Fall 2008

The Unaffordable Cost of Not Having Positive Rights, A United States Perspective

Malla Pollack

Available at: https://works.bepress.com/malla_pollack/41/
THE UNAFFORDABLE COST OF NOT HAVING POSITIVE RIGHTS: A UNITED STATES PERSPECTIVE

Malla Pollack

I. INTRODUCTION

Despite the high value of advanced economic theory and the enviable wealth of the United States of America, developing countries should be leery of making decisions based primarily on either economic theory or the example of the United States—including the decision not to provide positive rights. My argument, however, is limited to undercutting these two attacks on positive rights. The possible existence of better paths to utopia is beyond both this article and my expertise.1

II. DE-PRIORITIZING ECONOMIC THEORY

I am not an economist. No, do not stop reading yet. This article is worth reading because I am not an economist. Just as business lawyers need to listen to businessmen or risk confusing legal means with business goals, economic specialists need to listen to humanists or risk confusing economic theory with real

life. Economics is about means; each individual person is an independent end. “Efficiency” in economic theory is about total accumulation of surplus, not about that surplus’ distribution. Humanists refuse to accept accumulation as an end in itself; they have this nagging problem with justifying distribution. In other words, a country should be valued based on how its residents live; national policy should aim for a strong economy only because (and to the extent that) a strong economy leads to persons being more satisfied with their lives. Empirical studies confirm that life satisfaction is tied to social relationships.

Many scholars warn of the possible economic danger to developing countries of burdening businesses with human rights. This fear is legitimate. Reacting solely to this fear, however, may lead to even worse outcomes.

Assume two countries, each with a large population below the poverty level and a dearth of capital. If the current wealth of either country is evenly divided on a per capita basis, no one has enough to eat; clearly, more wealth is needed. Both countries

2. See, e.g., Pope John Paul II, Encyclical Letter, Centesimus Annus: On the Hundredth Anniversary of Rerum Novarum, Ch. VI, § 57 (1991) (emphasizing Church’s continuous preaching of the “preferential option for the poor”); ROBERT D. COOTER, THE STRATEGIC CONSTITUTION 36, 247, 251-52 (2000) (describing “welfare economics” as valuing a dollar available to a poor person more than one available to a rich person, but disagreeing with this approach); JOHN RAWLS, POLITICAL LIBERALISM 6-7 (1993) (emphasizing his continued support of the “difference principle”); Universal Declaration of Human Rights, G.A. Res. 217A, at 71, art. 25, cl. 1, U.N. GAOR, 3d sess., 1st plen. mtg., U.N. Doc. A/180 (Dec. 12, 1948) (“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.”); BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY 4 (1999) (suggesting that “[a]s a citizen of the United States, each American [should be] entitled to a stake in his country: a one-time grant of eighty thousand dollars as he reaches early adulthood.”).


4. See, e.g., DIREITO, ORÇAMENTO ‘E RESERVA DO POSSÍVEL’ (Luciano Benetti Timm & Ingo Sarlet eds., 2008). A Portuguese version of this article is a contrarian chapter in Professor Timm’s collection.
wish to attract foreign investors and corporations for the purpose of obtaining better lives for their citizens.\textsuperscript{5} Host Country One recognizes that foreign investment and trade are not goals in themselves. Therefore, Host Country One enacts legal rules to ensure that entering businesses pass on profits to the citizens of Host Country One. Property rights are recognized, but so is the social function of property.\textsuperscript{6} Similarly, courts are ordered to consider contract disputes in light of the social function of contracts.\textsuperscript{7} Host Country Two agrees that trade is not an independent goal, but recognizes that capital flows towards the highest possible return. Host Country Two, therefore, places no “extraneous” human rights limitations on would-be investors. It even gives generous tax incentives to foreign firms wishing to build factories. Outside investors choose Host Country Two over Host Country One. They build factories, hire local workers, and export goods. As more work is available to residents of Host Country Two, wages rise. Country Two wins, but perhaps only in the short run.\textsuperscript{8}

\textsuperscript{5}Similar problems arise in the more complex situation where local capital exists but is not invested locally.

\textsuperscript{6} See CONSTITUIÇÃO FEDERAL [C.F.][Constitution] art. 5, ¶ 22 (Braz.) (“the right of property is guaranteed”); id. at art. 5, ¶ 23 (“property shall comply with its social function”); id. at art. 173, § 1, ¶ 1 (amended 1998) (“The law shall establish the legal regime at public companies, mixed-capital companies and their subsidiaries that engage in economic activities of production or marketing of goods or services, dealing with: (I) their social functions and the forms of supervision by the State and society. . .”); see generally GREGORY S. ALEXANDER, THE GLOBAL DEBATE OVER CONSTITUTIONAL PROPERTY (2007) (arguing for adoption of the German model of same doctrine).

\textsuperscript{7} “The freedom to contract shall be exercised by virtue, and within the limits, of the social function of the contract.” CÓDIGO CIVIL BILÍNGUE [C.C.] § 421 (Braz.)

\textsuperscript{8} Positive spillovers from foreign direct investment may have occurred, but such spillovers are not automatic. See Simona-Gabriela Serbu, FDI Role in Promoting the Economic Growth—A Problem Still Ambiguous (Oct. 2006) (unpublished paper) available at http://ssrn.com/abstract=962356 (demonstrating that empirical evidence does not support the common claim that foreign direct investment automatically promotes economic growth); Klaus E. Meyer & Evis Sinani, Spillovers from Foreign Direct Investment: A Meta Analysis (Univ. of Bath – Sch. of Mgmt. & Copenhagen Bus. Sch. – CEES, 2005) available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=899525 (reporting that empirical studies examining FDI productivity spillovers to local firms have not provided conclusive results). Questions have also been raised
After a period of time, investors recognize that they could earn an even greater rate of return if they abandon their factories in Host Country Two and build new ones in less developed Host Country Three, so they move on. This scenario is merely business as usual. The United States “rust belt” is a similar phenomenon. Steel manufacturers abandoned functional plants in unionized states near the Great Lakes and built more modern plants in states with non-union labor. They even blocked acquisition of the abandoned plants by organizations of their former workers (for fear that such co-operatives might obtain a competitive advantage from government subsidies). The firms rationally ignored various externalities: the massive losses born by their employees, who now had houses located out of practical reach of employment; the local merchants, who now had stores located where the customers had no income to spend; and the local government, which now had an almost worthless tax base to continue funding the schools, hospitals, and other services it had developed to support the population brought to town by the now-closed plants.9

about the need to manage trade openness for local improvement. See, e.g., Robert E. Baldwin, Openness and Growth: What’s the Empirical Relationship?, (Nat’l Bureau of Econ. Research, Working Paper No. 9578, 2003) (concluding that local economic growth is improved when lower trade barriers are combined with a “stable and non-discriminatory exchange-rate system, prudent monetary and fiscal policies, and corruption-free administration of economic policies ....”); Prabirjit Sarkar, Trade Openness and Growth: Is There Any Link? (MPRA, Paper No. 4997, 2007) available at http://mpra.ub.uni-muenchen.de/4997/ (reporting that empirical studies show that trade openness is not directly related to economic improvement in most least developed countries). Cf. Santanu Chatterjee, Paola Giuliano & Ilker Kaya, Where Has All the Money Gone? Foreign Aid and the Quest for Growth (Inst. for the Study of Labor, Discussion Paper No. 2858, 2007) (reporting that empirical studies find no systematic correlation between foreign aid and economic growth). Baldwin, supra, among other proponents of “free trade,” often ignore the example of mainland China, which has obtained wonder-growth without eliminating corruption, decontrolling its currency exchange rate, or fully opening itself to foreign firms. See, e.g., Jan Svejnar, China in Light of the Performance of Central and East European Economies, (Institute for the Study of Labor, Discussion Paper No. 2791, 2007) (discussing China’s stunning economic growth obtained without incurring the massive social instability experienced in other countries).

