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ECONOMIC AND SOCIAL RIGHTS

Herman Schwartz*

Before I begin, I want to make a few prefatory comments. First of all, I know very little about South Africa, and I'm not here to give advice. What I can do is to talk a little bit about my experience in America and elsewhere in the world where I have studied and worked. You will then decide how much of that experience, some of which may be quite unique to the United States or these other countries, but some of which may indeed be transferable, is of value to you.

Second, my remarks assume ongoing societies, not a mythical or hypothetical state of nature. I assume that both my activities on these issues, and yours, are in the context of an ongoing society in which there are economic, governmental, and other power structures as well as other established institutions, centuries of repression, and enormous differences in political, economic, and social power. This is the context in which we work. We do not start afresh, in some state of nature. The problems we face are very practical: how can we make an existing society, with all of its already existing strengths, and sometimes ineradicable shortcomings, tolerable for its people?

Let me start with the nature of a constitution. I want to touch on two aspects: one is conceptual, while the other is operational.

Conceptually, a constitution is more than a legal document. It is a device for creating power-wielding structures and institutions, and for better or for worse, it is timebound. It is a snapshot at a moment in time, reflecting the hopes and fears of the nation at a specific moment between its misfortunes of the past and its aspirations for the future. The 1958 Gaullist Constitution in France, for example, not only harks back explicitly to the *Droits d'Homme* of 1789 and to the Preamble of the Constitution of 1946, but it also reflects General DeGaulle's return to power after thirteen years of political instability. Indeed, it was tailored to him. The United States Constitution reflects the disappointments with the Articles of Confederation, the post-revolutionary disillusionments, and the founding generation's nervous hopes for the future. Constitutions thus reflect the nation's past and the triumphs and tragedies that preced-

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ed the constitutional moment, along with the turbulence of the present, and its immediate needs and concerns.

Operationally, constitutions entrench those things that are supposed to be relatively immune to change. In a very real sense, a constitution is an anti-democratic instrument.¹ Like all of you, I believe that democracy and its concomitant, majority rule, are the only appropriate forms of government for a decent society. But, as we see in Eastern Europe today and have seen for two hundred years in the United States and elsewhere, democracy is a very imperfect form of government. It seems so inefficient. It involves so much talk and often seems to get nowhere. Democracy is nevertheless a system that most want, for only democracy offers the possibility of freedom and self-determination.

Pure democracies are dangerous, however. They can be brutally intolerant of minorities and dissenters. A "rigid" constitution that limits majoritarian power is thus a necessary counter to majority rule, to remove certain things from changing and fluctuating majorities so that they will stay relatively fixed over time.

What are these things? What is it that a nation must keep relatively unalterable if it is to function efficiently while being true to itself, faithful to what the nation would like to be and to attain? For a free society, this class of relative unalterables must include protection for the rights of individuals and minorities. If the democratic process is to work, it must include protection for all those who may run afoul of the majority's ideas and values and who must therefore be protected if the society is to be and to remain free. A bill of rights, of course, serves as the vehicle for this, and almost every civilized nation today has one in its constitution, often right at the very beginning.

Also in need of permanence is much of the basic governmental structure, on both the overall national level and the relationships between the national government and its constituent units. These structures must obviously be relatively stable so that the country can function, and so that people can know and rely upon the rules of the game. Structural matters deal with the distribution of powers within and among governmental power centers, however. They are, therefore, the most difficult to agree on, and are often the subject of political struggles. The constitu-

1. See Cass R. Sunstein, *On Property and Constitutionalism* 17 (Chicago Law & Economics Working Paper No. 3, 1991) (suggesting that constitutional provisions should be designed to work, in one sense, against "those aspects of a country's culture and tradition that are likely to produce harm through that country's ordinary political processes").

tional arrangements that result from these struggles are often compromises and deals that are absolutely necessary if any constitution at all is to be agreed upon. Such arrangements often reflect merely temporary political power relationships and can be far from ideal.²

And I believe, as most of the world does, that in a modern industrial society it is also necessary to entrench economic and social rights, if only because civil and political rights are not safe when people are hungry, unemployed, or sick, and there is nobody and nothing to care for such people. The 1992 Los Angeles riots and many earlier and current urban troubles in the United States provide ample evidence of this. Every country, however, has more than enough evidence of the links between want, disorder, and repression.

