The constitutional protection of economic rights*

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1. Introduction

The shape of constitutions has changed greatly in the last fifty years or so. During this time, the new or substantially revised constitutions that have accompanied major changes in the political or economic order of states have almost always included extensive lists of individual rights for recognition or protection, and, normally, such lists have included rights bearing particularly on the economic life and well-being of subjects. So, too, have the new constitutions of the many states that have undertaken, since 1989, the so-called transition process from a socialist command economy to one based, wholly or largely, on market principles.1 Are such rights worth having? The question is of more than academic interest. There remain important areas of the world where the choice whether or not to incorporate such rights in the constitution remains a matter of practical politics. China is one country where the move to a form of market economy (“socialist market economy,” in this case)2 has not (yet) been accompanied by any systematic incorporation of economic rights into the Constitution. Elsewhere, a number of countries whose economies have long been run on market principles have hitherto seen no need for such incorporation, at least not in comprehensive and explicit terms, despite the decades-long trend in this direction. The United Kingdom, Canada, and Australia all fall into this class.

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1 The Czech Republic, however, has a separate Charter of Fundamental Rights and Freedoms. See ÚSTAVA ČR [Constitution] (Czech Rep.).

2 XIANF [Constitution] pmbl. para. 7, and art. 11 (1982) (P.R.C.), as revised by the amendment adopted on March 15, 1999, arts. 12 and 16 (official translation). The source generally used for the constitutional texts cited in this article is the collection of English translations maintained by the University of Würzburg, and available at www.oefre.unibe.ch/law/icl/home.html. The date in parentheses is that of promulgation, unless otherwise indicated.
This article aims to illuminate the debate about constitutional protection of economic rights by exploring two sets of issues. First, what makes rights “economic”? Can “economic rights” be distinguished convincingly from the social and cultural rights with which they are commonly associated, or indeed from other kinds of rights? And to what extent can they give constitutional expression to the economic order of a state? The second area for investigation is the nature of constitutional protection. What does it mean to say that a right is “constitutionally protected,” and how is such protection typically provided for economic rights? I examine these questions principally through a survey of constitutions, concentrating on some seventeen European constitutions and looking more closely at the operation of one or two key rights, particularly as applied in France and Italy. I conclude that “economic rights” is a flawed concept, and that the express constitutional protection of such rights, at least as encountered in the constitutions examined, adds little of value to the protection that derives from other constitutional and legal sources.

2. What are economic rights?

2.1. International usage

The term “economic rights” is widely used in both primary and secondary sources to describe a group of rights within the so-called “second generation” of human rights. The concept of the “generations” of rights—the first, civil and political; the second, economic, social, and cultural; and the third consisting of collective rights, such as minority rights and indigenous peoples’ rights—has been widely used but no less widely criticized for concealing both different patterns of national development and the links between rights of different “generations.” Nonetheless, the generational concept reflects the fact that economic rights are commonly discussed as part of the larger cluster of “economic, social, and cultural rights,” a fact that is at the root of the problems in defining the concept. The characteristics of the individual members of this trio seem not to have been regarded as of much importance either by the negotiators and constitution makers who conceived them or by the commentators who celebrated their birth and who have watched over their growth. Much more attention has been paid to such questions as whether “second generation” rights are different in nature from “first generation” rights, as being claims on the state for protection and assistance as opposed to claims to freedom from state action, and whether, in consequence, we should presume that economic, social, and cultural rights are “programmatic” and nonjusticiable.


4 See, e.g., Martin Scheinin, Economic and Social Rights as Legal Rights, in Economic, Social and Cultural Rights: A Textbook, supra note 3, at 29–54; Matthew Craven, The Justiciability of
The international agreements that have been important to the recent spread of economic rights are, therefore, of little help in defining them. The key document, the Covenant on Economic, Social and Cultural Rights, was adopted by the United Nations General Assembly on December 16, 1966, along with the companion Covenant on Civil and Political Rights.\(^5\) By the former covenant, the state parties recognize rights to work (art. 6), to enjoy just and favorable conditions of work (art. 7), to form trade unions that may function freely, to strike (art. 8), and to social security (art. 9); they commit themselves to the protection of the family, mothers, children, and minors (art. 10); and they further recognize rights to an adequate standard of living (art. 11); to health (art. 12); to education (arts. 13 and 14); to participation in cultural life, to the benefits of scientific progress, and to the protection of moral and material interests in one’s creative work (art. 15).\(^6\) Which of these rights were “economic,” which “social,” and which “cultural,” the framers did not say. All the rights touch on the economic interests of individuals in some way; but so do the civil and political rights in the other covenant, and this, I shall argue, is precisely one of the problems of the concept. It may be more helpful to assume that the ordering of the articles reflects the ordering of the instrument’s title, so that we might take the labor rights of articles 6 to 8, and perhaps also the right to social security (art. 9), to be the “economic” rights evoked.\(^7\)

Even were its categories clearer, the definitional value of the covenant would be seriously limited by the fact that its overall content, and, in particular, the division of material between it and the Covenant on Civil and Political Rights, was from the outset acknowledged to be arbitrary, the result of a compromise between various states over important political differences. One result of these factors is that the right of property, already recognized by the Universal Declaration on Human Rights,\(^8\) and which some would see as the core economic right,\(^9\) appears in neither covenant; while there was general

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\(^7\) Id., 993 U.N.T.S. at 6–7. The first substantive article, art. 1, is about self-determination; it appears in both covenants.


\(^9\) See text accompany note 17 *infra*. 
agreement that it was to be respected, there was a stalemate among delegates as to the limitations that might be imposed on it.¹⁰

The lack of rigor in the international use of the adjectives denoting these rights is also evident in the fact that each of the rights in articles 6 to 9 of the covenant also appears, more or less contemporaneously, as a “social” right in the European Social Charter of 1961.¹¹ More recently, the Europeans have added further to the terminological confusion. In the Charter of Fundamental Rights and Freedoms of the European Union (2000), the member states of the Union have listed the fundamental rights that, in their view, should regulate the Union’s activity.¹² The charter classifies as “Liberties” the rights to work and to the free exercise of profession (art. 15), to freedom of enterprise (art. 16), and to property (art. 17), but places in a chapter on “Solidarity” a number of more detailed labor rights (arts. 27–32) drawn from the European Social Charter, Community provisions, and other sources, including, among others, the right to collective negotiation, to strike action, to protection against unfair dismissal, and to fair conditions of work.¹³

2.2. “Property rights” as defining economic rights

Political theory appears, at first sight, to offer the clarity of definition that international negotiation has failed to provide. Unfortunately, it also seems to lead us in quite a different direction. An influential current in American analysis of “economic rights” focuses on property as the core, or, indeed, as the whole content, of such rights. Thus, the editors of a recent American collection on economic rights assume, without argument or justification, that such rights consist of “rights to use, possess, exchange and otherwise dispose of property.”¹⁴ Other writers add freedom of exchange and contract as economic rights.¹⁵


¹¹ European Social Charter, 529 U.N.T.S. 89 (entered into force Feb. 26, 1965), arts. 1 (right to work); arts. 2–4 (just and favorable conditions of work); arts. 5–6 (trade unions and collective bargaining, including strike action); art. 12 (social security). The preamble to the 1996 revision of the charter expressly describes these as “social rights,” while also referring to “the indivisible nature of all human rights, be they civil, political, economic, social or cultural.” European Social Charter (Revised), E.T.S. 163, 36 I.L.M. 31 (1997) (entered into force July 1, 1999).

¹² Charter of Fundamental Rights and Freedoms of the European Union, 2000 O.J. (C 364) 1 (entered into force Dec. 7, 2000) [hereinafter European Charter]. The charter is structured as a declaration, rather than as a legally binding instrument under European Union law, but it would be strange if judges did not refer to it as a guide to the operation of fundamental rights, at least in the Union context.

¹³ Id. arts. 15–17, 27–32.

¹⁴ ECONOMIC RIGHTS vii (Ellen F. Paul et al. eds., Cambridge Univ. Press 1992).

