The Expansion of Constitutional Rights and Its Implications

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Abstract

Social and economic rights are conspicuously absent from the American Bill of Rights and subsequent amendments to the American Constitution. There have been periodic calls for the inclusion of such rights. Professor Cass Sunstein of Harvard Law School, currently serving as the Administrator of the White House Office of Information and Regulatory Affairs, is an influential legal scholar who has argued in support of such rights. In a law review article and an acclaimed book, Sunstein has made an eloquent and impassioned plea for social and economic guarantees under the U.S. Constitution. While the substance of his book is unexceptionable, this essay seeks to make a few observations: 1) Sunstein has not adequately dealt with the tension between positive liberty and negative liberty represented by the two rival strands of republicanism that animated the American Declaration of Independence and the Ratification of the Constitution; 2) Sunstein cites with approval "The Directive Principles of State Policy" in the Indian Constitution (including an extract in the Appendix) as a possible means of recognition of social and economic rights. However, he has omitted to examine the complicated history of how the interaction between the social and economic rights (positive rights) embodied in the Directive Principles and the civil and political rights (negative rights) embodied in the chapter on "Fundamental Rights" have played out in the Supreme Court of India; 3) Sunstein's favored means of recognition of social and economic rights is through "constitutive commitments" rather than through constitutional amendment or judicial recognition. Such commitments would, perhaps, find more efficient expression in individual efforts as envisaged by one conception of civic republicanism, rather than through governmental intervention; 4) For such rights to attain constitutional status, greater scholarly attention is necessary to the contemporary manifestation of the social compact theory in the subfield of constitutional political economy within the larger discipline of public choice theory.

The basis of a democratic state is liberty; which according to the common opinion of men, can only be enjoyed in such a state; this they affirm to be the great end of every democracy.…

Aristotle[1]

Liberty is not a means to a higher political end. It is itself the highest political end.

Lord Acton[2]

I. Introduction:

The first ten amendments to the Constitution of the United States of America, collectively called the Bill of Rights, were ratified and came into effect on December 15, 1791. They embody the principal rights of the people, including, among others, the right to free speech and expression, protection from unreasonable search and seizure, and protection against the deprivation of life, liberty, or property without due process of law. The inclusion of the Bill of Rights as amendments to the Constitution was an act of concession to the anti-federalists who feared that the strong national government envisaged by the Constitution would lead to an erosion of individual rights and liberties.

Conspicuously absent among the rights and liberties enumerated in the Bill of Rights is any mention of social and economic rights. Such social and economic rights would roughly mean the right to adequate housing, health care, education, or at least the right to appropriate work that would provide the means for a minimum level of subsistence. There have been seventeen subsequent amendments to the U.S. Constitution. None of these relate to social and economic rights.

From time to time, there have been calls for the inclusion of such rights either by the process of amendment set out in Article V of the U.S. Constitution, or by the recognition of such rights by the United States Supreme Court.

Professor Cass Sunstein is a prominent legal scholar who has recently espoused the case for social and economic rights in the United States. His principal case has been

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[1] Aristotle, *Politics*, Book VI, Chapter 2, translated by Benjamin Jowett, available at http://www.constitution.org/ari/polit_06.htm.

[2] Lord Acton, *The History of Freedom and Other Essays*, chapter 1, available at http://files.libertyfund.org/files/75/0030_Bk.pdf.

set out in a law review article[3] and an acclaimed book, *The Second Bill of Rights: FDR's Unfinished Revolution - And Why We Need It More Than Ever*.[4] Also noteworthy is a recent collection of articles by some of the most eminent scholars of constitutional law in the United States. The book is entitled *The Constitution in 2020*.[5] Among the contributors in the section on social and economic rights are Mark Tushnet, Frank Michelman, William Forbath, and Cass Sunstein.[6]

The demand that such social and economic rights be recognized carries particular resonance at the present time. The worldwide economic crisis that followed in the wake of the 2007 financial crisis in the United States persists. This has led to a quiescence among the votaries of laissez-faire and the efficient market hypothesis. On

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[3] Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 Syracuse Law Review 1 (2005), and in *American Exceptionalism and Human Rights* 90 (Michael Ignatieff editor, Princeton University Press, 2005).

[4] Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution ? And Why We Need it More Than Ever* (Basic Books 2004).

[5] *The Constitution in 2020* (edited by Jack M. Balkin and Reva B. Siegel, Oxford University Press, 2009).

[6] The book is divided into seven sections with the second section devoted to social and economic rights under the U.S. Constitution. In this section, inter alia, Sunstein makes out a case for judicial minimalism, Frank Michelman discusses the ramifications of economic power and the constitution, W.Forbath discusses the often neglected field of Constitutional Political Economy, and Mark Tushnet urges the need for positive social and economic rights as opposed simply to negative rights, that is, the right of a citizen to be free in specified spheres from governmental interference. Taking exception to the conservative social and political movements that have dominated recent American politics, the scholars included in the present volume collectively argue back against originalists who seek to deny the propriety of investing constitutional law with contemporary understandings, and instead seek to restore it to an imaginary pristine moment of the past. The preface avers that the task of vindicating the Constitution's commitments, requires an occasional delving into the past but for the specific purpose of redeeming constitutional guarantees that have not yet been met. Declaring an adherence to redemptive constitutionalism which they believe to be part of an American tradition, they are committed to a constitution that is a work in progress. Citing the radical changes that the fundamental understanding of constitutional commitments have undergone over the past two centuries, the authors of the book are, in effect, declaring a manifesto for an urgent implementation of their constitutional agenda. Although some of the stances that they have assumed in these writings cannot be gainsaid, the papers are sparse on the precise details of how such economic commitments can be actually carried out in practice.