There is not much disagreement about what these economic and social rights are. They include the right to work, to a job, to a minimum wage, to equal pay for equal work, to welfare, to housing, to clothing, to education, to health care, to leisure, and to special care for children.³ In their most controversial form, these rights represent not merely claims on government, but claims on government for something *new*, something that does not already exist. In this aspect, some of these rights require government to create programs, usually to spend money and perhaps other scarce social resources, and often to order priorities in ways it

2. This brings up one piece of advice that I give to Eastern Europeans (advice that is usually ignored). A constitution should not be made too difficult to amend in its early years, since whatever is done at the beginning may turn out to be mistaken — either too tied to events occurring at the time the constitution is written, or in some other way inadequate for the long run. A constitution should be relatively easy to change, so that a nation can respond to changing times and benefit from learning, sometimes fairly quickly, that certain approaches do not work. Experience everywhere shows that if those changes are not made at the beginning, it becomes almost impossible to make them later, as groups within the society learn to live with and build on the mistakes. The United States did not do that, and we suffer for it. For example, we created an electoral college. Within three or four years it became very clear that it was not a very good device. Nevertheless, it has been politically impossible to abolish, and we still have it. There are other things that we have that we probably would not write today that we are stuck with, and that is true with almost all nations. If certain matters should, however, be unalterable such as the basic rights, this can be specifically provided for, as in the German Basic Law, or by excepting these matters from the provisions that are easily changed in the early years.

3. See European Social Charter, Oct. 18, 1961, 529 U.N.T.S. 89, *reprinted in* DAVID HARRIS, *THE EUROPEAN SOCIAL CHARTER* 312 (1984) (listing nineteen categories of such rights). See also THOMAS BUERGENTHAL, *INTERNATIONAL HUMAN RIGHTS* 116-22 (West 1988) (discussing the social and economic rights proclaimed in the European Social Charter).

might not otherwise do. The constitutional problems raised by these economic and social rights revolve primarily around constitutionally requiring the government to create social and economic programs which it has not yet established, and to meet needs that its people ordinarily cannot cope with on their own.

Although economic and social rights appear in a great many founding documents and charters, controversy has arisen in some quarters about including them in a constitution. The German Basic Law of 1949, heavily influenced by the United States, contains very few such rights,⁴ and much controversy has arisen over whether to include a more complete set of such economic and social rights in a new constitution for a unified Germany. The very conservative government of the Czech Republic, led by Prime Minister Vaclav Klaus, a disciple of Margaret Thatcher, does not want such rights in a new Czech constitution, (though he may be forced to accept them as a political compromise). And the United States Constitution, now being interpreted by a very conservative, market-oriented Supreme Court, is being read to exclude almost any sort of governmental social obligation to the American people.⁵ Indeed, if asked, most American lawyers would be inclined to share this view and to insist that constitutions and bills of rights be primarily *negative* legal instruments that simply limit governmental power and do not impose affirmative obligations.

The analytic arguments against including such rights in a constitution are succinctly stated in a recent article by Professor Cass R. Sunstein of the University of Chicago Law School, the home of market economics thinking in the law, though he, unlike Professor Richard A. Epstein, who is commenting on this paper, is not one of its more fervent advocates. It will be useful to set out Professor Sunstein's brief statement in full during the course of this paper, since much of the rest of this paper will be a commentary on that.

Professor Sunstein's first concern is that:

4. See BASIC LAW [GG] art. 6(2) (F.R.G.) (giving children the right to special protection from the State).

5. See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989) (holding that the State had no constitutional obligation to protect a child who was being abused by his father even though the Department of Social Services had received reports that the child was being abused). The Supreme Court ruled that although the State was aware of the child's dilemma, the State neither created the abusive situation, nor made the child more vulnerable to abuse. *Id.* at 201. A State only has an affirmative duty to provide for an individual's safety and well-being when that individual is placed under the custody of the State. *Id.* at 200.

to state aspirations and impose positive duties—prominent of course in the Soviet Constitution—runs the risk of turning a constitution into something other than a legal document with real-world consequences. It is important to remember that if it is to create rights realistically enforceable in the world, a constitution should not list all things to which a country aspires. *It should limit itself, for the most part, to rights that it is genuinely able to enforce.* A constitution that creates positive rights is not likely to be subject to judicial enforcement, because these rights are vaguely defined, simultaneously involve the interests of numerous people, and depend for their existence on active management of government institutions—something for which judges are ill-suited.⁶

