Economic Consequences of the Constitutional Control and the Impact of the Constitutional Justice on the Transitional Economy in Georgia; Constitutional Court as Political Actor in the Political System

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# TABLE OF CONTENTS

INTRODUCTION .................................................................................................................................3

1. The study of the constitutional adjudication of economic issues .................................................5
   1. 1. How to build constitutions that would be good for the economy? ........................................6
       1. 1. 1. Constitution – maximizing liberty and contributing to the economic growth ...............8
       1. 1. 2. Goal of constitutions and the economic liberty as a constitutional value.....................10
   1. 2. Economic rights in the US constitutional system. Origin, faith and implications of the American “Second Bill of Rights” .................................................................10
       1. 2. 1. Absence of social and economic in the U.S. Constitution .........................................12

2. 1. Enforceability and protection of economic rights and liberties – theoretical and comparative perspective .................................................................................................................15
   2. 2. The US Constitution and the judicial attitude towards the constitutional review of economic issues ..........................................................................................................................17
   2. 3. The US constitutional economic liberties and the Supreme Court ......................................19
       2. 3. 1. Economic Due Process and Liberty of Contract as constitutional principles of review: problem of reasonableness and narrow definitions .........................................20
       2. 3. 2. Economic issues and the allocation of responsibilities between the Federal Government and the States: weakening of the economic liberties protection? ...............21
       2. 3. 3. Economic Due Process and the poor as a constitutionally protected class: judicial reawakening of interest in economic rights and the “constitutional rationality” ........22
       2. 4. Judges, economics and the reasonableness of adjudication .............................................22

3. 1. Considerations about the judicial capacity in the realm of economic regulation .......................24
   3. 2. Economic regulation by judicial decision in the USA ..........................................................25
   3. 3. The body of constitutional review as a political actor: Judicial discretion and judicial function .................................................................26
   3. 4. The effects of and the implications on the “wrong” and the “right” judicial activism ...........30
   3. 5. Legitimacy and courts as constrained actors ........................................................................33

CONCLUSION AND OUTLOOK ........................................................................................................35
...the Constitution of the United States is not a mere lawyers’ document: it is a vehicle of life, and its spirit is always the spirit of age.

Woodrow Wilson

We are under a Constitution, but the Constitution is what the judges say it is, and the judiciary is the safeguard of our liberty and our property under the Constitution.

Charles Evans Hughes

INTRODUCTION

Consequences of the constitutional adjudication and an impact of the constitutional system on the economy, when the court seems to be a political actor, could be comprised in a term “constitutional economic adjudication” or a “constitutional economic judicial review.” The constitutional economic adjudication is a complex issue, which could be examined from the legal, economic as well as political perspectives. This research does not assess the topic from any particular viewpoint and the scope of the paper would not suggest the detailed scrutiny or the in-depth constitutional analysis of the case-law. The general tool of this study is a comparative method of analysis. American constitutional development as well as politics and history of judicial review in the United States offers significant pattern for the study of the current constitutional and judicial developments in Georgia as well as the other Post-Soviet countries in transition.

Because the body of constitutional control, which has to adjudicate upon certain economic issues, is directed and bound by the relevant constitution, the study of economic adjudication shall begin with exploring the constitution with regard to the economy. Constitutional economic judicial review is linked to the economic nature of constitutions. Law and Economics researchers offer some useful new insights in the constitutional law and political scientists provide some explanations about the behavior of judicial system. Economists develop their ideas that the good constitution for an affluent country should secure basic liberty and maximize the value of marginal liberties. Despite of the increasing literature on this issue, there is a still growing demand of more inter-disciplinary, combined three-fold (legal, economic and political) vision on how the courts should fairly as well as efficiently apply and enforce the constitution that would be good for the economy.

The current study examines a broad notion of economic issues, which are occasionally facing the constitutional review. Economic rights and liberties in the constitution interfere also with the social rights. However, the social rights have to be distinguished from the economic rights, but the constitutional adjudication with regard to the both categories of rights involves the same complexity. Description of these intricate rights and liberties is an important aspect, but not the core issue of this research. Despite of the differences, the basic scope of economic rights are represented in most constitutions. If not represented explicitly in the constitution, economic rights and liberties are being elaborated by the judicial interpretation from the case-law, as the Constitution is a “living document”. The adjudication is based on specific judicial tests and the presumptions about the essence or the “soul” of the Constitution or what the drafters of the constitution have had in mind. The topic of current research – the constitutional judicial review of economic issues - is related to the judicial interpretation of economic rights, i.e. economic liberties in action. This interpretation is a difficult task for the judiciary. Comparative
constitutional scholarship indicates that there is a modern trend to look at global, international legal standards and other courts’ case-law and therefore consider and apply foreign legal concepts and approaches when the court faces any complex issue. It is significant to illustrate the US Supreme Court’s approaches and development of the judicial review, as it could be applied as a practical example with regard to the relatively young courts in transition, such as the Constitutional Court of Georgia.

Judgments of the US Supreme Court about the economic regulations are generally linked to the political structure, namely the federal system of the USA, which significantly differs from the Georgian system. Nevertheless, in view of the ongoing reforms and developments in Georgia, it is important to consider other countries’ experience with the federal structure. The approaches of the US Supreme Court could serve as important example for the reformers in Georgia, as well as for the comparative scholars, interested in transition countries’ constitutional and institutional development.

It might be argued that the economic change is a constitutional implication and it is possible without explicit change of economic rights in the constitution. But most scholars would agree that the political will and strong institutions - which are interconnected as well as restrained within their own authority by the democratic principle, - are significant facilitating factors for efficient, result-oriented reforms. Developments in the USA constitutional and judicial system show that each new deal of reforms might affect the country’s economic growth, as well as it could be the challenge to the courts. New times, deals and reforms entail confrontations for the each branch of the government. Their cooperation with the common principle of democracy and the rule of law is essential; it evolves over time and may be depicted as development of the constitutional culture. Changes in society, economy and culture, especially some significant political reforms inevitably affect the courts and the judicial activism.

Therefore, it is important to analyze what are the factors of judicial activism, what may drive the court to affect certain economic policy? Is the judicial activism a negative or a positive term? Constitutionality on the New Deal and the controversial evaluation of the US Supreme Court’s activism as well as the eventual change of the judicial behavior with regard to economic adjudication is a significant example of inter-related development of policy, law, economy and the judicial review.

The paper is organized to examine several significant aspects related to the constitutional economic adjudication: part one generally illustrates the nature, goals and economic considerations about the constitutions as well as the notion and the scope of economic rights and liberties in theoretic and comparative perspective; Part two addresses enforceability of economic rights and liberties, with the emphasis on the US Supreme Court. Several basic American judicial approaches with regard to the economic judicial review are briefly demonstrated. The study of the constitutional review of economic issues also requires considering an important matter of judicial capacity in the realm of economic regulation. The New Deal program of Franklin Delano Roosevelt is a significant example for the analysis of judicial activism and restraint. Therefore, part three is dedicated to the search of what are the factors of judicial economic activism and restraint, analyzing judicial discretion and judicial function, as well as the effects of and the implications on the “bad” and “good” judicial activism. Finally, the notion of legitimacy and the concept of constitutional culture provide new insights to the constitutional economic review and general tendencies of judicial behavior in the political context.

The current study is dedicated to examine the role of the Georgian Constitutional Court, which is a special institution created to safeguard the basic human rights established by the Constitution of Georgia. The aim of this research is to derive general observations from the inter-disciplinary
research about the constitution and economy, the role of the judge, judicial power and activism related to the economic issues and policy implications, summed up in the concluding observations. It is an attempt to facilitate future discussions and a more in-depth study about this topic.

1. The study of the constitutional adjudication of economic issues

The constitutional adjudication of economic issues – which entails economic rights and liberties as well as the economic regulation policy - is interplay between the law, politics and economics and may be studied from the different scientific perspectives. For instance, from a positive perspective, constitutional political economy evaluates the economic consequences of the constitution and helps to explain the main paradigm of the constitutional court’s decisions from its policy preferences; its intersections with other constitutional players, the legislative and the executive branch and some consistency restraints. Normative constitutional economics explains that the Constitution has to provide both protection of the majority against well-organized special interest groups as well as the protection of innovative and wealth-accumulating individuals against exploitation by the majority. The economic consequences of constitutional adjudication are important to assess, as they may imply that empowering constitutional courts to take part in economic policy is not necessarily desirable. On the other hand, scholars agree that the legitimacy of instrumental reasoning in the court and policy-based arguments about the economic issues is important to safeguard basic economic liberties.

Collective choice theory uses economic models of rational behavior to explain the workings of political institutions, including majority rule and representative government. Standard economics is interested in the analysis of choices within rules, thus assuming rules to be exogenously given and fixed. Constitutional economics broadens this research program by analyzing the choice of rules using the standard method of economics, that is, rational choice. After these various approaches to the economic analysis of politics, the fourth and important approach is comparative law and economics. It is true, that the microeconomics in different countries might be same, while the law is different. Therefore, economic rationales do not lose their persuasive power at national boundaries. Economic theories can analyze different legal systems in language that is neutral between them and economic analysis of law in comparative perspective is an efficient tool for the inter-disciplinary research.

According to Posner, despite the fixation of American lawyers and especially law students and law professors, on the Constitution, there is relatively little economic writing on the subject. Economic analysis might illuminate several important topics, such as “proposals to refashion constitutional law to make it a comprehensive protection of free markets, whether the reinterpretation of existing provisions such as the takings clause or through new amendments, such as one requiring a balanced budget; also the relationship, if any, between the Constitution and economic growth.”

It could be accepted from all perspectives, that the fundamental economic rights in a democratic constitution provide a framework of rules in the game of politics. An effective constitution constrains and channels political competition. Judicial activism related to the interpretation and

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practical application of the fundamental economic rights and liberties, when the Court recognizes its’ constitutional limits, would not deter but facilitate efficient policy-making. That would be generally beneficial for the overall economic growth.4

The United States Constitution is the foundation of the market economy in America. It sustains the property rights on which American markets rest. It also shapes government regulation of those markets. But what has been the role of the US Supreme Court in safeguarding this foundation? Based on which principles and how (i.e. how effectively) did the US Supreme Court deal with economic issues? But can a two hundred and twenty year old document support a twenty-first century economy? 5 Most scholars assume a certain relationship between the Constitution, the judicial review and the economic life in American history. They try to define, is the US Constitution a “good constitution” for the market economy and how good and just has the Supreme Court been in safeguarding such constitution?

By briefly examining the constitutions as economic documents and observing ways in which the economic liberties have been shaped by the U.S. Supreme Court case-law, this research tries to define the general plausible approach for the body of constitutional review, which is entitled to defend economic rights and liberties and adjudicate upon some very important and complex economic questions. Because the body of constitutional control is directed and bound by the relevant constitution, the study of economic adjudication shall begin with the study of economic matters in the constitution. This implies a broader fundamental question: how to shape constitutions that would be good for the economy and that would not hinder but facilitate the economic growth?

1. 1. How to build constitutions that would be good for the economy?

