

# Socioeconomic rights in constitutional law: explaining America away

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*The apparent omission of a socioeconomic commitment from United States constitutional law gives rise to continuing debate. The case is unclear that this omission has any likely bearing on the actual performance of American governments in the social welfare field. Might there be other reasons for treating the omission as problematic? If so, might the omission nevertheless be explained in terms consistent with belief that some kind of socioeconomic commitment ideally belongs in the constitutional law of a country like the U.S.? After briefly reviewing the uneasy instrumental case for a constitutionalized socioeconomic commitment, this article suggests a different possible ground for favoring inclusion as a matter of political-moral principle. It then canvasses possible responses to the American case. These include both a possible denial that socioeconomic guarantees are in fact lacking from U.S. constitutional law, and a possible claim that omitting them is the correct choice for the U.S. as a matter of “non-ideal” political morality.*

[A word about the origins of this paper. As part of an international conference on comparative constitutionalism, a panel was set up on “Substantive Protection of Socioeconomic Rights in the New Constitutional Order.” The organizers requested me to direct my presentation to the specific case of the United States. The following paper resulted.]

Is the United States of America a welfare state? Does United States constitutional law contain any socioeconomic guarantees? Whichever way your snap answers go – maybe “no” and “no” for most readers – you can get an argument in return. It is clear why people care about the first question, less clear why anyone cares about the second, and clear again that many do care about the second. Cass Sunstein sees a need to explain why the American Constitution lacks what it lacks.<sup>1</sup> The “social rights” question begets books and more books, devoted not just to

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<sup>1</sup> See Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYR. L. REV. 1 (2005) (hereinafter cited as Sunstein, *American Constitution*). See also Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 90 (Michael Ignatieff ed., Princeton University Press, 2005).

programmatic issues but in at least equal measure to questions of higher-law imprecation that can make no difference for anyone's life without concrete implementation from lawmakers and bureaucrats.<sup>2</sup> I have nagged at the higher-law imprecation question over a span of forty years.<sup>3</sup> Why?

Below, I explore some questions about why and how Americans today might find reason to seek inclusion of socioeconomic guarantees in their constitutional law. I then turn to a consideration of how anyone who does find such reason might nevertheless conclude in favor of leaving unmolested the current state of our law, exceptional in the world though one might find it to be.<sup>4</sup>

## 1. Terms and distinctions

### 1.1 “Constitutive commitments”

Here is the country's President, proclaiming into force (or was he?) a new chapter in its constitutional law:

... 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. \* \* \* I ask the Congress to explore the means for implementing this economic bill of rights—for it is definitely the responsibility of the Congress to do so. . . .<sup>5</sup>

FDR listed guarantees respecting jobs, food and clothing, homes, medical care and health, education, and social security.<sup>6</sup> Seeing to these would be “the responsibility of the Congress” pursuant to “a Second Bill of Rights.” That language evokes the Constitution and constitutional law, most certainly not by accident. We know the dénouement: In the years since FDR's promulgation of the second bill, the idea that U.S. constitutional law might harbor any sort of welfare-state mandate has

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<sup>2</sup> See, e.g., EXPLORING SOCIAL RIGHTS: BETWEEN THEORY AND PRACTICE (Daphne Barak-Erez & Aeyal M. Gross eds., Hart Publishing, 2007). Compare Sunstein, American Constitution, *supra* note 1 (“Political actors, even those interested in helping poor people, have been skeptical about the likely effectiveness of constitutional provisions that might be ignored in practice.”)

<sup>3</sup> See, e.g., Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (hereinafter cited as Michelman, *Foreword*); Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, in EXPLORING SOCIAL RIGHTS, *supra*, at 21.

<sup>4</sup> See Sunstein, American Constitution, *supra* note 1, at 3-4 (making a case that this is, indeed, an instance of American exceptionalism).

<sup>5</sup> Franklin D. Roosevelt, Message to Congress on the State of the Union (Jan. 11, 1944), in 13 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 40-42 (Samuel I. Rosenman ed., Random House, 1950).

<sup>6</sup> See *id.*

been burnished by pundits,<sup>7</sup> put to the test, and decisively rejected.<sup>8</sup> Or so most well-informed lawyers would certainly report. Was FDR, then, a false prophet?

If he was, it is not for the reason that he envisioned developments in our constitutional law that have not, in fact, taken hold. Arguably, a heralding of the advent of socioeconomic guarantees in U.S. constitutional law – assuming FDR intended one – would have been well grounded. Cass Sunstein surmises that only for want of nail did a post-New Deal constitutionalization of the welfare state fail of consummation in this country. “Social and economic rights, American-style,” Sunstein speculates, could very possibly have become “a part of American constitutional understandings” if Hubert Humphrey had been elected President in 1968.<sup>9</sup> A series of decisions issuing from the Warren Court had seemed headed toward recognition of some sort of socioeconomic guarantee inhabiting our constitutional law,<sup>10</sup> and happenstance may be all that cut the development short: Lyndon Johnson’s Vietnam quagmire leading to the election of Richard Nixon to the presidency, and then the occurrence of four Supreme Court vacancies on Nixon’s watch.<sup>11</sup> On that view of events, American constitutional socioeconomic rights may perhaps be deemed an accidental “casualty of an election that was fought out on other grounds.”<sup>12</sup>

All that, however, is not why I acquit FDR of mistaking our constitutional law’s trajectory. I do so, rather, on the ground that constitutional law never was FDR’s intended or his predicted medium for the second bill; not, at any rate, as *we* mean constitutional law. FDR’s guarded claim was that Americans had “accepted, so to speak,” an economic bill of rights. To put the matter that way seems more to point away from constitutional law than toward it, as the medium of acceptance.<sup>13</sup>

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<sup>7</sup> See, e.g., Michelman, Foreword, *supra* note 3; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash. U.L.Q. 659 (hereinafter cited as Michelman, *Welfare Rights*). The academic interest continues. See, e.g., Goodwin Liu, *Rethinking Constitutional Welfare Rights*, \_\_ STAN L. REV. \_\_ (2008).

<sup>8</sup> See *DeShaney v. Winnebago Cty Dept. of Soc. Serv.*, 489 U.S. 189 (1989); *Maher v. Roe*, 432 U.S. 464 (1972); *Harris v. McRae*, 448 U.S. 297 (1980); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970).

<sup>9</sup> Sunstein, *American Constitution*, *supra* note 1, at 22

<sup>10</sup> Sunstein here cites Michelman, Foreword, *supra* note 3.

<sup>11</sup> See Sunstein, *supra*, at 20-23.

<sup>12</sup> *Id.* at 23.

<sup>13</sup> Might Bruce Ackerman be tempted to claim that Roosevelt’s “so to speak” was a harbinger of the theory of non-formal amendment and “constitutional moments?” See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* 266-67 (Harvard University Press, 1991). I don’t think so. As Sunstein points out, New Dealers – fresh from frustration at the hands of those Nine Old Men – were anything but keen to

Toward what, then, did FDR point, if not toward constitutional law? Sunstein has the answer, in the form of what he has neatly dubbed “constitutive commitments” of American society.<sup>14</sup> On Sunstein’s account, these are highest-priority, popular canonical expectations for the conduct of American government. They are the stuff of public political sensibilities and debates, not of lawyers’ constitutional law. Sunstein gives as examples the claims, in the United States today, to be free to join a union without risking your job, to be secure against racial discrimination by private employers, and to social security.<sup>15</sup> The public’s expectations of government’s recognition of these claims could have arisen, and could subside, without amendment of the Constitution; they exist, in Sunstein’s account, alongside constitutional law, not inside it. By shortchanging the claims or renegeing on the commitment to fashion laws and policies with a view to honoring them, Congress would not violate any law. Yet such conduct would, Sunstein maintains, be widely received as a comparably grave violation of the public trust, unless and until there had taken place in our country a mutation in “public judgments” on a scale for which a constitutional amendment would be a suitable form of expression.<sup>16</sup>

If Sunstein is right about the current content of American constitutive commitments, then perhaps FDR may be said to have prophesied truly our acceptance, “so to speak,” of the second bill. If Sunstein is wrong about that, the President was correspondingly wrong about the impending course of American politics. The President was not wrong, though, about American constitutional law – regarding which, I believe, he placed no bets. Whether Sunstein is right or wrong about welfare-state policies having made it onto the ledger of American constitutive commitments, they more or less plainly have *not* made it onto the ledger of American constitutional-legal guarantees. Let us, for now, take it as established that they have not. My first question about that is: Why should anyone care, any more than FDR probably did?