Efficient businesses increase their own profit. Some believe that business expansion automatically radiates benefits to society in general (usually called the “trickle down” theory). However, empirical evidence fails to support this claim, as discussed below.

If positive externalities are not the automatic consequence of business profit, helping the local poor requires intentionally diverting some business-generated surplus into non-business goals. In theory, however, such diversions are dangerous. Since capital flows toward maximum profit, it will flow away from spending money on nonessentials, such as higher wages. Any humanitarian management willing to earn less will be forced out of business by competitors able to offer better rates of return to investors. Any tapping of corporate resources for local goals causes business flight to other jurisdictions. Absent an international floor, capital will flow to the least expensive jurisdiction.

This economic argument proves too much. It leads inevitably to the conclusion that a country can never obtain local benefit from business unless the persons investing capital are local persons (in which case, the benefit to the poorest will rest solely on the philanthropy of the local capitalists). History does not seem to support this conclusion any more robustly than it supports Malthus’s prediction of never-ending human misery.

As Copernicus kept pointing out to his critics, facts should

10. “The ideology of American business seems to be that prosperity is defined as money, and as economic station, but not as the kind of society in which one would want to live. This tends to be regarded as a settled issue.” Bruce Barry & Jason Stansbury, Corporatism and Inequality: The Race to the Bottom (Line), in RACE AND WEALTH DISPARITIES 41-56, 54 (Beverly Moran ed., 2008).


12. See AN ESSAY ON THE PRINCIPLE OF POPULATION, AS IT AFFECTS THE FUTURE IMPROVEMENT OF SOCIETY 14 (1st ed. London, J. Johnson 1798) (“Population, when unchecked, increases in a geometrical ratio. Subsistence increases only in an arithmetical ratio . . . . This implies a strong and constantly operating check on population from the difficulty of subsistence. This difficulty must fall some where; and must necessarily be severely felt by a large portion of mankind.”).
trump human-made models. Reality is not neat. Since observers generally see only what they look for (e.g. by setting up empirical experiments taking account of variables perceived as important), theoretical predictions are commonly blind-sided by occurrences. Economists should have no problem admitting this; they are the ones who keep pointing out that well-intentioned statutes often have counter-productive outcomes, such as minimum wage statutes depressing employment of the least skilled.

The economist’s response to the humanist is to take the earlier track: helping businesses make money increases the size of the pie available for distribution. If the pie is bigger, benefits will trickle down to all. Not only is intentionally diverting business’ profits to social ends counter productive, it is unnecessary. In United States politics, this position characterizes itself as compassionate conservatism.

Benefits, however, have an odd habit of not trickling down.


14. See David Neumark & William Wascher, Minimum Wages and Employment (Inst. for the Study of Labor, Bonn, Germany, Discussion Paper No. 2570, 2007) (reviewing complex literature on effects of minimum wage statutes which moved from a consensus that such statutes lowered employment for the least skilled, to a revisionist claim in the 1990s that such statues were pro-employment, to a recognition of the complexity of the models needed to test either hypothesis).


16. “The contrast between the strong foreign trade expansion on one hand, and industrial output and employment stagnation on the other, implies the absence of trickle down effects [from the lowering of barriers to international trade in the Philippines]. Considering the fact that these policy reforms have been pursued for quite a while, the lack of trickle down effects suggests a high degree of duality between the local and foreign sectors.” Caesar B. Cororaton,
If the pie is too small, the poor will go hungry; fixing hunger, however, takes more than enlarging the pie. A leading economist contends:

The influential idea of the last 30 years . . . that high investment in public social services and social security deters growth, and that economic growth alone will automatically lead to a reduction in poverty, has not attracted convincing supporting research evidence. There is more support for the alternative idea, that high public social expenditure has positive effects on growth. For example one research team completed an analysis of economic and social data accumulated from panel data over 10 years for the United States, Germany and the Netherlands, representing the Neo-Liberal, Corporatist and Social Democratic (including Nordic) welfare regimes that came to be separately identified by social scientists in the 20th century. The welfare regimes of the three countries were compared in terms of their success in promoting efficiency (economic growth and prosperity), reducing poverty, and promoting equality, integration, stability and autonomy. The US did not turn out to be more efficient than the other two. Overall, the statistical data collected over time suggested that on both economic and social criteria the Social Democratic regime had advantages over the Corporatist, and both had advantages over the Neo-Liberal welfare regimes. Altogether, there has been a large range of research studies refuting the argument that social security has had a negative impact on economic development.\(^\text{17}\)

The principal anti-poverty strategy for developing countries advised by the North will have to be changed . . . . The dominant Washington consensus\(^\text{18}\) has been to argue for a


reduction in the size of the state—reducing public expenditure, extending private ownership and management and deregulating rules about business, trade and labour conditions.\textsuperscript{19}

Western economists argued that social security, except in the form of safety nets or means-tested selective measures for the

\begin{flushright}

Economic reforms in developing countries can create opportunities for poor people. But only if the conditions are in place for them to take advantage of those opportunities will absolute poverty fall rapidly. Given initial inequalities in income and nonincome dimensions of welfare, economic reforms can readily by-pass the poor. The conditions for pro-poor growth are this closely tied to reducing the disparities in access to human and physical capital, and sometimes also to differences in returns to assets, that create income inequality and probably also inhibit overall growth prospects.

extreme poor, was neither affordable in very poor countries nor desirable. Social security in any extensive form, many economists argued, was an albatross. As we have seen, this flies in the face of current as well as historical practice in the OECD countries — including, it must be emphasized, the United States. But many of the policies recommended for developing countries in the last 30 years are becoming increasingly doubtful, bringing about lower rates of poverty and enhanced social, political, and economic stability. “Affordability seems to be the wrong criterion in the 21st century when set against both the current developments in low-income and middle-income countries, and the history of the high-income countries.”

The legitimacy of the Washington Consensus has also been undercut by the economic experts of its leading proponent, the United States. In July 2008, during the aftermath of Bear Stearns’ near collapse and the continuing weakness of the housing market, Ben S. Bernanke, Chairman of the Board of Governors of the Federal Reserve System, publicly supported greater government intervention in credit markets, even suggesting new legislation. He admitted the failure of “market

20. Townsend, supra note 17, at 37 (emphasis in original). This is not the only policy area in which the United States insists that, allegedly in their own enlightened self-interest, developing countries should not follow the example of United States’ policy while it was developing. For example, the early United States was a notorious pirate country in intellectual property matters, but now preaches the alleged universal virtue of high protection. See Peter K. Yu, The Copyright Divide, 25 CARDOZO L. REV. 331, 353 (2003) (describing United States’ history as a pirate nation). Similarly, while preaching free trade, the developed world insists on providing government support to its own local agricultural businesses, despite the devastating effects on world hunger. See, e.g., Willem Van Genugten, Linking the Power of Economics to the Realization of Human Rights: The WTO as a Special Case, in HUMAN RIGHTS AND DEVELOPMENT: LAW, POLICY AND GOVERNANCE 201, 214 (C. Raj Kumar & D.K. Srivastava eds., 2006) (tying global hunger to western agricultural subsidies); Cella W. Dugger, Even as Africa Hungers, Policy Slows Delivery of U.S. Food Aid, N.Y. TIMES, Apr. 7, 2007 at A1. (“[T]he law in the United States requires that virtually all its donated food be grown in America and shipped at great expense across oceans, mostly on vessels that fly American flags and employ American crews . . . .” Further, “[a]gribusiness and shipping groups vigorously oppose” proposals to buy food locally, arguing that cash might be stolen and that American food is of higher quality.)
discipline.” By the end of September 2008, both Bernanke and the Secretary of the Treasury, Henry Paulson, were begging Congress for a $700 billion dollar government intervention in the credit markets, predicting the second great depression as the inevitable outcome of leaving the markets free.