Aristotle thought that, generally, a good constitution makes good citizens.6 Quite certainly, much of democracy’s superiority over other forms of government rests upon its greater ability to enlist the voluntary obedience and support of citizens. In so far as good laws makes good citizens and good citizens make good laws, democracy reinforces itself. Self-reinforcement helps a just state to succeed in competition with unjust states.7

In practical terms, the constitution, which is good for the market economy, should be shaped in order to match certain market economy concepts. These principles are: private property, freedom of enterprise and choice, motive of self-interest, competition, system of markets and prices and the limited role of government. More precisely,

- the economic notion of private property entails that labor resources, natural resources, capital resources (e.g., equipment and buildings), and the goods and services produced in the economy are largely owned by private individuals and private institutions rather than by government. This private ownership combined with the freedom to negotiate legally

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4 “Economic liberties seem to enhance economic growth. Direct-democratic rights tend to make sure that citizen preferences are better reflected in policy outcomes”; Voigt, supra note 1. at 538.
5 Many ideas and relevant questions for this research stem from the remarkable seminar about the US constitution and economy, that I have attended during the Carnegie Research Fellowship Program and I refer my special acknowledgments to the Graduate Institute for Constitutional History Director, Professor Maeva Marcus for this excellent opportunity and to Professors James Surowiecki and John Fabian Witt for highly interesting discussions and guidance throughout the seminar.
6 Aristotle wrote, “…legislators make the citizens good by forming habits in them, and this is the wish for every legislator, and those who do not effect it miss their mark, and it is in this that a good constitution differs from a bad one” (Nicomachean Ethics, 1103b5). In Cooter, supra n. 2 at 570.
7 See Rawls, John. A Theory of Justice (Cambridge, Massachusetts: Belknap Press of Harvard University Press, 1971);: Rawls emphasizes that people who experience the state is just will increase their allegiance to it. In Id at 570.
binding contracts permits people, within very broad limits, to obtain and use resources as they choose.

- **The concept of freedom of enterprise and choice** means that private entrepreneurs are free to obtain and organize resources in the production of goods and services and to sell them in markets of their choices. Consumers are at liberty to buy that collection of goods and services that best satisfies their economic wants. Workers are free to seek any jobs for which they are qualified.

- **Motive of self-interest** is concerned with the "Invisible Hand" that is the driving force in a market economy - each individual promoting his or her self-interest. Consumers aim to get the greatest satisfaction from their budgets; entrepreneurs try to achieve the highest profits for their firms; workers want the highest possible wages and salaries; and owners of property resources attempt to get the highest possible prices from the rent and sale of their resources.

- **The concept of Competition** is related to the economic rivalry, which means that buyers and sellers are free to enter or leave any market and that there are buyers and sellers, acting independently in the marketplace. It is competition, not government regulation that diffuses economic power and limits the potential abuse of that power by one economic unit against another as each attempt to further its own self-interest.

- **Economic system of markets and prices** means that markets are the basic coordinating mechanisms in the free market economy, not central planning by government. A market brings buyers and sellers of a particular good or service into contact with one another. The preferences of sellers and buyers are registered on the supply and demand sides of various markets, and the outcome of these choices is a system of product and resource prices. These prices are guideposts on which participants in markets make and revise their free choices in furthering their self-interests.

- **The idea of limited role of government** envisages that a competitive market economy promotes the efficient use of its resources. In a self-regulating and self-adjusting economy, no significant economic role for government is necessary. However, a number of limitations and undesirable outcomes associated with the market system result in an active, but limited economic role for government.

So, for example the technical method to analyze constitution with regard to the economy for example in the US is to match these economic concepts with certain provisions of the US Constitution, particularly, with the:

- **COMMERCE CLAUSE**
  Article I, Section 8 states that Congress shall have the power "To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes:..."

- **COINAGE CLAUSES**
  Article I, Section 8 states that Congress shall have the power "To coin Money, regulate the value thereof, ..." and "To provide for the Punishment of counterfeiting the Securities and current Coin of the United States:..." Article I, Section 10 gives Congress this power exclusively by stating that "No State shall...coin Money:..."

- **COPYRIGHT CLAUSES**
  Article I, Section 8 states that Congress shall have the power "To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writing and Discoveries:..."

- **CONTRACT CLAUSES**
  Article I, Section 9 states that "No Bill of Attainder or ex post facto Law shall be passed..." by Congress. Article I, Section 10 states that "No state shall...pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligations of Contracts,..."

- **EXPORT CLAUSES**
Article I, Section 9 states that "No Tax or Duty shall be laid on Articles exported from any State...", and Article I, Section 10 states that "No State shall without the Consent of the Congress, lay any Imposts or Duties on Imports or Exports,..."

- **SEARCHES AND SEIZURES**

  Amendment IV states that "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,..."

- **DUE PROCESS**

  Amendment V states that "No person shall...be deprived of life, liberty, or property, without due process of the law,..." and Amendment XIV, Section 1 states "nor shall any State deprive any person of life, liberty, or property, without due process of law:..."

- **RESERVED RIGHTS AND POWERS**

  Amendment IX states that "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." And Amendment X states "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

This method would require involving in the in-depth analysis of the constitutional economic provisions (economic rights) in the US constitution, compared to other constitutions, for example the Georgian Constitution. This broad aspect falls outside the scope of the current interdisciplinary research about the constitutional economic adjudication. This research is dedicated generally to economic issues, which entails not only economic rights and liberties, but also economic regulation and other economic aspects that are facing the constitutional review. Thus, first of all, it is useful to illustrate some economic points of view about the "good economic constitution": the constitution, which is good for the free market economy.

Generally, a good constitution in economist’s perspective should suggest how to maximize the value of specific rights to the people who enjoy them. As Cooter [2000] puts it, a question about how to build the good constitution is linked with some philosophical aspirations and it could well be a matter of belief – a conservative or a liberal one. For instance, a constitution built in the spirit of Hobbes allocates individual rights in response to natural powers of the social groups forming the state. A constitution built in the spirit of Locke allocates individual rights in response to the shared morality of the groups forming the state. Finally, a constitution built in the spirit of Rawls recognizes the welfare rights of the least able citizens. Each approach presumably leads to different welfare outcomes.

**1.1.1. Constitution – maximizing liberty and contributing to the economic growth.**

Economic analysis could be used to clarify philosophies of liberty and distribution. Economists argue that constitutions are far too important to be left to the lawyers. From Buchanan’s [2003] perspective, it seems that lawyers and legal scholars themselves do not widely share what he has called the constitutional way of thinking. Perhaps the lawyers, the scholars as well as the practitioners, are too close to the institutions of the constitution, as legally understood, and to arguments carried on within the context of those institutions, to step back and examine the role of constitutions and constitutional logic in the more inclusive structure of a liberal political order. 

Generally, from an economist’s point of view, the philosophy that liberty trumps other values implies that a constitution should maximize liberty. Instead of maximizing liberty, the

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8 Cooter, Robert, *supra* n. 2 at 426; For an economic illustration see Figure 56. at 402-403.

constitution for an affluent country should secure basic liberty and maximize the value of marginal liberties. Depending upon the evaluator’s philosophy, the value of a marginal liberty depends upon its ability to increase wealth, welfare, or merit. The people who enjoy rights usually value them, and a good constitution responds to peoples’ valuation of rights.\footnote{Cooter, supra n. 2, at 427-428}

Consequently, economists generally consider how to maximize the value of specific rights to the people who enjoy them. For this viewpoint, economists judge, for example, the consequences of alternative understandings of property rights, as well as of the free speech, and civil rights.

Economists’ point, that a good constitution would increase the general welfare through securing and maximizing the value of rights, implies another aspect: the matter of individual rights and economic growth. There is an extensive literature about this. Voigt (1998) indicates two results from the various studies that searched for a relationship between political, civil and economic rights on the one hand and growth rates on the other: (1) there is a clear-cut positive relation between individual economic liberty and per-capita income. (2) Economic liberties are also significantly correlated with a society’s rates of economic growth. To sum up: Economic liberties seem to enhance economic growth. Direct-democratic rights tend to make sure that citizen preferences are better reflected in policy outcomes.\footnote{Voigt, supra n. 1 at 539}

However, there is another fundamentally important element in the design of constitutions that will enable rather than hinder economic transitions and economic growth. This element, which is mostly ignored in advance, is the lack of an embodied economic theory that might fit ill with dynamic transitions. Hardin (2001) argues that perhaps the greatest strength of the US Constitution in managing economic relations is its weakness. It does not empower government to do very much more than plead with business. Much of the seemingly strong power it has in facing business is the kind of power business would want it to use, just as citizens must almost all welcome the imposition of power to make traffic flow well. The extraordinary strength of the constitution or the government or the society is in government’s inability to override the weaknesses of its empowerment from the flimsy constitution. Notably, what mattered for the initial success of the US Constitution was whether it coordinated positive expectations.\footnote{Hardin, Russel, “Constitutional Economic Transition”. In Constitutional Culture ad Democratic Rule, John Ferejohn, Jack W. Rakove, Jonathan Riley ed. (Cambridge University Press, 2001), at 329 ff}

Therefore, the best constitutional arrangement for handling economic transitions is to generate and coordinate positive expectations and to leave the economy relatively free of government management. Constitutional flexibility is, from this perspective, undesirable in that it permits the government of the day the opportunity to intervene too often in economic processes. A government that attempts to run the economy is likely to be tarnished with economic failure because state interference will put the nation at a competitive disadvantage to other nations whose economies are less encumbered. Although Hardin does not ask whether a constitution that permits the development of a prosperous economy is democratic, Hardin leaves little doubt that the people would generally have better lives if they lived under such a constitutional regime. For example, it was impeding economic failure that finally broke the Soviet regime, as Hardin suggests, rather than seven decades of sometimes brutally illiberal social and political control.\footnote{Id.}

Hence, it is the constitutionally guaranteed economic liberty, as an important constitutional value and the coordination of positive expectations by the constitution, as well as leaving the economy relatively free of government management, which is generally good for the economy. Eventually, the constitution, which may be considered as good for the economy shall secure
basic rights and liberties and coordinate positive expectations and it may lack an embodied economic theory that might fit ill with the dynamic transitions.

1. 1. 2. Goal of constitutions and the economic liberty as a constitutional value.

Cooter [2000] argues that the liberty, which provides the individual with the freedom to choose, is an important constitutional value that connects with economic theory and such notions like the economic growth and prosperity. Each person knows his own wants better than others. Consequently, individuals satisfy their preferences best when given freedom to choose. Therefore, a constitution that aims to satisfy the preferences of individuals must give them liberty.

Any kind of liberty for citizens requires limiting the powers of government, which can thwart political ambitions. When law and ambition collide, ambition sometimes destroys law. Therefore, the foremost goal of the constitution is to impose the rule of law and protect the liberty of citizens. These considerations may be applied specifically to the term economic liberty.

Protecting liberty means directly stating these liberties in the constitution, or indirectly - deriving them from the constitutional principles in judicial decisions. Notably, liberties, therefore economic liberties, could be mere statements and aspirations, or constitutional values, as goals.

While most democratic constitutions impose some limits on redistribution by protecting property, some democratic constitutions drafted after the creation of the welfare state incorporate welfare goals. To illustrate, for instance, the constitutions of South Africa and some post-communist countries provide for “positive rights” such as housing, pensions, and education. Welfare states, however, mostly pursue redistributive goals through legislation, not through constitutions. It is often argued, that instead of entitlements enforceable in court, constitutional rights to welfare could resemble aspirations.

Constitution can be good in defining particular general goal, such as the rule of law and the liberty. But, as Chief Justice Marshall noted in McCulloch v. Maryland, a constitution that attempted to detail every aspect of its own application “would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. . . . Its’ nature, therefore, requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects be deduced from the nature of the objects themselves.” In fact, the US constitution does not attempt to detail every aspect of its’ application. At this point, it is remarkable to illustrate the scope of economic rights and liberties (including the social rights) in the US Constitution, their origin, faith and implications.