## 1.2. “in constitutional law”

Before proceeding, it is best to make sure we know what we are talking about, when we talk about getting socioeconomic rights into constitutional law. Questions can come up at any time about whether this or that scheme of state provision for

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“increase the authority of judges” by putting the welfare state into constitutional law. *See* Sunstein, *American Constitution*, *supra* note 1, at 12, 14.

<sup>14</sup> CASS R. SUNSTEIN, *THE SECOND AMERICAN REVOLUTION: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 62 (Basic Books, 2004).

<sup>15</sup> *See id.*

<sup>16</sup> *Id.*

people's material wants (Social Security, say, or food stamps, or AFDC) shall be set in place, removed, or revised. Resolving such questions is not we mean when we talk about getting socioeconomic rights into constitutional law. But then what do we mean? What sort of question, beyond or distinct from those set to policymakers by programmatic issues as and when they show up on parliamentary and bureaucratic agendas, do we take to be raised by talk of putting socioeconomic "rights" into "law" that is "constitutional"?

Undoubtedly, the term "socioeconomic rights" names a certain class of *norms*, meaning by "norm" simply a guide to conduct that somehow, in some way, transcends the purely optional. Our question for the moment is what it means for a norm to exist in (or as) constitutional law, and we may as well start with "law." What does it mean for a norm to exist "in law" – as distinct, say, from "in morals" or "in social practice"? For purposes of the current inquiry, it seems we can best use an answer that holds open the vexed question of whether a norm can be said to exist in law regardless of expected judicial responses to perceived deviations. Therefore, for now, I shall simply say that a norm exists in law – has been gotten into law – when and insofar as legal inquiry will identify it as one of those norms to which anyone who aims to be law-abiding should, for that reason, normally feel a decisive (or at any rate a substantial) pressure to adhere in the right way. To get a norm into law is to produce a state of public affairs in which that sort of pressure can be expected to impinge on whoever is found or supposed to bear obligations attendant upon the norm. Conceiving of positive legality in such vague, watery, even circular terms is, of course, jurisprudentially tendentious and maybe fatuous – a far cry from "The prophecies of what the courts will do in fact and nothing more pretentious is what I mean by law."<sup>17</sup> But please bear with me: there is a method in this madness.

Now, what about "constitutional" law? In my scheme of definitions, law is constitutional when it is binding in the indicated way (at least) on a country's ordinary lawmakers – meaning by "ordinary lawmakers" whoever is in a position to decide the content of any and all of the country's law that is not constitutional law.<sup>18</sup> Thus, to get a norm into constitutional law means to produce a condition in which the country's ordinary lawmakers are brought under the sort of pressure for compliance that legal norms in general are expected to exert. Getting "socioeconomic rights" into constitutional law means garnering that sort of effect for the class of norms to which we give that name.

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<sup>17</sup> O. W. Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 461 (1897).

<sup>18</sup> Of course that is not the only way to understand the idea of constitutional law – jurists in the United Kingdom have historically understood it quite differently – but it is the way that is germane to the aims of this paper.

### 1.3. “socioeconomic rights”

And what, then, would be that class? As a class, the norms called “socioeconomic rights” envision a desired set of social outcomes – roughly, that the holders of the right should at no time lack access to levels deemed adequate of subsistence, housing, health care, education, and safety, or at any rate to decent work by which they can gain the same for themselves and their dependents. Now, we speak here of “rights,” and that term usually denotes a class of warranted demands, where the warrant may be legal, moral, or “social” as the case may be. Socioeconomic rights in constitutional law would thus appear to be legally warranted claims to some line of conduct by the state and its functionaries – not least including ordinary lawmakers – by which the desired result will in fact be produced. Again, however, my aims are best served by a weaker conception. Let us speak, then, of legal obligations on lawmakers to make *the best effort they can* to devise, adopt, and execute policies and measures that will result in the desired social-outcome targets being hit – leaving open how far “best” efforts will be ones that take due account of certain other, perhaps circumstantially competing principles (liberty, dignity, independence, self-respect, self-sufficiency, the rule of formally realizable law, general economic prosperity) that may appear in the same constitution’s order of values.

Such a best-efforts obligation – what I shall sometimes call a “socioeconomic commitment” – is in fact the sort of norm that I think is usually envisioned by talk of socioeconomic rights in constitutional law.<sup>19</sup> Interlocutors seem typically to have in mind something like the South African model: a declaration of everyone’s rights of access to adequate housing, food, water, health care services, and social security, coupled with a mandate to the state to take “reasonable legislative and other measures, within available resources, to achieve the progressive realization” of these rights.<sup>20</sup> And indeed there is a plain reason why constitutionalized socioeconomic commitments are likely to seek such open-ended formulations. How would you make them more programmatically explicit, if you could, and hope to get them *constitutionalized* – entrenched in the country’s ranking law – by any process possessed of a modicum of sincerity and prudence?<sup>21</sup>

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<sup>19</sup> See, e.g., SOTIRIOS A. BARBER, *WELFARE AND THE CONSTITUTION* (Princeton University Press, 2003) 42 (observing that “the logic of positive constitutionalism . . . promises no more than or less than a good effort”).

<sup>20</sup> CONSTITUTION OF THE REPUBLIC OF SOUTH AFRICA, Act 108 of 1996, §§ 26, 27.

<sup>21</sup> A commentator on a prior version of this paper charged me with changing the subject from “socioeconomic rights” to mere “commitments” that are not true rights. I hope my exposition to this point makes sufficiently clear that there is no incontrovertible, conceptual barrier to positing a best-efforts

## 2. Why care?

### 2.1. instrumental reasons

Back, now, to our question: If, owing to failures on the part of American governments and legislatures, the rights in FDR's proposed second bill go unfulfilled, then those failures are obviously something for latter-day New Dealers to deplore and seek to rectify. But is there any reason why our constitutional law's indifference to such questions (if indifference it be) ought to trouble any American's mind or conscience? New Dealers want American governments and legislatures to act devotedly toward fulfilling the Rooseveltian vision, but why should they care about what constitutional law has to say about it? In what way, if any, shall U.S. law be thought the poorer or the worse, just on account of the Constitution's failure to speak to the question of socioeconomic guarantees?

The most immediately inviting path of rejoinder to these questions is instrumental, along a judge-centered or a popular-constitutionalist branch. Either branch (or maybe some combination of the two) must respond to an obvious worry: Courts of law are widely viewed as ill-equipped for confidence-inspiring appraisal of state performance of a South Africa-style, best-efforts commitment – the only sort of socioeconomic commitment, we have said, that prudence seemingly would allow into constitutional law. Performance in this field involves complexly designed and coordinated governmental action in the forms of taxes, transfers, subsidies, and policy instruments affecting markets, industries, families, education, health, internal and external trade, and the monetary system. The choices needing to be made are subtle, technical, interactive, uncertain, subject-to-experience, and endlessly debatable. It is far from clear how courts of law can inject themselves into such matters with much credibility or authority.

