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CIVIL RIGHTS AND SOCIAL RIGHTS: THE FUTURE OF THE RECONSTRUCTION AMENDMENTS

Mark Tushnet *

The Constitution's revision after the Civil War reflected distinctions that the Reconstruction's legal culture drew among different kinds of rights.[1] That culture operated comfortably with distinctions among civil rights, political rights and social rights.[2] Even during the post-Reconstruction period, the distinctions were not entirely stable. In the past century, the definition of civil rights has continued to change. Today's legal culture treats the right to vote and the right of unimpeded access to public accommodations as civil rights,[3] not as the political or social rights they would have been treated as a century ago. We continue to distinguish civil rights from social rights, but we take our definition of social rights from the emerging criteria of international human rights law: social rights deal with the material bases of human well-being and include the rights to shelter, to a job under decent working conditions and to subsistence.[4]

In this Essay I suggest a parallel between the Reconstruction legal culture and contemporary legal culture. During the Reconstruction era,

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1. The analysis in Section I draws from, and in many ways summarizes, the argument in Mark Tushnet, *The Politics of Equality in Constitutional Law: The Equal Protection Clause, Dr. Du Bois, and Charles Hamilton Houston*, 74 J. AM. HIST. 884 (1987) [hereinafter Tushnet, *Politics of Equality*]. The analysis in Section II is based on a paper presented at the annual meeting of the American Philosophical Association, Eastern Division, December 1991. Mark Tushnet, Philosophical Implications of Recent Developments in Central and Eastern Europe (Dec. 1991) (unpublished manuscript, on file with author). Tom Krattenmaker made extremely helpful comments on that paper.

2. For an example of the distinction's influence, see Plessy v. Ferguson, 163 U.S. 537 (1896) (segregation statute not unconstitutional, in part because argument for nonsegregation rests on claim of equality in respect to social rights unprotected by Fourteenth Amendment), *overruled by* Brown v. Board of Educ., 347 U.S. 483 (1954).

3. *See, e.g.*, Voting Rights Act of 1965, 42 U.S.C. §§ 1973-1973bb-1 (1988); Americans With Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (Supp. 1991).

4. *See* International Covenant of Economic, Social and Cultural Rights, Jan. 3, 1966, 993 U.N.T.S. 4, 6-7. There is an emerging category of third-generation rights that implicate the rights of groups as such. *See* Speech of Karel Vasak *in* Stephen P. Marks, *Emerging Human Rights: A New Generation for the 1980's?*, 33 RUTGERS L. REV. 435 (1981). However, for present purposes I intend to ignore that category.

legal thinkers believed that the distinctions among civil, political and social rights were immutable and almost inherent in the nature of society. Similarly, today many commentators distinguish sharply between civil rights and social rights: civil rights are absolute and must be provided in any civilized society, while social rights are necessarily contingent on a society's level of economic development. Additionally, contemporary commentators believe that courts can enforce civil rights but cannot enforce social rights.[5] I argue, in contrast, that these distinctions are no less contingent than the ones Reconstruction legal culture drew. The future of the Reconstruction Amendments, I suggest, may resemble their past: seemingly immutable definitions of fundamental categories of legal analysis may change before our eyes.

I. CIVIL, POLITICAL AND SOCIAL RIGHTS IN RECONSTRUCTION LEGAL CULTURE

For Reconstruction legal thinkers civil, political and social rights were seen as three distinct categories. Civil rights attached to people simply because they were people; they were the rights one had in a state of nature, such as the right to personal freedom of action, the right to life and the right to select and pursue a life plan.[6] The Privileges or Immunities Clause of the Fourteenth Amendment protected these civil rights.[7] Political rights, in contrast, arose from a person's location in an organized political system.[8] These included the right to vote and otherwise participate in the political life of the community by, for example, jury service. The Fifteenth Amendment protected the central political right to vote.[9] Social rights were exercised in the rest of the social order and, most importantly, in the market. For Reconstruction legal thought, government had nothing to do with guaranteeing social rights except to enforce those rights guaranteed by the common law.[10]

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5. *See, e.g.*, Cass Sunstein, *Constitutionalism, Prosperity, Democracy: Transition in Eastern Europe*, 2 CONST. POL. ECON. 371, 383 (1991) ("A constitution that creates positive rights is not likely to be subject to judicial enforcement, because these rights are vaguely defined, simultaneously involve the interests of numerous people, and depend for their existence on active management of government institutions—something for which judges are ill-suited.").