1. 2. Economic rights in the US constitutional system. Origin, faith and implications of the American “Second Bill of Rights”

In practice the rights and liberties are constructed not only according to the goals, but they are a product of concrete historical experiences with wrongs. Sunstain (2006) argues that United States Constitution in its original form was born directly out of two experiences: the tyranny of English rule and the inadequacy of the decentralized system, created by the articles of Confederation that preceded the Constitution.15

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15“The vivid memory of he American Revolution inspired the effort to ensure the preconditions for republican self-government. The experience under the Articles helped inspire a more centralized system that was genuinely capable
There have been some attempts in American constitutional history to make the US constitution a better constitution with regard to the economy. According to Sunstein (2006), the idea of “Second Bill of Rights” has been an important but neglected part of America’s heritage. The immediate source of the second bill of rights was the Great Depression, as inadequate education, hunger, and unemployment emerged not as inevitable features of free market societies but as human rights violations. In brief, the second bill attempted to protect both opportunity and security, by creating rights to employment, adequate food and clothing, decent shelter, education, recreation, and medical care. The presidency of Franklin Delano Roosevelt, culminated in the idea of a second bill. It represented Roosevelt’s belief that the American Revolution was radically incomplete and that a new set of rights was necessary to finish it.

The second bill was proposed in 1944 in a widely unknown speech. The origins of the basic idea can be traced to the earliest days of Roosevelt’s New Deal, and even before, to his first campaign for the presidency, when he proposed “an economic declaration of rights” that entailed “a right to make a comfortable living.” Sunstein indicates there is a direct link between the second bill and Roosevelt’s famous speech of 1941, in which he proposed the four freedoms: freedom of speech, freedom of religion, freedom from want and freedom from fear. Roosevelt insisted in direct response to the growing international crisis that these essential freedoms should exist “everywhere in the world.” The second bill of rights was meant to ensure the realization of the freedom from want – which, in Roosevelt’s view, meant “economic understandings which will secure to every nation everywhere a healthy peacetime life for its inhabitants.” During World War II, Roosevelt and the nation saw an intimate connection between freedom of want and protection against external threats, captured in the notion of “freedom from fear.” In his words, “Freedom from fear is eternally linked with freedom from want.” As Sunstein argues, Roosevelt’s emphasis on freedom should be underlined. He was committed to free markets, free enterprise, and private ownership of property, he was not egalitarian. While he insisted that the wealthiest members of society should bear a proportionally higher tax burden, and while he sought a decent floor for those at the bottom, he did not seek anything like economic equality. It was freedom, not equality that motivated the second bill of rights. Roosevelt contended that people who live in “want” are not free. And he believed too that “want” is not inevitable. He saw it as a product of conscious social choices that could be counteracted by well – functioning institutions directed by a new conception of rights. In World War II, Roosevelt internationalized that belief, arguing that “security” required freedom everywhere in the world.

However, Roosevelt’s second bill is largely unknown in the United States. The economic rights catalogued by Franklin Roosevelt (so called “Second Bill of Rights”) failed to become part of the American Constitution through Amendment or interpretation. Nevertheless, it has had extraordinary influence internationally. It played a major role in the Universal Declaration of Human Rights, finalized in 1948 under the leadership of Eleanor Roosevelt and publicly endorsed by American officials at the time. The Universal Declaration includes social and economic guarantees that show the unmistakable influence of the second bill. And with its effect on the Universal Declaration, the second bill has influenced dozens of constitutions throughout the world. According to Sunstein (2006) we might even call the second bill of rights a leading American export.16

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16 Id. at 1-2.
I. 3. 1. Absence of social and economic rights in the U.S. Constitution

The absence of any social, economic (or also environmental) rights in the U.S. Constitution is extraordinary when one considers how frequently these rights have been recognized in other countries’ constitutions and in international treaties. It shall be noted, that initially, the state convention delegates have engaged in numerous debates about whether to include social, economic, and environmental rights in their constitutions, and they have frequently answered these questions in the affirmative, by adopting permissive governmental action, as well as rights provisions requiring governmental responsiveness in certain cases.

Whereas critics have argued that social, economic and environmental rights are less fundamental than political and civil rights, supporters such as state convention delegates have frequently responded that, in the contemporary era, these rights are just as important as traditional rights. Moreover, enshrining these rights in a constitution can serve other purposes from giving rise to judicial decision making. 17

US State constitution makers have considered a set of positive-rights provisions permitting, and in some cases requiring, the government to provide for the economic and social security of the citizenry. 18 Notably, the US federal constitution was drafted before a wide range of economic (as well as social and environmental) rights assumed prominence, and even when changing conditions generated call to recognize these rights at the federal level, the rigidity of the federal amendment process prevented these proposals from being given serious consideration. But at the state level, the positive-rights proposals have been advanced and in many cases, adopted. State convention delegates have disregarded critical arguments and have responded to the contemporary requirements with more flexibility, than it was possible on the federal level.

Critics have argued that the economic rights as well as social and environmental rights, labeled as “positive rights” are not as susceptible to judicial enforcement as traditional civil and political rights. But proponents of these rights have responded that adoption of constitutional provisions can empower legislators and permit them to secure these rights in the face of contrary judicial decisions. Such provisions can also serve to inspire or admonish legislators to take action in a particular area. Finally, these provisions can give expression to the fundamental goals and values of polity.

Despite strong arguments at the both sides, even though other countries’ constitutions may include a wide range of economic (as well as social and environmental) entitlements, the very nature of these rights makes them difficult to be adjudicated and enforced. Socialist and communist nations often insisted on the importance of social and economic guarantees even while objecting to (and failing miserably on) political rights. But many noncommunist and post communist constitutions include economic rights as well. As Sunstain (2004) observed, the constitutions of Ukraine, Romania, Syria, Bulgaria, Hungary, Russia, and Peru (to name a few) recognize some or all of the economic rights cataloged by Franklin Roosevelt (so called “Second Bill of Rights”), that failed to become part of the American Constitution. Other nations take different approach referred to as “Indian approach”. They recognize social and economic guarantees as goals but not legally enforceable rights. 19 This approach promises to do some good and little harm. It helps create a cultural expectation about what government ought to do – which

18 Id. at 221.
19 Sunstein names the constitutions of primarily India, Ireland, Nigeria and Papua New Guinea in this category.
 supra n. 15 at 100ff.
can have real effects on human lives. If a constitution recognizes a right to a good education or a right to health care, then the government comes under serious pressure to legislate in a way that respects those rights. To be sure, the absence of judicial enforcement creates some risks. In increases the possibility that the Second Bill rights would be mere words without any meaning in the real world.

But how should a nation choose between the two approaches? There is no simple answer. The advantage of the According to Sunstein (2006) Indian approach is that it minimizes the difficulties produced by judicial entanglement with questions of priority setting. The disadvantage is that it decreases the likelihood that the Second Bill rights would have real-world effects. Note in this regard that communist constitutions were filled with strong guarantees of individual rights – political, civil, social and economic, but these guarantees meant nothing in the real world, partly because of the absence of judicial enforcement. Advocates for the more detailed inclusion of such rights in constitutions - so called “directive principles” approach – might hope that such principles will ensure that social and economic rights are taken seriously; when those rights have constitutional status, elected officials might see them as real obligations. But there is a pervasive risk that societies, even democratic ones, will be inattentive to the needs of their most vulnerable members. When the courts are involved, it is more likely that the relevant rights will receive respect. The disadvantage is that judicial involvement might displace reasonable legislative judgments about sensible priority setting.

For this reason, Sunstein (2006) suggests, it might be preferable to adopt the distinctive South African approach. Following the International Covenant on Economic, Social, and Cultural Rights, the South African Constitution recognizes a wide range of social and economic rights but also acknowledges that the government has limited recourses and cannot respond to all problems at once. Hence the South African constitution obliges the state, in most of the relevant provisions, to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of” the relevant right. Most of the provisions of the second bill must be protected within the limits of available resources, but not absolutely. Though ambiguous, provisions of this kind have sometimes been held to be enforceable by national courts, obliging governments to fulfill certain obligations. This approach allows for a degree of judicial enforcement in a way that respects the fact that nations, particularly poor ones, cannot do all that should be done.

Interestingly, comparative review of the world constitutions shows that the strongest commitments to economic rights are found in Portugal, Brazil, Poland, Finland, Uruguay, and Paraguay. The weakest commitments belong to Austria, New Zealand, Singapore, Trinidad – and the United States. Nations with an English common law background are far less likely to contain social and economic rights than those with a French civil law background. Notably, the commitment to such rights tends to be higher in democratic nations. Newer constitutions are only slightly more likely to contain social and economic rights, and the difference is not statistically significant.  

It is significant that the constitutions of many nations, with diverse backgrounds, create social and economic rights, whether or not they are enforceable. But the American Constitution does nothing of a kind and it lies in American culture. So why are the social, economic, or environmental rights absent in the U.S. Constitution? There are four factors explaining this:

1. According to Sunstein (2006) the first and most obvious explanation is chronological. The American Constitution is the oldest in force in the world. The very oldest
constitutions lack social and economic guarantees, which are largely a creation of the twentieth century.

2. The second explanation is that something in American culture is especially hostile to social and economic rights. Perhaps America has a distinctly libertarian or individualist culture that prizes the right to be free from government intrusion. The citizens of such a culture might well provide private charity, perhaps a great deal of it. But their government will not provide food, housing, and clothing as a matter of right. The cultural explanation is closely associated with what is sometimes called American exceptionalism: the absence of a significant socialist or even a social democratic movement in the United States. American culture is in some ways hostile to government intervention. Therefore, even any “good intentions” such as adequate health care and economic benefits are met with the vast suspicion and resistance and the latest anxious discussions about the Health Care Bill illustrate this.

3. Sunstain’s third and important explanation of why there are no economic rights in American Constitution begins with the fact, that the American Constitution is enforced by courts. It is argued, that some nations regard constitutions as a place for setting out general goals and aspirations – symbols not meant for real-world implementation. Such understanding does not apply to America, where rights are not mere aspirations; Citizens are entitled to expect that independent judges will ensure that the government respects those rights in practice. If we emphasize this point, we might conclude that the American Constitution does not recognize social and economic rights for one simple (as well as good) reason: judges cannot enforce those rights. American scholar would argue about other nations constitutions, that when some nations place a wide range of economic as well as social rights in their constitutions, it is because they believe that their founding document need not be limited to provisions with real meaning in the world. Another reason of this might be, perhaps they are simply too idealistic to hope that by putting them in the constitutions they will automatically become the “living rights” – not just existing as mere declarations.

4. The fourth explanation, derived from the third one - addressing why the American Constitution is relatively salient on economic as well as social and environmental rights,- is the observation that the Constitution means what the Supreme Court says that it means.\(^{21}\)

Consequently, it stems from the nature of American constitutionalism and it is justified, if social and economic rights are not included in the constitution because such rights are difficult for courts to enforce. However, there is an argument against such logic that Sunstain indicates: courts can in fact enforce social and economic rights, at least to a degree. Some nations that explicitly protect such rights in constitution also have judicial review – and in some cases, courts have acted aggressively to protect people from the worst kinds of deprivation. This issue is linked to the judicial activism which shall be addressed more closely below.