the other hand, there has been a resurgence of the allure of Keynesian economics and a concomitant rise in the demand for governmental intervention and regulation of the economic affairs of the state.[7]

The U.S. Constitution has exercised influence, in varying degrees, on the content of constitutional law in a vast number of countries around the world.[8] In addition thereto, the "transnational judicial dialogue,"[9] an evident phenomenon of recent years, makes constitutional developments in the United States a matter of worldwide interest.

This paper seeks to assess the arguments favoring the expansion of constitutional

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[7] See, for example, Peter Clarke, *Keynes: The Rise, Fall, and Return of the Twentieth Century's Most Influential Economist* (Bloomsbury Pub Plc USA, 2009); *The Return to Keynes* (edited by Bradley W. Bateman, Toshiaki Hirai, and Maria Cristina Marcuzzo, Belknap Press of Harvard University Press, 2010).

[8] See generally, *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (Louis Henkin and Albert J. Rosenthal, editors, Columbia University Press, 1990); Charles R. Epp, *The Rights Revolution: Lawyers, Activists, and Supreme Courts in Comparative Perspectve* (Chicago University Press, 1998); and Mark Tushnet, *The Possibilities of Comparative Constitutional Law*, 108 Yale Law Journal 1225 (1999).

[9] The "Transnational Judicial Dialogue" refers to the process by which courts in different countries engage in an exchange of ideas on the basis of comparative analysis and judicial comity. See: Bruce Ackerman, *The Rise of World Constitutionalism*, 83 Virginia Law Review 771 (1997), David Fontana, *Refined Comparativism in Constitutional Law*, 49 UCLA Law Review 539 (2001), and *Judges in Contemporary Democracy: An International Conversation* (Robert Badinter and Stephen Breyer, editors, NYU Press, 2004). Also See: *Transnational Judicial Dialogue: Strengthening Networks and Mechanisms for Judicial Consultation and Cooperation*, Conference Organized by the American Society of International Law and Harvard Law School, December 1-2, 2006. Available at http://www.asil.org/files/asilharvardconf.pdf. The conference description states:

> In recent decades, a significant number of judges from around the world have engaged in an unprecedented dialogue on issues related to promoting judicial independence, accountability, and efficiency. This dialogue has taken place via meetings of professional associations, intergovernmental organizations and commissions, and other formal networks of judges and legal professionals. [internal citation omitted]. In addition, many judges have participated in delegations that visit courts and related institutions, such as law enforcement and judicial training centers, to learn more about how legal and judicial systems other than their own operate. Countless others have exchanged know-how and expertise by participating in judicial reform and assistance projects and initiatives to improve judicial cooperation.

rights in the United States to include social and economic guarantees and the implications that such an expansion would entail. The paper is organized in the following way. After this introduction, Part II sets out the gist of Cass Sunstein's arguments favoring social and economic guarantees in his book and article mentioned above. Part III sets out the issues and implications entailed by the contents in Part II. Finally, Part IV sets out the conclusion.

II. Sunstein's Case In Support of Social and Economic Guarantees:

Cass Sunstein is one of the most well-known and prolific legal scholars in the United States. After teaching at the University of Chicago Law School for 27 years, he took up a full-time appointment as Professor of Law at Harvard Law School. He is currently on leave, serving as the Administrator of the White House Office of Information and Regulatory Affairs, which is in charge of coordinating the regulatory activities of the state. In his book *The Second Bill of Rights: FDR's Unfinished Revolution -And Why We Need It More Than Ever*, Sunstein has made an impassioned case for reading social and economic guarantees in the U.S. Constitution. Following is a gist of Sunstein's case.

Sunstein's book begins with an extended paean of praise to the leadership and statesmanship qualities of Franklin Delano Roosevelt.[10] With unnecessary hyperbole Sunstein argues that the State of the Union Address delivered by Roosevelt in 1944 was the preeminent political speech of the twentieth century because of its espousal of social and economic rights. In Sunstein's view, it was tantamount to a manifesto to make real a second Bill of Rights in addition to the first one ratified in 1791 along with the subsequent amendments. The ideas advanced in this speech have been crystallized in much subsequent legislation in following decades. They have also been instrumental in the shaping of the Universal Declaration of Human Rights which was ratified in the year 1948 and the International Convention of Social and Economic Rights which was ratified in 1948. These, in turn, have been important influences in the shaping of constitutions around the world in following years.