The first of these problems, the difficulty of judicial enforcement, does not apply to all of these economic and social rights, however. Some of these rights do not involve creating new government programs at all but are only applications in a social and economic context of what we usually call “negative rights.” Such rights *deny* power to the government or to private parties. This includes, for example, the right to strike or the right of labor to organize. To assert such rights is to say that these are things that people want to do on their own, and all they want from the government is either to stay out or, as with any other private interference with rights, to prevent somebody else from unfairly interfering with what they want to do. Thus, for example, to declare that employees have a right to strike is only to say that if someone wrongly interferes with a strike, the employees can go into court and get a court order to stop that interference. Obviously, the definition of “wrongly” requires interpretation and development, but courts do that all the time with both statutory and constitutional language and, in the common law tradition, with respect to rights in tort and contract law.

Such negative rights account for many of the economic and social rights at issue here. To put them into the basic charter simply constitutionalizes what we usually do now by legislation. It does not involve any allocation or reallocation of public resources, except perhaps for the enforcement apparatus, which is likely to be minimal.

There is another group of rights that also raises few enforcement problems. This group includes rights that do not require that the government create something new at state expense, but only that it require private people to do what the law usually requires them to do. This applies, for example, to the right to a safe workplace. It is not uncom-

6. Sunstein, *supra* note 1, at 14 (emphasis added).

mon for government to insist that unsafe conditions, a form of public nuisance, be changed.⁷ Indeed, that is often what governments do by statute, and in terms no more explicit than what appears in some of these constitutions.⁸

Similarly, a constitutional insistence that employees be paid a minimum wage usually presupposes that a minimum wage has already been set. And the right to equal pay for equal work is a demand for some kind of equality. This is the kind of demand that courts have to deal with all the time, hard as it may be, if they are to give meaning to the guarantees against discrimination that exist unchallenged in all constitutions.

The economic/social rights that raise the most difficult problems — difficulties with judicial enforcement, alleged interference with the legislative process, of allocating scarce national resources among different needs — include such matters as the right to an education, to health care, to a job, to social security for the elderly and the disabled, to housing, to subsistence, and to food and clothing. As I noted above, these rights may call on government to create something that was not there before, to provide something that the private sector is probably not adequately providing, to spend money or other resources, and perhaps to reorder legislative priorities. This group also includes what have come to be called among human rights specialists “third generation rights” such as the right to a clean environment or to consumer safety. All these do indeed raise quite different considerations from the rights discussed above.

In the eyes of some people, these rights are vestiges of Communism.⁹ While this may indeed be true of certain countries emerging from Com-

7. W. PAGE KEETON ET AL., *PROSSER AND KEETON ON THE LAW OF TORTS*, § 90, at 643 (5th ed. 1984). Under the concept of public nuisance the government may remedy, usually by injunction or criminal prosecution, a threat to general health or welfare. *Id.*

8. Compare Czechoslovak Charter of Fundamental Rights and Freedoms, art. 28 (stating “[e]mployees are entitled to . . . satisfactory working conditions”) [and] art. 29 (stating “[w]omen, adolescents, and handicapped persons are entitled to increased protection of their health at work and to special working conditions”) with the Occupational Safety and Health Act, 29 U.S.C. § 654(a)(1) (1988) (providing that “[e]ach employer shall furnish to each of his employees employment and a place of employment which are free from recognized hazards that are causing or are likely to cause death or serious physical harm to his employees”).

9. Cass R. Sunstein, *Something Old, Something New*, 1 E. EUR. CONST. REV. 18, 20 (1992).

munist regimes, that is not their real and certainly not their sole origin. In fact, these rights go back to the Freedom from Want in the Four Freedoms and to the 1948 Universal Declaration of Human Rights,¹⁰ which, incidentally, the Communist countries did *not* sign. These rights appear in many other international and national charters including the constitutions of nations that are anything but Communist. For example, the Gaullist Constitution of 1958 explicitly incorporated the Preamble to the 1946 Constitution, which guarantees the French people many of these rights. Italy, Spain, and Japan have also included such rights in their national charters.¹¹ All these nations realize that, as the United Nations has often pointed out, economic and social rights are inexorably intertwined with civil and political rights.

