

Constitutionalising Social Rights

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Let us assume, with egalitarian liberals, that people have social rights to minimum income, housing, education and health care, and that civil and political rights should be constitutionalised. Let us also assume that rights are interest-based.¹ The purpose of this article is neither to defend nor to dispute those propositions. It is instead to argue: (1) that if one is committed to these claims, one must also advocate the constitutionalisation of social rights;² and (2) that one cannot object to constitutional social rights on the grounds that social rights are positive rights. The differences between negative and positive rights have been classically expounded by Charles Fried:

A positive right is a claim to something—a share of material goods, or some particular good like the attention of a lawyer or a doctor or perhaps the claim to a result like health or enlightenment—while a negative right is a right that something not be done to one, that some particular imposition be withheld. Positive rights are inevitably asserted to scarce goods, and consequently scarcity implies a limit to the claim. Negative rights, however, the rights not to be interfered with in forbidden ways, do not appear to have such natural, such inevitable limitation . . . It is logically possible to respect any number of negative rights without necessarily landing in an impossible and contradictory situation . . . Positive rights, by contrast, cannot as a logical matter be treated as categorical entities, because of the scarcity limitation.³

There is thus a fundamental distinction between negative and positive rights, which I call the *duty distinction*: some rights are negative in that they ground

¹Along the lines of Raz's definition of rights: "X has a right" if and only if X can have rights and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) under a duty"; Joseph Raz, *The Morality of Freedom* (Oxford: Clarendon Press, 1986), p. 166.

²Two points. First, I do not mean to imply that civil, political and social rights are the only rights that there are. There is now talk of cultural and environmental rights. The reason why I focus on the first three categories is because they are uncontroversial in the egalitarian liberal literature. Second, by constitutionalisation, I mean that rights are enshrined in the constitution and protected by an institution such as the judiciary, by way of judicial review and/or judicial preview, which is the review of the law after it is enacted but *before* it is implemented.

³Charles Fried, *Right and Wrong* (Cambridge, Mass.: Harvard University Press, 1978), p. 110. For arguments to the effect that there are differences between the two sets of rights, see Thomas Nagel, 'Equality', *Mortal Questions* (New York: Cambridge University Press, 1979), at pp. 114–15; Maurice Cranston, *What Are Human Rights?* (London: Bodley Head, 1973), ch. 8; Hugo Adam Bedau, 'Human rights and foreign assistance programs', *Human Rights and U. S. Foreign Policy*, ed. Peter G. Brown and Douglas MacLean (Lexington, Mass.: Lexington Books, 1979), pp. 29–44. The difference which is usually made in the literature between negative and positive rights is the duty distinction.

negative duties only while other rights are positive in that they only ground positive duties to help and resources. From this difference, and from the fact that resources are scarce, a second difference is derived, which I call the *conflict distinction*: since negative rights ground negative duties of non-interference, they are not assigned to scarce goods and therefore do not conflict with one another; by contrast, since positive rights ground positive duties to help and resources, they are assigned to scarce goods and therefore conflict with one another.

Now, constitutional social rights are often rejected on the basis of these two distinctions, which are powerful in that they appeal to the widely shared claim that certain rights are negative while others are positive. Most of these objections concern the role of the judiciary, which is said to lack the competence and/or the legitimacy to adjudicate *constitutional* social rights. I shall argue that the duty distinction is correct, but that it cannot ground objections against constitutional social rights, and that the conflict distinction is not correct and therefore that it cannot ground such objections either.

The paper proceeds as follows. In section I, I make a case for constitutional social rights. In section II, I clarify the relationship between two distinctions, to wit the distinction between civil and political rights on the one hand and social rights on the other hand, and the distinction between negative and positive rights. In section III, I argue that the duty distinction is valid. Having shown this, I argue in section IV that even though positive rights, and therefore social rights, by contrast with negative rights, are assigned to scarce goods and therefore are in apparent conflict with one another, negative rights also are in apparent conflict with one another, which calls into question the claim that conflicts between social rights precludes their constitutionalisation whereas no such problem arises in the case of negative rights. Last, in section V, I argue that the judiciary can legitimately deal with constitutional social rights, and can acquire the competence to do so in some cases, although it may have to find other, non-traditional, ways of dealing with them.

I. GROUNDING SOCIAL RIGHTS: THE VALUE OF AUTONOMY

Suppose one believes that people have civil, political and social rights. Suppose, further, that one believes that civil and political rights should be constitutionalised. Then, or so I shall argue, one must also advocate constitutional social rights. The argument has three steps: (1) civil, political and social rights are morally valuable because they rest on a certain view of people as having some control over their life, as being autonomous agents; (2) viewing them in such a way commits oneself to constitutionalising civil and political rights; (3) it also commits oneself to constitutionalising social rights.

On the interest view of rights, someone has rights if an interest of hers is important enough to hold someone else under some duty. Obviously criteria are needed to assess which interests of hers possess this importance, and why these rights are particularly valuable morally. I submit that if, of all the reasons why we would want to assign these rights, autonomy is indeed one such reason, then it is

what makes those rights especially valuable morally. Autonomy captures an essential characteristic of human beings, which distinguishes them from other beings, namely their ability rationally and morally to decide what to do with their life, and to implement these decisions, over long periods of time, so as to lead a meaningful existence and through it develop an awareness of the kind of persons they are.⁴ Were we to deny that respecting and furthering people's autonomy is fundamentally important, we would thereby ignore "what is essential to being human and to being able to live a distinctly human life."⁵ It is precisely because autonomy is so distinctly human that it is what gives rights which protect it their special importance.

Now, as I shall show here, one of the reasons why we want to assign civil, political and social rights to people and why we want to constitutionalise the first two sets of rights, thereby protecting the interests encapsulated in those rights from the democratic majority, is indeed that they give people some degree of control over their life. Consider civil and political rights. Civil rights are the rights to basic freedoms such as the freedoms of speech, association and movement and the freedoms to acquire, to sell and to contract, to form meaningful relationships with others, as well as the right to seek redress to courts; political rights are the rights to political participation, standardly the rights to vote and to run for office. Assigning these rights to people supposes that they are capable of exercising these freedoms and making use of these opportunities, and moreover that it is of fundamental importance that they be able to do so without interference. In other words, on the interest theory of rights, one has a right to, say, freedom of speech, because one's interest in freedom of speech is important enough to hold some person under some duty. Now, the reason why the interests encapsulated by the rights listed above are so important is that they are those of people capable of deciding for themselves the kind of life they lead. If I am not able to express myself, to associate with whomever I want, to move about freely, to make my views heard in the political forum, I am not in a position to make a whole range of decisions about my life and to implement these decisions. That is, I am not autonomous.