He makes a connection between Roosevelt's vaunted speech of 1944 and his earlier more famous speech delivered in 1941 in which he listed his commitment to the four freedoms. However, Sunstein goes to lengths to emphasize that Roosevelt's commitment

[10] Sunstein, *supra* note 4, Part I, at 9-98.

to economic rights did not stem from any egalitarian impulse but rather from his commitment to freedom. Roosevelt was as fervently committed to the principle of individualism as any other person. However, he equally believed that true freedom required absence from want.[11]

Sunstein regrets that Roosevelt's urging for a second bill of rights remained largely unknown in the United States even though it exercised unusual international influence. It was through the leadership of Eleanor Roosevelt that the ideas embodied in the 1944 speech found their expression in the Universal Declaration of Human Rights and also in the International Convention of Social and Economic Rights. Sunstein seeks to explore the question of why social and economic rights have not received constitutional recognition in America. He acknowledges and refutes the most commonly offered arguments, namely, (i) the historical period in which the Constitution came into effect,[12] (ii) American exceptionalism,[13] and (iii) American Pragmatism.[14] He makes out a case that the Supreme Court under Chief Justice Earl Warren was edging in the direction of granting constitutional recognition for social and economic rights, but that this was thwarted by the results of the presidential election of 1968 which led to the election of a conservative president and which in turn led to the packing of the Court with nominees inclined to favor conservative policies.[15]

Sunstein's favored mode of according constitutional status to social and economic rights is through what he terms "constitutive commitments" and not through the more conventional mode of constitutional amendment or through the judicial recognition of such rights. He explains such rights as having "a special place in the sense that they

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[11] Sunstein, *supra* note 4, at 2.
[12] *Id*. at 109-126
[13] *Id*. at 127-138.
[14] *Id*. at 139-148.
[15] *Id*. at 149- 174. Martha Nussbaum has, in a recent significant law review article advocating a "capabilities approach" to the reading of the U.S.Constitution made out a similar argument that economic and social rights narrowly missed out on becoming a part of the constitutive commitment of the U.S.Constitution because of a change in the composition of the court and a consequent swing away from the liberal predilection of the Warren Court to a decidedly conservative predilection during the era presided over by Chief Justice Rehnquist. See Martha Nussbaum, *Constitutions and Capabilities: "Perception" Against Lofty Formalism,* 121 Harvard Law Review 4 (2007).

are widely accepted and cannot be eliminated without a fundamental change in social understanding. They are genuinely constitutive in the sense that they help create, or constitute, a society's basic values."[16] Although he prefers the use of a neologism, it is clear that he places them on at least on an equal footing with conventionally described constitutional rights. In his view constitutional rights are "a subset of the broader category of constitutive commitments"[17] and this category is distinct from "the interests and rights protected through ordinary law and policy."[18]

III. Issues Arising from Sunstein's Arguments:

In this section is a brief discussion of some of the salient issues relating to the arguments advanced by Professor Sunstein.

A. The Two Strands of Classical Republicanism:

Professor Sunstein gives short shrift to the often drawn distinction between positive and negative rights. Negative rights are freedom from governmental interference whereas positive rights imply the freedom to do something, carrying with it the often implied corollary that it necessarily requires the ability to do that something. Thus negative rights require the government to abstain from doing certain acts, whereas positive rights require a more active role on behalf of the government requiring the government to provide for the welfare of the citizens. Sunstein dismisses this distinction as misguided inasmuch as negative rights also require a positive role on behalf of the government to provide for their protection.

However, Sunstein does not deal with the perennial tension that exists between these two forms of rights. The tension between positive and negative liberty can be traced back to two conflicting strands of classical republicanism which was the animating ideology that informed the American Declaration of Independence and the Constitution of the United States.[19] Two rival schools of thought champion one over

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[16] Sunstein, *supra* note 4, at 62.
[17] Sunstein, *id.*, at 63.
[18] Sunstein, *id.*, at 62.
[19] Kelly, Harbison, and Belz, *The American Constitution: Its Origins and Development*, at 70 (Norton,1983); Richard Vetterli and Gary Bryner, *In Search of the Republic: Public Virtue and the Roots of American Government* (Rowman and Littlefield, 1987).

the other as the dominant understanding of republicanism at the birth of the American Republic.[20]

The libertarian strand, derived from the writings of John Locke, has been most famously championed by Louis Hartz in *The Liberal Tradition in America*.[21] Hartz contends that the dominant set of beliefs at the time of the American founding were an unshakeable belief in individualism, property rights, and limited government.

Opposed to the libertarian idea are those who champion the cause of civic republicanism as being the principle that animated the founding of the American republic. This thesis has been most famously championed by Bernard Bailyn in *The Ideological Origins of the American Revolution*[22] and Gordon S. Wood in *The Creation of the American Republic*.[23] The proponents of civic republicanism champion the interests of society at large as opposed to that of the individual, place emphasis on the individual's obligation to society, and view property rights as principally a means to serve the public good. According to Wood, these are the principles that formed "the essence of republicanism and comprehended for Americans the idealistic goal of their Revolution."[24]

It is evident that an emphasis on the libertarian strand of republicanism would lead to a greater insistence on the primacy of negative rights, while an emphasis on the civic republican strand of republicanism would lead to a greater emphasis on the primacy of positive rights. It is equally evident that both strands epitomize values of paramount importance. Striking the right balance between the two should be the ideal to be aimed for. However, this is not easily done. The constitutionalization of both forms of rights vests the responsibility of striking the right balance on the national government. It would complicate the task of governance manifold.