It is for this reason that some constitutional scholars, myself included, have suggested that even in the United States, which prides itself on its negative constitution, there is an awareness that certain needs are basic and that government and our constitution have an important part to play in protecting those rights. Although the United States Supreme Court has refused to find a constitutional status for the rights to welfare, shelter, or other basic necessities,¹² where a statute has created such rights,

10. G.A. Res. 217A (III), U.N. GAOR, 3d Sess., pt. 1, at 71, arts. 22-26, U.N. Doc. A/810 (1948), reprinted in RICHARD B. LILICH, *INTERNATIONAL HUMAN RIGHTS INSTRUMENTS* (1990); International Covenant on Economic, Social and Cultural Rights, opened for signature, Dec. 16, 1966, 993 U.N.T.S. 3, G.A. Res. 2200(XXI), U.N. GAOR, 21st Sess., Supp. No. 16, U.N. Doc. A/6316 (1966), entry into force Mar. 23, 1976, reprinted in 6 I.L.M. 360 (1967).

11. See MANOUCHEHR GANJI, *THE REALIZATION OF ECONOMIC, SOCIAL AND CULTURAL RIGHTS: PROBLEMS, POLICIES, PROGRESS*, U.N. Sales No. E.75.XIV.2 (1975) (offering a complete list of such rights and of the nations that have placed such rights in their constitutions as of 1972).

12. See, e.g., *Dandridge v. Williams*, 397 U.S. 471 (1970) (upholding a Maryland regulation which imposes a ceiling on Aid to Families with Dependent Children (AFDC) grants to families with dependent children); *Lindsey v. Normet*, 405 U.S. 56, 74 (1971) (holding that the United States Constitution does not guarantee access to housing); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33-35 (1973) (holding that the right to education is neither explicitly nor implicitly protected by the Constitution). The issue of basic rights aroused a good deal of scholarly study in the late 1960s and 1970s. See Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695 (asserting that welfare rights cannot be derived from the Constitution); Frank I. Michelman, *The Supreme Court, 1968 Term — Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (examining judicial responses to claims of economic equality); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter Michelman,

it has prevented the government from cutting them off. Thus, when Pennsylvania tried to cut off all welfare benefits to a fifteen-year-old, when Maricopa County, Arizona, refused hospital care to recent arrivals, and when the federal government denied food stamps to households in which not all the members were related, the Court, often by top-heavy majorities, insisted that the benefits be provided.¹³ In a rather odd turn, the Court has refused to require equality of benefits, but a total denial of basic necessities to some, when they are made available to others, is apparently beyond the pale.

Some of these positive rights have even been given explicit constitutional status. All but one or two of our *state* constitutions, for example, include the right to an education.¹⁴ Some courts have used this right to equalize school financing. The United States Supreme Court refused to do this, however, even though it has insisted that a state cannot totally deny the children of illegal aliens an education.¹⁵

One View of Rawls] (exploring the implications of judicially inspired welfare rights); Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (defending the argument that the United States Constitution provides welfare rights); Ralph K. Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41 (assessing the Equal Protection Clause's role in reducing economic inequality); Ralph K. Winter, Jr., *Changing Concepts of Equality: From Equality Before the Law to the Welfare State*, 1979 WASH. U. L.Q. 741 (arguing that equality before the law is distinct from socioeconomic equality). The debate seems to be dead except for one recent effort. See also Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987) (arguing for a constitutional right to a "subsistence" income).

13. See *Williams v. Wohlgemuth*, 366 F. Supp. 541 (W.D. Pa. 1973), *aff'd*, 416 U.S. 901 (1974) (holding unconstitutional a state regulation denying eligibility for welfare assistance to unemancipated minors living with unrelated persons not receiving assistance); *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (holding that the state's residence requirement for non-emergency free medical care impinges on constitutionally protected interests); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528 (1973) (holding that classification which denied food stamps to households whose members were not "all related to each other" violates equal protection). *But see Lyng v. Castillo*, 477 U.S. 635 (1986) (holding that the statutory distinction between parents, children and siblings and other groups of individuals for purpose of food stamp eligibility does not violate the Due Process clause).