The main reason why those rights ought to be constitutionalised is precisely that autonomy requires it. It is commonly, and rightly, argued that people's autonomy should be curtailed by law if by exercising it they impinge on others' autonomy.⁶ Equally, citizens and members of the legislature, when exercising their autonomy in the public forum, should not be allowed to impinge on people's autonomy either, and should be legally prevented from doing so. Just as

⁴The conception of autonomy I am sketching out here and the reasons I put forward as to why we should value it are standardly liberal. See, e.g., John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993), p. 72; Joel Feinberg, 'The idea of a free man', *Education and the Development of Reason*, ed. R. F. Dearden (London: Routledge & Kegan Paul, 1972); Gerald Dworkin, *The Theory and Practice of Autonomy* (Cambridge: Cambridge University Press, 1988).

⁵Peter Jones, *Rights* (London: Macmillan, 1994), p. 128.

⁶H. L. A. Hart, 'Are there any natural rights?', *Philosophical Review*, 64 (1955), 175–91 at p. 183.

we think that there ought to be legal constraints on private individuals' pursuit of their conception of the good, there ought to be legal constraints on citizens' and members of the legislature's promotion of conceptions of the good.⁷ The constitution, and more specifically the bill of rights, thus serve as such legal constraints on citizens and members of the legislature in that they hold them under legal duties to respect individual rights and they disable them should they try to violate those rights.

Note that there are other reasons why one might want to constitutionalise civil and political rights. In particular, one might argue that civil and political rights are fundamental elements of democracy, that the democratic majority should be legally forbidden to abolish democracy, and therefore that it should be legally forbidden to violate those rights, by way of a bill of rights.⁸ Or one could claim that the judiciary is institutionally better equipped to deal with these rights than the legislature, either because it relies on specific modes of argument and reasoning which must be used when dealing with rights,⁹ or because it gives certain disadvantaged groups access to centres of decision-making, an access which the legislature does not provide them.¹⁰ However powerful these arguments may be, I believe that they must ultimately appeal to moral considerations about how important these rights are for people. It may be true that civil and political rights should be constitutionalised because they are intrinsic to democracy. But we need a further argument as to why democracy should be protected from the abolition of its own structure by the majority, why, in short, democracy is valuable. One such argument precisely appeals to the value of political participation and of basic liberties and, ultimately, of people's autonomy. If it is important that I have some degree of control over my life, then surely it is important that I have some degree of control over the social and political environment within which I lead my life: electing representatives in Parliament, voting in referenda and running for office myself are means to acquire that control. Similarly, saying that the judiciary is better equipped to deal with these rights than the legislature cannot on its own explain why these rights should be constitutionalised: an argument is needed as to why it is so important that these rights be correctly dealt with, and here again appealing to the value of

⁷My point is not that private morality constrains public morality and that it is possible to determine everything that the state cannot do simply by determining everything that private individuals cannot do. Rather, my claim is that in some cases we forbid private individuals and the state from harming people on the same grounds. If the reason why a certain action is forbidden to a private individual is that this action violates someone's autonomy, then such an action should not be allowed to the state either; it should therefore not be allowed to this person when he acts as a citizen or as a representative. (For an account of the links between private and public morality, see W. Nelson, *On Democracy* [London: Routledge & Kegan Paul, 1980], pp. 100 ff. and T. Nagel, 'Ruthlessness in public life', *Public and Private Morality*, ed. S. Hampshire [Cambridge: Cambridge University Press, 1978].)

⁸There is a vast literature on this issue. See, e. g., J. H. Ely, *Democracy and Distrust* (Cambridge, Mass.: Harvard University Press, 1980).

⁹See, e. g., Joseph Raz, *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994), p. 42.

¹⁰See, e. g., Joseph Raz, 'Rights and Politics', *Indiana Law Journal*, 71 (1995), 27–44 at p. 43.

people exercising these rights and thereby being autonomous provides a convincing justification.

Just as autonomy powerfully justifies constitutional civil and political rights, it also justifies assigning them social rights to decent levels of minimum income, education, housing and health care. Giving these resources to people is important because without them they would be unable to develop the physical and mental capacities necessary to become autonomous. If we are hungry, thirsty, cold, ill and illiterate, if we constantly live under the threat of poverty, we cannot decide on a meaningful conception of the good life, we cannot make long-term plans, in short we have very little control over our existence.¹¹ In other words, on the interest view of rights, one has a right to, say, a decent minimum income if one's interest in having such income is important enough to hold someone under a duty. This interest is important enough precisely because were we unable to further it, we could not be autonomous.

Thus, civil, political and social rights together protect the value of autonomy. Now, I claimed at the beginning of this section that were autonomy to be one of the reasons why we assign rights to people, it would be what makes these rights morally valuable. I have shown that autonomy is one reason why we assign people constitutional civil and political rights and social rights. It follows that autonomy is what makes these rights valuable. If that is so, then social rights should be constitutionalised as well. For were they left out of the constitution, the constitution would fail adequately to protect autonomy in two ways. First, the government would have legal leeway not to fulfil the duties imposed by social rights. Second, in cases of conflicts between the interests protected by social rights and the interests protected by civil rights, the former would always lose out since the government would be legally mandated to respect the latter. If, for example, the right to private property is constitutionalised and social rights are not, and if the government increases taxes so as to launch welfare programmes designed to implement social rights, then the door is open for challenging this policy on the grounds that it violates people's constitutional right to private property.

To conclude, if the moral value of autonomy thus justifies the constitutionalisation of civil and political rights, and if it is true that social rights encapsulate interests the protection of which is also necessary for us to become and remain autonomous, then it follows that these rights should be constitutionalised as well.

II. TWO DIFFERENT BUT OFTEN CONFLATED DISTINCTIONS

Before I start analysing the duty difference between negative rights and positive rights, it is necessary to look closely at the relationship between this difference

¹¹I do not mean to imply here that people who suffer from such ills are totally unable to do anything. Indeed, they have to be resourceful to, say, find food and water, arrange to sleep somewhere. Yet, it is not implausible to think that the ability to make identity-conferring plans of life requires material means.

and the difference between civil and political rights on the one hand and social rights on the other hand.¹² For these two differences are often conflated. Thus, Will Kymlicka and Wayne Norman do not deny that:

[d]emocratic constitutions have traditionally protected civil and political rights (e.g., freedom of speech and association, freedom to vote). These are ‘negative rights’ in the sense that they prohibit the state from doing certain things *to* you.¹³

Similarly, Charles Fried includes amongst negative rights all the traditional civil and political rights, and lists them as follows: ‘freedom of movement, freedom of speech and development of one’s talent, sexual freedom, the right to privacy, political rights, the right not to have one’s liberty or property interfered with by the state except according to the process of law, the right not to be subject to criminal prosecution except before a jury and with the assistance of a counsel, the right not to be compelled to testify against oneself’.¹⁴

Now, I do not think that all the traditional civil and political rights are negative, because not all of them ground a duty on the state and other people not to interfere with their holder. Granting for the time being (until we get to section III) and for the sake of argument that it is correct to distinguish between negative rights and positive rights according to the kind of duties they ground on people, it is clear that the civil right to be tried by a jury and with the assistance of a counsel is not a negative right, since it demands that a whole state apparatus be established, namely the setting up of a judicial system whereby judges are paid, juries are appointed and catered for, judges communicate with defence lawyers etc.¹⁵ In a similar but more general vein, and contrary to what the quote from Kymlicka’s and Norman’s article suggests, the right to seek redress in court, which is a civil right that all declarations of rights have insisted upon, is not a negative right but a positive right: it grounds a duty on the state to exercise justice, and therefore to provide a service to people. Of all the traditional civil rights then, those rights which pertain to the relationships between the individual and the courts are positive rights.