So what? Never mind these courts, you might say under populist persuasion; the point of giving constitutional-legal form and expression to moral intuitions of socioeconomic rights is to set going a political churn. It is to provide a goad, a platform, and a focus for a continuing political mobilization to press the Rooseveltian

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commitment as the obligation correlative to a constitutional-legal, socioeconomic right. I should perhaps also point out that the exposition to this point circumvents debate about whether the political theory implicitly undergirding any socioeconomic rights that might appear in one or another country's constitutional law is a "right-based," "duty-based," or "goal-based" theory, in the classification proposed by RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 171-73 (Harvard University Press, 1977). A right is still a right, regardless of which sort of background theory prompts its recognition. *See id.*

vision upon the government by popular means including the vote;<sup>22</sup> and maybe it is also to make that vision an explicit part of the conscientious legislator's standard guide to good conduct in office.<sup>23</sup> But then are you not getting constitutional *law* confused with Sunsteinian constitutive *commitment*? Perhaps foolishly so? Without a boost from a political-cultural condition of constitutive commitment, you can't hope to achieve the reform of constitutional law you say you seek with a view to popular mobilization; and once you have that boost, the constitutional law reform won't matter any more as a means to mobilization; the mobilization will – must – already have occurred without it.

How, after all, do you get welfare-state norms into constitutional law when they are not now there? One way is the juristocratic way: judges reading the norms into a doctrinal corpus that does not self-evidently contain them.<sup>24</sup> That can happen (although perhaps not to the unadulterated liking of popular constitutionalists), but it almost certainly cannot happen without the kind and degree of support and prodding from society that the notion of constitutive commitment encapsulates.<sup>25</sup> The other way is express constitutional amendment. Again, however, Americans cannot hope to pass a welfare-state amendment without first accomplishing the political work required to bring national public opinion to the point of a constitutive commitment. In fact, you will have to bring it beyond that point, because, in the United States, constitutional amendment meets with resistance from sources beyond substantive disagreements of ideology and policy, including both doctrinaire anti-juristocracy (inasmuch as every additional bill-of-rights norm threatens to widen the authority of judges), and doctrinaire anti-amendmentitis.<sup>26</sup> Converting a New Dealish constitutive commitment into constitutional law thus requires a major additional push. From the standpoint of popular constitutionalism, that extra expenditure of

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<sup>22</sup> See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (Oxford University Press, 2004).

<sup>23</sup> See Paul Brest, *The Conscientious Legislator's Guide to Constitutional Interpretation*, 27 *STAN L. REV.* 585 (1975).

<sup>24</sup> "Juristocracy" appears to be coinage of Ran Hirschl. See RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* (Harvard University Press, 2004). On the point of non-self-evidence in the U.S. case, the most telling testimony comes from two egalitarian liberals: Cass Sunstein, who pleads constitutive commitment in lieu of constitutional law, and Ronald Dworkin, who denies that even Judge Hercules can find socioeconomic guarantees in American constitutional law, while "wishing" for moral reasons that the case were otherwise. See RONALD DWORKIN, *FREEDOM'S LAW* 36 (Harvard University Press, 1996).

<sup>25</sup> See Robert Post, *Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 *HARV. L. REV.* 4, 8, 9 (2003) (positing and describing "a continuous exchange between constitutional law and constitutional culture").

<sup>26</sup> See Kathleen M. Sullivan, "Constitutional Amendmentitis," *The American Prospect*, Nov. 30, 2002.

effort will be wasted if it succeeds. The new constitutional law, if you ever could get it, would do no instrumental good that the prerequisite constitutive commitment does not already do.

Ah, well, you say, but maybe constitutional law is the will o' the wisp, the pot at the end of the rainbow. Maybe drumming up a sustained campaign for constitutional-legal reform, whether by the means of amendment or of interpretation, is the best way to build and ignite the constitutive commitment – or the popular, intersubjective awareness of it – that really is the ultimate aim of the chase; never mind what results, in the end, for constitutional law.<sup>27</sup> I am happy to grant the point.<sup>28</sup> It offers no answer to my question about why or how, if at all, U.S. constitutional law should be thought the poorer or the worse for its failure to contain a welfare-state amendment, or otherwise to speak to the question of welfare-state guarantees.

Enter your more judge-centered, instrumental theory. By writing (or reading) welfare-state guarantees into U.S. constitutional law, you would engage an influential national institution – the national judiciary – in adjudicative oversight of the adequacy of the governmental performance respecting them. Granting that courts are ill-equipped for fine-tuned appraisals of governmental efforts in this field, does that disqualify them totally from a potential helpful role? Allowing for the obvious – that “no court can ensure” fulfillment of a socioeconomic commitment – you might still find experience from other countries suggesting that courts may be able to “take steps to ensure that basic needs receive a degree of priority, and to correct conspicuous neglect.”<sup>29</sup> Not everyone regards that as a uniformly good bet, though. Uncertainty

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<sup>27</sup> See Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives From the Women's Movement*, 61 N.Y.U. L. REV. 598 (1986).

<sup>28</sup> For historical documentation, see, e.g., Reva Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: the Case of the De Facto ERA*, 94 CALIF L. REV. 1323 (2006). In the case that Siegel recounts, the process of struggle for explicit amendment wound up producing a “de facto” equivalent, made up of a combination of civil rights legislation and judicialized re-interpretation of old constitutional material. The question, though, is how much the constitutional-interpretation part adds to the total effect. See *infra* note 40.

<sup>29</sup> Sunstein, *American Constitution*, *supra* note 1, at 16. As Sunstein has noted, South African experience offers several possible examples. See CASS R. SUNSTEIN, *DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO* 221-37 (Oxford University Press, 2001). The most recent instance, at this writing, is *Occupiers of 51 Olivia Road v. City of Johannesburg*, Case CCT 24/07, [2008] ZACC 1. The Constitutional Court held that § 26 of the Constitution, on the right to housing, “obliges every municipality to engage meaningfully with people who would become homeless” in case the municipality exercises its authority (for example) to evict current occupants from fire-trap or disease-trap housing found to be a danger to them and others. The Constitution, § 26(3), provides that no one may be evicted from their home without a court order, and the Constitutional Court, relying on the mandate for “reasonable legislative and other measures” in § 26(2), held that a court must refuse an eviction order whenever it finds a lack of “meaningful engagement” with occupants facing homelessness. *Id.* at ¶ 18.

remains high about whether, where, and when such means are likely to improve overall performance. Some think it may depend on whether just the right judicial toolkit, and just the right forms of cross-branch interaction, have been successfully designed into a country's constitutional culture and practice.<sup>30</sup>

Yes? And what, then, of the United States? American courts have shown that they can do *something* with constitutional law to lend support to a welfare-state vision. They can do things like abolish poll taxes,<sup>31</sup> weed out punitive welfare and education policies (like long waiting periods for new arrivals in a state<sup>32</sup> or exclusion of “illegals” from basic education<sup>33</sup>), and temper abuses in the administration of social programs.<sup>34</sup> Granted, those are all forms of judicial intervention that have occurred in the U.S. without benefit of a New Deal clause in the Constitution, but perhaps such a clause, if we had it, would radiate its influence across the entire field of constitutional adjudication, making it easier for courts to rule on the New Deal side in debatable cases, thereby perhaps improving the chances that they will.

Are we looking through rose-colored glasses? The courts we always have with us – we can't turn 'em on and off at will – and the courts have shown themselves perfectly capable of construing and enforcing constitutional law in ways that New Dealers consider obstructive to their aims.<sup>35</sup> Judges honoring claims to constitutional protection for freedoms of speech and association can stymie legislative efforts to fashion a set of electoral practices professedly designed to minimize conversions of economic into political power.<sup>36</sup> Judges honoring claims to private liberty, property, and freedom from racial classifying may block legislation directed to what New Dealers may regard as equal economic opportunity<sup>37</sup> or decent conditions of work.<sup>38</sup> Judges honoring claims to states rights may block such actions when emanating from the central government.<sup>39</sup> Again, you might think a New Deal clause in the Constitution could radiate deterrence of such rulings.

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<sup>30</sup> See MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS* (Princeton University Press, 2008).

<sup>31</sup> See *Harper v. Bd. of Elections*, 383 U.S. 663 (1966).

<sup>32</sup> See *Saenz v. Roe*, 526 U.S. 489 (1999); *Shapiro v. Thompson*, 394 U.S. 618 (1959).

<sup>33</sup> See *Plyler v. Doe*, 457 U.S. 202 (1982).