14. William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661 (1989).

15. *Plyler v. Doe*, 457 U.S. 202 (1982) (holding that children of illegal aliens cannot be denied an education). Compare *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973) (holding that the Texas school financing system did not violate a fundamental right) with *Robinson v. Cahill*, 303 A.2d 273 (N.J. 1973) (holding that

The right to subsistence has also been subjected to judicial enforcement. Some twelve state constitutions set forth a state constitutional obligation to care for the sick and needy.¹⁶ Although some state courts have virtually ignored such provisions, New York has used Article XVII of the New York State Constitution to develop a right to welfare. Article XVII provides: "[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."¹⁷ New York's highest court, the Court of Appeals, has ruled that Article XVII of the New York State Constitution requires that the legislature not deny aid to needy individuals on the basis of criteria unrelated to need.¹⁸ This is, of course, another case where the issue could have been treated as a discrimination matter, but in the modern welfare state, that holds for many economic and social issues.

Even the United States Constitution contains some positive obligations, though not of the economic and social variety discussed here. Thus, the Seventh Amendment requires the federal government to provide jury trials in civil and federal cases even though, unlike in a criminal case, the state is not directly involved. And in the criminal context, the Supreme Court has required the state to provide counsel,¹⁹ trial transcripts and other aids to defendants.²⁰ Indeed, it can be said that an organized society always makes a claim on government to create institutions and programs "to provide for the common defense [and] promote the general welfare," including the protection of property. The fact that these latter are not conventional economic and social rights is unimportant. The point is that we do demand that the government provide certain things, and to that end obligate it to create certain programs, because we believe that as citizens we are entitled to them.

the New Jersey system of financing education was unconstitutional) [and] *Helena Elementary Sch. Dist. No. 1. v. State*, 769 P.2d 684 (Mont. 1989) (holding the state system of funding violated the Montana Constitution).

16. Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 596-605 (1989).

17. N.Y. CONST. art. XVII, § 1.

18. *Tucker v. Toia*, 371 N.E.2d 449 (N.Y. 1977).

19. *E.g.*, *Gideon v. Wainwright*, 372 U.S. 335 (1963) (holding that indigent defendant in state criminal prosecution has the right to have counsel appointed to him).

20. *See, e.g.*, *Griffin v. Illinois*, 351 U.S. 12 (1956) (holding that indigent defendants have the right to be furnished with trial records and transcripts without cost for appellate purposes).

Moreover, not every right must be judicially enforceable. There are rights in the United States Constitution that are not judicially enforceable. For example, because of our political question doctrine, a citizen's right to a republican form of government in Article IV is not judicially enforceable.²¹ There are other provisions in our Constitution which, we are told, must and should be left to the political process because of standing problems.²² In the 1940s and 1950s distinguished jurists like Justice Felix Frankfurter told us again and again that we should not look to the courts for resolution of all the problems of society. Our Supreme Court may be going back to Frankfurter's view at this time. I happen to think that they underestimated what the courts can do, particularly when helped by legislation.²³ But there are nevertheless rights which are not judicially enforceable, but only politically enforceable.

Where political enforceability is concerned, putting such rights into the constitution is not an empty gesture. It can be a great help. In the typical bargaining and battle that goes on in the political process, something that is claimed as a right is likely to be considered to be more worthy than something that is only an aspiration, a hope, or an interest group demand. Those who call for enforcement of what is deemed a *right* can invoke a constitutional and legal obligation to have

21. *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849). *Cf. O'Brien v. Brown*, 409 U.S. 1 (1972) (holding that the federal court system was not the proper forum to address grievances of delegates to the 1972 Democratic National Convention); *Republican State Cent. Comm. of Ariz. v. Ripon Soc'y, Inc.*, 409 U.S. 1222 (1972) (staying an injunction by the District Court to halt the 1972 Republican National Convention from using a particular system for allotting delegates for the 1976 convention, partly because of the political nature of the questions involved).

22. *See United States v. Richardson*, 418 U.S. 166, 179 (1974) (holding that a federal taxpayer did not have standing to sue for grievances common to the public in general and that some constitutional claims were intended not for the judicial but rather solely for "the political process"). Richardson argued that the Central Intelligence Agency Act, which provided that appropriations and spending by the CIA be kept private, violated Art. I, § 9, cl. 7 of the Constitution which states that "a regular statement of account of the receipts and expenditures of all public money shall be published from time to time."