As to political rights, they are not negative rights either. Although the right to freedom of political association and to freedom of expression in political contexts are indeed negative rights, they are in fact the political version of the more

¹²In singling out these two ways of classifying rights, I do not mean to imply that one cannot produce a more differentiated analysis of rights. Clearly the two differences under study here do not capture so called fourth-generation rights such as cultural rights and environmental rights. However it is enough for the purpose of this paper that I focus on these two differences. For a detailed account of how one might classify rights, see J. Donnelly, *Universal Human Rights in Theory and Practice* (Ithaca, N.Y.: Cornell University Press, 1989), pp. 34–7.

¹³Will Kymlicka and Wayne J. Norman, ‘The Social Charter debate: should social justice be constitutionalised?’, *Network Analyses: Analysis No. 2*, January 1992, published by *Network on the Constitution*, Ottawa, p. 2.

¹⁴Fried, *Right and Wrong*, pp. 133–4. For another example of conflation between traditional and negative rights, see A. Pereira-Menault, ‘Against positive rights’, *Valparaiso Law Review* 22 (1988), 259–83.

¹⁵For points along those lines, see Henry Shue, ‘Rights in the light of duties, in *Human Rights and U. S. Foreign Policy*’, pp. 65–83.

general civil rights to freedom of association and freedom of speech, and as such they are not really political rights. As to the political rights proper, to wit, the right to vote and the right to run for public office, Fried claims that they are negative in important respects, because:

if anyone can vote, then no citizen may be prevented from voting (except on conviction of crime or for other grave reason), no citizen may be prevented from offering himself for election, and so on.¹⁶

The problem with that claim is that it includes a crucial proviso, which distorts the sense we usually have of what these two rights are, namely ‘if anyone can vote’. This proviso shifts the weight of the argument from the rights to vote and to run for public office to a right to be treated on the same footing as those who have the same relevant characteristics as one has for the assignment of the right. It states the following: if in order to vote one has to be over eighteen, to hold the nationality of the country and to not have been convicted of serious criminal offences, and if some people who meet these criteria have the right to vote, then anybody who also meets them and who did nothing that according to the law entails the loss of his political rights also has the right to vote. But that says nothing about what the right to vote is in the first place, and what kind of duty it grounds on the state.

Even if we drop this equality proviso, this right is still not negative. For it is not a right not to be interfered with when we go voting, or when we are in the booth filling up the ballot paper. These instances of interference seem rather to be violations of the right to freedom of movement and the right to vote in secret. The right to vote is a right to take part in the political process of one’s country, by voting in referenda and by electing representatives in various bodies. The duty of the state is to organise regular elections, which supposes a whole range of activities, from paying people to take care of each station poll to printing out ballot papers and to rescheduling the parliamentary agenda so as to accommodate the election campaign, etc. As for the right to run for public office, it also grounds a duty on the state to maintain the whole electoral system, that is, to preserve the right to vote and to organise elections.

I hope to have shown that it is inaccurate to conflate the distinction between traditional (civil and political) rights and social rights and the duty difference between negative and positive rights. Some traditional rights are negative rights while others are positive. As a result, it cannot be argued that traditional rights can be entrenched because they are negative while social rights cannot because they are positive. Indeed, social rights are positive, but so are political rights and the rights to seek redress through courts and to be tried by jury according to due process of law. If social rights are not to be entrenched because they are positive,

¹⁶Fried, *Right and Wrong*, p. 134.

then political rights and these two civil rights should also be left out of the constitution.

Now, there are three different possible routes from there. One could argue either that the duty difference between negative rights and positive rights does not make sense anyway; or that it does make sense, and that one should leave all the positive rights out of the constitution (and that includes political rights and the rights to seek redress through the courts and to be tried by a jury); or that the duty difference between negative rights and positive rights is valid but is irrelevant to arguments about the constitutional entrenchment of positive, and therefore social, rights. In the next section, I go down the third route.

III. DEFENDING THE DUTY DISTINCTION

Opponents of constitutional social rights often argue that these rights are positive in that they ground only positive duties on the part of the state to distribute resources, whereas traditional rights such as civil rights are negative in that they ground only negative duties of non-interference on the part of the state. The fact that social rights are positive is said to preclude their constitutionalisation, on the grounds that were social rights constitutionalised, the judiciary would have to demand that the democratic majority *do* certain things, as opposed to *refrain* from doing certain things, and this it has neither the competence nor the legitimacy to do.

The claim that certain rights are negative in that they ground only negative duties of non-interference while others are positive in that they ground only positive duties to help has a lot of intuitive appeal. After all, when we talk, say, of the right to freedom of speech, we have in mind a right grounding a duty not to censor; we do not think that it is also a right to be given the means to express ourselves. Conversely when we talk, say, of the right to housing, we have in mind a right grounding a duty to give housing, not a duty not to be interfered with when we look for a house. Suppose, then, that we have an interest Q. On the interest theory of rights, this interest Q, if deemed important enough to hold people under a duty, can be protected by a subset of the six following rights:

- (i) a negative right against others that they do not harm us by interfering with us when we further Q;
- (ii) a negative right against the state that it does not harm us by interfering with us when we further Q;
- (iii) a positive right against other people that they protect us from third parties if they try to harm us by interfering with us when we further Q;
- (iv) a positive right against the state that it protects us from other people if they try to harm us by interfering with us when we further Q;
- (v) a positive right against the state that it gives us the material means to further Q;

- (vi) a positive right against the state that steps be taken towards making possible the fulfilment of duties specified at (iv) and (v).¹⁷

As Waldron puts it, ‘there are many ways in which a given interest can be served or disserved, and we should not expect to find that only *one* of those ways is singled out and made the subject matter of the duty’.¹⁸ Conceiving of the relationship between rights and interests in the way set out above makes sense of the intuition that some rights are negative only while others are positive only. This intuition has been called into question, and the purpose of this section is to defend it against two objections, to wit, a linguistic objection (section III.A) and an objection put forward by Henry Shue (section III.B). I shall address claims about the judiciary made on the basis of the duty distinction in section V.

