whelan and Donnelly 2007.

⁴⁰⁶ Kirkup and Evans 2009, 221–22; Whelan and Donnelly 2009b, 239.

⁴⁰⁷ The 1952 Bricker amendment aimed to limit any possibility that international treaties would supersede the US Constitution by 1) specifying that any treaty that conflicted with the Constitution would not be of any force or effect; 2) that it could only become effective as internal law only through domestic legislation; and 3) that Congress could limit the executive’s treaty-making power. *See* Kirkup and Evans 2009, 227–30.

⁴⁰⁸ Kirkup and Evans 2009.

⁴⁰⁹ Whelan and Donnelly 2009b, 246–48.

⁴¹⁰ Kang 2009, 1006–07; Whelan and Donnelly 2009a, 1030.

United States in the drafting of the international human rights instruments, none of these scholars look in detail at the US official position during the drafting period of the UDHR over the period 1947–1948. Even Whelan’s more recent 2010 book on the history of the International Covenant on Economic, Social and Cultural Rights (ICESCR)⁴¹¹ and its division from the International Covenant on Civil and Political Rights (ICCPR) (which also contains some of the material on which Whelan and Donnelly’s article is based), looks at important US sources of inspiration for the UDHR but does not look in depth at the US position during the drafting of the UDHR.⁴¹² While Whelan delves in depth into the *travaux préparatoires* [drafting history] of the Covenants,⁴¹³ he avoids a detailed investigation of the *travaux préparatoires* of the UDHR—largely because he sees Johannes Morsink’s seminal exploration of the UDHR as definitive.⁴¹⁴ Yet while Morsink’s history of the UDHR locates much of the inspiration for economic, social, and cultural rights with the existing constitutions of Latin American states (among others) and various Latin American proposals to the drafting of the UDHR, Morsink also does not explore the official United States written submissions to the UN at that time.⁴¹⁵

Delving into the detail of the official position of the United States during the drafting of the 1948 UDHR sheds new light on this debate and has revealed an important part of the history of economic, social, and cultural rights that appears to have been missed by these scholars. My own research in the United Nations archives of the *travaux préparatoires* of the UDHR has yielded a July 1947 proposal entitled ‘United States Suggestions for Articles to be Incorporated in an International Bill of Rights’ (US Suggestions)⁴¹⁶ and an earlier June 1947 submission on which this is based entitled ‘United States Suggestions for Redrafts of Certain Articles in the Draft Outline’ (US Suggestions for Redrafts).⁴¹⁷ These texts (among other US position papers) were submitted as official US contributions to the UN for the work of the Drafting Committee on an International Bill of Human Rights set up by the UN Commission on Human Rights.⁴¹⁸ These US Suggestions set out the official US position as of mid-1947 on the rights in the preliminary UN Secretariat draft of an international bill of rights and propose wording for new provisions which the US believed should be included in the draft international bill of rights. Surprisingly, the US Suggestions set out, in substantial detail, not only a full catalogue of civil and political rights, but also a full set of economic, social, and cultural rights, with curiously detailed text on the correlative duties of the state,

⁴¹¹ U.N.Doc. A/6316 (1966) International Covenant on Economic, Social and Cultural Rights, adopted 16 Dec. 1966, G.A. Res. 2200 (XXI), (*entered into force* 3 Jan. 1976).

⁴¹² Whelan points *inter alia* to Franklin Roosevelt’s 1944 ‘Economic Bill of Rights’ and the American Law Institute’s 1946 Statement of Essential Human Rights, as important sources of inspiration for the Universal Declaration. Whelan 2010, 11–31.

⁴¹³ *See* *Ibid.*, 87–111.

⁴¹⁴ *Ibid.*, 11–12.

⁴¹⁵ Morsink 1999. Morsink examines the sources of inspiration for ESC rights in the UDHR, but he does not examine the US written submissions discussed here.

⁴¹⁶ U.N.Doc. E/CN.4/21, July 1, 1947, Annex C, 41-47, July US Suggestions.

⁴¹⁷ U.N.Doc E/CN.4/AC.1/8, June 11, 1947, June US Suggestions

⁴¹⁸ The June 1947 US Suggestions were submitted by the US to the UN Drafting Committee and a slightly revised July 1947 US Suggestions were published as Annex C to the report by the Drafting Committee to the Commission on Human Rights in July 1947.

going significantly beyond the UN Secretariat draft in specifying the duties of states in relation to these rights.

This June 1947 text (and the slightly revised July 1947 version) of United States Suggestions thus provides a key piece of strangely overlooked historical evidence which provides proof—at least at the level of a positivist and rhetorical approach to human rights—⁴¹⁹ of official, albeit fleeting, US support for the inclusion of economic, social, and cultural rights, in an aspirational declaration, if not in a legally-binding covenant. Internal US government files available in the US archives also provide further insights into the US position during the drafting, particularly the records of the Interdepartmental Committee on International Social Policy and its Subcommittee on Human Rights and Status of Women, which developed the negotiating position of the United States during the whole period of the drafting of the UDHR from 1947 to 1948.⁴²⁰ The Interdepartmental Committee on Social Policy (ISP) was established in January 1947 to provide a coordinating mechanism between governmental departments for post-war international social policy, and responsibility for formulating human rights policy was delegated to its Subcommittee on Human Rights and the Status of Women, chaired by the Department of State, with representatives from the Departments of Justice, Labor and the Federal Security Agency as well as ad-hoc representatives from other government agencies.⁴²¹ The files of these committees help to reveal in more detail the nuances of the US position and how it shifted quite significantly over the short period of the drafting of the UDHR between 1947 and 1948.

Yet there is a certain mystery to this US history, in that this June-1947 US text has been forgotten, and features neither in the debate reviewed above, nor in contemporary histories of human rights, including in histories of the UDHR.⁴²² It is also absent from detailed histories of US policy on human rights in the 1940s,⁴²³ even recent histories of the ICESCR, such as that by Whelan cited above.

⁴¹⁹ As discussed above, Kirkup and Evans roundly criticized Whelan and Donnelly for their positivistic approach in relying on human rights rhetoric and documents to prove western support for ESCR, while ignoring actual politics and practice. *See* Kirkup and Evans 2009. Much of this section also focuses rather narrowly on the rhetoric of the official US position, but this is in the belief that this forgotten history is interesting given the significance of the US draft not only for the UDHR but also for the later drafting of the ICESCR.

⁴²⁰ The records of the United States Inter-Departmental Committee on International Social Policy (ISP) and its Subcommittee on Human Rights and Status of Women (S/HRW) for the period 1947-1949 are found in the US National Archives and Records Administration at College Park, Maryland (NARA), Record Group (RG) 353, Boxes 98-113 (hereinafter identified with box number, RG353, NARA). The ISP and S/HRW files include many brief position papers on each of the rights, setting out the detailed US negotiating positions, which were provided to Eleanor Roosevelt as instructions on the US position in her role as US representative in the UN Commission and Drafting Committee.

⁴²¹ *See* US Committee on ISP, *Draft Terms of Reference for the Committee on Human Rights and the Status of Women*, ISP-D8/47, Box 98, RG353, NARA (3 Jan.1947).

⁴²² As noted above, there has been a recent explosion of the literature on the history of human rights. *See* for example, Lauren 2003; Hunt 2008; Morsink 1999; Simpson 2001; Moyn 2012; Moyn 2018.

⁴²³ Key works on US human rights policy in the 1940s include Glendon 2001; Borgwardt 2007; Borgwardt 2008; Borgwardt 2012; Anderson 2003a; Brucken 2013; Simpson 2001; Vik 2012a; Vik 2012b.

The 1947 US Suggestions is significant not only because it belies standard assumptions about the US position on ESC rights, but also because substantial parts of the US wording and provisions on economic, social, and cultural rights are closer to the text of the 1966 ICESCR than to the 1948 UDHR. Several concepts and phrases that were later to become part of the ICESCR, including the concepts of ‘progressive realization,’ ‘maximum use of resources,’ and the specific formulation of rights such as the ‘right to the highest attainable standard of health’ appear to have clear roots in this 1947 US text, which anticipates the phrasing of the ICESCR. This then begs a number of questions: why is it that this US text has not appeared or been analyzed in existing histories? And how did this 1947 US text have such an impact on the text of the 1966 ICESCR, a text which was only finalized nineteen years later, after endless negotiations between states?

What is clear from the archives is that this 1947 US proposal demonstrates US commitment to a particular conception of economic, social, and cultural rights early in the drafting process of the UDHR—one that is very similar to the rights eventually incorporated into the ICESCR. It is also clear, however, that this mid-1947 text marked a high watermark of official support for ideas of economic, social, and cultural rights within the US administration, a position which quickly shifted under the pressure of constitutional concerns, deepening conservative opposition as Franklin Roosevelt’s New Deal era drew to a close, and an increasingly fraught ideological environment at both the domestic and international levels.

The Drafting of the International Bill of Human Rights

The drafting of the UDHR began when, in June 1946, the UN Economic and Social Council (ECOSOC) set out terms of reference for the new Commission on Human Rights,⁴²⁴ and assigned it the task of drawing up an international bill of rights with the assistance of the UN Secretariat’s Division of Human Rights.⁴²⁵ The Secretariat, headed by the Canadian, John P. Humphrey, then initiated a comprehensive survey of existing state constitutions and of proposals for an international bill of rights that had been submitted by states, nongovernmental organizations, and intergovernmental bodies. From this review, Humphrey prepared a preliminary ‘Draft Outline of an International Bill of rights,’ which contained a set of forty-eight articles on different human rights.⁴²⁶ This first Secretariat draft included civil and political rights, and economic, social, and cultural rights, collected and collated from existing state constitutions around the world, as well as from the various proposals for draft declarations that had been sent in to the Secretariat. For its provisions on economic, social, and cultural rights, Humphrey’s first draft drew on many sources, but most prominently from the many existing Latin American constitutional

⁴²⁴ The UN Commission on Human Rights was established in 1946 with eighteen commissioners: representatives of the five Great Powers (United States, Soviet Union, United Kingdom, France, and China) plus representatives from another thirteen member states of the Commission with revolving three-year terms, with the first consisting of Australia, Belgium, Byelorussia, Chile, Egypt, India, Iran, Lebanon, Panama, Philippines, Ukraine, Uruguay, and Yugoslavia.

⁴²⁵ C.H.R. Res. 1946/9, at 520–22, U.N.Doc. E/Res/9(II) (1946).

⁴²⁶ U.N.Doc. E/CN.4/AC.1/3, 4 June 1947 (*Draft Outline of International Bill of Rights, prepared by the Division of Human Rights*).

provisions on these rights as well as proposals for an international bill of rights submitted by various organizations and some states—including proposals submitted by Panama, Chile, and Cuba.⁴²⁷

However, although Humphrey's draft of the international bill of rights was very important as the first preliminary draft of what eventually became the UDHR, it was produced by the UN Secretariat and was not considered necessarily representative of the wishes of the member states of the UN Commission on Human Rights. Thus the Commission itself, in its first meeting at the beginning of 1947, set up a 'Drafting Committee on an International Bill of Rights' consisting of eight state representatives⁴²⁸ and led by the Chair, Eleanor Roosevelt (who was also the US representative to the Commission). This Drafting Committee was charged with taking the lead in formulating a preliminary draft international bill of rights. Humphrey's very detailed first draft, along with copies of other draft proposals and comments and suggestions from states,⁴²⁹ were then submitted to this Drafting Committee as the basis for them to begin their work. The Drafting Committee met for its first official session between 9 and 25 June 1947 in Lake Success, New York, and started to negotiate the text for an international bill of rights, and by the end of the June 1947 session, the Drafting Committee had produced its own draft.⁴³⁰

At the end of its June 1947 session, the Drafting Committee reported on its work back to the Commission on Human Rights, providing a preliminary draft international bill of rights that had emerged from its work, but also providing the Commission with copies of the materials on which it had based its work. Along with its own draft, the Drafting Committee's report to the Commission provided annexes of documents that had influenced its work, including Humphrey's Secretariat draft, a detailed proposal from the United Kingdom (proposing a legally binding Covenant limited to civil and political rights) and proposals from the United States for revisions of the draft (which offered redrafts of articles already set out in Humphrey's initial Secretariat draft, not only on civil and political rights, but also on ESC rights). Paragraph 11 of the Drafting Committee's July 1947 report reads:

In addition to the Draft Outline of an International Bill of Human Rights prepared by the Secretariat (. . . constituting Annex A), the Drafting Committee had before it the text of a letter from Lord Dukeston, the United Kingdom Representative on the Commission on Human Rights, transmitting (a) a draft International Bill of Rights and (b) a draft resolution which might be passed

⁴²⁷ U.N.Doc. E/CN.4/AC.1/3/ADD.1 *International Bill of Rights Documented Outline, Part I—Texts*. Submitted texts included proposals for draft declarations submitted by Chile, Cuba, and Panama, as well as detailed proposals made by the US, the UK, and India. Notably Panama submitted the 1946 model bill of rights drawn up by the American Law Institute, while Chile submitted the 1945 Draft Declaration of the International Rights and Duties of Man drawn up by the Inter-American Juridical Committee.

⁴²⁸ Initially, the UN drafting committee was composed of only three members of the Commission: the appointed Chair, Eleanor Roosevelt of the United States; the Vice-Chairman, P.C Chang of China; and the Rapporteur, Charles Malik of Lebanon, but was soon expanded to include another five members with representatives from Australia, Chile, France, the Soviet Union, and the United Kingdom. During the second meeting in June 1947, the representatives of these members who attended the meetings included Ralph L. Harry (Australia), H. Santa Cruz (Chile), Rene Cassin (France), Vladimir M. Koretsky (USSR), and Geoffrey Wilson (UK).

⁴²⁹ U.N.Doc. E/CN.4/AC.1/3/ADD.1 *International Bill of Rights Documented Outline, Part I—Texts*. This included proposals for draft declarations submitted by Chile, Cuba and Panama, and specific detailed proposals made by the United States, the UK and India.

⁴³⁰ Morsink offers a very clear overview of the seven stages of the drafting process in Morsink 1999, 4–12.

by the General Assembly . . . constituting Annex B . . . These two documents were considered and compared, *together with certain United States proposals for the rewording of some items appearing in the Secretariat Draft Outline, constituting Annex C.*⁴³¹

The Drafting Committee Report's Annex C is entitled 'United States Suggestions for an International Bill of Rights',⁴³² which is a slightly revised version of the June 1947 US submission submitted entitled 'United States Suggestions for Redrafts of Certain Articles in the Draft Outline.'⁴³³ These US Suggestions (both in the June and July versions) set out proposed revisions on text contained in the Secretariat draft and wording for new provisions on all rights, including ESC rights. These documents provide a clear picture of the official US position and point to a significant difference between the UK and US positions at that time. While the UK was emphasizing the importance of a legally binding covenant that would include only civil and political rights (as set out in Lord Dukeston's letter in Annex B), the US was emphasizing the importance of a non-legally binding declaration that would be a forceful statement of all human rights, including ESC rights.

It is important here to remember that the Drafting Committee and the Commission on Human Rights could not reach agreement on whether to pursue the UK proposal of a legally binding covenant restricted only to civil and political rights, or whether to pursue the US proposal of a more expansive and inspirational, but non-legally binding, declaration of rights encompassing civil and political rights as well as economic, social and cultural rights. The failure to reach agreement led to a decision to pursue the drafting of both a declaration and a covenant simultaneously. By the end of 1948, both texts had been through several rounds of negotiation under UN auspices, but the UN General Assembly only adopted the Universal Declaration of Human Rights, leaving the potentially legally binding covenant on civil and political rights until later.

The 1947 'United States Suggestions for Articles to be Incorporated in an International Bill of Rights'

The mid-1947 US Suggestions were thus conceived within the context of the US position to produce a non-binding declaration, but nonetheless included language on the full range of human rights. The US Suggestions, which amounted to a full draft of an international bill of rights, included sixteen provisions on civil and political rights,⁴³⁴ but also five expansive provisions on economic, social, and cultural rights

⁴³¹ U.N.Doc. E/CN.4/21, July US Suggestions, at 41–47 (emphasis added).

⁴³² *Ibid.*

⁴³³ U.N.Doc E/CN.4/AC.1/8, June US Suggestions. Comparing the June and July version shows that the only difference is the headings of articles, plus one brief addition to July 1947 which introduces a provision on private education into the article on the right to education: 'The State shall maintain adequate and free facilities for such education which, however, *'shall not be exclusive of private educational facilities or institutions.'* (The changed text italicized.)

⁴³⁴ Articles covered under 'equal protection before the law' were: the right to life, the right not to be subjected to arbitrary arrest or detention, the right not to be subjected to torture or any 'unusual punishment,' the right to a fair trial, the right not to be held in slavery or compulsory labor, the right to privacy, the right to freedom of

including: the right to progress; the right to health; the right to education; the right to economic security (including a decent standard of living, social security, work-related rights, adequate food, housing, and community services necessary to wellbeing); and the right to participate in cultural life and share the benefits of scientific progress. The US draft not only enunciated ESC rights, but carefully spelled out a correlative duty of the state in detail for each economic and social right. In its provisions on ESCR rights, the text of the US Suggestions (taken here from the June 1947 US Suggestions) proposes:

Article 35 RIGHT TO PROGRESS

Everyone has the right to a fair and equal opportunity to advance his own physical, economic, and cultural well-being and to share in the benefits of civilization.

It is the duty of the State, in accordance with the maximum use of its resources and with due regard for the liberties of individuals, to promote this purpose by legislation or by other appropriate means. Among the social rights thus to be achieved progressively by joint effort of the individual and the State are those defined in the following articles.

Article 36 RIGHT TO HEALTH

Everyone, without distinction of economic or social condition, has a right to the highest attainable standard of health.

The responsibility of the State for the health and safety of its people can be fulfilled only by provision of adequate health and social measures.

Article 37 RIGHT TO EDUCATION

Everyone has the right to education.

Each State has the duty to require that each child within territories under its jurisdiction receive a fundamental education. The State shall maintain adequate and free facilities for such education. It shall also assure development of facilities for further, including higher, education, which are adequate and effectively available to all the people within such territories.

Article 38 RIGHT TO ECONOMIC SECURITY

Everyone has a right to a decent standard of living; to a fair and equal opportunity to earn a livelihood; to wages and hours and conditions of work calculated to insure a just share of the benefits of progress to all; and to protection against loss of income on account of disability, unemployment, or old age.

It is the duty of the State to undertake measures that will promote full employment and good working conditions; provide protection for wage-earners and dependents against lack of income for reasons beyond their control; and assure adequate food, housing, and community services necessary to the well-being of the people.

Article 39 RIGHT TO PARTICIPATE IN THE CULTURAL, SCIENTIFIC AND ARTISTIC LIFE

Everyone has the right to participate in the cultural life of the community, to enjoy the arts and to share in the benefits of science.⁴³⁵

The way in which the rights are set out, with an initial statement of the right, followed by a correlative duty, mirrors the form (though not the content) of the American Law Institute's 1946 Statement of Essential Human Rights.⁴³⁶ The US proposals on correlative duties set out concrete measures necessary

movement, the right to a legal personality, the right to equal opportunity in employment, the right to property, the right to a nationality, the right to freedom of expression and association, and the right to vote.

⁴³⁵ U.N.Doc E/CN.4/AC.1/8, June US Suggestions, at 6–7.

⁴³⁶ The 1946 ALI statement was submitted to the UN Secretariat via the delegation of Panama and was used by Humphrey in his first draft of the UDHR. The ALI statement also appears to have had a significant effect on the

to implement the economic and social rights, including measures for health and education and policies for ensuring full employment and social protection for a decent standard of living. These proposals for text on correlative obligations were surprisingly also significantly stronger than the original Secretariat text (except in the case of the right to education, on which Humphrey's draft had already provided similarly worded text on the duty of the state).

Although setting out the ESC rights and their correlative obligations in such detail did not necessarily suggest that the US administration believed that these rights should be legally enforceable,⁴³⁷ this text suggests that the US at least initially believed that a forceful statement of these rights should also include references to take particular policy measures that would be necessary for states to meet their responsibility towards these rights.⁴³⁸ Yet despite this relatively strong language on duties in mid-1947—and despite succeeding in getting significant amounts of these mid-1947 text proposals into the draft Declaration (e.g. the US text on the right to health was taken verbatim into the draft of the Declaration that emerged at the end of the June 1947 Drafting Committee meeting), the US position later shifted and from late 1947 onwards, the US explicitly tried to downplay or eliminate all this text on correlative duties or state obligations in relation to ESC rights, as discussed below.

The UN archives of *travaux préparatoires* of the UDHR offer key insights into the negotiating positions of the United States, in terms of the interventions of Eleanor Roosevelt, as head of the US delegation, during the negotiations. However, more background on the US position can be found in internal US Government files available in the US National Archives in Maryland, particularly the records of the US Interdepartmental Committee on International Social Policy and its Subcommittee on Human Rights and Status of Women.⁴³⁹ The Interdepartmental Committee on Social Policy (ISP) was established in January

official US position, via Eleanor Roosevelt's adviser, Durward Sandifer of the State Department who had been involved in the drafting of the ALI statement since 1942. Brucken 2013; Vik 2012b.

⁴³⁷ By pursuing a non-binding declaration on human rights, the US was able to postpone the question of whether these rights should be legally enforceable in the domestic US context. In relation to the ALI's approach, Vik details how the ALI drafting committee included economic and social rights drafted as rights with correlative duties, but members of the committee could not agree on their precise legal form and remained divided over whether these rights should be presented as legally enforceable rights or as policy goals. The final approach agreed was that these rights could be framed as a declaration of principles, with the aim to encourage states to enact social legislation and formalize constitutional principles, much as the formulation of international principles in the International Labour Organization had had some effect on states. This failure to agree on the legal form of these rights led to the ALI's proposal being presented as a 'Statement of Essential Rights,' rather than as a 'draft bill of rights,' and it was 'circulated,' rather than submitted for approval by the wider ALI membership. Vik 2012a.

⁴³⁸ The files of the US Inter-Departmental Committee on International Social Policy and its Subcommittee on Human Rights and Status of Women suggests that there were some internal differences between representatives of different government agencies on the character of ESC rights, with some suggesting that the US proposals should take a declaratory rather than a mandatory form, focusing on the rights of individuals, rather than the duties of the state. See, US Committee on ISP, *Supplement to Recommendations with Respect to Specific Articles, Declaration on Human Rights: Article 26 (Social Security)*, position paper submitted by the Federal Security Agency with Labor, ISP D-72/48, 7 May 1947, Box 107, RG353, NARA

⁴³⁹ The records of the United States Inter-Departmental Committee on International Social Policy (ISP) and its Subcommittee on Human Rights and Status of Women (S/HRW) for the period 1947-1949 are found in the US National Archives and Records Administration at College Park, Maryland (NARA), Record Group (RG) 353, Boxes 98-113 (hereinafter identified with box number, RG353, NARA). The next section refers to these files as the ISP and S/HRW files.

1947 to provide a coordinating mechanism between governmental departments for post-war international social policy, and responsibility for formulating human rights policy was delegated to its Subcommittee on Human Rights and the Status of Women, chaired by the Department of State, but also consisting of representatives from the Departments of Justice, Labor and the Federal Security Agency as well as ad-hoc representatives from other government agencies.⁴⁴⁰

As Vik argues, this sub-committee went to great lengths to establish a coordinated government policy on human rights, and engaged in substantive debate on political, philosophical and legal issues, as the representatives of the different departments represented on the Sub-Committee had different views on the issue of economic and social rights.⁴⁴¹ The Department of Labor's representative, for example, was committed to Roosevelt's New Deal and saw the establishment of an international human rights agreement as an opportunity for pushing further domestic reform – and strengthening federal power to regulate labour issues at state level. The State Department lawyers however had a very different position given broader constitutional concerns with regard the expansion of federal power as well as the legal implications of any international treaties.⁴⁴² It was these Committees however who agreed on the negotiating position of the United States and provided detailed instructions via the State Department to Eleanor Roosevelt for her role in the UN Commission and the Drafting Committee.

The *US Suggestions* was produced by the ISP's Subcommittee on Human Rights and Status of Women,⁴⁴³ which had reviewed not only the UN Secretariat's draft, but had also reviewed at least twenty-three other draft bills of rights in existence at the time.⁴⁴⁴ The Subcommittee files contain a number of brief position papers on each right, which were produced by the different department representatives on the Subcommittee, and which reveal some significant differences in the understanding of the character of economic and social rights between the different government departments.⁴⁴⁵ However, these position papers also show that the 1947 US Suggestions intended to strengthen some of the language of Humphrey's Secretariat draft, particularly in relation to the articles on the rights to health, education and social security. However, it also sought to avoid a direct reference to the right to work (preferring the

⁴⁴⁰ See US Committee on ISP, *Draft Terms of Reference for the Committee on Human Rights and the Status of Women*, ISP-D8/47, Box 98, RG353, NARA (3 Jan.1947).

⁴⁴¹ Vik records the US position at the UN as at January 1947, as this was published in the US archives in a *Department of State Bulletin* dated 16 February 1947, although she also does not review the US documents submitted to the UN discussed here. See Vik 2012a, 906 See her note 17.

⁴⁴² *Ibid.*, 894.

⁴⁴³ See the earlier position paper, US Subcommittee on HRW, *Section II: Social Rights*, ISP D-89/47, Box 110, RG353, NARA(3 June 1947).

⁴⁴⁴ The US S/HRW files collect together many of these drafts, which range from the bill drafted by Hersch Lauterpacht to that of H.G. Wells, from the American Bar Association to the statement of the American Law Institute and many others, showing that these US Committee were well aware of these other efforts.

⁴⁴⁵ US Subcommittee on HRW, *Draft International Bill of Rights* ISP D-95/47, Box 110, RG353, NARA (20 June 1947) at 8 and at the Annex: *Section II (Social Rights)*.

promotion of full employment – as explored further below) and introduced the notion of ‘progressive realization’ and emphasised the need for efforts of the individual as well as the state.⁴⁴⁶

Of the articles proposed by the US, the proposed article on the Right to Progress was new (in that this did not exist in the Secretariat draft) and is set out as a *chapeau* or ‘umbrella’ article for the following economic and social rights. It is significant in that its wording is surprisingly close to the eventual wording of Article 2(1) of the ICESCR, and it appears to provide the first use of the concepts ‘maximum available resources’ and ‘progressive realization’ (or ‘achieving progressively’). The US position papers suggest that the US initially drafted this article as a provision to balance the duties of the state with the duties of the individual, and to limit the immediacy of the obligation by emphasizing that these rights would be ‘progressively realized.’⁴⁴⁷ The UN meeting records show that Eleanor Roosevelt (acting simultaneously in her role as Chair of the meeting but also a member of the drafting committee representing the United States) raised this proposal to the attention of the Drafting Committee, but did not press forcefully for this to be included explicitly as a right to progress during the June meeting in 1947.⁴⁴⁸

This language was not then immediately incorporated by the Drafting Committee into its draft, although the idea of an umbrella article for economic and social rights did come back into the drafting process at a later point as a French proposal and is partly captured in the final UDHR in Article 22.⁴⁴⁹ This eventual UDHR Article 22 was however interpreted differently by different government representatives to the UN, with the French emphasizing the aspect of international cooperation for securing economic and social rights (Cassin, as the French representative, emphasized that international cooperation was essential for resolving the issue of mass unemployment)⁴⁵⁰ while the US later stressing that this article was intended as a limitation on state duties, as Eleanor Roosevelt emphasised in her final speech to the General Assembly before the adoption of the Declaration.⁴⁵¹

The US proposed text on the right to health is also interesting, as it was significantly different and more detailed than Humphrey’s preliminary draft. Humphrey’s draft read, ‘Everyone has the right to medical care. The State shall promote public health and safety’,⁴⁵² but the US Subcommittee position paper

⁴⁴⁶ A range of position papers is accessible in Box 110 for this time period. Precise references are given below under the separate discussions of each right.

⁴⁴⁷ US Subcommittee on HRW, *Article 28.A: Right to Progress*, position paper, S/HRW D-122/47, Box 110 (12 Sept. 1947) explains that the text aimed to balance the duties of the individual and the need for self-reliance, with the duties of the state. I could not find any position paper clearly explaining the concepts of ‘achieving progressively’ and ‘maximum available resources’, although it appears that this combines some text from other position papers on social security and the right to work (see further below).

⁴⁴⁸ U.N. Doc. E/CN.4/AC.1/SR.14, 23 June 1947, 6.

⁴⁴⁹ Universal Declaration of Human Rights, *adopted* 10 Dec. 1948, 22, U.N. Doc. A/RES/3/217A (1948) states as Art 22:

Everyone, as a member of society, has the right to social security and is entitled to realization, through national efforts and international co-operation and in accordance with the organization and resources of each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.

⁴⁵⁰ See Morsink 1999, 226–30.

⁴⁵¹ *Ibid.*, 230. Eleanor Roosevelt, Speech ‘*On the Adoption of the Universal Declaration of Human Rights*’ (9 Dec 1948).

⁴⁵² US Subcommittee on HRW, *Draft Outline International Bill of Rights*, 12.

suggested that this article on the right to health ‘was entirely inadequate’ and called for the use of stronger language, adapted from the Constitution of the World Health Organization on the right to ‘the highest attainable standard of health’ and on the responsibilities of governments in the ‘provision of adequate health and social measures.’⁴⁵³ In the June 1947 UN meeting, Eleanor Roosevelt explained that her government was in support of the substance of the article on health suggested in the Secretariat draft, but that the United States had proposed a new wording. She explained that the language proposed by the US (which read that, ‘Everyone, without distinction of economic and social condition, has the right to the highest attainable standard of health’ along with language on the correlative duty of the state to ensure the ‘provision of health and social measures’ was an adaptation of text from the Constitution of the World Health Organization.⁴⁵⁴

The US proposal on this right did make its way almost verbatim into the draft after her intervention. However, the text on the right to health was later merged and collapsed into a broader article covering a range of rights and in the final UDHR, the right to health is subsumed into Article 25 as ‘Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care.’⁴⁵⁵ Interestingly, however, this phrasing of ‘the highest attainable standard of health’ was to later come back in the text of the ICESCR. It is intriguing, then, that it was the US that first proposed this language—a phrase which, like the phrases of ‘progressive realization’ and the ‘use of maximum available resources,’ has since entered the lexicon of economic, social, and cultural rights.

On the proposal for the right to education, the US proposal cleaved more closely to Humphrey’s text (which already followed a similar format setting out the duty of the state),⁴⁵⁶ although US Subcommittee position paper had even proposed stronger language than the language that ended up in the US draft, including phrasing on the need for the development of facilities to ‘the highest attainable level’ for further education.⁴⁵⁷

The United States also proposed an article on the ‘Right to Economic Security’, to include the right to a decent standard of living, work-related rights, and social security. This appears to have been a revision and extension of the article of Humphrey’s draft article on social security, along with folding in some of his other proposed economic and social articles into this one provision. The US Sub-committee position

⁴⁵³ US Subcommittee on HRW, *Right to Health: Article XXXV*, position paper S/HRW D-66/47, Box 110 (20 May 1947).

⁴⁵⁴ Morsink 1999, 194. Morsink provides a discussion of the US spoken positions, as Eleanor Roosevelt’s interventions are recorded in the UN meeting records, but does not analyse the US written submissions.

⁴⁵⁵ *Ibid.*, 334.

⁴⁵⁶ Humphrey’s text appears to be closely influenced by the text of the right to education proposed in the 1946 ALI statement. Whelan draws a careful comparison between the ALI statement and Humphrey’s preliminary draft. *See* Whelan 2010, 22.

⁴⁵⁷ US Subcommittee HRW, *Right to Education: Article XXXVI*, position paper, S/HRW D-63, Box 110 (20 May 1947).

paper on social security criticised the Secretariat draft article on social security as being ‘too narrow in concept’ and suggested it should incorporate the broader understanding adopted in the 1944 Philadelphia Conference of the International Labour Organization, which went beyond the provision of social insurance to include other types of social measures including public assistance, the provision of medical care, as well as measures for encouraging employment.⁴⁵⁸ Eleanor Roosevelt raised this proposal for an article on the ‘Right to Economic Security’ in the June 1947 meeting, and although the United States text was not taken wholesale into the new draft, many elements of it were eventually incorporated in the UHDR as Article 25 on the right to an adequate standard of living.⁴⁵⁹

The Subcommittee’s position papers therefore generally proposed strengthening the ESCR articles in the Secretariat draft, particularly in relation to the duties of the state in implementing them – even whilst introducing the idea that these should be duties to be progressively realized. It was only the article proposed on the ‘right to work’ that appears to have raised significant problems for the Subcommittee. The US Subcommittee’s position paper on the right to work takes a markedly different tone, far less positive on the right than the other position papers (and it appears to have been written by a different agency than the other papers, although it was not possible to establish conclusively from the archives which government body drafted the paper). Responding to the US domestic context, and recent debates over the an enforceable right to work in the draft 1945 Full Employment Bill, this position paper questions the legal enforceability of the right to work (and social rights more broadly) and pushes for the UN language of the right to work to be replaced by US language accepted during the UN Charter negotiations on the ‘promotion of full employment.’⁴⁶⁰ The fear of an explicit reference to the right to work is clearly linked to the administration’s keen awareness that any guarantee of the right to work had already been rejected outright by Congress during the fierce debates in 1945 and 1946 that followed the introduction of the Full Employment Bill of 1945. As discussed above, that bill was eventually passed, but only as a much watered down 1946 Employment Act, with a commitment to pursue ‘maximum employment’ but no guarantee of the right to work.⁴⁶¹ The position paper of the Sub-Committee expresses these concerns explicitly:

In Congressional debates preceding the enactment of our own Employment Act of 1946, the concept of a ‘right to work’ met with strong opposition. Neither this phrase nor ‘full employment’ appears in the law as enacted, which instead declares it to be the policy and responsibility of the Federal Government, subject to certain provisos, to use all its resources to create and maintain ‘conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production and purchasing power.’⁴⁶²

⁴⁵⁸ US Subcommittee on HRW, *Right to Social Security: Article XXI*, position paper, S/HRW D-66/47, Box 110 (20 May 1947). Note that this proposed broadening the definition of on social security, although it also called for the deletion of a more progressive article in the Secretariat’s draft on the ‘right to an equitable share of the national income.’

⁴⁵⁹ U.N.Doc. E/CN.4/AC.1/SR.9.

⁴⁶⁰ US Subcommittee on HRW, *Right to Work: Article XXXVII*, position paper, S/HRW D-71/47, Box 110 (23 May 1947).

⁴⁶¹ . See Bailey 1950.

⁴⁶² US Subcommittee on HRW, *Right to Work*, 3.

The same position paper also points out that, during the drafting of the UN Charter's Article 55, the United States had also opposed text on the duty to guarantee full employment, although it had eventually accepted language to 'promote full employment.' For these reasons, the US Suggestions therefore subsumes the article on the right to work under the 'Right to Economic Security', replacing language on the 'right to work' with text on the duty of the state to promote full employment and good working conditions in the context of a 'right to a decent standard of living'.

In the drafting process, the US was not successful in eliminating a reference to the right to work in the final UDHR, which includes the right to work in its Article 23. During the drafting of the UDHR, there was also a lengthy dispute with the Soviet delegates on the meaning of the right to work, as the Cold War rhetoric on both sides escalated during the meetings of the Commission on Human Rights.⁴⁶³ This US suggested that the USSR conception of the right to work meant that people were forced to work, without a choice in their occupation, which explains why the UDHR's article on the right to work in Article 23 is also balanced with US language on the 'free choice of employment.' And while the UDHR did not include language on 'full employment,' it is again interesting to note that this wording was recovered later in the ICESCR which calls in its Article 6(2) on the right to work for policies to promote, *inter alia*, 'full and productive employment.'

Although both the UDHR and the ICESCR were clearly the result of negotiations and the difference voices and ideas of many different country representatives, the language and concepts raised in its 1947 US Suggestions do therefore appear nonetheless to have had an important impact on the drafting of the UDHR. Oddly however, the 1947 US Suggestions appear to have had a greater significant impact on the later drafting of the ICESCR. Indeed, the wording of the provisions of US Suggestions is surprisingly close in form and content to the 1966 text of the ICESCR. The table below shows the similarity between the two texts by highlighting in italics the similar wording in relation to economic, social, and cultural rights, using the full text of the 1947 US Suggestions, and comparing this with extracts of text of articles of the ICESCR (with references in italics where there are similarities in the text). Note, for example, the provisions on 'maximum available resources' and 'progressive realization,' as well as the references to 'full employment' and the 'right to the highest attainable standard of health':

US July 1947 US Suggestions	ICESCR 1966
<p>'Everyone has the right to a fair and equal opportunity to advance his own physical, economic, spiritual and cultural well-being and to share in the benefits of civilization.'</p> <p>It is the duty of the State, in accordance with the <i>maximum use of its resources</i> and with due regard for the liberties of individuals, to promote this purpose by</p>	<p>'Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the <i>maximum of its available resources</i>, with a view to <i>achieving progressively</i> the full realization of the rights recognized in the present Covenant by all</p>

⁴⁶³ See, e.g., U.N.Doc. E/CN.4/SR.64 (1948).

<p>legislation or by other appropriate means. Among the social rights thus to be <i>achieved progressively</i> by joint effort of the individual and the State are those defined in the following Articles.’</p>	<p>appropriate means, including particularly the adoption of legislative measures.’</p>
<p>‘Everyone, without distinction as to economic or social condition, has a <i>right to the highest attainable standard of health</i>. The responsibility of the State for the health and safety of its people can be fulfilled only by provision of adequate health and social measures.’</p>	<p>‘The States Parties to the present Covenant recognize the right of everyone to the enjoyment of the highest attainable standard of physical and mental health.’</p>
<p>‘<i>Everyone has the right to education</i>. Each State has the duty to require that each child within territories under its jurisdiction receive a fundamental education. The State shall maintain <i>adequate and free facilities for such education</i> which, however, shall not be exclusive of private educational facilities or institutions. It shall also assure development of facilities for further, including higher education, which are <i>adequate and effectively available to all the people</i> within such territories.’</p>	<p>‘The States Parties to the present Covenant recognize <i>the right of everyone to education</i>. They agree that education shall be directed to the full development of the human personality and the sense of its dignity, and shall strengthen the respect for human rights and fundamental freedoms. ‘The States Parties to the present Covenant recognize that, with a view to achieving the full realization of this right: ‘(a) Primary education shall be compulsory and <i>available free to all</i>’</p>
<p><i>Everyone has a right to a decent standard of living</i>, to a fair and equal opportunity to earn a livelihood; to <i>wages and hours and conditions of work calculated to insure a just share</i> of the benefits of progress to all; and to protection against loss of income on account of disability, unemployment or old age. ‘It is the duty of the State to undertake measures that will <i>promote full employment and good working conditions</i>; provide protection for wage-earners and dependents against lack of income for reasons beyond their control; and assure <i>adequate food, housing, and community services</i> necessary to the well-being of the people.</p>	<p>The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions. The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favourable conditions of work. The States Parties to the present Covenant recognize the right to work, which includes the <i>right of everyone to the opportunity to gain his living by work</i> which he freely chooses or accepts, and will take appropriate steps to safeguard this right. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include . . . to achieve . . . <i>full and productive employment</i> under conditions safeguarding fundamental political and economic freedoms to the individual.</p>
<p>‘Everyone has the <i>right to participate in the cultural life</i> of the community, to enjoy the arts and to share in the <i>benefits of science</i>.’⁴⁶⁴</p>	<p>‘The States Parties to the present Covenant recognize the <i>right of everyone</i>: a) To take part in cultural life; (b) To enjoy the <i>benefits of scientific progress</i> and its applications’</p>

⁴⁶⁴ Note that this provision was similar to the provision in Humphrey’s first draft, so the similarity in wording is less surprising here.

