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Looking Beyond the Negative-Positive Rights Distinction: Analyzing Constitutional Rights According to their Nature, Effect, and Reach*

BY JORGE M. FARINACCI-FERNÓS**

Introduction

The relatively short catalogue of rights recognized by the Constitution of the United States, coupled with their near exclusive articulation as political and civil rights of a negative character opposable only to state action, has substantially narrowed the scope of analysis as to the different features and manifestations of constitutional rights in general. This has led the debate amongst U.S. scholars to focus their attention to rights as a sometimes simplistic dichotomy between negative political rights on the one hand, and positive socioeconomic rights on the other, which are more typically found in modern, teleological constitutions.

In this brief Article, I wish to challenge and transcend that narrow dichotomy and analyze the different variables applicable to constitutional rights, considering several interacting features. First, the *nature* of a right, that is, whether it is civil and political or socioeconomic. Second, the *effect* of a right, that is, whether it is negative rights that protect the titleholder against the actions of others or positive rights that entitle its titleholder to require others to act. Third, the *reach* of a right, that is, whether it is vertical rights opposable to the state or horizontal rights opposable to private parties. Finally, the *titleholder* of the right, which could be an

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individual or a collective entity.

These sets of variables demonstrate the potential multiplicity in terms of the actual articulation of constitutional rights. Rights come in all shapes and sizes. This requires a more precise analysis of the different features mentioned above with greater care and individual attention, so as to better understand the different manifestations constitutional rights can take. This can help us better understand the different uses of rights and, in turn, aid courts in their efforts to adequately apply these rights in a wide range of circumstances. This discussion could also be helpful in the discussion about constitutional rights in general and the usefulness of post-liberal constitutionalism.

One of the most enduring legacies of liberal constitutional theory has been the focus on rights as central to modern constitutionalism.¹ While older framework constitutions normally give more attention to governmental structure and institutions, even they tend to *start with the Bill of Rights* and only later turn to the structural provisions.² Teleological constitutions, that is, constitutions that focus more on substantive policy issues and goals, continue this practice of giving priority to rights. The focus on rights is a shared feature of both liberal and post-liberal constitutional systems.

The effect of this focus on rights has been so compelling that many actually believe that most of the substantive policy content of a constitution lies in its rights provisions. If it is substantive in nature, it probably is a right. This constitutes a true rights revolution,³ and it is a very individual-based approach to constitutional theory. This logic has created an interesting, but not total, self-perpetuating cycle: Because most people believe that substantive provisions equal rights, constitution-makers do, in fact, articulate constitutional substance in the form of explicit rights, thus reinforcing the original view. Rights-centered constitutional theory is a mainstream view: “[the]

1. See VICTOR F. COMMELLA, *CONSTITUTIONAL COURTS & DEMOCRATIC VALUES: A EUROPEAN PERSPECTIVE* 36 (Yale Univ. Press 2009); Daniel P. Kommers & Russell A. Miller, *Das Bundesverfassungsgericht: Procedure, Practice and Policy of the German Federal Constitutional Court* in *CONSTITUTIONAL COURTS: A COMPARATIVE STUDY* 104 (Andrew Harding & Peter Leyland, eds., Wildy, Simmonds & Hill Publishing 2009).

2. FERRERES COMELLA, *CONSTITUTIONAL COURTS & DEMOCRATIC VALUES* 78, *Op. Cit.* note 1.

3. Victor Ferreres Comella, *Commentary: Courts in Latin America and the Constraints of the Civil Law Tradition*, 89 *TEX. L. REV.* 1967 (2011).

protection of fundamental or human rights has been the central driving force behind the convergence on constitutional fundamentals since 1945.”⁴ A central doctrinal issue has been the scope and breadth of rights.⁵

But rights are sometimes either bundled up together in a one-size-fits-all descriptive model or characterized in necessary opposition to each other. For example, as we will see shortly, many scholars tend to characterize, almost axiomatically, that, because civil and political rights are negative and opposable to the state, then socioeconomic rights must be positive rights that create an entitlement against the state. Such is not the case. The articulation of rights, even at the constitutional level, is far richer and complex.

Classic liberal constitutions include the familiar list of (1) individual, (2) political, (3) negative rights (4) opposable to the state (vertical). The U.S. experience has been one of negative political rights at the federal level. State constitutional regimes are different, but have been the victims of a judicial approach premised on the federal model that have put those rights in a state of semi-hibernation.⁶ As such, government action that infringes the freedom of speech, unduly burdens religion, unjustifiably discriminates against an individual or violates the protection against unreasonable searches and seizures is found to be in violation of the Constitution. Courts as negative legislators that strike down government actions that infringe the Constitution take center stage in this approach to rights. But the articulation of rights is much broader than negative protection against government action. As we saw, there are multiple variables that, in turn, create a vast array of combinations that transcend the classic paradigm.

The U.S. scholarship, as well as other scholars from the liberal democratic tradition, constantly fails to make these distinctions or take into account all of these variables. For example, they always seem to equate, almost inherently, socioeconomic rights as positive

4. Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 MICH. L. REV. 391, 395 (2008).