A. A LINGUISTIC OBJECTION

One way of calling into question the duty distinction between negative and positive rights is to say that such distinction between the two sets of rights has no conceptual value at all, because it simply rests on differences in the way those rights are usually (but need not be) phrased.

Fried gives an example of such an argument:

Thus it might be said that I have a negative right not to be deprived of a minimal diet (or not to have my portrait *not* painted by Salvador Dali). And, indeed, every positive claim might be cast in terms of a negative right not to be *deprived* of the good claimed.¹⁹

Indeed, if every positive right can be phrased as a right not to be deprived of something, it seems that it grounds a duty on other people that some imposition be withheld, which is also the kind of duties that negative rights ground on other people.

One could also argue that negative rights can always be phrased as positive rights. For instance, one could say that the right to freedom of speech, although traditionally understood as a negative right, can in fact be phrased as a positive right to be granted freedom of speech.

¹⁷See A. Sen, ‘The right not to be hungry’, *The Right to Food*, ed. Philip Alston and Katarina Tomasevski (Utrecht: SIM, 1984), at p. 69. This right is often overlooked in the literature, even though it is particularly important as far as social rights are concerned. If the government is not able to meet even the basic needs of the people, at least it should make sure that it takes steps towards meeting such needs, that it runs no policy which is not necessary and which is obviously detrimental to the meeting of needs.

¹⁸Jeremy Waldron, ‘Rights in conflict’, *Ethics*, 99 (1989), 503–19 at p. 510.

¹⁹Charles Fried, *Right and Wrong*, p. 114. See also S. Hook, ‘Reflections on human rights’, *Ethics and Social Justice*, ed. H. E. Kiefer and M. K. Munitz (New York: State University of New York Press, 1986.)

I do not think that this objection against the duty difference really works. When it is claimed that the positive right to food can be phrased as a negative right not to be deprived of a minimum diet, four different things can be meant:

- (1) The right not to be deprived of a minimum diet is a right to be given food.
- (2) The right not to be deprived of a minimum diet is a right not to be interfered with when we try to get food.
- (3) The right not to be deprived of a minimum diet is a right not to be left without means to support ourselves.
- (4) The right not to be deprived of a minimum diet is a right that this food not be taken away from the right-holder once he has it.

Now, (2) and (4) are very problematic as interpretations of the right, because the right which is violated in (2) is not a right not to be deprived of food as we usually understand such a right, but a right to freedom of movement. As to the right which is violated in (4), it is a right to private property in our food. This shows the oddity in phrasing the right to food in such a way, for it appears that the right to food, or the right not to be deprived of a minimum diet, in fact becomes an instance of the right to freedom of movement, or an instance of the right to private property. It loses any significance as a right *to food*. The only way to restore its meaning is to say that the right to food is a right not to be deprived of a minimum diet in cases where one is not in the process of going somewhere to try and get it (claim (2)) and where we do not have it already (claim (4)). But that amounts to making it a right *to be given* food, which grounds on other people a positive duty to do something for the right-holder. As to the right stated in (3), it can be understood either as a right not to be deprived of something that we already have, a piece of land, in which case it loses significance as a right to food; or it can be understood as a right to be given a piece of land to grow crops, in which case it is a right to be given something, which grounds a positive duty to do something. It thus does not seem possible to phrase positive rights in such a way that they ground negative duties and at the same time retain their meaning.

Is it possible to say that negative rights in fact can be phrased as positive right, so that the right to freedom of speech in fact can be phrased as a positive right to be granted freedom of speech? If so, then there is no duty difference between the two sets of rights. Yet, I do not think that it is possible. Let us suppose that the right to freedom of speech is a right to be granted such freedom. Such a right can be understood as:

- (1) a right against others that they do not interfere with us when we exercise our freedom of speech;
- (2) a right against the state that it does not harm us when we exercise our freedom of speech;
- (3) a right against others that they protect us when we exercise our freedom of speech;

- (4) a right against the state that it protect us when we exercise freedom of speech;
- (5) a right against the state that it give us the material means to exercise freedom of speech;
- (6) a right against the state that steps be taken towards making possible the fulfilment of duties specified at (4) and (5).

Now, I agree that (3), (4), (5) and (6) are positive rights, and that if they are correct interpretations of the right to freedom of speech, then such a right can be understood as a positive right. However, there does not seem to be any reason to exclude (1) and (2) as valid interpretations of the right. The rights stated there are negative in that they ground duties of non-interference and the right to be granted freedom of speech can thus be understood as a negative right as well. It may be true that the right can be seen as positive, but it can also certainly be seen as negative. As a result, it does make sense to say that there are negative rights which ground only negative duties of non interference and positive rights which ground only positive duties to help.

To conclude, the linguistic objection against the conceptual distinction fails.

B. SHUE'S ARGUMENT

There is another way of challenging the duty distinction between negative and positive rights by saying that any given moral right grounds negative and positive duties. This line of argument, of which Henry Shue's *Basic Rights* is the clearest exposition, seems misguided to me.²⁰

Shue argues that rights ordinarily thought of as negative rights in fact ground positive duties as well as negative duties. Take, for example, the right to physical security: it is respected if one refrains from assaulting people and if steps are taken by the state so as to protect people from assault. In other words, a right to physical security does not simply ground a negative duty on the part of others to refrain from assaulting its bearer: it grounds a positive duty on the part of others

²⁰See Henry Shue, *Basic Rights: Subsistence, Affluence, and Foreign U. S. Policy* (Princeton, N.J.: Princeton University Press, 1980), as well as his 'Rights in the light of duties' and 'Mediating duties', *Ethics*, 98 (1988), 687–704. Shue seeks primarily to argue that basic rights, i. e. those rights whose enjoyment 'is essential to the enjoyment of all other rights', ground negative and positive rights (*Basic Rights*, p. 19), but he claims that this thesis about basic rights should be true of all moral rights (see *Basic Rights*, pp. 54–5.)

