

SOCIAL AND ECONOMIC RIGHTS IN THE CONSTITUTION OF THE UNITED STATES

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The article starts by discussing the most common explanations for a substantial silence of the US constitutional culture on social and economic rights. It then suggests that the most plausible explanation seems to rest rather than on what it is usually referred to as the American exceptionalism, on a peculiar culture of rights spread among US legal thinkers and endorsed by Supreme Court Justices. A review of the past and more recent Supreme Court case law on social and economic rights is presented, as well as a tepid prediction of what will occur in the future.

1. Why doesn't the US Constitution acknowledge the existence of socio-economic rights?

Many Constitutions around the world acknowledge the existence of socio-economic rights, whether or not they are enforceable, but the American Constitution does nothing of the kind. Why is this? What makes the American Constitution so distinctive in this regard?¹ Although such a question is often implied in a substantial amount of literature on the constitutional discourse around the globe, Cass Sunstein has posed it in very explicit terms. He has advanced four possible answers and has alleged to expose the fourth explanation.

- 1.1 The first explanation that he reports is chronological; it points simply to the age of the American Constitution, which is the oldest in force in the world. Given its date of birth, the US Constitution may at most reflect the British

¹ Cass Sunstein, *Why does the American Constitution Lack Social and Economic Guarantees?* 56 Syracuse L. Rev. 1 2005.

culture of rights of the Eighteenth century but could not have any hint of the social rights. The Founders were predominantly interested in the protection of basic liberties both by framing political institutions with checks and balances and by acknowledging a list of basic rights. Most of them, however, were wealthy owners who did not have any urge or even knowledge of social and economic guarantees granted by the government. Such an explanation goes hand in hand with a peculiar theory of constitutional interpretation: originalism. The combination of the two assumptions that the Framers did not pay attention to social and economic guarantees and that of originalism results in the following syllogism. Since the Constitution shall be interpreted according to its textual meaning or to the meaning intended by the Framers (major premise) and since the Framers did not create any social right or guarantee (minor premise), it follows that the Constitution cannot be interpreted as to include or provide for any social rights.

- 1.2 The second answer which Sunstein mentions is institutional in nature. It emphasizes that social and economic rights cannot easily coexist with judicial review, a preoccupation of the American legal culture². In other words, since social and economic rights are more difficult to enforce at a judicial level, they have not been included in the Constitution – even through an Amendment – because of their *softness*. The US Constitution contains solely those rights which can

² *Ibidem*, p. 4. See also Cass Sunstein, *Constitutionalism, Prosperity, Democracy. Transition in Eastern Europe*, 2 Const. Pol. Econ. 371, 383 (1991) (“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.”).

be judicially enforced. This might explain why it took a relatively unusual stance among modern nations in refusing to ratify the International Covenant on Social, Economic, and Cultural Rights. A variant of such an explanation is the concern for a powerful judiciary. If social rights are not enforceable, then there is no real utility in including them in the Constitution. On the other hand, where social rights were, in fact, enforceable, then their express provision in the Constitution may result in an excessive increase of the judiciary power. The balance among institutional powers strongly held by the Federalists would be altered.

- 1.3 The third explanation points to the “*American exceptionalism*”, as it is standardly understood: the absence of a significant socialist movement in the United States. It is therefore a cultural explanation. The exceptionalism thesis is often intertwined with similar claims in other fields. For example, the exceptionalism allegedly characterizes the entire US Constitution or the way it is interpreted by the Courts. The cultural explanation, although *prima facie* appealing, is however disconfirmed by historical facts. The years after the Great Depression gave rise to strong labor and social movements. The New Deal legislation betrays a policy socialist in nature. So, it is not true that the US has not witnessed a policy where social and economic rights were created and granted. It is true, however, that such a policy did never result in a Constitutional amendment. This means that *welfarism* may be compatible with the US Constitutional structure and its basic principles, provided that it is the result of political action. To quote Justice Holmes in the famous case *Lochner v. New York*, the Constitution does not bind the legislator to any peculiar economic theory, not even Herbert Spencer’s Social Statistics. This is how Holmes explains his dissent from the majority Justices who had

stricken down Section 110 of the labor law of the State of New York, providing that no employees shall be required or permitted to work in bakeries more than sixty hours in a week, or ten hours a day. The Court held that the law is not a legitimate exercise of the police power of the State, but an unreasonable, unnecessary and arbitrary interference with the right and liberty of the individual to contract in relation to labor, and, as such, it is in conflict with, and void under, the Federal Constitution. Holmes replied.

This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we, as legislators, might think as injudicious, or, if you like, as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics. The other day, we sustained the Massachusetts vaccination law. *Jacobson v. Massachusetts*, 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. *Northern Securities Co. v. United States*, 193 U.S. 197. Two years ago, we upheld the prohibition of sales of stock on margins or for future delivery in the constitution of California. *Otis v. Parker*, 187 U.S. 606. The decision sustaining an eight hour law for miners is still recent. *Holden v. Hardy*, 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the State or of *laissez faire*. [p76] It is made for people of fundamentally differing views, and

the accident of our finding certain opinions natural and familiar or novel and even shocking ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States³.

- 1.4 The fourth explanation of the absence from US Constitutional law of socio-economic rights has a legal realist's flavor. It stresses developments within the United States Supreme Court in the 1960s and 1970s⁴ and signals the mutable nature of constitutional rights. More in particular, it points out that in the 60s and 70s, the Court leaned towards a change in acknowledging the strength of social rights, although such a change had not led to a full inclusion of social rights in the US. Constitution. Advocates of this fourth thesis hold that the reluctance to create social and economic rights is mostly dependent on the type of Justices on the Court. It follows that with a shift in personnel, the US legal culture could have changed, as it seemed to have happened in the 1960s and 1970s, when the Court came close to understanding the Constitution to create social and economic rights. However, Sunstein alleges, President Nixon's four critical appointments: Chief Justice Warren Burger and Justices Blackmun, Powell, and Rehnquist, were the real cause of the halt to an emerging movement. It is the reluctance of even democratic Presidents to appoint "radicals" on the Court as the real source of the "American exceptionalism" in the domain of social and economic rights. This fourth explanation is based on the assumption that the Constitution is what the Justices say it is.

³ *Lochner v. New York*, 198 U.S. 45 (1905), *Holmes dissenting*.