The provisions proposed in the mid-1947 US Suggestions are, in fact, closer in wording to the 1966 ICESCR than to the wording of the 1948 UDHR, which is significant to the extent that the US suggestions appear to have remained influential even after 1948, and after the US position had shifted substantially in its own position against commitments to ESC rights.

The archives show that, despite the evidence of official US support for the inclusion of ESC rights in the declaration in June and July 1947, there was a significant shift in the US position by the end of 1947 to eliminate references to the correlative obligations of states and to emphasize the non-legally binding nature of the declaration. Albeit in a non-binding form, the US did however support the inclusion of ESC rights in the UDHR right up until its adoption in 1948, and it was only after turning towards the drafting of the legally binding Covenant(s) in 1949 that the US position turned more decisively against these rights.

The Evolution of the US Position on Economic, Social, and Cultural Rights during the drafting of the UDHR, 1947-1948

The US position on the international human rights agenda was already clear by 1942 –its 1942 draft ‘Declaration of Human Rights’ was a ‘forceful statement of general principles’ that would include new rights related to social and economic justice.

The first US submission to the Commission on Human Rights in 1947 dated 28 January 1947 and entitled “United States Proposals Regarding an International Bill of Rights”⁴⁶⁵ echoed that position, by suggesting the inclusion of social rights:

“Among the categories of rights which the United States suggests should be considered are the following:

- a) personal rights, such as freedom of speech, information, religion and rights of property,
- b) procedural rights, such as safeguards for persons accused of crime;
- c) social rights such as the right to employment and social security and the right to enjoy minimum standards of economic, social and cultural well-being;
- d) political rights such as the right to citizenship and the right of citizens to participate in their government.”⁴⁶⁶

This brief January 1947 US submission was then substantially expanded in the June and July 1947 *US Suggestions* discussed above, after the review of Humphrey’s first draft. By this time, the official US position was being prepared by an Interdepartmental Committee on Social Policy which reviewed the draft international bill of rights and set out the official US response and proposals, and submitted via her advisers to Eleanor Roosevelt who led the US delegation to the Commission on Human Rights, as well as chairing the UN Drafting Committee.⁴⁶⁷

⁴⁶⁵ U.N.Doc E/CN.4/4.

⁴⁶⁶ *UN doc E/CN.4/4* 1947.

⁴⁶⁷ James Hendrick ‘Memorandum of Conversation with Eleanor Roosevelt, 3 June 1947’ Black 2007, 556.

Glendon suggests that Roosevelt, “although she cooperated closely with her State Department aides, was able to influence US policy at several key junctures, especially by keeping the spirit of the New Deal alive where economic and social rights were concerned”⁴⁶⁸ although Simpson argues that it is difficult to assess the extent of her impact.⁴⁶⁹ But the archives suggest that she had more autonomy early in the smaller, more informal drafting process of the initial Drafting Committee meetings, but after that she became more constrained in her role as US representative in the wider Commission on Human Rights and General Assembly she was required to stick more closely to an increasingly less positive State Department script.⁴⁷⁰

Like Franklin Roosevelt himself, for Eleanor Roosevelt the language of rights was powerful, even if the rights were not to be initially inscribed as legally enforceable ‘rights’ or legally binding provisions. She did not push back against her instruction, when at the beginning of the drafting period of the UDHR, when in February 1947, the US called for the drafting of a nonbinding declaration to be followed by (a) legally binding convention(s) at a second stage:

With regard to the legal form of an international bill of rights, the United States suggests that the Commission should first prepare it in the form of a Declaration on Human Rights and Fundamental Freedoms to be adopted as a General Assembly resolution. This Declaration should be . . . framed with a view to speedy adoption by the General Assembly. The resolution containing this Declaration should make provision for the subsequent preparation by the Commission on Human Rights of one or more conventions on human rights and fundamental freedoms. This course, it is thought, would permit prompt adoption of a broad statement of human rights and allow time for the working out of detailed treaty provisions on specific matters.⁴⁷¹

Eleanor Roosevelt was keen that the declaration should not be full of legalese but should rather be phrased in short, rousing text in ordinary language ‘readily understood by all peoples.’⁴⁷² Marjorie Whiteman, Eleanor Roosevelt’s legal adviser from the State Department at the time, wrote:

In her view, the world was waiting, as she said, ‘for the Commission on Human Rights to do something’ and that to start by the drafting of a treaty with its technical language and then to await its being brought into force by ratification, would halt progress in the field of human rights.⁴⁷³

While it is easy to take a cynical reading of the US decision to pursue a non-binding instrument on human rights, it is also interesting to examine whether, for Eleanor Roosevelt and her advisers, pushing first for a morally binding declaration (and only later for a legally binding convention) was also a strategic choice

⁴⁶⁸ Glendon 2001, 45.

⁴⁶⁹ Simpson 2004.

⁴⁷⁰ Black 2007.

⁴⁷¹ US Government, Department of State Bulletin, ‘US Proposals regarding an international bill of rights’ February 16 1947.

⁴⁷² Lash 1972, 71. Other members of the original Drafting Committee had also urged this, particularly the USSA delegate. In December 1947, the Commission on Human Rights issued a Resolution that the Drafting Committee prepare a short text.

⁴⁷³ *Ibid.*, 65.

from the perspective of the US domestic context. Pursuing a declaration first would mean that difficult constitutional questions over the implications of a binding international treaty could be postponed and, importantly, a non-legally binding statement of principles would not require congressional approval. Avoiding the need for congressional approval was particularly important for Eleanor Roosevelt and her advisers in the historical context of isolationists in Congress becoming increasingly hostile to the United Nations and the drafting of international treaties that might impact on national sovereignty.⁴⁷⁴ It was also important if economic and social rights were to be included in a declaration—as the Subcommittee on Human Rights was deeply aware of the Congressional rejection of the right to work in the wake of the controversy over the 1945 proposal for a ‘Full Employment Bill’ (as reflected in their position discussed above). But bypassing the need for congressional approval was not only important only for human rights as such, and for ESC rights in particular—it was also for civil and political rights, particularly in relation to provisions related to non-discrimination and right to vote in the context of tensions over racial desegregation and southern opposition to change.⁴⁷⁵

On 3 July 1947, Eleanor Roosevelt requested advice from the head of the US delegation to the UN, Senator Warren Austin, on his views regarding the likelihood of securing approval for a legally binding convention from the Senate (even one only referring to civil and political rights as the UK had proposed). Senator Austin ‘agreed with Mrs. Roosevelt that there would be certain elements among the Southern contingent and the reactionaries from other parts of the country where very strong opposition to a convention would be met.’⁴⁷⁶ Eleanor Roosevelt concurred:

We should be perfectly willing to enter into a convention as well as a declaration, but we must be reasonably certain that the country will back us up. We should not try for too much. It would be most unfortunate if we were to take the lead in forcing a convention through the General Assembly and then be turned down by the Senate.⁴⁷⁷

By the end of that meeting in July 1947, Austin had agreed with Eleanor Roosevelt that priority should be given to drafting the declaration, followed by the preparation of one or more legally binding conventions. She also asked Austin if he could put some pressure for support of this position on Robert Lovett, who had just become Under-Secretary of State, responsible for UN affairs, but was opposed to both the declaration and the covenant. Lovett became opposed to any legally binding covenant, as he was convinced that the Senate, dominated by powerful southern Democrats, would oppose any agreement on human rights that might outlaw segregation and other forms of racial discrimination.⁴⁷⁸ He was also opposed to a declaration as he did not see how it would serve the interests of the United States. He further believed that economic and social rights had no place in the draft, but focused his efforts firstly

⁴⁷⁴ Glendon 2001, 71.

⁴⁷⁵ See generally Anderson 2003a.

⁴⁷⁶ The Eleanor Roosevelt Papers 5587, James Hendrick, *Memorandum of Conversation with Eleanor Roosevelt*, 3 June 1947, Black 2007.

⁴⁷⁷ *Id.* at 588.

⁴⁷⁸ *Letter of Eleanor Roosevelt to Robert Lovett*, Black 2007, 711; Anderson 2003a; Katznelson 2013.

on preventing the drafting of the covenant, and secondly on insisting that the declaration would not impose any contractual duties on the state.⁴⁷⁹ A.W. Brian Simpson details how Eleanor Roosevelt ‘locked horns’ with Lovett in November 1947, but went over his head to the White House and Dean Acheson to insist on US involvement in the drafting of the declaration and also to have the freedom to participate in the drafting of a convention, if this became the priority at the UN.⁴⁸⁰ Lovett’s instructions to the US delegation of 26 November 1947 were self-contradictory and revealed these tensions in the US position:

The United States position . . . is that priority should be given to the declaration. The draft declaration should not be so phrased as to give the impression to individual citizens or governments that there is a contractual obligation on the part of government or on the part of the USA to guarantee the rights set forth in the declaration . . . the proposal for a convention at this time should not be pressed. It may be that the original US position, that conventions should be worked out carefully over a period of years, may be the best approach. The US does not wish to see members of the U.N. enter into a convention unless they intend to observe it in good faith. . . . *You are, however, authorized at your discretion to participate in the drafting of a convention and to accept it for submission to your government.*⁴⁸¹

While Lovett’s views were not reflected in the June and July US Suggestions, with its emphasis on correlative obligations, by the December 1947 second session of the Commission on Human Rights, Eleanor Roosevelt’s interventions, as recorded in the UN meeting records reflect Lovett’s view and a shift in the US position:

[T]here had been a slight evolution in the United States’ position with regard to the form which a Declaration on Human Rights should take. Her delegation thought that priority should be given to the draft Declaration, and that the latter should not be drawn up in such a way as to give the impression that Governments would have a contractual obligation to guarantee human rights. As regards the draft Convention or Conventions, the United States considered that the Commission should not proceed to draw them up until it was sure that such Conventions could be accepted and applied in all good faith by the participating States.⁴⁸²

The US position had evolved to the extent that it now wished to avoid any suggestion of correlative duties or contractual obligations of states and would avoid any legally binding instrument. At this point the US also argued that the declaration should be shorter and less detailed. On 26 November 1947, the United States submitted a new draft text for a short form Declaration with only 10 Articles, with an emphasis on the brief declaration of rights, with no reference to mandatory language or correlative obligations.⁴⁸³ Only one of the articles (Article 9) referred to economic and social rights—which collapsed the earlier proposed rights together, cutting much text and eliminating any reference to correlative duties. The text of Article 9 on ESC rights thus now read ‘Everyone has the right to a decent living; to work and advance his well-being; to health, education and social security. There shall be equal

⁴⁷⁹ *Letter of Eleanor Roosevelt to Robert Lovett*, Black 2007, 711.

⁴⁸⁰ Simpson 2001, 429.

⁴⁸¹ *Ibid.*, 429–30. See also US Committee on ISP, *Commission on Human Rights, Changes Made by the Under Secretary of State in the US Draft Declaration of Human Rights and in the US Draft Convention on Human Rights*, ISP D-182/47 (21 Nov. 1947) and US Committee on International Social Policy, *Instructions to US Representative*, ISP D-188/47, (11 Dec 1947) in Box 111.

⁴⁸² U.N.Doc E/CN.4/SR.25, December 2, 1947.

⁴⁸³ U.N.Doc. E/CN.4/36, November 26, 1947 *Proposal for a Declaration of Human Rights, submitted by the Representative of the United States*.

opportunity for all to participate in the economic and cultural life of the community.⁴⁸⁴ (To the dismay of Lovett, the US delegation did however also put forward a more legalistic text for a convention, although this did not include ESC rights.)⁴⁸⁵

Despite the clash with Lovett, at the time of the third session of the Commission between May and June 1948, Eleanor Roosevelt was still emphasizing the importance of economic and social rights and echoing the words of Franklin Roosevelt's 'Economic Bill of Rights,' but she also again emphasized that the US position was now against setting out the correlative duties of states or how states should implement those rights, as that would have to be accomplished in different ways by different countries. Referring explicitly to the right to work and the commitment to full employment, she stated that:

The United States delegation favoured the inclusion of economic and social rights in the Declaration, for no personal liberty could exist without economic security and independence. Men in need were not free men. The United States delegation considered that the Declaration should enunciate rights, not try to define the methods by which Governments were to ensure the realization of those rights. Those methods would necessarily vary from one country to another and such variations should be considered not only inevitable but salutary.⁴⁸⁶

In other words, the US position had shifted distinctly to suggest that Declaration should enunciate only the rights, but not the correlative duties of states for implementing those rights – a significant shift from the June 1947 *US Suggestions* which clearly enunciated correlative duties, even if these were perceived at the time as an encouragement for to undertake such policy measures, rather than as legally-binding duties.

By the end of its third session in mid-1948, the Commission on Human Rights had a final draft of the Declaration. This was sent to the UN General Assembly's Third Committee, which again debated every article of the draft Declaration against the increasingly tense backdrop of growing rivalry and tensions between the US and the Soviet Union and rising Cold War rhetoric. But on 23 September 1948, Secretary of State George Marshall gave a resounding call to the General Assembly: 'Let this third regular session of the General Assembly approve by an overwhelming majority the Declaration of Human Rights as a standard of conduct for all,'⁴⁸⁷ emphasizing also that '[o]ur aspirations must take into account men's practical needs—improved living and working conditions, better health, economic and social advancement for all, and the social responsibilities which these entail.'⁴⁸⁸

However, minutes of meetings of the US delegation to the third session of the General Assembly dated 24 and 25 September 1948 record the continuing sense of growing domestic pressures in relation to the nature of the Declaration and the anti-communist pressures at home. The minutes record how John

⁴⁸⁴ *Ibid.*, 2-3.

⁴⁸⁵ U.N.Doc E/CN.4/37, *Proposal for a Human Rights Convention, Submitted by the Representative of the United States*.

⁴⁸⁶ U.N. Doc. E/CN.4/SR.64, 5.

⁴⁸⁷ US Government, FRUS, 1948 Vol I, Pt. 1, at 289 (Minutes of the Fourth Meeting of the US Delegation to the Third Regular Session of the General Assembly, Paris, September 24, 1948)

⁴⁸⁸ Glendon 2001, 135.

Foster Dulles, who had joined the US delegation (and who later became Secretary of State), asked for assurances that the Declaration would not impose any new legal obligations on the United States and State Department advisers reassured him that the Declaration would not be legally binding.⁴⁸⁹ But Dulles was concerned by one particular provision in the Declaration:

Mr. Dulles read the provision of the Declaration which states ‘everyone has the right of access to public employment’ and recalled that he had had to sign a declaration that he was not a Communist at the time of his appointment to the Delegation. . . . He pointed out that unexplained United States support of the Declaration, however, might lead to misunderstanding, if it were not made clear that the Declaration is a general statement of principle and aspiration and not a legal document. . . . He emphasized that it was important to make this very clear to avoid any unfortunate inferences. He referred again to the statement regarding the right of any person to public employment. . . . He referred to the possibility of the Republican Party picking up an isolated clause such as that on public employment and interpreting it as a commitment by the United States Delegation agreeing to employment of Communists in such agencies as the Atomic Energy Commission.⁴⁹⁰

This provision on the right of access to public employment was about non-discrimination in access to public employment. It had been in the original Humphrey draft and had also been supported by the US and included in the 1947 US Suggestions. But Dulles was referring to the 1947 Federal Employee Loyalty Program introduced to address fears of communist spies in the federal government, especially in agencies such as the Atomic Energy Commission.⁴⁹¹ Dulles’ concern, and other domestic objections to ideas of economic and social rights, explains Eleanor Roosevelt’s statement when she presented the UDHR to the Third Committee of the General Assembly that: ‘The United States Government did not feel that it was infringing any basic human right by excluding individuals with subversive ideas from its civil service.’⁴⁹² This was related to what has been called an anti-communist ‘witch-hunt’ which was purging progressives from the administration and bringing an end of New Deal reforms.⁴⁹³

The Truman administration was also under attack by the American Bar Association and others, which (as I detail further below) was putting constraints on the US position in the General Assembly and on Roosevelt herself - though as Roosevelt stated in a radio broadcast in November 1948, she was ‘quite sure that she wasn’t a communist’.⁴⁹⁴ After her September 1948 speech, at the University of Sorbonne in Paris on ‘The Struggle for the Rights of Man’, John Humphrey recorded in his diary:

“The crowd had come to hear the Chairman of the Human Rights Commission and the widow of a very great man. It heard a speech which had obviously been written by the State Department and ninety per cent

⁴⁸⁹ US Government, FRUS, 1948 Vol I, Pt. 1, at 291-92 (Minutes of Fourth and Fifth Meeting of the US Delegation to the Third Regular Session of the General Assembly).

⁴⁹⁰ *Ibid.*,

⁴⁹¹ Dulles’ role is interesting, as he was an earlier supporter of human rights, but by 1953 as US Secretary of State, Dulles announced a no-treaty policy in the human rights field, sacrificing human rights to defuse the growing controversy over the Bricker and other amendments. Vik 2012a, 901.

⁴⁹² U.N.Doc. A/C.3/SR.89, September 30 1948, 33.

⁴⁹³ The House Special Committee to Investigate Un-American Activities became a permanent committee in 1945 and launched investigations of liberals and progressive reformers in an attempt to discredit the New Deal, linking it to communists and radicals. See Brinkley 1996.

⁴⁹⁴ Eleanor Roosevelt ‘On being called a Communist’, 17 November 1948, Black 2007, 936–937.

of which was devoted to an attack against the USSR. I do not blame the Americans for talking back; but I regret that they are using Mrs. Roosevelt as their spokesman in these polemics.⁴⁹⁵

In her final speech to the General Assembly on 9 December 1948, before the adoption of the UDHR on 10 December 1948, Eleanor Roosevelt made sure to reiterate that the Declaration was not legally binding and that the commitments to economic, social, and cultural rights did not imply any legal obligations for the state to take direct action.

[M]y government has made it clear in the course of the development of the Declaration that it does not consider that the economic and social and cultural rights stated in the Declaration imply an obligation on governments to assure the enjoyment of these rights by direct governmental action. This was made quite clear in the Human Rights Commission text of article 23 [22] which served as a so-called ‘umbrella’ article to the articles on economic and social rights. We consider that the principle has not been affected by the fact that this article no longer contains a reference to the articles which follow it. This in no way affects our whole-hearted support for the basic principles of economic, social, and cultural rights set forth in these articles.⁴⁹⁶

But she was not only emphasised this in relation to economic and social rights, but in relation to the Universal Declaration as a whole:

‘In giving our approval to the declaration today, it is of primary importance that we keep clearly in mind the basic character of the document. It is not a treaty, it is not an international agreement. It is not and does not purport to be a statement of law or of legal obligation. It is a declaration of basic principles of human rights and freedoms, to be stamped with the approval of the General Assembly by formal vote of its member, and to serve as a common standard of achievement for all peoples of all nations.’⁴⁹⁷

The Chilean representative, Hernán Santa Cruz, who had accompanied her on the journey to produce the UDHR since their roles together in the Drafting Committee, wrote that her ‘intervention disappointed me a little. I did not hear the spontaneous expression of her personal fight for human rights that was present on previous occasions. On the other hand, one sensed the caution of someone who was speaking on behalf of a State that does not forget the political implications of the practical application of human rights instruments.’⁴⁹⁸ However, Eleanor Roosevelt, too, was troubled: she recorded that night:

‘I wondered whether a mere statement of rights, without legal obligation, would inspire governments to see that these rights were observed.’⁴⁹⁹

Contextualising this shift in the US position

⁴⁹⁵ Simpson 2004, 362.

⁴⁹⁶ Eleanor Roosevelt, Speech ‘On the Adoption of the Universal Declaration’, December 9, 1948. The Article 23 that she refers to became Article 22 in the Declaration, and in turn this appears to have provided the background to Article 2(1) of the ICESCR, as discussed further below.

⁴⁹⁷ Eleanor Roosevelt, ‘Statement to the United Nations’ General Assembly on the Universal Declaration of Human Rights’, December 9 1948. See also US Government, Department of State Bulletin 19 December 19 1948, 715.

⁴⁹⁸ Glendon 2001, 167.

⁴⁹⁹ *Ibid.*, 170.

The US position had thus shifted significantly over the brief period between 1947 to 1948 between the mid-1947 US Suggestions and the final US position. This close analysis of the UN and US archives shows a far more nuanced picture on the US position on ESC rights than is reflected in most histories of human rights, including even histories of the ICESCR.

This shift should be understood within a broader historical arc of the domestic and international context between 1945 and 1953. The international context of the Cold War is a familiar story, as the drafting of the UDHR took place against the dramatic backdrop of the end of the wartime alliance with the USSR, the announcement of the Truman Doctrine and the Marshall Plan for Europe in June 1947, and the Berlin blockade that began in June 1948. But the domestic US context is also important.

The drafting took place against the background of a domestic crusade against “Communists in government” or the “Second Red Scare” in the US, as well as the formalization of the Federal Employee Loyalty Program in the US in March 1947⁵⁰⁰ and its chilling effect on administration staff.⁵⁰¹ It was a time of rising conservative fears of an overextension of federal and executive power in racial desegregation and progressive New Deal reforms and growing isolationist opposition to US involvement in international treaty making⁵⁰² There was a major shift in power from the internationalists who drove overwhelming US congressional approval of the UN Charter in 1945, towards the isolationists culminating with the Bricker amendment controversy, and the eventual announcement in 1953 under Republican President Dwight Eisenhower that the US administration would not become party to any human rights treaty.

Many of the legalistic arguments around constitutional concerns and the balance of responsibilities between the federal and state governments were related to conservative fears of federal and executive overreach.⁵⁰³ And this in turn was related to fears that human rights agreements would strengthen federal power to outlaw racially discriminatory practices (such as segregation and lynching) in southern states and to interfere in the economy by imposing labour laws and social rights.⁵⁰⁴ Conservative opposition to ESC rights particularly through the forceful lobbying of the American Bar Association to any international human rights convention, particularly one that included economic and social rights, began around the beginning of 1948 during the drafting of the UDHR and escalated during the drafting of the Covenants.⁵⁰⁵ Along with the end of the New Deal era (and its support to economic and social rights as expressed in Franklin Roosevelt’s ‘Second Bill of Rights’ speech one year before his sudden

⁵⁰⁰ As noted above, this program aimed to purge presumed communists from the US administration. For a contemporaneous view, see Richardson and Truman 1951.

⁵⁰¹ See generally Storrs 2013; Brinkley 1996; Brinkley 1998.

⁵⁰² Vik 2012a, 891.

⁵⁰³ Ibid.

⁵⁰⁴ Anderson 2003a.

⁵⁰⁵ Kaufman 2011.

death in 1945), it was this growing domestic opposition led to the shift in the US official position, from the comparatively strong language in the mid-1947 document to a much weaker position by the end of 1948.

However, it was only in 1949 that the tide turned decisively against economic and social rights in the US position, once the negotiations moved on to drafting the legally binding Covenants. With the election of Eisenhower to the Presidency in 1953, the tide then turned even further against human rights, with the new administration announcing to the world that it would not accept “foreign interference” in its domestic affairs and would not become a party to any human rights treaty approved by the United Nations.⁵⁰⁶ This is explored further below in Section 3.3.1 which traces the impacts of the opposition of the American Bar Association, the Bricker Amendment on this 1953 change.

What remains important here is how the mid-1947 US Suggestions are significant for the history of ESCR. This analysis of the UN archives, alongside the US archives, has shown that the US position was far more nuanced than standard narratives suggest, that there were differences amongst the US delegation and its advisers, and that the US position in fact shifted quite significantly over the short period of the drafting of the UDHR between 1947 and 1948 in response to domestic and international pressures. Any history of the ICESCR must thus take this earlier history into account, not only because it questions standard assumptions about the US position on ESC rights, but because substantial parts of the US wording and provisions on economic, social, and cultural rights reappear in the text of the 1966 ICESCR.

Several key concepts and phrases that were later to become part of the lexicon of ESC rights, including the concepts of “progressive realization” and “maximum use of resources,” have clear roots in this 1947 US proposal. In the next section, I explore this further, looking in more detail at how the July 1947 US Suggestions on the ‘right to progress’ with its concepts of ‘progressive realisation’ and ‘maximum available resources’ came eventually to influence the drafting of the ICESCR and its Article 2.1.

⁵⁰⁶ Plummer 2003, 31.

3.2.2 Tracing the drafting of ICESCR Article 2.1 - Keynesianism lost in translation?

ICESCR Article 2.1 is of particular importance because it sets out the nature and scope of economic, social and cultural rights in a way that is markedly different from the equivalent Article 2.1 of the ICCPR. While the ICCPR Article 2.1 sets out immediate obligations to ‘respect and ensure’ the rights of that Covenant, ICESCR Article 2.1 sets out progressive obligations to take steps towards achieving the rights, ‘to the maximum of its available resources’. Article 2.1 reads:

‘Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.’

Most analyses of this Article locate its roots in the *travaux préparatoires* of the ICESCR and a proposal for an ‘umbrella’ article for ESC rights discussed in the 1951 meeting of the Commission on Human Rights.⁵⁰⁷ However, as we have seen above, it appears the roots of Article 2.1 lie further back in history in the US proposals dated June and July 1947,⁵⁰⁸ which were submitted to the June 1947 first session of the Commission on Human Rights⁵⁰⁹ which includes phrasing that is surprisingly similar to the eventual phrasing of the ICESCR Article 2.1. The similarity between the texts is striking:

June-1947 US proposal on ‘right to progress’	1966 ICESCR Article 2.1
<p>It is the duty of the State, in accordance with the <u>maximum use of its resources</u> and with due regard for the liberties of individuals, to promote this purpose by legislation or by other appropriate means. Among the social rights thus to be <u>achieved progressively</u> by joint effort of the individual and the State <u>are those defined in the following articles</u>.</p>	<p>Each State Party to the present Covenant undertakes to take steps, <u>... to the maximum of its available resources</u>, with a view to <u>achieving progressively</u> the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures</p>

The US language above referring to the rights ‘defined in the following articles’ suggests that the US always saw their proposal for a ‘right to progress’ as an ‘umbrella’ or chapeau clause that would define the nature and scope of the ESCR obligations. And as I show in more depth below, these phrases were to eventually come into the ICESCR via the drafting of the UDHR’s Article 22, which was also originally conceived of as an ‘umbrella’ article for the ESCR during the drafting of the UDHR (although some of the changes in phrasing later obfuscated this history). The June 1947 US proposal thus substantially prefigured Article 2.1 of the ICESCR.

⁵⁰⁷ See for example, Alston and Quinn 1987; Whelan 2010.

⁵⁰⁸ U.N.Doc E/CN.4/AC.1/8, June US Suggestions, U.N.Doc E/CN.4/21, Annex C July US Suggestions.

⁵⁰⁹ See Annex C of U.N.Doc E/CN.4/21.

Yet even the detailed overview of Morsink's examination of the Universal Declaration on Human Rights does not give a clear indication of the role of the US in drafting this provision.⁵¹⁰ Most of the academic literature that analyses the ICESCR and its Article 2.1 in depth, such as Alston, Whelan and Craven start their analysis by concentrating on the drafting history of the ICESCR from 1949 onwards,⁵¹¹ without exploring its roots in the drafting of the UDHR between 1947 and 1948. These scholars have thus largely missed that Article 2.1 had its roots in UDHR Article 22 and in these 1947 US Suggestions on a 'right to progress'. These scholars have also missed the possible Keynesian connotations of 'maximum available resources' – at least in the US proposal – which offers another small, but significant, part of the history of the nature and scope of economic, social and cultural rights.

Much of the contemporary literature interprets Article 2.1, with its provisions of 'progressive realisation' and 'maximum available resources', as a limitations clause suggesting that the achievement of ESCR will necessarily be limited by the (lack of) availability of resources. Many have suggested that the phrasing of Article 2.1 also lacks clarity and introduces a certain 'vagueness' into obligations on ESC. Vierdag even argued that the 'vague commitment' of Article 2.1 rendered economic and social rights 'of such a nature as to be legally negligible.'⁵¹² Craven further suggested that its 'convoluted phraseology and numerous qualifying sub-clauses' seem to 'defy any sense of obligation',⁵¹³ and Robinson has problematised that the formulation of 'maximum of its available resources' as 'a difficult phrase – two warring adjectives fighting over an undefined noun'.⁵¹⁴

In tracing its roots back through the earlier US history however, including back to Franklin Roosevelt's rights and his National Resources Planning Board's elaboration of these rights, I show that the phrasing (at least in its very initial elaboration in the US 1947 *Suggestions*) may have earlier had a very different – and indeed much clearer - meaning. Building on the history traced earlier of Roosevelt's New Deal, I show that the roots of both 'progressive realisation' and 'maximum available resources' appear to lie in this earlier conceptualization of the rights. The concept of 'progressive realisation' for example appears to have earlier been understood more positively in the US in the 1940s, emerging as it did out of the legal realist distrust of the courts, and their commitment to keeping ESCR out of the hands of the (often conservative) judges, and in the arena of changeable policy rather than immutable law.⁵¹⁵

The concept of 'maximum available resources' also has roots in Roosevelt's National Resources Planning Board's vision of economic and social rights as grounded in Keynesian economic thinking. As I will show below, the phrasing of the US proposal in terms of 'maximum use of its resources and with due

⁵¹⁰ Morsink provides a discussion of Art 22, Morsink 1999, 226–230.

⁵¹¹ Alston and Quinn 1987; Craven 1995; Whelan 2010.

⁵¹² Vierdag 1978, 105.

⁵¹³ Craven 1999, 15.

⁵¹⁴ Robertson 1994a, 694.

⁵¹⁵ This is evident in Ellingston's long statement on the right to work presented at the hearings on the 1945 Full Employment Act. Ellingston 1945.

regard for the liberties of individuals' points to a Keynesian interpretation of full employment – including recognising the freedom of the individual to choose employment (a freedom that was emphasised to contrast Keynesian-style 'full employment', with the lack of choice, or even forced labour, of the Soviet notion of full employment). This is significant since it challenges the conception of resources as 'limited' as, within the historical and linguistic context of the Keynesian era in which these documents emerged, the idea of the 'maximum use of available resources' was not aimed as a limiting clause (as it is commonly understood today) but was rather an exhortation for governments to spend more, to ensure the 'maximum use' or 'full employment' of all available unemployed resources. It was, in other words, an exhortation to adopt Keynesian economic policies, challenging classical economic prescriptions for balanced budgets, limited spending and austerity - especially in times of economic crisis.

I first trace how the June-1947 US Suggestions with its proposal for a 'right to progress' including the 'use of maximum available resources' had its roots in this economic understanding of this clause. I then trace how it was through this circuitous route of the Keynesian impact on the United States' later New Deal policies and on planning for the post-war economic order, as well as early US interventions in the drafting of the UDHR, that this phrase entered the lexicon of economic, social and cultural rights. Yet this *economic* understanding of the phrase - and even an awareness of this debate - was quickly 'lost in translation' and obscured in the international negotiations over the UDHR and the ICESR once lawyers and diplomats took over from economists in the drafting process. However, I suggest that, even though this economic understanding was quickly lost, reading the phrase 'maximum available resources' with a Keynesian eye still unsettles our contemporary interpretation of Article 2.1 - and offers insights worth recovering today for our own Great Recession and contemporary trends towards the 'constitutionalisation of austerity' (as highlighted later in section 4.3.1).

The US proposal for a the 'Right to Progress' - a exhortation for Keynesian spending?

As I argued have already argued above, Keynes' argument, which drew from the lessons of mass unemployment during the Great Depression of the 1930s, was that the government could and should intervene in the economy to ensure 'full employment' or, in other words, to ensure the maximum use of available resources. As Bailey wrote at the time:

'Keynes' *General Theory*, was an attack upon the 'classical' and 'neoclassical' economic thought that the free market capitalistic economy was a self-adjusting mechanism which tended to produce a condition of full employment and maximum utilisation of resources... [given that] a vast amount of involuntary unemployment existed and the economic system showed few signs of moving automatically toward the full utilization of resources.⁵¹⁶

As I have also shown above, US conceptions of 'economic and social rights' in New Deal liberalism and in post-war planning were clearly articulated in the work of the National Resources Planning Board

⁵¹⁶ Bailey 1950, 16.

(NRPB). The NRPB's *National Resources Development Report 1943* set out a vision for Roosevelt's Four Freedoms and a 'new bill of rights', conceptualising these rights as being implemented through a set of economic and social policies grounded in Keynesian economic policy. The NRPB's 1943 report emphasized the need to ensure 'the 'full use of our national resources, to full employment and increasingly higher standards of living',⁵¹⁷ challenging classical economic assumptions of automatic equilibrium of free markets - 'there are no automatic devices in our system that will insure the fair distribution of income between various kinds of goods and services or guarantee the full use of resources'.

The Board emphasised the necessary role of the state in the economy, emphasising that '[o]ne of the most important economic facts we have learned in the past decade is that fiscal and monetary policy can and should be used to foster an expanding economy.'⁵¹⁸ It also insisted that the key to 'winning the war' and 'winning the peace' was full employment - '[t]he economic and social stability of the United States, as of other countries, depends in great measure on our capacity to prevent mass unemployment'.⁵¹⁹ The NRPB's Chair, Charles E. Merriam had also declared that: 'We propose to plan our national activities so that they will ensure the maximum utilization of our most important resource of all – manpower.'⁵²⁰

Many of the NRPB's publications, including pamphlets written by the 'American Keynes', Alvin Hansen, throughout the early 1940s, regularly listed five key objectives essential to 'defend our freedoms and our rights, our way of life'⁵²¹. These priority objectives forcefully linked the role of the state to ensure full employment (to make full use of all available resources of 'men and machines' if the market and the private sector failed to do so) with the 'progressive realisation' of basic rights and freedoms:

1. We must plan for full employment, for maintaining the national income at 100 billion dollars a year, at least, rather than to let it slip back to 80, or 70, or 60 billion dollars again. In other words, we shall plan to balance our national production-consumption budget at a high level with full employment, not at a low level with mass unemployment.

...

4. We must plan to enable every human being within our boundaries to realize progressively the promise of American life in food, shelter, clothing, medical care, education, work, rest, home life, opportunity to advance, adventure, and the basic freedoms.⁵²²

Post-war planning was focused on how to prevent another 'great depression' after the end of the war and how to prevent another global war, by securing full employment not only at the national level, but also at the global level. Keynesianism was thus part of the discursive context of the drafting of the UN Charter and the international bill of rights (and the Bretton Woods institutions), and for Roosevelt's 1944 'Second

⁵¹⁷ US Government, National Resources Planning Board, *National Resources Development Report for 1943*, 4.

⁵¹⁸ Ibid.

⁵¹⁹ Ibid., 6.

⁵²⁰ Merriam 1942, 45.

⁵²¹ Hansen 1943, 2055.

⁵²² Ibid., 2059.

Bill of Rights'. This also appears to set the historical and linguistic context for the drafting of the US State Department 1942 draft for an international bill of rights, which as we saw above, included in its Article II an article linking employment, ESCR and the 'resources of the country, effectively used, are capable of sustaining' - which echoes the NRPB and Alvin Hansen's call for the state to ensure the full employment of all available resources, up to the maximum limit that could be quantified (sustaining national income at 100 billion dollars, rather than leaving it to languish at lower levels).

This phrasing is even more closely reflected in the June-1947 US Suggestions and its 'Right to Progress', that was prepared for the drafting of the UDHR. Evidence in the US archives and position papers which set out the US position on each of the rights to be included in the international bill of rights suggest this US position was framed in the discursive context of Keynesianism.

As we saw the section on the US influence on the drafting of ESCR, more background on the positions of the US during the drafting of the UDHR can be found in internal US government files, particularly the records of the US Interdepartmental Committee on International Social Policy and its Subcommittee on Human Rights and Status of Women.⁵²³ In my research in these US national archives in Maryland, I found evidence that the 1947 US position papers prepared for the drafting of the UDHR contributed to the development of the concept of 'maximum available resources', grounded in advice from economists and specialists in these different ministries. The files include a number of position papers, one on each human right, setting out the US's own position on each right, and proposing redrafts of the Secretariat articles. I did not find in the archives a position paper relating specifically to the US proposal on the 'right to progress' but I did find relevant position papers on the right to social security and the right to work, drafted by the specialist departments of government that were part of the International Committee on Social Policy, including among others, the Department of Labour and the Federal Security Agency.⁵²⁴

For example, a position paper dated 20 May 1947 on the Right to Social Security proposed a redrafting of the UN Secretariat draft article on the right to social security, suggesting this be combined with a few other articles and reworded as follows:

'Everyone has the right to security of income and access to services necessary to support a healthful standard of living for himself and his family. The State shall undertake measures designed to bring about full use of productive resources and effective opportunity for gainful employment at fair and reasonable wages; to assure income for the family when the worker is sick or disabled, unable to find a job, too old to continue working for pay, or has died prematurely or when means of subsistence are lacking or insufficient for any

⁵²³ The next section refers to these files as the ISP and S/HRW files, with their box numbers as above.

⁵²⁴ Note however, that it is not clear from all the ISP and S/HRW files exactly which departments drafted which position papers, since the files come under the name of the Committees rather than its members. From reading the position papers, it becomes clear however that they are not all produced by the same author or the same government department - rather it appears that the department most specialized in the issue was asked to produce the position paper.

other reason; to assure the availability of adequate food, housing and community and personal health service for all, and to provide social services necessary to the health and wellbeing of the people.⁵²⁵

Another position paper, dealing directly with the Right to Work dated 23 May 1947, proposes a rewording of a number of articles, including suggesting a provision on work:

‘Measures to assure full employment through maximum use of productive resources and equitable distribution of purchasing power among its people’⁵²⁶

This frames to the language on the ‘maximum use of productive resources’ in a slightly different terminology, but even more closely related to the eventual wording of Article 2.1, as well as to Keynesian prescriptions of full employment to compensate for the lack of aggregate demand or ‘purchasing power’ amongst the population.