The claim that a right grounds negative and positive duties has been the backbone of numerous decisions handed down by the Supreme Court of Canada and by the European Court of Justice. See Patrick Macklem and Craig Scott 'Constitutional ropes of sand or justiciable guarantees? Social rights in a new South African Constitution?', *Univeristy of Pennsylvania Law Review*, 141(1992), 1–148 at pp. 48 ff. Macklem and Scott agree with Shue on that point, and claim that insofar as so-called negative rights ground positive duties to resources as well as negative duties of non-interference, if one believes in entrenching negative rights one should also entrench the rights whose corresponding positive duties are also grounded in "negative" rights. Since I disagree with the claim that rights ground negative *and* positive duties, I disagree with the argument for constitutional social rights on which it rests.

to help the right-bearer if he is assaulted, as well as a duty on the part of the state to provide for ‘police forces; criminal courts; penitentiaries; schools for training police, lawyers, and guards’, and so on.²¹

In his view, it will not do to argue that there is a distinction between a so-called negative right to physical security, requiring others not to assault us, and a so-called positive right ‘to-be-protected against-assaults-upon-physical-security’, on the ground that:

the demand for physical security is not normally a demand simply to be left alone, but a demand to be protected against harm. It is a demand for positive action, or, in the words of our initial account of a right, a demand for social guarantees against at least the standard threats.²²

Shue’s point derives some of its force from the fact that we do indeed think that we cannot enjoy physical security if steps are not taken by the state to enforce it. However, he cannot infer from this ‘demand’, as he puts it, the claim that the right to physical security *itself* grounds a duty on the part of the state to take those steps. He has to explain why we cannot argue that we have *two* demands, each encapsulated by a different right: a demand that we not be assaulted, encapsulated by a negative right not to be assaulted, and a demand that we be protected against assaults, encapsulated by a positive right that the state take steps to protect us from potential attackers.

Shue also claims that rights which are ordinarily thought of as positive rights in fact ground negative as well as positive duties. Suppose that people have a right to subsistence. It certainly grounds a duty on the part of the state and others to help us by giving us food; but it also grounds a duty on the part of others to refrain from acting in such a way as to threaten our means of subsistence. Suppose a farmer in a third world country has six employees to help him grow 25 per cent of the crops in the area; other families grow some of what they need, and buy supplements from him. One day this farmer is offered and accepts a contract whereby he stops growing crops and starts growing flowers, with the help of two employees only. As a result, due to the decrease of crops, production prices soar and people who depended on this farmer for wages and supplements suffer from severe malnutrition. According to Shue, if the farmer had *refrained* from signing the contract, if he had not interfered with these families’ livelihood, these people’s right to subsistence would not have been violated.²³ In other words, a right to subsistence grounds a positive duty to help the deprived by giving them resources, a positive duty to protect them from deprivation and a negative duty to avoid depriving them of their means of subsistence.²⁴

²¹Shue, *Basic Rights*, pp. 37–8.

²²Shue, *Basic Rights*, pp. 38–9.

²³Shue, *Basic Rights*, p. 42. As Shue himself recognises there are difficulties with saying that the farmer who signed the contract, or indeed the person who offered the contract, violated these people’s right. For the sake of argument, I shall prescind from discussing them.

²⁴Shue, *Basic Rights*, p. 52.

Shue's argument is appealing in that it rests on the idea that deprivation is often brought about by acts which people could have refrained from performing, and on the claim that we do not simply demand that food be given to us, but also that we not be interfered with to provide for ourselves. However, the same point I made above in connection with negative rights applies: Shue has to explain why instead of facing *a* demand for subsistence, we are not in fact confronted with a demand to be given food when we are deprived, which is encapsulated by a positive right, *and* a demand that people do not act in such a way as to make us poor, which is encapsulated by a negative right.

Thus, Shue fails convincingly to explain why a right to *x* grounds both negative and positive duties. The fundamental difficulty with his argument is that, assuming that he is right to say that we have *one*, multifaceted demand for *x*, this can only apply to very general rights, such as a right to physical security and a right to subsistence: it cannot account for the conceptual possibility of talking of the more specific rights in which these general rights can be broken down, such as, say, the right not to be assaulted and the right to be given food, and for the widely held view that we do indeed have such specific rights. Most importantly, in not being able to recognise that we have specific rights, and therefore that we have, in Shue's own terms, a 'justifiable demand',²⁵ for example, that we not be assaulted or that we be given food, Shue does not allow people to be in a position to insist that they not be harmed in this specific way. The implication of Shue's argument, in other words, is to remove the possibility of talking about certain crucial demands of ours as being protected by *rights*, as opposed merely to duties on the part of others. This presents Shue with a dilemma from which he cannot escape: either he accepts talk of specific rights and must therefore accept that some rights are negative while others are positive, or he rejects talk of specific rights and thus rescues his original claim that rights ground positive and negative duties, but at the cost of enabling people to demand, for example, that they not be assaulted or that they be given food, *as a matter of right*. This, I think, is not a cost he is prepared to pay.²⁶

IV. SCARCITY AND THE ENTRENCHMENT OF SOCIAL RIGHTS.

I have argued so far that social rights should be constitutionalised, and that the duty distinction between negative rights and social rights is valid. It gives rise to another distinction, which I called the conflict distinction, and which is sometimes said to ground objections to constitutional social rights. By the very fact that they ground a duty of non-interference, the argument goes, negative

²⁵Shue, *Basic Rights*, p. 13 and footnote 11 above.

²⁶See, e. g., p. 39, where he says that 'the central core of the right [to physical security] is a right that others not act in certain ways'. So we *do* have a right that they refrain from acting in certain ways, as opposed to a right to physical security grounding, *amongst other duties*, a duty that others refrain from so acting.

rights cannot conflict with one another; by the very fact that they ground a duty to help and to give resources, and by the very fact that resources are limited, positive rights are assigned to scarce goods and therefore conflict with one another.²⁷ Now, like the duty distinction, the conflict distinction is said to preclude the constitutionalisation of social rights on the grounds that the judiciary lacks the competence and the legitimacy to adjudicate them.²⁸ In this section I shall argue that negative rights are as apparently likely to conflict with one another as social rights, and that in fact the interests protected by these rights, and not the rights themselves, conflict.

I agree that social rights are assigned to scarce goods while negative rights are not. I also agree that negative rights do not conflict with one another, but not for the stated reason. It is true that ‘we can fail to assault an infinity of people every hour of the day. Indeed, we can fail to lie to them, to steal their property, and to sully their good names—all at the same time’.²⁹ But that points to only one way out of three in which we can be said to be under the duty to respect negative rights. Consider the following:

- (a) we can and ought to respect at any one time all the negative rights of one person;
- (b) we can and ought to respect at any one time one negative right—freedom of speech, for instance—of everybody;
- (c) we can and ought to respect at any one time all the negative rights of everybody.³⁰

The examples that Fried gives, failing to assault people, stealing from them, etc. illustrate both (a) and (b). It is true that we can at the same time respect one person’s right not to be assaulted, not to be robbed, not to be defamed. It is also true that we can fail to assault a lot of people. However, there are instances where, *at first sight*, it does not seem possible to respect everybody’s negative right(s). I may decide to exercise my right to free speech, and you ought to respect it. But the only way to respect it might be to renounce your exercise of the same right. Equally, for me to respect your right to free speech might require in some

²⁷See Fried, *Right and Wrong*, p. 110.