⁴ Sunstein, *Why does the American Constitution Lack Social and Economic Guarantees?* p. 5.

- 1.5 To the four explanations above, I will add a fifth. The reluctance to constitutionalize social rights rests on a peculiar theory of constitutional rights spread in the US legal culture. Regardless of whether they are captured under the metaphor of shields⁵ or trumps⁶ or side constraints⁷ or as a block against an appeal to consequences⁸, rights define a sphere which the government shall not infringe. That such a culture of rights is very well rooted seems to be confirmed also by the detractors of rights, which abide to the so called rights critique⁹. The focus on liberties more than general rights has become even stronger in the last decade, espe-

⁵ Frederick Schauer, *A Comment on the Structure of Rights* Georgia Law Review 27:415, 1993.

⁶ Ronald Dworkin, *Taking Rights Seriously*. Cambridge, Mass. Harvard University Press, 1977.

⁷ Robert Nozick, *Anarchy, State and Utopia* 26-53 New York, Basic Books, (1974).

⁸ Charles Fried, *Rights and Wrong*, Cambridge Mass., Harvard University Press. 1978, 81.

⁹ The rights-critique was authored by a group of scholars, sometimes referred to as the "rights critics." The rights critique, in turn, was the moral heart of the Critical Legal Studies (CLS) movement. It was also, for a brief moment in time, ubiquitous. Rights harm us, according to the Bill of Particulars put forward by the rights critics of the 1980s, in three distinct ways. First, even apparently liberating rights that seemingly expand the sphere of individual liberty also subordinate, at least according to the first and perhaps the most important of the rights critics' charges. Rights to privacy protect not only private decision making against the prying and moralistic eye of the state but also, even if inadvertently or indirectly, private subordination of vulnerable family members. Rights to liberty of contract protect private choices of individuals but also the economic subordination of laborers by employers, and rights to speech protect ideas but also, arguably, pornography and private verbal, racial, or sexual harassment." see Morton J. Horwitz, *Rights*, 23 Harv. C.R.-C.L. L. Rev. 393, 396-98 (1988); 3. Catherine A. MacKinnon, *Privacy v. Equality: Beyond Roe v. Wade*, in *Feminism Unmodified: Discourses on life and law* 93, 93 (1987); Robert W. Gordon, *Unfreezing Legal Reality: Critical Approaches to Law*, 15 Fla. ST. U. L. Rev. 195, 198-99 (1987); Mark Tushnet, *An Essay on Rights*, 62 Tex. L. Rev. 1363, 1384 (1984); Peter Gabel, *The Phenomenology of Rights-Consciousness and the Pact of the Withdrawn Selves*, 62 Tex. L. Rev. 1563, 1569 (1984). Recently, see Robin West, 53 Wm. & Mary L. Rev. 713 2011-2012.

cially after safety and security concerns brought upon terrorism. The debate on rights in the last years has been massively centered on issues such as privacy, personal freedom, criminal proceedings' guarantees on the assumption of the so called *immunities* view of rights (see below, under §4)¹⁰. Social rights on the other hand escape the meaning of such a theory. They require an active intervention of the government rather than an abstention. While this might be true also for classical liberties – you cannot have a right to a fair hearing without a complex and costly procedural system – the classical conceptions of rights – as defining a threshold that the government shall not pass – seem still well rooted among US legal scholars. Upon such conceptions rests, in my opinion, the reluctance of the Supreme Court to constitutionalize social rights.

2. Social rights and other rights

Traditionally social rights are opposed to civil or political rights which are familiar from historic bills of rights such as the French Declaration of the Rights of Man and the Citizen (1789) and the U.S. Bill of Rights (1791, with subsequent amendments)¹¹. Typical formulations of civil rights and liberties are such as

“Everyone has the right to freedom of thought and expression. This right includes freedom to seek, receive, and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing, in print, in the form of art, or through any other medium of one’s choice”. (American Convention on Human Rights, Article 13.1);

¹⁰ Bruce Ackerman, *Before the next Attack. Preserving civil liberties in the age of terrorism*. New Haven, Yale University Press, 2006.

¹¹ James Nickel, *Human Rights*, ad voce, Stanford Encyclopedia 2010.

or

“Everyone has the right to freedom of peaceful assembly and to freedom of association with others, including the right to form and to join trade unions for the protection of his interests (European Convention, Article 11)”;

or

“The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized” (US Constitution, IV Amendment);

or

“Every citizen shall have the right to participate freely in the government of his country, either directly or through freely chosen representatives in accordance with the provisions of the law. Every citizen shall have the right of equal access to the public service of his country. Every individual shall have the right of access to public property and services in strict equality of all persons before the law” (African Charter, Article 13).

Social (or “welfare”) rights address matters such as education, food, and employment. The Universal Declaration of Human Rights proclaims that everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond his control (Article 25(1)).

The European Convention did not mention them (although it was later amended to include the right to education). Instead they were put into a separate treaty, the European Social Charter. When the United Nations began the process of putting the rights of the Universal Declaration into international law, it followed the model

of the European system by treating economic and social standards in a treaty separate from the one dealing with civil and political rights. This treaty, the International Covenant on Economic, Social, and Cultural Rights (the "Social Covenant," 1966), treated these standards as rights —albeit rights to be progressively realized¹².

The Social Covenant's list of rights includes nondiscrimination and equality for women in the economic and social area (Articles 2 and 3), freedom to work and opportunities to work (Article 4), fair pay and decent conditions of work (Article 7), the right to form trade unions and to strike (Article 8), social security (Article 9), special protections for mothers and children (Article 10), the right to adequate food, clothing, and housing (Article 11), the right to basic health services (Article 12), the right to education (Article 13), and the right to participate in cultural life and scientific progress (Article 15).

More recent European documents have followed such a path. The Charter of Fundamental Rights of the European Union includes a right to education (Article 14), the freedom to choose an occupation and the right to engage in work (Article 15), the workers' right to information and consultation within the undertaking (Article 27), the right of collective bargaining and action (Article 28), the right of access to placement services (Article 29), the protection against unjustified dismissal (Article 30), fair and just working conditions (Article 31), social security and social assistance providing protection in cases such as maternity, illness, industrial accidents, dependency or old age, and in the case of loss of employment (Article 34), the right of access to preventive health care and the right to benefit from medical treatment under the conditions established by national laws and practices (Article 35).

