

# Looking for Rights in All the Wrong Places

Why State Constitutions Contain America's Positive Rights

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Sample Chapter

## Chapter 1

### Looking for Rights in All the Wrong Places

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

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

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

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

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

rights to the claim that *America* lacks positive rights, at least at the constitutional level. It is this error that I endeavor to correct.<sup>iv</sup>

The texts of state constitutions force us to question the ubiquitous assertions that America lacks positive constitutional rights. Illinois was not alone in creating constitutional rights to interventionist and protective government, nor was this provision for miners the only positive right it created.<sup>v</sup> Throughout the nineteenth and twentieth centuries and across the United States, activists, interest groups, and social movements championed positive rights, and building support for their inclusion in state constitutions. As a result of these political campaigns, state constitutions have long mandated active government intervention in social and economic life, and have delineated a wide array of situations in which government is not only authorized, but actually obligated to intervene. State constitutions contain many different kinds of mandates for interventionist and protective government, not only with respect to laborers, but also with respect to government's obligations to care for the poor, aged, and mentally ill, preserve the natural environment, provide free education, and protect debtors' homes and dignity.

This book focuses on three political movements to add these kinds of positive rights to state constitutions. In particular, it examines the campaign for education rights, which spanned the nineteenth and twentieth centuries, the movement for positive labor rights, which occurred during the Gilded Age and Progressive Era, and the push to add environmental bills of rights to state constitutions during the 1960s and 1970s. Together, these cases serve to highlight not only the historically and geographically contingent variations in the form and function of America's positive rights tradition, but also its extraordinary length. The arguments and political calculations of the three rights

movements I examine displayed remarkable continuity across diverse issue areas, vast geographic distances, and entire centuries. It is in this recurrent recourse to constitutional politics, along with the textual provisions in state constitutions, that I identify a sustained positive rights tradition.

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

This study also sheds new light on the origins of constitutional rights. Most accounts of rights' creation, both within and outside the United States, hold that dominant political coalitions write new rights into constitutions when (and precisely because) they are worried about losing their dominant positions. On this account, movements for new rights are fundamentally conservative projects, intended to maintain the status quo. However, the origins of the positive rights in state constitutions are quite different. Like

the Illinois miners who campaigned for constitutional protections, many positive rights' advocates did not intend to crystallize existing political arrangements. Instead, these activists hoped to re-write the rules of politics and transform their societies. In the book that follows, I demonstrate that rights movements in the United States have used state constitutions for reasons that theories of constitutional politics have tended to miss. I also argue that constitutional theorists have largely overlooked the positive rights that these movements created.

### **American Constitutional Exceptionalism**

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

America's political development was once thought to be similarly unusual. When compared with Europe, the industrializing United States appeared exceptional in its lack protective social and economic regulations and its citizens seemed to evince a strong and unusual aversion to government. Thanks in large part to historical studies of state and local governance, this story about American political development has been dramatically

revised and this version of American exceptionalism widely rejected. Few scholars would still endorse the idea that America's political development was exceptional in its lack of governance. The resemblance between the outdated theory of American exceptionalism and the current theory of American *constitutional* exceptionalism should give us pause, and should prompt us to ask whether the standard view of America's constitutional tradition may also require revision.

Of course, the idea that America's constitutional tradition is exceptional is grounded in considerable empirical analysis. There is indeed strong evidence that the American constitutional tradition is exceptionally hostile to positive rights. While many prominent political figures, including several U.S. presidents, have argued on behalf of positive rights, few (and arguably no) positive rights claims have ever changed either the U.S. Constitution's text or the Supreme Court's interpretation of it. Thus, America's welfare state is widely believed to consist of statutory law alone, and is generally understood as a matter of legislative and majoritarian choice, rather than constitutional obligation.