Consequently, significant is not as much the virtue of the economic rights and liberties in the constitution, but their enforcement, interpretation and protection by Courts. This implies the active role of the courts. Both in the absence of economic (as well as social and environmental) provisions in the US Constitution as well in the systems where these rights are defined in a more broad way – there is one common trouble with them. This trouble is enforcement of these specific rights and how the courts deal with the issue at stake: fairness v. efficiency as well as non-interference in affairs of the other branches of government.

\(^{21}\) Id. at 108.
Because of the complex nature of economic (just like the social and environmental) rights, the judicial decision making faces some problems. How the Courts could interpret economic rights, therefore, safeguard them? What is the nature, i.e. the dangers and benefits of judicial activism in adjudicating economic rights? In order to assess this, we shall address the question of the enforceability of these rights and the role of judicial enforcement, illustrating specifically the US Supreme Court’s approaches and developments of the judicial review with regard to economic issues.

2. 1. Enforceability and protection of economic rights and liberties – theoretical and comparative perspective

American constitutional scholars generally agree, that the Constitution confers rights against government, both federal and state, as well as conferring rights upon the federal government (the letter rights are more commonly called “powers”). A constitutional right is “a claim of noninterference, but generally just by government, enforceable through the courts.” Such rights are negative in form, just like the property right (i.e. other “economic rights”).

Do individuals possess positive rights that depend for their enforcement on governmental action, as distinct from negative rights that limit the scope of governmental action? The issue did not arise at the American federal convention. Nor did it surface during the drafting of the federal Bill of Rights, which was concerned with defining civil rights and liberties and ensuring their protection against governmental action. Since that time, various efforts have been made to secure federal constitutional protection for social, economic as well as environmental rights, but with little success. As mentioned above, possibly, it originates from the nature of American constitutionalism. Therefore, it may be justified, if social and economic rights are not included in the constitution because such rights are difficult for courts to enforce.

Those, who believe that the economic, social and environmental rights, such as proposed by the second bill of rights, are unenforceable, might believe that these enumerated rights should count as constitutive commitments to be protected democratically rather than judicially. Or they might urge the path like that, set out in the International Covenant on Economic, Social, and Cultural rights, where violations are monitored and publicized but not addressed by courts.

In many countries, however, those who accept the second bill have been arguing for judicial enforcement. Not is the question irrelevant in the United States. State constitutions protect some aspects of the second bill, and there are continuing arguments on behalf of a stronger place for state courts in protecting the relevant rights.

With respect to judicial enforcement, it is argued, that the difficulty with the Second Bill does not lie in ambiguity or vagueness but in the limited resources of government and the extreme difficulty of ensuring that the rights in the second bill are respected in practice. The broader problem is that in order to implement the second bill, government officials have to engage in resource allocation and program management. Courts are not in good position to oversee those tasks. Does this mean that courts can play no role at all? Or are the economic (as well as social and environmental) rights enforceable by the courts? How plausible is it for the body of constitutional control to exercise the constitutional control over the economic laws?

A great deal on economic (as well as social) adjudication comes from Europe, especially Eastern Europe where courts have actively protected social and economic rights. All over the world,

22 Posner, supra n. 3 at 655.
courts are developing principles to adjudicate claims that the government has failed to respect social and economic guarantees. The most detailed of these rulings come from South Africa. Comparative review of different constitutional court’s standing to economic and social rights indicates the South African Constitutional Courts’ “fresh and promising approach” to judicial protection of social and economic rights that directly addresses the most serious concerns of those who believe that such rights cannot be enforced by courts. The appropriate approach to social and economic rights was intensely debated before ratification of the South African constitution. The idea of including such economic rights was greatly spurred by their recognition in international law, and above all by the International Covenant on Economic, Social, and Cultural Rights. As argued by Sunstein (2006) this is a testimony to Roosevelt’s influence. Without his advocacy of freedom from want and his plea for a second bill of rights, it is most doubtful that social and economic guarantees would have the status they do.23

The court’s rulings require close attention to the human interests at stake and sensible priority setting, but they do not mandate protection of each person whose economic needs are at risk. These rulings are to be deemed exemplary as they do suggest that the underlying rights can serve, not to preempt democratic deliberation, but to ensure democratic attention to important interests that might otherwise be neglected in ordinary debate. This has large implications for how we think about citizenship, democracy, and minimal social and economic needs.24 Hence, the South African experience shows that a democratic constitution, even in a poor nation, is able to protect those rights without placing an undue strain on judicial capacities.

By itself this point does not demonstrate that the economic, social or environmental rights necessarily belong in a constitution, or that the United States should amend its founding document in order to include these rights in explicit and retailed manner. For American, the simpler the better course seems to be Roosevelt’s own: to treat these rights (proclaimed in the second bill ) as a set of constitutive commitments, helping define the nation’s deepest principles. But the South African experience shows that some of the strongest objections to constitutionalizing the second bill are misconceived. If courts are asked to protect the rights that Roosevelt identified, they have sensible ways to do so.25

With regard to American constitutional legal setting, Franklin D. Roosevelt went on to argue in his 1944 State of the Union Address that the country had accepted, so to speak, a second Bill of Rights under which a new basis of security and prosperity can be established for all. Moreover, during his presidency he signed into law several measures that were intended to achieve economic security, to the point that the New Deal has been described by certain scholars as bringing about a constitutional transformation. However, Roosevelt made no effort to secure passage of amendments to the Constitution to attain his goals of securing the rights of an individual to certain social and economic rights. Then, in the 1960s, prominent US legal scholars began to argue that various clauses in the U.S. Constitution might be interpreted as securing protection for social and economic rights.26 Although legal scholars continued to argue in subsequent years that economic, as well as social and environmental rights might be seen as implicit in various constitutional clauses, these arguments have had little lasting impact on U.S. Supreme Court decision making.27 As it has been observed, the closest the Court came to recognizing constitutional rights in this area came in two welfare benefits decisions – Shapiro v.

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23 Cass R. Sunstein, supra n. 15 at 216
24 Id. at 212
25 Id. at 229
27 supra n. 17 at 185
Thompson (1969) and Goldberg v. Kelly 397. U.S. 254 (1970). However, in DeShaney v Winnebago (1989) the Court was explicit in rejecting any notion that the US Constitution, namely the Fourteenth Amendment might be read as guaranteeing positive rights.\textsuperscript{28}

Significantly, in its attempts to deal with economic issues the US Supreme Court has reflected the change of American society’s attitude toward socio-economic problems. Therefore it is important to highlight the development of the constitutional economic judicial review and its’ underpinnings in the USA.

2.2. The US Constitution and the judicial attitude towards the constitutional review of economic issues

The constitutions generally contribute to economic growth by providing for an institutional infrastructure for investment, production, cooperation, distribution etc. But they are contributing to the overall economic development by setting limits to the regulatory power of legislative majorities. Arguably, this constraint-setting role of the constitution has been the basic intention of the framers of the Constitution of the United States. Moreover, Hirschfield (1962) argues that one of the most important reasons for establishment of the Constitution in the USA was the recognized need for greater central authority in regulating the nation’s economic affairs.

But the constitutional statement empowering Congress to “regulate commerce... among the several States” is not very clear. What kinds of economic activity does the word “commerce” comprehend? Is the congressional power to be exclusive or may the states also regulate commerce? What if an economic activity affects the national economy but takes place entirely within one state? These and many other questions were left unanswered by the Framers, and they have been the focus of a continuing conflict between opposing views of government’s role in economic affairs.

It is important to illustrate that, according to Hirschfield (1962) the American judicial opinion is falling roughly into four periods:

The first period – extending from the establishment of the Constitution to the end of John Marshall’s reign on the Court – was dominated by the great Chief Justice’s Federalist view: the Marshallian position was that Congress’ power comprehended all aspects of commercial life.\textsuperscript{29}

But the underlying conception was that in economic affairs, as in all other essential areas of national life, Americans were one people.

The second period covered Roger Tuney’s tenure as Chief Justice – from 1835 through the Civil War – and was characterized by a modification of the Court’s prior position in favor of greater state power over commerce.\textsuperscript{30}

In the third period – from the end of the Civil War through the early 1930s – issues related to the economic system were predominant on the American scene, for this was an era of tremendous economic expansion and the concomitantly serious social problems. All of the strains and tensions resulting from this “industrial revolution” were reflected in the decisions of the Supreme Court, as that tribunal undertook to resolve the conflicts between competing socio-economic theories. In general the Court aligned itself with those forces opposed to economic regulation, but despite its bias, as scholars point out, it is difficult to find a clear pattern in its opinions. The Court’s approach seemed to be confused and confusing approach to interpretation of the commerce power continued throughout the third period of conflict over economic issues.

\textsuperscript{28} 489 U.S. 189 (1989), 195, 196 Id. at 185-186
\textsuperscript{29} See Gibbons v. Ogden, 22 U.S. 1 (1824) as an exemplary case
\textsuperscript{30} important case during that period was Cooley v. Board of Wardens, 53 U.S. 299 (1852)
So there was no clear line of development in the judicial attitude toward those issues. However, by the time of the Great Depression a dominant view had been adopted by the Court and embodied in the Constitution. This was the view, combining the federal principle and laissez-faire economic theory, which emphasized the limits rather than the powers of the federal government. It resulted in the negation of efforts to deal on a national scale with the increasingly serious social and economic problems of a complexly interdependent industrial economy.

The fourth period of conflict in this area of constitutional development began with the Great Depression of the 1930s, was indicated by the “battle-royal” between the Court and the President, and ended in a shift of judicial attitude which opened the way for a new conception of government’s role in regulating socio-economic affairs.

When Franklin D. Roosevelt assumed the Presidency in March 1933, the economic depression which had begun with the stock market “crash” of 1929 was at a critical point. Roosevelt made clear his determination to treat the economic crisis as though it were a war. Acting quickly and decisively, FDR bridged the separation of powers and instituted a period of presidentially-directed legislative activity. Out of this “hundred Days” of effort came a stream of legislation constituting the initial program of the New Deal. Many of these measures were designed to provide relief for those who were hit hardest by the Depression; others were designed to reinvigorate the economy and stimulate recovery. All were based on the philosophy that the federal government under the existing conditions had both the power and the responsibility to regulate economic affairs for the general welfare of the nation. The New Deal program represented the most comprehensive attempt at economic regulation in American history, unprecedented in its sweeping encroachment on powers traditionally reserved to the states, in its limitation of contractual property rights, and in its delegations of authority to the President to effectuate legislative policy. But the situation which had given rise to this departure from the previous conception of government’s role in economic affairs was also unprecedented. The big question was whether, in view of this fact, the Supreme Court would sublimate its bias against national regulation and place the stamp of constitutionality on the New Deal. 31 This period is a significant case-study with regard to the wrongs and benefits of judicial review, which shall be addressed below.

The problem of interpreting the commerce clause and those other parts of the Constitution relevant to the economy has historically occupied more of the US Supreme Court’s time and energy than any other. And few problems have involved the Court in deeper controversy, for its decisions in this field have affected policies determining the basic social and economic (as well as political) structure of the American community. The essential issue in this still unresolved conflict is the extent to which economic affairs should be subject to governmental supervision and control; and in its attempts to deal with this issue the Court has reflected the change of attitude toward socio-economic problems which the American nation itself has undergone.

However, with regard to constitutional economic adjudication, such as the New Deal period, the basic question for all scholars is: is there one efficient and fair basic constitutional criterion to adjudicate upon the economic issues? Notably, the US Supreme Court has its’ specific characteristics. The Court has used several constitutional principles in adjudication of economic rights, facing the problem of interpreting the commerce clause and those other parts of the Constitution relevant to the economy. All these approaches involve the notion of economic liberty.


