

## **The New Bill of Rights**

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When Franklin Roosevelt became President in 1933, he brought the scrutiny Constitutional regime to power. The doctrine of the scrutiny regime is that nearly all power over nearly all facts, is in the political system. This made possible many health and welfare provisions which had been ruled unconstitutional by the previous Constitutional regime, the doctrinal Constitutional regime. However, these provisions established no new rights. They were benefits only, and Congress makes it clear in its legislation (for example, in Obamacare) that the provision creates no new individually enforceable rights.

There are three levels of Constitutional scrutiny under the scrutiny regime which the Supreme Court recognized in *West Coast Hotel v. Parrish*, *U.S. v. Carolene Products*, and their progeny: minimum, intermediate and strict (there are lots of online discussions of these levels). If a fact does not enjoy a higher level of scrutiny than minimum scrutiny, it is not an individually enforceable right. If it does, then it is a right. It is a crystal clear line.

The Supreme Court held, in *Lindsey v. Normet*, that housing enjoys only minimum scrutiny. This case is why housing is not a right. We know now that the Court got the facts wrong, and that people experience something other than what the Court considered homelessness. The better view of the facts is that housing is an unchanging fact of human experience. People are naturally housed—what we call homelessness is what happens to them when they are assaulted with respect to their housing. This is simply a better informed view of how people relate to housing. If a fact is an unchanging fact of human experience, it is an individually enforceable right, and policy affecting it is subject to the highest level of scrutiny, strict scrutiny. Under strict scrutiny, housing evictions would have to be narrowly tailored to meet a compelling government interest. Any lawyer will tell you that that would virtually eliminate housing evictions (ask one!). Indeed, “eviction” would change its meaning, to “uninhabitable.” For example, government could remove people from a burning house, on the grounds that the fire made it no longer housing, and so the right to housing was factually irrelevant. That is how narrow the exception would be. Eminent domain, for example, could not be used for housing evictions.

By the time President Roosevelt gave his State of the Union address in 1944, he had learned that the scrutiny regime no longer comprehended the facts. He said:

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;
- 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.

America's own rightful place in the world depends in large part upon how fully these and similar rights have been carried into practice for our citizens. For unless there is security here at home there cannot be lasting peace in the world....

I ask the Congress to explore the means for implementing this economic bill of rights-- for it is definitely the responsibility of the Congress so to do. Many of these problems are already before committees of the Congress in the form of proposed legislation. I shall from time to time communicate with the Congress with respect to these and further proposals. In the event that no adequate program of progress is evolved, I am certain that the Nation will be conscious of the fact.

Needless to say, Congress never enacted any of these rights. Meantime, the Supreme Court has acted to hold, in a series of cases, that these rights, so-called "social rights," are not Constitutional rights.

There has been some progress in some states toward the establishment of some of these rights—for example, the education right in New Jersey. See [www.edlawcenter.org](http://www.edlawcenter.org). However, the task is to get the Congress to invalidate those Supreme Court holdings and establish the rights, through legislation, which the Court declined to find. Congress has the power to invalidate Court holdings, and legislation is routinely introduced in Congress with respect to some of these rights. See <https://mccollum.house.gov/media/press->

releases/mccollum-introduces-constitutional-amendment-guaranteeing-health-care-all#:~:text=Res.,this%20article%20by%20appropriate%20legislation.%E2%80%9D

The establishment of new rights is part of the slow establishment of the new Constitutional regime, which is the maintenance Constitutional regime, the fourth of our Constitutional regimes. The doctrine of this regime is that the law only maintains unchanging facts of human experience. An unchanging fact of human experience is

- a fact of human experience,
- which, history demonstrates,
- is unaffected by assaults upon it.

Under the maintenance regime, as stated above, every unchanging fact of human experience is an individually enforceable right. This underlying test is in the process of being adopted in the states in cases establishing new rights, and to a slight extent in Supreme Court cases.

Thus, a new bill of rights, passed by Congress, says this:

1. Housing enjoys strict scrutiny. This provision invalidates the holding in *Lindsey v. Normet*. The Congress shall have power to enforce and implement this article by appropriate legislation.
2. Health and medical care enjoy strict scrutiny. The Congress shall have power to enforce and implement this article by appropriate legislation.
3. Education and learning enjoy strict scrutiny. This provision invalidates the holding in *San Antonio School District v. Rodriguez*. The Congress shall have power to enforce and implement this article by appropriate legislation.
4. Maintenance and employment enjoy strict scrutiny. This provision invalidates the holdings in *DeShaney v. Winnebago County* and *Dandridge v. Williams*. The Congress shall have power to enforce and implement this article by appropriate legislation.