Even the dramatic expansion of the United States' social safety net during the New Deal seems to confirm the assessment. In the wake of the Great Depression, Franklin Roosevelt explained, government must take active steps to protect citizens from economic and physical risk in order for them to take advantage of America's traditional political liberties. He argued the Constitution's negative liberties were only meaningful under conditions of economic security, and listed the social and economic safeguards that must undergird the political liberties contained in the Bill of Rights. This list, which Roosevelt named the "Second Bill of Rights" included rights to housing and medical care

and protection from unemployment and hunger.<sup>vi</sup> However, to the degree that these governmental commitments to social welfare became a part of federal policy, it was through statutory programs, like Social Security and Medicare, alone. Many of these protective policies have engendered enduring political support, and as a matter of practical politics, the statutes that embody them may be quite difficult to repeal. However, the positive-rights claims underlying New Deal policy were never constitutionalized through a formal amendment to the text of the Constitution or through changes in Supreme Court doctrine. Absent a constitutional mandate, Congress remains free to scale back or eliminate any statutory entitlement program that becomes unpopular, as it did with Aid to Families with Dependent Children (AFDC) in 1996.

Hoping to find a constitutional mandate for a more robust welfare state than the one that is already embodied in statutory law, several litigation movements have looked to the Fourteenth Amendment. Yet these movements have met with extremely limited success, and the Supreme Court has generally declined to read either the Equal Protection or Due Process clause as a mandate for active government intervention.<sup>vii</sup> To be sure, several landmark cases seem to imply or contain a positive-rights reading of the Fourteenth amendment, but these decisions have not served as the foundation for any more extensive positive rights jurisprudence, and the Court has explicitly rejected the positive rights reading in its subsequent cases.<sup>viii</sup> Instead, the Court has consistently ruled that protective and redistributive policies are questions of majoritarian choice, not matters of constitutional duty. Government may well choose to protect citizens from the threats that do not stem directly from government. However, the Court has been quite explicit in its repeated determination that the U.S. Constitution imposes no obligation for it to do so.

Thus, Most observers agree that even if the U.S. Constitution ought to be read differently or might have been interpreted in another way, it is not currently understood to contain positive rights. Indeed, campaigns on behalf of positive constitutional rights seem to have fizzled without ever gaining significant traction in either a court of public opinion or law.<sup>ix</sup> Even one of the nation's most prominent welfare-rights advocates, who, in the 1960s, pioneered the case that Constitution contained justiciable welfare rights, has begun to argue that the U.S. constitution may actually lack these rights.<sup>x</sup> This view of American constitutionalism has, quite understandably, given rise to the argument that America's constitutional tradition is distinct from those of other industrialized nations.

Assertions about America's constitutional exceptionalism are commonplace.<sup>xi</sup> For instance, noted law professor Cass Sunstein has declared that "the constitutions of most nations create social and economic rights, whether or not they are enforceable. But the American Constitution does nothing of the kind." He goes on to ask "Why is this? What makes the American Constitution so distinctive in this regard?"<sup>xii</sup> Many scholars have answered this question with classically exceptionalist tropes, particularly with reference to America's unique political culture.<sup>xiii</sup> For instance, prominent constitutional scholar Frederick Schauer writes "American distrust of government is a contributing factor to a strongly libertarian approach to constitutional rights. The Constitution of the United States is a strongly negative constitution, and viewing a constitution as the vehicle for ensuring social rights, community rights, or positive citizen entitlements of any kind is . . . highly disfavored."<sup>xiv</sup> Other theorists have followed suit, opining that "the constitutionalization of positive rights will not occur absent a shift in America's classically liberal political culture."<sup>xv</sup> Andrew Moravcsik has written that, while he

doubts that such abstract cultural differences can, on their own, explain divergent policy outcomes, “Americans [do] tend to shy away from state intervention to redress social inequality—now established in most advanced industrial democracies as the primary fiscal task of the state. The aversion to state intervention is a distinctively American trait as compared to the political cultures of other advanced industrial democracies.”<sup>xvi</sup>

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

length, to protect people and particularly their property and economic arrangements from state power distinguish America's constitutional tradition from Europe's.<sup>xix</sup>