<sup>34</sup> See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

<sup>35</sup> See MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton University Press, 1999).

<sup>36</sup> See *Buckley v. Valeo*, 424 U.S. 1 (1976).

<sup>37</sup> See *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469 (1989).

<sup>38</sup> See *Lochner v. New York*, 198 U.S. 45 (1905).

<sup>39</sup> See, e.g., *Bd. of Trustees v. Garrett*, 531 U.S. 356 (2001).

This sort of instrumental case for a New Deal clause – as a spur to preferred (or a brake on dispreferred) judicial readings of other constitutional matter – still has to contend with the objection disclosed in our discussion of popular-constitutionalist instrumentalism. You can't get the clause without an amendment. You can't get the amendment without first ginning up the manifestations of a constitutive commitment. The manifest constitutive commitment may do as much to provide the spurs and brakes you seek as the New Deal clause would do: it depends on how closely you think the Supreme Court follows the th' iliction returns.

Well, but what about the formal-legal entrenchment of constitutional texts? The wave of passionate societal conviction – the rising constitutive commitment – that gains you your constitutional amendment may be transient. The amendment is that wave frozen in stone, always potentially radioactive. Even as the crest of societal conviction subsides, the legal amendment survives to cast its beneficent rays across the whole field of constitutional adjudication – until the day comes, if ever, when an equal and opposite wave of popular conviction arises to wipe it off the books. Fine if you believe it; fine, that is, if you believe that constitutional text is what will spell the difference in these kinds of cases in the U.S. – and the populist side of your conscience is not troubled by the use of constitutional law to foist a possibly transient, passionate societal commitment upon a future that may not share it. (I do not mean that mine necessarily would be.)

Perhaps we could sum up as follows: A New Dealer can certainly find plausible, instrumental reasons for deploring the silence of U.S. constitutional law on the matter of socioeconomic guarantees. Those reasons, however, are troubled and contested. They may not, in the end, be deeply convincing to all whose convictions of morality and policy are strongly welfare-statist.<sup>40</sup> As Sunstein writes, “it is hard to show that nations that are relatively more likely to help poor people do so because they have constitutional provisions calling for such help.”<sup>41</sup> It seems in order, then, to ask what *further* grounds – of political morality, say – one might turn up for rating a body of constitutional law that contains socioeconomic guarantees superior to one that does not. I believe at least one set of such reasons can be identified. Having got that far, I shall then ask how those who subscribe to the set of reasons I find might respond

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<sup>40</sup> Do not the very same troubles and contestations apply to the first amendment, and every other cherished clause in the Bill of Rights? They do. *See generally* MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* (Princeton University Press, 1999). Their force, however, appears to be greatly enhanced for socioeconomic concerns as compared with the standard liberal freedoms – owing mainly, it seems, to inevitable open-endedness in verbal formulations of constitutional welfare-state guarantees, and the resulting alternative dangers that they, especially, seem to pose: on the one hand, judicial futility; on the other, judicial overreaching. See below, section 4.2.

<sup>41</sup> Sunstein, *American Constitution*, *supra* note 1, at 16.

to the current state of constitutional law in the United States.

## **2.2. Liberal constitutional morality: the political case**

Suppose you find yourself convinced that each of us (who can afford to do so) stands under strict moral obligation to do *something* toward alleviating material distress wherever in the country (or wherever in the world) it may be found. The ground of this strict moral duty, you think, is facts of suffering and common humanity. Your conviction gives you strong reason for receptiveness to FDR's account of the welfare-state responsibilities of Congress. Here is why:

If any of us stands under moral obligation to contribute toward the relief of others in need, that is – on the view I am just now attributing to you – simply because others do in fact stand in need and we are able to help them. The sustaining cause for belief in the duty to aid is strictly and simply our knowledge of others standing in need that we could help to cure. But that will not suffice to tell us what to do, if we also will confess (and will you not?) to believing in some self-serving, equitable limit to the duty. It is, after all, extremely morally contentious to attribute the entire load of obligation to any or every individual person. It is one thing to debate whether you or I stand under a moral duty to take in overnight in sub-zero weather the homeless person who fetches up at our doorstep. It is a very different and hugely more contentious thing to suggest that you or I stand under a moral duty, first to sell everything we have, and then to submit ourselves to a lifetime of eighteen-hour days plying the most remunerative trades we can devise for ourselves, in order to turn over all of the net-of-reproduction proceeds to getting every poor person housed, fed, and vaccinated – all of this regardless of whether others who could be helping out at all.

From acceptance of this point, one cannot pass immediately to negative conclusions about moral claims to welfare-state services or individual moral duties pertaining to such claims. The fact of the state, for one thing, blocks the way. As pointed out by Charles Fried and Liam Murphy, among others, there happens to exist among us an agent capable of imposing a distribution among citizens of the burdens of aid, and capable also (let us assume) of conducting a fair political deliberation on the scope of needs and the contours of an equitable distribution.<sup>42</sup> For those who begin with a conviction of the moral obligation resting on each to contribute equitably toward the relief of others, just in virtue of our common humanity, it makes perfect sense to claim that the state is morally bound to exercise those capabilities, or anyway (if that is too metaphysical a view) that citizens are morally bound to press it to do so and to pay unresistingly the taxes required for fulfillment of the obligation.

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<sup>42</sup> See CHARLES FRIED, *RIGHT AND WRONG* 118-31 (1978); LIAM MURPHY, *MORAL DEMANDS IN IDEAL THEORY* (Oxford University Press, 2000).

Of course it is true that each person, acting alone or in voluntary collaboration with others, can try in good faith to define and fulfill his or her individual, equitable obligation of aid to the needy, regardless of what others in a position to help may or may not do. But frustration surely awaits whoever will make the attempt,<sup>43</sup> and the argument seems very strong that our efforts along those lines are most effectively and satisfyingly directed to getting the state to tax us in order to pay for activities along the lines envisioned by FDR.<sup>44</sup>

How far have we come? We see that to speak of pre-political rights to basic-needs assistance is an order of magnitude more contentious than to speak of pre-political rights (say) not to be assaulted or defrauded. Arranging outside the state for a fair distribution of correlative burdens seems not to be a troublesome issue with the latter sort of (“negative”) rights, as it is with socioeconomic rights.<sup>45</sup> But still our question remains: What is there in that set of perceptions that makes it even a conditional moral imperative to get a demand for the state’s activity *put into constitutional law*, over and above uneasy instrumentalist hopes of boosting thereby the chances of a morally satisfactory governmental performance?

In order to make out a further moral case for constitutionalization of socioeconomic commitments – I now wish to suggest – you may have to see the state as a part of the problem, not just the solution. You may have to see the state itself – the very fact of its existence, with our support – as a sustaining cause for belief in our obligations to do what we can to make the state be something of a welfare state.<sup>46</sup> You may have to embrace a moral argument for socioeconomic rights that is not only “goal based” or “duty-based,” in Dworkin’s nomenclature, but “right-based.”<sup>47</sup>

The point is this: The moral issues in this neighborhood would not and could not exist in just the form they do, were certain basic legal-institutional contingencies not as they are. The least controversial, most widely appealing moral case for giving legal force to socioeconomic rights – say, by including socioeconomic guarantees in a constitutional bill of rights – is one that bypasses claims about moral rights and

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<sup>43</sup> See RONALD DWORKIN, *SOVEREIGN VIRTUE* 265-67 (Harvard University Press, 2002):

We may try to live with only the resources we think we would have in a fair society, doing the best we can, with the surplus, to repair injustice through private charity. But since a just distribution [can only be established] through just institutions, we are unable to judge what share of our wealth is fair.

<sup>44</sup> Note this is not to take a position on whether or how far the conduct of the activities thus funded should be centralized, bureaucratized, or kept in the hands of state functionaries.

<sup>45</sup> See MURPHY, *supra* note 42, at 74-75, 94-97.

<sup>46</sup> I take the notion of “sustaining cause” from work of Gerald Gaus. See GERALD F. GAUS, *JUSTIFICATORY LIBERALISM* 19-25 (Oxford University Press, 1996).