B. The Interplay Between Fundamental Rights and The Directive Principles of State

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[20] See e.g., Richard Ellis, *American Political Cultures* (Oxford University Press, 1993); and Seymour Martin Lipset, *The First New Nation: The United States in Historical and Comparative Perspective* (Transaction Publishers, 2003).

[21] Louis Hartz, *The Liberal Tradition in America* (Harcourt, Brace,1955)

[22] Bernard Bailyn, *The Ideological Origins of the American Republic* (Harvard University Press, 1967).

[23] Gordon S. Wood, *The Creation of the American Republic* (The University of North Carolina Press,1969).

[24] Gordon S. Wood, *id.*, at 53.

Policy Under the Indian Constitution:

Professor Sunstein cites with apparent approval Chapter IV of the Indian Constitution embodying the "Directive Principles of State Policy" as an example of a national constitution's recognition of social and economic rights.[25] He even reproduces an extract in the Appendix of his book.[26]

Professor Sunstein's enthusiasm for the Directive Principles of State Policy should be tempered with some realistic regard to the tortuous path that governmental efforts to implement its edicts have taken over the past sixty years. A chronicle of this period evidences the value pluralistic conflict that inheres between the civil and political rights guaranteed as fundamental under the Indian Constitution, and the economic and social concerns embodied in the Directive Principles of State Policy (DPSP).

1. The Scheme of the Indian Constitution:

First, a brief mention of the relevant provisions of the Indian Constitution.

a. Fundamental Rights:

The fundamental rights of the citizens of India are set out in Part III entitled "Fundamental Rights." This part runs from Article 12 to Article 35. Article 13 (2) states:

> The State shall not make any law which takes away or abridges the rights conferred by this Part and any law made in contravention of this clause shall, to the extent of the contravention, be void.

The rights included in this part are classified in sub-categories: Right to Equality, Right to Freedom, Right against Exploitation, Right to Freedom of Religion, Cultural and Educational Rights, and the Right to Constitutional Remedies. Article 31 sets out that certain laws are immune to attack on the grounds of their being inconsistent with the fundamental rights.

The power of judicial review is set out under the rubric "Right to Constitutional Remedies," and is set out in Article 32. Article 32 (1) states:

> The right to move the Supreme Court by appropriate proceedings for the enforcement of the rights conferred by this Part is guaranteed.

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[25] Sunstein, *supra* note 4, at 103, 104, 143, 181, 182, 213, 217, and 219.
[26] Sunstein, *supra* note 4, at 255 to 257.

b. The Directive Principles of State Policy:

The DPSP are set out in Part IV of the Constitution. This part runs from article 36 to Article 50. Article 37 states:

> The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making law.

The DPSP contain provisions, *inter alia*, relating to the promotion of the social and economic welfare of the people.

c.. Amendment:

Part XX containing Article 368, relates to the amendment of the Constitution. Article 368 (1) states:

> Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.

2. The Development of the Jurisprudence Relating to Constitutional Rights Under the Indian Constitution:

The following is a very brief outline of the major developments in the constitutional history of India as they relate to the interplay between the Fundamental Rights and the Directive Principles of State Policy.

The Constitution of India was adopted and enacted on November 6, 1949. From that date up to December 2007, the Constitution has been amended ninety-four times. The most contentious of these amendments have been in respect of provisions relating to the Fundamental Rights guaranteed to the citizens and the Directive Principles of State Policy. The Supreme Court of India has been called upon to resolve the issues arising from these amendments. It has done so in a cavalcade of landmark judgments.

The opening salvo came with the Constitution (First Amendment) Bill of 1951. The first sentence of the Statement of Objects and Reasons read: "During the last fifteen months of the working of the Constitution, certain difficulties have been brought to light by judicial decisions and pronouncements specially in regard to the chapter on fundamental rights." One of the main difficulties related to the perceived impediment

to certain social and agrarian reforms. To remedy this, certain amendments were introduced. Among these was the addition of the Ninth Schedule by means of the addition of Article 31B, which read:

> "31B. Validation of certain Acts and Regulations.-Without prejudice to the generality of the provisions contained in article 31A, none of the Acts and Regulations specified in the Ninth Schedule nor any of the provisions thereof shall be deemed to be void, or ever to have become void, on the ground that such Act, Regulation or provision is inconsistent with, or takes away or abridges any of the rights conferred by, any provisions of this Part, and notwithstanding any judgment, decree or order of any court or tribunal to the contrary, each of the said Acts and Regulations shall, subject to the power of any competent Legislature to repeal or amend it, continue in force."[27]

This effectively put all legislation listed in the Ninth Schedule beyond the pale of judicial review. The constitutional validity of the First Amendment Act was called into question before the Supreme Court. The Court held that a constitutional amendment is not law within the meaning of Article 13(2) and therefore did not violate the provision of that article. Effectively, fundamental rights could be abridged by constitutional amendment.[28] The substance of this ruling was reaffirmed by the Supreme Court in 1965[29] in respect of the 17th Amendment Act of 1964.

These were the precursors to one of the Supreme Court's fabled judgments in the *Golaknath* case.[30] In this case, for the first time ever, a bench of 11 judges of the Supreme Court was convened to consider whether the fundamental rights could be amended. Reversing its earlier position, the Court ruled by a narrow majority of 6 to 5 that a constitutional amendment was law within the meaning of Article 13(2) and therefore any amendment which sought to "take away or abridge" a fundamental right violated the constitution.