¹⁵ Jon Elster, The Impact of Constitutions on Economic Performance, in PROCEEDINGS OF THE WORLD BANK ANNUAL CONFERENCE ON DEVELOPMENT ECONOMICS 1994 209, 211 (World Bank 1995); Randy
though it might be argued that these are implicit in the definition of property just given. That definition may articulate an *analytical* contrast with the thinking evidenced in the covenant and the European charters, or an *ideological* difference, or perhaps both. Much depends on whether “property” is understood in an expansive or a restricted sense. If property is understood to include any good of which an individual might dispose, including labor and personal capacities, then the definition is capable of encompassing the group of rights under the covenant that I have identified as “economic.” On this understanding, however, the notion of “property” becomes indistinguishable from that of individual fundamental rights as a whole, since the restriction or deprivation of any such right necessarily implies an impairment of some personal capacity viewed as “property.” This point is made in a different way by one of the contributors to the collection referred to above:

The rights of several [i.e., individually held] property and freedom of contract are widely viewed as “economic rights.” Yet they can be as personal as any “personal right” one can imagine. Properly understood, the right of several property includes the right to control one’s body, including one’s sexual behaviour. The right of freedom of contract includes the right to purchase books, birth control devices, or intoxicating substances from willing sellers.16

If, on the other hand, “property” is given a meaning more familiar to lawyers, limiting its application to our relations with various categories of things, whether physical or incorporeal, then the definition does not appear broad enough to encompass all forms of economic activity. Work as such is thus not a subject of rights and enjoys a protection inferior to that of capital. This does not worry many of those in the so-called property rights school, who would argue that property, even in this more limited sense, is the fundamental human right, in so far as it guarantees the independence that is necessary to protect liberty in the face of state and other private power.17

Even if property is understood in the broadest sense, we should notice that to the degree that it incorporates or is necessarily accompanied by freedom of contract, there remains a clash between the freedom to dispose of one’s labor, and other capacities, and any constitutional regulation of the work relationship, such as a guarantee of adequate remuneration. Authors like Elster who believe property and freedom of exchange to constitute the essence of


16 Barnett, supra note 15, at 65 n.4.

economic rights thus characterize any such regulation as “social.” The issue of where the core or essence of economic rights is to be located reflects a basic ideological difference between two groups. The first believes that only the freest possible operation of the market system can lead to the broad dissemination of wealth among individuals necessary to sustain collective liberty, and, therefore, it condemns the legal—and even more, the constitutional—protection of workers’ interests, for example, as a brake on that process. The second also may well accept that property is important to liberty, but, being less convinced of the efficiency and benevolence of the market, seeks the more direct and immediate empowerment of those who, for the present at least, are (relatively) propertyless. Most American property rights theorists appear to belong to the former group; the framers of international human rights agreements, to the latter.

Property rights theory thus offers little help with the task of definition. It has, however, the merit of pointing out the fact that, even within the market economy framework, there is room for fundamental argument regarding both the proper scope and extent (if any) of constitutional protections of rights and the relationships of priority and subordination that should be established between them. I return to this issue later.19

2.3. National constitutions

2.3.1. Approaches to classification

In the absence of reliable international or scholarly definitions of economic rights, national constitutional practice may offer the best source of guidance. While recent constitutions normally reflect the substance of the Covenant on Economic, Social and Cultural Rights, they seldom categorize rights in this way, although a small minority of European constitutions, as we shall see, do make distinct and explicit provision for economic issues (though not necessarily in “rights” terms). However, a general scan of post-1966 constitutions suggests that while many of the rights identified by both covenants commonly figure there, it is unusual for the framers to break up their listing of the individual rights recognized or guaranteed by a constitution by reference to any or all of the classes identified in those covenants. This makes good sense, in that it offers one less target for controversy in the course of the constitution-making process; more profoundly, it also may reflect a sense that the constitution is to be seen as an organic whole that should not treat the capacities and interests of individuals (and even groups) in isolated compartments—civil, economic, social, and cultural.

18 Elster, supra note 15, at 211.

19 See infra section 3.2.1.

20 Constitutions that, exceptionally, have employed the category of “Economic, Social and Cultural Rights” are those of Croatia (1990), Slovakia (1991), and Poland (1997). See CROAT. CONST.; SLOVK. CONST.; KONSTYTUCJA [Constitution] (Pol.). Unlike the covenant, however, Poland includes property in this category: but not collective employment rights, which appear elsewhere.
political, economic, social, cultural, and so on—because all of these contribute to the development and exercise of the human personality in ways that are necessarily interlinked.\textsuperscript{21} In this connection, we should note the regularity with which contemporary constitutions, following the Universal Declaration on Human Rights\textsuperscript{22} treat human dignity as a key concept to which all the rights they recognize may ultimately be referable.\textsuperscript{23}

2.3.2. “Economic relations” under the Italian Constitution
A holistic approach, in which all recognized rights—and indeed, all the structural provisions of the constitution—are seen as contributing together to the development and exercise of the human personality, is not necessarily inconsistent with the categorization of rights. Highly apposite in this respect is the Italian Constitution of 1948, which marks off a set of provisions dealing with economic relations (part I, title III) distinct from those dealing, respectively, with civil, ethicosocial, and political relations. While the Italian Constitution, like its near contemporary in Germany, accords a significant place to human dignity (art. 3(1)) and to the full development of the individual person (art. 3(2)), placing these concerns in its opening section on fundamental principles, its guiding concept is to establish Italy as “a democratic Republic, founded on work” (art. 1). Though it is clear from title III that work relations are included within economic relations, the notion of work—as expressed in the fundamental principles—has been described, by a leading commentator, as “neither an end in itself, nor a mere instrument for securing the means of subsistence, but as a necessary avenue for the affirmation of one’s personality.”\textsuperscript{24} The nature of work as more than merely economic is emphasized by the manner in which the duty of every citizen, as a corollary to the “right to work” in article 4, is articulated: “[a]ccording to capability and choice every citizen has the duty to undertake an activity or a function that will contribute to the material and moral progress of society.”\textsuperscript{25}

Having thus placed the activity of work (which encompasses all forms, not just that of wage labor) on the highest political, social, and moral plane, and

\textsuperscript{21} Consider the notion of the structural unity of the German Basic Law. See Donald Kommers, The Constitutional Jurisprudence of the Federal Republic of Germany 45–49 (Duke Univ. Press, 2nd ed. 1997); European Social Charter (Revised), supra note 11, pmbl.

\textsuperscript{22} See UDHR, supra note 8, pmbl.

\textsuperscript{23} Among many other examples, see Const. art. 3(1) (1948) (Italy); S. Afr. Const. (1996) art. 10; Thail. Const. (1997) art. 4; Konstytucja art. 30 (1997) (Pol.); Guinea Const. art. 5 (1990); Swed. Const. art. 2 (1975); Greece Const. art. 2 (1975); GG [Constitution] art. 1(1) (1949) (F.R.G.).


\textsuperscript{25} Const. art. 4(2) (Italy).
having committed the state to “promote the conditions which render the exercise of the right [to work] effective,”26 the Italian Constitution goes on to treat it in more detail under the specific aspect of “economic relations.”27 This title begins by stating the republic’s commitment to the support and protection of work and training,28 and it deals successively with workers’ rights to fair and adequate remuneration, the working day, and holidays,29 with the rights of women and young people as workers,30 with social security (which is based on permanent or temporary inability to work),31 trade union organization, general rights,32 and with the right to strike.33 It then proceeds to guarantee the freedom of private economic initiative,34 and private property,35 while providing that legislation may reserve or transfer to the state, to public bodies, or to “worker or user communities” certain key economic activities.36 It also empowers the state to exercise extended powers of control of land37 and to promote cooperatives.38 It concludes by recognizing the right of workers to participate in the management of their enterprises,39 and by stating that the republic will encourage saving.40

This is a detailed and extensive catalogue,41 though not necessarily a complete one. Two key principles are nowhere mentioned. The first is freedom of contract. Constitutions generally have not expressly protected freedom of contract, despite (or perhaps even because of) its central position in civil and

26 Id. art. 4(1).
27 Id. pt. I, title III.
28 See id. art. 35.
29 See id. art. 36.
30 See id. art. 37.
31 See id. art. 38.
32 See id. art. 39.
33 See id. art. 40.
34 See id. art. 41.
35 See id. art. 42.
36 See id. art. 43.
37 See id. art. 44.
38 See id. art. 45.
39 See id. art. 46.
40 See id. art. 47.

41 The closest parallel is offered by the Constitution of Lithuania (1992), whose Chapter on "National Economy and Labor" includes equivalents of all the Italian title II provisions except those on property, cooperatives, and saving, while adding provisions on health care and environment. Property is treated under the heading of "The Individual and the State" in chapter 1. Compare COST. title II (Italy), with KONSTITUCIJA (Lith.) chs. 1, 4.
common law. Their framers have tended, instead, to recognize property, and sometimes also freedom of enterprise or commerce, as rights necessarily implying freedom of contract. Yet these rights do not cover the whole scope of freedom of contract, as the case law of the Italian Constitutional Court, which has refused to “find” freedom of contract in the Constitution, makes clear. The result is to leave unrecognized and unprotected at the constitutional level the most basic building block of the market economy, the right to state enforcement of bargains entered into by private parties on their own initiative.

A second key element of the market economy which goes unnoticed by title III is the capacity to create juridical persons as a means of carrying on economic activities. While some constitutions explicitly recognize that such juridical persons may be capable of enjoying “human” rights, none that I have examined expressly guarantees the right to create them. Unless held to be implicit in such other rights as freedom of association or freedom of commerce, this capacity remains under the control of the legislature.

Naturally, title III reflects the combination of interests and forces particular to a given time and place. It is highly unlikely that the same combination of provisions would be found even in constitutions that take a similarly expansive approach to the enumeration of rights. Some provisions may be regarded as politically unattractive by the framers of other constitutions; others may command sympathy but not be seen as appropriate for inclusion in the basic state document. Nonetheless, the detail with which the Italian provisions have been expressed, and the care taken to distinguish between different categories of human relationships, give title III a strong claim to be regarded as an authoritative indication of the core concerns of economic rights: the three broad areas of work, enterprise, and property each one facet of our interest in material survival and in the creation and preservation of wealth.

2.3.3. Other protections of economic interests

2.3.3.1. Civil and political rights. To define the core concerns of economic rights, however, is not to define the rights themselves. The Italian example tells

42 For the argument that the civil code is a kind of “constitution” complementary to the formal constitution, and its refutation, see Antonio Gambaro, Codes and Constitutions in Civil Law, in EUROPEAN LEGAL TRADITIONS AND ISRAEL 157–90 (Alfredo M. Rabello ed., Nevo Publishing 1994).