5. Jeffrey Goldsworthy, *Australia: Devotion to Legalism* in INTERPRETING CONSTITUTIONS: A COMPARATIVE STUDY 141 (Jeffrey Goldsworthy ed., Oxford Univ. Press, 2006).

6. “Although nearly two dozen state constitutions contain some type of affirmative guarantee of welfare rights, state courts are *extremely reluctant to enforce* those rights.” (Emphasis added.) Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863 (2008).

claims upon the state with the corresponding budgetary and resource allocation problems which, in turn, fuels their apprehension for judicially enforced socioeconomic rights.⁷ This appears to be the result of an artificial dichotomy: since they are accustomed to political rights that are negative in nature, they assume that socioeconomic rights are positive. They seem to be mirror images of each other. But socioeconomic rights need not be positive and need not be only opposable to the state. The idea that negative political rights are wholly enforceable while positive socioeconomic rights are not fails to distinguish between the multiple articulations of rights. Let us take a closer look.

A Closer Look at Rights

Rights According to Their Nature

Here we focus on the content and substance of the right itself. As to this feature, we focus on the distinction between political and civil rights on the one hand, and socioeconomic rights on the other. Although historically different, for the purposes of this analysis, cultural and environmental rights are bundled up with their socioeconomic counterparts, as they share many of the same features as to their nature.

Political and Civil Rights

Examples of political and civil rights are freedom of speech and of the press, freedom of religion and association, criminal procedure guarantees, due process and the equal protection of the laws.

These are the bread and butter of liberal constitutions. They are considered first generations rights, precisely because, as a historic matter, they were the first to be adopted.⁸ One of the main purposes and functions of this type of right is to facilitate self-government by improving the proper operation of the structural machine created by

7. Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U. J. INT'L L. & POL'Y 1233, 1235 (1995) (describing the argument made against the enforceability of these rights).

8. FRANCOIS VENTER, CONSTITUTIONAL COMPARISON: JAPAN, GERMANY, CANADA AND SOUTH AFRICA AS CONSTITUTIONAL STATES 130 (Juta & Co., Cape Town, 2000).

the constitution. It is because of that connection with the structures of government and the institutions of public power that we label them as *political rights*. As a result, they are inherently connected to the concept of real citizenship and participation in the political process, hence their label as *civil rights*. Because of this nature, they can be characterized as procedural. Historically, these rights are associated with liberal political theory that focuses on the political liberty and empowerment of the individual citizen.

Political and civil rights normally take center stage when a modern constitution is being drafted. There are multiple probable explanations for this phenomenon. First, their longevity. As part of the first generation of rights, political and civil rights have been around longer than any other type of right, and so are almost automatic in any modern constitutional endeavor. They have acquired sticking power and thus form part of most modern constitutions, whether liberal or post-liberal. Second, they are essential to democratic self-government. Political and civil rights are part of citizenship and, in turn, avoid a breakdown in the structure created by the constitution. They are essential to the effective operation of democracy. As a result, most constitutional designers recognize their vital role in making the constitutional structure work effectively. Without these rights, the thinking goes, democratic politics are weakened and self-government is threatened. Third, the dominant status of liberal democracy as the main political theory in the world today has an inevitable spillage effect over to constitutional design.⁹ Political rights are seen as a guarantor of a base core of individual liberty and autonomy central to the liberal tradition. Yet, these rights have also been adopted by post-liberal constitutional systems that, while less individualistic in their approach, do share the view that political rights are central to democratic governance and coexistence.

The historically central role given to political and civil rights is partially responsible for the skeptical approach many scholars have to giving constitutional rank to nonpolitical rights: “And once a bill of rights is being framed or subsequently interpreted, there are

9. See Sujit Choudry, *Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation*, 74 *IND. L.J.* 819, 821 (1999); Sarah K. Harding, *Comparative Reasoning and Judicial Review*, 28 *YALE J. INT’L L.* 409, 433 (2003); HANNAH LERNER, *MAKING CONSTITUTIONS IN DEEPLY DIVIDED SOCIETIES* 209 (Cambridge Univ. Press, 2011).

pragmatic reasons for focusing on more traditional civil and political right and leaving the existence or extent of positive social and economic rights to legislative discretion.”¹⁰ As a result, the inclusion of these rights in the constitutional text is a political necessity. Omitting these rights makes the constitution vulnerable to attack as to their commitment to individual liberty.

Also, because of historical and ideological factors, civil and political rights *tend* to be of a negative character.¹¹ In other words, that they protect *against* a determined action. They are also typically opposable to the state. But, as we will see when diving into both the negative-positive and horizontal-vertical dichotomies, political and civil rights come in all shapes and sizes. Some constitutions have broken this classic and limited mold. Yet, the (1) negative and (2) vertical articulations of political and civil rights are the main articulations in existence today. As we just saw, ideologically speaking, these rights also tend to reflect an individualistic outlook, equating liberty with lack of public intervention.