<sup>47</sup> See note 21, *supra*.

obligations as they might arise in conditions of no-law or so-called state of nature. In this respect, socioeconomic rights appear to differ from legal rights protecting against assault, fraud, and the like. Debates over the morally proper scope of such garden-variety legal rights typically reach back to pre-legal, moral rights and obligations as the source of a demand upon lawmakers to do the correspondingly right thing. The most widely commanding moral case for installing socioeconomic rights in a country's laws – what we may call the “political” case – does not proceed in that way. It by-passes speculation about moral duties to aid rooted solely in facts of suffering and common humanity, anchoring itself instead in the historical contingency that law exists in the country. It rests on facts of social cooperation in the form of legal ordering, and the demands for general compliance with the laws that a legally ordered society directs to everyone in sight. Adding this political-moral view to the common-humanity view (which the political view does not challenge or displace) can only strengthen the background moral case for welfare-state activity. There is no apparent reason why adding in the political case should repel anyone who stands already convinced without it. The political view is not, after all, the view that morally required regard for others' needs flows “entirely” from concerns about political legitimacy;<sup>48</sup> it is only that such a requirement does flow from such concerns.

All legal systems are, at bottom, practices of social cooperation, dependent for survival on the persistence in society of general compliance with the laws and legal interpretations that issue from the practice.<sup>49</sup> They thus all present – at least to broadly speaking liberal sensibilities – the question of political justification or legitimacy, the need to supply a moral warrant for demands for general compliance with laws produced by non-consensual means, directed to individual members of a population of presumptively free and equal persons. In the “political-liberal” formulation of John Rawls, such demands are justified when, and only when, the laws in question issue from a general lawmaking system – a constitutional regime – that everyone who is both rationally self-interested and socially reasonable may be expected to endorse.<sup>50</sup>

On this view, general political legitimacy depends on what we may call a

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<sup>48</sup> Liam Murphy, *Institutions and the Demands of Justice*, 27 PHIL. & PUB. AFF. 251, 273, 277 (1998).

<sup>49</sup> See, e.g., JOHN RAWLS, A THEORY OF JUSTICE 240 (Harvard University Press, 1971) (discussing “Hobbes’s thesis”).

<sup>50</sup> See JOHN RAWLS, POLITICAL LIBERALISM (Columbia University Press, paper ed. 1996) 137, 217 (presenting the “liberal principle of legitimacy”) (hereinafter cited as Rawls, Liberalism).

“legitimation-worthy” constitution.<sup>51</sup> To judge a constitution legitimation-worthy is to find that its prescriptions, taken all together to comprise a unified political system, have a special kind of virtue or merit: They are such as to cast a mantle of moral probity over enforcement against everyone of approximately all of the laws, rulings, and decrees that issue in compliance with the system they comprise. The aim is thus a constitution whose terms are such as to allow you or me to say, with clear conscience, that any law whose process of enactment and whose content pass muster under its requirements can ipso facto be deemed a law with which all within range have good enough reason to comply, and which we, therefore, are justified in enforcing.

A legitimation-worthy constitution thus does important moral work. It allows for a kind of proceduralization of judgments regarding the moral permissibility of collaboration in the enforcement of laws of uncertain and disputed moral and other merits. Instead of asking whether the contested law is good or bad or right or wrong in substance – a question that seems bound to land us in obdurate division in too many cases – one asks whether it is “constitutional,” a technical and a procedural question. If the answer is yes, those who enforce the law are deemed justified in doing so, no matter (within limits) how morally or otherwise deficient anyone, possibly including the enforcers, may find that law to be. Judgments regarding the legitimacy – meaning the morally justified enforceability – of laws are in that way proceduralized. The burden of justification is displaced from the law in question to the legally constituted political system whence it issued. So what a legitimation-worthy constitution gives us, if we have one, is not just a procedure but a procedure imbued with a special virtue. It gives us, to wit, a legitimation procedure.

But of course, this or that constitution that you happen to find in force cannot be deemed legitimation-worthy just because it is there. And what, then, shall be the test? For Rawlsian liberals – I put this very roughly – the test is that everyone affected, ranking his or her own projects and commitments as no more, but also no less, deserving of consideration than anyone else’s, should be able to accept that constitution as an apt and fair set of basic governance arrangements for an ethically and otherwise diverse population of free and equal persons whose various aims, hopes, and projects will often come into conflict. In order to meet that test, a lawmaking system must include a commitment – a principle – affecting every topic for which a “rational and reasonable” person would demand one as a condition of

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<sup>51</sup> I have adapted the next few paragraphs from my *The Not So Puzzling Persistence of the Futile Search: Tribe on Proceduralism in Constitutional Theory*, \_\_ TULSA L. REV. \_\_, \_\_ (2008). See also Frank I. Michelman, *Is the Constitution a Contract for Legitimacy?*, 8 REVIEW OF CONSTITUTIONAL STUDIES 101, 101-09, 115-21 (2003); Frank I. Michelman, *Constitutional Legitimation for Political Acts*, 66 MODERN L. REV. 1 (2003).

willing support for the system as a whole. It may well seem that we cannot fairly call on everyone, as reasonable but also as rational, to submit their fates to the tender mercies of a democratic-majoritarian lawmaking system, without also committing our society, from the start, to run itself in ways designed to ensure to every person the chance (at least) of being or becoming a competent and respected contributor to political exchange and contestation and furthermore to social and economic life at large.<sup>52</sup>

That quite arguably means that social rights guarantees of some kind must compose an essential part not just of the law but of the *constitutional* law – the publicly acknowledged, basic terms of the lawmaking system with whose outputs everyone in sight is called upon to comply – of any country committed to a broadly speaking liberal political morality. At least in a constitutional democracy such as the United States, where “the order itself” is equated with the Constitution – where the Constitution stands for the political contract<sup>53</sup> – the result of the Rawlsian conception would seem to be morally required inclusion of a socioeconomic commitment in constitutional law. Expression of the morally requisite systemic commitment will be justifiably suspect if we begrudge it the social form that begets the maximum civic backing the country’s political culture can muster. So, evidently, does John Rawls himself conclude.<sup>54</sup>

Cass Sunstein draws a contrast between a typically American “pragmatic” conception of what a constitution is meant to do and a more typically European “aspirational” conception. American pragmatists, Sunstein suggests, tend to select principles for constitutionalization that “would be a sensible part of an enforceable constitution containing the important institution of judicial review,” whereas European aspirationalists want their constitutions to “affirm, in principle,” their nation’s “deepest hopes and highest aspirations.”<sup>55</sup> The Rawlsian view I have described may be said to raise a question about how far Americans retain full moral freedom to deny or refuse an aspirational aspect to their constitutional law.

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<sup>52</sup> Compare Michelman, *Welfare Rights*, *supra* note 7, at 676-79 (arguing that inclusion or detection of justiciable, socioeconomic guarantees in American constitutional law would be thoroughly congenial to John Hart Ely’s conception of democracy-sustaining, “representation-reinforcing” judicial review).

<sup>53</sup> See Frank I. Michelman, *Living With Judicial Supremacy*, 38 WAKE FOREST L. REV. 579, 580-85, 606-11 (2003) (documenting but not unreservedly applauding this fact of American life).

<sup>54</sup> See RAWLS, *supra* note 49, at 7, 166, 228-29 (treating provision for a “social minimum” as both a lexically top-ranking principle of justice and a constitutional essential); JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 47-48, 129 (Erin Kelly ed., Harvard University Press, 2001) (same) (hereinafter cited as Rawls, *Restatement*); *id.* at 127-29 (grounding this moral conclusion in considerations of “reciprocity” and “strains of commitment”).

<sup>55</sup> Sunstein, *American Constitution*, *supra* note 1, at 14-15.

