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What is the place of social and economic guarantees in a democratic constitutional order? Do such guarantees place a special strain on the judiciary? Do they help poor people? What is the relationship between such guarantees and doctrines involving state action and the horizontal application of constitutional norms?

Mark Tushnet does not attempt to answer these questions directly. But he casts new light on them by analyzing a number of cases in which courts have, or have not, taken their constitutions to alter background rules of property, contract, and tort. Tushnet contends that the rise of the activist state, understood as some form of social democracy, unsettles preexisting understandings of the relationship between constitutional norms and the private sector. In the classical liberal state, the constitution does not apply horizontally; there are no economic guarantees; and what counts as state action is relatively clear. But once the state assumes "affirmative obligations," constitutional norms might well be triggered, and the state's failure to alter the background rules of property and contract law might well raise serious constitutional problems. To borrow from Tushnet's summary of his complex account: In a "thin social democratic nation," such as Canada, courts are placed in a new and extremely difficult position, being forced either to "enforce obviously arbitrary lines between what they treat as state action and what they do not," or to work out "the set of entitlements people should have in a thicker social democracy."[1]

Much of what Tushnet says is highly illuminating, but I think that there are several gaps in his discussion. I emphasize two points here. First, the classical liberal state assumes affirmative obligations, and does so no less than the social democratic state. The obligations are different, but they are not less affirmative. The widespread neglect of this point, within the legal and political culture, has led to serious failures in analysis, and the failures are not innocuous. Second, state action is always present.

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1. Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 Chi J Intl L 435 (2002).

The constitutional question, in any system that has a state action requirement, is not whether there is state action, but whether the relevant state action is unconstitutional. That is a hard question on the merits, but it is not a hard state action question. A thin social democracy may struggle with constitutional issues, but by virtue of its status as a thin social democracy, it ought not to have any special struggle with questions involving state action or horizontal effect. A nation that currently embraces social democracy might create, at the constitutional level, social and economic rights, or it might not. A nation that currently rejects social democracy might offer, at the constitutional level, social and economic rights, or it might not. The legal questions involve the merits.

I now offer some details about these two points.

1. The so-called activist state is no more activist than what preceded it. Tushnet speaks of the "rise of the activist state," which he contrasts with the "classical liberal state." In his view, the "activist state ... is defined by the fact that it *has* affirmative obligations."[2] This is the conventional understanding. But the conventional understanding is an unfortunate way of seeing the relevant categories. Most of the so-called negative rights require governmental assistance, not governmental abstention. Those rights cannot exist without public assistance. Consider, for example, the right to private property. As Bentham wrote, "Property and law are born together, and die together. Before laws were made there was no property; take away laws, and property ceases."[3] In the state of nature, private property cannot exist, at least not in the way that it exists in a free society. In the state of nature, any property "rights" must be protected either through self-help—useful to the strong, not to the weak—or through social norms. This form of protection is far too fragile to support a market economy or indeed the basic independence of citizens. As we know it, private property is both created and protected by law; it requires extensive governmental assistance.

The same point holds for the other foundation of a market economy, the close sibling of private property: freedom of contract. For that form of freedom to exist, it is extremely important to have reliable enforcement mechanisms in the form of civil courts. The creation of such mechanisms requires action, not abstention. Nor is the point—the dependence of rights on public assistance—limited to the foundations of a market economy. Take, for example, the right to be free from torture and abuse, perhaps the defining "negative" freedom. Of course it is possible to say this right is a "negative" safeguard against public intrusion into the private domain. But as a practical matter, this right requires a state apparatus willing to ferret out and to punish the relevant rights violations. If the right includes protection against private depredations, it cannot exist simply with governmental abstention. If the right is limited to

2. Id at 442 (emphasis in original).
3. Jeremy Bentham, *The Theory of Legislation* 113 (Harcourt, Brace 1931) (C.K. Ogden, ed) (Richard Hildreth, trans, from Etienne Dumont, ed).

protection against public abuse of power, it can be satisfied by abstention; but in practice, abstention from torture and abuse must be guaranteed by a public apparatus that will deter and punish misconduct. Some rights require the government to protect against its own rights violations. If we go down the list of conventional private rights, we will see this same point at every turn.

There is a larger implication, with direct relevance to the question of social and economic rights. All constitutional rights have budgetary implications; all constitutional rights cost money.[4] If the government plans to protect private property, it will have to expend resources to ensure against both private and public intrusions. If the government wants to protect people against unreasonable searches and seizures, it will have to expend resources to train, monitor, and discipline the police. If the government wants to protect freedom of speech, it must, at a minimum, take steps to constrain its own agents; and these steps will be costly. It follows that insofar as they are costly, social and economic rights are not unique.