Socioeconomic Rights

Examples of socioeconomic rights are right to a free public education, access to quality healthcare, and minimum wage or maximum hour provisions.

These are the bread and butter of post-liberal teleological constitutions. They are labeled as second generation rights.¹² At a bare minimum, they continue where political and civil rights left off. In other words, they *add* to the list of rights that are necessary for the democratic process to work. In that sense, they serve a procedural role along the same lines as political and civil rights: “Economic and social rights are inextricably intertwined with civil and political rights.”¹³ That is, they are partially premised on the notion that civil

10. Gardbaum, *supra* note 4, at 465.

11. Venter, CONSTITUTIONAL COMPARISON 12, *Op. Cit.* note 8.

12. *Id.* at 130; “[S]uch provisions are not found in traditional bill of rights, such as that of the United States.” S.P. Sathe, *India: From Positivism to Structuralism* in INTERPRETING CONSTITUTIONS 219, *Op. Cit.* note 5. While socioeconomic rights are associated with more modern constitutions, Glandon explains that pre-twentieth century “continental European constitutions and codes acknowledged state obligations to provide food, work, and financial aid to persons in need.” Mary Ann Glandon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 524 (1992).

13. Schwartz, *supra* note 7, at 1242-43.

and political rights are not, by themselves, enough to guarantee full citizenship and ensure effective democratic self-government. It is enough to have the right to speak and worship; denial of an education, for example, as well as other basic human needs also weakens citizenship and effective political participation. Yet, because they are socioeconomic in nature, they are better labeled as substantive instead of procedural. Their substantive characterization is strengthened by the fact that their articulation is normally the product of policy judgments, as in the case, for example, of labor and employment rights. In other words, they carry actual substantive content that reflects a policy choice. In that sense, they are not mere means to an end, but ends in themselves.

Many socioeconomic rights come in the form of positive rights; many, but not all. Furthermore, that typical characterization as positive is also accompanied by the label *vertical*. In other words, that socioeconomic rights are positive rights that create an affirmative duty on the state. For now it is important to separate these aspects: socioeconomic versus positive-vertical. While in practice many constitutions do put them together, from a conceptual standpoint they share no inherent link and are not synonymous. Like political and civil rights, socioeconomic rights also come in different shapes and sizes. Unfortunately, many scholars still make reference to socioeconomic rights *only* as positive or vertical rights.¹⁴

This seems to be the result of a U.S.-centered view where, as we saw, negative political rights opposable to the state are the norm. As such, any alternative articulation *must* be its opposite, which is both conceptually and empirically inaccurate. In fact, one would think that even an intuitive reading of the term “socioeconomic” would point to the *private* sphere, where most of economic activity takes place and where our social relation to the means of productions is established. This is related to the vertical-horizontal dichotomy. In addition, because constitutional rights are normally adopted to protect weaker groups, it would also seem intuitive that socioeconomic rights have a *negative* articulation, in order to *protect* the weakest members of society, like the poor or workers, *against*

14. See CONSEQUENTIAL COURTS: JUDICIAL ROLES IN GLOBAL PERSPECTIVES 17 (Diana Kapiszweski, Gordon Silverstein & Robert A. Kagan, eds., Cambridge Univ. Press, New York, 2013); Venter, CONSTITUTIONAL COMPARISON 130, *Op. Cit.* note 8; FRANCOIS VENTER, GLOBAL FEATURES OF CONSTITUTIONAL LAW 84 (West Legal Publisher, Nijmegen, Netherlands, 2010).

powerful private economic forces.

Aside from their procedural function, socioeconomic rights are the product of material inequality and the failure of democratic ordinary politics to solve that problem. There is also a structural argument for socioeconomic rights: to protect vulnerable people from the failures of ordinary politics. As to their substantive content, socioeconomic rights cover, at a minimum, basic human material needs, such as education, healthcare, food, housing and employment. If all else fails, a core minimum of sustenance is addressed, although that does not necessarily imply government guaranteed sustenance.

Aside from the familiar list of healthcare, housing and education, there are other types of socioeconomic rights that must be mentioned briefly. First, labor rights. Almost by definition, these rights are mostly horizontal than vertical; that is, that they operate against private employers.¹⁵ This is crucial in the effort to widen our view of socioeconomic rights are merely a laundry list of entitlements against the state and the public coffers. Second, even though some have characterized environmental protection provisions as belonging to third-generation rights,¹⁶ because of their similarity with second-generation rights, I think it is correct to include this type of provision within the socioeconomic rights family.¹⁷

More than mere aspirational declarations, many of these rights are directly enforceable. In these cases, the constitution is not just a mission statement but offers “substantive standards of social rights.”¹⁸ But even in situations where a right is not directly enforceable, it does not mean it has no role no play or that it has no legal significance or consequence: “Putting rights into a constitution, even if not judicially enforceable, is not an idle

15. See Pedro C. Magalhães, *Explaining the Constitutionalization of Rights: Portuguese Hypothesis and a Cross-National Test* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 441, *Op. Cit.* note 17; Helen Hershkoff & Stephen Loffredo, *State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis*, 115 PENN ST. L. REV. 923, 929 (2011); Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrast*, 2 INT'L J. CONST. LAW 1, 25 (2004).