¹² *Ibidem*.

Most of Constitutions around the world acknowledge the existence of social rights. The Italian constitution refers to a number of fundamental social rights. In Article 4 of the section headed 'Basic principles' the Republic recognizes the right of all citizens to work and promotes such conditions as will make this right effective. Article 31 requires the state to facilitate, by means of economic and other provisions, the formation of the family and the fulfillment of the tasks connected therewith, with particular consideration for large families, and to protect mothers, children and young people by promoting and encouraging institutions necessary for this purpose. Article 32 requires the Republic to provide health safeguards as a basic right of the individual and in the interests of the community and to grant free medical assistance to the indigent. The German Basic Law does not specify any fundamental social rights apart from the right of mothers to special protection. Germany nonetheless sees itself as a welfare state and, by defining state objectives, requires the public authorities to base all their actions on the welfare state principle. The Benelux countries, France and the Scandinavian countries have fundamental social rights in the form of individual rights, policy clauses or provisions defining the state's objectives, but tend to be restrained when it comes to detail, leaving this to ordinary legislation.

Social rights are seen as atypical rights with some features making them unusual. For example a conventional answer for social rights' peculiarity is that while ordinary rights, such as the right to freedom of religion, create "negative" checks on government, preserving a sphere of private immunity, social and economic rights impose "positive" obligations on government, creating a set of private entitlements to governmental assistance.

Another common distinction between civil rights and social rights seems to result from the formulation of some legal texts. For example, Article 2.1 of the Social Covenant sets out what each of the parties commits itself to do about this list, namely to

“take steps, individually and through international assistance and co-operation...to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant.”

In contrast, the Civil and Political Covenant simply commits its signatories to

“respect and to ensure that all individuals within its territory the rights recognized in the present Covenant” (Article 2.1).

The contrast between these two levels of commitment has led some people to suspect that economic and social rights are really just goals and not truly rights¹³.

Opponents of social rights often deny them the status of human rights, restricting that standing to civil and political rights. Familiar objections to social rights include the following:

- (1) they do not serve truly fundamental interests;
- (2) they are too costly and therefore too burdensome on governments and taxpayers; and
- (3) they are not feasible in less-developed countries¹⁴.

¹³ James Nickel, *Human rights*, supra.

¹⁴ Cranston, M., 1967. “Human Rights, Real and Supposed,” in D. D. Raphael (ed.), *Political Theory and the Rights of Man*, London: Macmillan; Cranston, M., 1973. *What Are Human Rights?*, London: Bodley Head; Beetham, D., 1995. “What Future for Economic and Social Rights?”, *Political Studies*, 43: 41–60; Howard, R., 1987. “The Full-Belly Thesis: Should Economic Rights Take Priority over Civil and Political Rights?” *Human Rights Quarterly*, 5: 467–90; Nickel, J., 2005. “Poverty and Rights,” *Philosophical Quarterly*, 5: 385–402; Nickel, J., 2006. *Making Sense of Human Rights*, Second edition. Oxford: Blackwell Publishing.

While the third objection is not relevant for the purpose of this Article, the first two need to be taken seriously.

Compared to the right not to be subject to torture or to cruel and unusual punishment or not be searched without a warrant, it could be claimed that social rights do not meet a standard of great importance. This is mostly due to the vague formulation of some social rights. However, following Nickel, it would suffice to consider the two classical social rights in order to overcome this first objection: the right to food (Article 25 of the Universal Declaration of Human Rights) and the right to education (Article 26). Both rights require government to remedy to serious evils such as hunger and ignorance. In the words of Mark Eric Butt, Julia Kübert and Christiane Anne Schultz who completed a study commissioned by the European Parliament,

Fundamental social rights [...] mean rights to which the individual citizen is entitled, which he can exercise only in his relationship with other human beings as a member of a group and which can be made effective only if the State acts to safeguard the individual's environment¹⁵. Social rights are a necessary complement to civil rights and liberties, since the latter cannot be enjoyed without a minimum of social security. In contrast to civil rights and liberties, this means that it is not freedom from the State that is achieved, but freedom with the State's help. These are, then, fundamental rights in the form of entitlements¹⁶.

The second common objection against social rights is that they are too burdensome on government and on private citizens. The objection is based on the conventional wisdom that while ordinary rights create "negative" checks on government, preserving

¹⁵ H.-J. Wipfelder, Die verfassungsrechtliche Kodifizierung sozialer Grundrechte, *Zeitschrift für Rechtspolitik* 1986, p.140.

¹⁶ Mark Eric Butt, Julia Kübert and Christiane Anne Schultz, *Working Paper: Fundamental Social Rights in Europe*, 1999. http://www.europarl.europa.eu/workingpapers/soci/pdf/104_en.pdf

a sphere of private immunity, social and economic rights impose “positive” obligations on government, creating a set of private entitlements to governmental assistance. Such a distinction usually is accompanied by a specular distinction between negative liberties and positive liberties. However, also this second objection might be overcome. Usually the claim that the government shall supply food or healthcare or education seems too costly when compared with the principle that the government shall not intrude into private domiciles or shall guarantee freedom of expression or shall subject searches and seizures to certain conditions (typically a magistrate’s order upon founded suspicion). While some of these contentions may be true, it shall be reminded that most of the rights are costly. Let us think about liberty rights such as freedom of communication, association, and movement. These rights require both respect and protection from governments. And people cannot be adequately protected in their enjoyment of liberties such as these unless they also have security and due process rights. The costs of liberty, as it were, include the costs of law and criminal justice¹⁷. Similar considerations apply to liberties to communicate, associate, and move. An effective system will require a legal scheme that defines personal and property rights and protects these rights against invasions while ensuring due process to those accused of crimes. It requires a certain institutional setting such as legislatures, police, courts, and prisons, all of which are extremely expensive.

Consider the right to private property. As Bentham wrote,

“Property and law are born and must die together. Before the laws, there was no property: take away the laws, all property ceases.”¹⁸

¹⁷ James Nickel, *Human Rights*, supra.

¹⁸ Jeremy Bentham, *Principles of the Civil Code*, in I The works of Jeremy Bentham 297, 309 (John Bowring ed., 1843).