As I have noted above, this position paper on the Right to Work is significantly less enthusiastic than the other position papers on social rights, it also considers the legal interpretations on whether all social rights will be immediately enforceable if resources are limited), and refers explicitly to the domestic US policy debates over Keynesian-style full employment during the fierce discussions over 1945 and 1946 that followed the introduction of the draft 1945 Full Employment Bill and resulted in the 1946 Employment Act (as discussed in Section 2.3.3). The position paper argues that, given the domestic conflicts that arose during this time, the US position in the drafting of the UDHR would need to be careful with respect to making explicit references to the ‘right to work’ and to the concept of ‘full employment’:

‘In Congressional debates preceding the enactment of our own Employment Act of 1946, the concept of a ‘right to work’ met with strong opposition. Neither this phrase nor ‘full employment’ appears in the law as enacted, which instead declares it to be the policy and responsibility of the Federal Government, subject to certain provisos, to use all its resources to create and maintain ‘conditions under which there will be afforded useful employment opportunities, including self-employment, for those able, willing, and seeking to work, and to promote maximum employment, production and purchasing power.’⁵²⁷

This position paper noted how the US rejected, but ultimately agreed to the commitment in the UN charter to ‘promote’ ‘full employment’, and warns against adopting a more conservative approach that would imply a retreat from Articles 55 and 56 of the UN Charter. It nonetheless warned of the risk that ‘the right to work’ could be interpreted as implying a guarantee by the State of a job for all which ‘may be, or may be thought to be, incompatible with economic institutions in certain countries e.g. with the principles of a private enterprise economy’.⁵²⁸ This, along with the US concern to distinguish their approach to full employment from what they saw as the ‘forced employment’ approach of the USSR

⁵²⁵ US Subcommittee on HRW, *Right to Social Security: Article XLI*, position paper, S/HRW D-66/47, Box 110 (20 May 1947).

⁵²⁶ US Subcommittee on HRW, *Right to Work: Article XXXVII*, position paper, S/HRW D-71/47, Box 110 (23 May 1947).

⁵²⁷ *Ibid.*, 3.

⁵²⁸ *Ibid.*

appears to explain the additional phrasing the duty of the state to ensure ‘maximum use of resources, with due regard for the liberties of individuals’ in its ‘right to progress’.

The position papers also show that the US government position was however not monolithic, that there were different ministries pushing for distinct aspects of the rights, and that the roots of this Keynesian phrasing of the economists was not always clearly understood, and became ‘lost in translation’ as lawyers and diplomats took over from the economists in defining the US position on economic and social rights during the drafting of the UDHR.

The drafting of Article 22 as a ‘chapeau’ clause for ESCR in the UDHR

It was during the one of the first meetings of the Drafting Committee on the international bill of rights in June 1947 that Eleanor Roosevelt, in her role as the US delegate, raised the US proposal on the ‘Right to Progress’. However, the proposal, and its clauses relating to the ‘duty of the state’, the ‘maximum use of resources’ and ‘to be achieved progressively’, did not make it into the draft international bill of rights at that meeting.

However, it came back into the drafting process when the United States brought this up again in the context of discussing Article 22 of the UDHR during the June 1948 meeting of the Commission. Although Article 22 of the UDHR appears to be an article focused on the right to social security, the UN archives show that Article 22 was originally developed as a chapeau clause for the ESC rights, as part of an effort to develop ‘a special article concerning the measures to be taken in order to ensure enjoyment of economic and social rights’.⁵²⁹ It was not intended as a stand-alone article on ‘social security’ but rather as a covering clause for all the ESC rights that came below it in the draft UDHR. Indeed, the phrase ‘right to social security’ was only added to Article 22 significantly later, on the insistence of French delegate Cassin, after strained disagreements over the definition of social security led to its deletion from Article 25 on the right to an adequate standard of living.⁵³⁰ Cassin insisted that no modern bill of rights could exclude social security and it was integrated given a lack of objection, despite not adding much clarity to Article 22.

A close reading of the final text of Article 22 shows that it contains key elements of a chapeau article including the listing at the end of ‘of the economic, social and cultural rights’, the clause on ‘national efforts and international cooperation’ and ‘in accordance with the organization and resources of each State’ (which were later to become the roots of ICESCR Article 2.1):

‘Everyone, as a member of society, has the right to social security and is entitled to realization, through national efforts and international co-operation and in accordance with the organization and resources of

⁵²⁹ See E/CN.4/SR.65, 11 and Morsink 1999, 226.

⁵³⁰ 15 November 1948, A/C.3/SR.137, 499.

each State, of the economic, social and cultural rights indispensable for his dignity and the free development of his personality.⁵³¹

The US proposal on the ‘right to progress’ had included wording on ‘the economic, social and cultural rights, as set out below’ signalling it as a chapeau clause - but ‘as set out below’ was also eventually deleted, much to the ire of the US delegation, who came to see this article as part of the increasingly urgent strategy to limit the legal effect of the UDHR (as described in the previous section) and to avoid spelling out a precise role for the state on ESCR. This explains Roosevelt’s later insistence in her final address on 9 December 1948 to the General Assembly, referring directly to the chapeau article: ‘We consider that the principle has not been affected by the fact that this article no longer contains a reference to the articles that follow it’, although this ‘in no way affects our whole-hearted support for the basic principles of economic, social and cultural rights set forth in these articles.’⁵³²

During the drafting process, the most detailed discussion on the ‘umbrella article’ occurred in June 1948, emerging in the context of the right to work and full employment, and the role of the state in securing that right. The US explained that its position the right to work meant ‘the right of the individual to benefit from conditions under which those who were able and willing to work would have the possibility of doing useful work, including independent work, as well as the right to full employment and to further the development of production and purchasing power.’⁵³³ But the US was insistent by this point, that the duty of the state should not be spelled out - the UDHR should ‘not try to define the methods by which Governments were to ensure the realization of those rights’ salutary.⁵³⁴ The representative of France, Rene Cassin countered however that it was important to explain what the duties of the state were in relation to ESCR - ‘Recently acquired rights, such as the right to work, should be stated more explicitly than the rights recognized for centuries, such as the right to life.’ He also emphasized that there may be a need to spell out responsibilities not only at the national level (since unemployment was ‘not purely a national question’) but also the international level.⁵³⁵

A consensus began to emerge that, instead of spelling out the duties for each ESC right under each right, a general article specifying that measures should be taken might be useful.⁵³⁶ There were two different proposals at this point - the Lebanese delegate, Malik, argued that ESC rights would also require favourable social conditions,⁵³⁷ and proposed a text ‘Everyone has the right to a good social and

⁵³¹ UDHR, Article 22.

⁵³² US Government, ‘General Assembly Adopts Declaration of Human Rights: Statement by Mrs Franklin D. Roosevelt, US Representative to the General Assembly, December 19, 1948, *Department of State Bulletin* Oct-Dec 1948, 751.

⁵³³ E/CN.4/SR.64, 6.

⁵³⁴ E/CN.4/SR.64, 5.

⁵³⁵ E/CN.4/SR.64, 12.

⁵³⁶ E/CN.4/114.

⁵³⁷ E/CN.4/SR.65.

international order in which the rights and freedoms set out in the Declaration can be fully realized.⁵³⁸ Cassin however proposed a general article emphasising both national and international responsibilities that ‘Everyone, as a member of society, has the economic, social and cultural rights enumerated below, whose fulfilment should be made possible in every State separately or by international collaboration.’⁵³⁹

The US called for adding the phrase ‘in accordance with the social and economic system and political organization’⁵⁴⁰ into Cassin’s wording, to emphasise that states had very different economic institutions and models of organization (the US was still keen to differentiate its market system from the Soviet communist system in relation to the right to work, since they perceived the Soviet system as not giving anyone free choice of their work). It is not exactly clear where this phrase came from, but Eleanor Roosevelt’s legal adviser, James Hendrick, explaining the US position in the US *State Department Bulletin* in his August 1948 Progress Report suggested the US modelled this clause on a provision of the draft International Trade Organization Charter⁵⁴¹, explaining that:

‘Certain members felt that there was no reason to say anything more about social and economic rights than was said about civil rights; to do so would indicate the former were more important than the latter, an impression which they definitely did not wish to convey. Others felt that this new type of right should be given special attention; people throughout the world were ‘used to’ civil rights, but they did not know about social and economic rights.

The compromise was to retain the *chapeau* clause but to include it in a phrase, loosely modelled after a provision of the International Trade Organization Charter, which would recognize the necessary differences among various states in the manner and extent of the granting of these rights, which would depend upon ‘the organization and resources of each state’.⁵⁴²

Hendrick does not specify exactly which provision of the ITO was used as a model. One possibility could be the draft ITO Article 3.1 which read that each member state should secure full employment through measures appropriate to its particular form of organization: ‘Each Member shall take action designed to achieve and maintain full and productive employment and large and steadily growing demand within its own territory through measures appropriate to its political, economic and social institutions’.⁵⁴³ This ITO text did not emphasise resource limitations, but rather full employment, while nonetheless

⁵³⁸ E/CN.4/120 Report of the Sub-Committee. This was agreed in a Sub-Committee, later adopted as Article 29 of the UDHR.

⁵³⁹ Ibid.

⁵⁴⁰ E/CN.4/SR.71, 14 June 1948; E/CN.4/133 ‘Suggestion for New Article of the Draft International Declaration on Human Rights, United States of America’, 14 June 1948.

⁵⁴¹ This was the ‘Havana Charter’ which was being negotiated simultaneously, for the precursor to the WTO, which eventually failed to take off due to US opposition in Congress.

⁵⁴² US Government, Department of State, ‘Progress Report on Human Rights by James P. Hendrick,’ August 8, 1948 *Department of State Bulletin* Vol 19, no. July-Sept 1948, 165 note 19.

⁵⁴³ Other relevant provisions could be the draft ITO’s Article 8 which makes reference to ‘The Members recognize that the productive use of the world’s human and material resources is of concern to and will benefit all countries, and that the industrial and general economic development of all countries, particularly of those in which resources are as yet to relatively undeveloped, as well as the reconstruction of those countries whose economies have been devastated by war, will improve opportunities for employment etc.’ It also states in Article 78.2.c that: ‘In selecting the members of the Executive Board, ...regard shall be paid to their shares in international trade, and that it is representative of the different types of economies or degrees of economic development to be found within the membership of the Organization.’

making clear that the US (Keynesian) approach to full employment would be different from the USSR (socialist) approach.

The US proposal was adopted, but revised to include a reference to resources: 'in accordance with the organization and resources of each State' (text that eventually coalesced into the final Article 22), and states began to discuss resources as a limitation at this point. The UK, for example, linked the issue of resources to different levels of development in different states 'in view of existing differences in the state of economic and social progress throughout the world.'⁵⁴⁴ The UK was clear by this point that resources should be a limitation - although for the UK, this appears to have been aimed at avoiding Cassin's 'international' responsibilities in terms of potentially onerous obligations towards people living in Britain's colonial territories.

The US position at this stage was less focused however on limited resources, but more focused on establishing a 'chapeau' or covering clause for ESCR. In December 1947, Roosevelt had already argued that 'there are widely different theories and practices in different parts of the world as to the manner in which the Government can best facilitate' ESCR, and that the UDHR should 'proclaim rights, but should not attempt to define the role of government in their ultimate attainment.'⁵⁴⁵ By the meeting in November 1948, she suggested the essential elements of Article 22 were its two provisions on 'through national effort and international cooperation' (as suggested by Cassin) and 'in accordance with the organization and resources of each State' (as suggested by the US with others), explaining also that this article was 'intended as something of an introduction to the subsequent articles'. She emphasised that this was 'a compromise between the views of certain Governments, which were anxious that the State should give special attention to the economic, social and cultural rights of the individual, and views of Governments, such as the United States Government, which considered that the obligations of the State should not specified.'⁵⁴⁶

Hendrik, in his public explanation of the US position in the *State Department Bulletin* revealed that the strategy of the State Department lawyers was to ensure that the UDHR was not conceived as creating any new legal obligations, but that it would 'be considered to impose *a moral, but not a legal, obligation to strive progressively* to secure universal and effective recognition and observance of the rights and freedoms therein set forth' - although for the Americans, 'progressive realisation' by this time applied not only to ESCR but to the whole UDHR:

[This] finds expression in the preamble to the declaration... proclaiming the declaration as a 'common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society ... shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance'. It finds expression also in the introduction to the articles dealing with social and economic

⁵⁴⁴ E/CN.4/65, United Kingdom amendments to Article 31 and 33 of the Draft Declaration on Human Rights

⁵⁴⁵ E/CN.4/82

⁵⁴⁶ A/C.3/SR.138, 15 November 1948, 510.

rights: ‘Everyone as a member of society... is entitled to the realization, through national efforts and international cooperation, and in accordance with the organization and resources of each State, of the economic, social and cultural rights set out below.’⁵⁴⁷

Against the backdrop of emerging domestic opposition against the US role in drafting an international bill of rights including in Congress, as well as rising international pressure within the negotiations (see below section 3.3.1), this umbrella text became an increasingly urgent US strategy aimed at avoiding taking on any immediate legal treaty obligations, but the notion of progressive realization was not only linked to ESCR rights, but to the whole Declaration, including CPR rights. With the adoption of the Article 22 language on ‘in accordance with the organization and resources of each State’, the precise US phrases on ‘maximum available resources’ and ‘progressive realization’ were lost in the drafting of the UDHR, although it is clear from the archives that these stood behind the US reasoning on this provision. Oddly however, these phrases were to later return during the drafting of the Covenant.

The drafting of Article 2.1 - a ‘chapeau’ clause for ESCR in the legally-binding Covenant

The US 1947 proposal for a ‘right to progress’ and its clauses on ‘maximum available resources’ and ‘progressive realisation’ made its comeback in May 1951, during the meetings of the 1951 Seventh Session of the Commission on Human Rights. At that point in 1951, the Commission was still drafting a joint Covenant that was to include both civil and political rights as well as economic, social and cultural rights, and the US proposals re-emerged as part of discussions over preambular ‘chapeau’ for the ESC rights to be included in the Covenant.

In the May 1951 session, negotiations started over the ESCR to be included in the joint Covenant, and a joint French/US proposal was submitted on 8 May 1951, proposing adding the phrase ‘achieving progressively the full realisation’ into a text that was grounded on the previous preambular text of UDHR Article 22:

‘4. Undertake, in accordance with their organization and resources, to take steps, individually and through international cooperation, by legislative or other methods with a view to achieving progressively the full realization of the rights recognized in this part of the Covenant.’⁵⁴⁸

The next day another revision in a French proposal on 9 May 1951 replaced the text ‘in accordance with their organization and resources’ (the agreed text of UDHR Article 22) with phrasing of ‘the maximum available resources’, proposing:

‘4. Undertake to take steps, individually and through international cooperation, to the maximum of the available resources, with a view to achieving progressively the full realization of the rights recognized in this part of the Covenant.’⁵⁴⁹

⁵⁴⁷ Hendrick 1948.

⁵⁴⁸ E/CN.4/615, May 8, 1951, 1, amending the proposal in; ‘E/CN.4/612,’ May 5, 1951.

⁵⁴⁹ E/CN.4/618, May 9, 1951, 1.

It was in this way, that the June-1947 American proposal made its way back, through a French proposal, into the text of the Covenant, substantially prefiguring what was to become ICESCR Article 2.1. And, once the General Assembly changed its position on the Covenant and called for the drafting of two separate Covenants, it was this preambular text that then became part of the preamble of the ICESCR, eventually becoming its Article 2.1. Tracing this story in more depth shows how the French delegate (Cassin) worked closely with the Americans to get their wording back into the text.

Tracing the drafting process in more detail - French-American collaboration

After the adoption of the UDHR in 1948, states decided to move ahead with the drafting of legally-binding instruments in 1949, and took up the existing draft of the Covenant that had been put aside in early 1948. The existing text of the Covenant (based on the original UK proposal) only included a narrow set of civil and political rights. But, in taking this text up again in 1949, there was a long debate over whether ESC rights should be added into the existing text. The US argued against, on the grounds that adding more provisions would slow down its finalisation, so it would be better to finalise this one and then develop a further Covenant for ESCR. Other delegations were adamant that ESCR must be included. This led to long debates over whether or not the Covenant should be divided into two Covenants on the different categories of rights or whether it should be one Covenant including both CPR and ESCR. In 1950 the GA instructed the Commission to integrate ESCR into the existing Covenant, and it was only in 1952 that the GA decided to develop two separate Covenants.⁵⁵⁰

Most of the drafting on the articles of ESCR took place in meetings over 1951, when it was envisaged that ESCR would make up a distinct Part III of one Covenant. Discussions emerged on a preambular article for Part III as part of an agenda item on a ‘general clause concerning economic, social and cultural rights’⁵⁵¹ over the period 8 to 11 May 1951. At this point, states were still arguing over whether or not there would be one or two covenants – and to some it seemed that this general clause was a precursor for separating the two Covenants. John Humphrey, agreeing with the USSR delegate that some states appeared to be trying to ‘write a covenant within a covenant’ complained that while he ‘realized that the Covenant would have to be in two parts with a separate system of implementation in each... the Americans and the French have carried this logic too far and they are now encumbering the economic and social part of the Covenant with umbrella clauses, general limitations clause, anti-discrimination clauses etc.’⁵⁵²

Many states submitted proposals for a general clause, but it was the French and US proposals that were discussed in most detail. The French proposal provided a long preambular-style text to introduce Part III of the Covenant, including an operative paragraph building on Article 22 of the UDHR, but adding

⁵⁵⁰ For a detailed discussion of the division of the Covenants, see e.g. Whelan 2010.

⁵⁵¹ E/CN.4/SR.231, 8 May 1951,1.

⁵⁵² Whelan 2010, 101.

(the American) proposal on progressive implementation, such that States parties ‘pledge themselves to take steps, both individually and through international cooperation, in accordance with their organization and resources, to ensure the progressive implementation of all these rights...’.⁵⁵³ Meanwhile, the US proposal offered three covering articles for Part III of the covenant – a non-discrimination article, a general article on state obligations, and a limitations clause.⁵⁵⁴ The US proposal in a sleight of hand attempting to weaken explicit language on ESCR, offered a general, chapeau article that included the notion of ‘economic, social and cultural progress’ instead of ‘rights’: ‘Each State party to the Covenant undertakes, within the framework of its organization and compatible with its resources, to promote by legislative or other methods conditions of economic, social and cultural progress and development for securing the rights recognized in this Part of the Covenant.’⁵⁵⁵ The USSR delegate (Mr Morosov) pointedly compared the US proposal on the general article for ESCR, with the general article for the CPR part of the covenant, arguing that it was ‘conceived in much weaker and less precise terms’ and would effectively enable governments to ‘circumvent their obligations to ensure an adequate standard of living for their peoples.’⁵⁵⁶

Other states became concerned that the reference to ‘resources’ might give the impression that this could be construed as a loop-hole, or an ‘escape clause’ – although Chairman Malik pointed out that Article 22 of the UDHR employed almost identical language.⁵⁵⁷ Developing states tried to clarify that this should be replaced with language making clear this was about the difficulties of developing countries, proposing alternative text: ‘in accordance with the level of their economic development.’ to avoid putting onerous responsibilities on developing countries⁵⁵⁸. Eleanor Roosevelt, speaking as the US delegate, also insisted that ‘organization and resources’ was not ‘tantamount to an escape clause’, but recognised the de facto situation that countries were differently organized (had different economic systems), and then suggested, making the link to resource limitations, that the obligations of governments should be ‘necessarily be linked to their respective national systems and available physical resources.’.⁵⁵⁹ Greece (Mr Eustathides) pointedly suggested this would in fact strengthen the obligations of states with substantial economic resources.⁵⁶⁰

France (Mr. Cassin) emphasised that the term ‘progressively’ was needed to qualify implementation, otherwise some states would not be able to ratify the Covenant. While the Lebanese delegate Malik assumed this referred to resources (and countered that some of the ESCR could be implemented

⁵⁵³ E/CN.4/612, 5 May 1951.

⁵⁵⁴ For the US proposals, see E/CN.4/610 and Add.1 and Add.2. The US proposals were eventually largely adopted. The provision on discrimination appears as Art 2.2, the limitations clause was largely adopted as Article 4, and the general article contributed to Art 2.1, as discussed further here.

⁵⁵⁵ E/CN.4/610/Add.1, 5 May 1951, 1.

⁵⁵⁶ E/CN.4/SR.233, 9 May 1951, 9.

⁵⁵⁷ E/CN.4/SR.232, 8 May 1951, 7.

⁵⁵⁸ E/CN.4/SR.233, 9 May 1951, 5.

⁵⁵⁹ *Ibid.*, 7.

⁵⁶⁰ *Ibid.*, 11.

immediately, such as equal pay for equal work and trade union rights.⁵⁶¹), it seems that Cassin was more concerned that the Americans would not ratify the Covenant unless ‘progressive realisation’ appeared in the preambular text. This would explain why Cassin was working with the Americans on re-introducing this language. Thus, the joint French/US proposal submitted on 8 May 1951, proposed adding the phrase ‘achieving progressively the full realisation’ into the preambular text.

The next day, (Cassin) then dropped text on the ‘organization and resources of states’ from a combined US-French proposal,⁵⁶² preparing a further French proposal which replaced this text with the phrase that states would undertake to ‘take steps to the maximum of their available resources.’⁵⁶³ The new operative paragraph in a revised French proposal read that States parties: ‘undertake to take steps, individually and through international cooperation to the maximum of the available resources with a view to achieving progressively the full realization of the rights recognized in this part of the Covenant.’⁵⁶⁴ It is this French proposal, dated 9 May 1951, that then substantially captures the American proposal with its key phrases regarding ‘progressive realization’ and ‘maximum available resources’, largely prefiguring what was to become ICESCR Article 2.1

All the states continued to discuss this draft preambular article, debating their different understandings of its provisions for the next three days. Questions were raised over whether resources referred to national resources or also those available from international assistance, and the extent to which some elements of ESC rights had to be implemented immediately, while others would need to be implemented progressively – although Uruguay (Mr Ciasullo) suggesting that this limitation might ‘represent a regression by comparison with Article 56 of the Charter’ which did not contain such limiting clauses.⁵⁶⁵ Despite a number of questions the French proposal was adopted, and thus the US managed to get their June-1947 text into the preambular provision for ESCR.

Despite its success, the US delegation, increasingly under pressure from deepening domestic opposition to US involvement in the drafting of the Covenants (see Section 3.3.1 below), later tried to weaken even their own proposed text. In 1952 at the Commission’s eighth session, the US made proposal to change ‘to the maximum of available resources’ to ‘with due regard to its available resources’.⁵⁶⁶ This was not accepted, so the US then proposed a revision to read ‘to the maximum of its available resources available for this purpose’, and in an increasingly conservative approach further away from public action of the state, introduced also an amendment for realization by ‘legislative or other means such as private

⁵⁶¹ Ibid., 10.

⁵⁶² E/CN.4/615

⁵⁶³ E/CN.4/618

⁵⁶⁴ E/CN.4/618.

⁵⁶⁵ E/CN.4/SR.236, 28.

⁵⁶⁶ E/CN.4/L.54

action.⁵⁶⁷ Many states resisted these US changes and further questioned ‘progressive realisation’ over the next few meetings⁵⁶⁸ and in the end the US agreed to revert to the earlier phrasing.⁵⁶⁹ By 1952, the US delegation was publicly setting out its case that it did mean this as a limiting clause:

‘Although the term ‘rights’ is used in both the civil and political articles and the economic, social and cultural articles, it is used in two different senses. The civil and political rights are looked upon as ‘rights’ to be given effect promptly. The economic, social and cultural ‘rights’ are looked upon as goals toward which countries ratifying the covenant would undertake to strive, achieving these objectives ‘progressively’ over a much longer period of time.

3) The manner in which the two groups of rights will be achieved is different. In the case of the civil and political rights, these are to be effectuated by the adoption of such legislative or other measures as may be necessary. In the case of the economic, social and cultural rights, these are to be achieved by many means and methods, private as well as public.... Many economic, social and cultural rights cannot be effectuated immediately because their effectuation is so dependent on available resources and in some countries available resources are not now sufficient for the immediate realization of these rights.’

4) [The] Complaint procedure... is expected to be applicable to the civil and political rights but not to economic, social and cultural rights because of the obligations with respect to these rights cannot be as precisely defined as in the case of civil and political rights.⁵⁷⁰

Few changes were made after that and by 1954 the Commission on Human Rights had finalised the drafting of both the ICESCR and the ICCPR passed these to ECOSOC and then the General Assembly for their finalisation. Sixteen years later, after the eventual adoption of both Covenants in 1966, the final text of Article 2.1 remained much the same as it had been in the Commission’s 1954 draft – and indeed, much the same as the very initial US draft of 1947. However, any Keynesian connotations of the phrase on ‘maximum use of available resources’ had long been lost. During debates between 1954 and 1966, in the shift towards discussions over issues of colonialism and the addition of a right to self-determination in the Covenants, attention shifted even more towards an understanding of the resource constraints of the developing states, and a concomitant duty of international assistance and cooperation. In the final detailed discussion before the adoption of Article 2.1, the meeting record reported that all the delegates speaking:

‘recognised that in view of the inadequacy of resources in many countries and the time needed to develop them, it was important to impose on States’ Parties only the obligation of achieving ‘progressively’ the realisation of economic and social rights. The considerable difficulties which would be experienced by the developing countries desirous of applying the Covenant were mentioned. It was also agreed that the development of resources in each country depended on the continuation and intensification of assistance and international cooperation.’

⁵⁶⁷ E/CN.4/L.54/REV.1 ‘Revised Amendment To Article 19 Of The Draft Covenant On Human Rights (E/1992), United States Of America’.

⁵⁶⁸ The US (Roosevelt) reiterated that ‘she failed to see any danger in the use of the word ‘progressively’...as some of the economic, social and cultural rights could not be enacted into law immediately. The political and civil rights might be immediately justiciable, but it would be wiser not to raise exaggerated hopes about the other rights...’ E/CN.4/SR.271, 12.

⁵⁶⁹ E/CN.4/SR.274, 15.

⁵⁷⁰ Simsarian 1952. 710–11.

In the end then, the final draft of ICESCR Article 2.1 includes language strikingly similar to the original US proposal in 1947, pointing to the strong influence of the US in framing the nature and scope of the obligations envisaged for ESC rights. However, the meaning changed significantly as it also became an increasingly urgent strategy of the US to limit the legal effect of the Covenant in asserting ESCR as rights. The US State Department lawyers came to push hard for Article 2.1 as a safeguard clause against ESCR as immediately enforceable legal rights (just as they pushed hard for a federal state clause as a strategy in the context of racial discrimination). As the international lawyers took over from the economists in the shaping of economic and social rights, the earlier conceptions of the New Deal economists working at the time of the Great Depression and its NRPB roots in the Keynesian implications of ‘maximum available resources’ were therefore quickly ‘lost in translation’, as were the potential implications as an exhortation for Keynesian fiscal policy.

The final text of ICESCR Article 2.1 came to be understood as a limitations clause subjecting ESCR to the limited availability of resources and progressive realization, and seen by many scholars as undermining the nature and scope of ESCR obligations. Nonetheless, as I note above, reading the phrase ‘maximum available resources’ with a Keynesian eye unsettles and casts new light on how this clause could be interpreted, particularly in the context of economic crises, and our own Great Recession. I turn to that in Section 4 on the evolution of the ESCR, including looking at how the UN Committee later interpreted this clause.

Before that however, I explore another part of the history of the nature and scope of ESCR, which lies in the curious case of right to property and the question over why it was included in the UDHR, but was never to be included in either of the legally binding Covenants.

3.2.3 The curious case of the right to property – the missing right?

As Franklin Roosevelt had shown, influenced by legal realists and institutional economists, establishing ‘new’ economic and social rights on an equivalent basis to ‘old’ classical rights, was critical to challenging the underpinnings of laissez faire economic liberalism. This in turn required questioning the ‘absoluteness’ and primacy accorded to the right to property in classical liberal theories of rights, and their taken-for-granted nature in orthodox economic theory. For this reason, Roosevelt’s ‘human rights’ emerged to counter the primacy of ‘property rights’ in his 1936 constitutional moment – a shift that was also reflected more broadly at the international level.

By 1945, these shifts within ‘western’ liberalism and towards ‘embedded liberalism’ were clearly reflected in the proposals for an international bill of rights, including in an explicit questioning of the sanctity and absolute character of the liberal right to property. For example, the then eminent legal scholar, Lauterpacht, in his proposal for an international bill of rights, produced in advance of the 1945 UN

Charter negotiations, explicitly excluded the right to property from his draft, explaining that while property was an important right, it should not be included within a list of rights described as ‘human rights’:

‘...in so far as the right to property is conceived as an absolute and inalienable right of man it finds no place in the draft. Deep social and economic changes have intervened since Locke considered property to be the most sacred right of all..... That character of sanctity and inviolability has now departed from the right of property....⁵⁷¹

Many contemporary critiques of human rights tend to elide human rights and property rights, as if they are one and the same thing, or as if human rights are merely a cover for the expansion of a ‘neoliberal’ capitalism. This is particularly true of critics employing the theoretical lens of Marxism, but it also true for many other scholars (and lawyers) who tend to take the relationship between human rights and property rights very much for granted. Many of these critics appear not to have noticed that, while the Universal Declaration of Human Rights does include a right to property, there is no right to property included in either of the legally binding Covenants, neither the ICCPR or the ICESCR. Indeed, as Shabas points out, the right to property has the ‘distinction of being the only article in the Universal Declaration of Human Rights with no counterpart in the multilateral treaties which were intended to give it binding effect.’⁵⁷²

This section therefore explores the drafting history of the right to property, as part of understanding the shifts within ‘western’ liberalism that had occurred, and as part of questioning the simplistic narrative that ‘western’ states supported only civil and political rights, while socialist states promoted economic and social rights. In looking at why the right to property was left out of the Covenants, I show how, in the context of the time, the ‘absoluteness’ of the right to property had come to be questioned, not only by communist and socialist states, but also by more liberal Western states, as Lauterpacht’s bill had illustrated. The drafting process of the UDHR and the ICESCR included intensely philosophical debates and disagreements over whether there was a particular element of property rights that could strictly fall into the category of ‘human rights’.

This drafting history also shows that, while the United States was in fact the most insistent supporter of the inclusion of a right to property, even the US position on the right to property shifted markedly from a position at the start of the UDHR negotiations that reflected this questioning of the absoluteness of property, towards a far more conservative position by the end of the ICESCR negotiations (under intense domestic scrutiny in the context of the ABA opposition and the Bricker amendment, as I detail further in Section 3.3.1).

⁵⁷¹ Lauterpacht 1945, 163.

⁵⁷² Shabas 1991, 136.

Morsink records how the discussions during the UDHR ‘were some of the most openly philosophical ones in which the drafters engaged.’⁵⁷³ In his review of the *travaux préparatoires* of the Covenants, Shabas also notes that ‘Scholars have been tempted to explain the absence of a ‘right to property’ provision in the Covenants as the result of ideological differences between the Western powers and the Soviet Union...’.⁵⁷⁴ However, he points out that

‘Careful review of the *travail préparatoires* (sic) demonstrates that there were frequent hesitations about the need to recognise the right in the Covenants and even, for that matter, in the Universal Declaration. It is also clear that there was unanimity on the importance of limitations on the right to property. Once the formulation ‘alone or in association with others’ was generally accepted in the Universal Declaration, it is hard to distinguish any real ideological agenda at work. If anything, the debates were sharpest between the United States and the United Kingdom, on such issues as the use of the word ‘arbitrarily’....’ The real conclusion to be drawn from the travail préparatoires is that the right to property was left out because it simply was not (considered) important or fundamental enough!⁵⁷⁵

Morsink and Shabas explore some of the wide-ranging disagreements over different definitions in differing national legal systems, the definition of ‘arbitrary’ in relation to expropriation, as well as whether it was an individual or collective right, and whether the right to property was a ‘positive’ or a ‘negative’ right. However, neither scholar fully explores the animated discussions over whether property rights could be considered fundamental human rights, or how the ‘absolute’ character of property should be subject to limitations necessary for promoting social welfare. It is these aspects that this section briefly explores in more detail, delving back into the *travaux préparatoires* of the UDHR and the ICESCR, as well as looking at the position of the US showing that, like its position on ESCR more broadly, the US’s own interpretation of the right to property also shifted over time, including as a response to domestic and international pressures during the drafting period.

Drafting the right to property – from the UN Charter to the UDHR

Many of the draft international bills of rights prepared for the 1945 San Francisco conference (and later submitted for the drafting of the Universal Declaration on Human Rights) included some form of right to property, although not as an absolute right.

In 1945, the proposal of Panama at the San Francisco conference (which had been drafted by the American Law Institute) presented a fairly standard formulation that ‘Everyone had a right to own property under general law. The state shall not deprive any one of his property except of public purpose and with just compensation’ though it noted some limitations in that ‘the right to private property is subject to the right to the state to expropriate property in pursuance of public policy, just compensation being made to the owner.’⁵⁷⁶ By contrast, the proposal of Chile at San Francisco (which was the initial

⁵⁷³ Morsink 1999, 139.

⁵⁷⁴ Ibid., 158–59.

⁵⁷⁵ Ibid..

⁵⁷⁶ UNCIO Doc 2G/7/(2).

draft of the American Declaration on the Rights and Duties of Man, prepared by the Inter-American Juridical Committee), took a much more ambitious, socialistic approach, suggesting that the right to property meant the state had a duty to ensure everyone a minimum level of property necessary for a decent life:

‘Every person has the right to own property. The state has the duty to cooperate in assisting the individual to attain a minimum standard of private ownership of property based upon the essential material needs of a decent life looking to the maintenance and dignity of the human person and the sanctity of home life. The state may determine by general laws the limitations which may be placed upon the ownership of property, looking to the maintenance of social justice and to the promotion of the common interest of the community.’⁵⁷⁷

The US position in 1945 was based on its 1942 draft ‘Declaration of Human Rights’. In that draft, the US had included an article not on the right to property *per se* - rather the right was framed in terms of non-discrimination with respect to the rights to life, liberty and property. Significantly the draft suggested that any deprivation of the right to property should be subject, not simply to ‘due process’ (as prescribed in Article VI of the existing US bill of rights) - but rather should be subject to a broader standard of the ‘humane and civilized processes’ of the law:

Article III: 1. All persons shall enjoy equality before the law with respect to life, liberty, property, enterprise and employment, subject only to such restrictions as are designed to promote the general welfare. 2. No person shall be deprived of life, liberty or property except in accordance with humane and civilised processes provided by law.⁵⁷⁸

By 1947, at the start of the UDHR negotiations, this same article was still the official US position and was included in mid-1947 ‘US Suggestions’ we explored above. A US position paper on the right to property in the archives of the US International Social Policy Subcommittee on human rights, dated May 5, 1947 noted that the right to property would ‘undoubtedly arouse controversy in the drafting of an international bill of rights’ noting that other states were tending away from a private enterprise system and would likely call for ‘greater social control over the means of production and distribution or use of various types of property’.⁵⁷⁹ It did support including the right, suggesting that property rights were a part of ‘larger freedom’ - ‘property enables a person to live his life in larger freedom’, but noted that ‘attitudes towards property are in a state of flux in many countries’⁵⁸⁰ and that many of the draft proposals for international bills of rights rather focused on its ‘negative aspects’ in terms of non-discrimination

⁵⁷⁷ As submitted to the UN Secretariat for the UDHR drafting, see E/CN.4/AC.1/3/Add.1, 168. It continued ‘The right of private property, includes the right to the free disposal of property, subject, however to limitations imposed by the state in the interest of maintaining the family patrimony. The right to private property is subject to the right of the state to expropriate property in pursuance of public policy, just compensation being made to the owner.’)

⁵⁷⁸ US Subcommittee on HRW, 3/HRW D-78-47, dated 3 December 1942, RG 353, Box 110. Note that Article VI of the US Bill of Rights ‘no person (shall).. be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation’.

⁵⁷⁹ US Subcommittee on Human Rights and the Status of Women, Position Paper: Right to Property, 5 May 1947, S/HRW D-35/47, NARA, 1.

⁵⁸⁰ Ibid.

protections (through equality before the law) and the prohibition of deprivation of property. At the start of the UDHR negotiations, the US position thus first also followed this non-discrimination approach (with its article focused on equality before the law), although later the US position became far more conservative (partly in relation to the ‘one-man crusade’ of Frank Holman and the broader conservative reaction to the US position in the drafting of the UDHR and the Covenants.⁵⁸¹)

John Humphrey, as he prepared the first draft of the international bill of rights, was aware of all of these previous proposals, and he included a right to property in his first 1947 draft of the international bill of rights. This was then slightly revised in Cassin’s next draft, formulated not as an absolute right, but as a limited ‘right to own personal property’, and allowing for state regulation of property.⁵⁸² Significantly, the right to property was never included in the draft of the binding Covenant (that was discussed in parallel with the draft Declaration) as the draft Covenant was based the UK draft that focused narrowly on civil rights.⁵⁸³

The first discussions over this article on the right to property came up in June 1947, when it was agreed that, as the representative of France (Cassin) noted the discussions would be difficult given ‘enormously different conceptions regarding the right to property’.⁵⁸⁴ One significant element of the debate was over limitations on the right to property for public interest and public welfare. This was linked to debates over ‘personal property’ versus ‘real property’ and ‘private property’ versus the ‘social functions of property’. It was also linked to a debate over which elements of property rights could properly be included as part of a fundamental human right to property.⁵⁸⁵ The representative of Chile, (Santa Cruz) suggested that it might be possible to arrive at an agreement along the lines that, ‘everyone has the right to personal property in certain cases, and that general property is subject to the interest of the community.’⁵⁸⁶ Lebanon also suggested that ‘the unlimited character of the ownership of private property could not be considered a fundamental right’ but it was ‘self-evident that men (sic) cannot live without personal property; that this...was as essential and fundamental as almost any other right’ and that ‘even the most socialistic constitutions refer to the fact that a man must have something which is his own’.⁵⁸⁷

The ‘western’ states also agreed on the need for some limitations. For example, the US (Roosevelt as the Chair) suggested that ‘the need for the limitation of property rights, or the consideration that the rights of other people ought to be considered’ could be covered by a general article on limitations that ‘in the

⁵⁸¹ Kaufman 2011.

⁵⁸² See U.N.Doc E/CN.4/21 dated 1 July 1947.

⁵⁸³ The US did later try to add a right to property into the right to life clause of the draft Covenant in May 1948, but this was rejected by other Member States - and then the legally binding Covenant was left aside in favour of finalising the Declaration.

⁵⁸⁴ U.N.Doc E/CN.4/21 dated 1 July 1947, 9

⁵⁸⁵ E/CN.4/AC.1/SR.8, 8-11

⁵⁸⁶ E/CN.4/AC.1/SR.8, 8-11

⁵⁸⁷ E/CN.4/AC.1/SR.8, 11

exercise of his rights, everyone is limited by the rights of others'. Roosevelt continued 'property rights of an individual... would be implicitly limited by the rights of others.'⁵⁸⁸ The UK also suggested that 'little remained of the absolute right to property' since it was 'subject to a mass of control in every country' and suggested it should be omitted altogether, or included in a very limited form such as 'stating that everyone has a right to own such property as is necessary in order to enable him to live a decent life.'⁵⁸⁹

In the second and third session of the Commission on Human Rights in May 1948, the draft article was refined further, but a key debate remained over the extent of state regulation of the right and over whether it was possible to establish that 'at least part of the property held should be held as of essential right' given that 'the purpose of the declaration, which was to establish essential rights'.⁵⁹⁰ Many other issues were also raised, including regarding whether the right should be made subject to different national legal and property systems (the USSR pleaded for wording 'in accordance with the laws of the country where the property is located' and that property could be enjoyed individually and 'in association with others'). Another heated issue was the meaning of 'arbitrary' in relation to the deprivation of property, which was also linked to concerns over whether the 'nationalisation' of resources by states would be subject to international supervision.