Furthermore, empirical evidence demonstrates that social welfare spending can significantly decrease socially costly behavior. For example, during the United States’ Great Depression, “a 10 percent increase in per capita relief spending lowered crime rates by roughly 5.6 to 10 percent at the margin.”

A. Tying Humanist Goals To Contract Suits

In sum, human-regarding governments must balance surplus-enhancing and surplus-distributing government policies. Should this balance include requiring contract disputes to be adjudicated in light of “the social function of contracts”? As with most legal questions, the answer depends on the fact situations triggering the standard suggested. If the social function of contract means that in each and every contract dispute the less wealthy party wins, why would anyone (foreign or resident) sign a contract with a poorer person? A contract becomes a gift.

A slightly narrower construction of the social function of contract


contracts would tie refusal to enforce to an unexpectedly large change in market values. Contracts allocate risks: sellers take the risk that prices will rise more than anticipated between execution and performance, and buyers take the risk that prices may fall. A court might enforce contracts where the richer person greatly miscalculated risk, but not those where the poorer person similarly miscalculated. While less drastic than the first suggestion, this rule also systematically undercuts the possibility of profit. Even if a business is willing to limit its own profit in order to help create a better society, it must be able to make large profits on occasion or it will not be able to balance out unexpected loses (when the market swings against it and the court insists on enforcing the contract). Both these possible rules seem self-defeating, like New York City’s unfortunate experience with rent control.  

However, the United States’ contract doctrines of unconscionability and public policy suggest a more useful definition for the social function of contracts. First let me explain these common law doctrines.

According to the Restatement Second of Contracts,

If a contract or term thereof is unconscionable at the time the contract is made a court may refuse to enforce the contract, or may enforce the remainder of the contract without the unconscionable term, or may so limit the application of any unconscionable term as to avoid any unconscionable result.

Only a small subset of contracts are unconscionable, those

24. See Richard A. Epstein, Rent Control and the Theory of Efficient Regulation, 54 Brook. L. Rev. 741, 768 (1988) (arguing that rent control is economically inefficient and results in harm to both potential landlords and potential tenants, mentioning the example of “the 1942 New York law, [which] like other older statutes, was so rigid and oppressive that it decimated the housing stock of New York for a generation by forcing the abandonment of many units.”).

25. Similarly, United States common law property rights are inherently limited by the doctrine of nuisance, which limits a property owner from imposing externalities on others. See Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1029 (1992) (recognizing that “background principles of the State’s law of property and nuisance” are “inherent in the title itself” as restrictions on ownership rights).


81
“such as no man in his senses and not under delusion would make on the one hand, and as no honest and fair man would accept on the other.”

To limit bias and emotional responses, the judge (not a jury) makes the relevant factual and legal determinations. Relief is limited and rarely provided unless the deal is both substantively one-sided and reached through a flawed formation process. Generally, mere high price, lack of alternative suppliers, or disparity of bargaining power is insufficient. Unconscionability, furthermore, turns on conditions at the time of contract formation. Later changes in market conditions do not render a contract vulnerable to reformation under this doctrine.

The even narrower doctrine of public policy allows a court to refuse to enforce a contract if, for example, it is a bargain to perform an illegal or tortious action, such as murder or assault.

A few policies are well established, but very occasionally a court will extend the doctrine’s reach to block clearly anti-social deals so novel that the legislature has not had an opportunity to set policy by statute.

To a dedicated humanist, the problem with the United States’ public policy and unconscionability limits on contracts is their gross under-enforcement. Consider the following examples.

Large corporations decided they could earn more money by closing older plants in unionized locations and building modernized plants in non-union areas. Instead of announcing their intentions, they told the workers at existing plants that the facilities were unprofitable and might be closed. As hoped, the
workers were frightened into agreeing to below-contract wages to help the plants stay open. Management ran the plants in this fashion for some time, then simply abandoned the old plants and employees in favor of new plants and employees further south. The abandoned workers sued in contract and on the contract-related theory that the firms should be required to keep their promises to prevent injustice. The workers lost because they should have been sophisticated enough not to rely on managements' hopeful statements, judicially characterized as not clear enough to be "promises."  

Intent on raising her new-born child, an unmarried eighteen year old left the house of her unsympathetic parents with only twenty dollars in assets. She soon realized her inability to cope and spoke to a social worker at the Department of Public Welfare. After being told that adoptions were not final for six months, she signed a standard "Consent to Place Child for Adoption" form. About a month later, she asked the Department of Public Welfare to return the child. Both the department and the courts refused her request because the form expressly stated: "I do hereby voluntarily and unconditionally consent to the placement of my said child for adoption . . . ."; "I hereby surrender custody and relinquish all rights which I may have in the child to said agency. . . ."; "I hereby confer absolute and unrestricted power upon the said agency to consent to the adoption of the child without further notice to me . . . ." The

---

34. Abbington, 561 F. Supp at 1291.
35. See, e.g., Abbington, 561 F. Supp. 1290 (employer did not breach collective bargaining agreement nor memorandum of agreement); United Steelworkers of Am., Local No. 1330, 492 F. Supp. 1 (finding no basis for plaintiffs' claim that defendant breached a contract with them by taking action to close the subject plants); see also AMY KASTELY, CONTRACTING LAW 72-74, 306-07, 311-16 (4th ed. 2006) (providing background information to cited cases).
37. Id.
38. Id.
39. Id.
40. Id. at 1352.
court insisted that this document was unambiguous, despite some use of the future tense:

“I realize that as a result of this consent to place child for adoption, and by the eventual giving of consent by the said agency, the parent-child relationship between me and the child shall, upon entry of a decree for adoption, be completely terminated and that all the legal rights, privileges, duties, obligations, and other legal consequences of said relationship, shall cease to exist, under [statute].”

The unmarried teenager, “a high school graduate presumably of at least normal intelligence,” had responded in the affirmative when asked if she understood the form. The social worker had not purposely misrepresented. No public policy required a harried social worker to go through the form with the mother to make sure she understood the difference between placing her child with the agency (irrevocable) and the child being placed for adoption with a specific family (revocable for six months).

Two brothers jointly raised cattle for several years. One insisted on ending the relationship. The plaintiff had insufficient liquid assets to buy his brother’s share, so the land and cattle were to be auctioned. The plaintiff tried to arrange financing with the local bank. He received loan documents which required another local businessman to co-sign and which mentioned that under state law bank contracts to loan over $50,000 must be in writing and signed by the bank. The co-signer backed out at the last minute. The plaintiff spoke to the local bank manager (who had been handling his business for some years) who assured him orally that the bank was behind him; he could buy cattle at the auction because the bank would loan him the money. After the first day of the auction, the local bank manager again orally reassured him that the bank would make the loan; he could

41. Id. at 1352-53.
42. Id. at 1354.
43. Id.
45. Id.
46. Id.
continue to bid the next day. After the plaintiff spent $500,000 on cattle, the bank refused to make the loan. When the plaintiff sued, the court ruled for the bank. Even though courts are empowered to enforce promises which the promisor should have expected to be relied upon and which have been relied upon by the promisee to his detriment, the court refused to bypass the statutory requirement for a signed writing. According to the court, the cattle-buyer should have paid attention to the warning on the loan documents. The court made no mention of the greater sophistication of the bank manager or the long relationship between this bank and the would-be cattle-buyer.