16. Venter, CONSTITUTIONAL COMPARISON 131, *Op. Cit.* note 8.

17. Jeff King, *Constitutions as Mission Statements* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 83 (Dennis Galligan & Mila Versteeg, eds., Cambridge Univ. Press, 2013); Pascal, *supra* note 6, at 863-64.

18. Dennis J. Galligan & Mila Versteeg, *Theoretical Perspectives on the Social and Political Foundations of Constitutions* in SOCIAL AND POLITICAL FOUNDATIONS OF CONSTITUTIONS 12, *Op. Cit.* note 17.

gesture.”¹⁹

Almost by definition, socioeconomic rights aim to protect weak members of society. That weakness is not necessarily numerical, as in the protection of minorities. The protected parties may be economically powerless and vulnerable to abuse by more powerful forces. Yet, *which* socioeconomic rights are constitutionally protected is not universally established. While there is a historical tendency in favor of progressive rights that typically protect the poorest and most vulnerable members of society, some socioeconomic rights can also include the property rights of less vulnerable groups. But, more conservative property rights have been severely weakened during the last decades.²⁰ Finally, some would say that property rights, as first adopted in liberal constitutions, are mostly seen – whether correctly or incorrectly – as more political in nature than as full-fledged socioeconomic rights. This is related to the classic liberal view that property promotes individual liberty and autonomy. Socioeconomic rights agree in part, but focus instead on the propertyless.

Socioeconomic rights constitute the cornerstone of the substantive nature of post-liberal teleological constitutions. When a constitution takes a position as to the importance, scope and effect of rights associated with education, health, labor and other similar matters, the constitution transcends its neutrality, takes a substantive position and molds the future development of society. Even teleological constitutions whose *only* substantive features are its socioeconomic rights – that is, they are not accompanied by other policy provisions – those rights make all the difference as to the substantive nature of the constitution.

There are many objections to the inclusion of socioeconomic rights in constitutions. Most are premised on their positive and vertical versions.²¹ In these circumstances, the main concern is that the constitution promises that which the government cannot deliver. When that happens, the constitution is weakened because there is a generalized sensation that one or several of its

19. Schwartz, *supra* note 7, at 1239.

20. Gardbaum, *supra* note 4, at 396.

21. See Jon Elster, *Clearing and Strengthening the Channels of Constitution Making* in COMPARATIVE CONSTITUTIONAL DESIGN 28 (Tom Ginsburg ed., Cambridge Univ. Press 2012) (noting the issue of the economic viability of these types of provisions); Venter, GLOBAL FEATURES OF CONSTITUTIONAL LAW 102, *Op. Cit.* note 14.

provisions become dead letter, which casts doubts on the authoritativeness and effectiveness of the entire constitution itself. It is better, they argue, not to have them in the first place.

This has also added to the view that, simply put, socioeconomic rights are not really constitutional rights: “Though many countries have included welfare rights or obligations in their constitutions, no democratic country has placed social and economic rights on precisely the same legal footing as the familiar civil and political liberties.”²² While I may disagree with the current universality of this affirmation, since I believe that *some* democratic countries *have* given some socioeconomic rights the same legal footing their civil and political counterparts, Glandon’s point is highly relevant as to the generalized problem of under-enforcement that results in undervaluation of socioeconomic rights.

The specific problem of judicial under-enforcement is reinforced by scholarly skepticism: “Until recently, most U.S. scholars placed socioeconomic rights outside the constitutional domain and beyond the enforcement power of courts.”²³ This in turns facilitates courts from reading those provisions out of their constitutions.²⁴ What is puzzling to me is that many modern democracies, even those that embrace the framework model, *do in fact recognize and enforce socioeconomic rights, it is just that they are of a statutory nature.*²⁵ For example, labor laws in the United States that establish minimum wages, maximum hours and collective bargaining rights are all socioeconomic in nature, yet are easily enforced. That is why some scholars have called for an adequate enforcement of these rights when they are given constitutional rank.²⁶ In other words, it makes little difference as to the practical application of a right if it has statutory or constitutional rank. If statutory socioeconomic rights are normally enforced, so should those same rights that are promoted to constitutional status. As such, it would seem that the objections

22. Glandon, *supra* note 12, at 527. Pascal makes a similar argument: “Yet *no* Constitution places these rights on the same constitutional footing as civil or political rights.” (Emphasis added.) Pascal, *supra* note 6, at 884.

23. Hershkoff & Loffredo, *supra* note 15, at 925.

24. Pascal, *supra* note 6, at 863.

25. See Schwartz, *supra* note 7, at 1243.

26. See Jeffrey Omar Usman, *Good Enough for Government Work: The Interpretation of Positive Constitutional Rights in State Constitutions*, 73 ALB. L. REV. 1459, 1517 (2010); Schwartz, *supra* note 7; Glandon, *supra* note 12; Pascal, *supra* note 6.

are more ideological than conceptual as to these types of rights.