After much debate, a decision was made to confine the discussion on the right to property to a subcommittee which included only the US, the UK, France and the USSR.⁵⁹¹ The final proposal that emerged from that subcommittee in the May 1948 session read, with far simpler wording than previous drafts: '1. Everyone has the right to own property, alone as well as in association with others. 2. No one shall be arbitrarily deprived of his property.'

This made no reference to the earlier heated debates over 'personal property' necessary for a life in dignity. Nor did it include a clear limitation on the right to property in the public interest, although there was a general agreement that Article 17 should be read with Article 29 which set out limitations on all rights. This text was eventually adopted, and included in the UDHR as Article 17 - but these same debates were later to forcefully re-emerge in the drafting of the Covenant.

Negotiations of the right to property for the ICESCR

When it came to the drafting of the legally binding Covenants, much of the discussion over the right to property during occurred in 1951 - during the discussions on ESCR, at a time when it was still planned that ESCR were to be included in one Covenant (in its part III).

⁵⁸⁸ E/CN.4/AC.1/SR.8, 11

⁵⁸⁹ E/CN.4/AC.1/SR.13, 17-18

⁵⁹⁰ E/CN.4/AC.1/SR.38, 2-7. See also E/CN.4/AC.1/SR.59, 3.

⁵⁹¹ E/CN.4/SR.107

During the 1951 seventh session of the Commission, on 7 May 1951, it was the US which proposed adding the right to property into the list of social rights, offering simple wording based on the UDHR article, with an amendment from Uruguay that ‘Private property shall not be taken for public use without just compensation.’ However, the Chilean representative (Santa Cruz) pushed back on including the right to property as a social right, suggesting that this would mean going over the same arguments as during the drafting of the UDHR - ‘the Commission would be wasting its time if it tried to define the concept of the right to own property, since it would find itself beset by the same difficulties as had led the General Assembly to limit itself in the Universal Declaration to an exceedingly simple wording.’⁵⁹² He argued that, during the UDHR negotiations, there had been a ‘majority view that the deprivation of property other than basic property (that was home, personal and household articles) was not a violation of a fundamental right of the individual.’⁵⁹³ He later added that he could not accept a ‘monstrous’ Uruguayan amendment which seemed to give protection to all types of property and seems to suggest that any State action to limit the right would constitute a violation of a fundamental human right:

‘the Commission would be making a serious mistake if it set up the right to own property as a fundamental human right, without any limitation. The fundamental human rights were those inherent in the human personality, those that gave man worth and dignity. It would be monstrous to accept the right to own property as a fundamental right without specifying what property was meant.’⁵⁹⁴

Uruguay (Ciasullo) was upset with his amendment being described as ‘monstrous’ - he argued that he had not been defending an absolute right to property – rather it was important to protect the individual right to property and at the same time the right of society to regulate it. The US representative (Roosevelt) also clarified that her delegation ‘did not maintain that the right to own property was an absolute right’, but thought that its limitation should be covered by a general clause applicable to all the economic, social and cultural rights in the Covenant.⁵⁹⁵

As the debate became more heated, Denmark (Sorensen) expressed frustration and suggested deleting the article, since the right to property was not a fundamental right - ‘Human beings could develop their personalities to the full without protection of property rights’.⁵⁹⁶ France (Cassin) proposed a solution by adding a limitation clause that read: ‘No one shall be arbitrarily deprived of his property. Expropriation shall occur only in cases of public necessity or utility established by law and provided equitable compensation is made account being taken where necessary of the origin of property and the nature of the possessions expropriated.’ But the USSR (Morosov) disagreed given the risk that specifying limitations posed to national sovereignty. Frustrated after further fruitless debate, a vote was called on the Danish proposal to delete the right to property: ‘The Commission on Human Rights decides not to

⁵⁹² E/CN.4/SR.230, 18.

⁵⁹³ Ibid., 19.

⁵⁹⁴ Ibid., 27. Chile brought up the issue of the seizure of enemy property, as well as expropriation and the rights of aliens (which were better protected in international law than for nationals).

⁵⁹⁵ E/CN.4/SR.231, 4

⁵⁹⁶ Ibid., 7.

include at present in the International Covenant on Human Rights an article on the right to property'. This was carried 10 votes to 6 with 2 abstentions.⁵⁹⁷

The issue came back however at the Commission's 1952 eighth session, but was again adjourned without resolution. There was heated debate over several issues, including over a new Lebanese and French proposal that the language on property should be revised to 'States should undertake to respect' so that it would not be subjected the ESCR-related clause on 'progressive realization'. But Chile threatened to vote against the Covenant if the draft article was approved:

It seemed out of place for a covenant that was designed to protect the rights of the individual and to promote his wellbeing and personal development, to protect property rights including the rights of monopolistic or foreign enterprises which controlled the natural resources of a country and thereby impeded the attainment of the objectives of the covenant. The Chilean delegation was prepared to accept a provision limiting the right of the individual to own property to the property needed for a livelihood and for development of the individual in society. No further extension of the right to property could be regarded as a fundamental right of the individual.⁵⁹⁸

The French delegate insisted that a provision had been included on due process with regards to expropriation, precisely in order to reflect the social aspects of the right to property (noting that in France at that time, the nationalization of key industries had been written into the law, and compensation granted).⁵⁹⁹ He also clarified that the right to property would not extend to referring to taxes, to which everyone was necessarily subject.⁶⁰⁰ There was no any clear agreement however, and against the wish of the US, the debate was adjourned once again.

It was not discussed again until two years later in 1954 at the Commission's tenth session, when the US again urged for its inclusion. By that point the US delegation had changed - Eleanor Roosevelt had been summarily sacked by the new Eisenhower administration, with her place taken over by Mrs Lord. By that point, the new US administration had also announced a new US position that it would never ratify the Covenants (this is discussed below at Section 3.3.1).

The 1954 meeting of the Commission discussed the right to property over 3 days.⁶⁰¹ In the meeting on 25 February 1954, the then head of the US delegation, Mrs Lord, re-introduced a US proposal with

⁵⁹⁷ Ibid., 17. Shabas, and Banning following him, appear to erroneously suggest that this Denmark resolution was about the ICCPR, but in fact it related to the joint Covenant which at that point was still to include both CPR and ESCR rights. It is important to recall that the GA instructed the Commission to include ESCR in the draft Covenant in December 1950, only reversing its decision in 1952 to agree with two separate Covenants.

⁵⁹⁸ E/CN.4/SR.303, 3-4.

⁵⁹⁹ Ibid, 6.

⁶⁰⁰ Ibid, 5. This debate raised another big issue at stake related to 'expropriation', given the economic context of the time, both related to a marked move towards a nationalization of industries in the 'western' states (that had included requisitioning property held by large monopolies and by non-nationals protected by provisions in international private law), as well as the nationalization of resources in developing states and the 'fair treatment of foreign capital and existing contractual relations – see E/CN.4/SR.415.

⁶⁰¹ Detailed debates were held over four days between Thursday 25 February 1954 and Tuesday 2 March 1954. See EC/CN.4/SR.413-SR.418.

identical language to Art 17 of the UDHR be included in the Covenant.⁶⁰² She reiterated that the US had made its position clear and would not be signing the Covenants, she urged the Commission not to 'weaken' the text of the Covenants by leaving out the right to property and reversing progress made in the UDHR. She insisted that under the law of many countries, including the United States, it was a 'fundamental principle that the Government could not interfere with or seize private property except for public purposes and in return for just compensation.' Several countries objected to the proposal or called for further amendments, including the Philippines, Egypt, Lebanon, USSR, Pakistan, Greece and Chile.

Australia (Whitlam) brought attention back to the economic context, reiterating that the 'sacredness' of the right to property was now gone, and noting that limitations for the purposes of public purposes, taxes and general welfare were essential:

'...it was unrealistic to imagine that any idea of inviolability or sacredness was attached to the concept of ownership in the modern world, where far-reaching economic and social changes had directly affected that concept. If the right was to be expressed in the covenants, it was essential to bear in mind the economic and social conditions to which the ownership and enjoyment of property were subject.... Thus, with regard to expropriation, it would be necessary to find an expression covering the concepts of 'public necessity', 'utility' and 'public purposes... It was also essential to include reference to other limitations on the right to property, such as taxes, death duties and general public welfare regulations.'⁶⁰³

The UK representative (Hoare) shared Australia's view: 'The difficulties in drafting an article on the right of property arose from the fact that the entire conception of property and the rights attaching thereto and of the relationship of the owner to society and the State was still fluid.'⁶⁰⁴ Others expressed a range of other concerns, including also 'expressing the importance of recognising the interests of the community and of limiting the right to property in relation to the public interest, safety and morals, the general welfare, public order and social progress.'⁶⁰⁵

Many states proposed further changes and amendments and eventually the US added in those proposed by India, Lebanon and Egypt, agreeing on a clause making the right to property subject to 'such reasonable restrictions as may be imposed by general law in the public interest'.⁶⁰⁶ The representatives of Chile and Uruguay however insisted on revising this to include 'social progress', with an amendment reading: 'as the public interest and social progress required'.⁶⁰⁷ Another subcommittee was formed to merge the amendments, producing a combined article, with clear limitations on the right to property, that read:

⁶⁰² E/CN.4/SR.413, held on 25 February 1954.

⁶⁰³ Ibid, 8-9.

⁶⁰⁴ Ibid, 10.

⁶⁰⁵ E/CN.4/705, 8.

⁶⁰⁶ E/CN.4/SR416

⁶⁰⁷ E/CN.4/705, 8.

‘1. The states parties to this Covenant undertake to respect the right of everyone to own property alone as well as in association with others. This right shall be subject to such limitations and restrictions as are imposed by law in the public interest and in the interest of social progress in the country concerned.

2. No one shall be deprived of his property without due process of law. Expropriation may take place only for consideration of public necessity or utility as defined by law and subject to such compensation as may be prescribed.’⁶⁰⁸

At this point however, this was too much for the US delegate, Mrs Lord, who refused to accept this limitation on the right to property to pursue ‘social progress’.

The draft was therefore put to the vote. Oddly there were separate votes for the first and second clauses – which were both separately adopted. But then there was another vote on the article as a whole, and in what Shabas describes an ‘astonishing’ final result, delegates rejected it (by a vote of seven votes to six, with five abstentions). Unable to agree on how to overcome this ‘deadlock’, the frustrated delegate of Uruguay then moved to an adjournment *sin die*.⁶⁰⁹ At that point, the *sin die* motion was overwhelmingly adopted (by 12 votes to two with 4 abstentions)⁶¹⁰ leaving the Covenants forever without a formal, legally binding right to property.

By the end of that session, its tenth session in 1954, the Commission had completed its work on the ICESCR as well as the ICCPR (which also never included a right to property), and the texts of Covenants were left to lengthy, further deliberations in ECOSOC and the General Assembly.⁶¹¹

Shabas suggests that, reading between the lines, that in the end the exclusion of the right to property from the Covenant can be laid at the foot of the US. By that time, not only had the US position hardened in terms of the limitations that would be put on the right to property, but the US had also shocked the Commission with its 1953 no-treaty policy. As Shabas points out:

‘the decisive stage in the rejection of the Sub-Committee draft [came] during the Tenth Session came in conjunction with the defeat of a US amendment, and this after the United States had declared that it would not sign the Covenants.’⁶¹²

This story shows then, how the drafting of the right to property was strongly influenced by contemporaneous questioning of the ‘absoluteness’ or ‘primacy’ of the right to property – and the need for certain limitations on this right, including to secure economic and social rights. As Australia had put it, there was no longer ‘any idea of inviolability or sacredness attached to the concept’ of the right to

⁶⁰⁸ E/CN.4/L.321

⁶⁰⁹ An adjournment *sin die* ends consideration of the item indefinitely, literally from the Latin ‘without assigning a day’ for a further meeting or hearing.

⁶¹⁰ E/CN.4/SR.418, 6-7.

⁶¹¹ For a discussion of the period 1954-1966 and the debates over that time, including over colonialism and the addition of a right to self-determination, which are not reviewed in this thesis, see Whelan 2010.

⁶¹² Shabas 1991, 158.

property and it was critical to include limitations to cover ‘public purposes’, taxes, and general public welfare regulations.⁶¹³

This was a debate not linked only to socialism, but also to debates within liberalism over classical liberal rights to life, liberty and property (and the questioning of the classical rights by the legal realists and economic institutionalists explored above). This story also shows how the US had a profound influence on the drafting of the right – not only on its inclusion in the UDHR, but also on its eventual exclusion from the legally-binding Covenants. At the same time, it is important to understand the context in which these debates were being waged, and how this changed over time, not only internationally but also domestically in the US, to which we now turn.

⁶¹³ E/CN.4/SR.413, 8-9.

3.3 From ICESCR to the Cold War and back to legal and economic orthodoxy

My purpose in offering this resolution is to bury the so-called covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection.'

Senator John Bricker, *Congressional Record*, 1951

Moyn has dramatically declared that the 1948 proclamation of the Universal Declaration on Human Rights was 'less than the annunciation of a new age than a funeral wreath laid on the grave of wartime hopes',⁶¹⁴ and that human rights 'died in the process of being born'⁶¹⁵ - but he has not explored why, preferring rather to examine their (re)emergence in the 1970s.⁶¹⁶

This section briefly explores (one strand of) how 'human rights' – and specifically discussions of 'economic and social rights' - were closed down in the US context. This shows how, despite its early support of economic and social rights, the US administration shifted to strong opposition not only to ESCR, but to the international human rights treaties more generally. Against the backdrop of domestic resistance from anti-communists, segregationists and isolationists, the US position became more conservative during the brief period of drafting of the UDHR between 1947 and 1948 (as described above), but shifted more dramatically after 1949 (including with respect to the right to property). The US position shifted decisively against ESCR once the drafting moved on to the legally-binding Covenants, and once the domestic opposition heated up, notably in a campaign led by the American Bar Association and the 'Bricker amendment' which explicitly sought to 'bury' the Covenants. Then in 1953, under the new Republican administration of President Eisenhower, the US dramatically announced that it would refuse to become party to any international human rights treaty - firmly laying the funeral wreath on US engagement with human rights.

This shift has often been set against the international backdrop of the Cold War, but it should also be set against fervent opposition to New Deal liberalism within the US domestic context, as well as broader efforts to reassert the classical liberal rights and economic orthodoxy. This section first looks at the impact of the ABA campaign and the Bricker amendment on the 1953 shift in the US position, before exploring broader attacks on ESCR (including Friedrich Hayek's) and the eventual return of neoclassical economic orthodoxy, culminating in Reagan's 1987 economic bill of rights and his four freedoms, designed precisely to reverse Roosevelt's.

⁶¹⁴ Moyn 2012, 2.

⁶¹⁵ Citing an NGO chief Moses Moskowitz, in *ibid.*, 47.

⁶¹⁶ Although he gives hints in his more recent work, Moyn 2018.

3.3.1 The United States - From proposition to opposition to 1953 withdrawal

While New Deal liberalism culminated in Roosevelt's four freedoms and his 1944 economic bill of rights, these rights were never constitutionalised in the United States. As I have shown above however, they were, partly through US influence, constitutionalised in the UN Charter and the international bill of rights.

Opposition within the United States to the 'constitutionalisation' of these rights at domestic, and then at the international level, was however fierce for many reasons – particularly after the rapid return to isolationism as the internationalism of the immediate post-war moment receded, and anxieties over international supervision of domestic policy (including on racial discrimination), as well as fears of the threat of communism. This section however, focuses just on one small element of that domestic opposition – Frank Holman's 'one-man crusade' – and the profound impact it had on the US involvement in the drafting of the international bill of rights (including on their increasingly conservative position on ESCR and the right to property).

I show how, while Holman was arguing against Communism as the Cold War began to heat up, he was also engaging in directly challenging the 'alien' and 'un-American' nature of New Deal constitutionalism, reasserting the primacy of the traditional rights to life, liberty and property and trying to avoid the formalisation or 'freezing' of Roosevelt's 'new' rights into the UDHR and the Covenants. With the powerful platform of the American Bar Association and its influence over Congress, he along with many others, sought to erase the recent history of New Deal liberalism and equate ESCR as rights imposed on the US by the USSR – engaging in historical revisionism already at that time, and contributing to a persistent narrative that continues to influence the perception of ESCR today.⁶¹⁷

Holman's crusade against the human rights treaties as 'a blank cheque for a new Constitution'

Frank Holman, who was later to become President of the American Bar Association in 1947, had launched his crusade in 1945 at the time of the drafting of the UN Charter. The conservative, anti-New Deal lawyer ridiculed the basic premise that economic issues should even be addressed in the Charter to preserve the peace at national and international levels: 'The fallacy that both World Wars were caused by economic distress or inequalities has so permeated the American mind that many think world peace is attainable only by a levelling out of the world's economic inequalities and that the surest way to do this is to have a 'world government' which can enforce a planned economy everywhere.'⁶¹⁸ He also directly attacked ideas for an international bill of rights as trying to impose a new economic philosophy:

I do not believe that either of the world wars were caused by the absence of an International Bill of Rights or, primarily by subnormal or abnormal social and economic conditions in any country.... Therefore, in my

⁶¹⁷ See for example the interpretation in Barsalou 2015.

⁶¹⁸ Holman 1946b, 643.

opinion, we are not dealing with a so-called International Bill of Rights that will assuredly contribute to world peace. We are dealing chiefly with a missionary spirit on the part of social and economic reformers to establish throughout the world their social and economic ideas....⁶¹⁹

Attacking the Roosevelt administration's legal realist critique of the Supreme Court, Holman's view was that judges had a duty state the law as it is, unchanging in all contexts, rather than adapting it to changing social and economic circumstances or democratic opinion, criticising Roosevelt's efforts at shifting the philosophy of the Court in his 'court-packing' plan:

'Another tendency which reached the peak of its advance in the days of the court-packing plan.... supports the specious doctrine that any action by the courts in holding act of Congress or state legislatures unconstitutional is usurpation of power on the part of the courts....[but]... the judicial function was never intended to register the changing opinions of social or economic pressure groups or even to register the opinion of a majority of the people as to what the Constitution and the law ought to be – but to interpret dispassionately and declare the Constitution and the law as they exist – whether such interpretation satisfies a majority of the people or the President and his advisers or the members of his party or no one at all.'⁶²⁰

A dedicated McCarthyite, he also argued that 'A nation-wide housecleaning is urgently need to rout out the Reds in Government who are burrowing through our structures of government like prairie dogs. Too many Communists today hide behind the star-spangled cloak of Americanism.'⁶²¹

Writing in the American Bar Association's journal in November 1948, just before the signing of the UDHR in December 1948, Holman warned that the international bill of rights would have 'dangerous implications' for the US and that the US public seemed to be unaware of the extent to which the UDHR was 'at variance with our fundamental concept of individual rights and freedoms'.⁶²² Holman was outraged that 'One of the most fundamental rights protected by our American form of government, that of private ownership of property' had been left out of the draft Covenant (not mentioning that it was included in the draft UDHR) and directly attacked the US State Department for this 'failure'.⁶²³ He lobbied hard against the State Department, writing to the Secretary of State on the dangers of US participation and criticizing the lack of protection of the right to property, receiving an assurance that the UDHR would be 'merely declaratory in character' and would have no legal effect.⁶²⁴

Writing on the 'so-called human rights' in 1949, Holman questioned the re-definition of 'human rights': 'the sponsors of the international human rights program would have this phrase include not only basic rights affecting life, liberty and property, as heretofore known to lawyers, but also a whole category of

⁶¹⁹ Holman 1948, 985.

⁶²⁰ Holman 1946a, 193. This also disproves Moyn's odd argument in his recent work on this same period of history, where he declares that New Dealers 'understood social rights to be about reshaping the economy', but never mentioned 'judicial enforcement, let alone intended to set off a debate about how passively (or for that matter actively) judges ought to behave.' Moyn, 2018, 81.

⁶²¹ Holman 1946a.

⁶²² Holman 1948, 1081.

⁶²³ Ibid., 986.

⁶²⁴ Brucken 2013, 143.

social and economic benefits.⁶²⁵ Seeking to reassert the primacy of the traditional rights, he challenged the State Department's involvement in the Covenant negotiations, arguing that:

“Our government seems to have lost sight of the basic principles of human liberty and freedom as set forth in our Constitution and Bill of Rights....and is attempting to sell a new concept of basic human rights to the American people.⁶²⁶

For Holman, the ESCR provisions constituted ‘an agreement to adopt the New Deal on an international scale’, requiring a ‘welfare type of government’, with rights that were not the usual rights that imposed ‘limits’ on government, ‘but on the contrary impose so-called economic and social duties upon government, the fulfilment of which will require a planned economy and a control of government of individual action.’⁶²⁷ He criticised Eleanor Roosevelt as not ‘trained in legal draftsmanship; she is primarily a social reformer’⁶²⁸ and suggested that it was ‘the immediate and important duty of lawyers to study and analyse before it is too late.’⁶²⁹

He insisted that any international human rights treaty would amount to a ‘blank check for a new Constitution’, and campaigned hard against the UDHR, but even harder against the legally binding treaties, concerned that they would amount to a rewriting of American law – and would allow the federal government to invalidate the states’ racial discrimination laws as well as transforming the US into a ‘socialistic state’.⁶³⁰ Holman insisted that any international human rights treaty (including the Genocide Convention) would threaten US national sovereignty, interfere with the states’ prerogatives over racial segregation, and ‘promote state socialism, if not communism, throughout the world’, destroying the ‘American way of life’.⁶³¹

He criticised the civil and political rights for their ‘loose language’, but was more apocalyptic on ESCR.⁶³² For example, on the comparatively soft language of the (then draft) Covenant’s provision of right to education, he insisted that this would mean that ‘education in the future shall be an instrumentality for propagandizing the citizens of America and of the world toward the promotion of a collectivist society set for in the Declaration’.⁶³³ And he threatened that the US would be forced, ‘in accordance with our greater resources we are to provide, or in a large part provide, social security for all the rest of the world.’⁶³⁴

⁶²⁵ Holman 1949, 479.

⁶²⁶ Ibid., 482.

⁶²⁷ Holman 1948, 1081.

⁶²⁸ Holman 1949, 479.

⁶²⁹ Holman 1948.

⁶³⁰ Holman 1950.

⁶³¹ Ibid.

⁶³² Holman 1950.

⁶³³ Ibid., 788.

⁶³⁴ Ibid., 789.

By 1950, Holman was declaring that American Bar Association must ‘explain this great legal and constitutional issue’ so the people can decide ‘whether they wish to follow further the Pied Pipers of Internationalism who are leading them to a complete change in their form of government’⁶³⁵. Ignoring the fact that it was less than 15 years previously that Franklin Roosevelt had taken this choice to the people in his 1936 ‘constitutional moment’, Holman engaged in revisionist history in his own time. With his unsubtle conflation of New Deal liberalism with Soviet communism, Holman also challenged the ‘alien’ and ‘un-American’ nature of New Deal constitutionalism, and reasserted the traditional rights to life, liberty and property, against the formalisation of Roosevelt’s ‘new’ rights in the UDHR and the Covenants. Holman was not alone - other conservative academics, including William Fleming, were also writing in the American Bar Association’s journal, that ESCR were a ‘danger to America’ and bore ‘the heavy imprint of Soviet philosophy’.⁶³⁶ With the powerful platform of the American Bar Association and its influence over Congress, these commentators thus worked to equate ESCR as rights imposed by the USSR (ignoring that other ‘Western’ states also supported the inclusion of ESCR in the Covenant.⁶³⁷)

These attacks on the constitutional implications of the human rights treaties, fell in fertile ground in the environment of McCarthyism where there was pressure on everyone to demonstrate publicly that they were not ‘Reds’ or communist spies. As Kaufman further details, the Cold War rhetoric of the Truman administration had itself contributed to conservative fears, legitimizing them in the public mind.⁶³⁸ She points to historians such as Richard Freeland who have argued that the Truman administration launched a propaganda effort against the USSR, as a way to get approval for the Marshall Plan, although this produced repercussions that the Truman White House could not control:

‘The campaign implanted the idea in the public mind that the United States was imminently threatened by a massive, ideologically based assault upon everything Americans valued. This exaggerated representation of the dangers of international and domestic communism created the emotional and conceptual context within which America reacted to the Soviet explosion of the atomic bomb, the fall of China, the outbreak of the Korean War, and convictions of Alger Hiss.’

Holman’s other central fear was that international treaties would take precedence over the United States Constitution, threatening American’s Bill of Rights. As the UDHR was being drafted, two Supreme Court cases on racial discrimination sought to invoke the human rights provisions of the UN Charter to

⁶³⁵ Ibid., 790.

⁶³⁶ Fleming 1951, 742.

⁶³⁷ For example, although the UK was against, Australia consistently supported ESCR in the Covenant, introducing its own proposals. In the sixth session of the Commission on Human Rights in 1950, the representative of Australia was explicit about ESCR challenging the inequalities produced by the *laissez-faire* economic model, insisting ‘The inequalities arising in human society from *laissez-faire* policies in relation to modern industrialization must be mastered speedily if the deepening tensions within society were to be stayed and allayed, or even if the coherence of present-date society were to be preserved. It was even more important to be conscious of the necessity of preventing avoidable inequalities from arising or increasing...[and] if freedom, justice and peace were not possible in the world without remedying such inequalities, then economic and social rights must be regarded as inseparable from the rights already under consideration by the Commission – mainly civil rights – and as having no less a claim to protection by law.’ See E/CN.4/SR.184, 4.

⁶³⁸ Kaufman 2011.

condemn discriminatory policies, giving him fodder for his argument.⁶³⁹ In the spring of 1949, a California Court of Appeal decision in *Sei Fujii v. The State of California* also held that California's 1920 Alien Tort Land Law (that prevented non-citizens, including Japanese residents, from ever owning land) was invalid in the light of the *UN Charter*. Although that case was made on questionable grounds, and was overturned the following year by the California Supreme Court, the decision became a lightning rod in the domestic debate, galvanising the emerging opposition to the UN and to the US role in drafting the international human rights treaties and eventually leading to the Bricker Amendment controversy.

In 1951, Republic Senator John W. Bricker of Ohio had introduced a proposal for a constitutional amendment that would severely limit the 'treaty-making power' of the US executive and its impact. Bricker labelled the human rights Covenant, the 'Covenant on Human Slavery or subservience to government', and declared that: 'My purpose in offering this resolution is to bury the so-called covenant on human rights so deep that no one holding high public office will ever dare to attempt its resurrection.'⁶⁴⁰ Bricker's resolution insisted that 'The President of the United States should instruct United States representatives at the United Nations to withdraw from further negotiations with respect to the covenant on human rights, and all other covenants, treaties, and conventions which seek to prescribe restrictions on individual liberty.'⁶⁴¹ By 1953, Bricker had proposed another amendment that came very close to being approved by the Senate, and although it was not adopted, it precipitated a final turn in the US position on the drafting of the treaties under the new Eisenhower administration, which announced in 1953 its decision that it would refrain from signing or ratifying any of the human rights treaties.

The shifting the US position during the drafting of the Covenants

The US position during the drafting of the UDHR as well as the Covenants was profoundly influenced by this domestic campaign, as well as broader opposition from conservative forces, including the democratic Dixiecrats, and the isolationists in Congress.

At the adoption of the UDHR in December 1948, in her final statement to the UN General Assembly, Eleanor Roosevelt had already stated clearly that the UDHR was 'not a treaty', and would have no binding legal effect. Once drafting the process to translate the UDHR into a legally-binding Covenant started to move forward in 1949, the US delegation then first pushed for two separate covenants (an ICCPR and a separate ICESCR) and then adopted a strategy to pushed harder for Article 2.1 as a safeguard clause against ESCR as immediately enforceable legal rights, as well as for a federal-state clause that would protect 'state's rights' with respect to racial discrimination issues. These pre-emptive strategies aimed to

⁶³⁹ The first was a federal level case of the US Supreme Court *Oyama v. California* on racially restrictive rules that prevented African Americans from owning land. The second was at the state level, in a California Supreme Court case *Perez v. Sharp*. See *Ibid.*, 100–101.

⁶⁴⁰ Senator John Bricker, *Congressional Record*, 1951

⁶⁴¹ As cited in Roberts 2015, 117.

disarm the domestic opposition, including opposition of ABA and the Dixiecrats on racial legislation, and reflected a shift in public opinion away from the UN and international treaties, not only the human rights treaties but also the Genocide Convention, which the Senate refused to ratify in 1949.

In 1951, with the Bricker Amendment coming before the Senate, and after the decision of the General Assembly to include ESCR and CPR in one binding Covenant, the US delegation moved to further water down the language on ESCR. The Department of State instructed the US delegation to limit provisions on ESCR 'to general language along lines proposing the promotion of economic, social and cultural progress and development'.⁶⁴² This legal sleight of hand was to emphasise 'economic, social and cultural progress', rather than 'rights'.⁶⁴³ Reporting back to the President and the Department of State after the 1951 session of the Commission on Human Rights, Roosevelt recounted that for many developing states, economic and social rights had become an aspirational symbol and standard by which they hope to prod their own governments towards efforts for social improvement, and they now resented the 'unwillingness of the United States to state them in terms of rights'.⁶⁴⁴ She warned that the Soviet Union would use this for propaganda against the US. Thus, the US delegation was caught between pressure at the international level, and strong domestic opposition as she saw that 'unless very carefully safeguarded, their inclusion in the Covenant would mean the rejection of the whole Covenant by the Senate'.⁶⁴⁵

The opposition to including ESCR as legally-binding rights, reflected the cautionary approach of the State Department lawyers who had always cautioned against including them in a legally binding Covenant, but the delegation was thus increasingly worried about the rejection of the Covenant by the Senate. In the minutes of a meeting of the US delegation to the General Assembly in Paris November 1951, Roosevelt described how US NGOs present were not happy with the US position on the Covenant, but did not 'seem to realize the practical difficulties involved, especially in connection with ratification by Congress'. From the advice of her State Department lawyers, she recognised the 'tremendous legal difficulties encountered by the US', though she was concerned by the 'danger that the US might seem to be opposed to the cause of human rights'.⁶⁴⁶ Asked by the Senators who had joined the US delegation

⁶⁴² US Government, 'Department of State Instruction to the United States Delegation to the Seventh Session of the Commission on Human Rights, April 1951', FRUS UN 1951 735-738. The instructions set out 3 options for phrasing of the language on ESCR: 1) a short paragraph emphasising economic, social and cultural progress with due regard to the organization and resources of the state 2) a longer paragraph emphasising progress but listing a range of elements including 'the development of high levels of education, health, leisure, cultural and living and working conditions in larger freedom for all and with due regard to the organization and resources of the State' and 3) a much longer option with a list of measures, policies and provisions (but not rights) for health, education, standard of living, collective bargaining, policies for wages to ensure a just share of the fruits of progress to all and a minimum living wage, work, and basic social security, even allowing for a reference to 'full employment' if insisted on by other delegations.

⁶⁴³ Roberts 2015, 213; See also the discussion in Whelan 2010, 89-90 Note however that Whelan sees this as the genesis of Art 2.1, unaware of the earlier US Suggestions from 1947.

⁶⁴⁴ US Government, 'Memorandum of Conversation, May 29 1951' FRUS UN, 1951, 741.

⁶⁴⁵ *Ibid.*, 742.

⁶⁴⁶ US Government, 'Minutes of the Tenth Meeting of the United States Delegation to the General Assembly, Paris, November 13 1951' FRUS UN 1951, 766-67.

to the GA why US was supporting two covenants, Roosevelt emphasised that it was very important that the US ratify the civil and political rights covenant, ‘even if it were necessary to have a big debate in Congress on the anti-discrimination clause’, but expressed the fear that the US would ‘never ratify economic and social rights in a treaty’.⁶⁴⁷

By 1952, ABA’s domestic campaign attacking the human rights treaties was generating even greater domestic opposition, raising the issue not only in the Senate, but also in the public mind. Eleanor Roosevelt declared that: ‘there is a great need for the State Department to undertake a general public relations program to meet the attack on US participation in the United Nations which is now concentrated on the work in the human rights field... It is time to meet the attacks being made on the United Nations which take the line that it is a highly dangerous organization’⁶⁴⁸ To avoid this becoming an issue in the 1952 election campaign, she insisted on the need ‘for the State Department to realize, meet and inform public opinion’.⁶⁴⁹ However, Truman lost the Presidency and, after the election of a new Republican President (Eisenhower), Eleanor Roosevelt was summarily sacked in 1953 by the Eisenhower administration and replaced by Mary Lord as the US lead delegate at the Commission on Human Rights. The new administration ordered a ‘complete review of our policy respecting the promotion of human rights through the United Nations’.⁶⁵⁰ The internal memo in the archives explicitly recorded the criticism of ABA and the subsequent Bricker amendment:

‘In recent years vocal criticism has developed in the United States concerning United States participation in the drafting of these Covenants, with the expression of fear by many that such international treaties would supersede the Constitution and impose obligations upon the United States destructive of some of the basic concepts of the United States Constitution. Such criticism, initially formulated by a Committee of the American Bar Association is reflected in the proposed ‘Bricker Amendment’.⁶⁵¹

It further records that ABA had called for the US to cease participating in the drafting of this Covenant (while recognising that this was opposed by other groups, such as the New York City Bar Association). However, it also warned that ‘Should the United States abandon the Covenants, it is certain that before their completion, the texts would substantially deteriorate and articles would be included utterly unacceptable to the United States.’⁶⁵² The archives contain detailed memos setting out the pros and cons of various positions, including discussing withdrawing completely from the drafting of both Covenants to dampen support for the Bricker amendment.

⁶⁴⁷ Ibid.

⁶⁴⁸ US Government, ‘Memorandum of Conversation, by an Adviser of the United States Mission at the United Nations (Hyde), New York, May 15, 1952.’ FRUS, 1952–1954, United Nations Affairs, Volume III, United States policy regarding the draft United Nations covenants on human rights: the 1953 change, 1537.

⁶⁴⁹ Ibid, 1538.

⁶⁵⁰ US Government, ‘Memorandum by the Assistant Secretary of State for United Nations Affairs (Hickerson) to the Secretary of State’ FRUS 1952–1954, United Nations Affairs, Volume III: the 1953 change, 1542 See note 1.

⁶⁵¹ Ibid., 1543.

⁶⁵² Ibid., 1544.

The decision was then made and the US suddenly announced to the world that it would not accept 'foreign interference' in its domestic affairs and would not become a party to any human rights treaty approved by the United Nations. On April 8, 1953 at the 1953 session of the Commission, Ms Lord, the new US representative, announced this change in the US position, suggesting that '...the United States is proposing a new and urgent approach to the promotion of human rights....my Government has concluded that in the present stage of international relations, it would not ratify the covenants.'⁶⁵³ Despite a strategy of telegraphing this change in advance to US allies in the negotiations, the reaction in the room was emotional and very negative. Writing urgently in a telegram back to capital, Lord noted that some representatives 'would have preferred less frankness now' on the US position, with some implying that the 'statement was timed to sabotage work on the covenants.' Even allies were not supportive:

'Our new action program did not get very strong support from our Western allies—Australia, Belgium, France, Sweden, and the United Kingdom. As a matter of fact, I had made an informal agreement with the representatives of these countries that they would not attack our program. I was disappointed that they not only referred to the importance of the Covenants and our not signing them but also went fairly far in pointing out the difficulties of such a program.'⁶⁵⁴

The telegram also called for damage control:

In light reactions and speeches after our statement urgently advise international-minded reporters be given background story by Secretary explaining that forthright statement in commission was needed at this time re covenants to meet arguments proponents Bricker Amendment.... Also urge consideration further explanation for domestic and international opinion that without forthright statement at this time serious risk restriction on treaty-making which might have crippled American participation in UN in areas of collective security in which treaties essential while in human rights area objective can be attained without treaties.'⁶⁵⁵

The new Republican administration of President Eisenhower thus laid the funeral wreath on US engagement with human rights, in a decision that continues to redound today. For her part, Eleanor Roosevelt could not hide her disgust in her blistering public attack on this US position, noting (as described above): 'We have sold out to the Brickers and McCarthys. It is a sorry day for the honor and good faith of the present Administration in relation to our interest in the human rights and freedoms of people throughout the world'⁶⁵⁶ and that 'the Eisenhower Administration does not want to fight a section of the American Bar Association, or the isolationists or those who might vote for the Bricker amendment.... The Administration . . . should feel . . . embarrassed.'⁶⁵⁷

⁶⁵³ US Government, 'Statement Made by the United States Representative (Lord) before the Commission on Human Rights, Geneva, April 8 1953' FRUS, 1952–1954, United Nations Affairs, Volume III: the 1953 change, 1953), 1571–72.

⁶⁵⁴ Ibid., 1578.

⁶⁵⁵ 'The Consul General at Geneva (Ward) to the Department of State Geneva, April 8, 1953, 7 P.M' FRUS 1952–1954, United Nations Affairs, Volume III: the 1953 change, 1953), 1574

⁶⁵⁶ Eleanor Roosevelt, *My Day* (9 Apr. 1953).

⁶⁵⁷ Eleanor Roosevelt, *My Day* (10 Apr. 1953).

3.3.2 From Roosevelt's 1944 Second bill of rights to Reagan's 1987 'Economic bill of rights'

Beyond the attack of ABA lawyers, there were broader attacks by economists on human rights and 'reform liberalism', which aimed at reasserting classical legal and economic orthodoxy. These efforts were eventually to result in the return of neoclassical economic orthodoxy of the Reagan/Thatcher era, culminating in Reagan's 1987 economic bill of rights and his four freedoms, designed precisely to reverse Roosevelt's.

In 1944, at the same time as Roosevelt's 1944 Second bill of rights, and after the 1943 list of rights and freedoms of the National Resources Planning Board that preceded it, Friedrich Hayek's 1944 'Road to Serfdom' (which was aimed at a UK audience) proved a sudden hit in the US, given its attack on the instinct for 'planning' and a greater role of the state to ensure 'economic security' for the ordinary man (sic) (although it had little immediate impact on economic policy).⁶⁵⁸ By 1976, at the time of the entry into force of the two human rights Covenants, Hayek was ridiculing economic and social rights in his 1976 *Mirage of Social Justice* and also equating New Deal liberalism with Soviet communism. Hayek wrote: this 'new trend was given its chief impetus through the proclamation of President Franklin Roosevelt of his 'Four Freedoms'' which found its 'definite embodiment' in the UDHR. But in an inconsistent sleight of hand, he then attacked the UDHR as an incoherent attempt 'to fuse the rights of the Western liberal tradition with the altogether different conception deriving from the Marxist Russian Revolution'.⁶⁵⁹ Hayek argued that the new 'economic and social rights' were in fact incompatible with the classical western liberal rights and would destroy capitalism – since they could not be guaranteed by the 'spontaneous order of the market' but would require 'planning' in terms of a role of the state in the economy. Hayek saw no inconsistency however in using the force of government to ensure the classical rights to property and freedom of contract in this 'spontaneous' order (ignoring the lessons of the institutional economists who long before had pointed out the 'laissez-faire' was a myth as government power was still being used to enforce the rights of some over others.)