Plaintiff Dosch was unable to afford health insurance, but not poor enough for state medical assistance. When he broke his hip, he went to Avera St. Luke Hospital, which “held itself out as a health ministry of the Benedictine and Presentation Sisters” providing “a quality, cost effective health ministry” which is “guided by gospel values of . . . hospitality and stewardship,” including “compassion . . . especially for the poor . . . .” Avera “received state and federal tax exemptions” as “a nonprofit charitable organization.” Before providing medical care, the hospital required Dosch “to sign an agreement to pay the [hospital’s] unspecified, undiscounted, pre-set charges.” The hospital did allow Dosch to pay the $30,000 bill at $200 per month, but charged such fees and interest that these payments were insufficient to reduce the debt’s principal. After going bankrupt, Dosch sued the hospital. He argued that the hospital’s billing practices were legally unacceptable in light of its self-description and tax exemptions, especially because patients with

47. Id. at 1107-08
48. Id.
50. Lettunich, 109 P.3d at 1109.
51. Id. at 1110.
52. Id. at 1108-11; see also Farmers Bank & Trust v. Willmott Hardwoods, Inc., 171 S.W.3d 4 (Ky. 2005) (ruling for bank despite its manager’s oral promise).
54. Id. at 196-97.
health insurance or government health assistance were routinely charged much less for identical services. The court dismissed his claim for failure to state a cause of action on which relief could be given.55

An automobile accident resulted in severe injury to Donald D. Martin’s leg. The doctors immediately concluded he would definitely lose use of his ankle but held out some hope that he might regain use of part of his upper leg after many months of treatment. One hundred and ninety-six days after the accident, the still useless limb was amputated. Martin was covered by a “Death or Dismemberment” insurance policy which pays substantial benefits when accidental injury results in “severance” of a leg above the ankle.56 Martin was denied benefits, however, because the limb was not “severed” within the contract-specified ninety days following the accident. The court upheld the time limit even as applied to such cases.57

In another case, after seventeen years of marriage, a couple had marital difficulties but were still living in the same home and working together in their small business. One day, husband asked wife to sign a marital property agreement which, in case of a divorce, apportioned him approximately 94% of their joint assets and waived any right to spousal support. He did not give her any information about the value of the assets but did tell her that he had spoken to an attorney about the document and she might want to see an attorney as well. Instead of finding her own attorney, the wife accompanied her husband the next morning to a notary public before whom both signed the agreement. The woman did not have highly marketable skills unrelated to the couple’s shared business; before marriage she had worked as a nurses’ aid.58 Nevertheless, the court refused to declare the property agreement unconscionable, ignoring the wife’s apparent long-term habit of deference to her husband and her possible perception, when asked to sign, that acquiescence

55. Id. at 199.
57. Id. at 826-28.
might preserve the marriage.\textsuperscript{59}

In many cases, arbitration agreements are enforced despite clauses barring class action suits (which allow more forcible litigation tactics and the use of more expensive, higher quality attorneys by plaintiffs whose claims, handled separately, are too small to do so). For example, one couple attempted to sue a finance firm, which had been assigned the second mortgage on their house. The court was unimpressed by the assertions that the couple had been rushed into signing a large pile of complex documents at the same time, and the court did not find problematic the couple's inability to bargain about terms. Moreover, the court was not bothered by the lack of parity in the ability to access the court system. The couple was required to arbitrate all possible claims. In contrast, the finance company retained the rights to both self-help and judicial process for foreclosure.\textsuperscript{60}

As these examples demonstrate, United States courts are loath to limit the almost-sacred freedom of contract merely to protect weaker or less sophisticated parties. Sometimes intentional lies or a principal's refusal to stand behind its agent's promises is insufficient to obtain relief. Most law and economics-minded contract scholars disapprove of even the limited judicial protection provided.\textsuperscript{61} I disagree.

\begin{footnotesize}
\begin{itemize}
\item[59.] Id. at 273.
\item[60.] Walther v. Sovereign Bank, 872 A.2d 735, 757-58 (Md. 2005) (listing many similar cases, including one from the United States Supreme Court).
\item[61.] Eric A. Posner, \textit{Contract Law in the Welfare State: A Defense of the Unconscionability Doctrine, Usury Laws, and Related Limitations on the Freedom to Contract}, 24 J. LEGAL STUD. 283, 284 (1995) (reporting consensus). But see F. H. Buckley, \textit{Just Exchange: A Theory of Contract} 144 (2005) (arguing that the refusal to enforce very one-sided contracts may be efficient for several reasons, including promoting the formation of contracts by discouraging the type of hard bargaining which tends to prevent contract formation); Richard A. Epstein, \textit{Unconscionability: A Critical Reappraisal}, 18 J.L. & ECON. 293 (1975) (arguing that unconscionability is efficiently used when the court sees strong indicia of fraud, duress, or undue influence but proof of such formation defect is too expensive to gather); Posner, supra, at 283 ("The provision of welfare in a free market produces perverse incentives to take excessive credit risks, which both drive up the cost of the welfare system and undermine its goal of poverty reduction."). The argument concludes that restrictive contract doctrines are appropriate means for deterring this socially costly behavior.
\end{itemize}
\end{footnotesize}
B. Self-Regulation Is Not Enough

Arguably, the most efficient regulation of big business would be self-regulation because it is well crafted. Self-regulation, however, only occurs in the presence of a credible threat of externally imposed limitations.62 Court attention to the “social function of contracts” could function as such a credible threat. Business thrives on predictability. Statutes subjecting businesses to regulation or taxation are more predictable than a court’s ability to ignore contract terms without advance warning whenever it feels the breaching party represents social equity.63 On the other hand, legislative regulation may be heavy-handed because it is generalized. The possibility of an unfavorable court judgment might be the minimal, credible threat needed to motivate businesses into just enough self-regulation to avoid egregious over-reaching.

Countries have an even more basic reason not to hastily jettison positive rights. While economic analysis is an important tool for predicting outcomes, other social sciences have valuable inputs.64 Most importantly, decision makers must never forget how little they know.65 Beyond the generalized problem of

62. See, e.g., Angela J. Campbell, Self-Regulation and the Media, 51 FED. COMM. L.J. 711, 758-59 (1999) (reporting this phenomenon as applied to media); Ellen D. Katz, Private Order and Public Institutions, 98 MICH. L. REV. 2481, 2490 (2000) (reporting phenomenon regarding commercial transactions). Because of its complexity and numerous permutations, this article does not discuss separately the possibility of controlling businesses through regulatory agencies. For purposes of this article, agency control is a subset of legislation.


64. See, e.g., Max H. Bazerman, Behavioral Decision Research, Legislation, and Society: Three Cases 2 (Harvard Business School Working Paper No. 07-049, 2007), available at http://ssrn.com/abstract=960089 (“While I clearly see an important role for economic logic in the policy-making process, I criticize economic theory when used at the exclusion of other social science knowledge. Indeed, my central goal is to provide evidence for the need for social sciences other than economics to be brought to the legal and policy-making domains.”).

65. The devastation of New Orleans by Hurricane Katrina, for example, was largely caused by the failure of the levee system’s designers to recognize
uncertainty, economic theory adopts several fundamental positions which *we know are incorrect*. First, it sets the wrong goal: maximization of the total economic pie. Second, it assumes “rational,” i.e., economically self-seeking behavior. We know, however, that humans tend to react negatively to unfair division of surpluses. We also know that humans work harder and cooperate more when they see themselves as valued by the institution in which they are embedded.

how little was known about tropical storms. See Robert R. M. Verchick, *Risk, Fairness, and the Geography of Disaster*, Issues in Legal Scholarship, Symposium on Catastrophic Risks: Prevention, Compensation, and Recovery, Art. 6, 5-6 (2007) (“In a nutshell, we didn’t adequately consider how much we didn’t know about a Gulf hurricane threat, how sparse our climate data were, and how thin our grasp of public risk. This was not because we did not know what we did not know. Instead, we did not see it. The obvious and inherent uncertainty built into our models was not drawn prominently enough onto our maps. Where cartographers of old once emphasized the limits of their knowledge by filling blank corners with flying beasts and colorful serpents, today’s conceptual mapmakers sketched only calm seas.”). See also Brief for the States of New York et al. as Amici Curiae Supporting Respondent at 3, *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.* 127 S. Ct. 2705 (2007) (No. 06-480) 2007 WL 621851 (“Untested economic hypotheses, whether promising or not, are no basis for overturning this Court’s longstanding precedent” in antitrust).