6. *See* MICHAEL K. CURTIS, NO STATE SHALL ABRIDGE: THE FOURTEENTH AMENDMENT AND THE BILL OF RIGHTS 41-54 (1986).

7. U.S. CONST. amend. XIV, § 1. The list of "privileges and immunities" in Corfield v. Coryell, 6 F. Cas. 546 (C.C.E.D. Pa. 1823) (No. 3230) was the source of illustrations of civil rights for this era.

8. Or, in some versions, in a well-organized political system where the adjective implies that there are normative constraints on how a government can properly be organized.

9. U.S. CONST. amend. XV.

10. Consider here the fact that the United States Supreme Court believed it relevant to

Even during Reconstruction, difficulties arose in sustaining the idea that these types of rights were categorically different. For example, during the congressional debates on the adoption of the Fourteenth Amendment, the right to serve on a jury was routinely described as a political right,[11] and the audience was repeatedly assured that the Fourteenth Amendment would not guarantee African Americans that right.[12] Yet some participants offered broader definitions of civil rights. When the United States Supreme Court was faced with a constitutional challenge to a statute barring African Americans from jury service, it had no difficulty concluding that the statute violated the Constitution.[13] The decision rested on the Fourteenth Amendment, but its conceptual basis surely was found in the Fifteenth:[14] because the Constitution guaranteed the most important political right there, it would have been senseless to insist that a less important political right was unprotected, even though the framers of the Fourteenth Amendment may have thought that it protected no political rights at all.

More embarrassing to proponents of the Fourteenth Amendment was a problem created by their insistence that civil rights included the right to enter into contracts. Their opponents pointed out that marriage was founded on contract and argued that it therefore followed that the Fourteenth Amendment would outlaw state statutes barring interracial marriage. Proponents responded feebly that the right to contract was not denied by such a law because it imposed equal disabilities on whites and African Americans.[15] Unfortunately for this argument the Fourteenth Amendment's supporters tended to distinguish between the Equal Protection Clause, which dealt with equality, and the Privileges or Immunities Clause, which, they argued when the issue of racial intermarriage was not before them, guaranteed some fundamental rights including the right to contract, in a non-comparative way.

Thus even at the outset, the distinctions among civil, political and

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discuss the common law obligations of common carriers in the Civil Rights Cases, 109 U.S. 3, 21-22 (1883) (superseded by statute as stated in Fisher v. Shamburg, 624 F.2d 156, 159-60 (10th Cir. 1980)). By the turn of the twentieth century, the dominant position was even stronger: the government *could not* attempt to protect social rights. *See* Lochner v. New York, 198 U.S. 45, 61, 64 (1905), *repudiated by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) *and* Ferguson v. Skrupa, 372 U.S. 726 (1963).

11. *See* Tushnet, *Politics of Equality*, *supra* note 1, at 887.

12. *See id.*

13. Strauder v. West Virginia, 100 U.S. 303, 310 (1879).

14. U.S. CONST. amend. XV. The Fifteenth Amendment provides in pertinent part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." *Id.* § 1.