For Hayek, economic and social rights not only debased the word 'right', but were a slippery slope to totalitarianism. Echoing his earlier 1944 polemic '*The Road to Serfdom*' which had directly attacked any government intervention in markets for social justice or 'economic security', and argued directly against Keynesian 'full employment' for leading to 'totalitarianism'⁶⁶⁰, Hayek also condemned the idea of 'full employment' on which these ideas of these rights were based:

⁶⁵⁸ Hayek 1944 A short version was adapted for American audiences and published in The Readers Digest in 1944.

⁶⁵⁹ Hayek 1999, 102–4.

⁶⁶⁰ Hayek 1944. See especially Ch 13 and Ch 14.

'It is evident that all these 'rights' are based on the interpretation of society as a deliberately made organization by which everybody is employed.... And so require that the whole of society be converted into a single organization, that is, made totalitarian in the fullest sense of the word.'⁶⁶¹

Despite Hayek's polemic and fear-mongering in the 1940s and his suggestions that Keynesianism would produce totalitarianism, Keynesian policies were in fact largely followed over the post-war years from the 1940s to the 1970s, along with elements of the US 'residual' welfare state. Those years were characterized by solid economic growth, fewer economic crises and a 'dramatic downward distribution of income and wealth', as the changes in the rules, institutions and role of the state in the economy had shifted the distributional impacts under the regulated markets of 'embedded liberalism'.⁶⁶²

However, in the 1970s, this Keynesian consensus started to unravel following the oil crises of the 1970s that produced spiralling inflation at the same time as rising unemployment. This called into question the Keynesian economic model (or at least the version of it that Joan Robinson had called 'Bastard Keynesianism') and precipitated a swing back towards the classical economic liberalism and neoclassical economics,⁶⁶³ led by Hayek along with other economists such as Milton Friedman (both won Nobel prizes for economics in the 1970s)⁶⁶⁴, who reasserted the classical liberal rights of property and freedom of contract, and (against Keynes) re-affirmed that 'free' markets would be inherently stable, efficient and self-correcting if only governments would refrain from intervention (reversing the lessons of the Great Depression).

Rolling back the lessons of the institutional economists as well as the Keynesian economists, this saw the re-emergence of the mathematical models of neoclassical economics, which in its modern form insisted that that 'an unregulated general equilibrium maximizes social welfare', and that 'Left to its own devices, without any government involvement, the perfectly competitive market will gravitate to that level of output and prices that is socially optimal.'⁶⁶⁵ There was a return to a faith in market relations as voluntary and non-coercive, and a belief in the justice of market outcomes and the impossibility of the existence of powerful economic actors.⁶⁶⁶ Against the lessons of the 'heterodox' economic theories of the institutionalists and Keynesians (discussed in the first part), there was a return to a faith in the formalist, deductive logic of the neoclassical economic model - which is timeless, context-less, and universally applicable in the sense that it can be applied at all times in all places –one-size fits all.⁶⁶⁷ This signalled a move back towards neoclassical economic models based on equilibrium and assumptions of a self-regulating economy that buttressed economic (neo)liberalism and its 'free market fundamentalism' (while

⁶⁶¹ Hayek 1999, 104.

⁶⁶² Krugman 2007, 39.

⁶⁶³ Mogdigliani, 1997 cited in Tabb 2002.

⁶⁶⁴ Hayek 1944; Friedman and Friedman 2002.

⁶⁶⁵ DeMartino 2002, 58.

⁶⁶⁶ See generally on neoclassical economics versus the heterodox economists, Waligorski 1997.

⁶⁶⁷ For a substantive discussion of this point, see Tabb 2002. This is relevant for example in the case of structural adjustment which is imposed in much same model in all contexts.

taking-for-granted state enforcement of a legal framework protecting the right to property and freedom of contract, as the earlier institutional economists who challenged the ‘myth of laissez-faire’ had pointed out).

Alongside the ending of the ‘Cold War’, a modern version of economic liberalism (later named by its critics as ‘neoliberalism’) came to underpin the governments of Ronald Reagan and Margaret Thatcher, and animated the ‘structural adjustment’ policies that the IMF and the World Bank promoted across the developing world. This version of economic (neo)liberalism encouraged rolling back the (social role of the) state in the regulation of the economy, through liberalization, privatisation, deregulation and decentralization (including financial liberalisation) despite the earlier lessons learned during the Great Crash and the Great Depression. It also set the stage for the dramatic reversal of the redistributive rules and regulations that had reduced inequality in the post-war period, and inequality started to rise from the 1970s onwards. As Hobsbawm detailed:

‘Those of us who lived through the years of the Great Slump still find it almost impossible to understand how the orthodoxies of the pure free market, then so obviously discredited, once again came to preside over a global period of depression in the late 1980s and 1990s, which once, again, they were equal unable to understand or to deal with. Still, this strange phenomenon should remind us of the major characteristic of history which is exemplified: the incredible shortness of memory of both the theorists and practitioners of economics.’⁶⁶⁸

By 1987, this ‘revolution’ culminated in Reagan announcing his own 1987 ‘Economic Bill of Rights’, effectively reversing Roosevelt’s 1944 ‘Economic Bill of Rights’. In this rarely cited initiative, Reagan countered Roosevelt’s ‘four freedoms’ with his own four freedoms:

‘Over the past 40 years, the growth of government has left our citizens with less control over their economic lives. What America needs now is an Economic Bill of Rights that guarantees four fundamental freedoms:

- The freedom to work.
- The freedom to enjoy the fruits of one's labor.
- The freedom to own and control one's property.
- The freedom to participate in a free market.’⁶⁶⁹

As Reagan’s manifesto further explained, his ‘freedom to work’ was to be secured by reducing government regulation and unnecessary restrictions on the individual’s pursuit of their livelihoods (in other words, they would be ‘free’ from having to join a union), as well as by the privatisation and contracting out of government services (on the assumption the private sector would create more jobs) - reversing the lessons of the institutional economists on strengthening the bargaining power of workers, and the Keynesian insistence that the private sector was not always able to create sufficient jobs to ensure

⁶⁶⁸ Hobsbawm 1996, 103.

⁶⁶⁹ Ronald Reagan, *America’s Economic Bill of Rights*, 3 July 1987, available at *Public Papers of the Presidents*, The American Presidency Project, <http://www.presidency.ucsb.edu/ws/?pid=34513>

full employment. In Reagan's manifesto, the 'freedom to enjoy the fruits of one's labor' meant reducing taxes and restoring balanced budgets by making every new government program 'deficit-neutral', again challenging Keynesian policy prescriptions to adjust government deficits to the economic circumstances of the time (and to avoid austerity in times of crisis). On the freedom to own property, Reagan's bill promised to 'restore your constitutional rights' and to strengthen intellectual property protection. His 'freedom to participate in free markets' promised to strengthen freedom of contract ('the right to contract freely for goods and services and to achieve your full potential without government limits on opportunity, economic independence and growth') and to reform the welfare system, as well as promoting free trade for American enterprise.⁶⁷⁰

Reagan's 1987 economic bill of rights thus reasserted the primacy of property rights and freedom of contract, and reinforced the rolling back of the positive role of the state in the economy, reversing the New Deal's 'reform' liberalism and Roosevelt's 'human rights' and marking the height of the return to liberal legal and economic orthodoxy.

⁶⁷⁰ Ibid.

4. EVOLUTION: JURISPRUDENCE OF THE UN COMMITTEE ON ESCR

As I have shown above, the emergence of economic and social rights occurred in the United States in the context of the Great Depression and the (liberal) challenge to economic liberalism, which in turn shaped their inclusion in the international bill of human rights in the UDHR and the ICESCR. After the adoption of the Covenants in 1966 however, there was little further formal elaboration of the rights until after the establishment of the UN Committee on Economic, Social and Cultural Rights in 1987.

This section explores how economic and social rights were elaborated in the 1980s and 1990s onwards in the 'jurisprudence' of this UN Committee on Economic, Social and Cultural Rights. I show how economic and social rights were defined in this period, arguing that they were elaborated again in the context of economic crisis and again in the context of a challenge to the resurgence of a modern form of laissez-faire liberalism (later labelled 'neoliberalism' or 'market fundamentalism' by its critics⁶⁷¹) that characterised the Reagan (and Thatcher) administrations and was epitomized in the 'Washington Consensus' of the international financial institutions. I show how the Committee began to elaborate the nature and content of economic and social rights against the backdrop of the severe human costs of the shock therapy of 'structural adjustment' imposed across the developing world and the transition to market economies across Eastern Europe and the former USSR. Much of the Committee's work can be seen as a call to 'humanise' economic policy and to put limits on the suffering of people from the negative impacts of the 'rolling back of the state' and of 'aggressive market forces', drawing on critiques of structural adjustment, including those by UNICEF and UNDP and influenced by the economist Amartya Sen. However, I also argue that many of the earlier insights from the Keynesian and institutional economists that shaped ESCR at their emergence have been lost in the modern elaboration of these rights from the 1980s onwards.

I show how the Committee interpreted Article 2.1 of the Covenant, by building on the understanding from the *travaux préparatoires* of the concept of 'maximum available resources' as a limitation clause on ESCR, but attempting to set a 'minimum core' or a floor below which expenditures and the realisation of the rights should never fall even in times of crisis. Although this interpretation sought to challenge the imposition of structural adjustment and austerity, this was a very different approach to the earlier exhortation for Keynesian fiscal policy to spend more, not less, in times of economic crisis.

I also show how with the development of its tripartite 'respect, protect, fulfil' framework of obligations, the Committee sought to challenge the classical liberal dichotomy of 'negative' versus 'positive' rights. This broke down the dichotomy by emphasising that both CPR and ESCR involved cost-free, negative obligations to refrain from intervention, as well as costly positive obligations to take action. It also reiterated the regulatory role of the state, challenging the model of the 'minimal state'. Although this

⁶⁷¹ Stiglitz 2009, 346–7.

challenged the priority accorded to traditional civil and political rights as rights, over economic and social rights as merely expensive 'aspirational goals', this did not touch on the issues that had animated the earlier institutionalists on the role of the state in the economy (including markets are structured by the state enforcing particular kinds of rights and obligations, including the rights of property and freedom from contract) and did not explicitly challenge the shifting in the 'working rules' of the economic game, even as liberalisation, deregulation and privatisation worked to 'disembed' the market from the 'web' of constraints institutionalised during the post-war era of 'embedded liberalism'.

I argue then that although these rights re-emerged in the context of a challenge to the re-emergence of a modern form of 'laissez faire' liberalism, the elaboration of economic and social rights in this era were attenuated and circumscribed by the much more constraining environment of economic thought in the 1980s in the discursive context of 'neoliberalism'. With the loss of confidence in Keynesianism, the shift away from 'embedded liberalism' and the insistence on TINA ('there is no alternative'), along with the lack of a strong alternative economic paradigm, the Committee had little powerful economic theory to draw from in shaping its interpretation and elaboration of the rights. There is evidence of some influence of one of the dominant heterodox economists of the time, Amartya Sen, who critiqued the assumptions of neoclassical economic theory, promoting a positive conception of freedom and 'capabilities' and replacing the focus on economic growth with a focus on human development. However, Sen's work was less 'progressive' than the institutional economists of the first 'law and economics movement' and less prescriptive than the Keynesians, offering fewer intellectual resources for challenging economic (neo)liberalism. Many of the earlier theoretical insights of the 1930s that shaped ESCR during the Great Depression have thus been lost in ways that have circumscribed the definition of these rights in the normative elaboration by the Committee on ESCR.

Moving on to examine the context of our more recent 2008 economic crisis, I suggest that the immediate aftermath of deepest crisis since the Great Depression generated a massive, globally coordinated Keynesian fiscal response at the policy level amongst governments, and a questioning of the neoclassical economic model amongst economists. However questioning rapidly receded and was replaced by a deepening entrenchment of economic neoliberalism and attempts among a number of states to 'freeze' orthodox economic policy prescriptions into law. Indeed, the contemporary trend towards what has been called the 'constitutionalisation of austerity' marks the culmination of a full reversal from earlier (New Deal) efforts to constitutionalise the anti-austerity policies of economic Keynesianism (as in the draft 1945 Full Employment Bill).

While the Committee has responded by reiterating its position on the importance of protecting ESCR in times of crisis against economic prescriptions of austerity, and has set out new tests for retrogression and for policy changes, as well as proposing a 'human rights impact assessment' in advance of loans from the international financial institutions (such as the IMF and the World Bank), its interpretive framework

has had little analytical purchase in confronting the crisis and in counterbalancing the deepening retrogression in ESCR. I therefore suggest that recovering the insights of the era of the Great Depression – and drawing on their more modern equivalents – may be useful, otherwise human rights risk being, as Moyn has posited, a 'powerless companion'⁶⁷² to the further entrenchment of modern neoliberal form of 'laissez faire constitutionalism'. This section then ends by signalling a further future risk that, without a deeper engagement with economics and macroeconomic policy, the Committee, like the human rights world more generally, also risks missing the need to develop concepts to address the new shift towards the extra-ordinary monetary policy of 'quantitative easing', and its distributional effects, which have accelerated already extreme levels of inequality since the Great Recession.

4.1 Establishing the Committee on Economic, Social and Cultural Rights

Although at the time of adoption of the Covenants in 1966, the UN General Assembly insisted that the rights of the ICESCR and the ICCPR were interdependent and indivisible, the two Covenants included significantly different provisions on their monitoring mechanisms,⁶⁷³ and the UN Committee on Economic, Social and Cultural Rights was not established until 11 years later in 1987.

While the ICCPR mandated a body for monitoring the treaty, the Human Rights Committee (to be made up of independent experts and charged with examining state reports and complaints) the ICESCR instead required States to submit reports to the UN's Economic and Social Council (ECOSOC) 'on the measures they have adopted and the progress made in achieving the observance of the rights' and indicating 'factors and difficulties affecting the degree of fulfillment of obligations'.⁶⁷⁴ The reason posited for these two approaches was the perceived differences in the nature and scope of ESCR in contrast to CPR⁶⁷⁵ which emerged in disagreements over the 'means of implementation' for the different sets of rights during the drafting process. While there had been proposals for a Committee for the ICESCR (e.g. Lebanese representative made a detailed proposal for a 'Committee on Economic, Social and Cultural Rights' in 1951 (to be comprised of fifteen members with 'recognized experience' in the field and nominated States Parties) this was rejected.⁶⁷⁶ Much later, at the very end of the drafting process in 1966, the representative of Italy also made a proposal for an '*ad hoc* Committee of Experts' and the US

⁶⁷² Moyn 2014.

⁶⁷³ Alston 1987, 351–52.

⁶⁷⁴ See ICESCR, Articles 16-19.

⁶⁷⁵ Although Alston and Simma have cynically observed that an 'unstated reason was that most states preferred to entrust implementation to a political body over which they could exercise full control, rather than a specialist body that might seek to develop either independence or expertise, or worse still, both.' Alston and Simma 1987, 748.

⁶⁷⁶ UN Doc E/CN.4/570 and Revised UN Doc E/CN.4/570/Rev 1, 1951. See also Alston 2002.

even presented a proposal for an independent Committee, but no agreement was reached except for the compromise text included in the Covenant.⁶⁷⁷

The debate over the nature of the rights and the perceived need for different supervision mechanisms also animated the (largely US-led) push for dividing the Covenants into two separate Covenants, and the drafting of the ICESCR's Article 2.1 (an article that became an increasingly urgent strategy of the US to avoid legally-binding obligations, as I have argued above). In 1952, James Simsarian, then the legal adviser to the US delegation, suggested that:

4) [The] Complaint procedure.... is expected to be applicable to the civil and political rights but not to economic, social and cultural rights because of the obligations with respect to these rights cannot be as precisely defined as in the case of civil and political rights.⁶⁷⁸

This American view prevailed, and with a change of heart in the General Assembly, the Covenant was split into two different Covenants, solidifying the different 'nature' of the rights and their differing monitoring provisions. This then left the ICESCR without a dedicated 'treaty body' to monitor its implementation.

Several attempts were made to establish an independent committee between 1954 and 1985, but all were unsuccessful.⁶⁷⁹ Once the ICESCR entered into force, progress in meeting its provisions was therefore monitored by ECOSOC under a series of sessional working groups. However, this process turned out to be so 'patently inadequate', that in 1985, ECOSOC itself decided to establish a new monitoring body - a Committee on Economic, Social and Cultural Rights (CESCR) to be composed of 18 experts, paralleling the ICCPR Human Rights Committee.⁶⁸⁰ Thus, unlike the other human rights 'treaty bodies' established by their treaties (or additional protocols), the Committee on Economic, Social and Cultural Rights was created *post facto* by ECOSOC resolution.⁶⁸¹ Nonetheless, most commentators agree 'that the Committee on Economic, Social and Cultural Rights now operates in practice (and is treated by States) in much the same way as the other bodies that supervise compliance with the global human rights treaties'⁶⁸² and this has been confirmed by the GA resolution on the strengthening of the treaty body system.⁶⁸³ Although there remain complaints about the ESCR Committee's perceived weaknesses (especially from governments),⁶⁸⁴ it has now become the authoritative monitoring body of State reports

⁶⁷⁷ For details, see Alston 1987; Alston 1992.

⁶⁷⁸ Simsarian 1952, 710–11.

⁶⁷⁹ For details, see Odello and Seatzu 2012, 24.

⁶⁸⁰ Alston and Simma 1987, 750.

⁶⁸¹ E/RES/1985/17, 28 May 1985.

⁶⁸² Alston 2002.

⁶⁸³ See A/RES/68/268, 21 April 2014, para 11.

⁶⁸⁴ Way 2005, 224–25. [...many of the problems frequently criticized have been deliberately built into the structure of the Committee and the reporting process...[and] must also be understood against the background that many governments remain reluctant to have their human rights records examined by an international supervisory body...]

under the ICESCR (and more recently also receiving individual complaints under the 2008 Optional Protocol), and has played a critical role in the elaboration, interpretation and formalization of the meaning and content of ESCR rights.

The Committee's jurisprudence has been developed through its 'Concluding Observations' on States parties reports,⁶⁸⁵ but more analytically through its 'General Comments' which, following the example of the Human Rights Committee, have served as 'a means of laying down some solid foundations for the future development of its jurisprudence.'⁶⁸⁶ It issued a number of General Comments from 1989 onwards on procedural and substantive aspects of the Covenant, to define the normative content of many of the specific rights. Since 1991, the Committee has also published public Statements and Open letters on issues of particular concern or as contributions to international conferences that have further served to interpret the rights. In addition, it explored a number of issues in depth through holding a Day of General Discussion on a specific topic during each of its sessions⁶⁸⁷. Before looking below at the interpretations of the Committee and the evolution of economic and social rights, I set these developments in the economic context of the time, for the light that this throws on the Committee's work, showing how 1987 became a watershed year for ESCR.

4.2 Economic crisis and structural adjustment - challenging (neo)liberal orthodoxy?

The new Committee – which held its first meeting in 1987 – was established against the backdrop of the height of the eras of the Reagan and Thatcher governments, the end of the Cold War, as well as the rise of the 'Washington consensus' and a resurgence of economic belief in the superiority of free markets over government intervention in the economy in neoclassical economics and what came to be called 'neoliberalism'⁶⁸⁸.

In 1987 US President Ronald Reagan had announced his own 'economic bill of rights' (as detailed above) and UK prime minister, Margaret Thatcher announced 'there was no such thing as society, only individuals'.⁶⁸⁹ Under the slogan that 'There Is No Alternative' (TINA) and 'government is the problem, not the solution', new economic policies highlighted the need for liberalization, deregulation and privatization in favour of a 'minimal state' that refrained from intervention in the economy (or at least the kind of intervention that protected people against the vicissitudes of the market). Social policies

⁶⁸⁵ Concluding Observations are part of the report adopted by the Committee after its review of the State.

⁶⁸⁶ Alston 2002, 494.

⁶⁸⁷ Alston describes this as an 'innovative' initiative of the Committee to set aside one day at each session to 'focus upon 'one specific right or a particular aspect of the Covenant in order to develop in greater depth [the Committee's] understanding of the relevant issues.' Ibid., 491–93.

⁶⁸⁸ For a critical history of the rise of neoliberalism, see generally Harvey 2005; For an alternative account, that also offers an analysis of the fall of Keynesianism and the rise of monetarism, see Stedman Jones 2012.

⁶⁸⁹ Thatcher 1987.

came increasingly under pressure and Keynesian full employment fiscal policies were abandoned in favour of a monetary policy designed to quell inflation, regardless of the consequences for employment. This political and economic project, which as Harvey colourfully describes, constituted the rise of ‘neoliberalism’, was a project that effectively aimed to disembed markets from the ‘web of social and political [institutional] constraints’ that it had been made subject to in the era of ‘embedded liberalism’, a web that served to restrain the ‘economic power of the upper classes’ to accord labour ‘a much larger share of the pie’.⁶⁹⁰ Although as Harvey also notes, this theory’s ‘distrust of state power sits oddly with the need for a strong and coercive state necessary to defend the rights of private property, individual liberties and entrepreneurial freedoms.’⁶⁹¹

In a different form, but with similar substance, these policies were also promoted through the IMF and the World Bank under structural adjustment programme in a package labelled as the ‘Washington Consensus’.⁶⁹² Williamson’s distillation of the ten main policy prescriptions of this new economic consensus put a high priority on ‘fiscal policy discipline’ as well as the liberalisation and deregulation, while concomitantly strengthening the legal framework for private property rights:

1. Fiscal policy discipline, with avoidance of large fiscal deficits relative to GDP;
2. Redirection of public spending from subsidies (‘especially indiscriminate subsidies’) toward broad-based provision of key pro-growth, pro-poor services like primary education, primary health care and infrastructure investment; [earlier versions focused more on the reduction of public expenditure in toto]
3. Tax reform, broadening the tax base and adopting moderate marginal tax rates;
4. Interest rates that are market determined and positive (but moderate) in real terms;
5. Competitive exchange rates;
6. Trade liberalization: liberalization of imports, with particular emphasis on elimination of quantitative restrictions (licensing, etc.); any trade protection to be provided by low and relatively uniform tariffs;
7. Liberalization of inward foreign direct investment;
8. Privatization of state enterprises;
9. Deregulation: abolition of regulations that impede market entry or restrict competition, except for those justified on safety, environmental and consumer protection grounds, and prudential oversight of financial institutions;
10. Legal security for property rights.⁶⁹³

Through the imposition of loan conditionality by the international financial institutions, in the aftermath of the ‘Third World debt crisis’ of the 1980s, these contractionary, ‘structural adjustment’ policies were implemented aggressively and often rapidly through ‘shock therapy’, first in Latin America and then in Sub-Saharan Africa - and, following the collapse of the Soviet Bloc, also in Eastern Europe. The debt

⁶⁹⁰ Harvey 2005, 11–23.

⁶⁹¹ Ibid., 21.

⁶⁹² Williamson 1990, 7–20.

⁶⁹³ Ibid.

crisis impelled the insistence that government expenditure was excessive – and that it was ‘crowding out’ the private sector. As Ellis suggests ‘Bank economists assumed that in the void left by collapsed state-run economies, free market economies would flourish. This erroneous thinking resulted in inconsistent successes and often tragic failures.’⁶⁹⁴ He suggests:

‘The World Bank’s neoliberal agenda manifested itself in the 1980s in ‘shock therapy’-style structural adjustment policies (SAPs). By the early 1990s, these had become ‘cornerstones’ of the Washington Consensus. Structural Adjustment Loans (SALs) – given on condition that borrowing countries liberalise their economies – became a key way to encourage reform. Shock therapy, in essence the immediate and simultaneous implementation of a large number of reforms, entailed a rapid ‘shift of economic decision making to the private sector’, while government intervention in the national economy was severely curtailed.’⁶⁹⁵

Yet critics - including economists – were growing wary of the negative impacts, he continues:

‘...many economists contend[ed] that such policies have only increased poverty in poorer countries through ‘depressed employment and real incomes as well as severe cuts in social expenditures.’ While Bank SAPs may increase world income as a whole, they simultaneously perpetuate income disparities, driving the poor deeper into poverty.’⁶⁹⁶

The evidence of harsh effects of ‘shock-therapy’-style structural adjustment policies generated louder and louder critiques throughout the 1980s and 1990s, particularly with respect to the impacts on the poorest and most marginalized communities.

It was in 1987 (the same year as the first Committee meeting), that UNICEF (the UN’s agency for children) issued its influential study in two volumes called for ‘*Adjustment with a Human Face: Protecting the Vulnerable and Promoting Growth*’, roundly criticizing the IMF and World Bank structural adjustment programmes for their neglect of the social and human dimension of development and for placing a disproportionate burden on the poorest.⁶⁹⁷ According to Danilo Turk, this suggested that:

‘the call for a more people-sensitive approach to adjustment is more than a matter of economic good sense or political expediency. Ultimately it rests on the ethic of human solidarity, of concern for others, of human response to human suffering’.⁶⁹⁸

Although later criticized as being too ‘modest’ in its ambition and potentially foreclosing more radical critiques,⁶⁹⁹ the UNICEF report was considered important in its time for its direct and explicit criticism

⁶⁹⁴ Ellis 2013, 293.

⁶⁹⁵ Ibid., 293–94.

⁶⁹⁶ Ibid., 294.

⁶⁹⁷ Cornia, Jolly, and Stewart 1989.

⁶⁹⁸ U.N.Doc E/CN.4/Sub.2/1991/17, Danilo Turk, Second Report. Danilo Turk served as UN Special Rapporteur on the Problems, Policies and Progressive Measures relating to a More Effective Realization of Economic, Social and Cultural Rights of the Sub-Commission.

⁶⁹⁹ De Waal described it as modest and ‘an attempt to sugar the neo-liberal pill’, De Waal 2007, 52; See also Rist and Camiller 2014.

of the dogma of structural adjustment being promoted by the international financial institutions, with human rights scholar and Special Rapporteur, Danilo Turk, describing the report as ‘monumental’ and ‘impressive’.⁷⁰⁰ It certainly had catalytic effects in shifting (at least rhetorically) the position of the World Bank.

By 1990, the World Bank responded with its *World Development Report 1990* which chose poverty as its theme, and for the first time, acknowledged the need for structural economic reforms to be accompanied by social policies. The report stated unembarrassedly that little attention had been paid to the impacts on the poor of structural adjustment, but it promised it had changed:

‘... when structural adjustment issues came to the fore, little attention was paid to the effects on the poor. Macroeconomic issues seemed more pressing, and many expected that there would be a rapid transition to new growth paths. As the decade [1980s] continued, it became clear that macroeconomic recovery and structural change were slow in coming. Evidence of declines in incomes and cutbacks in social services began to mount. Many observers called attention to the situation, but it was UNICEF that first brought the issue into the centre of the debate on the design and effects of adjustment. By the end of the decade the issue had become important for all agencies, and it is now reviewed in all adjustment programmes financed by the World Bank’.⁷⁰¹

UNICEF was not convinced that the World Bank had changed however, reverting in 1992 with a report that stated that the Bank was still focused on reducing the role of the state in protecting people from the negative impacts of free markets:

‘Maximum investment in people and minimum intervention in markets is [now] the nub of the Bank's current advice... [but] the Bank is not even-handed in its scrutiny of these two aspects of development policy. Its implication continues to be that markets can do little wrong and that all economic growth is necessarily to the good... Government intervention in the economy, on the other hand, is always regarded as guilty until proven innocent.’⁷⁰²

Meanwhile, in 1990 UNDP had also published its first *Human Development Report*, promoting the idea of ‘human development’ to replace economic growth as the primary concept and goal of development. Drawing on the work of Amartya Sen amongst others, the concept of ‘human development’ challenged the focus on economic growth as an end in itself.⁷⁰³ It sought to ‘humanize’ development, bringing the focus back to people and expanding people’s ‘capabilities’ as the end of development, drawing on Sen’s ‘capability’ approach (discussed further below).⁷⁰⁴ Through the development of its ‘Human

⁷⁰⁰ U.N.Doc E/CN.4/Sub.2/1989/19, Danilo Turk, Preliminary Report, 16.

⁷⁰¹ World Bank, *World Development Report 1990*, cited in Turk, *Ibid.*, 30.

⁷⁰² U.N.Doc E/CN.4/Sub.2/1992/16, Danilo Turk, Final Report, 26. Citing UNICEF *State of the World's Children 1992*, 34.

⁷⁰³ UNDP still today describes the ‘human development approach’ as being ‘about expanding the richness of human life, rather than simply the richness of the economy in which human beings live. It is an approach that is focused on people and their opportunities and choices., at their website, see <http://hdr.undp.org/en/humandev>, accessed 27 November 2016.

⁷⁰⁴ Although its architect, Ul Haq, suggested that the concept of ‘human development’ aimed to be a ‘judicious mix of market efficiency and social compassion’, Haq 1995, cited in StClair 2007, 185.

Development Index', UNDP further challenged the narrow measure of poverty as income poverty with a new measure of the multidimensional forms of poverty.⁷⁰⁵

These critiques denounced the singular focus of economic policy on aggregate economic growth and called for a broader conception of social and economic progress grounded in the concept of 'human development', with more attention to the impacts of SAPs on the poorest and most marginalized. Hulme suggested that this gave scholars and activists 'a relatively coherent framework from which to argue for policy change' although he presciently noted that 'it gave them limited guidance for challenging macroeconomic policy orthodoxy.'⁷⁰⁶ In other words, the concept of 'human development' provided a vision of the outcomes to be achieved, broadening the narrow vision of economic growth, but it did not provide a blueprint or prescriptive policies for how to get there. Sen's economic theory provided a vision for what outcomes should be achieved, but was not very clear on its prescriptions for policy - it did not in the end provide a paradigm shift to supplant the dominance of the neoclassical approach (as discussed further below).

The Committee and ESCR as a 'last ditch defence for the most vulnerable'

The Committee thus emerged in 1987 at the height of controversy over what Turk called the "deadly shift of the 1980s towards structural adjustment"⁷⁰⁷ with the increasingly loud calls for the need to 'humanise adjustment'.⁷⁰⁸ As the Committee started its work to elaborate in more detail the nature and content of these rights, it focused on the need to 'humanise' economic policy and to put limits on the suffering of people from the negative impacts of 'aggressive market forces' – particularly in times of adjustment, austerity and economic crisis. Indeed, as one of the Committee members, Bruno Simma vividly articulated early on:

'The Covenant had sometimes been described as a 'good weather instrument' ...[but] That attitude was based on false reasoning: just as conditions of political unrest constituted the decisive test for the relevance of the International Covenant on Civil and Political Rights, so, in times of economic crisis, the International Covenant on Economic, Social and Cultural Rights should assume its most important function – that of a last-ditch defence for the most vulnerable.'⁷⁰⁹

It was in this context that the Committee started to define and elaborate the provisions of the ICESCR. The Committee's work built on the 1987 Limburg Principles (a set of principles and definitions for the Committee agreed previously by a group of academics and activists, many of whom were later to have an influential impact on the Committee) as well as Asbjorn Eide's 1987 influential report on the right to

⁷⁰⁵ See for example Hulme 2014; McNeill and StClair 2009.

⁷⁰⁶ Hulme 2014, 90.

⁷⁰⁷ U.N.Doc E/CN.4/Sub.2/1992/16, Danilo Turk, Final Report, 36.

⁷⁰⁸ *Ibid.*, 50.

⁷⁰⁹ UN.Doc E/C.12/1990/SF.15 at 9 para 33 cited in Craven 1995.

food, which both set the groundwork for much of the later conceptual underpinning and evolution of the rights.

The Committee's concern with the harsh impacts of the impact of structural adjustment as well as the transition to free markets in many socialist economies can be traced throughout its early work – and this is one of the most dominant themes evident in its elaboration and interpretation in its General Comments, as well as in the recommendations of its Statements and its Concluding Observations, and the records of its debates in its 'Days of General Discussions'.⁷¹⁰ As Turk recorded at the time: "The United Nations Committee on Economic, Social and Cultural Rights has become increasingly concerned about the role of structural adjustment in many of the [then] 97 States parties to the Covenant on Economic, Social and Cultural Rights and consequently the ability of States parties to fulfil their obligations under the Covenant."⁷¹¹

The Committee focused particular attention on the role of international organizations, and the urgent need to protect basic rights in contexts of structural adjustment and austerity. In its second General Comment adopted in 1990, the Committee highlighted its concern about 'the adverse impact of the debt burden and of the relevant adjustment measures' on ESCR in many countries, recognising that adjustment programmes might have to involve some austerity, but calling for an alternative approach, such as 'adjustment with a human face', and insisting that 'protecting the rights of the poor and the vulnerable' must be a 'basic objective of economic adjustment'⁷¹² Its third General Comment, also adopted in 1990, the Committee again directly refers to 'adjustment with a human face' and reiterates the need to protect the most vulnerable even in times of economic crisis (although it seems to propose a shift away from universal social protection towards a narrower policy of targeting the poorest):

'12. Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low-cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled 'Adjustment with a human face: protecting the vulnerable and promoting growth, the analysis by UNDP in its Human Development Report 1990 and the analysis by the World Bank in the World Development Report 1990.'

The Committee was not concerned only with structural adjustment in developing countries, but with the shift to market economies in the developed world as well. As Turk had pointed out, 'the economic policies of many industrialized States, while perhaps rarely called 'adjustment', in fact resemble standard

⁷¹⁰ See above for an explanation of these processes of the Committee's work, see below for more detail on the substantive content.

⁷¹¹ U.N.Doc E/CN.4/Sub.2/1991/17, Danilo Turk, Second Report, 51.

⁷¹² U.N.Doc E/1990/23, CESCR, 'General Comment No. 2: International Technical Assistance Measures (Art. 22)', February 2, 1990, para 9.

policies of adjustment advocated by the IMF and World Bank. Cuts in public expenditure for most social services were common features of the economic landscape of the 1980s in developed States as well.⁷¹³

Wary of the recent Cold War divisions, the Committee sought to present its work as neutral with respect to the economic system in place – and as relevant to both market and non-market economies alike. As one member of the Committee suggested that ‘questions of a general nature on the wider aspects of the political or economic system of a country were not their concern except in so far as they affected the enjoyment of the rights embodied in the Covenant’⁷¹⁴ The Committee was careful to make the case that the realization of rights does not necessarily require any specific kind of economic system:

‘...in terms of political and economic systems the Covenant is neutral and its principles cannot accurately be described as being predicated exclusively upon the need for, or the desirability of a socialist or a capitalist system, or a mixed, centrally planned, or laissez faire economy, or upon any other particular approach. In this regard, the Committee reaffirms that the rights recognized in the Covenant are susceptible of realization within the context of a wide variety of economic and political systems, provided only that the interdependence and indivisibility of the two sets of human rights, as affirmed *inter alia* in the preamble to the Covenant, is recognized and reflected in the system in question.’⁷¹⁵

However, in the context of widespread evidence of the costs of structural adjustment and austerity measures, the Committee directly highlighted how the withdrawal of the state from social protections and the shift to ‘free-market’ economic policies were disproportionately affecting vulnerable groups. Frustrated with receiving regular reports from States listing aggregate statistics, apparently based on assumptions that simply generating aggregate economic growth would solve the issue of economic, social and cultural rights for all, including for the most marginalized groups, the Committee called on States (in its very first General Comment, adopted in 1989) to provide the Committee not only with ‘aggregate national statistics or estimates’, but with a diagnosis and information on the situation of the ‘worse-off regions or areas’ and the ‘specific groups or subgroups which appear to be particularly vulnerable or disadvantaged’.⁷¹⁶ Alston recorded that seeking more ‘disaggregated’ information, would help the Committee to focus on what he defined as its ‘proper, primary concern i.e. the extent to which the most disadvantaged individuals in any given society are enjoying a basic minimum level of subsistence rights.’⁷¹⁷

The Committee’s General Comment 5, on persons with disabilities, also directly addressed the shift towards ‘market-based policies’ and the negative impacts of the results of ‘market forces’ and economic developments over the past decade, which had been ‘especially unfavourable from the perspective of person with disabilities’, emphasising the duty of states to regulate markets and to temper market forces:

⁷¹³ U.N.Doc E/CN.4/Sub.2/1991/17, Danilo Turk, Second Report, 47.

⁷¹⁴ Badawi El Sheik, E/C.12/1987/SR.19 para 15.

⁷¹⁵ U.N.Doc E/1991/23, CESCR, ‘General Comment No. 3: The Nature of States Parties Obligations (Art. 2, Par. 1), adopted 14 December 1990, para 8.

⁷¹⁶ U.N.Doc E/1989/22, CESCR, ‘General Comment No. 1: Reporting by States Parties,’ adopted February 24, 1989, para 3.

⁷¹⁷ Alston and Simma 1987, 750.

11. Given the increasing commitment of Governments around the world to market-based policies, it is appropriate in that context to emphasise certain aspects of States parties' obligations.... [including] regulation to ensure the equitable treatment of persons with disabilities. ...

12. In the absence of government intervention there will always be instances in which the operation of the free market will produce unsatisfactory results for persons with disabilities, either individually or as a group, and in such circumstances, it is incumbent on Governments to step in and take appropriate measures to temper, complement, compensate for, or override the results produced by market forces.⁷¹⁸

These themes are also reiterated in most of the Committee's public 'Statements'. In the Statement to the 1993 Vienna World Conference on Human Rights for example, the Committee highlighted again that 'free markets' were self-evidently incapable of protecting the most disadvantaged:

'The increasing emphasis being placed on free market policies brings with it a far greater need to ensure that appropriate measures are taken to safeguard and promote economic, social and cultural rights. Even the most ardent supporters of the free market have generally acknowledged that it is incapable, of its own accord, of protecting many of the most vulnerable and disadvantaged members of society.⁷¹⁹

The Committee again repeated the need for the protection of economic and social rights in times of crisis - and even if older economic policy prescriptions (such as Keynesianism) were now considered 'obsolete' or 'invalid', there was still a need to ensure the values social justice shaped policy-making:

'5. Factors such as the reduced role being played by the State in a great many societies, an increasing emphasis on policies of deregulation and privatization, a markedly greater reliance on free market mechanisms, and the globalization of an ever larger part of all national economies, have all combined to challenge many of the assumptions on which social policy-makers have previously operated. Indeed, it is increasingly clear that, as a result of these changes, many of the specific policy approaches endorsed by the international community in the past 30 years or so have been called into question and in some cases even rendered obsolete or invalid. But it is precisely at a time of such rapid and unpredictable change in a truly global economy that it is essential to reaffirm the fundamental values of social justice which must guide policy-making at all levels.⁷²⁰

It was in this context of responding to economic crisis, austerity, structural adjustment and the return to orthodox prescriptions for free markets - and the insistence that there was no alternative (TINA) - that the Committee developed its interpretations of the nature and scope of ESCR, including elaborating Article 2.1 of the Covenant, its concepts of 'minimum core', the obligations to 'respect, protect and fulfil' and the 'AAAQ' (accessibility, availability, acceptability, quality) as described below.