This means that the right to property which apparently is cost free implies courts, officers in charge of the foreclosure, police system, legislators, just to mention few. So, it is possible that the common wisdom according to which *negative liberties* require solely a duty of abstinence on the side of the government is mistakenly associated with the fact that we give for granted a set of institutional devices which are necessary involved in the protection of private liberties but which we hold as our second nature: something we cannot do without since we live in a civil polity from cradle to grave¹⁹.

The comments made by Ellington and reported below are therefore fully convincing:

it is only because we are born into this mechanism as we are born into our homes that we take it for granted and fail to realize...what an immensity of daily effort on the part of government is required to keep it running. In terms of mechanism and trained personnel, a system of social security is child's play in comparison with the system that gives effect to due process of law²⁰.

In other words, all constitutional rights, including the traditional private liberties, bear a cost²¹. So, in order to ensure freedom from torture the government has to provide for institutions which intervene where such a right is violated. It has also to monitor and instruct its officers to refrain from abusive conducts. The same could be said with other constitutional rights, such as political rights whose costs have become more and more massive. So, although it may be true that some social rights are unusually costly – for example housing or health care – the comparison in the amount of

¹⁹ J. Rawls,

²⁰ John R. Ellington, *The Right to Work*, 243 *Annals Am. Acad. Pol. & Soc. Sci.* 27, 33 (1946).

²¹ Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why liberty depends on taxes*, New York & London. W.W. Norton Company (1999).

spending required is a matter of empirical enquiry²² and not one which may sustain a conceptual difference between social and other rights.

In addition, it shall be considered that taxes associated with social rights are partial replacements for other burdensome duties, namely the duties of families and communities to provide adequate care for the unemployed, sick, disabled, and aged. Deciding whether to implement social rights is not a matter of deciding whether to bear such burdens, but rather of deciding whether to continue with total reliance on a system of informal provision that distributes benefits in a very spotty way and whose costs fall very unevenly on families, friends, and communities²³.

3. Social rights and judiciary power

Are social rights judicially enforceable? And if so, is it better to let the Court decide rather than leaving all spending matters to the political branches? In her work on the social rights in the South African Constitution, Erica De Wet argues that meaningful judicial review is possible only if these rights are guaranteed as individual subjective rights, in other words, only if having the right to housing means that an individual can go to court and receive an order awarding him a house. Furthermore, she contends that if such an order were to be issued, it would implicate the court in matters reserved to the political branches, violating

²² Sunstein, *Why does the American Constitution Lack Social and Economic Guarantees?*, p.8.

²³ Nickel, *Human Rights*, *supra*.

a cardinal principle of democratic governance, the separation of powers²⁴. Usually two arguments are used in order to defy the contention that social rights are justiciable. The first is descriptive, the second is normative. Social rights, it is commonly held, are too vague to be enforced through a court order. So, judges do not have instruments to interpret and then implement them. The second claim is much more serious. It stresses the redistributive nature of the remedial measures associated to social rights and contends that the allocation of resources is typically deemed the province of the legislature, which has both the political legitimacy of being an elected body and the institutional capacity to weigh and accommodate competing demands on the public purse. Since rights override other legislative priorities, a judicial power of review positions an unelected judiciary to overrule majority decisions, raising accountability concerns²⁵.

Moreover, social rights' implementation implies a plethora of choices. Consider the rights to dependent care invoked by Professor West. Should the social obligation entailed by this right be satisfied by the payment of money or by services in kind? Should it be addressed by government directly or by employers under the compulsion of government? Which layer of government should be principally responsible? Who should finance this right? Should government involve itself in the training or regulation of caregivers?²⁶ The above remarks seem to lead to the idea that active politics rather than court shall be in charge of a social democracy. This however does not mean that courts shall not have any voice. Larry Sager draws the attention on two cases that illustrate the role of the judiciary towards this end.

²⁴ Erica De Wet, *The Constitutional Enforceability of Economic and Social Rights: The Meaning of the German Constitutional Model for South Africa* 33 (1996); Jeanne M. Wood, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, 38 *Tex. Int'l L.J.* 763 2003.

²⁵ Wood, *Justiciable Social Rights as a Critique of the Liberal Paradigm*, p. 772.

²⁶ Larry Sager, *The Constitution and the Good Society*, 69 *Fordham L. Rev.* 1989, 2000..

In *Goldberg v. Kelly*²⁷, the Supreme Court conferred procedural rights on applicants for basic welfare grants, and thereby reduced the likelihood of arbitrary exclusions from what could well be seen as an important element of the right to minimum welfare. In *Plyler v. Doe*²⁸, the Supreme Court held unconstitutional the state's attempt to deprive children of illegal aliens of the opportunity to attend public schools. *Shapiro v. Thomson*²⁹ is another good example. The case is an appeal from decisions of three-judge District Courts holding unconstitutional Connecticut, Pennsylvania, or District of Columbia statutory provisions which deny welfare assistance to persons who are residents and meet all other eligibility requirements except that they have not resided within the jurisdiction for at least a year immediately preceding their applications for assistance. Appellees' main contention on re-argument is that the prohibition of benefits to residents of less than one year creates a classification which constitutes an invidious discrimination denying them equal protection of the laws. Appellants argue that the waiting period is needed to preserve the fiscal integrity of their public assistance programs, as persons who require welfare assistance during their first year of residence are likely to become continuing burdens on welfare programs. Appellants also seek to justify the classification as a permissible attempt to discourage indigents from entering a State solely to obtain larger benefits, and to distinguish between new and old residents on the basis of the tax contributions they have made to the community. Certain appellants rely in addition on the following administrative and related governmental objectives: facilitating the planning of welfare budgets, providing an objective test of residency, minimizing the opportunity for recipients fraudulently to receive payments from

²⁷ 397 U.S. 254 (1970).

²⁸ 457 U.S. 202 (1982).