45 COST. arts. 35–40 (Italy).

46 Id. arts. 41, 43, 45, 46.

47 Id. arts. 42, 44, 47.
us what a constitution maker may understand as “economic” and, hence, provides a working definition of economic interests. But it does not adequately define “economic rights,” for the simple reason that virtually any type of right recognized by a constitution may bear upon the economic interests of individuals and groups. To mention only examples from among “first generation” civil and political rights, freedom of speech may be construed to protect commercial advertising; freedom of press and media necessarily provides economic guarantees to the owners of such media; freedom of movement is an essential complement to a freedom to choose one’s employment. The right to vote received its earliest legal protection in Britain under the character of a property right, not an unreasonable approach given the small size of electorates at that time and the material advantages secured by those for whom the majority of votes were cast, and not without cogency even in the age of universal suffrage and the mass party.

Again, a right to equality before the law, or to freedom from discrimination, will serve to protect against exclusion from economic opportunities even if it is limited to a defined range of personal characteristics such as gender or ethnic origin. If not so limited, it may be a means by which almost any economic burden imposed by legislative or administrative action may be constitutionally tested. If we say that what makes a right “economic” (or “social” or “cultural”) is the kind of interest it protects, then we surely have to accept that these “civil” rights can be “economic” too.

2.3.3.2. Structural and procedural provisions of constitutions. Constitutional protection for economic interests may also flow through channels quite different in nature from bills of rights. In federal constitutions, for example, the common endeavor to create and maintain a single economic space over the territory of the nation entails prohibitions on economic controls by component states or provinces. Breach of such prohibitions may provide a basis for litigation by individuals (or defenses against prosecutions) through which


49 The economic subdiscipline of “public choice” offers a stimulating—if often contestable—analysis of the modern electoral process (as of other political phenomena) through the continued application of concepts of economic exchange. See DENNIS C. MUELLER, PUBLIC CHOICE II (Cambridge Univ. Press 1989).

50 For a comparative examination of the importance in labor law of constitutional protections of equality, see the symposium in 18 INT’L J. COMP. LAB. & INDUS. REL. (2002), with papers on Germany, Spain, France, and Italy.


52 The leading example is the Commerce Clause of the United States Constitution. See U.S. CONST. art. I, § 8; NOWAK & ROTUNDA, supra note 51, at 308–46.
their freedom of commerce may be reinforced. While in most cases such “single market” provisions simply provide protection against discriminatory local controls, in some constitutions they are drafted broadly enough to inhibit some forms and types of national regulation as well.53

More generally, the “interest” test for defining economic rights raises the question of what rational borderline can be drawn between the kind of rights mentioned in title III of the Italian Constitution and any provision of a constitution that structures and limits state power. Collective economic welfare is a powerful determinant of the economic satisfaction of individuals and groups (though it is important not to assume that its improvement automatically satisfies legitimate individual economic claims). From Adam Smith forward,54 the relative economic success of nations has been presented as a function of—among other things—their political institutions. At different times, one or another aspect of such institutions has been singled out as especially propitious, be it security of property, freedom of contract or competition, absence of arbitrary power, “good governance,” or democracy.55 But each of these has implied the enjoyment by the country’s population—as a matter of fact and whether or not guaranteed by its constitution56—of both a spread of “civil,” “political,” “economic,” and “social” rights and freedoms and, no less important, of sound governmental institutions.

2.3.3.3. Nonconstitutional guarantees. In the era of globalization, it is also possible that some of the most important guarantees for economic interests may find their source outside the constitution itself. The ever-increasing interconnectedness of national economies through transnational trade, investment, and the movement of workers means that international economic agreements exercise a powerful influence not just on the situation of those engaged in the transnational activities but also on that of all those who, economically speaking,
choose to stay at home. Standards developed in the transnational context are, sooner or later, likely to spill over into the domestic environment; for example, if imported goods are subject to international standards for consumer safety higher than those applying to domestic products, local consumer advocates will apply strong pressure for the upward harmonization of domestic standards. The effects of such agreements may also be much more direct in countries whose constitutional order gives them a status in internal law either equivalent or superior to domestic legislation. Indeed, some international agreements may themselves offer mechanisms by which subjects can assert new economic rights against their own states. 57

European Union law is heavy with examples of this type. Its treaties themselves form an economic “constitution” for the territory of the Union that is far more detailed than the content of any national constitution’s articles on economic and social matters. This economic constitution is constantly ramifying by way of “secondary legislation”—a term that belies the practical entrenchment of such measures vis-à-vis national legal rules—and is generally enforceable through legal action at the instance of individuals. While a number of the provisions of the Union’s Charter of Fundamental Rights stem directly from application of the Community treaties, 58 in the sphere of economic rights the charter is but a pale shadow of the rich and complex structure through which the treaties articulate and sustain the concept of a common economic space ordered along “social market” lines. 59 The need to accept the acquis communautaire as a condition of membership is almost certainly a much stronger motor for economic reform in the formerly socialist candidate countries than are the commitments of their own constitutions to the market or mixed economy.

In summary, what the Italian Constitution’s title III offers us is an indication of an extensive, but not comprehensive, set of rights that are specifically associated with individual and collective interests in work, enterprise, and property. Such rights can represent neither the whole underpinning provided by a constitution for a country’s economic order nor an exhaustive legal


translation of the key concepts and principles of that order, which may be
distributed among a variety of types and levels of legal rules. But while title
III may give an incomplete picture of the constitutional provision for economic
interests and the economic order, it does point to a borderline between
“economic rights” and most of the other “second generation” rights. In a mar-
etomy economy, the rights of title III, with the notable exception of social security,
do not necessarily involve claims to positive state action, other than by way of
regulation. Rather, the rights are either in the nature of traditional liberties (as
with freedom to work and of private economic initiative) or are requirements
for legal protection and regulation (as with fair and adequate remuneration or
workers’ rights to participate in management) or both (as with property, trade
union organization, and the right to strike). Economic rights may be marked
off in this way, at least, from the social rights, which look for their satisfaction
to the financial and other economic resources of the state.

3. Constitutional protection

3.1. Types and levels of protection

How, then, do modern constitutions recognize and protect these economic
rights, and to what effect? The answer offered here is derived from a survey of
seventeen European constitutions, a survey whose limitations need to be
well understood. It is a survey of texts, focusing on whether constitution
makers have recognized a particular economic right and, if so, with what
characteristics and qualifications. It cannot, therefore, address the question of
whether constitutional recognition secures greater protection for such rights
in practice than would be the case if they were not so recognized. Answering
such a question calls, at every moment, for comparisons between the actual
socioeconomic situation of individuals or society in the presence of alleged
constitutional protection and the situation that would prevail in its absence.
Save in very limited cases, comparison between different legal systems is useless,
for this purpose, because of the impossibility of abstracting from the myriad
differences in the political, social, and economic contexts in which those

60 Indeed some essential principles or institutions may have no formal legal expression at all, such
as the Bank of England’s “lender of last resort” role in the United Kingdom. See Terence Daintith,

61 Namely, BELG. CONST.; DEN. CONST.; FIN. CONST.; FR. CONST.; GG (F.R.G.); GREECE CONST.; A MAGYAR
KÖZTÁRSASÁG ALKOMÁNYA [Constitution] (Hung.) (as revised to 1997); COST. (Italy); LAT. CONST.
(1922, revised 1998); KONSTITUCJA (Lith.); STATUT NRD. [Constitution] (Neth.); NRD. CONST.;
KONSTYTUCJA (Pol.); SLOVN. CONST.; C.E. [Constitution] (Spain); SWED. CONST.; and U.K. CONST. (uncod-
ified, but taken to include a semientrenched Bill of Rights operative from 2000, see Human Rights
Act, 1998, c. 42 (Eng.) [hereinafter HRA]). A range of non-European constitutions was also
referred to for occasional comparison.
systems operate, and because the techniques developed in other disciplines, such as historical counterfactualism, remain mired in controversy. Moreover, as we have seen, the fact that explicit “economic rights” provide only a part of the apparatus for guaranteeing individual and collective economic interests deprives such an inquiry of any meaning.

The remarks that follow, therefore, are framed in terms of the formal structure and possibilities of the legal system. Even within this constraint, however, it is possible to identify a hierarchy of constitutional provisions by means of which the approach of the different states can be assessed and compared and some general conclusions drawn. In doing this, it is important not to confine one’s attention to provisions that are specifically expressed in terms of rights. Constitutional adjudicators may find rights within provisions that take the form of state duties, or even within guidelines for policy. Seven classes of constitutional provision, described below, may be identified, in descending order of ostensible strength of protection. The term “ostensible” is essential. We may find that a “right” is enunciated in similar terms in two different constitutions; in one, it may be regarded by the courts as directly and immediately binding on all, both public and private actors, and hence the strongest form of right; in another, it may be a nonjusticiable aspiration, and hence one of the weakest forms. Some constitutions seek to be clearer about the levels of ostensible protection than do others. This may be seen in the way specific provisions are drafted (so as to make apparent, for example, that an obligation lies only on the state or public authorities, not on private persons); or by the inclusion of general rules indicating by or against whom constitutional duties may be invoked in litigation, and before what judicial or other authorities; or by classifying substantive provisions under contrasting headings such as “fundamental rights” and “economic and social relations” and attaching different legal consequences to each.