2.3. The US constitutional economic liberties and the Supreme Court

The US Constitution guarantees several specific liberties in the First Amendment: freedom of speech, freedom of the press, and the free exercise of religion. The Fifth and Fourteenth Amendments also provide that no person shall be deprived of “liberty ... without due process of law.” This brief bit of text conceals several important points. One is that the phrase “due process” has come to mean legislative as well as judicial process. Under some circumstances legislatures are forbidden to pass laws depriving people of liberty. Another is that there are grades of protected liberty. The Supreme Court of the US has said that the term “embrace[s] the right of the citizen to be free in the enjoinment of all his faculties; to be free to use them in all lawful ways.”

In order to take away most of these liberties the government must have some reason that is not purely arbitrary or vindictive. But there are also a few freedoms picked out by the courts for special protection.

Writings about due process liberty have stressed several important themes. The first is the issue of interpretation. How can the courts find substantive protection in a phrase like “due process?” Most of the attempts of the scholars to find a clear answer to this question are mostly unsuccessful. Therefore it leads to other considerations about whether the US Supreme Court has succeeded to protect such specific rights as economic rights and liberties.

*Economic liberty* could be generally identified with the right to pursue an honest living in a business or profession free from arbitrary government interference. This is a right that all Americans possess even though they won’t get much help from the courts if the right is violated. Arguably, other fundamental liberties matter little if a person cannot earn a living.

Economic liberties are naturally linked to the issue of economic regulation. In the USA the states and the federal government have broad power to regulate economic affairs. Article I-8 grants a cluster of related powers – to tax, borrow, control the currency, and regulate commerce – that together give Congress sweeping control over business and the economy, not merely directly but by creating agencies to administer public policies.

To the extent that federal legislation and regulation do not preempt, the states retain independent power to create and govern corporations and to regulate in the interest of public health, safety and well-being. Until the New Deal, the Court had discerned many constitutional impediments to one or another form of economic regulation. Some scholars like Lieberman (1999) suppose that today those impediments have practically vanished. The power is potent and pervasive. The place to remedy foolhardy economic regulation, as the Court observed long ago, is not the courtroom but the voting booth.

The reasons of this viewpoint and such development could be traced down the history of judicial review of economic issues, analyzing some of the basic constitutional principles and approaches the US Supreme Court has applied. In the case-law involving economic liberty and economic regulation the U.S. Supreme Court Justices have relied on several doctrines, such as the doctrine of Vested Rights, the Police Power or the Takings Clause doctrine of public interest as well as different approaches, labeled according to the cases

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that have set them up (like the “Lochner approach”). But basically, the Court has applied the *equal protection* and the *due process clauses*. These approaches could be generalized and described as the following basic principles of US economic constitutional judicial review:

- Economic Due Process and Liberty of Contract as constitutional principles of review;
- Economic issues and the allocation of responsibilities between the Federal Government and the States;
- Economic Due Process and the poor as a constitutionally protected class.

2. 3. 1. Economic Due Process and Liberty of Contract as constitutional principles of review: problem of reasonableness and narrow definitions

Between 1897\(^\text{36}\) and 1937\(^\text{37}\) the Supreme Court held unconstitutional a number of state and federal laws regulating wages, hours, working conditions, prices, market entry, and other business practices. Such laws, the Court often said, took away liberty (freedom of contract) guaranteed by the Due Process Clause. It is now generally agreed that the Court’s intervention in these cases was a mistake.\(^\text{38}\)

Especially from the late nineteenth century to the 1930s, the courts struck down efforts by Congress and state legislatures to ease the harshness of industrial conditions. Statutes that established maximum hours or minimum wages were declared unconstitutional interferences with property rights, due process and the judicially created “liberty of contract”. States legislatures attempted to use the “police power” to protect public health and safety. In many of these cases the courts held that government existed to protect life, liberty and property, with property accorded the greatest protection. Some scholars argue that over those decades the judiciary promoted exceptionally narrow definition of property and restricted the government’s ability to protect the health and safety of citizens.\(^\text{39}\)

However, Economic due process was the judicial doctrine espoused from the 1890s to the mid-1930s that the Due Process Clauses of the Fifth and Fourteenth Amendments permit courts to strike down laws impinging on private property interests and contractual relations.

Even though the Court has expressed the idea that for protection against abuses by legislatures the people should resort to the polls, not to the courts, the Court has still seen itself as the people’s protection against abuses by legislatures, as the Jurists became imbued with laissez-faire economic notions. The judges increasingly took the view that they were entitled to second-guess the legislature’s judgment about evils that needed correcting, if the evils affected private property and business enterprise.\(^\text{40}\) The Court took a cautious approach, presuming that “not every law purporting to promote “the public morals, the public health, or the public safety” is necessarily what the legislature makes it out to be, and the Court would be obliged “to look at the substance of things.”\(^\text{41}\) Nevertheless, in some cases the Court had admitted it did not have the power to assess the reasonableness of such economic issues, like rates, and as late as 1888 the Court adhered to that view.\(^\text{42}\) But the Court managed to disengage itself from the rate cases only in 1944, \(^\text{43}\) but felled the number of other economic regulations by the due process axe until 1934 when Justice Owen Roberts declared that the states are “free to adopt whatever economic policy

\(^{36}\) *Allgeyer v. Louisiana*, 165 U.S. 578, 17 S.Ct. 427, 41 L.Ed. 832 (1897)

\(^{37}\) *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 57 S.Ct. 578, 81 L.Ed. 703 (1937)

\(^{38}\) Aleinikoff, T. Alexander *et al. supra note* 32, at 675

\(^{39}\) see: Fisher, Louis & David Gray Adler *supra n. 35*

\(^{40}\) Lieberman, Jethro K., *A practical companion to the Constitution : how the Supreme Court has ruled on issues from abortion to zoning*, Berkeley : University of California Press, 1999, at 160


may reasonably be deemed to promote public welfare.” The Courts “are without authority” to override the legislature’s policy choices “[i]f the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory.” Thus, the court has established two criteria in adjudicating the issues, involving the economic policy: the non-arbitrariness and the non-discrimination. Consequently, the rational basis relationship test has been established, which entailed that a law is constitutional if there is any rational basis to suppose that it will accomplish permissible legislative goals. It has been widely recognized that the Economic due process was dead.

2. 3. 2. Economic issues and the allocation of responsibilities between the Federal Government and the States: weakening of the economic liberties protection?

The fourteenth Amendment was intended to be a revolutionary enactment, securing to citizens the rights protected by federal law against violations by their own state governments and placing the federal government in a position of primacy in protecting those rights. As a result, the Fourteenth Amendment expanded the privileges and immunities clause from the original Constitution: that clause consistently has been held to protect economic liberty, but only against states that discriminate against citizens of another states.

According to the scholarly interpretation today, the phrase “privileges and immunities” had a clear and common meaning as understood by the framers of the Fourteenth Amendment. It meant that the rights were not absolute but would be balanced against the state’s police power to protect public health, welfare, and morals. It is argued that “any believer in the original intent who devotes even the most cursory attention to the legislative history and to the problem Congress sought to correct will conclude that Congress unambiguously meant to protect economic liberty against excessive state regulation.” But it is also argued that this has been undone by the U.S. Supreme Court in the Slaughter-House Cases, when the court “essentially repealed the privileges and immunities clause by judicial fiat.” Lieberman argues that the economic due process had been soundly rejected in 1873 in the Slaughter-House Cases. Interestingly, in a dissent, Justice Stephen Field set forth the appropriate role of the courts in challenges to economic regulations: they should defer to proper exercises of the police power, he suggested, but “under the pretence of prescribing a police regulation the State cannot be permitted to encroach upon any of the just rights of citizens which the Constitution intended to secure against abridgement.” The judiciary’s task is to look behind the asserted rationale to determine whether the regulation was a proper exercise of police power or a mere pretext. On the other hand, Justice Noah H. Swayne, also dissenting, noted that the Courts’ “duty is to execute the law, not make it.” Therefore, Swayne criticized the majority opinion and expressed “hope that the consequences to follow may prove less serious and far-reaching than the minority fear they will be.” However, it has been observed that the consequences were quite serious and far-reaching, because whenever government is unleashed from its constitutional power limits, it is free to indulge the designs of those who exploit its power for their own ends.

44 Ibid. see: Nebbia v. New York, 291 U.S. 502 (1934); 5-4, Roberts, Dissents: McReunolds, Van Devanter, Sutherland, Butler, 58pp. [further citations omitted]
45 Ibid. see: Carolene Products Co., U.S. v, 304 U.S. 144 (1938) [further citations omitted]
46 Ibid.
48 Bolick, Clint, David's Hammer: The Case for an Activist Judiciary (Cato Institute, 2007) at 99
49 Id. at 100
51 Slaughter-House Case, 83 U.S. at 87 (Field, J., dissenting). in Bolick, Id. at 101
52 Slaughter-House Case, 83 U.S.at 125-30 (Swayne, J., dissenting). Ibid.
Economic liberties were forced to argue on equal protection grounds instead of their strongest argument - freedom of contract.

2.3. Economic Due Process and the poor as a constitutionally protected class: judicial reawakening of interest in economic rights and the “constitutional rationality”

It has been assumed that some Supreme Court decisions like (Carolene Products) have caused that the economic liberties have been mostly ignored and “thrown out of the family of protected rights altogether.”

However, “judicial reawakening of interest in economic rights” has been observed when the court has applied economic due process to the poor as a constitutionally protected class. It has been argued that the Griffin v. Illinois, 351 U.S. 12 (1956) was the first in a series of cases that can be explained on the theory that the government is required, as a matter of constitutional principle, to satisfy people’s “minimum just wants” regardless of ability to pay.

As regards the economic discrimination, “US Supreme Court has been almost invariably inhospitable to claims that a law regulating economic or business activity violates the Equal Protection Clause simply because it burdens one business or industry more than another.” By recognizing that the states have wide discretion to enact laws that “affect some groups of citizens differently than others,” even if the laws “result in some inequality”, the Court declined to set aside any law as long as “any state of facts reasonably may be conceived to justify it”. Hence, it has been observed that the justices have applied the criteria of “constitutional rationality” for the cases about the economic or business activity.

Arguably, from an economic standpoint, the best constitutional judicial approach in dealing with the economic issues would be to create incentive of efficient allocation of resources or to create disincentive of market distortions. This proposition impels to another significant point with regard to the constitutional economic adjudication: the judges and the economic reasoning.

2.4. Judges, economics and the reasonableness of adjudication

According to the case-law involving economic liberty and economic regulation, the U.S. Supreme Court Justices have elaborated their assumptions about economic theories and have created the constitutional presumption of liberty that the Framers intended. For example, Justice Oliver Wendell Holmes in dissent to Lochner v. New York case proclaimed that “[t]his case is decided upon an economic theory which a large part of the country does not entertain,” namely, the “shibboleth” of “[t]he liberty of the citizen to do as he likes so long as he does not interfere with the liberty of others to do the same.” His critics point out that “in reality, the theory in this case is not an economic one, but a constitutional one.” Moreover, although the framers of the Fourteenth Amendment may not have intended to protect economic liberty substantively under the due process clause, they did intend to protect it – mainly under the privileges or immunities clause.” It is argued, that some Justices were attempting to substitute their own constitutional

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53 Bolick, supra n. 48., at 98
54 See e.g. Griffin v. Illinois, 351 U.S. 12 (1956)
56 The cases that illustrate this are: Railway Express Agency v. New York, 336 U.S. (1949); Williamson v. Lee Optical Co. of Oklahoma, Inc., 348 U.S. 483 (1955) See in : Lieberman, supra n. 40, at 159
58 See: Lochner v. New York, 198 U.S. at 75 (1905) (Holmes, J., dissenting) in Bolick, supra n. 48. at 102
theory for the constitutional text and its manifest intent. In other cases, Justices proclaimed that
the Court’s precedents established “the constitutional presumption of liberty that the Framers
intended.”