²⁹ 394 U.S. 618 (1969)

more than one jurisdiction, and encouraging early entry of new residents into the labor force. Connecticut and Pennsylvania also argue that Congress approved the imposition of the one-year requirement in 402 (b) of the Social Security Act. In other words, the contending parties advance qualitative different claims: the appellees, private parties who seek for state benefits denounce a discriminatory policy; the appellants resort to the classical economic argument of the scarcity of resource which usually goes under the label of fiscal integrity (which may be altered by new indigent residents). The case is therefore about the strength of a social right: on the one hand, indigent petitioners who request state assistance, on the other hand, administrative bodies which attempt to preserve state funds and prevent too much spending. Put in the above terms, the case could have had any solution. Depending on which theory the Justices endorsed (the consequentialist argument of unplanned spending, or the deontological argument of public assistance of the indigent people) they could have ruled either in favor of one party or the other. Justice Brennan and the majority, however, decided to follow a different path. The narrative of the case played a decisive role. Appellees were an adolescent mom with two children of different fathers and a single mother of three children affected by breast cancer. They were both indigent and it emerged that they had both moved to Connecticut not with the main purpose to receive higher funds (for the States where they were living granted higher benefits), but to live closer to their respective mothers. Brennan understood that the central argument of the appellants was that the one year eligibility requirement would discourage indigents from entering a State solely to obtain larger benefits. The argument was based on the assumption that by moving to another States claimants were acting fraudulently (maybe even maintaining previous assistance and attempting to obtain double benefits). It was such an assumption that the majority Justices rejected: they comprehended that it was highly unlikely that very needy people – adolescent single mothers, or single mothers with cancer – would act instrumen-

tally. On the contrary, the appellees, as presumably most people in their tragic situation, were looking for other kind of support (such as living next to their original families), as the records had shown. The real purpose of the one year eligibility requirement was then not to discourage fraudulent claims, but to discourage indigent *per se*. This is why the regulation was held unconstitutional: for it impinged on the freedom of movement among States by denying such a freedom to the people that would need it the most. At the core of the reasoning there was an empathetic understanding which allowed the Justices to win the common prejudice of the fraudulent moving to a new State. Ironically in that occasion, it was Justice Warren who showed a lack of empathy. His dissent was grounded on an argument with a “let them eat the cake” ring to it (Henderson 1993: 260): “All of the appellees in these cases found alternatives sources of assistance after their disqualification”. More recently, in *Saenz v. Roe*³⁰, the Court invalidated California’s limits on the welfare benefits of new arrivals to the state.

It is possible that President Obama had cases like this in mind when he announced his wish to appoint on the Court an individual who could empathetically look at disadvantaged claimants.

On the capability of the courts to enforce social rights so it may be held, quoting Larry Sager, that when other governmental actors have utterly failed to heed the mandate of affirmative social rights, it may be that courts are largely powerless to act. But, when, as may often be the case, the legislature has responded at least in part to the call of such rights, courts can play an important secondary role in policing these rights against arbitrary and unjust exclusions on an individual or group basis. Further, there may be a substantive, good-behavior-reinforcing backwash from such secondary judicial activity, especially if the courts become more

³⁰ 526 U.S. 489 (1999).

self-conscious and articulate about the rights that prompt their involvement³¹.

4. American Exceptionalism?

Professor West complains that

“[liberal-constitutional rights, as they are now conventionally understood and authoritatively interpreted, at least in the United States, do not obligate the state to ensure anything resembling what welfarist ‘good society’ advocates envision.”

“Worse,” she adds, “liberal constitutional rights, as they are sometimes authoritatively interpreted in this country and others, actually limit the state’s authority to take action to secure the material preconditions of the good society.”³²

The explanations of such an American exceptionalism are usually twofold: either they rest on the idea that socialism has never become popular in the US or they “blame” some of the US Constitution institutional settings for the failure of progressive constitutionalism.

Karl Marx and Frederick Engels spent considerable intellectual energy explaining why socialist movements did not penetrate in the US. Werner Sombart’s 1906 book, *Why is there no Socialism in the United States?*³³ is still a classic. Lipset and other political scientists³⁴ have highlighted both the weaknesses of the socialist

³¹ Sager, *The Constitution and the Good Society*, 1990.

³² West, *Rights and the State’s Obligation to Secure the Material Pre-Conditions of a Good Society*, at 1904.

³³ Werner Sombart, *Why is there no Socialism in the United States?*, at ix, xi (1976).

³⁴ Seymour Martin Lipset, *Why No Socialism in the United States?* in *1 Radicalism in the Contemporary Age* 32-47 (Seweryn Bialer ed., 1977).

parties and the weaknesses of social democratic policies in the United States.

Others contend that the problem is mainly institutional³⁵. According to this second thesis, several institutional devices provided by the US Constitution hinder and even inhibit a socialist turn. For example, professor Elkin signals that a system of separated institutions, sharing powers has proved to be a poor vehicle for passing and implementing measures associated with progressive or social democracy. Federalism, by increasing the number of veto points and decentralizing American politics, further confounds the progressive constitutionalist³⁶. His words are echoed by professor Graber remarks which are closer to a lamentation:

The present incapacity of American institutions to produce progressive policies is a constitutional problem, not merely a technical problem with realizing a constitutional vision. The Framers structured constitutional institutions not simply to produce good government or fair outcomes, but to privilege certain policies and certain interests³⁷. [...]. Institutions matter. [...] Were business enterprise to have less political power, more progressive policies might result without an accompanying change in anyone's policy preferences³⁸. [...] Institutional analysis plays crucial roles in more general analyses of why there is no social democracy in the United States. Sombart's seminal study places great emphasis on the two-party system. A strong labor party did not develop in the United States, in his view, because Americans were reluctant to throw away their votes on third parties and because the two major parties were typically willing to co-opt less radical worker demands and worker leaders (quoting Sombart, *Why there is no Socialism*, at 33-54). Lipset highlights how Franklin Roosevelt during the New Deal was able to co-opt more radical democracy by incorporating moderate worker demands

³⁵ Mark A. Graber, *Social Democracy and Constitutional Theory: an Institutional Perspective*. 69 *Fordham L. Rev.* 1969 2000-2001

³⁶ Stephen L. Elkin, *The Constitutional Theory of the Commercial Republic*, 69 *Fordham L. Rev.* 1933,1941 (2001).

³⁷ Graber, *supra*, p. 1972.

³⁸ *Ibidem*, p. 1979.

in his program. “[T]he effects of a two-party electoral system centered on the direct election of the President,” Lipset declares, “have made it extremely difficult for any group to channel social discontent into an independent third party that appeals to class interests.” (quoting Seymour Martin Lipset, *Roosevelt and the Protest of the 1930s*, 68 *Minn. L. Rev.* 273, 273, at 274)³⁹.