In order to overcome this restriction on its power, parliament introduced certain

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[27] Amended Article 31B under the First Amendment Bill. Available at http://india.gov.in/govt/documents/amendment/amend1.htm.
[28] *Shankari Prasad v. Union of India* (AIR 1951 SC 458).
[29] *Sajjan Singh v. State of Rajasthan* (AIR 1965 SC 845).
[30] *Golaknath v. State of Punjab* (AIR 1967 SC 1643).

key amendments to the constitution through the Constitution (Twenty-fourth Amendment) Act 1971, the Constitution (Twenty-fifth Amendment) Act 1971, the Constitution (Twenty-sixth Amendment) Act 1971, and the Constitution (Twenty-ninth Amendment) Act, 1972.

The Statement of Objects and Reasons for the Twenty-fourth amendment Bill was remarkably explicit about its purpose. It read:

> The Supreme Court in the well-known Golak Nath's case [1967, 2 S.C.R. 762] reversed, by a narrow majority, its own earlier decisions upholding the power of Parliament to amend all parts of the Constitution including Part III relating to fundamental rights. The result of the judgment is that Parliament is considered to have no power to take away or curtail any of the fundamental rights guaranteed by Part III of the Constitution even if it becomes necessary to do so for giving effect to the Directive Principles of State Policy and for the attainment of the objectives set out in the Preamble to the Constitution. It is, therefore, considered necessary to provide expressly that Parliament has power to amend any provision of the Constitution so as to include the provisions of Part III within the scope of the amending power.
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> 2. The Bill seeks to amend article 368 suitably for the purpose and makes it clear that article 368 provides for amendment of the Constitution as well as procedure therefor. The Bill further provides that when a Constitution Amendment Bill passed by both Houses of Parliament is presented to the President for his assent, he should give his assent thereto.The Bill also seeks to amend article 13 of the Constitution to make it inapplicable to any amendment of the Constitution under article 368.[31]

The constitutional validity of the aforesaid amendments came up for consideration of the Supreme Court in the *Kesavananda Bharati* case.[32] A 13-judge bench was constituted for the purpose of deciding this case. The judges delivered eleven separate judgments running into over 1000 printed pages. Collectively, they were a complex

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[31] Statement of Objects and Reasons appended to the Constitution (Twenty-fourth Amendment) Bill, 1971.
Available at: http://india.gov.in/govt/documents/amendment/amend24.htm.

[32] *Kesavananda Bharati v. The State of Kerala and Others*, AIR 1973 SC 1461.

mélange of judgments, and the ruling of the Court was not readily discernible. To clear the potential confusion, nine judges issued a signed statement titled "The view of the majority." In effect, the ruling of the Court was that the Court's earlier ruling in the Golaknath case was overruled. That meant that the fundamental rights were not, ipso facto, beyond Parliament's power to amend. However, it was held that Parliament had no power to alter the basic structure or framework of the Constitution. Thus came into being the fabled doctrine of the "basic structure" of the Indian Constitution. This did little to clear the confusion, because there was no unanimity among the judges as to what constituted the basic structure of the constitution.

In response to the imposition of this restriction on parliament's power to amend the constitution, the forty-second amendment was enacted in 1976. Once again, the Statement of Objects and Reasons appended to the Bill was clear. In part, Clause 3 of the Bill read:

> 3. It is, therefore, proposed to amend the Constitution to spell out expressly the high ideals of socialism, secularism and the integrity of the nation, to make the directive principles more comprehensive and give them precedence over those fundamental rights which have been allowed to be relied upon to frustrate socio-economic reforms for implementing the directive principles....[33]

In effect, among other things, the amendment provided that there would be no limitation whatsoever on Parliament's power to amend the constitution. The validity of the forty-second amendment was called into question before the Supreme Court in 1980 in the *Minerva Mills* case.[34] The case was decided by a five-judge bench. By a majority of four to one, the Court relied upon the "basic structure" doctrine laid down in the *Kesavananda Bharati* case, and struck down as unconstitutional those provisions of the forty-second amendment that gave Parliament absolute power to amend the Constitution. The Court also examined the question whether the Directive Principles of State Policy could have primacy over fundamental rights. The majority judgment and

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[33] Statement of Objects and Reasons appended to the Constitution (Forty-fourth Amendment) Bill, 1976, which was enacted as the The Constitution (Forty-second Amendment Act, 1976). Available at: http://india.gov.in/govt/documents/amendment/amend42.htm.