As described above, Scholars of the US constitutional evolution have observed that “for a half
century, ending in the late 1990s, liberty of contract was an element of due process under the
Fifth and Fourteenth Amendments to the Constitution as interpreted by the Supreme Court, and it
was the ground on which the Court invalidated although not fitfully, a number of state and
federal statutes regulating economic activity. However, Richard Posner suggests that the Court
may actually have been right in many of its economic due process decisions. Posner argues that
“classical economic theory was thereby elevated to the status of constitutional principle, for the
idea that voluntary transactions almost always promote welfare, and regulations that inhibit such
transactions almost always reduce it, is a staple of classical theory. The Court upheld the
constitutionality of the antitrust laws and laws subjecting monopolists to maximum rate controls,
but these laws are commonly thought to be necessary to preserve, or simulate the results of, free
markets.”

Nevertheless, Posner admits “it is commonly believed that the liberty of contract decisions
reflected a weak grasp on economics.” Some economic explanations of the judges, which relied
on the negative understanding of the monopoly power and the need to protect against it; as well
as their considerations about creating the entry barrier to the detriment of competitors and the
interests of the poor people, may be criticized from economic standpoint.

We have mentioned this essential question above which still remains: is there one efficient and
fair basic constitutional criterion to adjudicate upon economic issues? It has been suggested that
the US Supreme Court should invalidate under equal protection clause any statute in which the
method chosen of achieving the declared purpose of the statute is not reasonably related to that
purpose. Eventually, the rational basis test has been established which entailed that the law is
constitutional if there is any rational basis to suppose that it will accomplish permissible
legislative goals.

But as Posner argues “the word “rationality” is misused by the lawyers, at least from the
economist’s standpoint, to describe what the courts do in these cases. The legislation they
invalidate or are asked to invalidate may be quite rational economically; it could be just not
public-interested. Hence, are the courts capable and authorized to adjudicate, whether the laws
by the policy-makers are public-interested with the vague principle of rational or proportional
review?

For Example, in *Lochner* case the US Supreme Court indicated that reasonableness of a
challenged statute, under the Due Process Clause, must be determined as an objective fact by the
judge upon his own independent judgment. In holding the *Lochner* law invalid, the Court in
effect substituted its judgment for that of the legislator, and decided for itself that the statute was
not reasonably related to any of the social ends for which the police power might validly be
exercised. This interpretation of reasonableness, as an objective criterion to be determined by the

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59 Ibid. For example: West Coast Hotel Co. v. Parrish, 300 U.S. (1937) at 406 (Sutherland, J., dissenting);
60 Currie, David P. The Constitution in the Supreme Court: The Second Century, 1888 -1986 (Chicago: University of
Chicago Press, 1990), at 7-50
Sup. Ct. Rev. 34. In Posner supra n. 3 at 657.
63 As labeled “obscure and contradictory” by Posner, supra n. 3 at 658-659.
64 See: Gunther, Gerald, “The Supreme Court 1971 Term – Foreword: In search of Evolving Doctrine on a
judge himself, permeates the *Lochner* opinion: “We think,” said the Court, “that a law like the one before us involves neither the safety, the morals nor the welfare of the public and that the interest of the public is not in the slightest degree affected by such an act.” Therefore, the *Lochner* Court, in striking down a law whose reasonableness was, at a minimum, open to debate, in effect determined upon its own judgment whether such legislation was desirable. Critics argued that the Court, in applying due process in such a manner, came close to exercising the functions of a “super-legislature” or a “third chamber in the United States.” Under the *Lochner* approach, the Supreme Court was able to set itself up as almost the supreme censor of the wisdom of regulatory legislation. Other critics would brand it as the “Court’s abdication of its duty to protect economic liberty” when the court used to justify its reasoning under the rational basis standard.

Finally, a combination of social, economic and political forces had ultimately reversed the constitutional doctrines of the Court. In the future, decisions about economic or social philosophy would be left largely to legislatures, not to the courts. This could be a consequence of judicial capacity in the realm of economic regulation.

### 3.1. Considerations about the judicial capacity in the realm of economic regulation

Law and economics scholars, such as Posner would argue that the economic adjudication by the Court, as an effect, could impair the efficiency of economic activity. Posner further argues that the close look at the case-law of the US Supreme-Court, related to some economic interests may reveal some contradictory motivations like the attempts of the court to suppress competition under the guise of promoting general welfare. It shows that although the policy of abdication cannot be justified in terms of an analysis of the nature and relative unimportance of the rights concerned, there is a second line of thought that merits consideration. Perhaps the decision to leave economic rights to the tender mercy of the legislative power is based on the idea that the US Supreme Court - and, arguably, any other body of the constitutional review - is peculiarly ill-equipped to deal with this subject.

The issue raised here is not to discredit the judicial review on certain matters, but to determine whether economic statutes always or usually involve extraordinary difficulties that a modest judiciary must eschew them, even though that same judiciary does claim the competence to

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66 Schwartz, *Id* at 75-76.


69 As Posner discuses it about *Muller v. Oregon* 208 US. 412 (1908); Such attempts are all but heresy to advocates of Chicago School of economics, which Posner himself has done so much to translate into legal doctrine. Schwartz (1990) argues that school has never reconciled itself to the fact that in modern times the invisible hand of Adam Smith has increasingly been replaced by the “public interest” as defined in regulatory legislation and administration. Posner then goes on to treat the Constitution as essentially a license to open-ended "balancing" of interests by the political branches and the courts. His thinking is informed largely by an economist's predilection for cost-benefit analysis and a philosophical enthusiasm for pragmatism. To the Chicago School, the overriding goal of law, as of economics, should be that of efficiency. The law should intervene “to reprehend only that which is inefficient,” and even then the law’s role should be limited, since the market punishes inefficiency faster and better than the machinery of the law.” See Fox, Eleanor M. &. Lawrence A. Sullivan. “Antitrust—Retrospective and Prospective: Where are we coming from? Where are we going?” 62 *N.Y.U.L. Rev.* 936 (1987); In Schwartz, Bernard, *supra note* 65 at 83.
judge other, more difficult, issues. In fact, issues at stake in the constitutional adjudication stand on common level of difficulty and that judicial scrutiny seems as feasible (or unfeasible) for economic issue as for the non-economic issue. There is a big variety of economic subjects and it is difficult to fashion a generalization that applies to all. Some subjects may be so inscrutable that judicial review cannot fruitfully cope with them; but this is not a justification for avoiding other economic subjects which are not more opaque than the “personal rights” issues that are the standard coinage of judicial discourse these days.  

This point raises considerations about the economic regulation by judicial decision in the USA as well as the judicial economic activism and restraint.

3. 2. Economic regulation by judicial decision in the USA

Generally, economic regulation by judicial decision is related to notion of judicial activism, which is a view of the capacity and responsibility of courts relative to other agencies of government. 

There is a historical explanation of the concept of economic regulation by judicial decision as a fraction of judicial activism. America’s legal system has evolved from a base embedded in the political and social heritage brought to this country by its English colonists. U.S. common law is the result of hundreds of decisions handed down by judges over several centuries. The longstanding goal of common law has been to address legal problems by applying principles based on justice and fairness. To a larger extent, common law represents the efforts of citizens to protect themselves from powerful rulers.

Moreover, it is argued, that “historical reliance on common law has given rise to a system in which the judiciary exercises a good deal of control over business. In the early period of U.S. economic development, there were few statutory enactments to guide jurists in their oversight of business enterprises. They therefore relied on principles developed in common law to regulate commerce. Once popular legislatures were established, statutes and their interpretation became important. The new rules formulated by judges using common law were then incorporated into legislation which dealt with monopoly, restraint of trade, bankruptcy, workmen’s compensation, contracts, public utilities, and so forth. 

Judicial decisions are unwieldy assumed to be instruments of economic policy. But there are some deficiencies of such regulation. Therefore, some scholars place economic issues in the same category as political issues that should be responsibility of elected officials. Separation of powers and democracy principles require political issues to be best dealt by the legislative. It may be suggested that the economic issues are best resolved in the marketplace. This may be accomplished by simply making the greatest possible use of powers of competition and free enterprise to resolve questions of how societal resources are to be allocated. Free and open markets, constrained only by the minimal government oversight necessary to preserve workable competition, are capable of resolving many matters which are not the subject of legal and regulatory attention. In those areas where this would prove feasible, alternative dispute resolution techniques generally offer a superior alternative to litigation. This would mean restricting legal attention to “proper issues.” Consequently, the initiator of the constitutional complaint about an economic regulation could think twice before challenging the economic law and might prefer alternative dispute resolution techniques. This could be efficient, because either upholding the such law, or striking it down may have unproductive economic consequences for

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70 John H. Garvey, T. Alexander Aleinikoff and Daniel A. Farber supra note 32 at 683
all players. Moreover, because of the involved complexity, it is hard for the parties to state clear legal merits about the constitutional disputes involving economic issues. In American legal system, as well as in other systems, issues which are without legal merits revert back to the aggrieved parties either to perfect for legal consideration, to bring before an alternative dispute resolution forum, to address through political or economic means, or to absorb personally.

However, this option that the economic issues are best resolved not by the judicial power but in the marketplace, or the idea that they should be left solely to the authority of the policy-makers, might be more a danger than a solution to the society. Generally, we may recognize that the restriction of judicial system access to those with ripe, legal disputes may have a dampening effect on the public’s perception of the universal availability of the courts. This would be especially detrimental to post-Soviet countries in Eastern Europe, whose main goal is to establish and strengthen democracy and the legitimacy of democratic institutions. Constitutional discussion and constitutional judicial disputes about the economic issues shall not be avoided, because this is the way in which the democratic statehood functions. In fact, judicial power would improve the coherence of the state, promote mutual dialogue and develop constitutional argumentation and political culture.

As regards the inter-connection of the judicial decisions, branded s judicial activism and the public opinion, notably, many political scientists argue that the courts trail rather than lead public opinion. As a result, legal excess are eventually corrected when the public outcry becomes too great to ignore. Often-cited examples of it include the Dred Scott decision, which was corrected by war and the decisions to overrule the implementation of the New Deal in the 1930s, subsequently corrected by the court-packing plan of Franklin D. Roosevelt. Consequently, we should analyze the judicial discretion and judicial function and, generally, judges’ position within the political realm.

3. 3. The body of constitutional review as a political actor: judicial discretion and judicial function

According to Hirschfield (1962), it is the nature of the American governmental system – and it is a unique feature of that system - that sooner or later, directly or indirectly, virtually all of the nation’s major political, social and economic problems become constitutional problems; and that the Supreme Court, through its power to interpret the meaning of the Constitution, ultimately determines the legitimacy of attempts to resolve them. Even though it may be limited by external political forces and by its own sense of self-restraint, and notwithstanding the fact that many of its’ most important decisions consist only in accepting the necessary or the inevitable, it is still the Court which “constitutionalizes” efforts to adapt the fundamental law to the changing needs and aspirations of American society. In short, the Constitution cannot be separated from the nation’s development, and the Court cannot be separated from Constitution. The basic law embodies the rules by which the American people are governed, but the law, as Charles Evans Hughes once remarked, “is what the judges say it is.”