Both analysis, the social / historical and the institutional, however, have some pitfalls. The first undervalues the circumstance that there was in fact a mass labor movement in the US. The second underestimates the changes brought upon by the New Deal. The New Deal involved some important changes towards a welfare conception of rights. First, during the New Deal, the Supreme Court altered its interpretation of the Constitution to vastly expand federal power and to relax other constitutional limitations, such as the separation of powers and the protection of economic liberties. While the document was not formally amended, the functional meaning of the Constitution was dramatically changed⁴⁰. Second, as Rappaport argues, the New Deal changed the nation’s fundamental institutions, moving the US from a country of limited government and federalism to one with a larger government, at both the state and federal level that regulated the economy and provided an economic safety net. The large number of significant institutions that the New Deal enacted, including the Social Security Retirement Program, unemployment insurance, federal deposit insurance, the Tennessee Valley Authority, the Works Progress Administration, the securities acts, and the National Labor Relations Act, transformed the nature of American government and society⁴¹.

³⁹ *Ibidem*, p. 1982.

⁴⁰ Michael B. Rappaport, *The Obama Administration, Fundamental Institutional Change and the Constitutional Lawmaking System*, 26 *Const. Comment.* 215 2009-2010.

⁴¹ *Ibidem* at 218.

While the United States came close to embracing economic and social rights during the New Deal, and initially provided leadership and inspiration for the embrace of these rights on the international stage, only education has ever been afforded legal protection as a right across the country, and only on the state level. For example, the New York state courts have both struck down the design of school financing on the grounds that it fails to provide adequate education and found ‘a positive duty upon the state’ to provide welfare payments to anyone considered indigent under the state’s ‘need standard’ (*Tucker vs. Toia*, 1997).

Cass Sunstein claims that the switch in the Supreme Court depends on the actual Justices appointed. More in particular, he urges that the crucial development was the election of President Nixon in 1968, which produced four Supreme Court appointments. This, in turn, led to a critical mass of justices willing to reject the claim that social and economic rights were part of the Constitution⁴². Sunstein signals that there was a serious and partially successful effort, in the 1960s and 1970s, to understand the existing Constitution as creating social and economic guarantees. In several of the cases, the Court went so far as to hold that the government must subsidize poor people in certain domains. For example, in *Griffin v. Illinois*⁴³, the Court held that the Equal Protection Clause requires states to provide trial transcripts or their equivalent to poor people appealing their criminal convictions. In *Douglas v. California*⁴⁴, the Court extended this ruling, concluding that poor people must be provided with counsel on their first appeal of a criminal conviction. In *Harper v. Virginia Board of Elections*⁴⁵, where the

⁴² Sunstein, *Why does the American Constitution Lack Social and Economic Guarantees?*, at 20.

⁴³ 351 U.S. 12 (1956)

⁴⁴ 372 U.S. 353 (1963)

⁴⁵ 383 U.S. 663 (1966)

Court struck down the poll tax, it effectively ruled that states must provide the vote free of charge—even though it is expensive to run an election⁴⁶. While this decisions are in some way limited to contexts in which poverty interacts with interests that seem part and parcel of citizenship (e.g., the rights to vote and to contest a criminal conviction), in some other occasions the Court went further. Consider *Shapiro v. Thompson*, as discussed above, where the Court made reference to the needs of people, contending that the laws deny “welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.”⁴⁷. In the same years, the Court equated benefit rights to property rights by holding that they could not be removed without first giving people a hearing⁴⁸.

However, Sunstein claims, things changed as a result of four appointments to the Court: Warren Burger in 1969, Harry Blackmun in 1970, and Lewis Powell and William Rehnquist in 1972. Sunstein draws our attentions to the following decisions:

- (1) In *Dandridge v. Williams*, the Court rejected a constitutional challenge to a state law that imposed an upper limit on the size of grants under its welfare program, regardless of the size of the family⁴⁹.
- (2) In *Lindsey v. Normet*, the Court upheld a state’s summary eviction procedure, by contending that “The Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in

⁴⁶ Sunstein, *Why does the American Constitution Lack Social and Economic Guarantees?*, at 20.

⁴⁷ 394 U.S. 618, 642 (1969).

⁴⁸ *Goldberg v. Kelly*, 397 U.S. 254, 261 (1970).

⁴⁹ 397 U.S. 471, 486 (1970). at 485.

that document any constitutional guarantee of access to dwellings of a particular quality”⁵⁰.

- (3) *San Antonio Independent School District v. Rodriguez*⁵¹, is what Sunstein defines as the death knell for social and economic rights in the United States. Here the Court upheld a constitutional challenge to the local financing of public schools even though local financing produces large intrastate disparities in per-pupil expenditures.⁵²

Things have not changed although the political climate in the US has changed several times. Clinton’s appointees - Ruth Bader Ginsburg and Stephen Breyer – have not been able to invert the trend opposed to social rights.

In the meantime the new political culture, I believe, has found support in the legal culture concerning rights. Not in the sense that the culture of rights spread in the 1970s reflected the conservative concerns for economic liberties as opposed to social rights. The culture of rights, as I define it, however, focused more on anti-utilitarian worries and anti-majoritarian concerns than on welfarism. Many conceptions fall under what Richards Pildes has defined the “immunities view” of rights, whereby rights emanate from some conception of the self; rights demarcate spheres of belief and conduct insulated from majoritarian preferences to enable fundamental attributes of that self to develop. Dworkin is one example of this anti-utilitarian conception which is wide embraced among political philosophers of rights-oriented liberalism both friends and critics⁵³.

⁵⁰ 405 U.S. 56, 63-64 (1972), at 74.

⁵¹ 411 U.S. 1,54-55(1973).

⁵² *Ibidem* at 37-38.

⁵³ Richard Pildes, *Dworkin's two conceptions of rights*, 29 J. Legal Stud. 309 2000, 311.

“A right against the Government must be a right to do something even when the majority thinks it would be wrong to do it, and even when the majority would be worse off for having it done”⁵⁴

is the slogan which become popular in the 80s of last century. The debate on rights has from them mainly focused on that agenda: upon what conditions could a government’s interest prevail over a right?⁵⁵ Is there a counter-majoritarian difficulty?⁵⁶ Or, even more radically, can rights – conceived as immunities cause any serious harm?⁵⁷.

Discussion on social rights slightly disappeared.

5. The contemporary Court: Obama health care reform and immigration law

Robin West signals that the trend of the Supreme Court of the last two decades is even more attached to a certain idea of rights than the past.