23. Roger Pilon, *On the First Principles of Constitutionalism: Liberty, Then Democracy*, 8 AM. U.J. INT'L L. & POL'Y 531, 547 (1993). I could not disagree more with Mr. Roger Pilon's statement that the Civil Rights Act of 1964 has been a failure. *See Civil Rights Act of 1964*, 42 U.S.C. §§ 1971, 1975a-1975d, 2000a-2000l-6 (1988) (prohibiting discrimination based on race, color, religion or national origin). The Act has been an *enormous* success, as has the Voting Rights Act of 1965, 42 U.S.C. §§ 1971, 1973-1973p (1988), and other civil rights laws, though much remains to be done.

that claim met, and this is likely to have political significance. I think that the American health care debate would be very different if a national health care program were a right rather than a matter of merely legislative grace.

Putting such rights into a constitution can also enhance their force when legislative or other issues that involve such rights are raised before the courts. Thus, in the United States, labor picketing is given special protection because it is considered a form of speech, which is protected by our Constitution.²⁴ Constitutionalizing such rights can thus serve as a guide for interpreting such legislation and for devising additional legislation.²⁵

Constitutionalizing economic and social rights will, of course, also make a constitution much longer, and this often bothers American lawyers who believe that constitutions should be brief and spare, with much left for judicial interpretation and development. But if a constitution is to serve as a meaningful support for judicial and other forms of constitutional protection, length is unavoidable. A brief constitution is appropriate only for a developed society, which already has strong institutions that can be relied on to fill in the lacunae, like a powerful Supreme Court or an executive and legislative branch committed to democracy and liberty. New states do not yet have such institutions. After all, it took the United States Supreme Court one hundred and fifty years to begin to make our Bill of Rights judicially significant, and new democracies do not have that kind of time.

For this reason, few new constitutions have been brief. Some, however, have gone too far in the opposite direction and have tried to micro-manage the society through the constitution, a practice which is very unwise. For example, the Ukrainian draft constitution grants workers not only a right to leisure, but mandates a forty-hour week. That is excessive. Experience with United States state constitutions which often have such fine details, has shown that the detailed provisions often become outdated very quickly and become a hindrance, requiring constant amendment. These amendments, in turn, are often very technical and incomprehensible to most. For these and other reasons, constitutions should not try to get into the fine points of economic or social policy. That is for the normal democratic process, in response to the ever-changing nature of economic and social reality.

It is suggested, however, that:

24. *Thornhill v. Alabama*, 310 U.S. 88, 103 (1940).

25. *THE WELFARE OF CITIZENS* 8 (Anna Coote ed., 1992).

[t]he existence of unenforceable rights will in turn tend to destroy the negative rights—freedom of speech, freedom of religion, and so forth—that might otherwise be genuine ones. If some rights are shown to be unenforceable, it is likely that other rights will be unenforceable as well.²⁶

The possibility that if *some* rights are not judicially enforceable, this will somehow depreciate the value of other rights is indeed a troubling possibility. Happily, there is no evidence for that. To the contrary, courts have often refused to enforce certain rights in this country and elsewhere, without any impact on the enforcement of other rights. Courts enforce those rights that they think important and do not worry very much about those rights that they think unimportant or unenforceable.

But, it is said, economic and social rights are very “vague”. There is hardly anything unique to such rights, however. Constitutional rights are usually written in general terms, and we depend on the courts to give them specific substance. Taking the United States Constitution, for example, one cannot have the slightest idea of what American constitutional law is like by simply looking at that very brief document and its generally stated rights. What in the world does “due process” mean? What is an “unreasonable search”? To answer the most basic questions, you must examine close to five hundred volumes of the United States Reports.

This, of course, is not a complete response. The vagueness of provisions in other constitutions doesn't eliminate the problems it causes. For example, how would a court deal with the “right to work”? What does that mean? Must the state provide jobs? Will it be able to afford to? How can it be forced to do so, even if that is the proper meaning of the phrase?

Obviously, any interpretation will depend on the total legal framework of a country, but it seems to me that a court is likely to conclude that the provision means either that (1) neither government nor private parties should erect impediments to the opportunity to work, such as racial discrimination, arbitrary requirements, etc., or (2) the state should provide public service jobs that pay a decent minimum wage and which, if offered, meet the constitutional obligation. If the state is too poor or is otherwise unable to provide such jobs, it may be that this right, like others, is judicially unenforceable because although it is indeed a consti-

26. Sunstein, *supra* note 1, at 14-15.

tutional right, its implementation is a matter of discretion, as is true of the other non-judicially enforceable rights discussed above.