### **Not So Exceptional After All**

Arguments about America's exceptional rights tradition will be immediately recognizable to those familiar with the broader theory of American exceptionalism. Scholars of American politics were once widely agreed that American political development was notably aberrant. While European countries developed strong, centralized welfare states as they industrialized, nineteenth-century America appeared virtually stateless and notably lacking in welfarist bureaucracies. Americans' deep suspicion of government and their single-minded devotion to the protection of private property were often used to explain America's divergent political path.<sup>xx</sup> As we have seen, the conventional wisdom about America's constitutional tradition still echoes with these exceptionalist tropes about Americans' unusual history, their resulting fear of government, and their conspicuous difference from the rest of the world.

It is important to note the close resemblance between the classic description of American exceptionalism and the commonplace assertions of American *constitutional* exceptionalism because scholars currently consider the broader theory of American exceptionalism largely incorrect. New waves of research have demonstrated that Americans have long embraced government and that American political culture cannot be described as simply anti-statist or exclusively liberal.<sup>xxi</sup> As historian Daniel Rodgers explains, "Arguments based on assumptions of timeless, holistic, homogenously structured national values still exist, of course. But it is safe to say that fewer and fewer

historians subscribe to them.<sup>xxii</sup> The development of the American state no longer appears to be defined by an exceptional commitment to *laissez faire* capitalism or an extraordinary suspicion of government intervention.

Studies of state and local politics have played a key role in undermining the notion of American exceptionalism. When we expand our examination of American governance beyond the federal level, even nineteenth century America no longer appears to lack regulatory, protective government. On the contrary, it is quite clear that state governments regulated social life in a variety of arenas, and established interventionist policies to promote social welfare well before the New Deal.<sup>xxiii</sup> Historian William Novak has been particularly influential in establishing that, even during the supposedly stateless nineteenth century, governmental regulation was a pervasive feature of American politics. Americans' everyday lives, Novak demonstrates, were permeated by the assumption that government's proper function was to continually intervene, regulate, and perfect community life. It was simply state and local governments that played this interventionist role.<sup>xxiv</sup> Even the federal government itself now appears to have been far more interventionist during the nineteenth century than was once believed. Building on existing norms of state and local governance, the federal government of the nineteenth century worked in partnership with state, local, and private intermediaries to meet social and economic needs.<sup>xxv</sup> As a result of this research, few would continue to defend assertions of American exceptionalism, especially in their strongest form. However, many continue to describe America's constitutional tradition as exceptional. Constitutional exceptionalism has thus outlived the dogma from which it was derived.

It is high time that we applied our knowledge of American political development to our assessment of America's constitutional rights. We should ask, in other words, whether American constitutionalism would continue to look exceptional if we broadened our view of governance to include states. I will argue that the answer is a resounding no. Just as it is mistaken to take the measure of the American state by looking only at the federal government, it is misleading to assess America's rights tradition exclusively with reference to the United States Constitution. The study of state and local governance has discredited claims about America's exceptional political development. Similarly, this study of state constitutions challenges assertions about the exceptional nature of America's constitutional rights.

### **First Central Argument: America Has Positive Rights**

This book's first central argument is that Americans have a long tradition of enshrining positive rights in constitutions, but that we must look at state constitutional politics to find them. State constitutions contain a plethora of positive rights provisions, that cover a wide range of topics. In fact, these constitutional provisions closely resemble the positive rights in constitutions all over the world. For instance, Article Twenty-four of the Belgian constitution of 1970 states "Everyone has the right to education. . . Access to education is free until the end of mandatory schooling," while the Missouri constitution of 1865 declared "The general assembly shall establish and maintain free schools for the gratuitous instruction of all persons. . . between the ages of five and twenty-one years." Article Twenty-four of the 1993 Peruvian constitution states that "The worker is entitled to a fair and adequate remuneration enabling him to provide for himself and his family. .

