EMILY ZACKIN

Looking for Rights in All the Wrong Places

Why State Constitutions Contain America's Positive Rights

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Looking for Rights in All the Wrong Places

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Looking for Rights in All the Wrong Places

CONTENTS

CHAPTER 1

Looking for Rights in All the Wrong Places

On January 15, 1870, Illinois's third constitutional convention had been under way for just over a year, and an experienced coal miner named George Snowden wrote a letter to one of its delegates. In it, he explained that his poor health had prevented him from writing sooner, but that in reading a newspaper account of the constitutional convention, he was moved to communicate with its members. He wrote, "as a miner, I thought it but proper that the miner's interest ought to be considered in that convention. I do not know that it is right in a legal sense, but I know it will do no harm for you to consider what the miners ought to have as their rights—either in the convention or in the legislature."[1] He went on to detail the protections that the miners "ought to have as their rights," listing specific regulations like requirements for ventilation and escapement shafts in coal mines, the mandatory presence of mining inspectors, and laws compelling mine owners to pay damages to injured miners.

Snowden might well have been pleased by the outcome.[2] The new state constitution established the duty of the state legislature to enact several of the safety regulations he listed, and thereby obligated government to protect the state's miners from the dangerous conditions in which they were forced to work.[3] Illinois's miners had, in fact, been organized to demand this kind of protection for some time, but had not been able to secure the protective regulations they sought from the state's legislature. After a decade of trying, they turned to the state's constitutional convention, where they successfully

[1] Illinois Constitutional Convention, Debates and Proceedings of the Constitutional Convention of the State of Illinois: Convened at the City of Springfield, Tuesday, December 13, 1869 (Springfield: E. L. Merritt & Bro., printers to the Convention, 1870), 270.

[2] In fact, the *Workingman's Advocate*, the official newspaper of the National Labor Union, responded to the new constitutional provision with "jubilation." See Amy Zahl Gottlieb, "The Influence of British Trade Unionists on the Regulation of the Mining Industry in Illinois, 1872," *Labor History* 19, no. 3 (1978): 404.

[3] The final article stated, "it shall be the duty of the general assembly to pass such laws as may be necessary for the protection of operative miners, by providing for ventilation, when the same may be required, and the construction of escapement shafts, or such other appliances as may secure safety in all coal mines, and to provide for the enforcement of said laws by such penalties and punishment as may be deemed proper."

secured this constitutional right to governmental protection from the particularly dangerous features of work in the mines.

Of course, when most people think about America's constitutional rights, they do not think about miners or about Illinois law. Instead, they think about the U.S. Constitution, its Bill of Rights, and the Supreme Court opinions that have shaped its meaning. Studies of the federal Constitution and the changes in its meaning have dominated discussions about American constitutional law. As a result, most accounts of American constitutional rights describe these rights as limitations on the scope of government. American rights, we are often told, protect their bearers from tyrannical government by forcing government to restrain itself from intervening in social and economic life. They do not mandate more government or offer protection from threats that do not stem directly from government itself. While other nations have constitutional rights to an active, welfarist state, often known as positive rights, constitutional rights in the United States are often thought to protect people from government alone, not to mandate that government protect them from other sorts of dangers. In other words, America is widely believed to be exceptional in its lack of positive constitutional rights and its exclusive devotion to negative ones. But how accurate is this conception?

As I will demonstrate, the conventional wisdom about the nature of America's constitutional rights is incomplete, and therefore incorrect. The problem is not that scholars have misinterpreted the federal Constitution or its history, but that most observers have taken the history of the federal Constitution and the federal Supreme Court to be the only one, or the only one worth considering. They have leapt effortlessly, and indeed unconsciously, from the assertion that the federal Constitution lacks positive rights to the claim that *America* lacks positive rights, at least at the constitutional level. It is this error that I endeavor to correct.[4]

The texts of state constitutions force us to question the ubiquitous assertions that America lacks positive constitutional rights. Illinois was not alone in creating constitutional rights to interventionist and protective government, nor was this provision for miners the only positive right it created.[5] Throughout the nineteenth and twentieth centuries and across the United States, activists, interest groups, and social movements championed positive