[34] *Minerva Mills Ltd. v. Union of India*, 1980 AIR 1789.

the dissenting judgments provide in stark relief the opposing views on this question. In the relevant part, the majority judgment stated:

> (5) The importance of Directive Principles in the scheme of our Constitution cannot ever be over-emphasized. Those principles project the high ideal which the Constitution aims to achieve. In fact Directive Principles of State Policy are fundamental in governance of the country and there is no sphere of public life where delay can defeat justice with more telling effect than the one in which the common man seeks the realisation of his aspirations. But to destroy the guarantees given by Part III in order purportedly to achieve the goals of Part IV is plainly to subvert the Constitution by destroying its basic structure. Fundamental rights occupy a unique place in the lives. of civilized societies and have been variously described as "transcendental", "inalienable" and "primordial"....
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> ...Parts III and IV are like ... a twin formula for achieving the social revolution which is the ideal which the visionary founders of the Constitution set before themselves. In other words, the Indian Constitution is founded on the bedrock of the balance between Parts III and IV. To give absolute primacy to one over the other is to disturb the harmony of the Constitution. This harmony and balance between fundamental rights and directive principles is an essential feature of the basic structure of the Constitution. [255B-D] The edifice of Indian Constitution is built upon the concepts crystallized in the Preamble. Having resolved to constitute ourselves into a Socialist State which carried with it the obligation to secure to our people justice social, economic and political, Part IV has been put into our Constitution containing directive principles of State Policy which specify the socialistic goal to be achieved. Having promised the people a democratic polity which carries with it the obligation of securing to the people liberty of thought, expression, belief, faith and worship, equality of status and of opportunity and the assurance that the dignity of the individual will at all costs be preserved, Part III has been put in our Constitution, conferring those rights on the people. Those rights

> are not an end in themselves but are the means to an end. The end is specified in Part IV. Therefore, the rights conferred by Part III are subject to reasonable restrictions and the Constitution provides that enforcement of some of them may, in stated uncommon circumstances, be suspended. But just as the rights conferred by Part III would be without a radar and a compass if they were not geared to an ideal, in the same manner the attainment of the ideals set out in Part IV would become a pretence for tyranny if tho price to be paid for achieving that ideal is human freedoms....[35]

In contrast, the dissenting judge stated, in part:

> (i) It is not correct to say that Fundamental Rights alone are based on Human Rights while Directive Principles fall in some category other than Human Rights. Fundamental Rights and Directive Principles cannot be fitted in two distinct and strictly defined categories. Broadly stated, Fundamental Rights represent civil and political rights, while Directive Principles embody social and economic rights. Both are clearly part of broad spectrum of human rights....
> (v) The Indian Constitution is first and foremost a social document... The Fundamental Rights are no doubt important and valuable in a democracy, but there can be no real democracy without social and economic justice to the common man and to create socio-economic conditions in which there can be social and economic justice to everyone, is the theme of the Directive Principles. It is the Directive Principles which nourish the roots of a democracy, provide strength and vigour to it and attempt to make it a real participatory democracy which does not remain merely a political democracy but also becomes a social and economic democracy with Fundamental Rights available to all irrespective of their power, position or wealth. The dynamic provisions of the Directive Principles fertilise the static provisions of the Fundamental Rights. The object of the Fundamental Rights is to

[35] Per Chandrachud C.J. *id.*

> protect individual liberty, but individual liberty cannot be considered in isolation from the socio-economic structure in which it is to operate. There is a real connection between individual liberty and the shape and form of the social and economic structure of the society... The real controversies in the present day society are not between power and freedom but between one form of liberty and another. Under the present socio-economic system, it is the liberty of the few which is in conflict with the liberty of the many. The Directive Principles, therefore, impose an obligation on the State to take positive action for creating socio-economic conditions in which there will be an egalitarian social order with social and economic justice to all so that individual liberty will become a cherished value and the dignity of the individual a living reality, not only for a few privileged persons but for the entire people of the country....[36]

Most recently, the continuing tussle between the Fundamental Rights and the Directive Principles of State Policy was played out in the *Coelho* case.[37] At issue, inter alia, was whether Parliament could render legislation which impinged upon fundamental rights immune from judicial scrutiny by placing it in the Ninth Schedule (which had been specifically created by the first amendment in 1951 to put certain legislation beyond the pale of judicial review). Relying upon the *Kesavananda Bharti* ruling, a nine-judge bench of the Supreme Court held that after 24th April 1973 (the date of the *Kesavananda Bharati* judgment), if any fundamental rights were affected, the constitutional validity of the legislation would be tested upon the touchstone of whether the "basic structure" of the constitution had been violated, notwithstanding the fact that they had been placed in the Ninth Schedule. On the specific point about the relationship between the Fundamental Rights and Directive Principles, the Court stated:

> Regarding the status and stature in respect of fundamental rights in Constitutional scheme, it is to be remembered that Fundamental Rights

[36] Per Bhagwati J., *id.*

[37] I.R.Coelho v. Union of India, (2007) 2 SCC 1, AIR 2007 SC 861.

> are those rights of citizens or those negative obligations of the State which do not permit encroachment on individual liberties. The State is to deny no one equality before the law.
>
> The object of the Fundamental Rights is to foster the social revolution by creating a society egalitarian to the extent that all citizens are to be equally free from coercion or restriction by the State. By enacting Fundamental Rights and Directive Principles which are negative and positive obligations of the States, the Constituent Assembly made it the responsibility of the Government to adopt a middle path between individual liberty and public good. Fundamental Rights and Directive Principles have to be balanced. That balance can be tilted in favour of the public good. The balance, however, cannot be overturned by completely overriding individual liberty. This balance is an essential feature of the Constitution.[38]

It is evident that the inclusion of the Directive Principles of State Policy, although seemingly a benign statement of good objectives, has led to unexpected difficulties. In its zeal to give effect to the laudable objectives set out in the Directive Principles, parliament has tended to overstep the bounds of constitutional legitimacy and in the process impinged upon individual liberties. The fact of the power of judicial review having been codified in the Indian Constitution has facilitated the task of the Supreme Court in keeping Parliamentary overreaching in bounds. In a nation where judicial review is derived from judicial precedent and tradition, courts would have the additional burden of fending off the charge of countermajoritarianism.