Individual rights applicable against all. As just noted, this is the strongest form of right, capable by definition of being invoked in ordinary legal proceedings between individuals as well as being the subject of claims between individual
and state. Reliance on the right, however, may involve reference to a specialized constitutional jurisdiction for authoritative interpretation, for example, by way of judicial reference. Whether or not a right, whose correlative duty is not expressly or by necessary implication limited to the state, has this “horizontal” effect may depend on general constitutional principles or on the provisions of a bill of rights whose effect may be that rights are, in general, exercisable only as against the state or public authorities. A right lacking such horizontal effect but expressed in terms that require no further action to define or perfect it will fall into the following category.

State duties directly enforceable by individuals. This is perhaps the commonest form assumed by the “traditional” civil and political rights in modern constitutions, and it is regularly encountered in relation to economic rights as well. The rights are ordinarily expressed in general terms, though the duties lie on the state as the possessor of the powers (of criminal justice, police, and so on) whose exercise is restricted by the constitutional guarantees. Again, how—if at all—such rights may be invoked in judicial process will be a matter for the general procedural provisions of the nation’s law and constitution.

Immediately enforceable rights subject to legislative or other specified control or restriction. Either of the above two classes of rights may appear in more restricted form, their declaration being immediately and specifically associated with a possibility of legislative control or restriction. This is to be distinguished from the possibility of restriction under general, but carefully drawn, provisions that the constitution may apply to all save the most fundamental rights. Such provisions permit restriction by reference to such concepts as “necessity for the maintenance of public order and democracy,” or “in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom,” sometimes coupled with a statement of inderogability of the “substance,” or “essential substance” of the right. A contemporary statement of what is regarded in Europe as an acceptable

65 Compare S. Afr. Const. § 8(2) (“A provision of the Bill of Rights binds a natural or juristic person if, and to the extent that, it is applicable, taking into account the nature of the rights and the nature of any duty imposed by that right”), with the United Kingdom’s HRA. 1998, supra note 61, § 6 (making action incompatible with the rights the act protects unlawful only for “public authorities,” which are, however, broadly defined). Indeed, it has been suggested that since the courts are included among public authorities, the HRA requires every judgment to take account of and apply the Convention rights, even in actions purely between private parties. For this and contrary views, see Noel Whitty, Thérèse Murphy & Stephen Livingstone, Civil Liberties Law: The Human Rights Act Era 35–39 (Butterworths 2001).

66 Guinea Const. art. 22.


69 Thai. Const. art. 29.
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Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they necessarily and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

In contrast, rights in this third class incorporate the possibility of control into their very definition, and, in practice and apart from periods of emergency, such controls shape the effective enjoyment of the right. Further examples will be mentioned in section 3.2.2 below, but the locus classicus must be—for its pithy expression of this relationship between right and restriction—paragraph 7 of the preamble to the French Constitution of 1946, which reads “[t]he right to strike is exercisable within the framework of the laws that regulates it.”

Rights recognized but subject to legislative implementation. Next on the rights tree are those that, whether apparently valid erga omnes or only against the state, are expressed so as to require some further action, usually legislative, for their full definition or activation. Examples of this type are offered by article 110 of the Norwegian Constitution (1814): “[s]pecific provisions concerning the right of employees to co-determination at their workplace shall be laid down by law,” and by article 67(1) of the Polish Constitution: “[a] citizen shall have the right to social security whenever incapacitated for work by reason of sickness or invalidism as well as having attained retirement age. The scope and forms of social security shall be specified by statute.” Formulations of this type are also encountered with regard to property. In several constitutions the right is recognized, but with the stipulation that its content is determined by law: for example, in Spain, Germany, and Thailand. The Italian Constitution is even more reserved, stating that “[p]rivate ownership shall be recognized and guaranteed by laws which shall determine the manner by which it may be acquired and enjoyed, and its limits, in order to ensure its social function and to make it open to all.” Such provisions make for a much

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70 See European Charter, supra note 12, art. 52(1).
71 Fr. CONST. (1946) pmbl.
72 NOR. CONST. art. 110.
73 KONSTYTUCJA (Pol.) art. 67(1).
74 C.E. art. 33(2) (Spain).
75 G.G. art. 12(1) (F.R.G.).
76 THAIL. CONST. art. 48.
77 COST. art. 42(1) (Italy).
weaker constitutional guarantee. If the legislature does not act to make the right effective, there may be no legal (as opposed to political) means available under the constitution to compel it to do so. Much will depend upon the arrangements for constitutional review in general and whether ordinary courts can take cognizance of constitutional provisions. On the other hand, in cases such as that of property, where there is already a well-established body of private law, such provisions make it impossible to claim that the content of a property right has been permanently fixed by the constitution by reference to the law in force at the time of the constitution’s promulgation.78

State duties not directly enforceable by individuals. There is no clear borderline to be drawn between such provisions calling for legislative action and the vaguer formulas exemplified, say, by the Norwegian Constitution, enjoining “the State authorities” to “issue further provisions for the implementation of [the] principles” of the right to a healthy environment,79 or the Italian Constitution, under which the state “shall establish special measures for protecting juvenile labour and shall guarantee equal pay for comparable work.”80 Clearly, the vaguer such formulas become, the more likely it is that the provision will be treated not as an injunction to legislate but merely as the expression of an aspiration or of political principle. (It is worth noting that the most careful attention must be paid in this area to the degree of precision generally encountered in the legal drafting of the nation concerned.) It may also be observed that while the Norwegian formula expressly recognizes a right but leaves its content uncertain, it is no less common for constitutions to mandate state action in terms that leave uncertain the question whether there is prior recognition of any right, and if so, what its “essence”—to borrow the language of the European Union charter—might be. The Italian article 37(3), quoted above, offers one example; another is to be found in the Polish Constitution, which simply states “[a] minimum level of remuneration for work, or the manner of setting its levels shall be specified by statute.”81 At the extreme, it may be impossible to formulate any kind of right, correlative to the duty laid on the state, of which a court could say, at a given moment, whether or not it had been respected or denied.82

78 As in Germany, where in the so-called Groundwater case, 58 BVerfGE 300 (1981), the Federal Constitutional Court held that a restriction on a previously existing right to take groundwater from beneath one’s land was a constitutionally sustainable legislative redefinition of property rights. See KOMMERS, supra note 21, at 257–61.

79 NOR. CONST. art. 110(b).

80 COST. art. 37(3) (Italy).

81 KONSTYTUCJA (Pol.) art. 65(4).

82 As with the duty laid on Spanish public authorities by C.E. art. 40(1) (Spain):

The public authorities shall promote favourable conditions for social and economic progress and for a more equitable distribution of regional and personal income within the framework of a policy of economic stability. Special emphasis will be placed on the realization of a policy aimed at full employment.
“Rights,” of course, may describe moral and political no less than legal claims, and economic rights expressly or implicitly acknowledged in constitutions are, therefore, not necessarily nugatory by reason of being nonjustici-able. The constitution maker has, in fact, long been accustomed to framing what the preamble of the 1946 French Constitution described as “political, economic and social principles”83 using, at least in part, the language of rights. The preamble itself uses such language in respect of equality between men and women,84 asylum,85 the right to work,86 union rights,87 the right to strike,88 codetermination,89 and social security.90 Similarly, “rights” language is also encountered in the general principles of the Italian Constitution, in articles 3 (equality), 4 (the right to work), and 8 (religious freedom).91

The device of the economic right as aspiration appears in its clearest form in the Indian Constitution of 1950, whose “directive principles,” which “shall not be enforceable by any court,”92 include requirements that the state “direct its policy towards securing that . . . men and women equally have the right to an adequate means of livelihood”93 and, “within the limits of its economic capacity and development, make effective provision for securing the right to work, to education,”94 and to social assistance. In these and other countries, the fact that a right appears among such “principles” does not necessarily mean that it is without legal effect—the matter depends on the approach taken by the relevant constitutional jurisdiction. Indeed, even provisions cast not in the form of individual rights but purely of state duties, of the “endeavour to provide” or “seek to ensure” type, may be construed as legally enforceable by an energetic court.95 Nonetheless, it seems clear that there remain provisions

83 FR. CONST. (1946) pmbl.
84 See id. para. 3.
85 See id. para. 4.
86 See id. para. 5.
87 See id. para. 6.
88 See id. para. 7.
89 See id. para. 8.
90 See id. para. 11.
91 COST. arts. 3, 4, 8 (Italy).
92 INDIA CONST. art. 37.
93 Id. art. 39(a).
94 Id. art. 41.
95 See Unni Krishnan J. P. v. State of Andhra Pradesh, A.I.R. 1993 S.C. 2178 (despite stipulation of nonjusticiability in art. 37, the Supreme Court, in effect, gave direct application to art. 45, containing the principle that the state should endeavor to provide free and compulsory education for
in the constitutions under review, including provisions cast expressly in the form of rights, which, while they may well be taken into account in appropriate cases, will not themselves be treated by the constitutional jurisdiction as generative of any individual right enforceable against the state nor, a fortiori, others.

*Silence.* It seems worthwhile, here, to envisage explicitly the case where a right that has been identified as falling among the economic rights is passed over in silence, or apparent silence, by a constitution. As noted above, such is the common fate of both freedom of contract and the right to incorporate, even in the constitutions of market-based economies to whose operation they are essential. This does not mean that a constitutional adjudicator will necessarily deny them protection: the French Conseil Constitutionnel, unlike its Italian counterpart, has been able to “find” protection for freedom of contract in the Constitution.