²⁸For recent formulations of this standard argument, see Penuell M. Maduna, ‘Judicial review and protection of human rights under a new constitutional order in South Africa’, *Columbia Human Rights Law Review*, 21 (1989), 73; Michael Mandel, *The Charter of Rights and the Legalisation of Politics in Canada* (Toronto: Thomson Educational, 1994).

²⁹Fried, *Right and Wrong*, p. 112.

³⁰See Hillel Steiner, ‘The structure of a set of compossible rights’, *Journal of Philosophy*, 74 (1977), 767–75.

cases that I renounce exercising mine.³¹ Our respective rights to free speech cannot, so it seems, be respected at the same time. As to (c), it is not always true either: your right to free speech may conflict with my right to privacy. The same reasoning as above applies: it may be impossible for me to respect your right to free speech without renouncing my right to privacy. Fried's point sounds convincing only if we set aside the fact that we, who are under the duty to respect others' rights, are also right-holders whose exercise of these rights may conflict with other people's exercise of their rights.

Although, and unlike what Fried says, there seem to be conflicts between negative rights, I do not think that these conflicts between rights *in fact* exist. This is not a standard point to make, as it is usually assumed that rights must conflict with one another, especially if they are interest-based.³² Jeremy Waldron, for instance, argues that 'if rights are understood along the lines of the Interest Theory proposed by Joseph Raz, then conflicts of rights must be regarded as more or less inevitable'.³³ According to Waldron, two persons A and B have rights which conflict where A has an interest which is 'important enough *in itself* to justify holding some person, C, to be under a duty whose performance by her will not be possible if she performs some other duty whose imposition is justified by the importance of some interest of B'.³⁴

The claim that rights conflict crucially rests on the addition by Waldron of 'in itself' after 'enough' in the definition of a right. On Waldron's reading of the Interest Theory, the assignment of a right to someone, X, is justified by the importance of X's interest in itself, independently of other factors such as, precisely, the fact that some interest of other people might be harmed by X's pursuit of his interest. If X and someone else, Y, *both* have interests which *in themselves* are deemed important enough to hold someone under duties, disabilities etc., whose performance and imposition are mutually exclusive, then X's and Y's rights do conflict. However, the addition of 'in itself' is unwarranted, at least on Raz's definition of a right, which, you recall, goes as follows: 'X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason to hold some other person(s) to be under a duty'.³⁵ Now, it may well be the case that the importance of the interest in itself is a criterion for deciding whether X has a

³¹What I have in mind is this. If you and I start talking at the same time, one of us will have to renounce exercising her right to freedom of speech. In other cases, this need not be the case. For instance, if you start talking, for me to forbear from interrupting you does not amount to renouncing my exercise of the right to freedom of speech. The right to speak is not the right to interrupt. As Rawls notes, 'we must distinguish between their [i.e.: basic liberties] restriction and their regulation' (*Political Liberalism*, p. 295). Asking people not to interrupt counts as a regulation of freedom of speech, not as a restriction.

³²Some authors think that rights can never conflict. See in particular R. Martin, *A System of Rights*, pp. 109ff; R. Nozick, *Anarchy, State and Utopia* (Oxford: Blackwell, 1974), pp. 28–9; Steiner, 'Compossible rights'. None of these three authors holds that rights are interest-based.

³³Waldron, 'Rights in Conflict', p. 503.

³⁴*ibid.*, p. 506; my emphasis.

³⁵Raz, *The Morality of Freedom*, p. 166.

right, but nothing in this definition indicates that it is the only criterion. It is perfectly plausible to aver that one has to take into account what would happen to Y if X were assigned a right, and that if it is thought that some interest of Y would be seriously harmed, then X's interest, although important in itself, is not important *enough* to justify holding someone else under some duty, disability, etc. In other words, one must adjudicate between people's competing interests *before* one assigns rights to them.

Obviously, in order to do so, one needs a common metric by which to judge the relative importance of conflicting interests. Now, I argued in section I that autonomy is of fundamental moral importance because it is a distinctive characteristic of human beings. I also claimed that insofar as it justifies assigning rights to people, it is what gives these rights their special moral value. I suggest that it therefore serve as such a metric to adjudicate between conflicting interests, and further that we adopt the principles of equality and priority in order to assess whether people's interests are important enough to be protected by rights. That is, equally non-autonomous people should be treated equally, and priority should be given to less autonomous people. According to the equality principle, if I am as non-autonomous as you are, then my interest in being more autonomous than I currently am is not important enough to be protected by a right to be given more resources, or to be less interfered with, than you. According to the priority principle, if you are more autonomous than I am, your interest in being even more autonomous than you currently are is not important enough to be protected by a right to be given more resources or to be less interfered with; by contrast, my interest in being made as autonomous as you are or at the very least more autonomous than I am is important enough to be protected by such a right.³⁶

What I have just said applies to negative rights *and* to positive rights. Suppose we must decide whether your interest in housing is more important than your interest in health care, or than my interest in housing. If your interest in housing is said to be more important because without a house you are less autonomous than I am without a house or without health care, then it means that my interests are not important enough to be protected by rights, whereas yours are.

Let me elaborate on that. The claim that rights assigned to scarce goods can never all be respected rests on the assumption that they ground a duty on other people to give the needy the standard of services or the amount of resources that will meet their needs completely. That is, on this view, if I need £1m worth of health care, I have a right that this good be given to me if the state has the money,

³⁶See Jones, *Rights*, pp. 201–2 on the need for such a common metric, and A. Gewirth, *The Community of Rights* (Chicago: University of Chicago Press, 1996), pp. 45 ff. for the adoption of agency as such a common metric. Both Jones and Gewirth seem to think that this common metric must be used to adjudicate conflicts between rights themselves. Within the scope of this paper I cannot hope to make a full argument in favour of the equality principle and the priority principle. They have enough intuitive appeal amongst egalitarian liberals for me simply to sketch them out here.

no matter what. But social rights do not impose so stringent a demand on the state.³⁷ They secure provision that might be regarded as adequate given the level of economic development that obtains, and given certain expenditures that are simply unavoidable, like national defence and police forces (it is also necessary to defend the people you are going to house and feed), courts, working of the government etc. By virtue of the principle that ‘ought’ implies ‘can’ and by virtue of the fact that rights ground duties, if the government cannot meet certain duties, then simply we do not have the corresponding rights. If the government is shown by an independent body, say the judiciary, to be unable to devote the resources necessary to meet our needs, it cannot be held under the duty to do so, and we therefore do not have (social) rights to these resources.

Once that allocation is made, insofar as it is unlikely that the government will have enough resources to meet all the needs of everyone, it will be necessary to adjudicate between competing individual claims to those resources. I argued above that autonomy serves as a metric to adjudicate between different interests, and that the two principles of equality and priority should be adopted. It is thus possible philosophically to conceive of social rights so that they do not conflict with one another, as it is possible to conceive of negative rights so that they do not conflict with one another either.