Sunstein states that India has realized the difficulty of judicial enforcement of economic and social rights.[39] However, it is evident that the constitutional history of the past sixty years has revealed a concomitant difficulty of judicially imposed restraint on parliamentary overreaching.

C. The Non-governmental Conception of Civic Republicanism:

The brief chronicle of the Indian experience reveals the difficulty of investing the

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[38] Per Y.K. Sabharwal, C.J., *id.*

[39] Sunstein, *supra* note 2, at 143.

government with the task of giving effect to the civil and political rights, and at the same time, social and economic rights as well.

This leads to the thought that Sunstein's favored "constitutive commitments" could be realized in more efficient and non-controversial ways through private efforts rather than through governmental intervention. This would be in line with the view urged by Gary Bryner and Richard Vetterli that for the founders, acts of public beneficence "were not to be provided for through national governmental institutions..., but through private efforts and primary institutions, supported by local government."[40]

Such an interpretation could also be plausibly made from the preamble to the U.S. Constitution, which reads:

> We the People of the United States, in Order to form a more perfect Union, establish Justice, insure domestic Tranquility, provide for the Common defense, promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity, do ordain and establish this Constitution for the United States of America.[41]

Although promotion of the general welfare and the securing of liberty are both mentioned in the preamble to the Constitution which was ratified in 1889, it was only liberty that was guaranteed protection in the Bill of Rights that was ratified in 1891.

D. The Social Compact Theory and the Discipline of Constitutional Economics:

Sunstein makes a fleeting mention of the social contract theory of government.[42] But he chooses not to engage with it in any meaningful way. Thereby he does disservice to his cause, because it is the social contract theory also called the social compact theory, that points the way to any realistic prospect of the social and economic rights entering into the constitutional ambit.

The Social Compact is another of the foundational concepts that provided the underpinning of the American Constitution. Derived from the writings of John Locke, it found a succinct expression in Thomas Jefferson's Declaration of Independence:

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[40] Gary Bryner and Richard Vetterli, *In Search of the Republic: Public Virtue and the Roots of the American Government* 8-9 (Rowman and Littlefield, 1987).

[41] Preamble to the Constitution of the United States. Available at http://www.usconstitution.net/const.html.

[42] Sunstein, *supra* note 4, at 202.

"....That to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed...."[43] The Federalist #21 makes a reference to the social compact between the states,[44] and at the 1787 Constitutional Convention, James Madison declared that the purpose of the Convention was to craft "a compact by which an authority was created paramount to the parties, and making laws for the government of them."[45]

The subfield of constitutional political economy within the larger discipline of public choice theory is the modern heir to the social compact theory. It seeks to find normative answers to the question of how human beings can live together in a harmonious social order. One of its pioneering scholars, James M. Buchanan, was awarded the Nobel Prize for Economics in 1986. As he stated in his Nobel Prize acceptance speech:

> The purpose of the contractarian exercise is not explanatory.... It is,...,justificatory in that it offers a basis for normative evaluation. Could the observed rules that constrain the activity of ordinary politics have emerged from agreement in constitutional contract? To the extent that this question can be affirmatively answered we have established a legitimating linkage between the individual and the state. To the extent that this question prompts a negative response, we have a basis for normative criticism of the existing order, and a criterion for advancing proposals for constitutional reform.[46]

The essential substance of the theory undergirding modern constitutional political economy, also described as constitutional economics, is set out in *The Calculus of Consent*[47]

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[43] *The American Declaration of Independence*, available at http://www.ushistory.org/declaration/document.

[44] *The Federalist Papers*, available at http://www.conservativetruth.org/library/fed21.html.

[45] *Constitutional Convention Debates*, 1787, available at http://www.constitution.org/dfc/.

[46] J. M. Buchanan Jr. — Prize Lecture. Nobelprize.org. http://nobelprize.org/nobel_prizes/economics/laureates/1986/buchanan-lecture.html.

[47] James Buchanan and Gordon Tullock, *The Calculus of Consent* (University of Michigan Press, 1962).

and *The Reason of Rules*.[48] Although research in the field of constitutional economics has been growing rapidly,[49] there is as yet a paucity of any substantial scholarship relating to the specific topic of social and economic rights.

It is in the field of constitutional political economy that serious scholarship will need to be done as to the conditions under which a substantial political consensus will be formed to support the constitutionalization of social and economic rights.

It is, after all, from the consent of the individuals that make up the polity that constitutional changes can get legitimacy and support. There is no obvious sign that America is headed toward a "constitutional moment" whereby a surge of the popular will is about to propel social and economic rights into the realm of constitutional status.[50]

IV. Conclusion:

What, then, would be the implications of the expansion of constitutional rights in the United States to include social and economic rights?