15. *See* Tushnet, *Politics of Equality*, *supra* note 1, at 887-88.

social rights were unstable. As the array of social power in the country changed so did the accepted understanding of the distinctions. Overall, the distinctions proved no more stable than the society itself. By the middle of the twentieth century, if not earlier, civil rights had come to subsume most of the rights that earlier had been called political rights. The New Deal revolution in constitutional law weakened the claim that social rights—those primarily implicated in market transactions—were somehow free from government regulation. In addition, the legal realists persuaded the legal culture that, analytically, we could not easily argue that the government lacked power to define social rights: the market itself, and therefore everything that flowed from market transactions, was structured by government.[16]

By the middle of the twentieth century, the claim that governments had to protect social rights was pressed more urgently. International norms of human rights came to include social rights. Working-class movements in Western Europe gained political power and with it began to show that governments could take on the task of guaranteeing social rights. From the nineteenth century on, many had found the socialist ideals that underlay those movements attractive, and governments began to respond to those ideals. Another source of social and economic rights was President Franklin Roosevelt's articulation of the "Four Freedoms."[17]

Today's legal culture finds the idea of social rights comfortable in a way that would have seemed quite strange to Reconstruction legal culture. The process by which it became comfortable, however, is not strange at all: distinctions among rights have always been unstable in fact, though participants in any particular legal culture tend to believe that their culture's definitions of the categories are embedded in the na-

16. The standard citations for this proposition are Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923), and Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927).

17. 9 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 672 (Samuel Rosenman ed., 1950). In his 1941 annual message to Congress, Roosevelt asserted that:

> In the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms. The first is freedom of speech and expression—everywhere in the world. The second is freedom of every person to worship God in his own way—everywhere in the world. The third is freedom from want—which, translated into world terms, means economic understanding which will secure to every nation a healthy peacetime life for its inhabitants—everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a worldwide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

Id.

ture of society. Today the differences are taken to be that social rights are more contingent than civil rights and that only civil rights are appropriate subjects for judicial enforcement. I argue next that these differences are no less contingent than the ones Reconstruction legal culture found to be natural.

II. DEFINING AND ENFORCING SOCIAL RIGHTS

In speaking of civil rights, as defined in today's legal culture, many have been influenced by Dworkin's idea that rights are "trumps," that is, considerations that absolutely override competing factors.[18] Further, many appear to believe that, at least in advanced constitutional systems, civil rights must be enforceable through some sort of judicial proceeding.

It has been contended that social rights are different. They often seem to require social provision; governments cannot simply stand aside, but must take positive steps to assure that rights to shelter, food and work are honored.[19] Yet, although courts are well positioned to protect civil rights, they are ill-suited to enforce social rights; courts cannot devise effective methods of ensuring that shelter, food or jobs are available to citizens. The latter point is reflected in international human rights documents, which typically declare that social rights are to be provided to the degree compatible with the state of economic development of each society; no such qualifications attach to the description of civil rights.[20]

I believe the foregoing claims are wrong.[21] First, civil rights are not in fact absolute in any interesting sense; that social rights cannot be abso-

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18. *See* Ronald Dworkin, *Is There a Right to Pornography?*, 1 OXFORD J. LEGAL STUD. 177, 211 (1981) (contending that rights can, in some instances, be "trumps" over general welfare). In a weaker, more plausible version, rights override competing factors unless those factors are truly extraordinary. For my purposes, nothing turns upon which version of the idea of "rights as trumps" one accepts.

19. *See* David M. Trubek, *Economic, Social, and Cultural Rights in The Third World: Human Rights Law and Human Needs Programs*, *in* HUMAN RIGHTS IN INTERNATIONAL LAW: LEGAL AND POLICY ISSUES 205, 205-33 (Theodor Meron ed., 1984).

20. *See* Johan D. van der Vyver, *Constitutional Options for Post-Apartheid South Africa*, 40 EMORY L.J. 745, 779-80 (1991).

21. In one dimension that is sometimes overlooked, the claims may well be pernicious. Given the historical legacy of the regimes in Eastern and Central Europe, the people there have become accustomed to the idea that they are entitled to second-generation rights (that is economic and social rights). *See* FRANK NEWMAN & DAVID WEISSBRODT, INTERNATIONAL HUMAN RIGHTS 363 (1990) (defining "social welfare rights"). Further, the role of international norms in assisting the successor regimes in attaining legitimacy means that those regimes can (strategically) defend their adherence to pre-revolutionary modes of social and economic organization by referring to the international guarantees of second-generation rights. As a result, abjuring second-generation rights would amount to a historical regression.