Now, recall that the conflict difference was often said to make the constitutionalisation of social rights undesirable, on the grounds that the judiciary lacks the competence and/or the legitimacy to adjudicate rights which conflict with one another. Such a problem, it is alleged, does not arise in the case of negative rights. We have just seen that the interests protected by rights, not the rights themselves, conflict, and that these conflicts arise both between negative rights and between positive rights. One cannot therefore claim that social rights should not be constitutionalised because they conflict with one another whereas negative rights can be constitutionalised because they do not conflict with one another. Nor can one argue that the former rights ought not to be constitutionalised because the interests they protect conflict with one another whereas the latter rights can be constitutionalised because the interests they protect do not conflict with one another. However, one might argue that the judiciary has competence and/or legitimacy to adjudicate conflicts between interests protected by negative rights, and lacks such competence and/or legitimacy when it comes to adjudicating conflicts between interests protected by positive rights. To addressing this objection, and more generally to looking at the role of the judiciary I now turn.

V. THE ROLE OF THE JUDICIARY

The duty distinction between negative and positive rights, which I have defended in section III, as well as the fact that, unlike negative rights, social rights are rights

³⁷For a similar argument, see Lesley Jacobs, *Rights and Deprivation* (Oxford: Clarendon Press, 1993), pp. 58–9.

to scarce resources, standardly ground two kinds of objections against constitutional social rights. Both objections have to do with the role the judiciary would play were social rights constitutionalised. Adjudicating negative rights, it is said, simply requires that judges decide whether a right-bearer has been illegitimately interfered with in his exercise of the right. Adjudicating positive, and therefore social, rights is more complex: it requires that judges decide whether a right-bearer has been illegitimately denied resources he is entitled to. In making that decision, judges have to assess whether other people might have needed the resources this right-bearer did not get, whether giving him those resources as well as compensation would deprive others of resources they are said to have a right to. In other words, it requires that judges decide whether resources have been allocated correctly: a difficult task in an economy like ours which is very complex and where resources are scarce. Now, the institutional logic of social rights is said to preclude their constitutionalisation because judges lack the *legitimacy* and/or the *competence* to deal with such issues.³⁸ That is, it is claimed that they ought not to be allowed to adjudicate constitutional social rights because it is the democratic majority's moral right to allocate resources as they see fit, and/or they should not be allowed to adjudicate these rights because they are not equipped to do so. I shall examine these two claims in turn.

There are two reasons why one might think that the judiciary does not have the legitimacy to adjudicate constitutional social rights. First, were it to do so, it would have to interfere with the drawing of the budget, thereby encroaching upon one of the main prerogatives of the legislature. Such a problem does not occur when negative rights are at stake, because even though the government and legislature are disallowed to act in certain ways, they still have scope to make fundamental economic and financial decisions.³⁹

Now, it is clear that the judiciary's degree of interference with the legislature is more important when social rights are at issue than in the case of negative rights. However, the point should not be overstated. There are different types of complaints one may raise against the legislature on the grounds that constitutional social rights have been violated. It may be that there are no welfare policies which give effect to constitutional social rights; or it may be that there are such policies but that they do not, or so it is claimed, give people what the constitution entitles them to get. The judiciary has two courses of actions. It can either ask the government to implement welfare policies or to

³⁸See M. Jackman, 'The protection of welfare rights under the Charter', *Ottawa Law Review*, 70 (1988), 315–38. Although I distinguish the question of competence from the question of legitimacy, they can be interconnected. If judges badly affect people's constitutional social rights because they are incompetent to deal with them, then one might conclude that they do not have the legitimacy to adjudicate them.

³⁹See, e. g., Michael Walzer, 'Philosophy and Democracy', *Political Theory*, 8 (1981), 379–400. See also Maurice Cranston, 'Human rights, real and supposed', *Political Theory and the Rights of Man*, ed. by D. D. Raphael (London: Macmillan, 1967.); W. S. Tarnopolsky, 'The Supreme Court and the Canadian Bill of Rights', *Canadian Bar Review*, 53 (1975), 649–56 at p. 651; M. Bossuyt, 'La distinction juridique entre les droits civils et politiques et les droits économiques, sociaux et culturels', *Revue des Droits de L' Homme*, 8 (1975), 783 at pp. 789–94.

allocate resources in such a way as to respect people's social rights, or it can draft policies itself and decide in great detail how resources should be allocated. I believe it should do the first; that is, it should remind the government that it is under a duty to do x: it should not tell the government *how* to fulfil this duty, precisely so as to allow for greater scope in democratic decision-making.⁴⁰

The second reason why it is thought that the judiciary does not have the legitimacy to adjudicate constitutional social rights is the following. As we have seen in section IV, resources are scarce and the interests protected by social rights are therefore likely to conflict. As a result, adjudicating between them requires that very difficult choices be made (who will get resources? homeless people or the sick?) which will shape what society looks like. Only the elected representatives of the people, it is argued, ought to be allowed to make those difficult choices. Now, admittedly, these may be difficult matters to deal with; however, adjudicating conflicts between interests protected by negative rights may be as difficult (how, for instance, is one to decide that someone's interest in privacy has been violated by someone else's exercise of their freedom of speech?), and if one thinks that the judiciary can adjudicate the latter conflicts on the grounds that the value of autonomy must be protected from attacks by the democratic majority then one must argue that the judiciary has legitimacy to adjudicate conflicts between the interests protected by social rights, precisely because these interests must be safeguarded for people to be autonomous.⁴¹

Whether judges are competent to deal with constitutional social rights raises different issues. Judges, it is said, are not competent to ask the government to allocate resources in certain ways: they do not have the training and the information-gathering tools that are required to decide whether funds have been spent the way they should have and whether a particular individual got the resources the constitution entitles him to have.⁴² In fact, or so it is argued, faced

⁴⁰For an example of this strategy, see the judgements handed down by the European Court of Human Rights in *Marckx v. Belgium* and *B. v. France*, 232 Eur. Ct. H. R. (ser. A) at 25 (1992).

⁴¹Obviously one could argue that the judiciary does not have the legitimacy to deal with negative rights either, precisely on the grounds that these difficult decisions must be made by the legislature. This is one of the most common objections against bills of rights in general. As I said in the introduction to this paper, I assume that bills of rights are legitimate and I therefore do not deal with this standard objection against bills of rights in general. For a classic example of this objection, see Jeremy Waldron, 'A right-based critique of constitutional rights', *Oxford Journal of Legal Studies*, 13 (1993), 18–51. See also James Allan, 'Bills of rights and judicial power—a liberal's quandary', *Oxford Journal of Legal Studies*, 16 (1996), 337–52, and H. P. Monaghan, 'The Court goes to Harvard', *Harvard Civil Rights—Civil Liberties Law Review*, 13 (1979), 117–31. For arguments against this objection, see Alexander Bickel, *The Least Dangerous Branch*, 2nd edn (New Haven, Conn.: Yale University Press, 1986).