[4] For other scholarly work noting the existence of positive rights at the state level and the significance of this difference between state and federal constitutional law, see John J. Dinan, *The American State Constitutional Tradition* (Lawrence: University Press of Kansas, 2006). See also H. Hershkoff, "Positive Rights and State Constitutions: The Limits of Federal Rationality Review," *Harvard Law Review* 112, no. 6 (1999); and Hershkoff, "State Courts and the 'Passive Virtues' Rethinking the Judicial Function," *Harvard Law Review* 114, no. 7 (2001).

[5] For instance, Illinois's farmers were successful in their movement to convince the state's constitutional convention to create mandates requiring the legislature to regulate railroad and warehouse prices in order to protect farmers from discriminatory rates. Gretchen Ritter, *Goldbugs and Greenbacks: The Antimonopoly Tradition and the Politics of Finance, 1865–1896* (New York: Cambridge University Press, 1997), 129–30.

rights, and built support for their inclusion in state constitutions. As a result of these political campaigns, state constitutions have long mandated active government intervention in social and economic life, and have delineated a wide array of situations in which government is not only authorized, but actually obligated to intervene. State constitutions contain many different kinds of mandates for interventionist and protective government, not only with respect to laborers, but also with respect to government's obligations to care for the poor, aged, and mentally ill, preserve the natural environment, provide free education, and protect debtors' homes and dignity.

This book focuses on three political movements to add these kinds of positive rights to state constitutions. In particular, it examines the campaign for education rights, which spanned the nineteenth and twentieth centuries, the movement for positive labor rights, which occurred during the Gilded Age and Progressive Era, and the push to add environmental bills of rights to state constitutions during the 1960s and 1970s. Together, these cases serve to highlight not only the historically and geographically contingent variations in the form and function of America's positive rights tradition, but also its extraordinary length. The arguments and political calculations of the three rights movements I examine displayed remarkable continuity across diverse issue areas, vast geographic distances, and entire centuries. It is in this recurrent recourse to constitutional politics, along with the textual provisions in state constitutions, that I identify a sustained positive-rights tradition.

State-level organizations' own descriptions of their views and goals provide compelling evidence for the existence of a coherent rights tradition. The leaders of each constitutional movement maintained that government's obligation to protect its people was too important to remain optional, and the protections they sought were too critical to leave at the mercy of legislative discretion. They insisted that the most salient threat to society was not too much government, but too little, and that constitutional law ought not only restrain government, but also force it to provide substantive protections. Many of the organizations that championed positive constitutional rights explained their understanding of the provisions they sought and of their political context through newspapers, newsletters, and internal memos. Their champions also made stirring arguments on behalf of these rights on the floor of states' constitutional conventions and in academic journals. Yet because they exist at the state level, these sustained and often-successful campaigns for positive constitutional rights have been widely overlooked.

This study also sheds new light on the origins of constitutional rights. Most accounts of rights' creation, both within and outside the United States, hold that dominant political coalitions write new rights into constitutions when (and precisely because) they are worried about losing their dominant positions. On this account, movements for new rights are fundamentally

conservative projects, intended to maintain the status quo. However, the origins of the positive rights in state constitutions are quite different. Like the Illinois miners who campaigned for constitutional protections, many positive-rights' advocates did not intend to crystallize existing political arrangements. Instead, these activists hoped to rewrite the rules of politics and transform their societies. In the chapters that follow, I demonstrate that rights movements in the United States have used state constitutions for reasons that theories of constitutional politics have tended to miss. I also argue that constitutional theorists have largely overlooked the positive rights that these movements created.

American Constitutional Exceptionalism

American constitutional law is often said to be exceptional in its lack of rights to governmental protection from social and economic privation. While many other nations' constitutions enshrine positive rights, which obligate the state to intervene in order to protect citizens from nongovernmental dangers, American rights are often thought to be negative rights, protecting citizens only from intrusive government by prohibiting governmental intervention. In other words, the U.S. Constitution appears to be dedicated exclusively to limiting the scope of government and to keeping government out of the lives of its citizens. Thus, assertions about America's exceptional constitutional rights are still very much the norm.