There are also objections to the judiciary's institutional capacity and legitimacy to put these rights into effect.²⁷ Our task here is simpler: to clarify the content, scope and reach of these rights so that, when the time comes, the goal of identifying an enforcement model is not thwarted by conceptual confusion.

We must shed many of the prejudices and assumptions normally associated with socioeconomic rights. It is an undeniable fact that they have become a generalized feature of many modern constitutions. Bognador explains that today's constitutions are "more than a mere organization chart."²⁸ Not only do they include a bill of rights that protects civil liberties, they "may also include a charter of social and economic rights, something characteristic of constitutions of the twentieth century."²⁹ Scholars like King make similar observations: "In more recent times, bills of rights have been quite expansive, embracing socioeconomic rights."³⁰ This requires a careful look at the different constitutions that are in existence right now, in order to explore what we might have missed. The description of the South African Constitution's recognition of socioeconomic rights as giving it an "unique character" is puzzling to me, due to the many other constitutions that do include these rights and put them in effect.³¹ Like their civil and political counterparts, socioeconomic rights have been on the rise for the past sixty years. They are less and less unique and more and more part of the constitutional mainstream.

If the problem of socioeconomic rights is enforcement, then it is the duty of constitutional jurists to step up to the plate and propose solutions. Yet, as we are about to see, *negative* and *horizontal* socioeconomic rights are quite easy to enforce. This should represent a decisive blow to the enforcement-based objections to socioeconomic rights that were thought to be

27. Heinz Klug, *South Africa's Constitutional Court* in INTERPRETING CONSTITUTIONS 307, *Op. Cit.* note 5; Hershkoff & Loffredo, *supra* note 15, at 934; Pascal, *supra* note 6, at 863; Venter, GLOBAL FEATURES OF CONSTITUTIONAL LAW 84, *Op. Cit.* note 14.

28. Vernon Bogdanor, *Introduction* in CONSTITUTIONS IN DEMOCRATIC POLITICS 4 (Vernon Bognador ed., Gower, United Kingdom, 1988).

29. *Id.*

30. King 83, *Op. Cit.* note 17. *See also* Glandon, *supra* note 12, at 523-24; Schwartz, *supra* note 7, at 1233.

31. Klug 267, *Op. Cit.* note 27. *See also* Venter, CONSTITUTIONAL COMPARISON 145, *Op. Cit.* note 8 (describing South Africa's Bill of Rights as "*avant garde*" as to this issue).

inherently positive and vertical. If many political rights are easily enforced because of their negative character – which we are about to see is not always the case, since, like with their socioeconomic counterparts, political and civil rights can also come in the positive and horizontal variety – then *negative* socioeconomic rights can just as easily be put into practice. So, as to them, most objections again would seem to be political instead of based on constitutional theory. If that is the case, we should not shield an ideological objection behind legal argument.

Rights as to Their Effects

Here we focus on the uses of the right, that is, whether they forbid or compel action. As to this feature, we focus on the distinction between negative and positive rights.

Negative Rights

These are the easiest to enforce, probably because it simply requires striking down the action that violated them. Simply put, negative rights protect us *against* something else. It basically acts as a shield.³² Negative rights are not inherently political or socioeconomic, nor vertical or horizontal.³³ A shield can protect a whole host of rights and against a wide range of actors. It can protect our political and civil rights as well as our socioeconomic rights, and it can also protect us against the state or against private forces or entities.

The ease of enforcement as to negative rights lies in the lack of affirmative or creative remedial action needed for their vindication. If a local government entity censors a small newspaper and there is a constitutional right to free speech, a court need only invalidate the state action; if a group of workers goes on strike having a constitutional right to do so and an employer attempts to fire them, a court need only stop the employer from going forward with the disciplinary action; and so on.

These examples illustrate the erroneous characterization of

32. See Harding, *supra* note 9, at 433 (referencing Canada's Charter of Rights as limiting the power of the legislature to interfere with individual rights).

33. See Gardbaum, *supra* note 4, at 444.

socioeconomic rights as purely or even mainly positive rights in relation to their effect, and vice versa. For example, the right of workers to strike is a negative socioeconomic right. Furthermore, it is enforceable against a private party, making it a *horizontal* as well as a negative socioeconomic right. Negative rights have no substantive content, yet they give substantive provisions like socioeconomic rights greater scope and reach by transcending their generalized characterization as only entitlements that require affirmative government action and financial disbursement. Negative socioeconomic rights do not require a direct disbursement of public funds, thus destroying one of the main argument against socioeconomic rights in general. In fact, they can even cost less than *positive* political and civil rights. As such, it seems that most of the cost-based objections to socioeconomic rights, as well as other competency concerns, are more adequately opposed to the notion of *positive* rights, whether they are political and civil or socioeconomic in nature. As a result, negative socioeconomic rights should be exempt from these types of objections.

The examples we just mentioned are a good sample of negative rights: freedom of speech; right to strike.