If anything, U.S. constitutional rights in the age of Obama are more overtly Lochnerian,” more economically regressive,” more aggressively colorblind,” more insulating of the private sphere and of intimate violence,” and, particularly when coupled with new technologies, more alienating⁵⁸.

⁵⁴ Dworkin, *Taking Rights Seriously*, at 194.

⁵⁵ Richards Fallon, Individual Rights and the Power of the Government *Georgia Law Review* 27:343, 1993.

⁵⁶ Jeremy Waldron, *The Dignity of Legislation*, Cambridge, Cambridge University Press, 1999.

⁵⁷ Patricia Smithn (eds.), *Feminist Jurisprudence*, New York, Oxford University Press, 1993.

⁵⁸ Robin West, *Tragic Rights: The Rights Critique in the Age of Obama*. 53 Wm. & Mary L. Rev. 713 2011-2012 at 722.

West cites several cases to support her claim. First, *Citizens United v. Federal Election Commission*, 558 U.S. 50 (2010) where the Court held that the First Amendment prohibited the government from restricting independent political expenditures by corporations and unions. In a 5–4 decision, the Court held that portions of BCRA §203 violated the First Amendment. Second, *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 551 U.S. 701, 733–35, 748 (2007), where the Court struck down student assignment plans that employed race as a factor in the assignment of students to oversubscribed schools and stating that “[the way to stop discrimination on the basis of race is to stop discriminating on the basis of race”. Third, *Castle Rock v. Gonzales*, 545 U.S. 748, 766–68 (2005) finding no due process interest in the enforcement by police of a restraining order against an estranged husband. As regards the right to bear arms, West claims, *McDonald v. Chicago*, in the footsteps of *District of Columbia v. Heller*, quite directly empowers individuals to kill.

“The newly minted right created by the Supreme Court in those two cases grants a citizen the right to not only purchase and own a handgun but also the fundamental or “inherent” right to use it, rather than retreat, in self-defense or in defense of his family members, at least in his home, and perhaps outside his home as well.”⁵⁹

While the *immunities view* seems to have prevailed, what have social rights become?

Before his election, Obama expressed the wish to appoint empathetic Justices on the Court. Here his words:

And we need somebody who’s got the heart—the empathy—to recognize what it’s like to be a young teenage mom. The empathy to understand

⁵⁹ See *McDonald v. Chicago*, 130 S. Ct. 3020, 3050 (2010); *District of Columbia v. Heller*, 554 U.S. 570, 635 (2008). West, *Tragic Rights*, at 728.

what it's like to be poor or African-American or gay or disabled or old—and that's the criteria by which I'll be selecting my judges"⁶⁰.

These and other remarks on the empathetic justice spread a heated debate which had the effect to make social rights resurrect both in the arguments of their advocates⁶¹ and detractors⁶².

Have the two appointees – Elena Kagan and Sonia Sotomayor – fulfilled the promises of a Court more concerned with social welfare? While it is still early to make a balance, I will cite some examples which seem to point towards a tepid resurgence of social concerns (more than social rights).

The first is *Arizona v. United States*, 567 U.S. (2012), involving Arizona's Support Our Law Enforcement and Safe Neighborhoods Act (SB). At issue is whether the law usurps the federal government's authority to regulate immigration laws and enforcement. The Court ruled that sections 3, 5(C), and 6 of S. B. 1070 are preempted by federal law. On April 23, 2010, Arizona Governor Jan Brewer signed into law SB 1070. The act made it a state misdemeanor crime for an illegal immigrant to be in Arizona without carrying registration documents required by federal law, authorizes state and local law enforcement of federal immigration laws, and cracks down on those sheltering, hiring and transporting illegal immigrants. The State of Arizona defended its authority to concurrently enforce federal immigration laws, especially in light of the selective and even lack of enforcement of those laws by the Obama administration. In its brief, joined by several other States, it was claimed that Under the current situation, the States have

⁶⁰ *Obama campaign speech to Planned Parenthood*, July 2007.

⁶¹ Bandes, Susan 2009. Empathetic Judges and the Rule of Law. *Cardozo Law Review De Novo*, 133.

⁶² Steven Calabresi, S. 2008 *Obama 'Redistribution' Constitution*, Wall Street Journal, Oct. 28.

lost control over their borders and are left to guess at the reality of the law⁶³. While the bill's passage immediately sparked concerns over potential civil rights violations and over encouraging racial profiling, the United States Justice Department filed a suit before the US District Court of the District of Arizona, challenging the BS as usurping the federal government's authority to regulate immigration laws and enforcement. The plaintiffs also referenced the notion of federal preemption and stated that, "The Constitution and the federal immigration laws do not permit the development of a patchwork of state and local immigration policies throughout the country". The case arrived before the Supreme Court and Justice Kennedy delivered the majority opinion where the Court struck down three of the four provisions of S.B. 1070. The Court ruled that Sections 3, 5(C), and 6 are preempted by federal law. The three provisions struck down: required legal immigrants to carry registration documents at all times; allowed state police to arrest any individual for suspicion of being an illegal immigrant; and made it a crime for an illegal immigrant to search for a job (or to hold one) in the state. Although all justices agreed to uphold the provision of the law allowing Arizona state police to investigate the immigration status of an individual stopped, detained, or arrested if there is reasonable suspicion that individual is in the country illegally, they specified that state police may not detain the individual for a prolonged amount of time for not carrying immigration documents; and that cases of racial profiling are allowed to proceed through the courts, if such cases happen to arise later on.

Justice Kennedy argued in favor of the Federal Government pre-emption rule also by stressing the importance of immigration for the US.

⁶³ States' July 14 Amici http://www.michigan.gov/ag/0,1607,7-164-46849_47203-240761--,00.html

Immigration policy shapes the destiny of the Nation. On May 24, 2012, at one of this Nation's most distinguished museums of history, a dozen immigrants stood before the tattered flag that inspired Francis Scott Key to write the National Anthem. There they took the oath to become American citizens. The Smithsonian, News Release, Smithsonian Citizenship Ceremony Welcomes a Dozen New Americans (May 24, 2012), online at <http://newsdesk.si.edu/releases>. These naturalization ceremonies bring together men and women of different origins who now share a common destiny. They swear a common oath to renounce fidelity to foreign princes, to defend the Constitution, and to bear arms on behalf of the country when required by law. 8 CFR §337.1(a) (2012). The history of the United States is in part made of the stories, talents, and lasting contributions of those who crossed oceans and deserts to come here. The National Government has significant power to regulate immigration. With power comes responsibility, and the sound exercise of national power over immigration depends on the Nation's meeting its responsibility to base its laws on a political will informed by searching, thoughtful, rational civic discourse. Arizona may have understandable frustrations with the problems caused by illegal immigration while that process continues, but the State may not pursue policies that undermine federal law⁶⁴.