America's political development was once thought to be similarly unusual. When compared with Europe, the industrializing United States appeared exceptional in its lack of protective social and economic regulations, and its citizens seemed to evince a strong and unusual aversion to government. Thanks in large part to historical studies of state and local governance, this story about American political development has been dramatically revised and this version of American exceptionalism widely rejected. Few scholars would still endorse the idea that America's political development was exceptional in its lack of governance. The resemblance between the outdated theory of American exceptionalism and the current theory of American *constitutional* exceptionalism should give us pause, and should prompt us to ask whether the standard view of America's constitutional tradition may also require revision.

Of course, the idea that America's constitutional tradition is exceptional is grounded in considerable empirical analysis. There is indeed strong evidence that the American constitutional tradition is exceptionally hostile to positive rights. While many prominent political figures, including several U.S. presidents, have argued on behalf of positive rights, few (and arguably no) positive-rights claims have ever changed either the U.S. Constitution's text or the Supreme Court's interpretation of it. Thus, America's welfare

state is widely believed to consist of statutory law alone, and is generally understood as a matter of legislative and majoritarian choice, rather than constitutional obligation.

Even the dramatic expansion of the United States' social safety net during the New Deal seems to confirm the assessment. In the wake of the Great Depression, Franklin Roosevelt explained, government must take active steps to protect citizens from economic and physical risk in order for them to take advantage of America's traditional political liberties. He argued the Constitution's negative liberties were only meaningful under conditions of economic security, and listed the social and economic safeguards that must undergird the political liberties contained in the Bill of Rights. This list, which Roosevelt named the "Second Bill of Rights," included rights to housing and medical care and protection from unemployment and hunger.[6] However, to the degree that these governmental commitments to social welfare became a part of federal policy, it was through statutory programs, like Social Security and Medicare. To be sure, many of these protective policies have engendered enduring political support, and as a matter of practical politics, the statutes that embody them may be quite difficult to repeal. However, the positive-rights claims underlying New Deal policy were never constitutionalized through a formal amendment to the text of the Constitution or through changes in Supreme Court doctrine. Absent a constitutional mandate, Congress remains free to scale back or eliminate any statutory entitlement program that becomes unpopular, as it did with Aid to Families with Dependent Children (AFDC) in 1996.

Hoping to find a constitutional mandate for a more robust welfare state than the one that is already embodied in statutory law, several litigation movements have looked to the Fourteenth Amendment. Yet these movements have met with extremely limited success, and the Supreme Court has generally declined to read either the Equal Protection or Due Process clause as a mandate for active government intervention.[7] To be sure, several landmark cases seem to imply or contain a positive-rights reading of the Fourteenth Amendment, but these decisions have not served as the foundation for any more extensive positive-rights jurisprudence, and the Court has ex-

[6] Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* (New York: Basic Books, 2004).

[7] Furthermore, the phrasing of the Fourteenth Amendment makes it a problematic vehicle for the pursuit of interventionist government action because even this positive-seeming provision is worded as a restraint on state governments, rather than a call to action. Thus, even the Due Process and Equal Protection clauses may be read simply as an extension of the negative liberties in the Bill of Rights to the states. Burt Neuborne explains it this way: "Like so many provisions of the Bill of Rights, from which it was copied, the due process clause is phrased as a prohibition, not an affirmative command: 'nor shall any state' is the equivalent of 'a state shall not.' Moreover, what the states are forbidden to do is to 'deprive; people of certain things'." Burt Neuborne, "State Constitutions and the Evolution of Positive Rights," *Rutgers Law Journal* 20, no. 4 (1989): 865.