.,” and the Wyoming constitution of 1889 says “The rights of labor shall have just protection through laws calculated to secure to the laborer proper rewards for his service.” These U.S. constitutional mandates, created in the nineteenth century, are still in place today. While the kinds of socioeconomic protections in the Peruvian and Belgian constitutions are often thought to be missing from American constitutional law, the texts of America’s state constitutions have contained virtually identical guarantees for well over a century.

Not only do the texts of state constitutions contain mandates for interventionist and protective government, but the politics surrounding the creation of these provisions reveal that many of their champions argued for their inclusion in constitutions using the very logic that defines positive rights. The advocates of protective constitutional provisions consistently argued that, for a certain segment of the population, intrusive government and the risks such government posed to private property and individual liberty were not the most salient or urgent threats to the well-being of every citizen. For at least certain groups of people, restrictions on government and protections for private property would mean little unless government also provided protection from other, even more immediate dangers—like poverty, dangerous working conditions, and environmental catastrophe. Furthermore, the advocates of positive constitutional rights insisted that protections against these non-governmental threats were too fundamental to be left in the hands of legislatures. In other words, the movements on behalf of positive rights at the state level sought to weave a social safety net of heartier stuff than mere statutes. Statutory law would certainly compose much of the protection they sought, but they insisted that it must be reinforced by constitutional mandates. These crucial

safeguards could not be a matter of legislative choice, these movements declared, but must instead be secured as obligations on the state, and must therefore be placed in the state's highest law. Different political movements, over different centuries, and across many states made this argument, and many of them succeeded in having protective guarantees added to state constitutions.

It may seem difficult to believe that highly salient commitments on issues of national importance could be reflected only in state constitutions, while omitted from the federal document. However, the federal government played a far smaller role than state and local governments in crafting social policy throughout much of American history. This is arguably the case even today, but it is entirely clear in the case of pre-New Deal politics. Before the 1930s, state governments were primarily responsible for regulating working conditions and employment relationships, for establishing public education, protecting the public health, supervising the management of natural resources like land and water, and caring for the aged, indigent, and insane. In fact, under the dominant interpretation of the Constitution's Commerce Clause, Congress wasn't even thought to possess the authority to regulate in many of these areas. This is not to say that the federal government had no role in shaping America's social policies. However states were primarily responsible for enacting the laws that governed these realms of social and economic life. Since states were the primary sources of law in most areas of social policy, their fundamental laws were the natural targets for activist groups seeking a more interventionist and protective state. Throughout the nineteenth and early twentieth centuries, Americans understood themselves to be living simultaneously under (at least) two governments of consequence (the state and federal governments), and under two

meaningful constitutions (their state and federal constitutions). As we will see, even well into the twentieth century, the policies of state governments were significant enough that some organizations continued to devote resources to shaping America's state constitutions.

One final reason that we might expect to find positive rights in state constitutions, even if they are absent from the Bill of Rights, is that the Bill of Rights was added to the federal Constitution in order to satisfy Anti-Federalists that the new national government would not impinge too dramatically on the sovereignty of the existing state governments. The Bill of Rights was not written to apply to state governments, but was created primarily to ensure that the new national government would not replicate the recent, unwanted intrusions of the British colonial system. It is no wonder, then, that the federal Constitution's Bill of Rights seems (at least at first blush) to devote itself almost entirely to limiting government. Thus, while the Bill of Rights may reflect a suspicion of the federal government, we cannot infer from this document that even its drafters were suspicious of all government.

### **Second Central Argument: Rights Movements Can Be Aimed at Change**

The book's second central argument is that when we look at the movements to create the positive rights in state constitutions, we gain new insights into why people engage in constitutional politics, and why they try to create new constitutional rights. This argument begins with a well-known puzzle about the origins of constitutional rights. Rights tell government what it must do and thereby limit government's choices. It seems strange, therefore, that any actors powerful enough to shape a polity's highest law would

include binding restraints on their own discretion. Surely, those empowered to write a constitution would prefer to leave their options open and their discretion complete. How, then, can we explain the emergence of constitutions, and especially of constitutional rights?