### 3. Sub rosa constitutional norms

A short digression is now required. Our premise so far has been that American constitutional law is in fact devoid of socioeconomic guarantees. Not every observer agrees. Lawrence Sager, for one, has developed persuasively a notion of “judicially underenforced” norms in U.S. constitutional law.<sup>56</sup> Sager argues that the refusal of courts to give direct remedial effect to one or another claimed obligation of the state does not necessarily signal the absence – or the court’s belief in the absence – of that obligation from American constitutional law. Why not? Because there may exist sound institutional reasons for *judicial* abstinence from *direct* enforcement, observance of which neither refutes the principle’s subsistence as one having the force of constitutional law for other actors in the legal system to whose conduct it may apply,<sup>57</sup> nor even denies its bindingness on judges when invoked in some way other than as a ground for direct judicial enforcement. Other ways might include, say, invocation of the principle as a ground of justification for otherwise constitutionally questionable government action.

The kinds of institutional considerations that may inhibit direct judicial enforcement of certain constitutional norms are well known to constitutional lawyers around the world. There may be lacking a crisp, justiciable standard for deciding questions of compliance and violation. Enforcement may require forms of judicial intervention in public affairs that strain relations between the judiciary and the executive and legislative branches of government; or it may involve the judiciary in making too many subsidiary, managerial decisions that belong properly to the popularly accountable branches of government.<sup>58</sup>

All of these problematic institutional ramifications – inherent contestability of standards, strain on inter-branch relations, excessive judicial engineering – are likely to be salient when the norms that judges are called on to enforce directly involve claims to the government’s active assistance of some kind. The problems abate when a norm or expectation of assistive or protective action by the state is invoked as

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<sup>56</sup> See, e.g., LAWRENCE SAGER, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 86-102 (2004) (hereinafter cited as Sager, Justice); Lawrence Sager, *The Domain of Constitutional Justice*, in CONSTITUTIONALISM: PHILOSOPHICAL FOUNDATIONS, 235, 240-41 (Larry Alexander ed., Cambridge University Press, 1998) (hereinafter cited as Sager, Domain). See also Frank I. Michelman, *The Protective Function of the State in the United States and Europe*, in EUROPEAN AND US CONSTITUTIONALISM 131, 143-48 (Georg Nolte ed., Council of Europe Publishing, 2005) (following Sager).

<sup>57</sup> See above, section 1.2.

<sup>58</sup> See, e.g., Sager, Domain, *supra* note 56, at 240.

justification, against constitutional complaint, for action the government considerably chooses to take. By endorsing the justification, the court neither ignites inter-branch controversy (rather the reverse!) nor takes on the role of social engineer; and although the exact, constitutional standard of protective obligation may be and remain debatable, a court upholding government action shares with the political branches responsibility for the judgment that the standard is truly engaged by the government activity in question.<sup>59</sup>

The theory of judicially underenforced constitutional norms is plausible. Plausible, too, may be an intimation from the theory of the presence of welfare-rights strands in the fabric of American constitutional law. Of course, no such inference can ever be logically or conceptually guaranteed. Take a case of the Supreme Court upholding against constitutional complaint a city ordinance requiring lessors of housing to absorb a special decrement in rent, when required to accommodate the needs of especially necessitous lessees.<sup>60</sup> That holding might be taken as a sign of a judicially underenforced constitutional right to housing, here being given precedence over a highly credible complaint of invasion of constitutionally recognized rights of property.<sup>61</sup> *Need* the holding be thus construed? May not constitutional law allow the state a license to infringe on certain constitutionally preferred interests in response to a certain sort of reason, without necessarily saying that anyone has a right that the state shall take up the license whenever that reason is at hand? When the Supreme Court construes U.S. constitutional law to permit a state to use racial classifications in a certain social context,<sup>62</sup> are we forced to the deduction that U.S. constitutional law obliges every state to follow suit in every comparable context? Must there be no play in the joints?<sup>63</sup>

Some years ago, commentators noticed that the Supreme Court seemed to be

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<sup>59</sup> See Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343, 389 (“For reasons [of] . . . comparative competence[,] . . . courts may rightly hesitate to translate every interest of constitutional magnitude into a [justiciable] constitutional right and may even defer to the judgments of non-judicial officers concerning what the Constitution requires.”).

<sup>60</sup> See *Pennell v. City of San Jose*, 485 U.S. 1 (1988).

<sup>61</sup> See *id.* at 15 (Scalia, J., concurring in part and dissenting in part).

<sup>62</sup> See *Grutter v. Bollinger*, 539 U.S. 306 (2003) (permitting limited consideration of race in selection among applicants for entrance to law school, in deference to the state’s interest in student-body diversity).

<sup>63</sup> For another instance of what we might call optional detection of a sub rosa socioeconomic commitment in U.S. constitutional law, see Laurence Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Services*, 90 HARV. L. REV. 1065 (1977); Frank I. Michelman, *States’ Rights and States’ Roles: Permutations of “Sovereignty” in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977). Both the cited articles found signs of a constitutionalized socioeconomic commitment in an ostensibly federalism-based decision holding state and city governments immune from national-government wage and hour regulations.

assigning exceptional weight to certain classes of human needs in various contexts of constitutional litigation.<sup>64</sup> A chief exhibit was a series of decisions in which the Court found that a constitutionally guaranteed “right to travel” bars American states from excluding recent entrants from access to state-provided subsistence allowances<sup>65</sup> and emergency medical services,<sup>66</sup> but not from reduced-price college education<sup>67</sup> or the state’s divorce courts.<sup>68</sup> What was the “source,” we wondered, for the “moral scale” by which the Court measured the acceptability of exclusions?<sup>69</sup> Must it not be constitutional law? And did there not emerge from these cases, then, “the categorical notion of a constitutional right to be provided, in case of need, with ‘the basic necessities of life?’”<sup>70</sup>

Well, no. At least not necessarily. Perhaps what emerges is exactly what the Court said: not a social-democratic (“redistributive”) norm, but a libertarian norm of freedom to change one’s state of residence without risk of excessively harsh consequences for doing so. No doubt the only proper source for the moral scale on which harshness of consequences is measured in constitutional litigation is constitutional law; we were right about that. We had found in constitutional law a clear confirmation that targeted exclusion of newcomers from whatever emergency treatment centers the state may be maintaining is an unconscionable impediment to freedom of movement. That, however, is a very different matter, with a very different ideological spin, casting a very different sort of shadow over the conduct of civic affairs, from finding in constitutional law a mandate upon the state to operate an emergency treatment center in every locality, free of charge for those in financial straits.

## 4. Explaining America away

### 4.1. Denial

I cite the underenforced-norms thesis not for its possible truth, but as one among several phenomena that might be collected under the heading of “explaining America away.”

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<sup>64</sup> See, e.g., Michelman, *Welfare Rights*, *supra* note 7, at 660-64; Sager, *Justice*, *supra* note 43, at 98.

<sup>65</sup> See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

<sup>66</sup> See *Memorial Hosp. v. Maricopa County*, 415 U.S. 985 (1971).

<sup>67</sup> See *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff’d*, 401 U.S. 985 (1971).

<sup>68</sup> See *Sosna v. Iowa*, 419 U.S. 393 (1975).

<sup>69</sup> Michelman, *Welfare Rights*, *supra* note 7, at 690.

<sup>70</sup> *Id.* (quoting from *Memorial Hospital*, *supra* note 66, at 259).

Suppose that, on Rawlsian or other grounds, you are inclined to endorse as true the following proposition:

*In prosperous constitutional democracies, where a body of national constitutional law binds ordinary lawmaking, sound moral reasons ideally call for inclusion of socioeconomic commitments in that body of constitutional law.*<sup>71</sup>

And then you observe, with respect to some prominent, prosperous constitutional democracy, that this country's constitutional law is devoid of socioeconomic commitments. Of course the case I have in mind is the United States.