Positive Rights

There are several examples of a positive right, some even found in U.S. constitutional doctrine, such as the right to access public information, jury trial and the right to counsel in criminal proceedings. Other positive rights include a safe workplace and access to a free public education.

Positive rights compel action. Like negative rights, these have no inherent substantive content. The compelled entity need not necessarily be public or related to the government. Private parties can also be compelled to action.³⁴ As to their specific articulation, Usman identifies five specific types: (1) authorizations to act, (2) non-justiciable positive rights, (3) non-self-executing rights, (4) highly specific enforceable provisions, and (5) abstract enforceable provisions.³⁵ As to enforcement, all of these forms of positive rights

34. *Id.*, at 441, noting that some rights “may, at least in principle, also impose positive duties on [private actors].”

35. Usman, *supra* note 26, at 1514.

have a role to play, from statutory construction to serving as authorization for legislative action.

It should be noted that “not all positive rights are social or economic in nature . . . [they can also] involve protective duties respecting civil and political rights.”³⁶ Also, “the converse is true: not all social and economic rights are positive rights.”³⁷ This is key, because many times there seems to be an automatic correlation between positive and vertical rights, that is, obligations on the part of the state. For example, Pascal states that “positive rights *always* require some type of affirmative governmental action.”³⁸ If a private employer is required to offer its employees safe working conditions as a positive right of the latter, outside from the *judicial enforcement* element that would be present if the workers wish to vindicate that right in court, no additional affirmative government action is needed.

This conceptual confusion has been problematic, because it has added to the notion that socioeconomic rights are inherently unenforceable: “Economic rights, so-called second generation rights such as healthcare, housing, education, etc. *are the equivalent of positive rights*, while negative rights include classic political freedoms, so-called first generation rights such as freedom of speech and religion.”³⁹ While the list of rights used by Usman as an example of economic rights are, indeed, positive in their effect, we have seen that there are *negative* socioeconomic rights as well as *positive* political and civil rights. That dichotomy should be put to rest.

The main problem with positive rights, whether they are political, socioeconomic, horizontal or vertical, is the issue of judicial enforcement.⁴⁰ *Positive rights are probably the greatest challenge for courts.* As we saw, this challenge is separate from the general enforceability of socioeconomic rights. *Even positive political rights are tricky to implement.* So, the issue is not the enforceability of socioeconomic rights in particular, but of *positive rights in general.* When it comes to positive rights, a challenged act can

36. Gardbaum, *supra* note 4, at 445.

37. *Id.*

38. (Emphasis added) Pascal, *supra* note 6, at 865. *See also* Usman, *supra* note 26, at 1461.

39. Usman, *supra* note 26, at 1464.

40. *Id.*, at 1491-95; Allan R. Brewer-Carías, *CONSTITUTIONAL COURTS AS POSITIVE LEGISLATORS: A COMPARATIVE LAW STUDY* (Cambridge Univ. Press, 2011).

be declared unconstitutional “not for what it provides but for what it fails to provide.”⁴¹

The issue of the judicial enforceability of positive right has raised separation of powers concerns.⁴² Negative rights, whether political or socioeconomic, vertical or horizontal, fall easier within the traditional judicial function as negative legislators.⁴³ While some negative rights have substantial policy implications, like a ban on privatizations of state-owned enterprises, positive rights have substantial *governance* implications. When a court acts as a negative legislator, it merely has to strike down the challenged act.⁴⁴ But when it comes to positive rights, the issue of alternatives as to remedies becomes trickier.⁴⁵ The main point is that positive rights create an affirmative duty on whomever they bind. But these difficulties should not be used as an excuse to undo what the people have decided: “The decision to include socioeconomic provisions in a state constitution [read: positive] thus is understood *as a mandate to the legislature that narrows the scope of political discretion.*”⁴⁶ Courts should not be able to erase this constitutional mandate. As Pascal explains, “[i]f social rights are truly unenforceable [again, read: positive], they may be meaningless provisions in constitutions, or even undermine constitutional legitimacy.”⁴⁷

Finally, some scholars believe that “the difference between negative and positive rights has been overemphasized.”⁴⁸ They point to the fact that some negative rights have “complementary positive

41. Tania Groppi, *Italy: The Italian Constitutional Court: Towards a ‘Multilevel System’ of Constitutional Review* in CONSTITUTIONAL COURTS 135, *Op. Cit.* note 1.

42. Pascal, *supra* note 6, at 864; Schwartz, *supra* note 7, at 1238.

43. Brewer-Carias 5, *Op. Cit.* note 40; Anna Gamper & Francisco Palermo, *The Constitutional Court of Austria: Modern Profiles on an Archetype of Constitutional Review* in CONSTITUTIONAL COURTS 34, *Op. Cit.* note 1.