If we examine how civil and social rights emerged, however, we might be troubled by one aspect of such a regression. Typically guarantees of rights to women lagged behind guarantees

lute, therefore, does not distinguish them from civil rights. Second, enforcing both civil and social rights requires the same degree of judicial action, whether the action be a lot or a little.

A. Non-Absolute Rights: Civil and Social

Legal philosophers in the United States may have been beguiled by Dworkin's treatment of rights as trumps in part because they are familiar with the so-called absolutist tradition in free speech adjudication. The absolutist tradition, associated with Justice Hugo Black, took the language of the First Amendment to mean what it said: Congress shall pass no law abridging the freedom of speech means that Congress shall pass *no law*.[22] In closely aligned constitutional traditions, however, the formulations are somewhat different. These traditions reflect a balancing of competing interests.

The preface to the Canadian Charter of Rights and Freedoms, for example, provides that rights are "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."[23] One can imagine a constitution that protects social and economic rights with an analogous preface. Indeed, the standard formulation that the rights are to be provided to the degree compatible with the society's level of economic development seems a suitable transformation. This formulation is an expression of the underlying idea that rights are qualified by the social setting—the values of a free and democratic society in one case, the level of economic development in the other—in which they are exercised or guaranteed.

The Canadian example is particularly interesting because the drafters and interpreters of the Canadian Charter were and have been influenced greatly by the constitutional experience of the United States. Some of the influence was by way of negative example, with the Canadians attempting to avoid some problems they associated with the United States Constitution. More of the influence, however, was positive, with the Canadians imitating the United States' experience. I believe the Charter's preface is an example of positive rather than negative influence.

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to men. To oversimplify, when men had civil rights, women had no rights; when men had political rights, women had civil rights; when men had social and economic rights, women had political rights. As intermittent news reports suggest, it seems likely that women will be the first victims of a regression in the protection of social rights. (There is, I should stress, no analytic connection between abjuring protection of social rights and increasing discrimination against women.)

22. *See, e.g.*, Bridges v. California, 314 U.S. 252, 263 (1941).

23. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 1.

That is, the drafters believed, I think correctly, that the constitutional tradition in the United States was not absolutist, Black and Dworkin to the contrary notwithstanding. The central tradition balances competing interests; the absolutist tradition simply offers a rhetorical device to insist that the values protected by the Constitution are very great values, which ought not be overridden except when truly necessary.[24]

Yet there is nothing to distinguish social and economic rights from civil and political rights in this regard. That is, a society could and should, under international human rights norms, treat social and economic rights as expressing very great values. These should be promoted except when it is truly impossible to do so. In this way social rights could be integrated into the absolutist tradition.

B. Negative and Affirmative Obligations

Requiring governments to *promote* social rights, however, immediately suggests that social rights differ from civil rights, because governments must only *protect* civil rights. Affirmative governmental action seems to be required to promote social rights; someone, and legislatures are the obvious candidates, must establish programs for public provision of housing, food and work in order to implement social rights. In contrast, civil rights seem to be largely negative; all governments must do to promote *them* is to stand aside, not interfere with free speech or voting rights, and the like.

The contrast is heightened when the idea of rights is coupled with the thought that, to deserve to be called a right, an interest must be protected by an enforcement mechanism that can compel compliance with the right. Thus, courts stand ready to invalidate laws that interfere with free speech. But, if social rights are the same as civil rights, then courts would have to stand ready to say, for example, that the legislature's public housing program falls short of what the Constitution requires. Therefore, it would seem that the courts could force the legislature to raise taxes and devise a more adequate program. Yet there is little reason to think that judges would be adept at figuring out how to move from an unconstitutionally deficient housing policy to a constitutionally acceptable one. Moreover, the vision of judges compelling the imposition of

24. I believe that Dworkin's characterization of rights as trumps is, in the end, compatible with the absolutist formulation. Some of Justice Black's defenders explained his position similarly. Richard H. Pildes & Elizabeth S. Anderson, *Slinging Arrows at Democracy: Social Choice Theory, Value Pluralism, and Democratic Politics*, 90 COLUM. L. REV. 2121, 2154-57 (1990).

taxes, or otherwise severely constraining the legislature in an area of difficult policy choices, troubles many.