*Constitutional enunciation of policies or rights inconsistent with given economic rights or of restrictions on their scope.* Clearly, the least-favored position for a claimed economic right, in terms of constitutional protection, is one in which the constitution either explicitly denies the right or, much more likely, enunciates policies or other rights that are in some measure inconsistent with it. The most obvious and sweeping examples are the provisions in socialist constitutions announcing that the basis of the nation’s economic system is socialist public ownership of the means of production, thereby effectively and completely denying the right of freedom of commerce or of private economic initiative. Even market-based constitutions not uncommonly subtract some area of economic life, or areas deemed particularly sensitive to the national interest, from this freedom. Other devices that we may place in this category are those guaranteeing a right not absolutely but within a specific policy framework, as seen in the Belgian guarantee of the right to employment and to the free choice of a professional activity “in the framework of a general employment policy”, or those restricting the enjoyment of a given right to a defined class of persons, such as the recognition of the right to strike as belonging only to

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96 See supra section 2.3.2.

97 Dominique Rousseau, *Chronique de jurisprudence constitutionnelle*, [2002] REVUE DU DROIT PUBLIC 633, 670–71; and compare the “promotion” of freedom of commerce to constitutional status, infra, section 3.2.2.2.

98 See infra text accompanying nn.151–55.

99 BELG. CONST. art. 23(3)(i).
trade unions in Poland,\textsuperscript{100} Sweden,\textsuperscript{101} and Greece.\textsuperscript{102} Such substantive restrictions make for a more rigid economic order than do provisions—like that of paragraph 7 of the 1946 preamble to the French Constitution\textsuperscript{103}—subjecting rights to legislative management and control.

3.2. Some constitutions compared

3.2.1. In general: levels of protection and the balance among rights

How do economic rights, as expressly identified by the European constitutions surveyed, map on to this hierarchy? I examined the treatment of a range of six rights or rights clusters that might be expressive of the general economic orientation of the constitution—property; freedom of commerce; choice of work; general protection of workers’ rights; fair and adequate remuneration; and the right to strike—noting the rank in the hierarchy of protection accorded to the rights by each constitution.\textsuperscript{104} As already noted, this is a purely textual exercise, but it produces some useful aggregated and comparative information on what constitution makers wanted to say.

Unsurprisingly, perhaps, property emerges as the most widely recognized right, with all constitutions containing some kind of guarantee. The protection is not, however, particularly strong. In all cases, property is subject to legislative control, and in several it is explicitly subject to legislative definition or to restrictions of subject matter. In contrast, the right to fair and adequate remuneration is recognized only in eight constitutions, but in five of these the guarantee is cast in an unqualified form. Freedom of commerce, the closely linked freedom to choose employment, general protection of workers’ rights, and the right to strike, are each recognized in between one half and two-thirds of the constitutions examined, but with somewhat different degrees of ostensible protection—strongest for choice of work, weakest for general worker protection, which, as one might expect, is often framed as a broad directive principle. The right to strike is always expressly subjected to legislative control and, as already noted, is in a few cases reserved to trade unions. Freedom of commerce presents the most varied constitutional profile, appearing in all forms, from an unqualified right to a mere principle of the economic order.

In terms of the balance between the economic rights that might be seen as implicit in a liberal economic order (property, freedom of commerce, free

\textsuperscript{100} KONSTYTUCJA (Pol.) art. 59(3).

\textsuperscript{101} SWED. CONST. ch. 2, art. 17.

\textsuperscript{102} GREECE CONST. art. 23.

\textsuperscript{103} FR. CONST. (1946) pmbl.

\textsuperscript{104} See also the useful survey, confined to work-related rights in the constitutions of European Union member states, in \textit{FUNDAMENTAL SOCIAL RIGHTS AT WORK IN THE EUROPEAN COMMUNITY} 52–64 (Alan C. Neal ed., European Association of Labor Court Judges, Ashgate 1999).
choice of work) and those with a more collectivist or socially protective coloring (promotion of workers’ interests, fair and adequate remuneration, rights to strike), the constitutions examined fall into three groups. A substantial group (Denmark, France, Germany, Netherlands, Norway, Slovenia, and United Kingdom) give a clear priority to the “liberal” over the “protective” rights. In part, this is a function of the age of the constitution, though it is noteworthy to find a “transitional” constitution, that of Slovenia, in this group. The same number preserve an even balance between rights of the two types: Finland, Hungary, Latvia, Lithuania, Poland, Spain, and Sweden fall into this category. It is worth remarking, however, that the scope and detail of provision varies widely across the group. All the protected rights find expression in the Spanish Constitution, for example, while in Sweden only property and the right to strike are mentioned. Finally, three constitutions, those of Belgium, Greece, and Italy, appear to give priority to the “protective” rights, though only in Italy is this preference carried through in a consistent way. Since even in constitutions that favor “liberal” rights some rights of the other type may still be present, and vice versa—this is the case everywhere, save the Netherlands and the United Kingdom—it will be apparent that, under the vast majority of the European constitutions examined, the problem often exists of reconciling different types of express economic rights that may well come into conflict. Rarely, indeed, do constitutions themselves offer rules of any kind to resolve such conflicts. Spain and Slovenia do provide for a weaker mechanism of entrenched or judicial enforcement for economic (and sometimes also social) rights and standards than for fundamental rights, but they include among the latter several of the more basic economic rights.105

3.2.2. In detail: two key rights

The nature of the problem of reconciling conflicting rights, and its implications for the utility of protecting such rights, can be illustrated by considering in more detail two key rights that correspond to two of the elements of economic activity: the “right to work” and freedom of commerce (or enterprise). A certain amount of unpacking is necessary before these familiar and freighted terms will yield satisfactorily to legal analysis.

3.2.2.1. The right to work. This language starts appearing in constitutions after World War II.106 More recent constitution makers have gone on using it but

105 See C.E. art. 28 (Spain) (strike action); C.E. art. 33 (Spain) and SLOVN. CONST. art. 33 (property and inheritance); C.E. art. 35 (Spain) and SLOVENIA CONST. art. 49 (the right to work); and C.E. art. 38 (Spain) (freedom of enterprise).

106 See, e.g., COST. art. 4 (Italy) and Fr. CONST. (1946) pmbl.
seem increasingly aware that they need to explain what they mean by it. Its different senses are nicely encapsulated by section 18 of the Finnish Constitution of 1999, which reads:

The right to work and the freedom to engage in commercial activity:

(1) Everyone has the right, as provided by an Act, to earn his or her livelihood by the employment, occupation or commercial activity of his or her choice. The public authorities shall take responsibility for the protection of the labour force.

(2) The public authorities shall promote employment and work towards guaranteeing for everyone the right to work. Provisions on the right to receive training that promotes employability are laid down by an Act.

(3) No one shall be dismissed from employment without a lawful reason.107

Properly analyzed, section 18(1), above, appears to recognize a right not to be prevented, whether by the state or by others, from doing the remunerative work of one’s choice. This is a right—in most constitutions separated into protection of freedom to work and of freedom of commerce—issuing from the breakdown of guild and corporatist modes of industrial and commercial production. An early assertion is the French Law of March 2–17, 1791 (also known as the décret d’Allarde)108 proclaiming the freedom of commerce, reinforced by the preamble to the Constitution of September 3, 1791. Available by its very nature against all encroachments, it is in the nature of a liberty, enjoining noninterference or constraint by others, not a claim to the provision of any service by the state. We encounter such a right of freedom to work and to free choice of work and career in a wide range of constitutions;109 it is often associated with prohibitions on forced labor, though these may appear elsewhere. The Finnish provision is unusual in apparently making the right itself dependent on legislation; more commonly, constitutions provide in various ways for legislative control of entry into or exercise of professions or trades in the public interest. German constitutional jurisprudence shows the Constitutional Court maintaining tighter control over restrictions on entry than on exercise, reflecting concern that freedom to work be preserved.110

Section 18(2), for its part, does something quite different, that is, requiring that the policy of the state be directed toward full employment, so that everyone

108 The décret d’Allarde provides that “From 1 April, everyone is free to undertake whatever business, or exercise whatever profession, skill or trade, he finds appropriate.” GÉRARD LYON-CAEN ET AL., DROIT DU TRAVAIL 7 (Daloz, 19th ed. 1998) (author’s translation).
109 See, e.g., SLOVN. CONST. art. 49; KONSTYTUCJA (Pol.) art. 65(1)–(2); GG art. 12 (E.R.G.); C.E. art. 35(1) (Spain); A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 70B(1) (Hung.); LAT. CONST. art. 106; STATUUT NED. art. 19(3) (Neth.).
110 Pharmacy Case, 7 BVerfGE 377 (1958).
who wishes to may work. Since the end of World War II, “full” employment has been generally seen as a feasible objective of economic policy, though experience has shown how difficult it is to reconcile, in a market economy, with other goals, such as monetary stability. A number of constitutions spell out this policy commitment, sometimes as an expression of “the right to work,” sometimes not; rarely do the other, possibly conflicting objectives of macroeconomic policy get a constitutional mention. An exception is article 40(1) of the Spanish Constitution:

The public authorities shall promote favourable conditions for social and economic progress and for a more equitable distribution of regional and personal income within the framework of a policy of economic stability. Special emphasis will be placed on the realization of a policy aimed at full employment.