Sophisticated exponents of law and economics assert that their theory aims at maximizing “utility,” not “wealth.” See, e.g., *Cooter, supra* note 2, at 266. However, as long as “utility” is defined in terms of willingness to pay, the desires of those with greater economic resources trump, dampening the asserted distinction. See id. at 247. For basic attacks on money as the universal metric see *Elizabeth Anderson, Value in Ethics and Economics* (1993); *Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality* (1983).

See, e.g., *Cooter, supra* note 2, at 55, 220. Individuals “are both nicer and (when they are not treated fairly) more spiteful than the agents postulated by neoclassical [economic] theory.” See also e.g., Christine Jolls, Cass R. Sunstein & Richard Thaler, *A Behavioral Approach to Law and Economics*, 50 Stan. L. Rev. 1471, 1479 (1998).

See, e.g., *Cooter, supra* note 2, at 144 (“[A]s Frey argues, direct democracy in Switzerland increases the morale of citizens and improves their motivation to support government . . . . because they feel informed and empowered.”). “[R]esearch suggests that trust in the motives of authorities is the central factor underlying the willingness to obey legal rules; Trust speaks to the quality of the relationship between people and authorities—that is, whether or not people believe that authorities care about them.” Tom R. Tyler, *Public Mistrust of the Law: A Political Perspective*, 66 U. Cin. L. Rev. 847, 867 (1998). People’s willingness to cooperate with authorities is less related to how the authorities’ actions impacted their personal interests than to the perception of fair process. “Fair process” requires decision makers to both listen to public
To a humanist, governments exist to help people. Even entities that use people as mere means want their people-tools to feel appreciated. Appreciated people actively cooperate, thereby lowering oversight and enforcement costs. The worst case occurs when a sufficient number of the country’s inhabitants feel so deeply unappreciated—or worse—by the government that armed rebellion erupts. Businesses agree that civil wars are not efficient.

For these quite reasonable reasons, political decision makers without tightly focused, empirical evidence should choose the rule which signals a high regard for individual citizens. Not only do we know this is an effective means of stimulating socially desirable behavior, we should also recognize it as a worthy end in itself. If we err by calculating that pro-property actions will result in humanistic ends, we err completely; we neither obtain humanistic ends nor signal our prioritization of people over property. In situations of uncertainty, prioritizing people minimizes the possibility of the worst possible outcome. Prioritizing efficiency does not.

III. REFRAMING THE LESSONS OF UNITED STATES’ HISTORY

“To protect markets, a constitution can guarantee the rights of property and contract that keep markets free,” according to Robert Cooter’s brilliant economic analysis of constitutional input and to make decisions based on objective information rather than bias. Id. at 866-75. See also George W. Dent, Jr., Race, Trust, Altruism, and Reciprocity, 39 U. RICH. L. REV. 1001, 1002-12 (2005) (reviewing recent empirical work on human reciprocity, altruism, and trust).

69. “[A] prudent approach to poverty will surely include giving the propertyless enough food from the table to prevent them from falling into rage or despair.” STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES 190 (1999). “The last 35 years saw wide swings in the Philippines’ economic growth. Growth was highest during the period 1973-82 under the military regime of the Marcos administration, averaging 5.5 percent per year . . . . This was not sustained, however, as dissatisfaction among Filipinos with military rule mounted, which eventually led to a political uprising in the following period, 1983-85.” Cororaton, supra note 15, at 3.

70. Cf. COOTER, supra note 2, at 11-12, 60 (recommending democracy because of same “minimax” effect).
choices.\textsuperscript{71} Free markets, however, were not the motivation for writing property and contract rights into the United States Constitution.\textsuperscript{72} According to John Locke, “[t]he great and chief end . . . of Mens uniting into Commonwealths, and putting themselves under Government, is the Preservation of their Property” from the dangers inherent in the state of nature.\textsuperscript{73} However, “property” in Locke’s claim includes persons’ “Lives, Liberties and Estates.”\textsuperscript{74}

Property in both the narrow sense—privately controlled wealth—and the wide sense—rights and liberties—was important to the drafters of the United States Constitution. They disapproved of state attempts to protect debtors from creditors, but they also saw themselves as the political heirs of the English Whigs’ successful fight against the early Stuart kings’ claim of divine right. Locke wrote to refute Robert Filmer’s assertion that the king needed no one’s consent to tax because God had vested the monarch with permanent, preeminent ownership of all property in his kingdom.\textsuperscript{75} The House of Commons’ successful grab for power was possible only because Charles I was forced by urgent military expenses to recall Parliament. In English history, therefore, republican government is rooted in a struggle over the purse strings. As ably explained by Jennifer Nedelsky:

[T]he Federalists’ focus on protecting property from redistribution and, more broadly, from democratic redefinition, led to a misunderstanding of both the problems and the potential of democracy; and treating the protection of unequal

\textsuperscript{71} Cooter, \textit{supra} note 2, at 261.
\textsuperscript{72} U.S. Const. art. I, § 10, cl. 2 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts . . . .”); U.S. Const. amend. V (“[N]or shall private property be taken for public use without just compensation.”).
\textsuperscript{73} John Locke, \textit{Two Treatises of Government}, Second Treatise, Chapter IX, § 124 at 350-51 (Peter Laslett ed., 1988) (emphasis in original).
\textsuperscript{74} Id. at § 123 at 350 (emphasis in original).
property as the paradigm case of the problem of protecting individual rights in a democracy led to a misconception of the complex relation between democracy and individual autonomy, which is the true problem of constitutionalism. It was thus not property as such, but the effort to protect property and inequality from democratic revision, that has had distorting consequences.  

Perhaps the ratifying generation overlooked the problems with its focus because, compared to England and Europe, the population of the 1789 United States lived in a society without extreme disparities in private wealth, if one viewed slaves and Native Americans as outside the bounds of human society. Perhaps the desire to enrich themselves by forcing the native population to transfer its land and natural resources was the underlying motivation. United States mythology continues to hide the problem of wealth inequality by insisting that any individual can reach the top by sheer hard work and gumption. A July 2008 study reaffirmed the continuing disconnect between this mythology and the working poor’s view of their own present, past, and future.

The confusion of Locke’s narrow and broad definitions of “property” underlie both of the United States’ original sins: chattel slavery of an imported population and savage destruction of the native population. Both were undertaken in the name of efficient use of resources; white men would make the land more productive than the native hunter-gatherers. Free labor was

77. For example, this is the key lesson of Horatio Alger’s wildly successful dime novels. See generally Horatio Alger Resources, http://www.washburn.edu/sobu/broach/algerres.html (last visited Oct. 2, 2008).
78. See Michael A. Fletcher & Jon Cohen, Hovering Above Poverty, Grasping for Middle Class, WASH. POST, Aug. 3, 2008, at A1; Post-Kaiser-Harvard: Survey of Low-Wage Workers 6-9 (reporting inconsistent responses to questions 19 through 27; poll is attached to newspaper article as a pdf file). A majority of low wage American workers recognize that their economic situation has gotten worse since 2001, that specific improvements are becoming more difficult, yet still believe that in their lifetime they will obtain the “American Dream,” and that people who work hard are likely to become well-off. See Post-Kaiser-Harvard at 8.
79. Locke, supra note 73, at 293-94.
expensive and often transient. After accumulating a minimum stake, young white men moved west to obtain their own land from dispossessed natives. Therefore, the fertile land of the Southeast could only be efficiently exploited with slave labor; the two reinforced each other, and Native American land was seized to allow territorial expansion of slave-based agriculture. The price the United States has paid for these twin sins of avarice should warn all other countries from following its erroneous insistence on a constitution protecting only against state action, the so-called negative rights position.

Chattel slavery infected the United States Constitution from birth. The only property which increased its owner’s voice in


81. Negative rights, furthermore, have costs—both indirect and immediate budgetary ones. See, e.g., Holmes & Sunstein, supra note 69, at 29 (“[P]rotection of property rights is a government service that is delivered to those who currently own property, while being funded out of general revenues extracted from the public at large,” for example fire and police departments); see also id. at 44 (“All rights are costly because all rights presuppose taxpayer funding of effective supervisory machinery for monitoring and enforcement.”).