The most famous solutions to the puzzle of how we get constitutional rights hold that the people powerful enough to shape a constitution's content realize that their political influence may not always loom so large. Therefore, in the interests of preserving their grip on the state well beyond their tenure in office, ruling coalitions enshrine their favorite policies in the form of constitutional rights. Constitutional courts will then be able to enforce these rights and uphold the policies they reflect even against the will of future ruling collations and/or democratic majorities. This story about the origins of rights explains that constitutions are not designed to bind their authors in the present, but are created to bind their authors' counterparts in the future.

To be sure, many American social movements comprised of relative outsiders have mobilized around the claim that their constitutional rights were being violated and that the Constitution demanded a transformed political order. The Civil Rights Movement is one well-known example of this phenomenon, and at least since the Civil Rights Movement, scholars of rights have described the central role of rights consciousness in Americans' efforts to organize for political change, and have registered the symbolic power of rights rhetoric in their struggles for political legitimation and recognition.<sup>xxvi</sup> Reformers have long insisted that the country has forsaken the central values embodied in its Constitution in order to demand political change, and scholars have noted this form of rights politics.<sup>xxvii</sup> These reformers have attempted to make (or at least realize) new

political meanings from existing constitutional texts, and when we study these movements we often find relative outsiders employing a rhetoric of rights. However, scholars who have asked about the origins of constitutions, rather than struggles over the meaning of existing texts, have tended to conclude that new constitutional texts, and even new bills of rights, are drafted by political insiders seeking to forestall change and entrench their influence.

Studies of constitution writing (as opposed to examinations of evolving constitutional meanings) have described textual rights provisions as products of elite entrenchment projects. This reigning theory about the origins of new textual rights has the three central components: 1) that rights are created by dominant regimes, 2) in an attempt to maintain the *status quo*, 3) by ushering the judiciary into politics. I argue that, while these factors explain the emergence of constitutional rights under some conditions, none of these elements is necessary for the creation of new constitutional rights.

When we examine the origins of America's positive rights, it quickly becomes apparent that the proponents of new constitutional rights need not hold positions of legislative dominance, are not always seeking to preserve the *status quo*, nor are they consistently hoping to usher the judiciary into politics. As we will see, the positive rights in state constitutions were often created by different kinds of political actors, and for very different reasons. These movements were not ruling elites or dominant legislative coalitions, but were, in fact, relative outsiders who were frequently frustrated with the legislative process. When they could not get the policy changes they wanted through the legislature, the advocates of positive rights were sometimes able to add the rights they championed to state constitutions. It was possible for such legislative outsiders to use

state constitutions in this way because state constitutional conventions allowed activists and social movements to sidestep legislatures, changing constitutions even where legislative change was challenging or impossible. Some states permitted constitutional amendment through the initiative and referendum process, allowing activists to circumvent legislative coalitions even in the absence of constitutional conventions. These motives for the creation of new rights point to a kind of constitutional politics that is not oriented around long-term stability or entrenchment, but around the achievement of immediate change.

Since so much constitutional theory assumes that constitutions are geared toward permanence and defined in large part by their rigidity, this focus on short-term political change offers a new way of thinking about the distinguishing features of constitutional law and the origins of constitutional rights. In fact, a focus on short-term, political change is such an unfamiliar way of thinking about constitutional politics that many have argued that state constitutions and their authors have been woefully misguided. The framers of state constitutions have drafted not only the broad and seemingly timeless principles that we typically associate with constitutional law, but have also filled state constitutions with detailed policy instructions that require frequent revision. This malleability and specificity render state constitutions so different from our standard image of constitutions that these characteristics have led many to dismiss state constitutions as failures of higher lawmaking. If state constitutions are really unworthy of their titles, we can hardly revise our view of American rights and their origins based solely on the study of their drafting. But, as this book will show, state constitutions are more than pale imitations of their federal counterpart. They are the products of debates about fundamental political values

and sites of thoughtful and serious lawmaking. Indeed, principled movements for government protection have rendered these constitutions rich repositories of the rights that seem absent from the federal Constitution.