The wording, here, maintains a consummately ambiguous balance between the “framework” of economic stability and the “special emphasis” on full employment. Elsewhere, silence on other policy objectives should not be taken to mean that full employment is the only constitutionally validated economic aim. The member states of the European Union, for example, are committed by treaty to an economic stability pact whose maintenance might well involve, at least temporarily, overriding the goal of full employment. Monetary stability is also solemnized as a treaty goal. The status of these commitments in domestic law will depend upon the constitution itself. It seems, however, highly unlikely that any macroeconomic policy measure that a state might take within such frameworks could be attacked as so clearly inconsistent with full employment policy as to sustain judicial standards of proof—especially when possible long-run effects are taken into account.

While the full employment objective is thus, in my view, nonjusticiable, the third element of section 18, the right not to have one’s employment wrongfully terminated, marks a return to the realm of immediately enforceable rights. The Finnish formulation gives full constitutional force to rights against unfair or unlawful dismissal, clearly placing employers under direct constitutional obligation. This is most unusual. In other constitutions, security of employment tends to be referred to through general formulas, such as “[t]he State

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112 See, e.g., Den. Const. art. 75(1) and Greece Const. art. 22(1).
113 See, e.g., Konstytucja (Pol.) art. 65(5); Nor. Const. art. 110(1); Statuut Nld. art. 19(1) (Neth.).
114 C.E. art. 40(1) (Spain).
115 EC Treaty, supra note 58, art. 104.
116 Id. art. 105.
shall be responsible for the creation of opportunities for employment and for work, and shall ensure the protection thereof by statute,\(^{117}\) or statements to the effect that work is placed “under the protection of the State.”\(^ {118}\) At best, such provisions would appear to create a state duty to legislate to prevent unfair or unlawful dismissal. Most constitutions, however, are silent on this aspect of work, though if, of course, they mention a “right to work” in general terms, judicial construction may shape some degree of protection of existing employment from the term. Within the countries of the European Union, the significance of this silence is limited by the fact that all the member states have accepted the Charter of Fundamental Rights and Freedoms of the European Union as a recognition by the Union of the rights it contains, among which we find a right to protection from unfair dismissal.\(^ {119}\) This bespeaks a confidence, among all members of the Union, including the large majority that makes no mention of this issue in their constitutions, that their domestic legislation complies with this precept.

The value of spelling out the meaning of a notion of “right to work” may be assessed by reference to the contrasting experiences of France and Italy in the interpretation of the notion by the constitutional jurisdiction. In France, we find the right among the “political, economic and social principles” proclaimed by the preamble to the 1946 Constitution, expressed in the unqualified terms “[e]veryone has the duty to work and the right to employment.”\(^ {120}\)

While the provisions of the preamble have been held by the Conseil Constitutionnel to be a source of constitutional obligation, and not mere pious hopes, the Conseil has also made it clear that they leave a large measure of discretion to the legislature, and that they must yield to otherwise conflicting provisions in the Declaration of the Rights of Man of 1789,\(^ {121}\) where we find the more traditional economic rights and the other rights, such as liberty and property. This “second-class” status, coupled perhaps with the difficulty of connecting the right as formulated with specific public or private duties, has meant that no legislative or regulatory provision has ever been declared unconstitutional by reference to the right. Instead, as we shall see, legislation designed to implement the right has been struck down as impairing other rights. Remarkably—in light of article 30 of the European Charter—the

\(^{117}\) *Sloven. Const.* art. 66.

\(^{118}\) *Greece Const.* art. 22(1) and *Cost.* art. 35(1) (Italy).

\(^{119}\) European Charter, *supra* note 12, art. 30 (“Every worker has the right to protection against unjustified dismissal, in accordance with Community law and national laws and practices”).

\(^{120}\) *Fr. Const.* (1946) pmbl.

provision was not even mentioned by the Conseil when it considered aspects of the law relating to labor force redundancy in 1989.\textsuperscript{122}

In Italy, the analogous provision, “[t]he Republic recognises that every citizen has the right to work, and promotes the conditions which make this right effective,”\textsuperscript{123} has been the basis of an impressive volume of legislation that is highly interventionist in nature, imposing important obligations to hire various categories of workers, such as the disabled; organizing what has been described as a “public monopoly on placing workers in employment”;\textsuperscript{124} and closely regulating dismissals. We shall see that, in contrast to its French counterpart, the Italian provision has effectively protected these measures against claims of unconstitutionality on grounds of commercial and other freedoms. In explaining this contrast, it is worth recalling not only the preeminent commitment of the Italian Constitution to the protection and promotion of work and workers but also the fact that the Italian Constituent Assembly took a clear decision to insert its general statement of the fundamental principles of the Constitution not as a preamble but as part of the body of the text.\textsuperscript{125}

3.2.2.2. Freedom of enterprise. As we noted above, this right derives from the same process of freeing economic activity from public and private regulation as underpins the first sense of the “right to work.” While crucial to revolutionary economic thinking in France and the subject of early legislative expression there,\textsuperscript{126} freedom of enterprise never received express constitutional formulation and was, until very recently, regarded only as a “general principle of law” of uncertain constitutional status.\textsuperscript{127} Elsewhere its incorporation into the constitution can rarely be dated before the end of World War II.\textsuperscript{128} Not only has the worldwide retreat of corporatism been slow and uneven, with occasional aggressive sallies even well into the twentieth century, as in Mussolini’s Italy, but it has never been accompanied by an unqualified willingness on the part of states to accept a laissez-faire economic order in its stead.

This is as true of the United States as of Europe. At the time of the promulgation of the United States Constitution, the economic order of the newly independent republic was not laissez-faire, but mercantilism. An extensive apparatus of control was inherited from the colonial era, and specific

\textsuperscript{123} COST. art. 4(1) (Italy).
\textsuperscript{124} MAZZIOTTI, supra note 24, at 344. The monopoly was abolished by Decree-Law n. 469, Dec. 23, 1997.
\textsuperscript{125} See COST. arts. 1–12 (Italy); GIANGIULIO AMBROSINI, COSTITUZIONE ITALIANA xx–xxi (Einaudi 1973).
\textsuperscript{126} See supra note 107.
\textsuperscript{127} FRANÇOISE DREVFUS, LA LIBERTÉ DU COMMERCE ET DE L’INDUSTRIE (Berger-Levrault 1973).
\textsuperscript{128} But see NOR. Const. art. 101 (“New and permanent privileges implying restrictions on the freedom of trade and industry must not in future be granted to anyone”).
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and discriminating public support for private development, in the form of charter privileges and funds for infrastructure, characterized the nineteenth-century economy. The fact that the United States Constitution made no mention of freedom of commerce or enterprise in 1789, and continued to make no mention of it when, in 1868, the Fourteenth Amendment to the Constitution extended to the states the prohibition against deprivation of life, liberty, or property without due process of law, should not be seen as reflecting a sense that this freedom was too fundamental to need mention, or as a casualty of the laconic mode of expression preferred by the framers. They were quite ready to descend to economic specifics where necessary, but in 1789 a constitutionalized freedom of commerce, far from being fundamental, could only have subverted an economy in which private economic initiative, while highly valued, was propelled by privilege and channeled by regulation. Even in the Slaughterhouse Cases of 1873, which might be seen as ushering in a period of laissez-faire Supreme Court jurisprudence by means of the recognition of substantive due process under the Fourteenth Amendment, the Court showed its low regard for the principle by rejecting the claim of New Orleans butchers that the statutory monopoly, which would deprive them of their business, was invalid.

While the subsequent drift of Supreme Court case law, until the crisis over New Deal legislation in 1937, was generally toward the increased protection of commercial freedom against state and federal regulation, this was largely effected by applying the protean notion of “substantive due process” to rights


130 See U.S. Const. amend. XIV.


132 Id. at 12, citing U.S. Const. art. I, § 10 (prohibiting the states—though not Congress—from passing any law impairing the obligations of contracts, as a specific response to state laws designed to relieve impecunious mortgagors).

133 83 U.S. 36 (1873).

134 Contrasting readings of this case can be found in Charles W. McCurdy, Justice Field and the Jurisprudence of Government-Business Relations: Some Parameters of Laissez-Faire Constitutionalism, 1863–1897, 61 J. Am. Hist. 970 (1975), and in Herbert Hovenkamp, Enterprise and American Law 1836–1937 116–24 (Harvard Univ. Press 1991), where further extensive references can be found.
of property and liberty of contract associated with commercial activity.135 With its volte-face following Roosevelt’s Court-packing threat, the Court lost interest, or confidence, in applying substantive due process concepts to judge the constitutionality of the regulation of business activity.136 While the Court’s laissez-faire jurisprudence may, to some extent, have been built on early dicta holding that “liberty” included “liberty of pursuit” and that “property” included a man’s rights in his calling, 137 the failure to develop any substantive notion of “freedom of commerce” along European lines is striking. This failure is evidenced in such modern cases as Ferguson v. Skrupa,138 in which the Court sustained state legislation that reserved to licensed attorneys aspects of the debt collection business on no other ground than that the substantive due process case law had “long since been discarded,”139 and it forcefully refused to enunciate any criteria by reference to which such legislation might otherwise be evaluated.