The apparent considered rejection of socioeconomic commitments from U.S. constitutional law might make you squirm a bit – you having signed on to the “sound moral reasons” proposition, as I am now assuming. If you are American, you may not like finding yourself in the posture of branding as morally egregious the constitutional law of your country – not to mention the moral dispositions of the mass of your fellow citizens (insofar as you might take U.S. constitutional law to be an approximately true expression of the prevalent, current value orderings of the American people taken whole). Or perhaps, conversely, the appearance of a decidedly rejectionist stance in U.S. constitutional law makes you anxious about your own moral certainties. A combination of these effects might even prompt an impulse toward denial of the fact of rejection that seems so plain to most lawyers.

“In denial” might indeed be one testy way to describe the outbreaks we see of suggestions that socioeconomic rights actually have – right now, today – a foothold in American constitutionalism (the idea of Roosevelt's second bill as a constitutive commitment of American society<sup>72</sup>) – or perhaps even have a foothold in U.S. constitutional law proper, as a judicially underenforced constitutional norm. If you were anxious to get the American people off the hook for a display of bad morals, the idea of constitutive commitments could come in handy. If you were anxious about getting the American polity off the hook for setting a bad moral example to the world, the idea of judicially underenforced constitutional norms could come in handy. Of course this is not to say that either of these ideas is false or mistaken as applied to the American case. Either or both may be true. But neither of these ideas quite gets at what I think may be the most incisive way to explain America away – to explain, that is, how the current U.S. position need not be construed either as normative repudiation nor as evidentiary impeachment of the “sound moral reasons”

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<sup>71</sup> There may be some countries properly classifiable as constitutional democracies where national constitutional law of that kind (i.e., that binds ordinary lawmaking) does not exist, and to whose affairs, therefore, the proposition in question has no application.

<sup>72</sup> See above, section 1.1.

claim to which I am now assuming your attachment. The more promising escape-way does cross paths with the thesis of judicial under-enforcement.<sup>73</sup> It differs, however, from the latter by spurning denial altogether – instead frankly choosing confess-and-avoid as the form of its plea.

## 4.2. Non-ideal constitutional morality

The key is the word “ideally.”<sup>74</sup> Spare me your groans. This will be no Clintonian quibble. On that word “ideally” hangs a serious moral argument, to the effect that a constitutionalization of socioeconomic commitments is *not* currently advised for the U.S. by sound moral reasons – it may even be contra-indicated by them – owing to the prevalence here of certain non-ideal conditions.

To be worth much in practice, moral argument must be capable of providing guidance for real-life choices. The choices that morality calls for “ideally,” meaning in some seamlessly conducive world we can imagine, morality may possibly reject in a different, less accommodating world that we actually confront. One can get somewhere by asking whether that might be the case respecting the current rejection of socioeconomic commitments by – in particular – U.S. constitutional law.

It can’t be, of course, unless we can first find some respect in which actual conditions in the U.S. deviate from those that are assumed by the ideal moral case for including socioeconomic commitments in constitutional law. Nor can we even start to look for any such deviation until we have in hand some definite content for the categories of ideal and non-ideal “conditions.” (It is not, after all, as though the U.S. faces some special difficulty in *affording* New Dealish programs.) Here, again, I take my cue from John Rawls. Roughly following Rawls, I shall say that conditions are “ideal,” for purposes of constructing arguments of political morality, when all three of the following conditions hold true:

- (i) Sound moral reasons, once publicly brought to light, are recognized as such by relevant actors.
- (ii) The actors strive to make their actions comply with what the publicly recognized, sound moral reasons require.
- (iii) This fact of compliance will be accurately detected by concerned observers. (In other words, there will not be lingering, divisive

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<sup>73</sup> It is also a close cousin of an “institutional” or “pragmatic” explanation for the American omission, proposed by Cass Sunstein, *American Constitution*, *supra* note 1, at 14-16.

<sup>74</sup> Recall the proposition: “In prosperous constitutional democracies, where a body of national constitutional law binds ordinary lawmaking, sound moral reasons ideally call for inclusion of socioeconomic commitments in that body of constitutional law.”

disagreement about whether choices actually made really comport with what the publicly recognized, sound moral argument permits or requires in the circumstances.)

Moral ideal theory seeks out principles for use where all three of these public-epistemic conditions hold. Non-ideal theory is concerned with morally best choices when one or more of them does not.<sup>75</sup> In Rawls's conception, we can best learn what we want to know by seeking first to determine what morality "ideally" requires in the way of constitutional choices, meaning what morality requires assuming that the correct choices, once brought to light by competent moral argument, will effectively govern the conduct, perceptions, and appraisals of relevant actors. We then use these conclusions from ideal theory to help us decide which choices are morally preferred when the assumptions of ideal theory appear not to be true in the actual world with which we have to deal, allowing that the morally preferred choice may then differ from the morally correct choice under ideal conditions.<sup>76</sup>

The Rawlsian conclusion in favor of basic-needs assurances as a constitutional essential is a product of ideal-theoretic argument, as such not guaranteed to hold true for cases in which the public-epistemic conditions of ideal theory do not obtain. Consider, then, the case of the United States today. Do all Americans accept (or can all be prodded by argument into accepting) what John Rawls regards as sound moral reasons for inclusion of socioeconomic assurances in constitutional law,<sup>77</sup> as imagined by condition (i)? Among Americans who do (or would if prodded), are all effectively motivated by such acceptance (or would they be if prodded), as imagined

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<sup>75</sup> These definitions broadly follow John Rawls's conception of "ideal, or "strict compliance" political-moral theory. "Strict compliance," Rawls writes, "means that

(nearly) everyone strictly complies with . . . the principles of justice. We ask in effect what a perfectly just, or nearly just, constitutional regime might be like, and whether it may come about and be made stable . . . under realistic, though reasonably favorable, conditions. In this way, justice as fairness . . . probes the limits of the realistically practicable, that is, how far in our world (given its laws and tendencies) a democratic regime can attain complete realization of its appropriate political values – democratic perfection, if you like.

Ideal theorizing is in order, Rawls suggests, when addressing disagreements about "what conception of justice is most appropriate for a democratic society under reasonably favorable conditions." Rawls, *Restatement*, *supra* note 54, at 13.

<sup>76</sup> To avoid misunderstanding: Ideal theory may be addressed to worlds in which facts of normative and evaluative disagreement or "pluralism" are assumed to be among the inevitable circumstances of justice, along with other social facts such as moderate scarcity. Principles and constraints of toleration, neutrality, and public reason will then very likely form a part of the resulting conception of justice. What is publicly-epistemically "ideal" about ideal theory is that it chooses and defends such principles of justice for a pluralistic (disagreeing) society on the assumption that, once publicly brought to light, the chosen principles (of toleration and so on) will be commonly recognized, understood, accepted, and loyally followed.

<sup>77</sup> See above, section 2.2.

by condition (ii)? Among Americans who do or are or would be, can we really expect anything approaching a convergence of respectable opinion about which courses of action open to government at any given time will and will not truly comport with the complex demands of a Rawlsian political morality (which calls not only for constitutionalized socioeconomic commitments but for adjacent and sometimes situationally competing commitments to liberty and so on) or, hence, about whether government's current performance measures up to what is demanded, as condition (iii) imagines?

Those questions are rhetorical, of course, and I expect almost every reader will nod agreement to their negative insinuations. What you may not so readily accept is any suggestion that these negations could somehow justify morally an omission of certain matter from U.S. constitutional law, in the eyes of anyone who considered such an omission morally insupportable under ideal conditions. (Why would't they rather simply show the benighted state of American public opinion?) And right you are: Standing by themselves, these negations cannot possibly justify anything. What they can do, however, is *open the door* to a possible argument to the effect that our constitutional law is morally in order, at least for the moment – given one further fact about American society.

That further fact is our currently entrenched reliance on judicial review as an indispensable guarantor of the rule of constitutional law, of the constitutional contract.<sup>78</sup> This is not on its face a fact that falls under the heading of a Rawlsian non-ideal condition.<sup>79</sup> It nevertheless works as a but-for cause of a morally significant, standard worry (as we shall call it) about writing or reading socioeconomic commitments into our constitutional law. It is true, as will be seen, that the prevalence of non-ideal public-epistemic conditions (assuring unquenchable controversy over whether government is at any moment doing what is required to honor a constitutionalized socioeconomic commitment) is also a but-for cause of the standard worry. My point, though, will be that without the American habit of dependence on judicial review as a guarantor of constitutional legality, the standard worry would not arise, or would be baseless if it did.