plicitly rejected the positive-rights reading in its subsequent cases.[8] Instead, the Court has consistently ruled that protective and redistributive policies are questions of majoritarian choice, not matters of constitutional duty. Government may well choose to protect citizens from the threats that do not stem directly from government. However, the Court has been quite explicit in its repeated determination that the U.S. Constitution imposes no obligation for it to do so. Thus, most observers agree that even if the U.S. Constitution ought to be read differently or might have been interpreted in another way, it is not currently understood to contain positive rights. Indeed, campaigns on behalf of positive constitutional rights seem to have fizzled without ever gaining significant traction in either a court of public opinion or law.[9] Even one of the nation's most prominent welfare-rights advocates,

[8] For instance, the majority opinion in *Brown*, 347 U.S. 483 (1954), did declare: "Today, education is perhaps the most important function of state and local governments," and "such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms." This statement might well suggest that government has a responsibility to educate its citizens. However, the Court stopped short of declaring education to be a fundamental, constitutional right, and did not rule that any government was obligated to provide it. In fact, only twenty years after it decided *Brown*, in *San Antonio School District v. Rodriguez* 411 U.S. 1 (1973), the Court explicitly denied the existence of positive education rights in the federal Constitution. Another promising decision from the perspective of positive rights' advocates was the case of *Goldberg v. Kelly*. In *Goldberg*, the Court ruled that New York State's practice of terminating AFDC benefits without first providing recipients with a hearing violated the Fourteenth Amendment by depriving AFDC recipients of their property without due process of law. This decision was initially considered a great victory for the larger project of forcing the government to actively protect its poorest citizens. However, the Court based its ruling on the idea that government must provide welfare benefits in particular cases only because the termination of someone's benefits without a hearing violated a constitutional restriction on the state, not because it violated a positive constitutional mandate. Even according to the ruling in *Goldberg*, the state's welfare termination constituted an unlawful action not because the Constitution required that the government actively provide aid, but because welfare benefits were deemed a form of property. This ruling forbid the state to deprive people of their property, but never obligated government to provide any. Yet, even this apparent victory for constitutional welfare rights, therefore, was rooted in a logic of negative rights and limited government. The Court roundly rejected welfare-rights lawyers' subsequent attempts to locate further welfare rights in the Fourteenth Amendment. R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* (Washington, DC: Brookings Institution, 1994).

[9] Other examples of positive-rights movements that have arguably fizzled include the efforts of the early civil liberties movement, which emphasized citizens' social and economic rights as central to true freedom of expression, and argued that these rights were already protected by existing constitutional provisions. It abandoned this focus by the 1930s in favor of a negative, autonomy-based conception of liberty. Laura Weinrib, "From Public Interest to Private Rights: Free Speech, Liberal Individualism, and the Making of Modern Tort Law," *Law and Social Inquiry—Journal of the American Bar Foundation* 34, no. 1 (2009). In addition, Akhil Amar has argued that the drafters of the Thirteenth Amendment, which outlaws slavery, envisioned this constitutional provision as a guarantee of a minimum standard of economic security Akhil Reed Amar, "Republicanism and Minimal Entitlements: Of Safety Valves and the Safety Net," *George Mason University Law Review* 11, no. 2 (1988): 49–51. This interpretation was also never widely accepted.

who, in the 1960s, pioneered the case that the Constitution contained justiciable welfare rights, has begun to argue that the U.S. Constitution may actually lack these rights.[10] This view of American constitutionalism has, quite understandably, given rise to the argument that America's constitutional tradition is distinct from those of other industrialized nations.

Assertions about America's constitutional exceptionalism are commonplace.[11] For instance, noted law professor Cass Sunstein has declared that "the constitutions of most nations create social and economic rights, whether or not they are enforceable. But the American Constitution does nothing of the kind." He goes on to ask, "Why is this? What makes the American Constitution so distinctive in this regard?"[12] Many scholars have answered this question with classically exceptionalist tropes, particularly with reference to America's unique political culture.[13] For instance, prominent constitutional scholar Frederick Schauer writes, "American distrust of government is a contributing factor to a strongly libertarian approach to constitutional rights. The Constitution of the United States is a strongly negative constitution, and viewing a constitution as the vehicle for ensuring social rights, community rights, or positive citizen entitlements of any kind is . . . highly disfavored."[14] Other theorists have followed suit, opining that "the constitutionalization of positive rights will not occur absent a shift in America's classically liberal political culture."[15] Andrew Moravcsik has written that, while he doubts that such abstract cultural differences can, on their own, explain divergent policy outcomes, "Americans [do] tend to shy away

[10] Frank I. Michelman, "The Supreme Court, 1968 Term," *Harvard Law Review* 83, no. 1 (1969); Michelman, "Socioeconomic Rights in Constitutional Law: Explaining America Away," *International Journal of Constitutional Law* 6, no. 3–4 (2008).