The second case concerns the highly discussed Obama's health care reform. In 2010, Congress enacted the Patient Protection and Affordable Care Act in order to increase the number of Americans covered by health insurance and decrease the cost of health care. One key provision is the individual mandate, which requires most Americans to maintain "minimum essential" health insurance coverage. 26 U. S. C. §5000A. For individuals who are not exempt, and who do not receive health insurance through an employer or government program, the means of satisfying the requirement is to purchase insurance from a private company. Beginning in 2014, those who do not comply with the mandate must make a "[s]hared responsibility payment" to the Federal Government. §5000A(b) (1). The Act provides that this "penalty" will be paid to the Internal Revenue Service with an individual's taxes, and "shall be assessed

⁶⁴ *Arizona v. United States*, 567 U.S. ____ (2012) at 25.

and collected in the same manner” as tax penalties. §§5000A(c), (g)(1).

Another key provision of the Act is the Medicaid expansion. The current Medicaid program offers federal funding to States to assist pregnant women, children, needy families, the blind, the elderly, and the disabled in obtaining medical care. 42 U. S. C. §1396d(a). The Affordable Care Act expands the scope of the Medicaid program and increases the number of individuals the States must cover. For example, the Act requires state programs to provide Medicaid coverage by 2014 to adults with incomes up to 133 percent of the federal poverty level, whereas many States now cover adults with children only if their income is considerably lower, and do not cover childless adults at all. §1396a(a)(10)(A)(i) (VIII). The Act increases federal funding to cover the States’ costs in expanding Medicaid coverage. §1396d(y)(1). But if a State does not comply with the Act’s new coverage requirements, it may lose not only the federal funding for those requirements, but all of its federal Medicaid funds. §1396c.

Justice Roberts delivered the opinion of the Court. The majority substantially left the first part of Obama’s reform unchanged by alleging that the government mandate may be upheld as within Congress’s enumerated power to “lay and collect Taxes.” Art. I, §8, cl.1. The majority explained that while the most immediate reading of the statute is that individuals are compelled to purchase health insurance, otherwise are subject to a penalty, there might by a different reading of the reforms which may save its constitutionality. “Under the mandate, if an individual does not maintain health insurance, the only consequence is that he must make an additional payment to the IRS when he pays his taxes.” See §5000A(b). That, according to the Government, means the mandate can be regarded as establishing a condition—not owning health insurance—that triggers a tax—the required payment to the IRS. Under that theory, the mandate is not a legal command to buy insurance. Rather, it

makes going without insurance just another thing the Government taxes, like buying gasoline or earning income. And if the mandate is in effect just a tax hike on certain taxpayers who do not have health insurance, it may be within Congress's constitutional power to tax. The exaction the Affordable Care Act imposes on those without health insurance looks like a tax in many respects. The "[s]hared responsibility payment," as the statute entitles it, is paid into the Treasury by "tax-payer[s]" when they file their tax returns. 26 U. S. C. §5000A(b). It does not apply to individuals who do not pay federal income taxes because their household income is less than the filing threshold in the Internal Revenue Code. §5000A(e)(2). For taxpayers who do owe the payment, its amount is determined by such familiar factors as taxable income, number of dependents, and joint filing status. §§5000A(b)(3), (c)(2), (c)(4). The requirement to pay is found in the Internal Revenue Code and enforced by the IRS, which—as we previously explained—must assess and collect it "in the same manner as taxes." *Supra*, at 13–14. This process yields the essential feature of any tax: it produces at least some revenue for the Government. *United States v. Kahriger*, 345 U. S. 22, 28, n. 4 (1953). Indeed, the payment is expected to raise about \$4 billion per year by 2017.

As regards Medicaid's expansion, the Court however held differently. The Medicaid provisions of the Affordable Care Act, in contrast, require States to expand their Medicaid programs by 2014 to cover all individuals under the age of 65 with incomes below 133 percent of the federal poverty line. §1396a(a)(10)(A)(i)(VIII). The Act also establishes a new "[e]ssential health benefits" package, which States must provide to all new Medicaid recipients—a level sufficient to satisfy a recipient's obligations under the individual mandate. §§1396a(k)(1), 1396u–7(b)(5), 18022(b). The Affordable Care Act provides that the Federal Government will pay 100 percent of the costs of covering these newly eligible individuals through 2016. §1396d(y)(1). In the following years, the federal payment

level gradually de-creases, to a minimum of 90 percent. Where the States do not comply with the expansion's provision they will lose all Medicaid funds. The States argue that the Medicaid expansion is far from the typical case. They object that Congress has "crossed the line distinguishing encouragement from coercion," New York, *supra*, at 175, in the way it has structured the funding: Instead of simply refusing to grant the new funds to States that will not accept the new conditions, Congress has also threatened to withhold those States' existing Medicaid funds. The Court agrees holding that the financial "inducement" Congress has chosen is much more than "relatively mild encouragement"—it is a gun to the head. Section 1396c of the Medicaid Act provides that if a State's Medicaid plan does not comply with the Act's requirements, the Secretary of Health and Human Services may declare that "further payments will not be made to the State." 42 U. S. C. §1396c. A State that opts out of the Affordable Care Act's expansion in health care coverage thus stands to lose not merely "a relatively small percentage" of its existing Medicaid funding, but all of it. For this reason the Court found the Medicaid expansion clause unconstitutional.

6. What future?

It is difficult to make prediction on the turn that the Supreme Court will take. Following Sunstein, we can accept that law and constitutional law in particular are strictly dependent on politics but that single Justices on the Court may not change the course of a country if they are not supported by a change in the legal culture. Such a change is still far to be seen. Among constitutional theorists still today the main preoccupations – such as liberties in the age of terrorism in a digital world – are still tied to the *immunities view* of rights. In the meantime, both the economic crisis and a different political course may pressure for a renewed debate on social rights, although such a turn is still far to be accomplished.