In a country like the United States – given both our demand for popular government and the irreducible uncertainty, contestability, and contingency on changing conditions of choices in the field of socioeconomic policy – any

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<sup>78</sup> Compare DWORKIN, *supra* note 24, at 33-35 (relying, in part, on historical entrenchment of judicial review in American practice for a defense of judicial review in the U.S. today); KRAMER, *supra* note 22, at 7-8, 227-33. Kramer calls this fact a “modern understanding,” and maintains that its vintage is “recent,” but he does not deny it; to the contrary, he decries it.

<sup>79</sup> Rawls is receptive to the defensibility of judicial review as a component of a legitimation-worthy constitutional regime. See Rawls, *Liberalism*, *supra* note 50, at 240.

constitutionalized socioeconomic commitment would inevitably have to be couched in abstract, best-efforts terms, South African style.<sup>80</sup> But the American culture and practice of judicial review do not fit comfortably with the seemingly boundless, practical indeterminacy of a commitment thus abstractly couched. By constitutionalizing socioeconomic rights in such a form, the standard worry runs, you would force the American judiciary, and especially the Supreme Court, to a hapless choice between usurpation and abdication, from which there is no escape without embarrassment or discreditation.<sup>81</sup> Down one path, it seem, lies the judicial choice to issue concrete, positive enforcement orders in a pretentious, inexpert, probably vain but nevertheless resented attempt to reshuffle the most basic resource-management priorities of the public household against prevailing political will. Down the other lies the judicial choice to debase dangerously the entire currency of rights and the rule of law – the spectacle of courts openly ceding to executive and legislative bodies a nonreviewable privilege of indefinite postponement of a declared constitutional right. In sum, an ostensible act of writing or reading socioeconomic assurances into U.S. constitutional law may risk serious damage to the integrity (and to public confidence therein) of the country’s practices of constitutionalism, of law and legality, and of democracy. So goes the standard worry.

The worry is credible. It envisions risks with which political morality (not just political prudence) has good reason to be concerned – a point I do not belabor here but which I hope is obvious. More to our purpose is that these are all risks that cannot arise under the public-epistemic assumptions of ideal theory. The risks all presuppose an obduracy and intensity of disagreement between the judiciary and at least some other civic actors, about what morality and the Constitution require of government and whether government is currently conducting itself in conformity to those requirements. No such disagreement can arise where everyone is assumed always to recognize compelling moral reasons once those have publicly been brought to light, and to gauge accurately the best-efforts compliance of others with what those reasons require in a given situation. Bearing this point in mind, we can see how the existence of non-ideal conditions in the U.S. *might* enable an argument that the morally preferable course here, all things considered, is to exclude socioeconomic commitments from constitutional law, although ideally they must be included.

Something more will be needed, though. The argument depends on a perception of moral risks engendered by drawing the judiciary into confrontations with the government over the government’s performance of claimed socioeconomic

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<sup>80</sup> See above, section 1.3.

<sup>81</sup> See, e.g., Sunstein, American Constitution, *supra* note 1, at 14-16 (offering the standard worry as a partial, but by itself insufficient, explanation of the American omission).

commitments. The risks in question are ones that can arise only where judicial constitutional review really does serve as a linchpin of constitutional legality, as (our argument assumes) it currently does in the United States. Completion of the argument for the defensibility of the American omission under non-ideal public epistemic conditions thus depends on American political culture's current penchant for judicial review, and more broadly for adjudication.

The standard worry, with its attendant suggestion of moral risk, depends on the view that a norm can't be constitutional *law*, can't count as constitutional *law*, without its being turned over lock-stock-and-barrel to judges for enforcement. It was in anticipation of this turn in the analysis that I insisted, in section 1.2, on a conception of a right's existence in law that did not necessarily posit, à la Holmes, a judicial remedy for every violation. For suppose we thought that Americans by and large accepted the more minimal view I offered there of what it means for a right to exist in law – roughly, that those who inexcusably act in violation of the right thereby expose themselves to the special sort of public blame or censure that we would typically direct to lawbreakers. The moral-risk objection to writing socioeconomic commitments into U.S. constitutional law would then collapse. In that case, we should feel perfectly free to write socioeconomic commitments into our constitutional law, while at the same time directing courts to get lost when controversies rage over the sufficiency of the government's performance of such commitments.

One might draw the following inference: Americans who believe that sound moral reasons ideally require the inclusion of socioeconomic commitments in constitutional law should see it as their moral obligation to do their best to persuade Americans at large of the gap between a norm's being law and its being available for judicial enforcement – and, hence, of the perfect prudence of writing certain norms into constitutional law while directing a hands-off judicial policy respecting controversies over what those norms concretely require. But even that proposition is not free from doubt. Burke must have his say. In any political culture, at any given time, there may be structures of belief on which confidence in the rule of law, legitimacy – call it what you will – simply depends, and that you cannot pull down with high confidence about what may follow. The less certain you are about all that, the more receptive you may be to a claim that sound moral reasons call – in these United States – for stopping with a New Deal constitutive commitment, if we have it or can get it, and leaving constitutional law alone.

With that question hanging (I do not propose to answer it), we can see how a respectable, moral case for exclusion of socioeconomic assurances from U.S. constitutional law might possibly trump an ideal-theoretic case for inclusion. We can also see how the case may be in some degree special to the United States. If we

thought it would be a safe and simple matter here – as it very well may be in many or most other countries – to write a socioeconomic commitment into constitutional law but instruct the judiciary to leave compliance judgments to purely political forums, the undoubted existence here of non-ideal, public-epistemic conditions would do nothing to impeach the ideal-theoretic case for inclusion (although of course it might fatally complicate the politics of getting it done).

For suppose we did have a clear and widely shared understanding here that a norm can be placed off limits to judicial enforcement without impeaching its status as law that counts as such. The Rawlsian case we reviewed in section 2.2 would then certainly call for inclusion in American constitutional law of an abstractly framed, best-efforts commitment to the satisfaction of everyone's basic needs. So what if the commitment would have to be so abstractly couched as to become a field for endless political debate? That matters of the deepest political-moral import should be found endlessly debatable in a democracy cannot itself be counted a danger to legitimacy, without dooming the chances for legitimacy in any modern, plural society.<sup>82</sup>

The analysis I have just completed adds up to this: Assuming that inclusion of socioeconomic rights in constitutional law is morally required under ideal public-epistemic conditions, with or without judicial review being also a part of the constitution, moral reasoning under non-ideal, public-epistemic conditions might favor exclusion, but only if judicial review occupies a certain, special place in the society's legal culture. Where the latter condition is absent, an ideal-theoretic moral conclusion in favor of a constitutionalized socioeconomic commitment would hold even under non-ideal conditions.

Thus it can be argued. Suppose you accept the argument. Does it leave you with a new moral ground of objection to judicial review?<sup>83</sup> Morally based objections to judicial review usually complain of removal of decisionmaking authority away from those who morally ought to have it.<sup>84</sup> The argument here suggests the possibility of a different sort of moral complaint. The complaint would be that over-dependence on judicial review can ground a situationally valid, moral objection to putting into your constitutional law something that moral ideal theory tells you should be there. The over-dependence thus provides moral cover for a choice that moral ideal theory condemns. Is that a moral cost to be chalked up against the case for judicial review?

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<sup>82</sup> For elaboration of this point, See Frank I. Michelman, *The constitution, social rights, and liberal political justification*, 1 I-CON 13, 25-30, 33-34 (2003).

<sup>83</sup> Not new in the sense of never before suggested. See, e.g., Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006).

<sup>84</sup> See, e.g., Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346 (2007).

It wouldn't necessarily be decisive, of course; any more than judicial review, at this stage of our history, is sheerly a matter of choice.