As a result of its interpretative function, the Supreme Court is a policymaking organ of government. Its role is essentially supervisory, being related primarily to the ratification rather than to the formulation of public policy, but while the Court does not ordinarily initiate or effectuate policy, as to Congress, the President, or the state governments, it nonetheless, “makes law” in three ways:

1. positively, by extending the provisions of the Constitution into areas of individual or governmental activity where they did not formerly apply;
2. negatively, by “vetoing” the policy determinations of other governmental agencies; and
3. passively, by accepting the constitutional changes brought about by custom or practice.
The Court’s enunciation over the past twenty-five years of the doctrine of racial equality is an example of positive judicial action setting a new standard of conduct for American society. Its rejection of the national government’s attempts at social and economic reform in the period before 1937 was accomplished by resort to the judicial “veto.” And passive policymaking best describes its acceptance of the principles and practices related to party politics, foreign affairs, and war.

Judicial participation in the policymaking process has often made the Supreme Court a center of political controversy, and dissatisfaction with its decisions has often raised the charge that it is an institutional anomaly in a democratic society. For instance, judicial activity in the field of racial relations led the way for the people’s elected representatives realizing the society’s goals. On the whole the Supreme Court has been a responsive organ of democracy, and it has played a notable part in guaranteeing a dynamic system of government.

Equally important, the Court has helped to maintain the kind of government stability which makes a continuing democracy possible. The Court has preserved “a scheme of ordered liberty” and assured the uniform application of national law throughout the country. Moreover, by assuming the difficult task of reviewing political decisions which affect individual liberty, the Court has helped to maintain a vigorous system of constitutional democracy in the United States. Finally, the Supreme Court has made a unique contribution to American government by its very existence. For the Court, like the Constitution, it is not only an instrument of power – it is also a symbol of restraint. Even when it approves extraordinary exercises of governmental authority, the fact of judicial review is an important indication that American government is ultimately subject to limitations. And even though its decisions seldom satisfy all of the people, they are manifestations of the concept that all disputes must be resolved peacefully Aside from its specific functions and powers, therefore, the Court has been a moral force, representing the institutionalization of the rule of law in American society.73

In recognizing that American politics is, at its heart, the process of managing interest group conflict, judges’ position may be located firmly within the political (as opposed merely the judicial) realm. According to Forcier (1994), although judges, legislators and chief executives are each involved in the political process, they do not necessarily represent the same interests or generate the same type of consequences for those interests, though their respective types of participation may vary, the fact that they all are participants does not.74 Moreover, as Griffin argues, the Court enforces the Constitution and adapts it to changing conditions. Ultimately, it does so only with the permission or acceptance of the political branches.75 However, the Court as an institution in charge of maintaining the Constitution must constantly monitor and scrutinize the flow of policy change. It must stand ready to intervene at any moment to prevent unconstitutional action.

The literature on the constitutional judicial process, in both law and political science over the past few decades, has shown considerable certainty over explanations of judicial behavior. Most scholars view judges as *homo politicus*. By large, the judicial behavior is understandable as a function of a judge’s politics. In other words, there is little that distinguishes the judicial function from the activity of politics, or judges from legislators and the New Deal period in the USA.

73 Hirschfield, Robert S; *supra n.* 31, at 187 ff
offers a fertile field for the study of this issue. Particularly, the New Deal cases are all concerned with the constitutional validity of governmental intervention, both state and federal, in the nation’s economic life. In each of these decisions the US Supreme Court attempted to establish the perimeters of governmental authority in the field of economic regulation. One significant fact about the economic regulation cases, especially in the early New Deal decisions, is that they are often proffered as evidence to substantiate the view of the judicial process that sees judges as politicians in judicial robes.76

This consideration raises an important question: by what criteria should the judiciary exercise its very considerable powers within the American constitutional framework? In the opinion of some US Supreme Court justices, the judicial self-restraint could be the optimal answer to this question. As Mr. Justice Stone wrote in US v. Butler that the “only check upon our own exercise of power is our own sense of self-restraint.”77 Mr. Justice Sutherland has responded to this in West Coast Hotel v. Parrish, stating that “the suggestion that the check upon the exercise of the judicial power, when properly invoked, to declare a constitutional right superior to an unconstitutional statute is the judge’s own faculty of self-restraint is both ill conceived and mischievous. Self-constraint belongs in the domain of will and not of judgment.”78 The self-restraint per se does not provide the criterion for the exercise of the judicial power. In fact, self-restraint for its own sake can produce an unsatisfactory result by unnecessarily inhibiting a judge. Most importantly, “the check upon the judge is that imposed by his/her oath of office, by the Constitution and by his own conscientious and enforced convictions.”79 However, this does not provide an efficient criterion either. Consciousness, like self-restraint does not belong in the realm of the judgment. There is no societal benefit in a judge conscientiously implementing any standard which he/she personally and subjectively cherishes. Thus, it is argued, the principal objective remains the development of standards for the exercise of the judicial power and then, but only then the notion of conscientiousness can be introduced usefully. So where does one start the search for these standards or criteria? This is task which is far too substantial to be resolved here. Even in those legal systems, such as England and the USA, where the doctrine of stare decisis holds, and the judiciary are obliged to apply the authoritative rule, there is disagreement between judges over which rule is authoritative. In United States, stare decisis has never achieved quite the same authority as in England and it has been apparent for a considerable period of time that the judicial function incorporates an element of creativity. Judicial creativity is required when existing rules are unclear, unsatisfactory or inadequate and it is the task of the judge to clarify the rule or replace it. But judicial creativity is necessarily guided by mutually agreed notions of reasoning and argument. Maidment (1991) disposes the idea that legal rules provide judges with unambiguous answers and assumes that rules offer judges no guidance and no answers.80 Moreover, Maidment argues that judges don’t have an unlimited discretion which would include the option to impose judicial solutions based on their own political and social desires.81 Importantly, the task of a judge to clarify the existing rule or replace it when the existing rules are unsatisfactory or inadequate requires judicial solution with some creativity. The view that the reasonable and argumentative judicial creativity is feasible is an intermediate position between those who argue that judges have no discretion for economic constitutional adjudication and others who declare that judicial discretion in all matters is absolute. Eventually, judges have discretion for economic constitutional adjudication given that they apply judicial creativity which is guided by mutually agreed notions of reasoning and argument.

77 297 US 1. 78 (1936)
78 300 US 379, 402 (1937)
79 Richard A. Maidment, supra n. 76 at 402
80 Id. at 134-135
81 Id. at 18-19 [citations omitted]
As Maidment observes, the US Supreme Court has created an interesting rule, which encompasses both the limitations and creativity of the judicial function. For example, the rule which Chief Justice Hughes chose to follow in *Blaisdell* case allowed the state legislature to abridge a contract directly, but only in an emergency and under careful judicial supervision, which would provide an assurance that no fundamental property rights were being abused. This rule was a case of “reasoning by example”. The war powers of the President provided an apt analogy for emergency powers in *Blaisdell* and it meant that Hughes was not introducing a new doctrine to a different series of circumstances. The use of analogical reasoning is both a principal characteristic of legal argument and a limitation on judicial creativity. When a judge is modifying an existing rule or creating a new one, it is incumbent on him to demonstrate by analogy that the new rule conforms to extant doctrines. Hughes was able to achieve this in *Blaisdell*. The doctrine of emergency powers was not new, nor did he seriously reduce the protections of the Contract Clause; nevertheless he did give the state legislature a further option in their attempt to provide their citizens with a measure of economic relief. The *Blaisdell* rule was thus example of creativity but creativity exercised within limits. It is not an instance where a judge made a rule on the basis of his preferences but an example where a judge, using the greatest delicacy and weaving a sophisticated argument, attempted to achieve a fine balance between the exercise of legislative power and the constitutional restrictions.

Moreover, in the case *Nebbia v. New York*, the US Supreme Court has framed a rule that is an example of judicial adaptation to the economic realities of the moment but through a cautious development of extant rules and principles. According to Maidment, The Court was able in *Nebbia* to provide the government of New York with a more flexible response to the economic depression, but was able to do so without a decisive break with the past. The Court has done it by returning to the evaluation of constitutionality to a consideration of due process and police power issues and dispensing with the “affected with the public interest” doctrine, and this new rule offered a very real protection against the abuse of property rights. *Nebbia* like *Blaisdell* is an example of judicial discretion in operation but a discretion that is both guided and limited.

However, if those two cases were examples of judicial adaptation, albeit cautious and incremental adaptation, to the economic realities of the 1930s, why was the Court less accommodating for instance in *Schlechter* and *Carter*? Maidment argues that the process of judicial adaptation is slow; the courts require time and rules change but they do so gradually. The Roosevelt administration expected far too much from the courts. The New Dealers expected the judiciary to be sympathetic to their belief that the times demanded innovative and drastic remedies. But the nature of the judicial function, at least as it was perceived in the 1930s, did not permit the judiciary to change direction sharply. Politicians could do so but not judges. Consequently the New Deal’s difficulties with the court did not result from the political preferences and attitudes of the judges but arose because judges were responding in a judicially proper manner to legislation which claimed significant new powers for the federal government and ran afoul of constitutional postulates at that time and several specific lines of Supreme Court precedent.

There is another significant point that Maidment indicates. Namely, that the more acute and intelligent judges were able to use the judicial process more creatively and they did attempt to provide a greater degree of judicial accommodation to the changing nature of the American economy. This again underlines the significance of judicial craftsmanship and professional

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82 E. Levi, An Introduction to Legal Reasoning (1948), p.1
83 Richard A. Maidment, *supra* n. 76 at 137 ff
84 Id. at 140 ff
skill, as an important factor for an efficient judicial discretion in such complex matters, like the constitutional economic adjudication.

As it has been generally observed, the judges on the United States Supreme Court between 1934 and 1936 were fundamentally in agreement. They agreed over the broad issues of constitutional interpretation and over the essential nature of the judicial function. Why did they behave so? The answer might be that they perceived the same problems because they all recognized the importance of legal rules, which set the context for the exercise of the judicial discretion. Legal rules were consequently a crucial factor in judicial decision-making. Within the reference set by the rules, judges did offer differing responses to the questions raised in the cases, but these differences can perhaps be accounted for by the variations in ability and skill among the nine judges and by their attachment to such notions as self-restraint.

Consequently, the central argument is that the Supreme Court’s decisions in the economic regulation cases can only be understood within a judicial and legal context. The realist version of judicial decision-making ignores the particular characteristics of the judicial and legal process. It treats the judicial decision-making as just another variant of political decision-making. In doing so, most realists discard all that is unique in judicial decision-making. No-one can deny the impact of the decisions made by the United States Supreme Court on the American polity, but it is vital to distinguish political impact from the process of decision-making. The impact is political but the decision-making is legal and judicial.85

Whether the decision-making is “positive” or “negative” may be assessed from the perspective of political science, analyzing the “wrong” and the “right” judicial activism.