82. According to one of the most famous, and most currently reviled, Supreme Court opinions:

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

In the opinion of the court, the legislation and histories of the times, and the language used in the Declaration of Independence, show, that neither the class of persons who had been imported as slaves, nor their descendants, whether they had become free or not, were then acknowledged as a part of the people, nor intended to be included in the general words used in that memorable instrument.

It is difficult at this day to realize the state of public opinion in relation to that unfortunate race, which prevailed in the civilized and enlightened portions of the world at the time of the Declaration of
the government was slave property.\textsuperscript{83} Congress was expressly forbidden to end slave importation before 1808; this ban was protected even from constitutional amendment.\textsuperscript{84} Ignoring moral wounds, the United States paid for this overprotection of one group’s property with the Civil War.

What was the cost of the Civil War? Out of a population of approximately 34.3 million persons, about 3.8 million persons (11.1\%) were enrolled in one of the fighting armies. Twenty-five point one percent (25.1\%) of the soldiers became casualties.\textsuperscript{85} The war lasted forty-eight months, during which time an average of 3,846 were killed in action each month; the death toll equaled two percent (2\%) of the entire population.\textsuperscript{86} Direct spending for the war, including neither infrastructure damage nor pensions, was $5.2 billion (roughly equivalent to $44.4 billion in 1990

\textsuperscript{83} “Representatives [in the House of Representatives] . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers, which shall be determined by adding to the whole Number of free Persons, including those bound to Service for a Term of Years, and excluding Indians not taxed, three fifth of all other Persons.” U.S. CONST. art. I, § 2, cl. 2 (later changed by the Fourteenth Amendment).

\textsuperscript{84} U.S. CONST. art. I, § 9, cl. 1 (“The Migration or Importation of such Persons as any of the States now existing shall think proper to admit, shall not be prohibited by the Congress prior to the Year one thousand eight hundred and eight . . . .”); U.S. CONST. art. V (“Provided that no Amendment which . . . shall in any Manner affect the first . . . Clause[] in the Ninth Section of the first Article . . . .”).

\textsuperscript{85} Statistical Summary of American Major Wars, available at http://www.civilwarhome.com/warstats.htm (last visited Oct. 3, 2008), provided by the Civil War Center, one of the special collections of the Louisiana State University Library.

\textsuperscript{86} See David D. Haddock & Lynne Kiesling, The Black Death and Property Rights, 31 J. of LEGAL STUD. S545, S546 at n.3 (2002).
dollars) or almost $1,300 (1990 dollars) per capita.87 The best estimate of direct costs, encompassing “all war expenditures by both Union and Confederate governments (including state and local outlays), and the value of destroyed [non-slave] human and physical capital,” but excluding pensions, is over $6.6 billion (1860 dollars).88 Estimated indirect cost of the war is $14.7 billion (1860 dollars), not including any decrease in savings rates.89 If we could compare the surplus obtained by United States slave owners from not paying slaves to the loss born by the United States from the Civil War, I sincerely doubt that pre-1861 United States government respect for property rights in slaves was an efficient investment.90

Lack of positive rights in the United States is historically tied to slavery. Under the “state action” doctrine, rights listed in the United States Constitution are merely agreements that the government itself will not block individuals from certain actions, not pledges that the individual will be able to make any real-world use of such rights. The doctrine was first clearly announced in a Supreme Court decision gutting Congress’s post-Civil War attempt to protect newly freed slaves from their former owners: “It is State action of a particular character that is prohibited. Individual invasion of individual rights is not the subject-matter of the amendment.”91 Because of the state action doctrine, the state has no duty to take care of its citizens, not even “Poor Joshua” in the twentieth century.

87. Statistical Summary, supra note 85.
88. See Claudia D. Goldin & Frank D. Lewis, The Economic Cost of the American Civil War: Estimates and Implications, 35 J. ECON. HIST. 299, 303-09, 322 n.31 (1975) (viewed as of June 30, 1861, i.e. discounted to present value on that date).
89. See id. at 311-17 (including Reconstruction costs).
90. Perhaps Adam Smith’s invisible hand agreed with Abraham Lincoln that “if God wills that [the Civil War] continue until all the wealth piled by the bond-man’s two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as it was said three thousand years ago, so still it must be said ‘the judgements of the Lord, are true and righteous altogether.’” GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA 187 (1992) (quoting Lincoln’s speech dedicating the Gettysburg battlefield as a military cemetery).
Joshua DeShaney was placed in the custody of his father, Randy, after his parents’ divorce. Randy DeShaney’s second wife, when she moved out and filed for her own divorce, informed the Winnebago, Wisconsin County Department of Social Services (“DSS”) that Randy was beating Joshua. During the next twenty-six months, Joshua was hospitalized three times for injuries indicative of child abuse. DSS knew of these incidents, repeatedly visited the DeShaney home, and repeatedly discussed the problem with Randy. DSS, however, did not move Joshua out of his father’s home.

In March 1984, Randy DeShaney beat 4-year-old Joshua so severely that he fell into a life-threatening coma. Emergency brain surgery revealed a series of hemorrhages caused by traumatic injuries to the head inflicted over a long period of time. Joshua did not die, but he suffered brain damage so severe that he [was] expected to spend the rest of his life confined to an institution for the profoundly retarded. Randy DeShaney was subsequently tried and convicted of child abuse.92

Joshua’s mother sued DSS for violating Joshua’s civil rights. The United States Supreme Court, however, held that all recovery was barred because the government owed Joshua no protection from third parties:

The Due Process Clause of the Fourteenth Amendment provides that “[n]o State shall . . . deprive any person of life, liberty, or property, without due process of law.” Petitioners contend that the State deprived Joshua of his liberty interest in “free[dom] from . . . unjustified intrusions on personal security” . . . by failing to provide him with adequate protection against his father’s violence. The claim is one invoking the substantive rather than the procedural component of the Due Process Clause . . .

But nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its

citizens against invasion by private actors. The Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.

. . . [E]ven where [government] aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual. . . . “[The Constitution] does not confer an entitlement to such [governmental aid] as may be necessary to realize all the advantages of that freedom.” . . . 93

Similarly, the state has no duty to provide free public education; therefore, Texas may establish a public school funding scheme which ensures vastly unequal resources for rich and poor localities.94 The state may not punish political speech but is not required by the Constitution to intervene when an employer fires an employee after the local newspaper publishes the employee’s letter to the editor.95

Returning to the core problem which led to the Civil War—racial subordination—the modern Supreme Court has interpreted the state action doctrine in a manner which shelters the rebirth of racial segregation. Consider the time line: At the end of the Civil War, Congress made some attempts to “reconstruct” the southern states by forcing the inclusion of former slaves in government decision-making, government-funded services, and the economic market. Reconstruction was ended and largely reversed by the presidential election of 1876. The outcome of the election turned on contested results in several

93. Id. at 194-96 (internal citations and footnotes omitted).
94. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 2 (1973) (“The Texas system does not disadvantage any suspect class. It has not been shown to discriminate against any definable class of ‘poor’ people or to occasion discriminations depending on the relative wealth of the families in any district.”).
95. Except for a few protected classes and union-contract jobs, most United States workers are within the employment at-will doctrine, meaning that their employers may fire them at any time for any reason or for no reason at all. See, e.g., Katherine V.W. Stone, Revisiting the At-Will Employment Doctrine: Imposed Terms, Implied Terms, and the Normative World of the Workplace, 36 INDUS. L. J. 84 (2007) (explaining doctrine and reporting that some recent cases provided a modicum of protection to employees).
southern states. A bipartisan commission awarded the Presidency to Republican Rutherford B. Hayes, but the price was Hayes’ withdrawal of the remaining federal troops from the southern states. Southern states subsequently instituted statutes and local practices effectively disenfranchising African Americans. Daily life in the South became segregated in public spaces, schools, transportation facilities, and private businesses. The Supreme Court upheld almost all such practices.96