I believe criticisms of the idea that social rights are analytically the same as civil rights are wrong.[25] Civil rights implicate positive governmental action no less than social rights do. The argument has several components.

First, immediately after the domain of civil rights was expanded to encompass the right to vote and the right to be free from discrimination in the job market, protecting civil rights entailed positive action by the United States government. The government must establish voting schemes in which everyone's vote counts. When nongovernmental actors prevent someone from voting, the present legal culture finds a violation of the right to vote.[26] Thus, protecting the right to vote means that the government must act positively to eliminate such interferences. Similarly, governments must establish mechanisms to enforce the civil rights limitation on discrimination by private employers, which also require positive steps by the government.

Second, we need to specify more precisely what is meant by "protecting a right." Some rights are purely formal in the sense that we demand only that the laws refer to those rights in the correct way but are unconcerned about associated social consequences. For example, a formal right to equality based on race would be satisfied by laws—such as laws dealing with housing—that made no reference to race, even though as a practical matter the quality of the housing available to people varied significantly based on race.

Other rights are more concerned with the actual distribution of social benefits and burdens. In the jargon of the constitutional lawyer, these rights deal with "effects" or "disparate impact." For example, many people believe that the constitutional protection of free exercise of religion requires the government to adjust its programs to take account of the impact those programs have on the practices of religious believers, even if the programs make no reference to religion at all. The Supreme Court's decision that Oregon could deny unemployment benefits to people who were fired because they used peyote as part of their religious

25. Although I also disagree with the assertion that courts are relatively less competent to deal with social rights than with civil rights, I confine my argument to the claim that social rights are positive while civil rights are negative.

26. *See, e.g.*, 42 U.S.C. § 1971 (1988) ("Whenever any person has engaged or . . . is about to engage in any act or practice which would deprive any other person of any right or privilege secured by subsection (a) [which secures the right to vote] . . . the Attorney General may institute . . . a civil action . . . .").

practice[27] was widely criticized.[28] The Court treated the free exercise right as purely formal—satisfied by an anti-drug law that was neutral on its face—when in fact that right must be concerned with effects.

As this example suggests, judicial enforcement of formal rights is quite limited. Formal constitutional rights provide statements of constitutional aspiration; that is, they identify values to which everyone ought to be sensitive. Therefore, legislatures ought to strive to devise programs that accommodate values inherent in formal rights. Moreover, courts ought to interpret statutes with an eye to those values.

The important point is that many civil rights are, to a substantial degree, formal rights. Social rights may be similarly formal. A right to housing, for example, may be satisfied when the legislature adopts a program aimed at assuring housing for all, even if the program falls short of the mark. To the extent that civil rights are simply formal rights (which I believe considerable) and that they serve as statements of aspiration rather than as enforceable legal norms, they may not differ substantially from many social rights.

Third, consider the idea of "effects." Suppose that when we call something a right, we mean that we would be concerned if people in the society could not, as a practical matter, exercise the right. So, for example, a society might protect a purely formal right to free speech, and yet the means of communication might be so concentrated that policies opposed by those who controlled the media could not be effectively put before the public. Similarly, as to the right of racial equality: many people believe that such a right is violated when, despite a regime in which law makes no reference to race, social benefits and burdens are in fact distributed differentially according to race.

If this is our conception of rights, or of some particular rights, then a right will be protected only when adequate provision is made for the effective exercise of that right. Thus, to protect rights, people must have access to the means of communication; social benefits and burdens must be "re"-distributed. This subset of civil rights, then, like social rights, would require positive government action.[29]

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27. Employment Div., Dep't of Human Resources v. Smith, 494 U.S. 872 (1990).

28. Donald L. Beschle, *Paradigms Lost: The Second Circuit Faces the New Era of Religious Clause Jurisprudence*, 57 BROOK. L. REV. 547, 547-48, 592-93 (1991); James D. Gordon, III, *Free Exercise on the Mountaintop*, 79 CAL. L. REV. 91, 92-97 (1991); Kenneth Marin, Note, Employment Division v. Smith: *The Supreme Court Alters the State of Free Exercise Doctrine*, 40 AM. U. L. REV. 1431, 1466-67, 1474-76 (1991).