### **The Rest of the Book**

Chapter two addresses why state constitutions have been so widely derided and consistently excluded from descriptions of America's constitutional tradition. In particular, it examines the impression that these documents are too detailed to serve as repositories of national political commitments, or even any kind of principled commitment. As a result of their details, state constitutions appear to reflect idiosyncratic anxieties rather than national concerns, to be products of pluralistic competition rather than deliberate judgment, and to enshrine trivial policies rather than fundamental promises. I argue however, that all of these critiques stem from a misreading of state constitutions. Placed in their proper historical and political context, state constitutions are quite clearly reflections of national affairs, careful thought, and weighty values. Having demonstrated that state constitutions are recognizably constitutional, I then address the book's two central arguments.

The book's first central argument is that America has positive constitutional rights. In order to make this claim, chapter three provides a definition of rights, and describes the distinction between the categories of positive and negative rights. It then defends the distinction between positive and negative rights against some of its most prominent critics. I argue that, while constitutional theorists have questioned whether it is possible to distinguish positive and negative rights at very high levels of abstraction, the

leaders of the rights movements described in this book argued that, at the level of their lived experience, there was a very real difference between rights that protected them only from the state, by forcing the state to restrain itself, and rights that forced the state intervene in order to protect them.

The book's second central argument is that rights movements invest in constitutional change not only because they want constitutions to bind future elites, but also because they want to overcome immediate political obstacles that they cannot surmount through statutory law alone. In addition, it is not only hegemonies or elites who champion rights. Indeed, many of the positive rights in state constitutions were not crafted by ruling coalitions, but were championed by relative outsiders, hoping to change rather than preserve the *status quo*. In chapter four, I detail the variety of political calculations that drove activists, organizations, and social movements to pursue the creation of positive constitutional rights. I also demonstrate that the motives of these rights advocates are quite different from those described by existing theories about who writes new rights and why they do it.

The next three chapters are case studies of particular positive-rights movements. Each case study provides evidence for both of the book's central arguments. Chapter five, a study of constitutional education rights, focuses on the common school movement, which originated in the Jacksonian period and continued through the Reconstruction era. The common school movement successfully established the states' constitutional duty to provide education, and its leaders argued that government had a moral duty to expand opportunities for children whose parents could not otherwise afford to educate them, and insisting that state legislatures should be legally obligated to fulfill it. This movement was

quite clear that the value of constitutional rights lay in their potential to promote policy changes by forcing legislatures to pass the kinds of redistributive policies they generally avoided. This chapter provides what may be the strongest evidence for an American positive rights tradition that exists primarily at the state level. Throughout American history and even in the face of federal involvement, state and local governments have been responsible for establishing and maintaining public school systems. Furthermore, every state constitution currently includes a provision about public education, and many state supreme courts have explicitly declared these provisions to be educational rights.

Chapter six, a study of labor rights, addresses an area in which active state intervention has been far more controversial, and in which constitutional rights are typically thought to have restrained the American state, not expanded its responsibilities. In fact, the quintessential arguments about America's exceptional anti-statism have focused on the labor movement. It demonstrates that the American labor movement pursued the creation of constitutional rights even during the Gilded Age and Progressive Era, when courts were at their busiest enforcing constitutional rights to the liberty of contract and nullifying protective labor regulations in their name. At the same time, the proponents of protective governance also created new constitutional rights (at the state level) to legitimize, and indeed to mandate, governmental protection for laborers. Thus, this chapter demonstrates that, even in the area of labor regulation, Americans have successfully pursued the creation of positive constitutional rights. It also establishes that rights are not always designed to judicialize controversies, but are also created to exclude the judiciary from policymaking.