In 1953, Earl Warren became the Chief Justice of the United States. The Warren Court systematically pushed the United States Constitution in the direction of individual rights and actual integration. Perhaps its most famous case is the now-hallowed Brown v. Board of Education of Topeka,97 which held that racially segregated public schools were inherently unequal, regardless of other objective criteria. Over strong resistance, especially, but not solely, in the South, public schools moved toward racial integration. A few Warren Court holdings created isolated “positive rights” against the states; the states were required to provide indigent criminal defendants with government-paid attorneys and free trial transcripts for the purpose of appealing their convictions. Additionally, indigents could not be blocked from obtaining divorces.98 The state action doctrine was stretched to prevent court enforcement of covenants that racially restricted land sales.99

In 1969, Warren E. Burger replaced Earl Warren as Chief Justice. The Justices who had made up the Warren Court

---

96. Compare Plessy v. Ferguson, 163 U.S. 537 (1896) (approving state statutes requiring separate train accommodations for the races), with Strauder v. West Virginia, 100 U.S. 303 (1880) (holding that state may not totally bar African Americans from criminal juries; issue was raised by a convicted African American defendant).


gradually died or retired, ending with Thurgood Marshall in 1991. From 1986 through 2005, the late Chief Justice William H. Rehnquist presided over a fundamentally different Supreme Court—a court dedicated to state’s’ rights rather than individuals’ rights. While the holdings of old pro-individual rights cases generally remained (in narrowly read versions), their logic was no longer accepted.\textsuperscript{100}

The change in Justices strongly impacted public school segregation. In 1954, the Supreme Court held racially segregated public schools inherently unequal, hence violating the Equal Protection Clause of the Fourteenth Amendment. In 1955, the Court ordered the nation’s public schools to desegregate “with all deliberate speed.”\textsuperscript{101} Some integration occurred, but in the 1970s, the Court distinguished unconstitutional, legally mandated (“de jure”) segregation from acceptable separation of races caused by individual decisions (“de facto segregation”); the Court refused to allow remedies for de jure segregation to cross jurisdictional lines into communities only segregated by private choice.\textsuperscript{102} In 1988, not quite 45% of African American public school students attended majority-white schools; in retrospect, this was the peak of school integration.\textsuperscript{103}

Sheltered by the state action doctrine, “U.S. schools are becoming more segregated in all [geographic] regions for both African American and Latino students.”\textsuperscript{104} As of the 2003-2004 school year:

[United States] public schools are now only 60 percent white nationwide and nearly one fourth of U.S. students are in states

\textsuperscript{100} See, e.g., Ross v. Moffitt, 417 U.S. 600, 616-19 (1974) (refusing to order state to provide indigent criminal defendant a free attorney when attempting to obtain review by the United States Supreme Court); United States v. Kras, 409 U.S. 434, 443-49 (1973) (refusing to waive bankruptcy filing fees for indigents).

\textsuperscript{101} Brown v. Bd. of Educ. of Topeka (Brown II), 349 U.S. 294, 301 (1955).


with a majority of nonwhite students. However, except in the South and Southwest, most white students have little contact with minority students.

The vast majority of intensely segregated minority schools face conditions of concentrated poverty, which are powerfully related to unequal educational opportunity. Students in segregated minority schools face conditions that students in segregated white schools seldom experience.

Latinos confront very serious levels of segregation by race and poverty, and non-English speaking Latinos tend to be segregated in schools with each other. . . .105

The absence of positive rights keeps alive other negative legacies of chattel slavery; it is the key piece of the Court’s current insistence on a characterization, as opposed to an anti-subordination view of racial classifications. The Court views the Reconstruction Era amendments to the Constitution as preventing the government from treating anyone differently solely because of race, rather than as promoting greater prosperity and power for formerly enslaved individuals. Therefore, neither state nor federal legislatures may act aggressively to obtain racial mixes in job categories or educational opportunities.106 Faceially neutral government action that has a disparate impact on one racial group is legally not problematical unless the action is taken with a desire for racial disadvantage; merely choosing an alternative despite knowledge of its inevitably disparate impact is insufficient.107

105. Id. at 3.


107. See Washington v. Davis, 426 U.S. 229 (1976) (requiring both disparate impact and discriminatory motive); Personnel Admin. of Mass. v. Feeney, 442 U.S. 256 (1979) (narrowing meaning of discriminatory intent to action because of, not merely in spite of, negative impact). This approach is especially dysfunctional if (as cognitive psychology claims) racial bias is a natural outgrowth of the human need to categorize, rather than a conscious desire to
Furthermore, absence of positive rights channels the poor into prisons. A middle class parent whose child is on drugs will locate a professional and pay for the best treatment available. A poor parent, however, can neither pay for services nor demand adequate counseling, job training, or other positive intervention from the government. The only reliable government presence is the arresting police officer. Racial bias in the justice system is theoretically unconstitutional, but systemic racial bias is largely shielded from judicial review by the Supreme Court's insistence on proof of intentional racial bias by an identified government actor in the specific case under review (statistical racial disparities are legally irrelevant). Poverty is simply not a "suspect class" deserving the federal judiciary's protection.

The "color blind" United States criminal justice system has a racially slanted impact on the population. The United States has the highest reported incarceration rate in the world, 738 per 100,000, even without counting those on probation or parole. The U.S. population is 75.1% white, 12.3% African American, and 12.5% Hispanic. In stark contrast, 40% of the prison population is African American, and 20% are Hispanic. African American males have a 32% chance of serving time in prison, Hispanic males a 17% chance, white-Anglo males only a 6% chance. One in ten African American males between twenty-five

---


and twenty-nine years of age is in prison or jail, compared to one in twenty-eight Hispanic males and one in fifty-nine white-Anglo males in the same age group.114 Calling the reasons for these statistics “complex,” “disputed,” and “politically charged” is beyond an understatement.

The Court’s insistence on formal “de jure” race blindness—as required by the anti-classification view of equal protection—shelters this racial imbalance.115 Similarly, because no one has a right to minimum resources from the government, the United States courts refuse to oversee resource allocation by legislatures, police departments, and prosecutors. Hence, because of the racially disparate impact of the War on Drugs, many see as a war on the African American population.116 Many drug users are not inherently dangerous to society, provided they have a social support network.117 Nevertheless, a large percentage of the incarcerated are guilty only of non-violent drug offenses.118 Despite high drug use by other groups, the police disproportionately arrest African Americans, and prosecutors disproportionately charge African Americans.119 Despite repeated contrary recommendations by the experts of the United


115. “Ostensibly color-blind selection of whom to punish will perpetuate segregated prisons as surely as ostensibly color-blind selection of whom to educate will return us to segregated universities.” Paul Butler, (Color) Blind Faith: the Tragedy of Race, Crime, and the Law, 111 HARV. L. REV. 1270, 1272 (1998); but see id. at 1270-71 (recognizing disagreement with this conclusion by such prominent scholars as Randall Kennedy).


118. See The Sentencing Project, supra note 114.

States Sentencing Commission, Congress has insisted on mandatory minimum sentences for the use of crack cocaine (overwhelmingly used by African Americans) and has set crack cocaine sentences one hundred times higher than those for equivalent doses of powder cocaine (commonly used by whites). Over policing of the African American community feeds on itself for at least two reasons. First, it generates community anger against the establishment—anger which may be redirected into criminal activity. Second, the price of a felony conviction includes loss of the right to vote, often permanently. Disproportionate incarceration of African Americans means disproportionate disenfranchisement of African Americans and, therefore, less voter-pressure to change criminal justice priorities.