⁷¹⁸ U.N.Doc E/1995/22, CESCR, 'General Comment No. 5: Persons with Disabilities,' adopted 9 December 1994, 11–12.

⁷¹⁹ U.N.Doc A/CONF.157/PC/62/ADD.5, CESCR Statement to the World Conference on Human Rights on behalf of the Committee, para 10.

⁷²⁰ U.N.Doc E/C.12/1994/20, CESCR, Statement of the Committee (eleventh session) 'Economic, social and cultural rights in the context of the World Summit for Social Development', Annex V, 112, para 5.

4.2.1 Nature and scope of ESCR - Article 2.1 and the ‘minimum core’

The Committee’s early General Comments focused first on establishing ESCR as human rights with concrete obligations (as opposed to aspirational goals), suggesting that despite being subject to ‘progressive realisation’ and the ‘availability of resources’, ESCR included some immediate obligations that would not be costly and could be rapidly implemented. In the context of economic crises, structural adjustment, and austerity of the time with the rolling back of government expenditures, the Committee also sought to establish what it called a ‘minimum core’ - an inviolable minimum standard for all rights, irrespective of the economic system in place, and irrespective of a country’s resources or the level of development. In the Committee’s interpretation of Article 2.1, it takes resource limitations for granted, but through the ‘minimum core’ tried to set a floor below which ESCR cannot fall, trying to prevent all-out retrogression in times of austerity and economic crisis.

The Committee’s General Comment No. 3 on the *Nature of States’ Parties Obligations (Article 2.1 of the Covenant)*, interpreted Article 2.1 of the ICESCR, recognising the differences between article 2 of the ICESCR and its mirror article 2 in the ICCPR. It recognised that Art 2.1 makes ICESCR subject to ‘progressive realisation’ and ‘acknowledges the constraints due to the limits of available resources’,⁷²¹ taking for granted the understanding of this phrase as a resource limitations clause, but asserts that this should nonetheless not be ‘misinterpreted as depriving the obligation of all meaningful content’ and shows that the ICESCR nonetheless still entails some immediate obligations.⁷²²

As Alston recorded, General Comment No. 3 on Article 2.1 of the Covenant aimed to show that ‘contrary to those who argue that the Covenant is wholly aspirational’, and despite the requirement of ‘progressive realization, the Covenant did in fact impose ‘various obligations of immediate effect’.⁷²³ These immediate obligations included the non-discrimination provisions, as well as the obligation to ‘take steps’ to implement the Covenant. And ‘most importantly of all’, he noted citing General Comment No. 3 the Committee had established that ‘a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State Party.’⁷²⁴ Without such an approach, Alston noted, the very *raison d’être* of the Covenant would be undermined, as already set out in the 1987 Limburg Principles 25 which unequivocally stated that: ‘States Parties are obligated, regardless of the level of economic development, to ensure respect for minimum subsistence rights for all.’⁷²⁵ While the concept of ‘progressive realisation’ provided a ‘necessary flexibility device’ ‘to reflect

⁷²¹ U.N.Doc E/1991/23, CESCR, ‘General Comment No. 3: The Nature of States Parties Obligations (Art. 2.1), para 1.

⁷²² Ibid para 9.

⁷²³ Alston 1992, 495. Alston saw General Comment 3 as critical for providing the ‘intellectual and legal framework within which the Committee can begin to interpret the normative obligations of each of the specific rights recognized in the Covenant’.

⁷²⁴ Ibid., 495. See also CESCR, ‘General Comment No. 3.’, para 10.

⁷²⁵ Ibid., 495–96. The Limburg Principles were produced by an international group of legal scholars and experts convened in 1987 to examine the nature of the Covenant obligations, in advance of the establishment of the

the realities of the real world', this nonetheless imposed 'an obligation to move as expeditiously and effectively as possible' towards the realization of the rights, and required avoiding deliberately retrogressive measures.⁷²⁶

Thus the Committee established that a baseline of a 'minimum core content' of the right must be met for all people in all States, that should be protected even in times of economic recession or crisis:

'.....the Committee is of the view that a minimum core obligation to ensure the satisfaction of, at the very least, minimum essential levels of each of the rights is incumbent upon every State party. Thus, for example, a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant. If the Covenant were to be read in such a way as not to establish such a minimum core obligation, it would be largely deprived of its raison d'être. By the same token, it must be noted that any assessment as to whether a State has discharged its minimum core obligation must also take account of resource constraints applying within the country concerned. Article 2 (1) obligates each State party to take the necessary steps 'to the maximum of its available resources'. In order for a State party to be able to attribute its failure to meet at least its minimum core obligations to a lack of available resources it must demonstrate that every effort has been made to use all resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.

.... Similarly, the Committee underlines the fact that even in times of severe resources constraints whether caused by a process of adjustment, of economic recession, or by other factors the vulnerable members of society can and indeed must be protected by the adoption of relatively low cost targeted programmes. In support of this approach the Committee takes note of the analysis prepared by UNICEF entitled 'Adjustment with a human face: protecting the vulnerable and promoting growth, the analysis by UNDP in its Human Development Report 1990 and the analysis by the World Bank in the World Development Report 1990.'⁷²⁷

Although this interpretation starts with a view that the 'minimum core' should be met, irrespective of resources, in the context of the serious issues faced by developing countries, it concedes that the level of resources will have to be taken into account but puts the burden of proof on the State for demonstrating that the minimum core has been treated as a matter of priority. It suggests that, even in times of adjustment and crisis, resources can and should be directed at least to 'low cost targeted programmes', pointing to the analysis and economic evidence that this should be possible in the reports of UNICEF, UNDP and the World Bank (discussed above). Governments cannot attribute their failure to a lack of available resources unless they can 'demonstrate that every effort has been made to use all the resources that are at its disposition in an effort to satisfy, as a matter of priority, those minimum obligations.'⁷²⁸ Even if resources are 'demonstrably inadequate', this did not relieve States of the obligation to at least take steps to devise strategies and programmes for their promotion.⁷²⁹

Committee. See U.N.Doc E/CN.4/1987/17 'The Limburg Principles on the Implementation of the International Covenant on Economic, Social and Cultural Rights' in the Annex, also published in *Human Rights Quarterly*, 122, 1987. It is interesting also to note that it was Philip Alston who also wrote the key working papers used at the meeting on the Limburg Principles.

⁷²⁶ CESCR, 'General Comment No. 3' para 9.

⁷²⁷ CESCR, 'General Comment No. 3' paras 10-12.

⁷²⁸ Ibid, para 10.

⁷²⁹ Ibid, para 11.

The Committee's approach to Article 2.1 thus took resource limitations for granted, following the way in which it was understood during the drafting process of the Covenant (as we saw earlier), but tried to establish some immediate obligations that are less dependent on resource constraints, including 1) the obligation to take deliberate and concrete steps towards making progress, 2) the concomitant obligation to avoid any deliberate retrogression⁷³⁰ and 3) to protect the 'minimum core' as far as possible and as a matter of priority⁷³¹ - calling on the international community also to assist when possible through international assistance or debt relief.

Oddly however, the Committee never precisely defined 'the phrase 'to the maximum of its available resources' in any detail, except to suggest that 'available resources' was intended by the drafters of the Covenant to refer to both the resources existing within a State and those available from the international community through international cooperation and assistance.⁷³² The Committee thus avoided addressing issues not only of government expenditure, but also of how resources are generated in the first place, as well as grappling with the extent to which the availability and use of resources is intimately bound up with the type of economic policies selected by governments.⁷³³

Even in its 2007 Statement on 'An evaluation of the obligation to take steps to the 'maximum available resources' under an Optional Protocol to the Covenant'⁷³⁴ (which further defined Article 2.1 in relation to how the Committee would address on receipt of an individual complaint under the Optional Protocol⁷³⁵) the Statement largely repeats the provisions of General Comment No. 3. It again interprets the 'availability of resources' as a limitation clause, although it repeats that this cannot be used by States to justify inaction, and even in times of severe resource constraints, States have a duty at a minimum to protect the most marginalised by adopting low-cost targeted programmes. The Statement does put the burden of proof on the State to show, in the context of failures to take any steps or the adoption of retrogressive steps, that 'full use was made of available resources'⁷³⁶ and suggests that if states use 'resource constraints' to explain retrogression, the Committee would consider the information on a country-by-country basis taking into account a list of criteria. These criteria include the country's level of development, the severity of the breach, the economic situation (whether the country was in recession), other claims on limited resources, whether the state had sought low-cost options, and whether the state

⁷³⁰ For a detailed review on the evolution of the concept of retrogression, see Nolan, Lusiani, and Courtis 2016.

⁷³¹ For a more detailed examination of the 'minimum core' concept, see Young 2008; MacNaughton 2013; Bilchitz 2002.

⁷³² CESCR, 'General Comment No. 3' para 13.

⁷³³ For a clear explanation of this point, see Balakrishnan and Elson 2008b.

⁷³⁴ UN Doc E/C.12/2007/1, CESCR Statement on 'An evaluation of the obligation to take steps to the 'maximum available resources' under an Optional Protocol to the Covenant', 10 May 2007.

⁷³⁵ For more information on the Optional Protocol to the ICESCR adopted in 2008, see e.g. Courtis 2012.

⁷³⁶ CESCR Statement on 'maximum available resources', 2007, para 9.

had sought cooperation or rejected resources from the international community (as set out in its paragraph 10).

However, the Committee again did not explore what ‘the maximum of its available resources’ means, apart from reiterating that this refers to resources within the State as well as those available from the international community. The Statement does not explore what constitutes ‘available resources’,⁷³⁷ nor considers questions that would be relevant with regards to how resources are made ‘available’ (i.e. how resources are generated, including for example through taxes, which also raises questions around the progressiveness of the tax structure⁷³⁸). Nor does it explore what the ‘maximum use’ of such resources would mean – so it does not begin to consider the issue of Keynesian-style deficit spending in times of economic crisis, nor other fiscal policy issues. It also does not analytically reflect on the extent to which ‘retrogression’ or reductions in government spending are, by definition, constitutive of structural adjustment and the shift to ‘free-market’ economies - except to try to put a limit on retrogression in public expenditures for at least a ‘minimum core’ or floor for social protection measures related to ESCR.

Nolan et al record that, in none of its country reviews of countries in economic crises across the 1990s, has the Committee ever deemed structural adjustment policies or public expenditure cuts to be in contravention of the Covenant, confining itself rather to expressing its ‘general concern’. They suggest this reticence is ‘consistent with the Committee’s historic, broader reluctance to link budgetary or economic policy decisions and their impacts with specific ESR obligations’.⁷³⁹ It may also be consistent with the lack of economic policy expertise amongst the Committee members.⁷⁴⁰ I would argue further however, that this was not only due to a lack of understanding or engagement with economic policy thinking, or the complexities of judging a particular case, but also the result of few strong alternative economic prescriptions to draw from. As the rights were elaborated in the discursive context of neoliberalism and its insistence of ‘TINA’ (‘there is no alternative’⁷⁴¹) and the abandonment of Keynesianism (as well as other heterodox theories of economics), the Committee had few alternative economic theories to draw from to help defend its alternative view. All the Committee could rely on was the alternative analyses of government spending and prescriptions proposed in the main alternative available: UNICEF’s ‘Adjustment with a Human Face’ and UNDP’s ‘Human Development’ reports. This is suggested by the frequent references to those frameworks in the Committee’s General Comments, as the dominant alternative economic frameworks of the time.

⁷³⁷ Robertson 1994b; Although scholars have explored this in more depth, going beyond financial resources to include other kinds of resources, see Skogly 2012.

⁷³⁸ See Balakrishnan and Elson 2008b, 5.

⁷³⁹ Nolan, Lusiani, and Curtis 2016, 127.

⁷⁴⁰ This argument has been made, though from a different perspective, by Dowell-Jones 2004b, 136.

⁷⁴¹ This was a common phrase invoked by Margaret Thatcher, see Berlinski 2008.

In 1990, the Committee held its annual ‘Day of Discussion’ on the right to housing, including discussing Danilo Turk’s final report on ESCR.⁷⁴² In the discussion, Turk referred to the UNICEF ‘*Adjustment with a Human Face*’ study in terms of its ‘important conclusion’ that ‘Governments can greatly improve basic social services even at times of great financial stringency by restructuring government expenditures’. He linked this explicitly to the ‘minimum core’, as the UNICEF study ‘concurred with the opinion of some international law experts that the duty of States progressively to achieve the full realization of economic, social and cultural rights existed independently of an increase in resources.’⁷⁴³ During another substantive Day of Discussion, held in 1993 on the right to health and ‘on the principle of non-discrimination and the minimum core content that constituted a floor below which conditions should not be permitted to fall in any State party’ (para 1), the report recorded the discussion that:

‘Economic, social and cultural rights had been called into question by the trend towards free market economics and the pressures to trim social budgets and to permit economic factors to become dominant. The human rights community now had a duty to show why certain economic, social and cultural rights should be considered immune from economic pressures and to respond to critics who maintained that the right to health was valid only in so far as it contributed to economic progress.’⁷⁴⁴

In its 1994 annual Day of General Discussion on ‘The role of social safety nets as a means of protecting economic, social and cultural rights, with particular reference to situations involving major structural adjustment and/or transition to a free market economies’⁷⁴⁵, the meeting record captured that ‘[t]he question posed was whether major structural changes in a country could be used as an excuse for the non-fulfilment of the obligations contained in the Covenant and whether there should not be some kind of minimum standard of social protection, a social safety net (below which a State could not fall)’⁷⁴⁶. As recorded by Wills, this day of discussion included a ‘sharply polarised’ debate between the Committee, representatives of intergovernmental institutions (notably the IMF) and participants from a number of non-governmental organisations.⁷⁴⁷ While non-governmental organisations argued that the structural adjustment model was incompatible with the realisation of economic, social and cultural rights given its primary focus on economic growth, the representative from the IMF defended structural adjustment, arguing that it was necessary to generate economic growth necessary for the realisation of ESCR. He accepted that structural adjustment could have ‘severe consequences’ in the short term, but argued that the reforms would be beneficial in the long run. He conceded that it might be important to have social

⁷⁴² UN.Doc E/CN.4/Sub.2/1989/19 Danilo Turk, Preliminary report.

⁷⁴³ CESCR ‘Day of Discussion’ 1990, paras 249-65

⁷⁴⁴ U.N.Doc E/C.12/1993/SR.41 and E/C.12/1993/SR.42, CESCR, Day of General Discussion: The right to health, 1993.

⁷⁴⁵ U.N.Doc E/C.12/1994/20, CESCR, ‘Day of General Discussion: The role of social safety nets as a means of protecting economic, social and cultural rights, with particular reference to situations involving major structural adjustment and/or transition to a free market economies’, Excerpt from the Report on the Tenth and Eleventh Sessions, 1994, paras. 363-390.

⁷⁴⁶ *Ibid.*, paras. 363-364.

⁷⁴⁷ See Wills 2014. and U.N.Doc. E/C.12/1994/20, CESCR, Report on the Tenth and Eleventh Sessions, 2–20 May 1994, at paras. 363–390.

safety nets to mitigate the negative impacts in the immediate term, but these should be ‘temporary’ – and he insisted that there was really no alternative.⁷⁴⁸

The Committee was drawing from the only apparent alternative – the existing (economic) critiques of structural adjustment in the reports of UNICEF and UNDP. As the Committee’s General Comment No. 2 on *International assistance measures (Article 22 of the Covenant)* also reiterated, like its General Comment No. 3, that in times of economic crisis protecting ESCR would become more not less urgent, and even if economic austerity was unavoidable, protections should be built into structural adjustment programmes, as by UNICEF’s ‘adjustment with a human face’ had illustrated was possible:

‘9. ...The Committee recognizes that adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity. Under such circumstances, however, endeavours to protect the most basic economic, social and cultural rights become more, rather than less, urgent. States parties to the Covenant, as well as the relevant United Nations agencies, should thus make a particular effort to ensure that such protection is, to the maximum extent possible, built-in to programmes and policies designed to promote adjustment. Such an approach, which is sometimes referred to as ‘adjustment with a human face’ or as promoting ‘the human dimension of development’ requires that the goal of protecting the rights of the poor and vulnerable should become a basic objective of economic adjustment. Similarly, international measures to deal with the debt crisis should take full account of the need to protect economic, social and cultural rights through, inter alia, international cooperation. In many situations, this might point to the need for major debt relief initiatives.⁷⁴⁹

The Committee repeatedly emphasised the same points in its examinations of country reports. For example, in its Concluding observations on Nicaragua in 1993, the Committee observed that:

‘6. To the extent that structural adjustment measures and the privatization of State property have had negative consequences for the enjoyment of the economic, social and cultural rights of the Nicaraguan people, and more specifically for the standard of living of the most vulnerable sectors, the Committee expresses its serious concern. It is particularly concerned at the fact that official figures reveal an alarming deterioration in the standard of living and that 70 per cent of Nicaraguans live below the poverty threshold and that 40 per cent suffer from protein deficiency. This reflects the tragedy of a child population which, in the words of the report itself, constitutes ‘a genuine national emergency’....

13. The Committee reiterates the view expressed in its general comment No. 2 that it is precisely in times of acute economic and social problems that respect for the obligations arising under the Covenant assumes its greatest importance.

14. The Committee wishes to bring to the attention of the State party the need to ensure that structural adjustment programmes are so formulated and implemented as to provide adequate safety nets for the vulnerable sectors of society in order to avoid a deterioration of the enjoyment of the economic, social and cultural rights for which the Covenant provides protection.⁷⁵⁰

The Committee’s approach then to the ‘maximum use of available resources’ never challenged assumptions of limited ‘available resources’ (as Roosevelt’s NRPB Keynesians had earlier done) but, with the concept of the ‘minimum core’, it still sought to challenge the neoclassical insistence on rolling back the role of the state in the economy, at least by setting a floor below which state expenditure on social

⁷⁴⁸ U.N.Doc E/C 12/1994/20, paras 373-390.

⁷⁴⁹ CESCR, ‘General Comment No. 2’, para 9.

⁷⁵⁰ U.N.Doc E/C.12/1993/14, CESCR, Concluding observations on Nicaragua January 1994, 4.

protection and ESCR should not fall – drawing on the work of economists as expressed in the reports of UNICEF and UNDP. In the context of the debt crises of the structural adjustment era, and the decline of Keynesianism, this was necessarily a very different approach to the ‘maximum use of available resources’ compared to the earlier Keynesian approach of Franklin Roosevelt’s NRPB conceptualization of rights, which called for avoiding austerity particularly in times of economic crisis. As I show later, the loss of these earlier (Keynesian) insights developing during the emergence of economic and social rights, has also left the Committee less able to later challenge prescriptions of austerity in our more recent era (as I explored further below in the section on the ‘constitutionalisation’ of austerity.)

The Committee also never explicitly addressed the extent to which structural adjustment policies (and hence retrogression) were necessarily constitutive of the ‘Washington consensus’, and how the ‘minimum core’ could be implemented in the context of a deliberate neoliberal prescription to ‘roll back’ the welfare state.⁷⁵¹

4.1.2 Tripartite duties versus classical liberal rights and the ‘minimal state’

The Committee did however address the role of the state in relation to ESCR more directly in its later adoption of the ‘respect, protect, fulfil’ framework of obligations. While defining the ‘minimum core’ to be implemented immediately and without great cost, was one approach of the Committee aimed at countering views that ESC rights were only aspirational goals and not really ‘real’ rights, a second step to define the correlative obligations of the rights also sought to show that ESCR (like CPR) entailed not only costly positive duties but also relatively ‘cost-free’ negative duties. This ‘respect, protect and fulfil’ framework of obligations was also adopted in the context of challenging assumptions regarding ESCR and CPR and the traditional liberal dichotomy of ‘negative’ versus ‘positive’ rights, linked to the role of the state in the economy.

The ‘respect, protect, fulfil’ framework of obligations was first adopted by the Committee on Economic, Social and Cultural Rights in its 1999 General Comment 12 on the right to food.⁷⁵² But this drew on the earlier work of a group of scholars developed in the early 1980s, well before the establishment of the Committee, and efforts focused on establishing a right to basic subsistence (and thus came to be linked to the ‘right to adequate food’).⁷⁵³ This work sought to challenge the delegitimation of rights that had

⁷⁵¹ This is not to suggest of course that there should never be any change or flexibility, as entitlements can also become ossified in ways that may be problematic, including for example, being discriminatory on the basis of race and gender.

⁷⁵² U.N.Doc E/C.12/1999/5, CESCR ‘General Comment No.12: The Right to Adequate Food (Art 11), adopted on 12 May 1999.

⁷⁵³ This included a number of scholars who were later to become closely involved in the international human rights system and the formal elaboration of the rights, including for example Asbjorn Eide, Philip Alston,

occurred in the period after the adoption of the UDHR, with their invocations of ESC rights as being not really ‘real’ rights, as well as the charge regarding the ‘vagueness’ of the duties imposed.⁷⁵⁴ The target of these scholars were the legal and political critiques of ESCR, including that of British scholar Maurice Cranston who was one of the most influential scholars challenging the view of economic rights as human rights.

Cranston’s classic critique of international human rights - ‘Human rights: real and supposed’⁷⁵⁵ - is often understood as a direct attack on ESC rights, although Cranston was actually arguing against all the rights included in the UDHR, as being merely moral rights, rather than legal rights that would ever be secured in positive law (in other words, as Bentham would have more imaginatively put it, that UDHR rights were nothing more than ‘nonsense on stilts’).⁷⁵⁶ Cranston did however reserve particular scorn for ESC rights which he argued did not pass the ‘practicability test’ as universal rights – ‘It is not my duty to do what is physically impossible for me to do... If it is impossible for a thing to be done, it is absurd to claim it as a right,’ and, logically then, it could not invoke a correlative duty either.⁷⁵⁷ ESCR also failed his ‘paramount importance test’. Cranston argued that the only rights that should be defined as ‘human rights’ should be those that were essential in the sense of Kant’s categorical imperative. For Cranston, human rights could include essential civil rights, but should not include economic and social rights which ‘it would be nice to see done one day’ - ‘A human right is something of which no one may be deprived without a grave affront to justice’ he opined, taking a rather narrow view of ‘justice’.⁷⁵⁸

Other scholars, including the philosopher Henry Shue, fervently dissented. For Shue, a lack of basic subsistence which could amount to starvation, was self-evidently both of ‘paramount importance’ and a ‘grave affront to justice’. Shue argued, directly taking on Cranston’s example of hunger in India and how starvation was not a deliberate violation:

‘Cranston obscures or does not see, the terrible severity of his view’s implications. The fact, if it be a fact, that resulting starvation within India would be only allowed to occur, and not intentionally initiated, is of little consequence. If preventable starvation occurs as an effect of a decision not to prevent, the starvation is caused by, among other things, the decision not to prevent it. Passive infanticide is still infanticide.’⁷⁵⁹

For Shue, a basic level of subsistence (which he defined broadly as a minimum level economic security - consisting of unpolluted air, unpolluted water, adequate food, adequate clothing, adequate shelter and

Katarina Tomasevski and others, who in turn drew from the work of other academics such as Henry Shue and activists including the non-governmental organisation, Food First Network (FIAN).

⁷⁵⁴ Shue 1996; Eide 1984; Alston and Tomasevski 1984.

⁷⁵⁵ Cranston, 1967. Note that Cranston’s article was published in 1967, but dated back to a conference in 1964 and written as an intervention against the formalisation of the UDHR rights in the legally binding ICCPR and the ICESCR that were being finalised and adopted by the General Assembly.

⁷⁵⁶ Ibid., 44.

⁷⁵⁷ Cranston 2002, 50.

⁷⁵⁸ Ibid., 52.

⁷⁵⁹ Shue 1996, 98.

minimal preventive public health care) should be considered a basic right - as essential as, and indeed also constitutive of, the right to physical security.⁷⁶⁰ He insisted that:

‘It is not enough that people merely happen to be secure or happen to be subsisting. They must have the right to security and a right to subsistence – the continued enjoyment of the security and the subsistence must be socially guaranteed. Otherwise a person is readily open to coercion and intimidation through threat of the deprivation of one or the other, and credible threats can paralyze a person and prevent the exercise of any other rights as surely as actual beatings and actual protein/calorie deficiencies can. Credible threats can be reduced only by the actual establishment of social arrangements that will bring assistance to those confronted by forces they cannot themselves handle.’⁷⁶¹

Shue’s point on establishing adequate ‘social arrangements’ echoes the old institutional economists, but he does not delve into this in great detail. Rather one of Shue’s most innovative contributions was to challenge the liberal dichotomy between ‘negative’ and ‘positive’ rights (as articulated for example by Isaiah Berlin).⁷⁶² Shue attacked the assumption that negative rights required only refraining from acting in a certain way, while positive rights required only positive action ‘to do something’, suggesting that the lines could not be so neatly drawn. He argued that important distinction to draw was not between the rights, but rather between the correlative duties they imposed. Against the traditional assumption of only one correlative duty per right, he proposed that all rights imposed three kinds of correlative duties:

- I. Duties to avoid depriving
- II. Duties to protect from deprivation (protection from harm)
- III. Duties to aid the deprived (providing for those unable to provide for themselves.)⁷⁶³

In Shue’s view (as he emphasised further later), the duty to avoid and protect would be the primary duties, since if they are respected, then the duty to provide would be unnecessary. Extending this argument, he even argued that economic strategies that did not provide basic subsistence could be seen as deliberate:

‘a government that engages in essential [systematic] deprivation – that follows an economic strategy in which deprivations of subsistence are inherent in the strategy – fails to fulfil even any duty merely to avoid depriving... Such a government is a direct and immediate threat to its own people.’⁷⁶⁴

Shue’s 1980 ‘tripartite typology’ of correlative duties was thus a powerful attack on the overly simplistic dichotomy between negative and positive rights, with important implications for the later conceptualisation of both ESCR and CPR. One of the implications was that both sets of rights can be

⁷⁶⁰ Ibid., 23–29.

⁷⁶¹ Ibid., 26. Shue also suggested that ‘The underlying distinction is between acting or refraining from acting... the moral significance, if any, of the distinction between positive rights and negative rights depends upon the moral significance, if any, of the distinction between action and omission of action.’ Ibid, 37.

⁷⁶² See in particular his Chapter 2 on ‘Correlative Duties’, Shue 1996.

⁷⁶³ Ibid., 52.

⁷⁶⁴ Ibid., 51. Shue also addressed the question of the inviolability of property rights in situations where subsistence rights are not guaranteed. He addresses this in terms of the institutional framework, suggesting that subsistence rights should be a form of property rights.

costly to implement, but also that both sets of rights entail relatively cost-free elements as well - including the duty to refrain from interfering with people's *existing* subsistence rights.⁷⁶⁵

The framework was rapidly adopted by human rights scholars, including Asbjørn Eide, who adopted it (renaming the typology as the obligations to '*respect, protect, fulfil*') in his writings on the right to food, including his reports to the UN Sub-Commission for the Prevention of Discrimination and the Protection of Minorities. In 1982 the Sub-Commission had requested Eide, as its Rapporteur, to produce a study on the right to food and Eide submitted his final report in 1987 (in addition to a preliminary report in 1984 and a final progress report in 1998).⁷⁶⁶

Eide's 1987 report grounded Shue's philosophical discussion of the correlative obligations of the rights more closely in human rights terms of the relationship between the State and the individual (in contrast to the individual-to-individual relationship that Shue tended to emphasise). From that perspective, he questioned the classic divide between CPR and ESCR between those rights that imply 'negative' freedom from the State versus those rights that require positive action by the State.⁷⁶⁷ He rechristened Shue's tripartite typology as the obligations to 'respect, protect and fulfil', defining them as follows:

'66. State responsibility for human rights can be examined at three levels: The obligation to respect, the obligation to protect, and the obligation to fulfil human rights.

67. The obligation to respect requires the State, and thereby all its organs and agents, to abstain from doing anything that violates the integrity of the individual or infringes on her or his freedom, including the freedom to use the material resources available to that individual in the way she or he finds best to satisfy the basic needs...

68. The obligation to protect requires from the State and its agents the measures necessary to prevent other individuals or groups from violating the integrity, freedom of action, or other human rights of the individual - including the prevention of infringement of the enjoyment of his material resources.

69. The obligation to fulfil requires the State to take the measures necessary to ensure for each person within its jurisdiction opportunities to obtain satisfaction of those needs, recognized in the human rights instruments, which cannot be secured by personal efforts.⁷⁶⁸

Thus ESCR rights implied three levels of duties, including both negative and positive duties.⁷⁶⁹ Eide focused more explicitly on the role of the State, pointing to its 'Janus-faced' nature – 'The State must

⁷⁶⁵ Shue suggested that interference with existing subsistence rights could include interference with *accidental* negative consequences or interference with *systematic* negative consequences, i.e. that is an inherent or systematic element of the action or policy. Shue explored one example of the promotion of export crops over food crops that ends up reducing people's access to food, recalling 'structural adjustment' although he did not use that term Ibid., 39–51.

⁷⁶⁶ U.N.Doc E/CN.4/SUB.2/1987/23, Asbjørn Eide, 'Report on the Right to Adequate Food, July 7, 1987; U.N.Doc E/CN.4/SUB.2/1998/9 Asbjørn Eide, 'Report Updating the Study on the Right to Food, June 29, 1998; Eide 1984.

⁷⁶⁷ See U.N.Doc E/CN.4/SUB.2/1987/23, Eide, 'Report on the Right to Adequate Food as a Human Right 11–15.

⁷⁶⁸ Ibid., 14–15.

⁷⁶⁹ In the 1996 edition of his 1980 book, Shue includes an afterword that notes Eide's version of the positive obligation to fulfil was more expansive than Shue's since he proposed that the duty to fulfil would involve more than aiding those whose rights had already been violated towards the creation of more effective institutions to ensure that the right is honoured in the first place. See the Afterword in Shue, 1996, 160.

respect human rights limitations and constraints on its scope of action, but it is also obliged to be active in its role as protector and provider.⁷⁷⁰ In other words, States must be judged not only by its failures to refrain from violating rights, but also by its failures to realize an adequate standard of living for its people. Eide's argument also sought to show - contra arguments that ESCR are aspirational given heavy resource implications - that ESCR were not necessarily costly; indeed, ESCR could often best be safeguarded through non-interference of the state:

‘115. It has sometimes been argued that the economic and social rights differ from the civil and political in that the former require the use of resources by the State, while the obligation for States to ensure the enjoyment of civil and political rights does not require resources. This argument is tenable only in situations where the focus for economic and social rights is on the tertiary level (the obligation to fulfil), while civil and political rights are observed on the primary level (the obligations to respect). This scenario is however arbitrary. Some civil rights require State obligations at all levels - also the obligation to provide direct assistance, when there is a need for it. Economic and social rights can in many cases best be safeguarded through non-interference by the State, by respecting the freedom and use of resources possessed by the individuals.’⁷⁷¹

Eide's 1987 report does not engage in detailed discussion, but it does address the role of the state in the economy, seeing the *respect* obligation implying the ‘non-interference of the State’, while the obligation to *protect* ‘implies the responsibility of States to counteract or prevent activities and processes which negatively affect [people]..., particularly the most vulnerable’.⁷⁷² He argued that the State should regulate to protect against third parties (and not only against persons or corporations but also against activities and processes), including against ‘assertive or aggressive subjects such as powerful economic interests acting in a ruthless way e.g. protection against fraud or unethical behaviour in trade and contractual relations, against the marketing or dumping of hazardous or dangerous products’.⁷⁷³ Eide also argued that the obligation to fulfil also required the State to make direct provision in cases where people were prevented from or unable to provide for their own needs, such as during unemployment under recession, or during sudden crisis or for those who are marginalized, including for example ‘due to structural transformations in the economy and production’.⁷⁷⁴ Later, during a CESCR annual Day of Discussion on the right to food, Eide also argued that:

‘When the possibility of improving one's situation was adversely affected by aggressive market forces, then the State was under an obligation to protect the individual.’⁷⁷⁵

Although Eide's final report was submitted in 1987, the Committee did not immediately adopt this framework, despite its important implications for strengthening the obligations framework for ESC rights. Indeed, although the framework was presented to the Committee several times from 1989

⁷⁷⁰ U.N.Doc E/CN.4/SUB.2/1987/23, Eide, ‘Report on the Right to Adequate Food’, 15, para 70.

⁷⁷¹ Ibid., 24, para 115.

⁷⁷² Ibid, 35, para 175.

⁷⁷³ Ibid, 35-36, para 175.

⁷⁷⁴ Ibid., 37, para 180.

⁷⁷⁵ U.N.Doc E/C.12/1997/SR.46, Day 1, para 59.

onwards, it was not until ten years later in 1999 (when the Committee adopted its General Comment No. 12 on the right to adequate food) that this framework made its way into the Committee's understanding and interpretation of ESCR – although it was consistently reflected in all its General Comments elaborating the different economic, social and cultural rights after that. The Committee's General Comment No. 12 on the right to food, adopted in May 1999, was the first to include a paragraph on the three obligations, as follows:

15. The right to adequate food, like any other human right, imposes three types or levels of obligations on States parties: the obligations to respect, to protect and to fulfil. In turn, the obligation to fulfil incorporates both an obligation to facilitate and an obligation to provide.⁷⁷⁶ The obligation to respect existing access to adequate food requires States parties not to take any measures that result in preventing such access. The obligation to protect requires measures by the State to ensure that enterprises or individuals do not deprive individuals of their access to adequate food. The obligation to fulfil (facilitate) means the State must proactively engage in activities intended to strengthen people's access to and utilization of resources and means to ensure their livelihood, including food security. Finally, whenever an individual or group is unable, for reasons beyond their control, to enjoy the right to adequate food by the means at their disposal, States have the obligation to fulfil (provide) that right directly. This obligation also applies for persons who are victims of natural or other disasters.⁷⁷⁶

General Comment No. 12 on the right to food also introduced an approach to what would constitute a violation of ESCR obligations – linking this also to the failure to achieve a 'minimum core', and a failure of the State to meet its obligations to protect and fulfil the rights, including through failures in the regulatory role of the State:

'Violations of the Covenant occur when a State fails to ensure the satisfaction of, at the very least, the minimum essential level required to be free from hunger. In determining which actions or omissions amount to a violation of the right to food, it is important to distinguish the inability from the unwillingness of a State party to comply. Should a State party argue that resource constraints make it impossible to provide access to food for those who are unable by themselves to secure such access, the State has to demonstrate that every effort has been made to use all the resources at its disposal in an effort to satisfy, as a matter of priority, those minimum obligations. This follows from Article 2.1 of the Covenant, which obliges a State party to take the necessary steps to the maximum of its available resources, as previously pointed out by the Committee in its General Comment No. 3, paragraph 10. A State claiming that it is unable to carry out its obligation for reasons beyond its control therefore has the burden of proving that this is the case and that it has unsuccessfully sought to obtain international support to ensure the availability and accessibility of the necessary food.'

.....19. Violations of the right to food can occur through the direct action of States or other entities insufficiently regulated by States.⁷⁷⁷

The Committee's tripartite obligations framework therefore, drawing on the work of progressive legal scholars, directly challenged the classical liberal dichotomy between negative and positive rights, by establishing that all rights entailed both negative and positive duties. By establishing how ESCR involved negative duties to refrain from violating rights as well as positive duties to regulate and to provide, including in instances where the market failed or people were unable to provide for themselves, the Committee also (even if only implicitly) challenged neoclassical economic prescriptions for a 'minimal

⁷⁷⁶ U.N.Doc E/C.12/1999/5, CESCR, General comment 12'.

⁷⁷⁷ Ibid, paras 17-19.

state' that refrained from intervening in the economy. The Committee was clearer with respect the regulatory role of the state, than with regard to specifying a specifically redistributive role, although again, it made clear that the state had a duty to 'fulfil' or provide whenever markets could not - at least to allow a minimum standard of living for all.

The Committee never drew directly from the earlier insights of the legal realists and the institutional economists, although the emphasis on the regulatory role of the State recalls their earlier more explicit insistence on using the countervailing power of the state to protecting people against the coerciveness of concentrated economic power, including in the supposedly 'free' markets imagined in neoclassical economics.

However, although the 'tripartite' framework of obligations addresses the role of the State in the economy, the Committee has not examined the extent to which the trends of liberalization, deregulation and privatization, are constitutive of economic (neo)liberalism or are an effort to change what institutional economists, like John R. Commons, called the 'working rules' of the economy.⁷⁷⁸ Liberalisation, deregulation and privatization have worked, as Harvey points out, to 'disembed' the market from the 'web' of social, political and institutional constraints that had served to constrain economic power and ensure a fairer distribution of economic resources during the post-war era of 'embedded liberalism' that the institutionalists had helped to establish. Indeed, as Balakrishnan and Elson have pointed out (echoing the lessons of the institutionalists), 'de-regulation is actually a form of re-regulation': deregulation changes the rules of the economy to benefit and re-regulate in favour of some actors over others.⁷⁷⁹ De-regulation does not necessarily reduce regulation, but rather changes the 'rules of the game', as the State shifts to re-regulate and enforce different rules and different rights, and their different distributional effects. Similarly, 'liberalisation' means 'freeing' markets, shifting conceptions of 'economic freedom' from freedom of people from the markets (the conception of 'embedded liberalism' and Roosevelt's rights), to freedom of the markets from the constraints protecting people.

In addition, unlike the earlier legal realists and institutional economists, the Committee's challenge to liberal legal orthodoxy in its tripartite framework, has not needed to challenge the primacy of the right to property, that had earlier inhibited expressions of economic and social rights. Indeed, since the 'right to property' was excluded from the Covenant during the drafting process (and since most economies have been 'mixed economies') the Committee has never had to deal directly with the stark challenges faced earlier with respect to the insistence over its 'absoluteness' or its 'primacy' over other rights, or the role of the State in its enforcement in 'free' markets. Given widespread acceptance of the substantive

⁷⁷⁸ Cf Commons 2009.

⁷⁷⁹ Balakrishnan and Elson 2008b.

positive role of the state in economies, challenging the primacy of property rights was less immediately important in the modern context.