Including these rights in constitutions may encourage people to feel that they are entitled to them. Professor Sunstein puts it this way:

[P]ositive rights [work] against the general current efforts to diminish the sense of entitlement to state protection, and to encourage individual initiative and self-reliance. Both markets and democracy tend to develop these highly salutary characteristics. Sometimes liberal constitutionalism is praised because it responds accurately to "human nature," and does not try to tinker with it. There is undoubtedly something to this idea; efforts fundamentally to revise human character are usually doomed to failure. But liberal constitutionalism might be defended precisely on the ground that it has healthy effects on human character. Markets and democracy tend to create certain types, with many valuable characteristics.²⁷

I do not find this a problem. People are entitled to get from their government and the tax money that is collected from them what they consider vital, whether it be an adequate defense or an adequate educational or health care system. On the other hand, there is no sign that putting such rights into the Czechoslovak Charter of Fundamental Freedoms²⁸ has dampened the market policies of Prime Minister Vaclav Klaus or the Czech people's entrepreneurial impulses.

Finally, it has been argued that constitutionalizing such rights will interfere with the market economy.²⁹ I doubt it. But if there is such interference, it is not from merely putting these rights into a constitution. Whatever interference occurs will result from the very existence of these programs, not from their sources. Governmentally provided education, whether it derives from the constitution or in legislation, costs money and sets up certain governmental structures.

The only real issue raised by the concern for markets is whether government should get involved in these matters at all, whether by legislation or constitutionally. And as to that, I believe that is exactly what government should do, because the market economy left to itself produces dreadful maldistribution and damage, as even opponents of constitutionalizing such rights recognize.³⁰ Almost every nation in the world has come to this conclusion because nowhere in this world is there an unregulated, uncontrolled market economy. It comes down to

27. *Id.* at 15.

28. ÚST.ZÁK.ČSFR [Constitution] art. 32 (Czech and Slovak Federal Republic).

29. Sunstein, *supra* note 1, at 15.

30. *Id.*

whether you think these social and economic benefits are important enough to entrench in the nation's basic charter so that the state *must* provide them, just as it provides other benefits of society. And I think most of us do.

Putting such rights in the constitution would also help avoid certain difficult constitutional problems in the United States and perhaps elsewhere. For example, we have a serious problem arising out of what are called unconstitutional conditions in which the basic question is this: since the government does not have to give you a particular benefit — money or something else — what conditions can it impose on you before it will do so? Can it require you to give up your right to speak freely on matters related to the benefit grant? Can it require you to refrain from certain behavior having some remote relationship to the grant? It is a terribly difficult problem, and the courts have had a great deal of difficulty drawing lines between what conditions can be imposed and what cannot.³¹ If the government *must* give it to you as a matter of constitutional right, however, then it probably cannot impose such conditions except within certain narrow limits, such as ensuring that the purposes of the grant are being met.

Constitutionalizing such rights would also avoid deplorable decisions like the recent United States Supreme Court *DeShaney* case.³² There, the public welfare department knew that a child was being beaten to death, did nothing about it, and the United States Supreme Court said the state had no obligation to do anything about it. If our Constitution had a provision for establishing a child's right to special care, as so many foreign constitutions do,³³ such an outrageous decision would be very unlikely.

These are the reasons why I think economic and social rights belong in any modern constitution. To some extent they are there already in most constitutions, because those nations that have signed such international treaties as the Covenant on Social, Cultural and Economic Rights

31. See *Rust v. Sullivan*, 113 S. Ct. 1759 (1991) (upholding a government regulation that bars recipients of federal family planning funds from discussing abortion as an option with their clients).

32. *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189 (1989).

33. See, e.g., ÚST.ZÁK.ČSFR [Constitution] art. 32(1) (Czech and Slovak Federal Republic) (stating that "[p]arenthood and the family are under protection of the law. Special protection of children and adolescents is guaranteed."). See also GRUNDGESETZ [Constitution] [GG] art. 6(2) (F.R.G.) (stating that "[t]he care and upbringing of children are a natural right of, and a duty primarily incumbent on, the parents. *The national community shall watch over their endeavors in this respect*") (emphasis added).

are bound to put them into effect as a matter of treaty. That is not enough, however. I believe that a modern society which wants a constitution that will guarantee its people a decent life should expressly include economic and social rights, and I hope the new South African Constitution will do so.