Free speech doctrine is the keystone to the self-perpetuating nature of social harm from the negative, or state action doctrine, view of human rights. Some of the problems discussed have already been muted by statute. Most, though not all, could be corrected by statute if elected officials chose to do so. Per public choice theory, the majority does not always get what it wants; however, it sometimes does get its way. The first step, of

---


course, is loud public outcry. Free speech, unfortunately, is itself only a negative right. The government may not stop you from airing your political views, but it does not have to provide you with a soap box, a megaphone, ten minutes to address Congress, newspaper space, or a spot on television. The Internet is helping many people make a political difference, but the commercial mass media still provide—and choose—the information and policy arguments for most people in the United States. The mass media is increasingly controlled by a small number of gigantic conglomerates with little interest in disturbing the status quo.123 Under Supreme Court doctrine, these non-human business firms are “speakers” whose editorial choices are protected by the United States Constitution.124 Campaign expenditures are similarly protected from government regulation as speech.125 Negative rights free speech doctrine, therefore, hobbles even the theoretical possibility of media and campaign reform, giving big business and the wealthy an overwhelming advantage in shaping public (including voter) priorities. An additional impediment is the Court’s reluctance to limit political parties’ ability to entrench themselves in power through gerrymandering.126

The United States has the third highest national income per capita in the thirty-state OECD—$34,681, compared to the OECD average of $23,700.127 In 2006, the United States provided 45.7% of the total world expenditures on “defense.”128

123. See generally ERIC KLINENBERG, FIGHTING FOR AIR: THE BATTLE TO CONTROL AMERICA’S MEDIA (2007) (providing negative overview of United States’ mass media situation). See also Ellen P. Goodman, Media Policy Out of the Box, 19 BERKELEY TECH. L.J. 1389, 1392 (2004) (“Today, the scarce resource is attention, not programming,” describing internet); YOCHAI BENKLER, THE WEALTH OF NETWORKS 247-49 (2006) (admitting that not everyone is a highly visible pamphleteer on the internet, but asserting that the Internet does provide broader intake than the mass media).


127. See OECD, supra note 112. Luxembourg is highest at $40,922; Norway is second at $34,915.

128. Posting of Jonathan Tasini, GUNS VERSUS BUTTER—OUR REAL ECONOMIC
Has the United States used its relative wealth to care for its citizens? Consider:

The United States has the highest reported incarceration rate in the world. In the United States, only 55% of voting age persons cast ballots, well below the OECD average of 70%.129

In 2003, the United States had a higher infant mortality rate than 22 of the 27 other OECD reporting countries.130

The United States has a higher rate of absolute poverty than all but one of the eleven OECD countries for which comparison data is available.131

The United States has the highest percentage of relatively poor persons among the nineteen rich countries for which comparison data is available—10.7%, compared to an overall average of 4.8%.132

A higher percentage of children are poor in the United States than in any of the other seventeen rich nations for which comparison data is available; at 14.7%, the rate is almost three times the 5.3% average.133

At 12%, the United States has the second highest poverty rate among the elderly of the eighteen rich countries for which

---

129. Canada matches the United States at 55%. The only countries with a lower percentage are Poland at 53% and Switzerland at 36%. See OECD, supra note 112.

130. OECD, Health Statistics 2006 (using 2003 data), available at http://www.oecd.org/statisticsdata (The United States' rate is 6.9 per 1000 live births; the higher rates are Poland (7.0), Hungary (7.3), Slovak Republic (7.9), Mexico (20.5), and Turkey (28.7)). In 2007, the American Cancer Society made the unprecedented decision to spend its advertising budget lobbying for health insurance because more cancer deaths were related to lack of screenings (due to lack of insurance) than to any other cause. Kevin Sack, Cancer Society Focuses Its Ads on the Uninsured, N.Y. TIMES, at A1, Aug. 31, 2007.


132. Id. at tbl. 2

133. Id.
The United States is the only rich nation reporting a relatively high rate of poverty among both children and the elderly.

Poverty in the United States is highly correlated with race; the average poverty rate from 2001 to 2003 was 10.2% for whites and 23.7% for blacks.

Child poverty in the United States is highly correlated with race. Some 25% of African American children are poor throughout their childhood and 80% for at least one childhood year; the comparable figures for white children are 3% and 21%.

Government programs (including tax benefits, assistance, and non-monetary transfers) raise a much smaller percentage of persons out of poverty in the United States than in any of the other six countries for which comparison data is available.

Intergenerational mobility is lower in the United States than in Denmark, Austria, Norway, Finland, Canada, Sweden, Germany, Spain, or France.

The United States has the highest percentage of full time jobs which are rewarded with low pay among the eleven OECD countries for which comparison data is available.

In the wealthy United States, negative rights theory (which

---

134. Id.
135. Id.
138. Smeeding, Rainwater & Burtless, supra note 131, at tbl.4.
140. Smeeding, Rainwater, & Burtless, supra note 131, at 19-20.
relies on the unregulated market to provide for peoples' needs) leaves an abnormally large percentage of the population ill-served. Low voting and high incarceration rates may be related to general disillusionment with government priorities.\textsuperscript{141}

In the United States, negative rights theory enables a self-perpetuating cycle of protecting the rich and powerful's private property at the expense of everyone else. The cycle can be broken (at least in theory), but statistics on the current United States demonstrate how (without positive rights) even a large pie may not include fair slices for the most needy.\textsuperscript{142} In the industrialized United States,

[w]hen business firms do well, share holders and managers obtain significant financial gains, but rank-and-file workers do not usually share in those gains. On the other hand, when firms do poorly, thousands of employees are laid off, while managers obtain bonuses for their forthright actions designed to curtail labor costs.\textsuperscript{143}

IV. CONCLUSION

This article suggests modeling “the social function of contracts” on a more robust analog to the United States’ contract

\textsuperscript{141} The problem is the government, not the populace. U.S. Health Care Politics, N.Y. TIMES & CBS NEWS, Feb. 23-27, 2007 (A supermajority of persons in the United States have health insurance (Question 57: 89%) and are satisfied with the quality of their own health care (Question 21: 41% very satisfied; 36% somewhat satisfied). Nevertheless, they believe that providing health insurance for everyone should be a higher domestic priority than maintaining recent tax cuts (Question 30: 76%) and for those who believe the government should guarantee health coverage for all Americans, a majority are willing to pay more (in taxes and/or health care costs) so that all Americans have health insurance they can't lose, no matter what (Questions 27, 28, 31 and 32). Similarly, the July 2008 poll of the working poor reported that a majority had health insurance; nevertheless, over 70% favored government provision of health insurance, a much greater number than those who prioritized lowering their taxes. Post-Kaiser-Harvard, \textit{supra} note 78, at 9, 14 (questions 29, 47 and 48)).

\textsuperscript{142} “[O]ur results suggest that inequality in the distribution of income is itself a barrier to the adoption of pro-poor policies.” Kimenyi, \textit{supra} note 19, at 33.

doctrines of unconscionability and public policy. It also provides two reasons to rethink economics-based attacks on positive human rights in developing countries. First, a society risks the worst possible outcome by employing property-regarding means in the hope of reaching humanitarian goals. Second, a constitutional scheme protecting private property but not positive human rights has produced unacceptable outcomes in the United States. The United States is not an evil country where the poor can only survive by selling their unwanted children to be eaten by the rich. 144 Neither, however, is it an ideal template for a poor society attempting to feed, cloth, and educate its entire population.

144. Compare Jonathan Swift, A Modest Proposal: For Preventing the Children of Poor People in Ireland from Being a Burden to Their Parents or Country, and for Making Them Beneficial to the Public, in THE NORTON ANTHOLOGY OF ENGLISH LITERATURE 1113 (3d ed. 1975) (presenting ironic proposal to help the Irish by encouraging them to sell their children as food to the wealthy), with Kimenyi, supra note 19, at 15 n.28 ("[T]he United States of America ranks number eight in terms of [Human Development Index] but it is ranked number 147. . . and 134 . . . in terms of human development effort. This would suggest that U.S. could do better in improving the well-being of her people given the resources.")