Ferguson v. Skrupa demonstrates, rather clearly, the disadvantages of relying on generous interpretations of laconic constitutional terminology for the protection of economic rights. The case offers a striking contrast with the jurisprudence of certain European constitutional adjudicators as they apply constitutional guarantees of freedom of commerce. Only ten out of the eighteen European constitutions examined contain such a guarantee in any form. Examples are offered by Germany,140 Spain,141 Italy,142 and France, where the Conseil Constitutionnel now derives the guarantee from article 4 of the

135 See, e.g., Adkins v. Children’s Hospital of the District of Columbia, 261 U.S. 525 (1923) (striking down minimum wage legislation for women and children on the ground that the right to contract is part of the liberty protected by the due process clause); Railroad Retirement Board v. Alton Railroad Co., 295 U.S. 330 (1935) (invalidating as a confiscatory infringement of due process congressional legislation establishing a national pension scheme for railroad employees). Much of the legislative content of the early New Deal was eviscerated by the Court’s strict interpretation of the federal commerce power. See A. L. A. Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

136 West Coast Hotel Co. v. Parrish, 300 U.S. 379 (1937). See also National Labor Relations Board v. Jones & Laughlin Steel Corp., 301 U.S. 1 (1937) (marking the acceptance of a broader definition of the commerce power).


139 Id. at 730 (Justice Hugo Black).

140 GG art. 12(1) (F.R.G.).

141 C.E. art. 38 (Spain).

142 Cost. art. 41 (Italy).
Declaration of the Rights of Man of 1789\textsuperscript{143} rather than from the \textit{décret d’Allarde}, thus enhancing its constitutional status;\textsuperscript{144} and among transitional economies, by Slovenia,\textsuperscript{145} Lithuania,\textsuperscript{146} and Hungary.\textsuperscript{147}

The terms in which freedom of commerce is recognized reflect a general European consciousness that such freedom will always be subject to constraint in the interest of a wide range of public concerns and values, from consumer protection through workers’ concerns with health and safety, stability of employment and fair remuneration, to broad national issues of economic stability and development. While in all the examples mentioned above the right is formulated with sufficient precision to make it at least potentially enforceable as a constraint on state action, in each case it is described as subject either to legislative control\textsuperscript{148} or to qualification by reference to other values, such as social utility, security, liberty, and human dignity,\textsuperscript{149} the public interest;\textsuperscript{150} or the demands of the general economy and planning.\textsuperscript{151} Moreover, the innate tensions between entrepreneurial freedom and consumers’ and workers’ interests mean that where the latter are constitutionally protected alongside freedom of commerce, adjudicators will frequently need to choose among or balance this freedom and its competing rights.

On top of these constraints, it is commonplace for these constitutions to contemplate reducing the area of the guarantee’s operation, by providing for the reservation—ordinarily to the state, but sometimes, as in Italy, to a wider range of nonprivate actors\textsuperscript{152}—of particular kinds of economic activity that are of special sensitivity: those relating to national assets and natural

\textsuperscript{143} Article 4 states: “Liberty consists in the freedom to do everything which injures no one else; hence the exercise of the natural rights of each man has no limits except those which assure to other members of the society the enjoyment of these same rights. These limits can only be determined by law.” Déclaration des droits de l’homme et du citoyen [Declaration of the rights of man], August 26, 1789, available at http://www.justice.gouv.fr/textfond/ddhc.htm (in French) and at http://www.yale.edu/lawweb/avalon/rightsof.htm (in English).


\textsuperscript{145} SLOVN. CONST. art. 74.

\textsuperscript{146} KONSTITUCJA (Lith.) art. 46.

\textsuperscript{147} A MAGYAR KÖZTÁRSASÁG ALKOTMÁNYA art. 9 (Hung.).

\textsuperscript{148} See GG art. 12(1) (F.R.G.); FIN. CONST. § 18(1).

\textsuperscript{149} See COST. art. 41(2) (Italy). And, in addition, to legislative coordination with public economic activity for social ends. See id. art. 41(3).

\textsuperscript{150} See SLOVN. CONST. art. 74.

\textsuperscript{151} See C.E. art. 38 (Spain).

\textsuperscript{152} See COST. art. 43 (Italy).
resources,\textsuperscript{153} land, natural resources, and means of production,\textsuperscript{154} essential public services, energy resources, and monopoly situations, which are of preeminent public interest,\textsuperscript{155} and goods and enterprises whose exploitation has or acquires the character of a national public service or a de facto monopoly.\textsuperscript{156}

In the face of such an array of caveats and qualifications, it is tempting to dismiss the provisions I have cited as mere constitutional lip service to the market economy principle. A fairer assessment, perhaps, is that while the European entrepreneur has a better chance than an American counterpart of getting a constitutional adjudicator to address the issue of freedom of commerce, it would be unwise to place much reliance on getting a positive answer. The need to engage in balancing exercises, in relation to most of the potential constraints on the continuing pursuit of economic activity, makes it unlikely that European constitutional jurisdictions generally, or even a single jurisdiction over time, will be able to maintain any consistently predictable limitations on regulatory burdens in the name of freedom of commerce. An instructive lesson is offered by contrasting Italian and French treatments of legislative control of enterprises’ workforce policies.

In Italy, despite the explicit but limited protection afforded to freedom of private economic initiative, the ability of an enterprise to select and adjust its labor force has, since the earliest years of the republic, been hedged about by strict controls: for example, the state monopoly of placement in employment already referred to,\textsuperscript{157} coupled with a requirement that employers hire workers only by reference to numbers and skills and not by selecting individuals by name.\textsuperscript{158} In addition, statutory controls on dismissals, first introduced in 1966,\textsuperscript{159} have been steadily strengthened. Specific regulation of collective dismissals came late to Italy, but again, it deprives the employer of the right to select employees for dismissal; selection must be in accordance with the terms of collective agreements or, in their absence, with rules set out in the legislation.\textsuperscript{160} Simultaneously, the hiring rule has been relaxed and the

\textsuperscript{153} See SLOVN. CONST. art. 70.
\textsuperscript{154} See GG art. 15 (F.R.G.).
\textsuperscript{155} See COST. art. 43 (Italy).
\textsuperscript{156} See Fr. Const. (1946) pmbl., para. 9.
\textsuperscript{157} See supra note 124.
\textsuperscript{158} Law n.264, Apr. 29, 1949.
\textsuperscript{159} Law n.604, July 15, 1966.
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state’s monopoly abolished, but Italy’s system of employment protection remains—for those enterprises to which it applies—one of the most restrictive in Europe.161

The hiring monopoly installed by Law 264 was once challenged constitutionally, but the challenge made no reference to freedom of private economic initiative,162 nor do the general laws on individual or collective dismissals appear ever to have been challenged on this ground.163 In the rare cases where article 41 has been invoked in the employment context, the Constitutional Court has brushed aside the argument on the ground that the controls complained of do not affect the economic organization of enterprises, because the relevant protected categories (disabled war veterans in one case, female employees getting married in another) form only a small proportion of a labor force that the employer is otherwise free to manage.164 While doubtless true in relation to each individual measure of protection, the aggregate restrictions involved are far weightier.

At first glance, one might expect a rather similar approach to prevail in France, especially since, as we have seen,165 there is no express commitment to freedom of commerce or enterprise to be found in French constitutional documents. But the dominance of that principle over those protecting workers’ rights, at least in the view of the Conseil Constitutionnel, has recently been demonstrated in striking fashion by the Conseil’s invalidation of legislation that would have tightened the definition of the lawful grounds for economically motivated collective dismissals to a point where, according to the Conseil,166 the enterprise could only so dismiss if its survival was threatened. While the Conseil recognized that the legislator could properly subject the freedom of enterprise to limitations designed to assure the right of everyone to obtain a job, a goal that was one of the economic and social principles of the 1946 preamble, and that it was the legislator’s task to secure, the Court found the restrictions imposed by the law to be “manifestly excessive” relative to the

161 Franco Carinci, “Outflow” Rigidity and Flexibility in Italian Employment Law, 18 INT’L J. COMP. LAB. L. & INDUS. REL. 215 (2002). Carinci suggests that there is a judicially recognized “balance” between free business initiative (art. 41) and the interest of the worker in job security.

162 The leading case is Corte cost., cass., 9 Apr. 1957, n. 53, 3 Racc. uff. corte cost. 57. See also COST. art. 41 (Italy).

163 There is, however, a considerable volume of case law in which limitations on the scope of these laws (which apply only to enterprises of certain sizes and types) have been argued to be unconstitutional on grounds of unjustified inequality.


165 See supra text accompanying notes 143 and 144.

166 But see Rousseau, supra note 97, at 669–70.
objective sought—namely, maintaining employment. Not much earlier, however, the Conseil had largely sustained, against a similar challenge, other innovative labor legislation that also affected substantially the management of enterprises through the imposition of a maximum of thirty-five hours of work per week.

Even though the Conseil had already established the superiority of the “liberal” rights of the 1789 declaration over the “collectivist” rights of the 1946 preamble and had found freedom of commerce among those liberal rights, its decision to countermand a core economic policy with its own basis in the constitutional order was a bold one. This was particularly so in light of the Conseil’s earlier amenability in blessing both a massive nationalization program in 1981 and an equally massive privatization program in 1986, in each case in the face of arguably fatal constitutional restrictions. Arguments, no doubt, can be framed that would formally reconcile the present decision both with the thirty-five-hour work-week case and with Italian jurisprudence; the fact remains that with this decision the Conseil has taken a further step in creating, from the vaguest of premises, a major constraint on the implementation of the more “collectivist” provisions of the constitution, in doubtless unconscious emulation of the late-nineteenth-century Supreme Court in the United States. In so doing, it has radically questioned a decades-long tradition of economic intervention in France that the principle of freedom of commerce, in the merely legislative guise of the décret d’Allarde, had been powerless to constrain.