Now it is possible that such rights are unusually costly. To ensure, for example, that everyone has housing, it will be necessary to spend more than must be spent to ensure that everyone is free from unreasonable searches and seizures. But any such comparisons are empirical and contingent; they cannot be made on an a priori basis. We could imagine a society in which it costs a great deal to protect private property, but not so much to ensure basic subsistence.

2. State action is always present, and the real question involves the merits—the meaning of the relevant constitutional guarantees. Much discussion of the state action question, and the "horizontal" application of constitutional norms, seems to me confused, because it disregards the extent to which the state is present in the arrangements under challenge. I do not think that Tushnet neglects this point, but I believe that the failure to recognize it accounts for serious conceptual problems in the United States and in Canada, and undoubtedly elsewhere.

Suppose, for example, that an employer refuses to hire women, or discharges people who disclose that they are homosexual. If the employer's acts are challenged on constitutional grounds, we might ask whether constitutional norms apply to the employer's action. But we might also ask whether the constitution permits the existing background law, undoubtedly a product of the state, to authorize the relevant decisions by the employer. If an employer is discharging people, or refusing to hire them, and is being allowed to do so, it is not because nature has decreed anything. It is because the law has allocated the relevant rights to the employer. The legitimacy of that allocation is a constitutional question to be decided on the merits. We do not have to worry much about whether there is state action or whether the constitution's norms apply horizontally.

4. This is the theme of Stephen Holmes and Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* (Norton 1999).

To see the point, let us add some more detail, drawing on a contrast to which Tushnet draws attention. In the first case, a state has no discrimination law, and an employee is discharged on the ground that she is homosexual. Has the constitution been violated? To know, we have to know the meaning of the provision on which the employee is relying. Suppose that it forbids states to deny people the "equal protection of the laws," or something similar. The question would then be whether the use of employment law to allow this particular discharge is a violation of that guarantee. If we conclude that it is not, it might be because the relevant provision does not forbid the (neutral?) use of employment law to grant employers the power to hire and fire as they choose.

Now suppose that the government has enacted a law forbidding discrimination on the basis of race, but not forbidding discrimination on any other ground. Suppose that discrimination on the basis of sexual orientation is alleged to have occurred. Is the government, in this case, any more "activist" than in the previous case? I do not believe so. Is there more likely to be a constitutional violation in this case, holding all else constant? Referring to Canadian law, Tushnet suggests that the answer is yes. If so, I think that there are two reasons. The first is that the second statute involves a new form of discrimination: The state has discriminated, in a sense, against sexual orientation discrimination, by treating it as more acceptable than race discrimination. The second reason is that the very existence of the prohibition on race discrimination shows that the state does not think that the background rules are sacrosanct. It is willing to compromise them when an antidiscrimination policy justifies the compromise. And if this is so, then a judicial decision calling for the extension of that policy would not seem to endanger extremely important social interests. I speculate that an understanding to this effect also lies behind some of the Canadian decisions.

It is not clear to what extent these points challenge Tushnet's claims. I do not believe that a "thin social democracy" has any new or special reason to struggle with questions involving state action, horizontal application, or social welfare rights. Social democracy or not, thin or not, any constitutional order has to grapple with the meaning of its fundamental document. A society might repudiate social democracy entirely, but its constitution, properly interpreted, might require minimum welfare guarantees or protection against employment discrimination. A society might be, for a time, a thin social democracy, but it might also be free to abolish welfare entitlements and face no constitutional obstacles when it allows, or does not allow, employment discrimination. Tushnet might be right to suggest that there is an empirical connection between what he (misleadingly) calls an activist state and some of the conundrums he describes. But I do not believe that there are any logical connections here. The real question is the merits—the meaning of the constitution.

One final point. In 1932, Franklin Delano Roosevelt emphasized that the exercise of property rights "might so interfere with the rights of the individual that the Government, without whose assistance the property rights could not exist, must intervene, not to destroy individualism, but to protect it."[5] In this way, Roosevelt stressed the omnipresence of state action—the dependence of property rights on government, "without whose assistance the property rights could not exist."[6] I believe that Roosevelt's emphasis on this point helped pave the way toward his remarkable endorsement, in 1944, of a Second Bill of Rights, including a wide range of social and economic guarantees—an endorsement that helped in turn to influence the development of the Universal Declaration of Human Rights and dozens of constitutions all over the world. But to elaborate this claim would take me well beyond the present discussion. My principal submissions here are that state action is always present and that the constitutionality of the relevant action is a question on the merits—not to be obscured by asking whether a nation's statutory law is committed to social democracy.

5. Franklin D. Roosevelt, 1 *The Public Papers and Addresses of Franklin D. Roosevelt* 746 (Random House 1938) (Samuel I. Rosenman, comp).
6. Id.

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