[11] For instance, one constitutional scholar has opined that "by limiting political authority and the very scope of politics itself, the American system aims to allow maximum opportunity for individual flourishing . . . fairness rather than justice is the hallmark of our legal aspirations and our cherished rights." David Abraham, "Liberty without Equality: The Property-Rights Connection in a 'Negative Citizenship' Regime," *Law and Social Inquiry—Journal of the American Bar Foundation* 21, no. 1 (1996): 3. Another scholar described the scholarly consensus this way: "One common and influential view of the [U.S.] Constitution suggests that it creates, almost exclusively, negative obligations of government and negative rights." David A. Sklansky, "Quasi-Affirmative Rights in Constitutional Criminal Procedure," *Virginia Law Review* 88, no. 6 (2002): 1233.

[12] Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?" *Syracuse Law Review* 56, no. 1 (2005): 4.

[13] Sunstein himself does not believe this cultural explanation is correct, and argues instead that America's lack of positive constitutional rights is the result of historical contingency. He attributes America's lack of postive rights to Nixon's (narrow) electoral win and to his conservative Supreme Court appointments.

[14] Frederick Schauer, "The Exceptional First Amendment," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005), 46.

[15] Curt Bentley, "Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution," *Brigham Young University Law Review* 2007, no. 6 (2007): 1723.

from state intervention to redress social inequality—now established in most advanced industrial democracies as the primary fiscal task of the state. The aversion to state intervention is a distinctively American trait as compared to the political cultures of other advanced industrial democracies."[16]

Other explanations for America's divergent constitutional development not only hold its distinct constitutional culture responsible, but explain that cultural difference with reference to America's unusual history. For instance, Dieter Grimm, a law professor and former Justice on the Federal Constitutional Court of Germany, has argued that the different nature of America's revolution accounts for the difference in its constitutional rights. He explains, "The American colonists lived under the English legal order, yet without the remnants of the feudal and the canon law still alive in their motherland . . . Colonists referred to natural law as the true source of fundamental rights in order to justify the break with the motherland . . . To fulfill this function negative rights were sufficient."[17] Americans' lack of experience with feudalism endowed them with a distinct political and legal culture. Thus, Grimm argues that negative rights continue to characterize the American tradition, while Europe has taken a very different course, and concludes that "the contrast seems deeply rooted in different historical experiences; different perceptions of dangers; different trusts in the state on the one hand, the market on the other; different ideas about the role of political and legal institutions; a different balance between individual freedom and communal interest."[18] In other words, individual freedom from governmental control, the desire to keep government at arm's length, to protect people and particularly their property and economic arrangements from state power distinguish America's constitutional tradition from Europe's.[19]

Not So Exceptional After All

Arguments about America's exceptional rights tradition will be immediately recognizable to those familiar with the broader theory of American exceptionalism. Scholars of American politics were once widely agreed that American political development was notably aberrant. While European

[16] Andrew Moravcsik, "The Paradox of U.S. Human Rights Policy," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton, NJ: Princeton University Press, 2005).

[17] Dieter Grimm, "The Protective Function of the State," in *European and US Constitutionalism*, ed. Georg Nolte (New York: Cambridge University Press, 2005), 140.

[18] Ibid., 154.

[19] Progressive Era historian Charles Beard is widely credited with generating the theory that American rights originated with a desire to preserve private property and are, consequently, devoted to circumscribing the government's authority. Charles Austin Beard, *An Economic Interpretation of the Constitution of the United States* (New York,: Macmillan Co., 1913). As we see from Grimm's analysis, this view has remained influential, despite its age.