Chapter seven examines the campaigns for constitutional rights to environmental protection. This case is particularly interesting not simply because it challenges the assertion that America lacks positive rights, but also because of its timing. In the 1960s and 1970s, when Congress was passing landmark environmental regulations and an entire executive agency had been developed to address the subject, environmental activists still staged state-level campaigns to add new positive rights to their constitutions. Thus, this case study allows us to investigate the value of state constitutional rights in an era of expanding federal responsibility. It also demonstrates that, like the education and labor rights before them, these environmental-rights provisions were intended to mandate active and protective government at the state level. They were also designed to enable political change and to facilitate the construction of a political movement, not to entrench the *status quo*.

This study examines both the nature and political origins of America's positive constitutional rights, and its arguments raise a number of questions that I hope future research will pursue. One such question is the extent to which these positive rights worked or mattered. While I describe instances of their successful enforcement and the political value of particular positive rights in particular cases, I do not advance a general argument about the efficacy of either positive rights or state constitutions. In other words, this book focuses on the causes, rather than the consequences, of the provisions it highlights.

Finally, this study is an empirical look at rights movements and their aims; I do not develop an argument about the normative desirability of positive rights or of the politics that surrounds them. My case studies of positive-rights movements do tend to

emphasize their redistributive and progressive features. Yet it is just as important to recognize that these rights movements were often committed to the proposition that only members of their own race or religion should benefit from the state's intervention and protection, and they maintained this position to the detriment of some of the most vulnerable residents of their states. The constitutional tradition I document here is, like most of America politics, appealing in some respects and abhorrent in others. Therefore, I conclude the book with a discussion of the exclusionary and racist side of the movements that championed positive rights. Whatever we ultimately conclude about their normative value, however, these movements for positive rights have clearly shaped America's constitutional law.

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## Notes

<sup>i</sup> Illinois Constitutional Convention, *Debates and Proceedings of the Constitutional Convention of the State of Illinois: Convened at the City of Springfield, Tuesday, December 13, 1869*. (Springfield: E.L. Merritt & Bro., printers to the Convention, 1870), 270.

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

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

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

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

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

<sup>vii</sup> Furthermore, the phrasing of the Fourteenth Amendment makes it a problematic vehicle for the pursuit of interventionist government action because even this positive-seeming provision is worded as a restraint on state governments, rather than a call to action. Thus, even the Due Process and Equal Protection clauses may be read simply as an extension of the negative liberties in the Bill of Rights to the states. Burt Neuborne explains it this way: "Like so many provisions of the Bill of Rights, from which it was copied,

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the due process clause is phrased as a prohibition, not an affirmative command: ‘nor shall any state’ is the equivalent of ‘a state shall not.’ Moreover, what the states are forbidden to do is to ‘deprive; people of certain things.’ Burt Neuborne, "State Constitutions and the Evolution of Positive Rights," *Rutgers Law Journal* 20, no. 4 (1989): 865.

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

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

<sup>x</sup> Frank I. Michelman, "The Supreme Court, 1968 Term," *Harvard Law Review* 83, no. 1 (1969); ———, "Socioeconomic Rights in Constitutional Law: Explaining America Away," *International Journal of Constitutional Law* 6, no. 3-4 (2008).

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

<sup>xii</sup> Cass R. Sunstein, "Why Does the American Constitution Lack Social and Economic Guarantees?," *Syracuse Law Review* 56, no. 1 (2005): 4.

<sup>xiii</sup> Sunstein himself does not believe this cultural explanation is correct, and argues instead that America’s lack of positive constitutional rights is the result of historical contingency. He attributes America’s lack of positive rights to Nixon’s (narrow) electoral win and to his conservative Supreme Court appointments.