Professor Sunstein makes an eloquent plea for social and economic guarantees in the form of constitutive commitments. His case is, for the most part, unexceptionable. Social and economic guarantees alongside with civil and political rights would be an

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[48] James Buchanan and Geoffrey Brennan, *The Reason of Rules* (Cambridge University Press, 1985).

[49] For a recent survey, see, Stefan Voigt, *Positive Constitutional Economics-A Survey of Recent Developments*, available at SSRN: http://ssrn.com/abstract=1358508.

[50] The concept of "constitutional moments" was most famously propounded by Bruce Ackerman in *We the People: Foundations* (Cambridge: Harvard University Press, 1991) and *We the People: Transformations* (Cambridge: Harvard University Press, 1998). In Ackerman's reckoning, constitutional moments refer to certain transformational periods when popular social and political movements are at the vanguard of constitutional change. They represent the quintessence of popular sovereignty and effectuate constitutional change while circumventing the onerous procedural difficulty set out in Article V of the U.S. Constitution. Also relevant in this context is the idea of "popular constitutionalism." Broadly stated, this idea encapsulates the notion that the meaning and content of constitutional provisions should reflect popular understanding and aspirations. The most well-known exposition of this idea has been by Larry D. Kramer in *The Supreme Court, 2000 Term-Foreword: We the Court*, 115 Harvard Law Review 4 (2001); and also by Larry D. Kramer in *The People Themselves: Popular Constitutionalism and Judicial Review* (Oxford University Press, 2004).

ideal worth aiming for. However, it cannot be gainsaid that there is an unavoidable inherent tension between these two sets of interests. They stem from different *Weltanschauungen*. The demand for civil and political rights is derived from a viewpoint that places greater value on individual liberty than on societal good. The demand for social and economic rights is derived from a worldview that places greater primacy on societal good than on individual liberty. These are two different worldviews. Both have much to commend them. Both could have their source in genuinely humanistic concerns. Although it is desirable to think of them as complementary, the fact is that they are sometimes contradictory. It would be wonderful to strike a balance between the two at all times. But this is no easy matter.

It is not particularly bad then that one set of rights should have a presumptive primacy over the other, and that this primacy be institutionalized in the written constitution. There is a strong case to be made that given a choice, it is infinitely safer to tilt the balance in favor of individual rights. To raise social and economic guarantees to a constitutional level would be to put them on an equal footing with civil and political rights. This would require the executive and legislature at all times to find a via media between the two, a task of exceeding difficulty. Furthermore, it would call upon the courts to second-guess the legislative choices at every step due to the constitutional challenges that the choices are sure to provoke. This would compound the countermajoritarian problem inherent in judicial review.

Professor Sunstein has made an elaborate political case for constitutional recognition of social and economic rights. However, any move to actualize this aspiration whether through constitutional amendment, judicial recognition, or nebulous "constitutive commitments" will inevitably entail tumultuous social, economic, political, and cultural repercussions. Due care and regard for these effects would be in order.

Constitutive commitments to secure social and economic rights will carry a high price. This requires not only widespread popular support in principle but also informed consent to the costs that it will entail. Constitutive commitments cannot be decreed by governmental fiat. They will only arise from a widespread popular will to change the terms of the social compact in the belief that constitutionalizing such rights will serve the cause of "a more perfect Union."

憲法的権利の拡大とその影響

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要　約

社会的経済的権利は、アメリカ合衆国権利章典とその後のアメリカ合衆国憲法修正条項から、著しく欠けている。そのような権利を含める要請が定期的になされてきた。ハーバード・ロースクールの教授であり、現在ホワイトハウスでOffice of Information and Regulatory の行政官であるCass Sunsteinは、そのような権利をサポートするように議論している、影響力のある法学者の一人である。法学の論文のレビューや賞賛された本の中でSunsteinは、アメリカ合衆国憲法下での社会的経済的保証のための、説得力があり、情熱のこもった主張をしている。彼の本の内容は、非の打ち所がないものであるが、この論文では、いくつかの所見を述べたいと思う：１）Sunsteinは、アメリカ独立宣言と憲法承認に活気を起こした2つの共和主義のライバルによって表された、ポジティブな自由とネガティブな自由の間の緊張を適切に扱っていないこと、２）Sunsteinは、社会的経済的権利の容認のできうる限りの手段として、インド憲法（目次に引用を含む）における“The Directive Principles of State Policy”に賛同している。しかしながら、彼は、Directive Principlesに体現された社会的経済的権利（ポジティブな権利）と“Fundamental Rights”のインド最高裁での役割における章に体現される市民・政治的権利（ネガティブな権利）のやりとり間でどのような複雑な歴史があったのかを調査するのを省いている。３）Sunsteinが好感を持っている社会的経済的権利の容認手段は、憲法修正案や法的承認を通してというよりもむしろ、“constitutive commitments（憲法的関与）”を通してである。そのような関与は、政府の介入というよりもむしろ、おそらく、市民の共和主義の一つの概念によって心に描かれたものとしての個人の努力に、より有効な表現を見出すであろう。４）そのような権利で憲法の状態に達するために、public choice理論のより広い原則の中の憲法学的政治的経済の副分野での現代の社会的契約理論の表現に多大な学問的注意を払うことが必要である。