⁴²See, e. g.: D. G. Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Oxford: Clarendon Press, 1986); Kenneth C. Davis, 'Facts in lawmaking', *Columbia Law Review*, 80 (1980), 931–42; Lon Fuller, 'The forms and limits of adjudication', *Harvard Law Review*, 92 (1978), 353–409; D. L. Horowitz, *The Courts and Social Policy* (Washington, D.C.: Brookings Institution, 1977); Neil K. Komesar, 'A job for the judges: the judiciary and the constitution in a massive and complex society', *Michigan Law Review*, 86 (1988), 657–721; Pereira-Menault, 'Against Positive Rights'.

with such difficulties, judges would be unwilling to adjudicate social rights, which would give their constitutionalisation no more than symbolic value.⁴³ No such problem occurs in the case of negative rights, since judges have simply to decide whether the state has interfered with someone in ways that are contrary to the constitution, and if so to strike down the law under review.

There is no denying that adjudicating negative rights is very different from adjudicating social rights. However, I do not think that the distinction should be overdrawn. As a matter of fact, judges in the United States, Canada and Europe have made decisions about allocations of resources when adjudicating negative rights, either on the basis that negative rights ground positive duties,⁴⁴ or on the basis that compensation should be given to someone whose constitutional negative rights have been violated. Furthermore, they now increasingly assess whether resources have been allocated according to the law, most notably, in the UK, with respect to education, housing and health care, which suggests that they would not be reluctant to adjudicate constitutional social rights. These judgements are usually taken into account by governments, and have led some governments to adjust their welfare policies.⁴⁵ This tells us two things. First, courts have not always been reluctant to adjudicate allocations of resources. Second, when they have done so, they have done so with some degree of success.

Now, it is likely that they are not always as successful as they should be. However, to bemoan this fact and reject constitutional social rights on that ground is misguided. Clearly, poring over budget reports and assessing welfare policies require some specific skills; but there is no reason why specialised judges could not be trained to acquire those skills, or could not seek advice from independent experts, as they actually already do. This does not seem to me to pose a serious problem. The greatest difficulty for judges is that they cannot readily (as they must) compare individual situations, usually because they will not even be able to see some of the parties in court. Suppose that A complains to the court that he was not awarded a council house he claims the constitution entitled him to. Suppose that the government (or local authority) claim that they did not have the resources to do it because they had to throw money into more urgent programmes for, say, sick pensioners. Suppose further that A is worse off than pensioner B was before he benefited from the programme simply by virtue of being a pensioner. Had direct comparisons between the two been possible, A

⁴³See, e.g. Brian Barry, *Justice as Impartiality* (Oxford: Clarendon Press, 1995), pp. 96–7; G. Hughes, ‘Social justice and the courts’, *Nomos XV: The Limits of Law*, ed. J. R. Pennock and J. W. Chapman (New York: Lieber–Atherton, 1974)

⁴⁴It follows from my argument in sections III.A and III.B that theirs is an incorrect reasoning. However that is beside the point at issue. The point is that they have handed down judgements concerning allocations of resources.

⁴⁵For example, the Belgian government reformed the law on inheritance following a judgement against it by the European Court of Human Rights in *Marckx v. Belgium*, 31 Eur. Ct. H. R. (ser. A) (1979). For an exhaustive discussion of this issue, see C. Scott and P. Macklem, ‘Constitutional ropes of sand or justiciable guarantees?’, at pp. 43 ff. and David Harris, *The European Social Charter* (Charlottesville: University Press of Virginia, 1984).

would have had the resources instead of B, who would still have had a decent level of resources to live on. As a result of this resource allocation by the government, A's constitutional right to housing is violated. Now in order to establish that, the court would have to hear B, one of many to benefit by these programmes, but it is unlikely that it will, for it usually has neither the time nor the money to hear all the beneficiaries of a particular policy.

It is far beyond the scope of this paper to offer solutions to this problem, which strikes me as the strongest for constitutional social rights. I would tentatively say this: the problem suggests that judges cannot adjudicate constitutional social rights at the individual level; that is, it might be virtually impossible for them to assess whether a social right of a given *individual* has been violated. However, that is no reason to reject the constitutionalisation of social rights altogether. The government could be put under weaker constitutional constraints, which could be formulated as follows: "the government of the day must take all steps to ensure that it satisfies social rights to minimum income, housing, education and health care, as far as it can, within the constraints of resources reasonably available to pursue them."⁴⁶ The judiciary would be able, I think, to make sure that the government does indeed take those steps. Furthermore, there are other ways of protecting constitutional social rights than constitutional judicial review of individual cases, which admittedly would not offer as good a protection, but would offer some protection nonetheless. For example, one might provide for group action, whereby associations of, say, homeless people, would be able to challenge government housing policies on grounds of unconstitutionality. Or one might provide for constitutional judicial *preview* of the law, as is the case in France and in the Republic of Ireland, where the law is reviewed and, if necessary, struck down, before it is implemented. These are areas to explore further before concluding that constitutional social rights can never be protected by judges under a bill of rights.

CONCLUSION

I have argued that if one advocates constitutional civil and political rights as well as social rights, then one must advocate *constitutional* social rights. I have then assessed the claims that some rights are negative while others are positive and that the positive character of social rights precludes their constitutionalisation. I have argued that negative and positive rights differ in the kinds of duties they ground on other people, that conflicts do not arise between rights but between the interests they protect, and that these conflicts arise both between the interests protected by negative rights and between the interests protected by positive rights. Finally, I have examined the implications of these arguments for the constitutionalisation of social rights, and concluded that the two distinctions

⁴⁶This formulation was suggested to me by R. E. Goodin.

between negative and positive rights cannot ground claims to the effect that the judiciary does not have the legitimacy to adjudicate social rights. However, I conceded that it might not always have the competence to do so, and I tentatively suggested ways to get around this problem.

The paper, thus, did not offer a full defence of constitutional social rights, since it rested on the assumption that bills of rights are legitimate. A full defence would require that this assumption be defended. Yet, almost all mainstream egalitarian liberals advocate bills of rights as well as social rights, and yet are remarkably silent on constitutional social rights. The latter were thus worth arguing for on egalitarian liberals' own premises, so as to fill a gap in liberal theory, and, more importantly, so as to point out that one cannot take social rights seriously and yet refrain from addressing the perennial question of the violation of these rights by the democratic majority.⁴⁷

⁴⁷I am very grateful to D. Castiglione, G. A. Cohen, M. Cohen, R. E. Goodin, M. Liao, M. Philp, L.-H. Piron, an anonymous referee for the *Journal of Political Philosophy* and the members of the Nuffield Political Theory Workshop for very helpful comments on earlier drafts of this paper.