4. Should constitutions specifically protect economic rights? Relevant considerations

Not long before the American and French revolutions, Benjamin Franklin wrote to the French Physiocrat economist André Morellet “[n]othing can be better expressed than your sentiments are on this point, where you prefer liberty of trading, cultivating, manufacturing etc. even to civil liberty, this

169 See supra decisions at note 121.
170 See supra notes 143 and 144.
172 See DREYFUS, supra note 127.
[civil liberty] being affected but rarely, the other, every hour.”173 The importance to individuals of the economic interests referred to by Franklin, and those other interests celebrated in the Italian Constitution, can hardly be denied, even if few would now place them above civil liberty. What good reason can there be, then, for hesitation about making them the subject of express constitutional rights? In the light of the constitutional practice analyzed here, I would offer three, with an accompanying caveat and possible exception.

4.1. The social contingency of economic rights

Human rights, by their name and nature, represent claims that transcend the demands of any given political or social organization. They set limits within which societies must be constructed and operated. The rights we have identified as “economic,” however, are the products of such societies, growing from and reflecting particular kinds of social relations that happen, now, to prevail across most of the world’s surface but that have had many challengers and alternatives in the past and continue to suffer important exceptions. The only economic rights arguably outside this socially determined category are those that represent particular expressions of bodily freedom and integrity, such as guarantees against slavery and forced labor. This characteristic of social contingency is most obviously reflected in the very different role and scope given to individual economic rights in liberal and socialist constitutions (both of which may, however, proclaim similar developmental and welfare goals), and, less dramatically but more pervasively, in the different choices made even in market economies as to what rights will be recognized and how. Most fundamentally, this contingency appears in the omnipresent need to balance economic interests within the polity, as manifested in the degree to which economic rights, even in liberal constitutions, are described as susceptible to legislative shaping and control. As we have seen, this is a characteristic shared by such diverse rights as the right of property and the right to strike. It is not, it should be stressed, just another way of providing for the possibility of legislative restriction of existing rights, as is commonplace in relation to all but the most fundamental civil rights. The latter is a case of occasional but necessary exception; for economic rights, the issue is one of essential definition.

4.2. Overspecification and excessive discretion

Making provision for legislative definition and control of economic rights removes a large part of the basic case for constitutionalization,174 but states


174 But not all: defining the “core” of a legislatively controlled right broadly may enable the constitutional adjudicator to assert tight control over legislative action, and even, as in Italy, to deploy the basic right as a means of compelling legislative action to implement it. See Pizzorusso, supra note 64, at 53–56. Such an approach will not be available to adjudicators who, like the French Conseil Constitutionnel, can only operate in relation to legislative proposals. See generally John Bell, French Constitutional Law (Oxford Univ. Press 1992).
that have tried to avoid doing this have often laid up trouble for themselves. Stipulating detailed standards with which the legislature, no less than the executive, must comply has the advantage of rendering more predictable the decisions to be made by the constitutional adjudicator in the event of a challenge to legislation or executive action. At the same time, it makes it likely that the nation’s capacity to respond to demands for change in the economic order, whether stemming from external change or from democratically mandated policy shifts, will be hobbled by the text of the constitution itself and perhaps also, and more seriously, by the weight of judicial precedent accumulated around particular provisions. Italy’s constitutional order certainly makes pension and labor market reform more difficult; Germany had problems in changing its system of university admissions when the established system became economically unsustainable;\textsuperscript{175} and Portugal needed to amend its 1976 Constitution before it could embark on a privatization program.\textsuperscript{176}

The contrasting approach of framing rights in broad and laconic language, with the idea of giving the legislator more discretion with which to adapt the economic order to changing needs and desires while inhibiting the radical impairment of rights deemed fundamental to it, creates an even greater risk. As demonstrated by the United States Supreme Court’s adventures with the substantive due process clause during the latter part of the nineteenth century and first decades of the twentieth, this is the risk that the constitutional adjudicators will appropriate for themselves that same constitutional discretion, and thus the role of censor of economic doctrine and policy. Since courts offer no better guarantee of consistency\textsuperscript{177} or of superior economic wisdom than do legislators, uncertainty over the constitutional viability of possibly major economic measures, or distortion of governmental economic choices, may ensue. By reason of the substantial transaction costs thereby created, and in terms of respect for democratic decision making, such results should be viewed as economically and socially negative, unless there are compensating gains.

4.3. Irrelevance to collective social and economic welfare
Such compensatory gains are hard indeed to demonstrate. The provision of constitutional protection for economic rights, as here defined, appears neither necessary nor sufficient in order to secure protection for the core economic interests—in work, enterprise, and property—of all classes of a nation’s population. First, as to necessity, one should consider the achievements of a range of countries that have managed to procure and maintain such protection over lengthy periods without recourse to substantive constitutional norms: the

\textsuperscript{175} See KOMMERS, supra note 21, at 281–89.
\textsuperscript{176} See Daintith & Sah, supra note 171, at 473.
\textsuperscript{177} There was little consistency, under substantive due process, in the treatment of state measures protective of workers’ interests. Compare Soon Hing v. Crowley, 113 U.S. 703 (1885), and Muller v. Oregon, 208 U.S. 412 (1908), with Lochner v. New York, 198 U.S. 45 (1905), and Adkins v. Children’s Hospital of the District of Columbia, 261 U.S. 525 (1923).
United Kingdom, Australia, New Zealand, Norway, and Switzerland are examples. It is clear from the relatively small number of such countries and the fact that several of them have recently adopted some form of bill of rights that confidence in this capability is steadily waning; but the historic achievement remains. Second, as to sufficiency, one need only mention the large number of countries that include such rights in their constitutions but whose governments—not necessarily for lack of trying—are unable to provide them. In this connection, it is worth noting that among the thirteen organizations whose data were used by World Bank researchers in compiling composite measures of good governance, to set against progress (or lack of it) in economic development, none of the investigators treated the terms of the constitution—as opposed to the realization in practice of such values as judicial independence, the competence of public sector personnel, or the suppression of corruption—as relevant to their inquiries.\footnote{KAUFMAN ET AL., supra note 55, app. 1. For other measures, focusing particularly on “economic liberty,” see Gerald W. Scully, CONSTITUTIONAL ENVIRONMENTS AND ECONOMIC GROWTH ch. 5 (Princeton Univ. Press 1992).}

4.4. A caveat and an exception

Of course, World Bank data are only indicators of national performance. It might well be argued that what matters is the exposure of the individual to oppressive conduct or circumstances, and that any steps to reduce this, even economically inefficient ones, are worthwhile. Given that economic rights ordinarily involve a balancing of the economic interests of different individuals and groups, the likelihood of their invocation to prevent conduct that is uncontestably oppressive and that does not contravene other constitutional provisions seems low, and I have not encountered cases of this kind. An article like this, however, can examine the constitutional jurisprudence only of a few countries and must ignore an enormous mass of constitutional practice, both judicial and nonjudicial, in which such examples might possibly be found. These conclusions are offered accordingly not as a rebuttal of any possible utility residing in the constitutional protection of specific economic rights but as grounds for hesitating about conforming to the current orthodoxy in favor of such rights, and, in particular, for critically appraising that orthodoxy in the light of national economic and social needs and aspirations and national styles of legal and constitutional ordering.\footnote{Cf. Jed Rubenfeld, Two Conceptions of Constitutionalism, 96 AM. SOC’Y INT’L L. PROC. 394 (2002).}

As an example of such specifically national factors, an argument might be made, perhaps, for economic rights in situations where a prime purpose of the promulgation of a new constitution is to mark the adoption of a profoundly changed economic order. Here it may be considered that the need to protect and consolidate that order by all possible means outweighs the risks that the constitutionalization of economic rights may entail. Thinking of this kind may
lie behind the constitutionalization of the “state founded on work” in Italy and of the social market economy in Germany after World War II, and it is of clear relevance to the constitutions of the former socialist states in central and eastern Europe. But the examples of Italy and Germany also suggest that the way this is done, what range of rights is to be protected, and how, needs the most careful consideration in the light of the specific transformational risks being run. In the former socialist states, the common aim has been to move quickly from a planned economy to a smoothly functioning market system. Does this mean that the constitutional emphasis should be placed on property and freedom of commerce, so as to restrain the state from sliding back into habits of detailed regulation? Or is the main risk that of a quick advance toward “savage capitalism,” so that special protection is needed for the interests of the less powerful, such as individual employees? Different views of this issue might be expected to produce different constitutions, but it is notable that in our constitutional sample the former socialist states are strongly represented in the group that closely balances “liberal” and “collectivist” rights: a result that suggests the constitution makers may have paid more attention to fashionable constitutional models than to their own special circumstances. Even if this happens, however, protection for specific economic rights may have the residual merit of providing an effective means of eliminating inappropriate ancien régime rules through individual initiatives in litigation, rather than waiting for the slow process of legislative reform to displace them.

180 See supra section 3.2.1.