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- <sup>xiv</sup> Frederick Schauer, "The Exceptional First Amendment," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton: Princeton University Press, 2005), 46.
- <sup>xv</sup> Curt Bentley, "Constrained by the Liberal Tradition: Why the Supreme Court Has Not Found Positive Rights in the American Constitution," *Brigham Young University Law Review* 2007, no. 6 (2007): 1723.
- <sup>xvi</sup> Andrew Moravcsik, "The Paradox of U.S. Human Rights Policy," in *American Exceptionalism and Human Rights*, ed. Michael Ignatieff (Princeton: Princeton University Press, 2005).
- <sup>xvii</sup> Dieter Grimm, "The Protective Function of the State," in *European and Us Constitutionalism*, ed. Georg Nolte (New York: Cambridge University Press, 2005), 140.
- <sup>xviii</sup> *Ibid.*, 154.
- <sup>xix</sup> Progressive Era historian Charles Beard is widely credited with generating the theory that American rights originated with a desire to preserve private property and are, consequently, devoted to circumscribing the government's authority. Charles Austin Beard, *An Economic Interpretation of the Constitution of the United States* (New York: Macmillan Co., 1913). As we see from Grimm's analysis, this view has remained an influential, despite its age.
- <sup>xx</sup> Most famously, Louis Hartz argued that Lockean liberal ideology exerted a hegemonic influence on American politics. It was Americans' preoccupation with *laissez faire* capitalism and a lack of experience with feudalism, Hartz explained, that explains why Americans never built a European-style welfare state. Louis Hartz, *The Liberal Tradition in America; an Interpretation of American Political Thought since the Revolution*, 1st ed. (New York: Harcourt, 1955). America's different history, others elaborated, endowed it with a different political culture, and this cultural difference served as a boundary condition, preventing European-style socialism from flourishing in the United States. Bernard Bailyn, *The Ideological Origins of the American Revolution* (Cambridge: Belknap Press of Harvard University Press, 1967).
- <sup>xxi</sup> Some scholars, of course, have questioned the degree of liberal hegemony in American political thought, and have demonstrated the existence and political influence of other, often conflicting, intellectual traditions. In particular, it is now widely agreed that republicanism and racist thinking have also powerfully influenced American ideas about politics. See Rogers M. Smith, *Civic Ideals: Conflicting Visions of Citizenship in U.S. History*, The Yale Ispis Series (New Haven: Yale University Press, 1997). In addition, scholars of labor history have demonstrated that the American labor movement was not merely duped into acquiescence by liberal rhetoric, but that American laborers found themselves in a different institutional context than their European counterparts, and responded with a different set of political strategies. See Amy Bridges, "Becoming American, the Working Classes of the United States before the Civil War," in *Working Class Formation: Patterns in Nineteenth Century United States and Europe*, ed. Aristide Zolberg and Ira Katznelson (Princeton, NJ: Princeton University Press, 1986); Victoria Charlotte Hattam, *Labor Visions and State Power: The Origins of Business Unionism in the United States*, Princeton Studies in American Politics (Princeton, N.J.: Princeton University Press, 1993); William E. Forbath, *Law and the Shaping of the American Labor Movement* (Cambridge, Mass.: Harvard University Press, 1991). Thus, it is the lack of a viable socialist party in America is not the result of a cultural deficit among American laborers, but of the institutional constraints they faced.
- <sup>xxii</sup> Daniel T. Rodgers, "American Exceptionalism Revisited," *Raritan* 24, no. 2 (2004): 43.
- <sup>xxiii</sup> See for example Gwendolyn Mink, *The Wages of Motherhood: Inequality in the Welfare State, 1917-1942* (Ithaca, NY: Cornell University Press, 1995).
- <sup>xxiv</sup> William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, Studies in Legal History (Chapel Hill: University of North Carolina Press, 1996), 42.
- <sup>xxv</sup> Brian Balogh, *A Government out of Sight: The Mystery of National Authority in Nineteenth-Century America* (Cambridge: Cambridge University Press, 2009); Kimberley S. Johnson, *Governing the American State: Congress and the New Federalism, 1877-1929*, Princeton Studies in American Politics (Princeton: Princeton University Press, 2007).
- <sup>xxvi</sup> For example, see Stuart A. Scheingold, *The Politics of Rights: Lawyers, Public Policy, and Political Change* (New Haven: Yale University Press, 1974).
- <sup>xxvii</sup> Bruce A. Ackerman, *We the People: Transformations* (Cambridge, Mass.: Belknap Press of Harvard University Press, 1998).