However, the fact that Committee has not had to clearly clarify the relationship between ESCR and the right to property, or even between human rights and the right to property may also mean that it has not been possible to invoke the Committee's authoritative interpretations against the narrowing down of human rights and the re-assertion of legal and economic orthodoxies. For example, as O'Connell has warned in his 'The Death of Social Rights', notions of ESCR are being narrowed down in courts across the world to be more consistent with 'neoliberalism' (even in Constitutional courts that had earlier established ground-breaking jurisprudence on ESCR, such as South Africa, India and Canada).⁷⁸⁰ O'Connell argues that 'in the context of neoliberal globalisation domestic courts are unlikely, because of a tacit and implicit acceptance of neoliberal orthodoxy, to advance the protection of socio-economic rights.'⁷⁸¹ Baxi has also warned of the narrowing down of human rights to 'market-friendly' rights particularly in the context of international trade.⁷⁸² Jessica Whyte has observed how even non-governmental human rights organisations have worked to re-define 'human rights' in ways that exclude ESCR.⁷⁸³

The Committee has not then drawn on some of these earlier insights from the emergence of economic and social rights in their normative elaboration of the rights in the more modern era. There is some evidence however that the Committee has nonetheless drawn from the dominant heterodox economist of the time, the Indian economist, Amartya Sen, via the concept of 'human development' captured in the UNICEF and UNDP reports, as well as through the 'AAQ' criteria (as defined below).

4.1.3 AAAQ, 'human development' and influence of the heterodox economist, Amartya Sen

In addition to setting out the 'tripartite framework', the Committee's General Comment No. 12 also set out the core content of the right to adequate food as including the elements of availability, accessibility, acceptability and quality, which have come to be called the 'AAAQ' criteria.⁷⁸⁴ This framework was first used in the context of the right to food, but also later taken up in the General Comments on other rights. I suggest below that this came into the framework for ESCR via Eide's 1987 report on the right to food, which in turn drew on the work of the economist, Amartya Sen and explore how Sen influenced the

⁷⁸⁰ O'Connell 2011.

⁷⁸¹ Ibid., 552.

⁷⁸² Baxi 1998, 234.

⁷⁸³ Whyte 2017b.

⁷⁸⁴ E/C.12/1999/5, CESCR, 'General Comment No. 12', See paras 7-13.

Committee's work, not only through notions of 'AAAQ', but also through his work on 'entitlements', 'capabilities' and 'human development'.

Asbjorn Eide's 1987 'Report on the right to adequate food as a human right' highlighted the availability and accessibility of food as key elements of the emerging new concept of 'food security' under the UN's Food and Agricultural Organisation (FAO) and other bodies, a definition driven in part by the work of the economist, Amartya Sen.⁷⁸⁵ Eide argued that the right to adequate food required a focus not only on availability, but on people's access to food and its cultural acceptability, adequacy and safety (in terms of being free of adverse or toxic substances).

This drew on the work of the Indian economist, Amartya Sen who, in his book on *Poverty and Famines*, had argued against the thesis that most famines are caused by a collapse in the availability of production of foodcrops.⁷⁸⁶ Rather, he argued that famine, like endemic hunger and starvation, was due to the lack of 'access' to available food, as for example in the Great Bengal famine when over 2 million people perished, yet 'people died in front of well-stocked shops protected by the state'. There was no problem of food availability, but poor people did not have access to that food as their incomes and jobs had been decimated by floods, and they had no other ways of accessing available food. What Sen labelled as their 'entitlements' (i.e. ownership or any legal means or rights they had to 'command' or have access to food) had collapsed, and so their families starved, even while wealthier people did not. Their rights were not actively violated, but the prevailing institutional framework gave them no other right or way of accessing food. They starved 'because of lack of legal entitlement not because of their entitlements being violated'.⁷⁸⁷

Sen thus suggested that institutional factors, as well as economic factors, could affect entitlements – including legal rights as well as other laws, customs, traditions, as well as social policies such as welfare transfers or charity. Like the earlier institutionalists he saw that 'market forces, can be seen operating *through* a system of legal relations (ownership rights, contractual obligations, legal exchanges etc)'. Thus he concluded viscerally: 'The law stands between food availability and food entitlement. Starvation deaths can reflect legality with a vengeance.'⁷⁸⁸

Eide in his 1987 report adopted some of this thinking, suggesting that Sen's 'entitlement approach' provided a bridge between human rights and development (and economic) thinking. This approach required:

'...a shift in thinking from *what exists to who can command what*. The entitlement approach therefore fits well with human rights thinking, and can provide a link between the analysis of how various development processes affect people's command over food in different ways, and the right to have a command at all. It

⁷⁸⁵ UN Doc E/CN.4/Sub.2/1987/2, Eide, Report on the Right to Adequate Food, see paras 122-135.

⁷⁸⁶ Sen 1981.

⁷⁸⁷ Ibid., 458.

⁷⁸⁸ Ibid., 66.

provides a bridge between legal and ‘development’ thinking, making it possible to avoid simplistic assumptions such as the one that the fulfilment of the right to food for all can be achieved simply by distribution of available food resources. Concretization of the entitlements provides an opportunity to develop some of the indicators that will be needed to assess the impact on household food security of economic or social changes that take place at more distant levels.⁷⁸⁹

Sen’s influence on the early work of the Committee is evident through this work on availability and accessibility of food, as well as through efforts to strengthen understanding of the right to food as a ‘human right’. An article of Sen’s entitled ‘The Right not to be Hungry’ was reprinted in Philip Alston and Katerina Tomasevski’s edited 1984 book *The Right to Food* given that, as the editors noted, it established the validity of the right to food as a basic human right.⁷⁹⁰ Denying a stark distinction between ‘moral’ and ‘legal’ rights, Sen argued that the right to be free from hunger could be a concrete, institutional or legal right in some countries (e.g. as concretised in social security system priorities), but it could also exist as a rather abstract, moral, background right in others (where it is not institutionalized but may still be understood as a ‘right’) or a ‘metaright’ to a policy.⁷⁹¹ As he argued elsewhere, authors such as Maurice Cranston who followed a Bentham-like rejection of human rights as ‘nonsense on stilts’ if they were not already enshrined in law, had largely missed the point of ‘human rights’.⁷⁹² From Sen’s perspective, rather defining human rights as only those rights that were already justiciable in court, it would be more productive to understand them as a demand for the institutionalization or ‘formalisation’ of such rights, given their ethical importance as entitlements of all human beings.⁷⁹³ Further challenging Maurice Cranston’s ‘feasibility’ critique of ESCR, Sen also insisted that the ‘non-realization [of a right] does not, in itself make a claimed right a non-right’ – the lack of supposed feasibility of a right should be an empirical question, not a normative claim nullifying the existence of economic and social rights. Attempts to exclude ‘all economic and social rights from the inner sanctum of human rights, keeping the space reserved only for liberty and other first-generation rights, attempts to draw a line in the sand that is hard to sustain.’⁷⁹⁴

Amartya Sen: One of the ‘most influential’ (heterodox) economists of the 20th century

Amartya Sen, who won the Nobel Prize of Economics in 1998, has been described as ‘one of the most influential development economists of the twentieth century’⁷⁹⁵ for the impact of his work, including his concepts of ‘entitlements’, ‘capabilities’ and ‘human development’ on economics, particularly in development economics.

⁷⁸⁹ U.N.Doc E/CN.4/Sub.2/1987/2, 9.

⁷⁹⁰ Alston and Tomasevski 1984.

⁷⁹¹ Sen 1984, 69–71.

⁷⁹² Sen 2001, 228–29. Referring to Cranston’s 1967 essay ‘Human rights: real and supposed’.

⁷⁹³ Sen 2001, 228–29.

⁷⁹⁴ Sen 2009, 384–85. Sen has also addresses the classic critique of Onora O’Neill on ‘imperfect obligations’ - see 382.

⁷⁹⁵ Prendergast 2011, 207.

Sen's work has taken a critical approach, challenging theories of rights and justice in political philosophy, from Nozick to Rawls, but his main target has always been mainstream neoclassical economic theory,⁷⁹⁶ particularly in the form of modern welfare economics⁷⁹⁷ (all of his work can be read as a critique of the underlying assumptions of neoclassical economics). Sen thus falls into the 'heterodox' tradition within economics, although he is not a direct heir to the old institutional economists nor to the Keynesian economists, but he shares with those theorists the aim to 'humanise' economic theory.⁷⁹⁸ He has challenged the negative conception of freedom in economics and its privileging of utility, by promoting a conception of positive freedom in his concept of 'capabilities' and advocating the replacement of a focus on aggregate economic growth, with a focus on 'human development'. He has also challenged assumptions in orthodox neoclassical economic theory that militate against public action, in an attempt to rescue welfare economics from the 'free-marketeters'⁷⁹⁹ Perhaps more than any other contemporary economist, Sen has also to clarify the linkages between economics, freedom and human rights, providing as Vizard has carefully demonstrated, 'a 'scholarly bridge' between human rights and economics.'⁸⁰⁰ Yet Sen has at the same time been criticised for a tendency to adopt 'evocative but ambiguous, politically safe labels and an avoidance of seeking debate on all fronts'⁸⁰¹ and his work is less 'radical' than the work of the institutional economists of the first 'law and economics movement' and less prescriptive than the Keynesians that influenced the conceptualisation of ESCR in the Depression era. His work has been very important for the conceptualisation of ESCR in our more modern era, but offers fewer intellectual resources for challenging economic power and the 'rules' of the economic game, as I show further below.

A central focus of Sen's work has been to challenge negative conceptions of freedom, including by criticising liberal (or rather, libertarian) theories of rights and justice in political philosophy. Thus, arguing for example against Nozick's 1974 *Anarchy, State and Utopia*, Sen has contended that this 'demanding version of libertarian theory' and the uncompromising priority it gives to the classical liberal rights of life, liberty and property is 'problematic since the actual consequences of the operation of these entitlements, can quite possibly include rather terrible results.'⁸⁰² As he shows, Nozick's 'entitlement theory of justice' put procedural justice over distributive justice, and suggests that justice has little to do with outcomes or the fairness of income distribution, but rather on the process entailed. Thus, while Nozick argues that, as long as there are no violations of peoples' rights (especially 'property rights') in the process, any resulting outcome is fair, even if this means extremely high levels of inequalities.⁸⁰³ From

⁷⁹⁶ Hahnel 2002.

⁷⁹⁷ For an clear and analytical overview of the definitions, differences and necessary overlaps between welfare economics and positive neoclassical economics, see Keita 1999.

⁷⁹⁸ Prendergast 2011, 213.

⁷⁹⁹ Ortega Landa 2004, 149–52.

⁸⁰⁰ Vizard 2003, 49.

⁸⁰¹ Gasper 2000, 989.

⁸⁰² Sen 2001, 65.

⁸⁰³ Nozick 1999. Nozick had also argued against any redistribution, on the basis that taxation by the state would constitute a coercive violation of (property) rights and thus could not be justified.

Sen's perspective however, any theory of rights must take account of outcomes and consequences - as his book *Poverty and Famines* had shown 'even gigantic famines can result without anyone's libertarian rights (including property rights) being violated.'⁸⁰⁴ For Sen, it is unacceptable that the libertarians care little if their rights regime results in starvation or endemic hunger for masses of people. Sen counters any regime of rights (or other institutional framework) should be judged, in part, on the basis of whether or not it can ensure substantive freedoms. It cannot be morally acceptable if a particular '[s]et of property rights leads, say to starvation' so he argues, 'the need for consequential analysis of property rights is inescapable whether or not such rights are seen as having any intrinsic value.'⁸⁰⁵

The main focus of Sen's work as an economist however has been to question the underlying assumptions of neoclassical economic theory, particularly in the field of welfare economics. While modern neoclassical economics is built not on libertarian foundations but rather on a specific form of utilitarianism called welfarism, it remains similarly suspicious of positive state intervention or 'public action'. Welfarism is 'deeply rooted in the utilitarian tradition', but while Bentham's utilitarianism encouraged the calculation of utilities (with the ultimate objective of allowing for some redistribution of wealth from the rich to the poor who would value it more), modern welfare economics rejects the possibility of calculating the sum of, and comparing, people's utilities in favour of what is called the 'Pareto criterion'.⁸⁰⁶ A state of 'Pareto optimality' is said to occur when in any policy/distributional change, no one can be made better off without making someone else worse off.⁸⁰⁷ Sen has pointed out however, that Pareto Optimality can be entirely consistent 'with some people in extreme misery and others rolling in luxury, so long as the miserable cannot be made better off without cutting into the luxury of the rich'.⁸⁰⁸ Sen thinks this makes little sense - for him it is obvious that 'making more resources available to individuals who are starving will improve overall well-being, even if some resources must be taken away from multi-millionaires, and even if utilities cannot be directly compared' - and he argues that 'the fact that traditional welfare economics fails to arrive at this conclusion is both a major flaw and severe limitation of this approach.'⁸⁰⁹

Arguing that neoclassical economic theory is 'supremely unconcerned with distributional issues',⁸¹⁰ Sen has also called into question the implications of one of the central theorems of welfare economics - called 'Arrow's impossibility theorem'. This proves mathematically that there is no logical way of defining the 'public interest' on the basis of calculations of individual self-interest. For Sen however, the implications are extremely problematic for welfare economics - because, as he argues: 'Arrow's results

⁸⁰⁴ Sen 2001, 66.

⁸⁰⁵ Sen 1988, 60.

⁸⁰⁶ DeMartino 2002, 45.

⁸⁰⁷ Pressman and Summerfield 2000, 92.

⁸⁰⁸ Sen, cited in Vizard 2003, 31.

⁸⁰⁹ Pressman 2014, 74.

⁸¹⁰ Cameron 2000.

call into question any policy or strategy that might improve economic welfare by reducing economic and social inequalities. Any policy proposal or any approach could be easily dismissed as being arbitrary... or dictatorial...⁸¹¹ In other words, there can be no rational basis for economic or social policies that improve human well-being – thus orthodox economic theory militates against ‘public action’. Sen’s believes however that policy change can and should improve people’s lives and has therefore worked to counter Arrow’s conclusion by developing an alternative set of rules for making social choices, and showing how interpersonal utility comparisons should be used under certain circumstances for making social choices about important issues.⁸¹² This fundamentally challenges the underlying assumptions of orthodox economic theory.

Similarly, Sen has argued that economists should focus less on maximising utility - or maximising aggregate economic growth - and more on maximising people’s ‘capabilities’ and opportunities. His aim to ‘replace the concept of utility with that of capability was a conscious attempt to incorporate a positive freedom concept, human development, at the heart of analytical welfare economics.’⁸¹³ In searching for an alternative to maximising utility, Sen had earlier explored the ‘basic needs’ approach pioneered by development economist Paul Streeten and others, which argued that everyone should have not only a basic income, but access to primary goods and services necessary to satisfy basic needs like food, healthcare, clean water. Contra Rawls’ *Theory of Justice*, Sen also pointed out however that it may be necessary to have an unequal distribution of primary goods, in order to ensure substantive equality – for example, a person with disabilities may need more resources than an able-bodied person to achieve the same result.⁸¹⁴ Sen eventually also moved the focus beyond ‘basic needs’ and the goods and services themselves, towards a focus on the valuable things they enabled people to do or be - in other words their ‘capabilities’.

He argued that ‘capabilities’ should serve as both the means and end of ‘human development’.⁸¹⁵ Economic and social development, Sen argued, should be a process of ‘expanding the real freedoms that people enjoy’⁸¹⁶ and ‘removing unfreedoms and extending the substantive freedoms of different types that people have reason to value’.⁸¹⁷ Negative freedom could never be enough since it can give rise to inequality in substantive freedoms and can be consistent with people starving to death or with extraordinary inequalities in income and wealth. From this perspective, he sought to ‘humanise’

⁸¹¹ Pressman 2014, 73.

⁸¹² For a far more detailed overview and explanation, see Pressman and Summerfield 2000.

⁸¹³ Prendergast 2011, 207.

⁸¹⁴ DeMartino 2002, 108–13.

⁸¹⁵ Nussbaum’s work has examined more explicitly the linkages between ‘capabilities’ and international human rights, and Sen has also addressed these issues in a number of different ways that are not covered comprehensively here, but for a good overview, see e.g Elson et al. 2014; Vizard 2003; Vizard, Fukuda-Parr, and Elson 2011; Burchardt and Vizard 2011.

⁸¹⁶ Sen 2001, 3.

⁸¹⁷ *Ibid.*, 86.

economics, calling for a shift away from a narrow focus on aggregate economic growth (or GDP per capita) towards a focus on people and the expansion of their (positive) freedom.

Putting the ‘human’ back into development: the concept of ‘Human Development’

This concept of ‘capabilities’ or positive freedom that Sen developed through the 1980s had a significant practical impact in the 1990s, when it was adopted and developed by the UN Development Programme’s Mahbub ul Haq in UNDP’s ‘Human Development Reports’, and the ‘Human Development Index’.⁸¹⁸

The first Human Development Report (HDR) was launched in 1990 (after UNICEF’s 1987 ‘*Adjustment with a Human Face*’) and aimed ‘to shift the focus of development economics from national income accounting to people-centred policies’.⁸¹⁹ It defined ‘human development’ as the process of enlarging people’s freedoms, or capabilities, expressed in the HDRs as expanding peoples’ ‘choices’.⁸²⁰ It also explicitly sought to challenge the economic policy prescriptions of structural adjustment and the one-size-fits-all neoclassical (or neoliberal) policy prescriptions of the ‘Washington Consensus’. As Richard Jolly noted,

[the] Human Development (HD) approach embodies a robust paradigm, which may be contrasted with the neoliberal paradigm of the Washington Consensus. There are points of overlap, but also important points for difference in objectives, assumptions, constraints and in the main areas for policy and in the indicators for assessing results.⁸²¹

Although Sen initially opposed it, UNDP also developed the ‘Human Development Index’ (HDI), as UNDP’s Haq who drove these developments, believed that a single number, measuring human development, would be critical if the paradigm of ‘human development’ were to compete with the paradigm of economic growth and GDP per capita. The HDI index thus includes three key capabilities (literacy and schooling, life expectancy and adjusted income) – and eventually a country’s HDI rank, along with its GDP per capita rank, became an important tool for assessing economies.

This had an impact on shifting the focus of structural adjustment from a narrow focus on economic growth towards a broader focus on ‘human development’. As Fukuda-Parr points out: Sen’s ideas provided a flexible framework for policy analysis, rather than ‘imposing a rigid orthodoxy with a set of policy prescriptions’.⁸²² At the same time however, the lack of clear policy prescriptions, left Sen’s alternative less effective in shifting the basic macroeconomic policy prescriptions of the ‘Washington Consensus’.

⁸¹⁸ Fukuda-Parr 2011.

⁸¹⁹ Citing its author Mahbub ul Haq, see Fukuda-Parr 2003, 302.

⁸²⁰ *Ibid.*, 303.

⁸²¹ Cited in *Ibid.*, 302.

⁸²² *Ibid.*

Despite his deep critique of the underlying assumptions of orthodox economic theory, Sen has been criticised for his methodological individualism, and lack of attention to the structural factors that shape underdevelopment, including with regards to unequal trade rules, disadvantageous international divisions of labour, and the global power exercised by the International Financial Institutions.⁸²³ While Sen, like Commons, did bring some renewed focus on the role of law in political economy though his focus on ‘entitlements’, this approach has also been seen as a framework for descriptive analysis, rather than a normative prescription for changing those entitlements and institutions.⁸²⁴ In contrast to the old institutional economists, who put a significant focus on the economic power within markets (particularly when the participants do not have equal bargaining power) Sen has also been criticised for ignoring ‘the coercive aspect of the market mechanism, by seeing the ‘free’ market in an abstract manner rather than as ‘a social institution which is itself a product of historical circumstances.’⁸²⁵ Prendergast suggests that Sen’s own work was disciplined by the discursive context of neoliberalism of the period in which he worked:

‘Amartya Sen’s positive evaluation of the market evolved during the 30 years when free market ideology was in the ascendancy and de-regulation of markets became a world-wide phenomenon. While his approach emphasises the importance of access to education, health and other factors which contribute to individual and social capability, his view of markets as a pure social and individual good tends to accommodate, if not reinforce, the pro-free market ideology of the period.’⁸²⁶

Indeed, Sen’s approach to ‘free markets’ has been far less critical than the earlier institutionalists. Sen has argued that ‘[t]o be generically against markets would be almost as odd as being generically against conversations between people... The freedom to exchange... is part of the way human beings in society live and interact with each other (unless stopped by regulation or fiat).’⁸²⁷ Sen has supported Adam Smith’s argument that free markets operated as a progressive force against feudal social relations - and sees this as still important in India, where feudalistic labour relations (ie bonded labour) still persist. Sen further declares that ‘It is hard to think of any process of substantial development can do without very extensive use of markets’ although he argues that this should ‘not preclude the role of social support, public regulation or statecraft when they can enrich-rather than impoverish- human lives.’⁸²⁸

Sen has also insisted that this ‘is not to deny the importance of judging the market mechanism comprehensively in terms of all its roles and effects’⁸²⁹ including the ‘persistence of deprivations among segments of the community that happen to remain excluded from the benefits of the market oriented society’.⁸³⁰ Sen encourages the constant interrogation of the ‘actual performance of actually existing

⁸²³ O’Hearn 2009; Fine 2004.

⁸²⁴ Prendergast 2011.

⁸²⁵ *Ibid.*, 213.

⁸²⁶ *Ibid.*, 217.

⁸²⁷ Sen 2001, 6.

⁸²⁸ *Ibid.*, 7.

⁸²⁹ *Ibid.*

⁸³⁰ *Ibid.*

economic systems and to press for reform to the degree that they fail to meet the demanding standard of capabilities equality⁸³¹:

‘Individuals live and operate in a world of institutions. Our opportunities and prospects depend crucially on what institutions exist and how they function. Not only do institutions contribute to our freedoms, their roles can be sensibly evaluated in the light of their contributions to our freedom. To see development as freedom provides a perspective in which institutional assessment can systematically occur.’⁸³²

Sen's work has thus challenged the negative conception of economic freedom that lies at the heart of neoclassical economics and its privileging of utility, by promoting his concept of positive freedom in his concept of ‘capabilities’ and replacing the focus on economic growth with a focus on human development. He has also carved out a clear justification for public action and the positive role of the State in the economy. Sen's work has thus provided a bridge between human rights and economics, and an alternative paradigm of ‘human development’ that challenged structural adjustment and the ‘Washington Consensus’ (and taken up by the Committee through its references to the UNICEF and UNDP reports, that in turn influenced the Committee's early work). However his work has offered fewer intellectual resources for challenging the ‘institutions’ that constitute ‘free’ markets (than the earlier institutionalists) and has offered fewer concrete prescriptions for human rights in relation to specific economic, and particularly macroeconomic, policies (than the Keynesians).

More recently, Sen has been more critical of markets in the context of the 2008 global economic crisis and has challenged the harsh imposition of fiscal austerity: ‘How was it possible, it has to be asked, for the basic Keynesian insights and analyses to be so badly lost in the making of European economic policies that imposed austerity?’⁸³³ Sen has argued that the 2008 was a failure of markets (and specifically financial institutions, after the financial regulations put in place during the Depression and rolled back from the Reagan era onwards), and criticized how this was so soon translated into being a problem of the role of the state and public debt (which had largely resulted from the banking bailouts and fiscal stimulus). As he writes:

‘There are many odd features of the experience of the world since the crisis of 2008....after the massive decline in 2008 of financial markets and of business confidence had been halted and to some extent reversed through the intervention of the state, especially through stimulating the economy, often paid for by heavy public borrowing, the state had large debts to deal with. The demand for a smaller government which had begun earlier, led by those who were sceptical of extensive public services and state provision, now became a loud chorus, with political leaders competing with each other in frightening people with the idea that the economy could not but collapse under the burden of public debt.’⁸³⁴

⁸³¹ DeMartino 2002, 108.

⁸³² *Ibid.*, 142–43.

⁸³³ Amartya Sen, ‘The Economic Consequences of Austerity,’ *New Statesman*, June 2015.

⁸³⁴ *Ibid.*

In this same article however, Sen's uncritically accepts the need for expansionary monetary policy (rather than Keynesian fiscal policy) as a welcome response to saving the global economy – he argues in relation to the plan of the European Central Bank:

‘which we have every reason to welcome, to deliver a trillion euros of ‘quantitative easing’ (not unlike expanding the money supply) – with decisive expansionary effect – is a result of that belated recognition which is slowly changing the European Central Bank: that expansion rather than contraction is what the economy needs.’⁸³⁵

Sen has offered little critique of this extra-ordinary expansionary monetary policy (which has come to be implemented at the same time as contractionary fiscal policy, with markedly unequal distributional effects) and his work has not helped human rights to define any particular position in relation to contemporary trends of the ‘constitutionalisation of austerity’ in the midst of our contemporary Great Recession.

4.3 The Global Economic Crisis of 2008 and the Great Recession

The recent global financial and economic crisis of 2007/2008, which rapidly turned into the ‘Great Recession’ has been called the worst global recession since the Great Depression of the 1930s⁸³⁶ - with mass unemployment, evictions and a rapid rise in poverty devastating developed economies as well as developing countries. Unemployment rates rose to levels not seen since the Great Depression of the 1930s, particularly youth unemployment.⁸³⁷ Housing bubbles collapsed across Europe and the United States leading to mass foreclosures and evictions. The human cost has been measured in rising poverty, malnutrition and mortality levels - with the World Bank estimating that over 1.2 million infants would die before the age of five as a direct result of the global economic crisis.⁸³⁸

These impacts came in successive waves, first from the financial and economic collapse, but then through a wave of austerity measures, that saw deep cuts imposed on public spending in countries across the world, once the immediate threat of the collapse of the global financial and economic system was averted. As I have written elsewhere, in the immediate response to the crisis, there was an initial unprecedented and coordinated global response to prevent a collapse of the financial and banking system and to prevent a collapse in economic growth (including a return to Keynesian-style fiscal policy), but, once the

⁸³⁵ Ibid.

⁸³⁶ See the Report of the Commission of Experts of the President of the United Nations General Assembly on Reforms of the International Monetary and Financial System. September 21, 2009 (the Stiglitz report).

⁸³⁷ In European countries, such as Spain and Greece, unemployment levels rose to levels not seen since the Great Depression - in Spain reaching 25% and youth unemployment still at 56% in 2013. Across the world, approximately twenty-seven million jobs were lost, pushing people into poverty, International Labour Organization (ILO), *Global Employment Trends 2012: Preventing a deeper job crisis*, 31.

⁸³⁸ World Bank, *The MDGs After the Crisis: Global Monitoring Report 2010*.

immediate threat was over, policies responses shifted towards a combination of monetary easing with fiscal tightening:

‘Initial government responses were unprecedented in terms of the scale of public intervention in markets. Government authorities, especially in the countries where the credit crisis struck hardest, mounted a massive and globally coordinated effort to prevent systemic financial meltdown, injecting trillions of dollars into the banking system. Simultaneously, many governments engaged in expansive, counter-cyclical fiscal and monetary stimulus measures to mitigate the social consequences of the crisis and to spur demand and economic growth so as to prevent a full-blown global depression. These stimulus measures were largest in developed countries, but many developing countries also adopted significant counter-cyclical fiscal measures in this period. However, the massive resources devoted to saving the financial sector far exceeded the resources devoted to fiscal stimulus or social protection programmes. Worldwide, the financial sector in 2010 reportedly received about US\$20 trillion (30 per cent of global GDP) in public support, while public funding for stimulus packages totalled only US\$2.6 trillion (4.3 per cent of global GDP). In addition, just as these steps began to result in a muted economic recovery, albeit largely jobless and wageless, by 2009 and 2010, many governments shifted away from fiscal stimulus measures towards implementing fiscal austerity policies to cut down the government debt incurred from lost tax revenue and from injecting liquidity into the financial system.’⁸³⁹

Despite the initial resurgence of Keynesian policy responses⁸⁴⁰ and a re-emergence of questions over neoclassical economic theory (and its assumptions of automatic equilibrium),⁸⁴¹ this questioning rapidly gave way to the reassertion of the orthodox economic policy prescriptions, little changed from the ‘Washington consensus’. As a response to high debt levels that resulted in part from bailing out the financial system, many governments moved to cut the debt by imposing fiscal austerity, cutting back on social programmes even in the midst of the negative social impacts of the crisis. In some countries, such as Greece, measures were imposed like the structural adjustment era, as conditions for receipt of loans by the IMF, the European Central Bank and the European Commission - known as the ‘Troika’ - which required permanent reductions in public spending, drastic labour market reform, extensive privatisation and a ‘welfare state retrenchment unprecedented in the post-war period.’⁸⁴² These policy prescriptions have been followed in many countries, despite the arguments of critical economists, that ‘inflicting austerity on a weak economy leads to deeper recession, rising unemployment and increasing misery’ and questionable evidence over the impact of austerity on economic growth.⁸⁴³

⁸³⁹ Way, Lusiani, and Saiz 2014, 88–89.

⁸⁴⁰ There was a resurgence of support amongst for Keynesian policy prescriptions of counter-cyclical fiscal spending to prevent the Great Recession from turning into another global Great Depression. Newspapers proclaimed that ‘We are all Keynesians in a foxhole’, and Skidelsky, the great biographer of Keynes, brought out a new book entitled ‘Keynes: The Return of the Master.’ See Skidelsky in *The Telegraph*, August 30, 2009.

⁸⁴¹ Krugman 2009.

⁸⁴² Salomon 2015, 4. Citing A. Koukiadaki and L. Kretsos, ‘Opening Pandora’s Box: The Sovereign Debt Crisis and Labour Market Regulation in Greece’, 26. The case of Greece is complicated by the legacy of corruption and that it had masked its sovereign debt, with the help of Goldman Sachs, allowing it to exceed EU limits, until this was exposed by the financial crisis.

⁸⁴³ Salomon 2015. Citing the ‘Jobs and Growth, not Austerity’, Open letter signed by US economists, Institute for America’s Future. McBride points out that today, ‘the key conflict between the different economic schools is about which strategy is successful in restoring growth, how and when austerity is to be implemented, and who should bear its costs, as well as what the macroeconomic mechanisms are that are supposedly at work. The Keynesian view essentially holds that a growth- oriented policy during an economic downturn is the only

This austerity-driven conditionality in European countries since the crisis has brought close comparisons with the structural adjustment programmes carried out in the 1980s and 1990s across the developing world - even a former World Bank vice president has observed that ‘few lessons have been learned’ and ‘the SAPs being imposed on Europe now by the IMF are very similar to those that were being pushed on developing countries in the 70s and 80s by the World Bank and the IMF.’⁸⁴⁴ The IMF recognised in a report on the May 2013 reforms of Greece that ‘the burden of adjustment was not shared evenly across society’.⁸⁴⁵ Despite all the lessons learned during the era of structural adjustment, none of these lessons were followed - as Salomon poignantly observes: ‘The people of Greece were treated as if there is no history.’⁸⁴⁶

Response of the Committee on ESCR to the 2008 global economic and financial crisis

The response of the Committee on Economic, Social and Cultural Rights to this 2007/2008 economic crisis has been to again reiterate the importance of protecting ESCR in times of crisis - as it did in the era of ‘structural adjustment’ – reasserting the standard of the ‘minimum core’ while introducing a new ‘tests’ for retrogressive measures and policy changes, as well as calling for ‘human rights impact assessments’ of austerity measures.

The Committee’s General Comment No. 19 on the right to social security (published in 2008, although it was being developed before the global economic crisis) suggested that deliberate retrogressive measures are assumed to be prohibited, introducing a test as follows:

‘There is a strong presumption that retrogressive measures taken in relation to the right to social security are prohibited under the Covenant. If any deliberately retrogressive measures are taken, the State party has the burden of proving that they have been introduced after the most careful consideration of all alternatives and that they are duly justified by reference to the totality of the rights provided for in the Covenant, in the context of the full use of the maximum available resources of the State party.

The Committee will look carefully at whether: (a) there was reasonable justification for the action; (b) alternatives were comprehensively examined; (c) there was genuine participation of affected groups in examining the proposed measures and alternatives; (d) the measures were directly or indirectly discriminatory; (e) the measures will have a sustained impact on the realization of the right to social security, an unreasonable impact on acquired social security rights or whether an individual or group is deprived of access to the minimum essential level of social security; and (f) whether there was an independent review of the measures at the national level.⁸⁴⁷

functional way to reduce deficits in the medium run.’ McBride 2016, 11. See also the disputes over the paper on the positive impacts of austerity by Reinhart and Rogoff – Cassidy, 2013.

⁸⁴⁴ Salomon 2015, 13.

⁸⁴⁵ Ibid., 6.

⁸⁴⁶ Ibid., 27.

⁸⁴⁷ U.N.Doc E/C.12/GC/19, CESCR, General Comment No. 19: The right to social security (Art. 9 of the Covenant), adopted 23 November 2007, para 42.

Reasserting the ‘minimum core’, this concluded that ‘the adoption of deliberately retrogressive measures incompatible with the core obligations’ could constitute a violation of the Covenant.⁸⁴⁸

On 16 May 2012, the Committee also finally directly addressed the global economic crisis when the Chairperson addressed a letter to States Parties on behalf of the Committee ‘in relation to the protection of Covenant rights in the context of the economic and financial crisis’ providing ‘certain important guideposts which can help States Parties to adopt appropriate policies that deal with the economic downturn while respecting economic, social and cultural rights’.⁸⁴⁹ It noted ‘the pressure on many States Parties to embark on austerity programmes, sometimes severe, in the face of rising public deficits and poor economic growth’ and that ‘[d]ecisions to adopt austerity measures are always difficult and complex, and the Committee is acutely aware that this may lead many States to take decisions with sometimes painful effects, especially when these austerity measures are taken in a recession’.⁸⁵⁰ But it warns States against infringing the Covenant, not only because this is contrary to their obligations, but also because it can lead to social insecurity and political instability with significantly negative effects, particularly on the most marginalised people.⁸⁵¹

The letter recalls that progressive realization requires making progress: ‘...at the heart of the Covenant is the obligation on States Parties to respect, protect and fulfil economic, social and cultural rights progressively, using their maximum available resources’ which requires states to ensure constant progress through incremental improvements.⁸⁵² However it also recognises that economic and financial crises as well as a lack of economic growth can impede progress and lead to retrogression, recognising that ‘some adjustments in the implementation of some of these Covenant rights are at times inevitable’ but insists that states should not breach their obligations, setting out a test that any policy change or adjustment should be:

1. A temporary measure, covering only the period of the crisis
2. Necessary and proportionate,
3. Non-discriminatory and should mitigate inequalities that can grow in times of crisis (including through tax measures to support transfers to the most marginalised)
4. It should identify and protect the ‘minimum core content’ or ‘social protection floor’ (as defined by the ILO) of the rights and ensure the protection of this core content at all times.⁸⁵³

⁸⁴⁸ Ibid, para 64.

⁸⁴⁹ CESCR, ‘An Open Letter’ (16 May 2012), Reference CESCR/48th/SP/MAB/SW (hereafter ‘Open Letter’). As pointed out by Nolan et al, the letter does not have the status of a General Comment and cannot be considered soft law, although that may change over time, as the Committee has regularly invoked it since in its Concluding Observations on country situations.

⁸⁵⁰ Ibid, 1.

⁸⁵¹ Ibid.

⁸⁵² Ibid, 2.

⁸⁵³ Ibid, 2.

The letter also further reiterates that ESCR obligations should be respected including in agreements with international financial institutions, such as the World Bank and IMF.

In its country reviews, the Committee has warned that austerity measures in a number of countries (including Spain, Iceland, New Zealand and Greece) are threatening ESCR, and has called on governments to ensure that any policy changes meet the test set out in its May 2012 letter - although it has not yet explicitly deemed any cases a breach of the Covenant.⁸⁵⁴ In the case of Greece for example, the Committee focused on the austerity measures adopted under the memorandums of understanding with the Troika, noting the efforts mentioned by the government to uphold the Covenant rights in its negotiations with its creditors, but reiterating the need for effective protection of the rights, including suggesting the 'progressive waiving' of austerity measures once economic recovery starts:

The Committee reminds the State party of its obligation under the Covenant to respect, protect and fulfil economic, social and cultural rights progressively, to the maximum of its available resources. While acknowledging that certain adjustments are at times inevitable, the Committee draws the State party's attention to the Committee's open letter of 16 May 2012 to States parties on economic, social and cultural rights in the context of the economic and financial crisis, in particular to the recommendations contained therein with regard to the requirements resulting from the Covenant regarding the applicability of austerity measures. In that context, the Committee recommends that the State party review the policies and programmes adopted in the framework of the memorandums of understanding implemented since 2010, and any other subsequent post-crisis economic and financial reforms, with a view to ensuring that austerity measures are progressively waived and the effective protection of the rights under the Covenant is enhanced in line with the progress achieved in the post-crisis economic recovery. The State party should further ensure that its obligations under the Covenant are duly taken into account when negotiating financial assistance projects and programmes, including with international financial institutions.⁸⁵⁵

The Committee has also, in a July 2016 Statement on 'Public debt, austerity measures and the ICESCR' (adopted after the Committee's examination of Greece) directly addressed situations where governments claim they are unable to comply with their obligations due to 'fiscal consolidation programmes, including structural adjustment programmes and austerity programmes' as a condition for obtaining loans.⁸⁵⁶ It emphasises that any conditions attached to a loan that would require unjustifiable retrogressive measures would constitute a violation of the Covenant, reiterating the tests for retrogression set out in its May 2012 letter and its General Comment No. 19 on social security. It also clarifies the obligations of borrowing states, as well as for international organisations in their role as lenders, and for states in their role as members of international organisations and for states that are lenders. In relation to the IFIs, the statement explicitly rejects that interpretations by the IMF and the World Bank that their Articles of

⁸⁵⁴ U.N.Doc. E/C.12/ESP/CO/5, CESCR 'Concluding Observations on Spain' (6 June 2012), para. 8; U.N.Doc. E/C.12/ISL/CO/4 CESCR 'Concluding Observations on Iceland' (11 December 2012); U.N.Doc. E/C.12/NZL/CO/3, CESCR, 'Concluding Observations on New Zealand' (31 May 2012), para. 17; U.N.Doc. E/C.12/GRC/CO/2 CESCR, 'Concluding observations on the second periodic report of Greece' (27 October 2015).

⁸⁵⁵ U.N.Doc E/C.12/GRC/CO/2 CESCR, 'Concluding observations on the second periodic report of Greece' (27 October 2015), para 8.

⁸⁵⁶ U.N.Doc E/C.12/2016/1, CESCR, Statement on 'Public debt, austerity measures and the ICESCR', adopted in session of June 2016.