44. Rosenfeld, *supra* note 15, at 5.

45. For example, some courts have adopted an approach based on giving the legislature wide deference as to the implementation of positive rights, especially as to the means to be used, limiting themselves to a reasonableness analysis of those actions. *See* Gardbaum, *supra* note 4, at 452. *See also* Usman, *supra* note 26, at 1495 (discussing that the “tendency of foreign judiciaries whose national constitutions contain affirmative rights provisions has been to avoid aggressive enforcement of such rights out of concern about distorting budgets, interfering with policy-making, and exceeding separation of powers limitations”).

46. (Emphasis added.) Hershkoff & Loffredo, *supra* note 15, at 929.

47. Pascal, *supra* note 6, at 864. Note the seemingly interchangeability of “positive” and “socioeconomic” rights. I think both Pascal’s and Hershkoff & Loffredo’s preference for the socioeconomic label is a testament of the current mainstream dichotomy that negative-equals-political-rights while positive-equals-socioeconomic-rights.

48. Pascal, *supra* note 6, at 866.

duties.”⁴⁹ If this is true, then there is hope that *all* constitutional rights, independent of their nature and effect, are capable of being judicially enforced, even if using different standards of review. As Pascal proposes, “constitutional rights create expectations that they will be judicially enforced if necessary.”⁵⁰ When discussing socioeconomic rights, I objected to the notion that, for example, South Africa was singled out as one of the few systems that actually enforces socioeconomic rights. Once we recognize the existence of *negative* or *horizontal* socioeconomic rights, we can find many examples of countries around the world that do have and enforce these types of substantive rights. However, when we address the issue of *positive* rights of a socioeconomic nature, then South Africa does represent an island in an ocean.⁵¹ But that island is by no means alone; we just have to look harder.

Rights as to Their Reach

Here we focus on the interaction of these rights, that is, against whom are they opposable. As to this feature, we focus on the distinction between vertical and horizontal rights.

Vertical Rights

Examples of these are: freedom of speech and the right to a free public education.

Simply put, these are rights that an individual has against the government. In their negative form, verticality enjoins the government from encroaching a particular right. In its positive form, it creates an entitlement the government must address affirmatively.

In the beginning, most constitutional rights were vertical in their reach. This has structural and ideological explanations. First, because the earlier constitutions were about government and not society, the rights contained in them only protected people from the state. This is the social contract theory at work, where the constitution is a contract between the individual and the state.

49. *Id.*

50. *Id.*, at 868.

51. “In many ways, positive rights litigation in South Africa has been an anomaly.” Pascal, *supra* note 6, at 889.

Therefore, the rights mentioned in the constitution only apply to the parties in the contract. Second, there is an ideological motivation here which identifies the government as the main threat to individual liberty. In order to protect that liberty, rights against the government must exist, especially those that have negative effect. This is at the core of the liberal democratic tradition, which is why many structuralist constitutional systems require state action in order to enforce a constitutional right.⁵²

Positive rights changed this ideological view. While still opposable to the state in their vertical articulation, by creating entitlements from the state, the government becomes a source of benefit and support instead of oppression. This is also an ideological stance, which is why constitutions that include positive rights against the state, especially of a socioeconomic nature, signal at minimum, a social-democratic or post-liberal approach to public power. “A right against” signals that the other entity in the equation may abuse its power. “A right to” signals that the transaction to be had is beneficial. Like political and negative rights, vertical rights were the first born as to the issue of reach. The state was the focus of these rights, particularly of a negative sort.

Horizontal Rights

Examples of horizontal rights are privacy, minimum wage provisions, guarantees of safe working conditions, and so on.

Not all sources of oppression and threats to individual liberty come from the government. Powerful private interests also affect the daily lives of citizens. Horizontal rights apply laterally, that is, from citizen to citizen. They are meant to shield against or create an entitlement opposable to private parties.⁵³

Although most of the rights found in classic structural constitutions are vertical, not all are. For example, the abolition of slavery in the United States by way of the Thirteenth Amendment interfered with the relationship between masters and slaves. Other framework-based systems have found that, while their rights are first and foremost vertical in their reach, there are spillover horizontal

52. Gardbaum, *supra* note 4, at 397.

53. Hershkoff & Loffredo, *supra* note 15, at 929 (The authors mention workplace conditions as a form of horizontal right.).

effects. An example of this that courts will interpret *private law* through the prism of the corresponding vertical constitutional right.⁵⁴ For their part, teleological constitutions tend to include a host of rights that have *express* horizontal reach.⁵⁵

The right of privacy, for example, can be articulated to protect us not only against unwanted and unjustified government intrusion, but against nosy neighbors and abusive employers. The protection of privacy rights, which are based on the existence on a minimum space of autonomy, can be just as important against the state as against private entities and even other individuals.

Rights as to Their Titleholder

Here we focus on the bearer of the right, that is, who actually possesses it. As to this feature, we focus on the distinction between individual and collective rights.

Individual Rights

Since the days of the early framework constitutions, the individual has been the main protagonist of the rights revolution. This reflects both a physical and ideological stance. First, individuals are the basic unit of human existence. Each person represents an independent component of the political community. Second, the individual as a political concept is the centerpiece of liberalism.