29. The size of this subset is of course an open question. Indeed, to the extent that people are concerned about the positive requirements of social rights, they may be attracted to formulations of civil rights that minimize the apparent need for positive provision. My only point

Fourth, the objection to social rights is that they require governmental distribution of important social goods, either by legislatures or by courts. Yet civil rights involve similar questions of distribution. The point has been put most forcefully by proponents of restrictions on the availability of pornography. Proponents of these restrictions argue that women's liberty is restricted—their ability to walk on the streets without fear is limited—when pornography is freely available.[30] The manner in which free speech rights are distributed affects the distribution of other societal goods, such as freedom of action. Thus, when a society defines free speech or other civil rights, it is defining what it regards as an acceptable distribution of important social rights.

The pornography example does not quite bring us to social rights, because the claim is that defining one civil right, free speech, in one way rather than another affects the distribution of another civil right. Consider, however, the problem of campaign financing. To the extent that free speech principles restrict a nation's ability to regulate campaign financing, substantive political outcomes regarding social rights are affected. Put crudely, making it difficult to regulate campaign financing helps preserve the status quo with respect to the distribution of shelter, food and jobs. The point is quite general: the definition of civil rights affects the degree to which social rights will be promoted.[31] It therefore cannot be a distinctive criticism of social rights that defining what *they* are involves determining the distribution of social benefits and burdens, for the same is true when civil rights are defined.[32]

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here is that the operative distinction is not congruent with the distinction between civil and social rights.

30. Drucilla Cornell, *Sexual Difference, the Feminine, and Equivalency: A Critique of MacKinnon's* Toward a Feminist Theory of the State, 100 YALE L.J. 2247, 2253, 2259 (1991) (book review). The analytic point does not depend on whether one agrees that such restrictions ought to be imposed. The empirical premise may be questioned, but not, I think, the analytic point.

31. I do not contend, of course, that the definition of *every* civil right affects the distribution of social rights to the same degree: consider the difference between free speech (connected to campaign financing) and the Confrontation Clause. I do believe, however, that the definition of every civil right has some effect on the distribution of social rights: consider the effect on child-rearing of different definitions of the right of confrontation in child abuse prosecutions.

32. There is a weaker reciprocal point. Once civil rights are guaranteed, political interests will find it useful to raise questions about the distribution of social rights affected by the way in which market rights are defined. Unless constitutional guarantees protect the distribution of social rights against alteration, see Lochner v. New York, 198 U.S. 45 (1905), *repudiated by* Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421 (1952) *and* Ferguson v. Skrupa, 372 U.S. 726 (1963), how civil rights are defined affects, albeit in an indeterminate way, how social rights are distributed.

Another way of making this point is that those who distinguish between civil and social rights assume that the distribution of housing, jobs and food results from private ordering—market processes—with which the government is uninvolved. Yet, as the current experience in Central and Eastern Europe abundantly shows, government is essentially implicated in structuring markets. The choices open to system designers are, in a sense, transparent, while the choices that have been made in more established systems are opaque.

Finally, consider the objection that "government in the large" may perhaps determine the distribution of food, jobs and housing by structuring markets, but courts should not. Courts may be appropriate institutions to define civil rights, but they are inappropriate institutions to define social rights.[33] Yet the distinction between civil and social rights is thinner than its proponents claim. Civil rights include the right to own property, to act freely subject to ordinary liability rules and to enter into contracts. The manner in which those rights are defined determines how the interests protected by social rights are distributed.[34]

For example, if a society defines the right to dispose of property to include a factory owner's power to shut down the plant whenever he or she wants, jobs may be more at risk than if the property right is defined so as to permit a shutdown only if certain conditions are met.[35] There is nothing in the nature of the concept of property, or other civil rights, that forecloses the second definition of property. Yet, of course, the two definitions have quite different implications for the protection that society accords work. If we want to assure a certain distribution of jobs, shelter and food, we can reach that goal by a careful definition of property rights.