Agreement prohibit them from including human rights considerations.⁸⁵⁷ The statement emphasises the duty of all the actors involved to assess the likely impact on the rights of the Covenant of any international agreements government enter into, and the need to take all measures possible to ensure ‘that any negative impacts are reduced to the bare minimum,’⁸⁵⁸ calling on both lending and borrowing states to carry out, prior to the provision of the loan, a ‘human rights impact assessment’.⁸⁵⁹

4.3.1 A ‘powerless companion’ to the ‘constitutionalisation of austerity’ and neoliberalism?

In his discussion of the Committee’s 2012 letter, Warwick has warned that, at the very time it mattered most in the worst international economic crisis since the inception of the international human rights framework, the Committee has backtracked on its own previous work on non-retrogression, potentially allowing ‘derogation-style deviations from the Covenant’.⁸⁶⁰ While his critique appears somewhat overblown,⁸⁶¹ Warwick is particularly concerned by the notion of ‘temporariness’ introduced in the Committee’s new test for policy changes, since he warns that this may allow for a ‘state of exception’ and emergency derogation from the Covenant rights.⁸⁶²

What seems more problematic however, is that this notion of ‘temporariness’ obfuscates the reality that many of the austerity measures have not been implemented as necessary, temporary measures over the period of crisis. Rather, the crisis has been used as an opportunity to further entrench permanent cuts to social protections and ESCR. This is certainly clear in the case of Greece, where its MoU with the IMF explicitly sets out that cuts will be permanent:

To bring the fiscal deficit to a sustainable position, we will implement bold structural spending and revenue reforms. The adjustment will be achieved through permanent expenditure reductions, and measures to this end have already been implemented as prior actions. [...] We remain committed to our ambitious privatization plans.⁸⁶³

The real issue is the changes being imposed are neither ‘temporary’ nor ‘exceptional’. As O’Connell has pointed out, ‘the current age of austerity is not so much an exceptional and objectively necessary

⁸⁵⁷ Ibid, paras 7-8.

⁸⁵⁸ Ibid, para 4.

⁸⁵⁹ Ibid, para 11. Note that the Committee has yet not provided any methodology for such a ‘human rights impact assessment’. However a new initiative is now underway in the work of the UN Independent Expert on Foreign Debt to establish human rights principles for austerity programmes - See U.N.Doc A/HRC/37/54.

⁸⁶⁰ Warwick 2016, 249–250.

⁸⁶¹ Since even in its 1990 General Comment No. 2, the Committee had also recognised that ‘adjustment programmes will often be unavoidable and that these will frequently involve a major element of austerity’, as recorded above.

⁸⁶² Warwick 2016, 258; See also King for a useful discussion of ‘state of exception’ powers and how these have been used in economic contexts King 2017, 216–218.

⁸⁶³ Salomon, citing IMF, Greece: Letter of Intent, Memorandum of Economic and Financial Policies (15 Mar. 2012).

response⁸⁶⁴, as it is a political project to further entrench (neoliberal) economic orthodoxy. As O’Connell puts it: ‘in a truly astounding slight of the proverbial invisible hand of the markets, a crisis created by the structural contradictions inherent within neoliberal capitalism, has been turned to the advantage of the same class of people who were central in causing, through a seamless transition to an age of seemingly perpetual austerity’⁸⁶⁵ Nolan has also argued:

‘Far from putting an end to the dominance of anti-statist, unregulated free market liberalism that predated and contributed to the crises, it is strongly arguable that by rescuing the financial markets (through taxpayer money and mass socialisation of debt), mainstream neoliberalism has actually contrived an opportunity to intensify the dominance of individualistic, anti-statist unregulated free market liberalism. Indeed, commentators such as Grant and Wilson have noted the ongoing dominance of what they term ‘neoliberal Washington consensus policies’ following the global financial crisis. This contrasts with earlier financial crises which resulted in major shifts in policy paradigms.’⁸⁶⁶

Civitarese and Halliday have also suggested that it is mistaken to see the current ‘age of austerity’ as triggered by the great financial crisis of 2008, since austerity policies were well established and were being implemented well before the crisis, as part of the economic model imposed over the past four decades. As they argue ‘[r]esponses to the 2008 crisis are rather a chapter in the phase of neoliberalisation, rather than a major rupture’.⁸⁶⁷ Indeed, focusing on the situation in European countries, Civitarese and Halliday have argued that the post-crisis period has seen not only the further rolling back of social rights protections, but that this is now being formalised and ‘constitutionalised’ in law; in other words, there is a ‘constitutionalisation of austerity’.⁸⁶⁸

They see this austerity being constitutionalised in a number of different ways - from the constitutionalisation of rules on balanced budgets, to the establishment of new institutions such as Fiscal Councils to undertake independent analysis of public finances, to enforced spending reviews.⁸⁶⁹ In Italy and Spain for example, constitutional amendments adopted after the receipt of loans (from the same ‘Troika’ that has imposed austerity on Greece - the IMF, the European Commission and the European Central Bank) have entrenched commitments to ‘budgetary and financial stability’, in ways that have ‘cast a dark constitutional shadow over public spending, particularly social welfare spending (which constitutes a large proportion of national budgets), and weaken the purchase of entrenched social rights’.⁸⁷⁰

They cite other contributors to their book, arguing that this may be ‘regarded as instances of a wider and longer trend whereby neoliberal economics has been constitutionalised within the European Union.’⁸⁷¹

⁸⁶⁴ O’Connell 2013, 66.

⁸⁶⁵ *Ibid.*, 62.

⁸⁶⁶ Nolan 2015.

⁸⁶⁷ Civitarese Matteucci and Halliday 2018, 12.

⁸⁶⁸ *Ibid.*, 10.

⁸⁶⁹ *Ibid.* See also Bilancia’s chapter in their book.

⁸⁷⁰ *Ibid.*

⁸⁷¹ Citing Christodoulidis and Goldoni chapter *ibid.*

They recall that the welfare state has always been ‘Janus-faced’ in being both about the welfare of the poor and the health of capitalism (regulating capitalism’s inherent capacity of self-destruction), citing Garland’s 2014 article that: ‘The welfare state is an essential basis for human flourishing in capitalist society and an essential basis for capitalist flourishing in human society.’⁸⁷² But they suggest that, while in the post-war period, it came to be understood that public spending and welfare was necessary for capitalism to flourish, those lessons have now been forgotten to the point where today, orthodox prescriptions suggest that capitalism can be protected only by containing spending and ‘neoliberalising’ welfare policies. They highlight, citing Couso’s work on international treaties and human rights, that:

‘international human rights law embodies an economic policy ‘frozen’ in time from the mid-twentieth century (in the form of social-democratic, social-Christian or ‘New Deal’ thought). This philosophy has been ‘transported’ into our time by the social and economic provisions of the Universal Declaration of Human Rights and the International Covenant on Economic, Social and Cultural Rights, which are now incompatible with some of the core principles of contemporary mainstream economic thinking.’⁸⁷³

McBride elsewhere points out that many of these rules on debt and budget deficits were already formalised in Europe under the 1993 Maastricht Treaty and the 2012 EU Fiscal Compact which ‘constitutionalised’ binding rules on balanced budgets to ensure fiscal discipline of EU member states, stating that these ‘rules.... shall take effect in the national law of the Contracting Parties. Through provisions of binding force and permanent character, preferably constitutional, or otherwise guaranteed to be fully respected and adhered to through national budgetary processes.’⁸⁷⁴ Hence fiscal discipline, along with other structural reforms (such as labour flexibilities) were intended to ‘be a set of permanently embedded rules through being constitutionalized.’⁸⁷⁵ He cites German Chancellor Angela Merkel’s comment about the European Fiscal Pact:

‘The Fiscal Pact is about inserting debt brakes permanently in the national legal systems. They shall possess a binding and eternal validity.’⁸⁷⁶

This then brings us full circle. As I have argued in the earlier parts of this thesis, the legal realists and the economic institutionalists had challenged formalism, not for the sake of formalism itself, but rather because of *what was being formalised* and what was being given a similar kind of ‘binding and eternal validity’, through the ‘constitutionalisation’ of laissez faire liberalism in that earlier period. The New Dealers in turn challenged laissez faire constitutionalism by pushing for a ‘new’ set of economic and social rights, changing the role of the state in enforcing different ‘institutions’ of the economy, and later even attempting to formalize commitments to Keynesian anti-austerity policies in the 1945 Full Employment Bill. Although these new rights were never constitutionalised in US, these ideas were formalised in

⁸⁷² Ibid.

⁸⁷³ Ibid., 12 Citing Couso 2006 on ‘The changing role of law and courts in Latin America.’

⁸⁷⁴ McBride 2016, 8.

⁸⁷⁵ McBride and Mitrea 2017, 1.

⁸⁷⁶ McBride 2016, 7.

international law in the ICESCR. But despite this attempt to ‘freeze’ ESCR in international human rights law, this has not been strong enough to counter the resurgence of economic and legal orthodoxy, and it has failed to reverse the contemporary trend towards the constitutionalisation of austerity and (neo)liberalism in our modern era. Thus Moyn has warned that human rights today appear a ‘powerless companion’ to ‘market fundamentalism’.⁸⁷⁷

In this context, I suggest that recovering the insights of the era of the Great Depression – and drawing on their more modern equivalents that have emerged since the 2007-2008 global economic crisis – could usefully strengthen the power of the Committee’s interpretive framework to prevent further retrogression of these rights and institutions in the future. The recent economic crisis has precipitated a new wave of critiques of both neoliberalism and formal neoclassical economic theory that have emerged since the crisis, many of which recall the lessons of the Great Depression and echo some of the insights of the earlier institutionalists and the Keynesians.⁸⁷⁸

For example, in 2009, the UN’s Report of the Commission of Experts on Reforms of the International Monetary and Financial System (the so-called ‘Stiglitz’ report) highlighted how the financial and economic crisis had thrown again into question the ‘belief that unfettered markets are, on their own, quickly self-correcting and efficient.’⁸⁷⁹ This reflected a renewed critique of the mathematical models of neoclassical theory that assume a tendency towards equilibrium, and thus assume that ‘free’ and unfettered markets are intrinsically stable (an assumption which in turn militates against any state intervention). As the earlier institutionalists and Keynesianism had shown, economic and financial crises suggest that markets are actually intrinsically unstable and need to be stabilised by an active role of the government (including in regulating the speculative financial sector). This Stiglitz report similarly reflects a heightened awareness of the lessons of those earlier economists that rising inequalities also contribute to the the instability of the market system, including through reducing what Keynes had called ‘aggregate demand.’ Recalling the lessons of history, the Stiglitz report states:

One of the most important lessons of the Great Depression was that markets are not self-correcting and that government intervention is required at the macroeconomic level to ensure recovery and a return to full employment. In the aftermath of the Great Depression, governments introduced policies that provided automatic stabilizers for aggregate demand and implemented discretionary policy frameworks to reduce economic instability. But as the Great Depression and earlier panics and crises faded from memory, confidence in the self-stabilizing nature of the market returned.⁸⁸⁰

The report also highlighted the dangers of rolling back of measures of social protection, which had previously served not only to redress the inequalities produced by the operation of free markets, but also to insulate economies against risks by increasing the size of ‘automatic stabilizers’. It suggests that today

⁸⁷⁷ Moyn 2014.

⁸⁷⁸ For an interesting discussion see McBride and Merolli 2013.

⁸⁷⁹ Stiglitz 2010, 8.

⁸⁸⁰ *Ibid.*, 24.

‘economic systems may have become more unstable as a result of weakening both public and private automatic stabilizers through the reduced progressivity of tax structures, weakening of safety nets, greater wage flexibility, and the movement from defined- benefit to defined-contribution schemes for workers’ retirement accounts’.⁸⁸¹ It further blames this on the deregulatory push of the era of neoliberalism, including of the financial sector:

There is now a consensus that inadequate regulations and regulatory institutions, some of which failed even to implement effectively those regulations that existed, contributed to this crisis. While “blame” should rest on the financial sector, government failed to protect the market from itself and to protect society from [its] excesses...⁸⁸²

It also suggests the need to the debate about institutions:

‘The debate about appropriate institutional practices and arrangements and the economic, political, and social theories on which they rest will continue for years. The ideas and ideologies underlying key aspects of what have variously been called neo-liberalism, market fundamentalism, or Washington Consensus doctrines have been found wanting’⁸⁸³

While many recent critiques (at least in the immediate aftermath of the crisis) have called for bringing back Keynesian policy prescriptions for counter-cyclical spending in times of crisis, this is also a reminder that it may be useful to return to the lessons of the old institutional economics.⁸⁸⁴ As institutionalists such as John R. Commons had shown, the ‘working rules’ or rights and obligations that govern the economy can be changed – and different regulations and institutions bring about very different distributional outcomes. Commons argued that it was ‘incorrect to speak of government intervention versus nonintervention’, but rather it was important to look at which rules and rights were enforced, and to whose benefit.⁸⁸⁵ This has its modern equivalent for example in the insistence of heterodox economist Radhika Balakrishnan and Diane Elson (who have worked recently on developing a human rights-approach to macroeconomics) that deregulation is actually a form of re-regulation.⁸⁸⁶ In other words, de-regulation is not about taking away regulation, but rather re-regulates who benefits from government enforcement of which rules.

Another modern equivalent of the ‘old institutional economics’ lies in work of heterodox economist Ha-Joon Chang in what he calls the ‘new institutionalist political economy’.⁸⁸⁷ Chang reiterates the need to

⁸⁸¹ Ibid., 28.

⁸⁸² Ibid., 48.

⁸⁸³ Ibid., 132.

⁸⁸⁴ Note that the ‘old institutional economics’ (which was a critique of neoclassical economic theory) is significantly different from the ‘new institutional economics’ (which is grounded in neoclassical theory). See Rutherford 2001.

⁸⁸⁵ See Introduction by Jeff E. Biddle & Warren J. Samuels, Commons 2009.

⁸⁸⁶ Elson and Balakrishnan 2011; Balakrishnan, Elson, and Patel 2010.

⁸⁸⁷ Chang 2002.

focus on the ‘rights-obligations structure underlying markets,’⁸⁸⁸ i.e. ‘which rights and obligations are regarded as legitimate and what kind of hierarchy between these rights and obligations is (explicitly and implicitly) accepted by the members of the society, since the same state action could be considered an “intervention” in one society and not in another’.⁸⁸⁹ He emphasises that ‘markets are in the end political constructs in the sense that they are defined by a range of formal and informal institutions that embody certain rights and obligations, whose legitimacy (and therefore whose contestability) is ultimately determined in the realm of politics.’⁸⁹⁰ He argues that neoliberals are ‘dressing up their own political views as objective’ and as above politics,⁸⁹¹ but their views are political and their theories normative rather than descriptive – and thus can and should be questioned:

...the ‘market rationality’ that the neoliberals want to rescue from the ‘corrupting’ influences of politics can only be meaningfully defined with reference to the existing institutional structure, which itself is a product of politics (see Vira, 1997 for further exposition of this point). And if this is the case, what the neoliberals really do when they talk of de-politicization of the market is to assume that the particular boundary between market and the state they wish to draw is the ‘correct’ one, and that any attempt to contest that boundary is a ‘politically minded’ one. However, as we argued in section 3.1, there is no one ‘correct’ way to draw such a boundary. If there appears to be a solid boundary between the two in certain instances, it is only because those who are concerned do not even realize that the rights-obligations structure underpinning that boundary is potentially contestable. So, if some people feel that central banks should be politically independent, it is only because they contest the right of the people to influence monetary policy through their elected representatives, and not because there is some ‘rational’ reason that monetary policy should not be politically influenced.⁸⁹²

In another recent theoretical advance, which is less grounded in institutional economics but similarly echoes some of these earlier insights, Jacob Hacker in a 2011 policy paper entitled ‘The Institutional Foundations of Middle Class Democracy’ has called for a ‘rebuilding the institutional foundations of middle-class democracy’ to ‘shift back the uneven organisational balance between concentrated economic interests and the broad public’.⁸⁹³ He argues that there needs to be more focus on what he labels ‘pre-distribution’ (rather than redistribution) i.e. a focus on the rules of the market that shape how its rewards are distributed:

‘When we think of government’s effects on inequality, we think of redistribution – government taxes and transfers that take from some and give to others. Yet many of the most important changes have been in what might be called “pre-distribution” – the way in which the market distributes its rewards in the first place. Policies governing financial markets, the rights of unions and the pay of top executives have all shifted in favour of those at the top, especially the financial and non-financial executives who make up about six in ten of the richest 0.1 % of Americans.’⁸⁹⁴

⁸⁸⁸ Ibid., 550.

⁸⁸⁹ Ibid., 543.

⁸⁹⁰ Ibid., 553.

⁸⁹¹ Ibid., 550.

⁸⁹² Ibid.

⁸⁹³ Hacker 2011, 33.

⁸⁹⁴ Ibid., 35.

Focusing on ‘pre-distribution’ brings the focus back to the institutions or rules that are enforced by the government as the ‘rules of the game’. Instead of focusing on and adopting policies that focus on redistribution to redress the inequalities produced by the market, this perspective suggests that it is rather possible to change the ‘rules of the economic game’ so that market outcomes are not so unequal. He points out that this avoids the need for ‘require major programmes of redistribution – never easy to enact – but rather [requires] measures to reshape the market so that it distributes its rewards more broadly in the first place.’⁸⁹⁵ The question also then becomes less about the resources available for public spending (including in terms the ‘maximum available resources’), and more about focusing on how the institutions of the economy can be changed to shift the distributional outcomes.

While these ideas are not closely grounded in the ‘old institutional economics’ of the institutional economists that we examined in the first part of this thesis, this approach similarly opens up ways for rethinking how rules – and rights – are structured and enforced by states in contemporary economies. This also serves as a reminder that, while human rights, like the welfare state or Keynesian policies, might be criticised as ‘minimalist’ or merely ‘saving capitalism from itself’, the post-war institutions of the New Deal and welfare states, did serve restructure the rules and institutions governing the economy and did have very material impact on reducing levels of inequality and improving wellbeing in the post-war era from 1945 to the 1970s.⁸⁹⁶ This was true up until these trends were reversed in the 1980s under neoliberal economic reforms, ‘structural adjustment’ and the project of ‘disembedding’ the economy from this ‘embedded liberalism’.

Finally, as a last additional point, I would also suggest that the Committee on Economic, Social and Cultural Rights (like the human rights world more broadly) also needs a deeper engagement on economic policy, to be able to address the contemporary shift in economic crisis-responses towards the unconventional, extra-ordinary expansionary monetary policy of ‘quantitative easing’⁸⁹⁷ given that this has more regressive impacts than expansionary fiscal policy.⁸⁹⁸ While governments have imposed fiscal austerity (cutting back particularly on social protections), they have maintained expansionary monetary policies, including extra-ordinary levels of monetary stimulus that have kept the banking and financial markets effectively on life support for ten years since the crisis (and allowed them to make extraordinary profits from ultra-low interest rates). While this combination of fiscal austerity and monetary easing may have prevented an even deeper economic recession, it has arguably also disproportionately benefited the financial sector while contributing to an escalation of income inequality in several countries since the

⁸⁹⁵ Ibid., 37.

⁸⁹⁶ Though this is not to romanticise the American New Deal or post-war Keynesianism welfare states - which were and are full of exclusions and discrimination, particularly with respect to both gender and race.

⁸⁹⁷ This refers to the coordinated policy of the central banks of the US, UK, Japan and EU to inject trillions of new money directly into the economy by raising reserves in the banking system.

⁸⁹⁸ One notable exception here, although it does not go into detail is Elson and Balakrishnan 2011.

2008 global economic crisis.⁸⁹⁹ Understanding this is also significant since the ‘unwinding’ of quantitative easing that has recently started, ten years after the crisis, may be setting the stage for the next great global financial and economic crisis.⁹⁰⁰

⁸⁹⁹ See ‘Quantitative easing has pernicious effects that favour the wealthy’, *The Guardian*, 23 September 2016. And ‘Debate rages on quantitative easing’s effect on inequality’, *Financial Times*, 21 October 2014.

⁹⁰⁰ See ‘Central banks hold a fifth of their governments’ debt: scale of challenge becomes clear as policymakers face unwinding assets after a decade of stimulus.’ *Financial Times*, 15 August 2017.

5. CONCLUSIONS: BACK TO THE FUTURE?

5.1 Lessons from history: ESCR from the Great Depression to the Great Recession

Taking a ‘law in context’ and ‘history of ideas’ approach, this thesis has explored the following questions:

- 1) How and why did ‘second generation’ economic and social rights come to be included in the 1948 Universal Declaration of Human Rights and the 1966 International Covenant on Economic, Social and Cultural Rights?
- 2) How have these rights been shaped by their economic context and the economic theories of the times in which they emerged and have later been elaborated?

By tracing just one strand of the history of human rights – and more specifically this history of the emergence and elaboration of economic and social rights as international human rights – this thesis has ultimately argued that the international human rights regime was born, not only out of the horrors of the Holocaust⁹⁰¹, but also out of the mass misery of the Great Depression of the 1930s, and the profound shift in liberal legal and economic orthodoxies that occurred at that time – the lessons of which remain profoundly relevant today.

I have argued that ‘economic and social rights’ came to be included in the international bill of rights, not only as an afterthought or on the insistence of socialist states, but because they were also central to shifts within ‘western liberalism’ during the Great Depression, that came to be reflected in the post-war consensus on ‘embedded liberalism’. Indeed, I have shown that these shifts within ‘western liberalism’ occurred even in the United States, and that economic and social rights were forged, in part, in New Deal efforts to re-define rights, freedom and the role of the state in the economy. This sought to challenge the ‘do nothing’ prescriptions of economic liberalism and the ‘*laissez faire* constitutionalism’ of the US Supreme Court in the Depression era economy. What put the ‘human’ in ‘human rights’ was the addition of a new set of economic and social rights to the classical liberal rights, to ‘humanise’ the prescriptions of both legal and economic orthodoxies, and to mitigate the negative impacts of the Depression on the lives and livelihoods of ordinary people. What was new about ‘international human rights’ was not only accountability to a supra-state power, but a new conception of the responsibilities of the state towards its citizens, extending beyond securing narrow, liberal freedoms, towards securing a ‘larger freedom’ from fear and want – a vision that required active intervention of the state in the economy to protect people from the vicissitudes and inequalities produced by ‘free’ markets.

The central thesis of this work is that ‘economic and social rights’ have been shaped by, and shaped, the economic context and the economic theories of the times in which they have emerged and been

⁹⁰¹ As Morsink and others have argued –this is itself a contested claim, but one that is beyond the scope of this thesis.

elaborated. I have shown how, at their emergence (in the United States) in the economic crisis of the Great Depression, they were shaped first by the heterodox theories of the institutional economists, and later by the theories of economic Keynesianism that both challenged neoclassical economic theory. These ideas that were later to influence the drafting of the 1945 UN Charter that emerged in the discursive context of Keynesianism, as well as the later 1948 UDHR and the 1966 ICESCR, through the surprising role of US on ESCR in the drafting of the international bill of human rights. I have also shown how these rights have later been elaborated, after the establishment of the Committee on ESCR in 1987, again in the context of economic crisis (this time the crises of structural adjustment and the transition to market economies in both developed and developing countries), and again as part of a challenge to (neo)liberal economic orthodoxy, and this time influenced by the one of the dominant heterodox economists of this period, Amartya Sen.

I have traced how the work of Amartya Sen, like the ‘first great law and economics movement’ and Keynes too, has sought to challenge both the primacy of classical liberal rights, as well as the assumptions of mainstream neoclassical economic theory, which together buttress economic (neo)liberalism, today as they did in the past. However, I have also shown that their elaboration has occurred with the very different discursive environment of neoliberalism, and that many of the insights that shaped the earlier emergence of these rights in liberal thought have been lost in the contemporary elaboration of economic and social rights, in ways that circumscribe their potential to challenge economic power and economic inequality. Indeed, I have argued that Sen’s work has itself been disciplined by discursive context of neoliberalism, leaving his work (and by extension, the work of the Committee since it had few other economic theories on which to draw) as less ‘radical’ than the work of the institutional economists and less prescriptive than Keynes, particularly in addressing the negative impacts of economic crises, structural adjustment and the ‘constitutionalisation of austerity’ in our own time.

While this thesis has focused on drawing out a lost history of economic and social rights, I have concluded that recovering some of key theoretical insights that shaped the emergence of these rights may therefore be useful for rethinking the contours of economic and social rights for the future. In making this point, I do not seek to suggest that these earlier insights better reflect the ‘origins’ or ‘essence’ of these rights. I have rather sought to explore this ‘pre-history’ and ‘post-history’ of economic and social rights and their historical, linguistic and economic context in order - as the historian Quentin Skinner has suggested – to ‘free us to re-imagine [these concepts] in different and perhaps more fruitful ways.’⁹⁰² Similarly, I have sought to juxtapose human rights and economic context not to draw strict causal links or correlations, but rather to see what insights can be drawn from this juxtaposition. From this perspective too, these insights need not be applied in a mutually exclusive way, but can be seen as

⁹⁰² Tully 1989.

complementary – in other words, it may be possible to draw on Keynesianism, institutionalism, Sen or others, applying their different insights at the same time, wherever these might prove fruitful.

Recovering these insights has potentially practical implications – including for the work of the UN Committee on Economic, Social and Cultural Rights. As I have begun to draw out in the last section (4.3), the Committee could use some of these insights to strengthen its interpretive framework for addressing the Great Recession, giving the Covenant renewed meaning in our contemporary context and addressing the contemporary trend towards the ‘constitutionalisation’ of austerity, which marks a renewed effort to formalise or ‘freeze’ this new form of (neo)liberalism in law. More research will still be needed to draw out the practical lessons in more detail. But for example, I have argued that Keynesian insights offer a useful lens for re-imagining the contemporary understanding of Article 2.1 and the interpretation of the use of the ‘maximum available resources’, and the Committee’s approach to austerity.⁹⁰³ Equally, the institutionalist insights show the importance of also moving beyond the question of resources, to examine the institutions that make up the market economy - including which institutions are enforced by the state and for whose benefit – and examining how these shape, or aim to re-shape, the distributional outcomes of markets (looking in other words at what Hacker has called ‘pre-distribution’, rather than redistribution). This perspective also helps us to see how liberalisation, privatisation and ‘de-regulation’ (or re-regulation in the interest of others) are part of the pattern of dis-embedding markets from the social constraints of post-war ‘embedded liberalism’. It also helps us to see why ESCR remain important in this context – indeed, one of the central lessons of the legal realists and the institutional economists, who so carefully studied the legal-economic nexus, is that our world is structured and constituted by the law, and markets are made of legal rights – so any challenge to the economic order must necessarily be a legal challenge in terms of rights.

5.2 Contributions of this thesis

This thesis has also made a number of original contributions to the literature on human rights.

One of these original contributions is the discovery and discussion of previously unexamined primary material from the UN and US archives, mysteriously absent from other histories of human rights, which has thrown new light on the US role in shaping the nature and scope of economic and social rights, as they emerged as international human rights. I have traced the history of this document – the July 1947 ‘*United States Suggestions for Articles to be Incorporated in an International Bill of Rights*’ – through both the UN archives and the US national government archives, finding that the official US position on ESCR was significantly different from what many conventional narratives suggest. This document sits at the heart

⁹⁰³ King offers a useful reminder that ‘austerity and social rights are not *necessarily* in principled conflict’, since many economists provide evidence that austerity may be necessary to regenerate economic growth. However in citing the controversial 2010 study by Reinhart and Rogoff, whose data proving austerity was associated with growth was disputed and their methodology questioned, King also effectively demonstrates that economic arguments can be as much political as they are technical. King 2017, 218–220.

of my research – and I have traced it backwards and forwards over time, including back through the ‘pre-history’ of the ESCR in the Roosevelt era, as well tracing its impact forwards on the conceptualisation and ‘constitutionalisation’ of ESCR during the drafting process of both the UDHR and the ICESCR. I have shown how these 1947 *US Suggestions* are historically significant, not only because they belie conventional narratives about the US position on ESCR, but also because a number of concepts and phrases that were later to become part of the lexicon of the ESCR have clear roots in this 1947 US proposal - including the concepts of ‘maximum available resources’ and ‘progressive’ realisation’ that came to be enshrined in Article 2.1 of the ICESCR and have shaped the nature and scope of ESCR in the more modern era. This offers a new contribution to the literature on this history of ESCR, that goes well beyond other existing analyses – including those that trace some of its roots in the US liberalism, such as Whelan’s detailed history of ESCR – as well as the broader history of the international bill of human rights.

Another original contribution emerged out of my methodological approach of placing texts and concepts in their historical, economic and linguistic context, which pushed me to revisit the meaning of ‘maximum available resources’, drawing out and exploring the early Keynesian connotations of that phrase, and eventually to the Keynesian contribution to the conceptualisation of ESCR in the New Deal era. Although I show that this economic understanding of the phrase was quickly lost the drafting process, this nonetheless unsettles our contemporary interpretation of this phrase and opens up new possibilities for re-imagining this concept in ways that are profoundly relevant in the context of contemporary trends of the ‘constitutionalisation of austerity’. This is because (at least in its initial incarnation), this Keynesian phrasing was not meant as a clause relating to the limited availability of resources, but rather the opposite – it was an exhortation to avoid austerity, particularly in times of economic crisis.

In tracing the ‘pre-history’ of these concepts in the New Deal era, my work also offers new primary material to challenge Samuel Moyn’s assertion that ‘human rights’ first appeared in the 1940s *by accident*. Responding to his declaration that ‘no evidence has been discovered to explain why and when the phrase appeared as it did,’⁹⁰⁴ I have excavated evidence (including from press articles at the time) which shows the phrase ‘human rights’ was in popular usage in the United States even in the 1930s and was certainly not accidental, but was deliberately deployed to challenge ‘*laissez faire* constitutionalism’, carving out a justification for an active government response to the economic crisis of the Great Depression in the New Deal era. While the New Deal administration was influenced by the legal realist concern to keep economic and social rights out of the hands of (conservative Supreme Court) judges, much of the New Deal was still popularly framed in terms of ‘human rights’ including in what the *New York Times* called in 1934 ‘the greatest conflict of constitutional and economic philosophy of the times’, and Roosevelt’s 1936

⁹⁰⁴ Moyn 2012, 49.

‘constitutional moment’ as well as the 1937 ‘court-packing plan’ which set ‘human rights’ against ‘property rights’ (as chronicled in section 2.2).

While Moyn notices in his more recent 2018 book that Roosevelt called for a ‘re-definition of rights’ and a new ‘economic constitutional order’ right already in 1932 – he misses much of the other evidence chronicled here. Indeed, Moyn alleges that the New Deal was not framed in terms of rights, and that Roosevelt only ‘flirted with social rights’ at the end of his tenure, at the ‘end of reform’ when the more egalitarian and institutional visions of the New Deal were waning. Moyn argues that what is most significant about Roosevelt’s 1944 Second Bill of Rights is the moment when it was articulated: ‘Easily the most significant fact about the Second Bill of Rights package, then, is that it came so late, when the energies of the New Deal were nearly spent and in the very different context of wartime.’⁹⁰⁵ I would suggest however that in making this argument, Moyn has relied too heavily on one interpretation of New Deal history – that of Brinkley’s ‘End of Reform’⁹⁰⁶ - which is an excellent overview of the shifts in the philosophical underpinnings of New Deal liberalism, but also has its own limitations.

Brinkley chronicles the shift from the radicalism of the institutionalists who aimed to restructure the economy, towards the later Keynesians who aimed rather to balance out the booms and busts of the economy without changing the structure of capitalism – which he disappointedly labels the ‘end of reform’.⁹⁰⁷ However, Brinkley also sets up a debatable dichotomy between what he calls the earlier ‘reform liberalism’ and a later ‘rights-based liberalism’ to support his narrative.⁹⁰⁸ While he recognises that the New Dealers rejected ‘the classical laissez faire liberalism of the nineteenth century’, he argues ‘they were not yet particularly concerned with (or at first, even much aware of) the rights-based liberalism that would become central to the post-war era’,⁹⁰⁹ glossing over Roosevelt’s early efforts to redefine ‘rights’. In my retelling of this history, contra Brinkley, rather than being antithetical to what he calls ‘reform liberalism’, human rights had their early roots in this kind of liberalism and its efforts to challenge the institutions being formalised in both the law and economics of laissez faire constitutionalism.⁹¹⁰ With the new evidence outlined here, my work thus also contributes in this small way to the historiography of the New Deal, as well as to that of human rights.

My work, like Moyn’s recent 2018 book, also seeks to contribute to contemporary debates within the human rights literature over the relationship between human rights and economic (neo)liberalism. I trace this relationship back through history to the Great Depression and the New Deal, as Moyn does too, but I cover far more detail than he does and while he picks up on some of the more egalitarian roots of

⁹⁰⁵ Moyn 2018, 34.

⁹⁰⁶ Moyn recognises that Brinkley informs his account throughout, see note 16, *ibid.*, 51.

⁹⁰⁷ Brinkley 1996.

⁹⁰⁸ Showing how historiography is so important.

⁹⁰⁹ Brinkley 1996, 10.

⁹¹⁰ As Weber had long ago pointed out, and institutionalists took forward, the legal institutions are central to the workings of capitalism, and as Marx had pointed out, legalism plays a role in legitimizing capitalism. See Trubek 1972.

human rights in the New Deal, I would suggest his argument lacks clarity because he sometimes appears to be arguing with his own premise: that human rights are merely ‘minimalist’. Moyn argues that, since the triumph of market fundamentalism in the 1970s, human rights has ‘accommodated itself to the reigning political economy’, with social rights offering only minimalist protection.⁹¹¹ My own thesis, by contrast, by bringing an additional focus on economic theory, as well as a detailed look at the drafting history, makes a more nuanced argument, arguing that in their emergence, elaboration and evolution, ‘human rights’ have consistently (if not always effectively⁹¹²) sought to provide a (liberal) challenge economic (neo)liberalism, drawing from the theories of heterodox economists as well as progressive jurists (precisely with the intention to ‘humanise’ economic liberalism and the liberal rights that underpin it, rather than to overthrow it).

While Moyn has earlier described human rights as rising in the 1970s as ‘the last utopia’, and ESCR as re-emerging in the 1980s merely as an automatic response to the waning of concerns over totalitarianism and authoritarianism,⁹¹³ my analysis suggests an alternative thesis. By locating the watershed year for economic and social rights in the 1980s (or 1987 to be exact!) at the establishment of the Committee, I suggest that this was a reaction to the height of ‘neoliberalism’, since this was the same year that Reagan announced his 1987 bill of rights that directly countered Roosevelt’s. My thesis thus suggests that rise of these rights was driven not by the decline in totalitarianism as Moyn would have it, but rather by a reaction to the vigorous re-assertion of (neo)liberal orthodoxy and a ‘free market’ model that promises a far more ‘stark utopia’.⁹¹⁴

As I show in detail in the last section, the definition and evolution of economic and social rights in the interpretations of the Committee on ESCR since the 1980s, has challenged the negative social impacts of ‘neoliberalism’, reacting to the impacts of structural adjustment and the transition to ‘free market’ economies, as well as to the social impacts of the 2007-2008 Great Recession. While the Committee’s interpretation has sought to establish a ‘minimum core’ in its elaboration of Article 2.1 of the Covenant, its work has not been merely to set ‘minimalist standards’ that Moyn seems to suggest now constitute social rights.⁹¹⁵ The ‘minimum core’ is less ambitious than Keynesian prescriptions (and even less so than the institutionalist prescriptions), but it has nonetheless been conceptualized with the aim of preventing the all-out roll-back of the social state, just as the ‘respect, protect and fulfil’ framework challenges the ‘minimal state’, and the AAAQ criteria set standards based on adequacy and quality, which

⁹¹¹ Moyn 2018, 16.

⁹¹² I have suggested that, if ‘human rights’ is perhaps less effective in this challenge today than it was in previous times, that is also because there have been few powerful alternative theories to draw from.

⁹¹³ Moyn writes that ‘as totalitarianism and authoritarianism waned, social and economic rights consciousness could not help but surge’, and laments that ‘human rights were compelled to assume exactly the sort of burden that had brought other ideologies low’, Moyn 2012, 223.

⁹¹⁴ As Karl Polanyi already warned in 1944, and as discussed more recently by Block and Somers, see Polanyi 1944; Block and Somers 2014.

⁹¹⁵ Moyn’s assertion that human rights are about minimum standards relates more to the implementation and framing of constitutional rights, and he does not look at the work of the Committee.

are more about relative than absolute minimums. It is clear however that there are other persistent efforts by other actors, well beyond the reach of the UN Committee's official interpretations, who are working narrow down even further these interpretations of ESCR, or to exclude ESCR altogether from notions of (human) rights (including national courts).

Moyn and others have thus suggested that human rights as they are currently interpreted are 'not enough' in this 'unequal world',⁹¹⁶ and that they fail to address inequalities. But efforts have started to rethink the approach of human rights to extreme levels of economic inequality, which have now risen in many 'western countries' to levels not seen since before the 1929 Great Crash⁹¹⁷ and it is in this context too that I would suggest that recovering the insights of the era of the Great Depression would be useful. In the financial and economic crisis of the 1930s, both the institutionalists and Keynes highlighted important insights as to the inherent fragility of the market system, challenging ideas of the economy as a law-like, self-stabilising economic system and justifying public intervention in the economy in the face of the inequalities and instabilities produced by so-called 'free' markets. Those earlier debates were also more alive to how economics – like the law – encodes particular assumptions with normative implications, thus even apparently 'neutral' assumptions like equilibrium in neoclassical economics can have conservative implications by militating against any state intervention against the 'invisible hand'.⁹¹⁸

In tracing this more detailed history and examining these heterodox economic theories in some depth, this thesis also aims to contribute to contemporary debates in the literature on the human rights and economics,⁹¹⁹ going beyond the scholarly debates that point to the 'non-conversation'⁹²⁰ or 'foundational' tensions⁹²¹ between these two disciplines, by tracing a more complex story of the interweaving of human rights and economics from the Great Depression to the Great Recession.

⁹¹⁶ Moyn 2018.

⁹¹⁷ See for example, Alston, 2015.

⁹¹⁸ For a modern discussion on this point, see Keen, who argues that 'ideology lurks within 'positive economics' in the form of the core belief in equilibrium. Keen 2011, 173.

⁹¹⁹ As well as contextualising the ICESCR in its (macro)economic context, as Dowell-Jones has admonished, though my analysis and conclusions remain different from hers. Dowell-Jones 2004a. Glasius suggests her prescriptions are based 'not just macro-economic analysis per se, but a particular kind of economic orthodoxy that is known to its proponents simply as sound economics, but to others as neo-liberalism', Glasius 2006, 165.

⁹²⁰ Reddy 2011.

⁹²¹ Wills and Warwick 2016, 633.

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I have included footnotes with exact document symbols. I have not used the titles of the UN docs (except where they are unusual or need emphasis), since the document symbols refer clearly to the body and meeting – instead I here provide a guide to the bodies and document numbers used in this thesis, as follows:

A/-	General Assembly A/RES/- Resolution of the GA A/C.3/ - Third Committee A/C.3/SR – Summary Records of Meetings
E/-	Economic and Social Council E/RES/- Resolution of ECOSOC E/CN.4/ - Commission on Human Rights E/CN.4/SR/- Summary Records of Meetings E/CN.4/AC/- Ad Hoc Committees E/CN.4/Sub.2/- Sub-Commission E/C.12/- Committee on Economic, Social and Cultural Rights (CESCR)
-/RES/-	Texts of Resolutions
-/Add	Addition of text to the main document
-/L/-	Limited Documents (e.g drafting proposals from member States)

Most of the documents referenced in this thesis are available (search by symbol) at:
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