Most rights belong to an individual. Even if we are in a group, as it relates to rights, that group is merely a collection of individuals. When a particular association engages in protest, it is the members who have the right to protest, not the organization as a separate entity. They have just decided to exercise their individual rights collaboratively.

54. Gardbaum, *supra* note 4, at 433; Venter, CONSTITUTIONAL COMPARISON 126, *Op. Cit.* note 8 (characterizing the approach in Germany as the “radiation effect” and in Japan the “spillover effect”).

55. See Klug, *Constitutional Authority* 280, *Op. Cit.* note 27.

Collective Rights

But not all rights can be exercised by an individual. Some rights *require* the existence of two or more persons. These are collective rights because they cannot be exercised by a single individual. For example, in the labor arena, many constitutions recognize the right to engage in collective bargaining. By definition, a single worker cannot engage in such type of bargaining. For that matter, the right to engage in a strike or concerted activity requires the presence of an additional person. Collective rights are not the sum of your right and mine. On the contrary, they are our rights, even if only one of us vindicates it in the judicial arena. Some constitutions give rights expressly to *groups*.⁵⁶

It All Comes Together: The Multiple Manifestation of Rights

A right can be classified by its nature, effect, reach and titleholder. Its nature can be civil and political or social and economic. Its effect can be negative or positive. Its reach can be vertical or horizontal. Its holder can be individual or collective. Each classification can engage with the other, thus creating a very wide range of possible rights articulations. A few examples will suffice to illustrate these combinations.⁵⁷

- Negative, Political and Vertical: *Freedom of speech*
- Positive, Political and Vertical: *Access to public information*
- Negative, Socioeconomic and Vertical: *Right to strike of public employees*
- Positive, Socioeconomic and Vertical: *Universal free public elementary education*
- Negative, Political and Horizontal: *Ban on slavery*
- Positive, Political and Horizontal: *Religious freedom in the workplace*
- Negative, Socioeconomic and Horizontal: *Ban on unjust dismissal in the workplace*

56. Kommers 170, *Op. Cit.* note 1; Venter, CONSTITUTIONAL COMPARISON 131, *Op. Cit.* note 8.

57. For reasons of expediency, I did not use the individual-collective variable for these examples.

-Positive, Socioeconomic and Horizontal: *Safe working conditions*

Let us briefly examine these different articulations.

The right of freedom of speech is an example of a political right that can be articulated to protect us against state action. In that sense, it is *political* in nature because it is related to personal freedom and expression that is essential to democratic governance; it is *negative* in its effect because it shields the bearer against action generated by an external entity; it is *vertical* because, at least in this example, it is opposable to state action.

The right to access public information is *political* because, like freedom of speech, it is essential to democratic governance. It is also normally opposable to the state, thus *vertical* in its reach. But, unlike freedom of speech, this right compels government action, thus earning the label of *positive*.

A constitutional right of public employees to go on strike is *socioeconomic* in nature, as it pertains to labor relations. Because it deals with public employees, it is essentially *vertical* in its reach. Finally, because the right to strike shields employees from adverse action, it is mostly a *negative* right.

The right to a free public education is mostly *socioeconomic* in nature, as it deals with an essential material human need. It is *vertical* because, like in the case of public employees, public education is a matter of state concern. Finally, like with the right to access public information, the right to a public education compels government action to provide one. This, it can be characterized as a *positive* right.

A ban on slavery guarantees a free citizenry. This is a quintessential *political* right. Since most slaves are owned by private persons, and not the state, its prohibition has *horizontal* effect and, because it prohibits action, it is principally a *negative* right.

A constitutional right that recognizes freedom of worship in the private workplace is *political* in nature, because it goes to the heart of personal liberty. It is *horizontal* because it is applicable to private employers. Finally, it is *negative* because it shields the bearer from intervention against the exercise of the right.

The right against unjust dismissal in the workplace is, like the one before, clearly *negative* in that it prohibits action, and is *horizontal* in reach because it enjoins private employers. Yet, it is *socioeconomic* in nature because it protects the status of employment

and a person's livelihood.

Finally, we have the right to safe working conditions which, like in the case of unjust dismissals, is *horizontal* because it applies to private employers and is *socioeconomic* because it goes to the intricacies of the worker-employer relation. Yet, it is *positive* in its effect because it requires action on the part of the employer to take the necessary steps to guarantee a safe working environment.

Conclusion

Rights have multiple features and layers; they come in all shapes and sizes. In turn, these features can constantly interlock with each other, creating a wide range of possible articulations which are different from one another. We have offered a few of those features, relating to the nature, reach, effect and title. There may be more features and even more articulations within the feature I have proposed. The point remains: When it comes to constitutional rights, a broader look is called for.

At the very least, I hope this allows a fresh look at socioeconomic rights and other policy provisions that are included in modern, teleological constitutions, particularly of a post-liberal nature. By dissecting with greater care, we can be in a position to offer models of interpretation and application that allow greater judicial enforcement of these rights that have earned constitutional status. It is up to us to find a way to make them become a reality.