Undoubtedly, the distribution of investment between plants covered by plant-closing laws and other economic opportunities will vary depending on the property and contract regimes a society has; if plant-closing laws define property rights only with respect to what used to be called the commanding heights of the economy, there will be more investment

33. Again, I forego a direct challenge to the claim of judicial incapacity.

34. For an extended discussion, see Karl E. Klare, *Legal Theory and Democratic Reconstruction: Reflections on 1989*, 25 U. B.C. L. REV. 69 (1991).

35. I put the point conditionally because the actual outcome will depend on who is authorized to make the decision that the prescribed conditions for shutdowns are satisfied: if the owner must have a good faith belief that the conditions are satisfied, one set of outcomes might follow, while if an administrative agency must be satisfied, another set might follow.

The Worker Adjustment and Retraining Notification Act, 29 U.S.C. §§ 2101-2109, requires employers to provide notification of pending plant-closings under specific conditions, thereby modifying the property rights they previously had. 29 U.S.C. §§ 2101-2109 (1988).

in "non-peak" industries than there would be if such laws applied to every enterprise. As a result, the forms of material well-being will also differ: less steel, more computers, perhaps. These differences, while arguably relevant to the question of how wealthy a society is, have essentially no connection to the more important question of what the society's level of social welfare is. Social welfare takes into account all of society's values in a way that money wealth does not.

In this way the distinction between civil and social rights collapses: by defining the civil right to property in a specified way, we can accomplish whatever we want regarding social rights.

Arguably, the preceding point may be correct when considering the initial distribution of property, but transactions between freely contracting parties will undo whatever provision of social rights we accomplish through the initial definition of property rights. The next step though should be obvious: nothing in the nature of civil rights determines what definition of "freedom with respect to contract" the society should adopt. Any system will have exceptions or conditions under which it may be said that a party was not freely contracting. One manner in which society may limit freedom of contract is through the law of incapacity. The system could have a quite narrow definition of incapacity, limiting it to lunatics and children, and it could invalidate only contracts procured by fraud narrowly defined. But, again, nothing inherent in the notion of civil rights bars a broader definition of incapacity. A system could, without violating any accepted notions of civil rights, hold that a person who lacked knowledge or appreciation of some important characteristics associated with a transaction—including the transaction's impact on the long-term distribution of power—lacked capacity to enter into a binding contract. Instead of taking intellectual capability as the measure of capacity, it could recognize cognitive impairments that make it unlikely that the party accepting the short end of the deal truly understood what was at stake.

By coupling a careful definition of initial property rights with an equally careful definition of the conditions of "free contract," then, we arrive at whatever specification of social rights we want. Notice, too, that this regime involves only the traditional categories of property and contract, that is, legal categories whose definition is ordinarily remitted to the courts. In short, if we think that courts have the ability to define civil rights, we must think that they have the ability to determine social rights. The only question is whether they will be sufficiently aware of that ability.

None of this is to say, of course, what choices societies should make

as they define civil or social rights. My only point is that people involved in the process should not attempt to distinguish between civil and social rights in the way many have suggested.

III. CONCLUSION

I am quite certain that the argument in Section II will seem to most readers entirely wrong. The distinction between civil and social rights is so ingrained in our way of thinking about fundamental law that we are likely to believe that, somehow, any argument against the distinction *must* be wrong. The lesson of Section I, however, is that distinctions among types of rights are historically contingent. At any time, a legal culture will take the distinctions it uses as capturing something essential about social and legal order. Here, as elsewhere, historical consciousness may be quite subversive: it helps us understand that people in the past believed that the distinctions they drew were natural, even as *we* can see that they were not.

Reconstruction legal culture used the terms civil rights and social rights. So do we. What the terms refer to, however, has changed dramatically. Reconstruction legal culture treated its terms as capturing the essence of the social and legal order. We treat ours similarly. That their culture has changed into ours, however, should suggest skepticism about our understanding of our own legal culture.