3. 4. The effects of and the implications on the “wrong” and the “right” judicial activism

Shannon Ishiyama Smithey and John Ishiyama provide some possible explanations for the degree of judicial activism in eight post-communist countries.86 They state, that judicial activism is a multifaceted concept and demonstrates the ability of judges to exercise political power. Judicial activism relates to court’s jurisdiction and caseload, the volume of cases and the case outcomes. Moreover, it is affected by a number of structural features: federalism, written constitution, judicial independence, competitive party system, certain cultural traditions (common law tradition, support for the concept of limited government, high esteem for judges and social consensus in fundamental regime questions). Formal division of power between the central and regional governments is also associated with powerful and active judiciary. Moreover, a country’s legislative party system and public opinion toward the judiciary relative to the other major institutions of government may also affect its extent of judicial activism.

Judicial activism as activities of the courts in areas where they lack both the necessary means and adequate preparation for rendering a decision, are rather uniformly considered as substantial policy-making. Such areas have been, above all, claimed to include economic policy. There is an opinion that the judicial activism may be comprehended as the universal pejorative, the one thing

85 Id.
86 Shannon Ishiyama Smithey and John Ishiyama, “Judicial Activism in Post-Communist Politics”, Law & Society Review, Vol. 36, N 4 (2002) pp.719-742; Authors examined constitutional court cases for the three years following the initial adoption of a constitution in the Czech Republic, Estonia, Georgia, Latvia, Lithuania, Moldova, Russia, and Slovakia. It was found that contextual political factors, such as the extent to which the party system is fragmented and the extent to which the court enjoys popular trust and confidence (rather than the formal powers entrusted to the court by the constitution or the structure of the political system), contribute most to the degree of activism by constitutional courts.
that liberals and conservatives agree is wrong, even if they disagree over what it is. Critics of judicial activism routinely complain that when the courts negate a statute, the judges are substituting their political agenda for that of the elected representatives of the people. But the only political agenda a judge should have is enforcing the Constitution, which often requires negating legislation. In fact, what is much worse is when the legislature or executive and the courts share a political agenda, and the courts become the handmaiden of the other two branches of government in promoting the steady accretion of government power and the concomitant loss of individual liberty.

Generally, judicial activism in a good sense means ensuring justice to be done. It also means not involving in political decision-making process which would be against the principle of democracy. On the other hand, “judicial restraint” might mean failing to curb the worst excesses of democracy or it might imply taking in mind the democratic process.

In some instances the courts could stay beyond appropriate judicial boundaries. On the other hand, deprivations of liberty would have occurred were it not for judicial intervention. Examinations of the US Supreme Court’s case-law illustrates that the judicial activism can be “bad” or “good.” In general terms, the “worst judicial activism” occurs not when the judiciary acts too expansively, but when it fails to act at all.

Notably, the approaches of the Supreme Court and the American judicial activism have developed over time, together with the expansion of the US constitutional clauses, such as the commerce clause, which would become the primary constitutional predicate for the modern regulatory welfare state. But an important assumption derives from the fact that because the judges take an oath to uphold, defend and protect the Constitution – and not the regulatory welfare state – they should have no license to abrogate intended limits on the other branches of government.

For a time, the Supreme Court performed its role as guardian of the Constitution. However, on different stages of the U.S Supreme Court’s operation, it has exercised different trends of the constitutional control, therefore, showed different tendencies of judicial activism. It is presumed that the New Deal Court eviscerated limits on government power; the Warren Court made its contribution to judicial activism largely by means of assuming powers that are assigned to the executive and legislative branches. Routinely, deferral courts during the Warren era did not invalidate unconstitutional legislation but rewrote the rules and assumed their execution.

The New Deal is especially remarkable for the American constitutional scholarship and it is an interesting period to assess the reasons and implications of judicial activism. American constitutional scholars claim that the New Deal amounts to a “constitutional revolution,” resulting after the Great Depression crisis in which it became necessary to contemplate regulation of the entire economy, all economic activity. But this policy ran afoul of several specific lines of Supreme Court precedent. Not everything done in the name of the New Deal was found unconstitutional by the Court. Nevertheless, what was declared unconstitutional devastated the general purpose of the New Deal – to assume responsibility for addressing what was wrong with the American economy as a whole. The course set by the Court in cases such as Railroad Retirement Board v. Alton Railroad, 295 U.S. 330 (1935), Schlechter Poultry v. United

87 see: Bolick, supra n. 48
88 Id. at 55-56
90 Bolick, supra n. 48 at 59
States, 295 U.S. 495 (1935), United States v. Butler, 297 U.S. 1 (1936), and Carter v. Carter Coal, 298 U.S. 238 (1936) guaranteed a political conflict with the New Deal. The Court’s action was regarded as “bad judicial activism”. But, it is argued that the New Deal ran counter to the American constitutional postulations at that time. New Dealers simply did not pay much attention to any of those assumptions. The necessity of the emergency justified ignoring these no doubt outmoded ideas, based as they were on notions of static, unchanged US Constitution. New Deal legal thinkers publicized the arrival of the dynamic, living Constitution, which changed as social and economic needs demanded (Gillman 1997; White 1997). Therefore, as it is observed, the US Supreme Court did not have the primary role in initiating or carrying through all of the dimensions of constitutional change. Despite of the controversial judicial activism, the Court was more at the mercy of events than it was their master. Consequently, Griffin claims that a revolution eventually forced the judiciary to adapt its reading of the Constitution to fit with the fundamental political change. Whether the Court was following the 1936 election returns, reacting to FDR’s Court-packing plan, simply changing as its membership changed after 1937, or some combination of all three, political forces outside the walls of the Marble Temple drove the transformation of constitutional doctrine that resulted.\(^{91}\) Namely, as the Court implemented the approach that the place to remedy the economic regulation is not the courtroom but the voting booth. Essentially, in most economic cases the Court was saying, only legislatures can decide; these were no longer appropriate subjects of judicial review.\(^{92}\) This illustrates that the Supreme Court and its’ opinions have been quite much affected by the political, economic and social circumstances, as well as the public opinion, if it exercised judicial activism, which was considered to be controversial.

Notably, the Supreme Court responded to the advent of the activist national state and the new power of the presidency not by increasing its own power, but by getting out of the way. Such behavior was largely triggered by the public opinion. On the other hand, such change of the judicial perspective with regard to economic issues could be considered as an act of politically conscious institution.

Moreover, at the same time, the US Supreme Court has shifted its attention to the other set of rights and took interventionist, activist, position in civil liberties and civil rights. At this point, it is feasible to distinguish economic judicial activism from its libertarian counterpart. As Novak (1982) concludes, the Court, when activist in civil liberties, is merely serving the only valid function of a non-democratic institution in a democratic political system – the protection if minority rights against majority will (when the rights involved are essential to the democratic process). Civil liberties, broadly construed, constitute the fundamental rights necessary for the continued existence of democracy and cannot be left to the vagaries of majoritarianism. On the other hands, economic issues, important as they may be, are not truly proper subjects for judicial review. If this is so, and the theory of constitutional democracy, if not that of free enterprise, seems to demand the distinction, the US Supreme Court has what amounts to a mandate for libertarian activism and economic restraint. In Ronald Dworkin’s words, “Constitutionalism – the theory that the majority must be restrained to protect individual rights – may be good or bad political theory, but the United States has adopted that theory, and to make the majority judge in its own cause seems inconsistent and unjust.”\(^{93}\)

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\(^{91}\) Ferejohn, John Jack Rakove and Jonathan Riley (eds), *Constitutional Culture and Democratic Rule* (Cambridge, England: Cambridge University Press, 2001) at 288 ff. 302-305


Thus, interdisciplinary perspective to sift through history, politics and key events is essential to assess crucial underpinnings to structuring policy processes and their implications on judicial activism. It seems that, the judicial activism could be constrained with the political consciousness of the court, as an institution within the political realm. Judicial activism is affected by the public opinion, which prevents judicial excess. At the same time judicial activism itself has implications on the public opinion. For instance, it is argued, that when the courts during the Warren era strayed beyond the judicial role to assume broad executive and legislative powers, they undermined their own legitimacy in the eyes of the public.\footnote{Eventually, legitimacy is an important factor related to the judicial activism and the court’s ability of constitutional economic adjudication. Court’s capacity to use effectively this authority, is a function if its legitimacy.}

3. 5. Legitimacy and courts as constrained actors

Economic-minded scholars would defend their hypothesis that the judges need not only legal consciousness, which is impacted by the fairness notion, but also the economic perception, which would enable them to deliver efficient decisions. This is especially important as the court has to control the constitutionality of the laws containing substantial policy-making rules such as the economic policy. For a political scientist, the study of the constitutional economic adjudication often illustrates constrained nature of the courts, especially in Post-Soviet countries.

Epstein, Shvetsova and Knight (2001) describe European-Type Constitutional Courts as constrained actors in developing democracies, inhibited by other actors and features of their institutional context. Unlike courts in evolved democracies, those in Eastern Europe have yet to establish their own independence, legitimacy, or authority (or, for that matter the authority of their constitutional systems), which in turn limits their ability to issue rulings that other actors will respect and implement, even when it is not in their self-interest to do so.\footnote{Epstein, Shvetsova and Knight (2001) describe European-Type Constitutional Courts as constrained actors in developing democracies, inhibited by other actors and features of their institutional context. Unlike courts in evolved democracies, those in Eastern Europe have yet to establish their own independence, legitimacy, or authority (or, for that matter the authority of their constitutional systems), which in turn limits their ability to issue rulings that other actors will respect and implement, even when it is not in their self-interest to do so.}

It has been observed, that elected officials have not been hesitant to suspend their courts, they fail to comply with their decisions, threaten impeachment against particular justices, or take other steps designed to punish justices or render their decisions inefficacious\footnote{It has been observed, that elected officials have not been hesitant to suspend their courts, they fail to comply with their decisions, threaten impeachment against particular justices, or take other steps designed to punish justices or render their decisions inefficacious. When these threats occur the courts are often unable or unwilling to mount differences, at least part because they till in countries where, under previous regimes, it had been unthinkable that an independent institution should exist which could exert constitutional control over the processes of government and law enforcement. The relative lack of legitimacy and support may also be a function of a general and long-held suspicion towards the judges, existing among the people, which will take time for courts in new democracies to dispel. Court’s legitimacy is indicated by its’ capacity to use effectively its’ authority, which is triggered by the public recognition and support.}. When these threats occur the courts are often unable or unwilling to mount differences, at least part because they till in countries where, under previous regimes, it had been unthinkable that an independent institution should exist which could exert constitutional control over the processes of government and law enforcement. The relative lack of legitimacy and support may also be a function of a general and long-held suspicion towards the judges, existing among the people, which will take time for courts in new democracies to dispel. Court’s legitimacy is indicated by its’ capacity to use effectively its’ authority, which is triggered by the public recognition and support.

Courts in mature democracies – whether of the American or European model – seem less constrained. These courts seem more able to reach decisions disliked by elected officials and the public, because they have built up such reservoirs of public support that legislators and executives are loathe (though not unwilling) to challenge them.\footnote{Courts in mature democracies – whether of the American or European model – seem less constrained. These courts seem more able to reach decisions disliked by elected officials and the public, because they have built up such reservoirs of public support that legislators and executives are loathe (though not unwilling) to challenge them.}

As it has been described above, the US Supreme Court during the New Deal has been criticized for exercising controversial judicial activism. However, the interdisciplinary analysis shows that the court did what the court was ought to do: because the New Deal reforms have run counter to the American constitutional postulations at that time, the US Supreme Court has struck down significant deal of the politically popular New Deal reforms, which were necessary for the economy. Nevertheless, the Supreme Courts’ opinions have been quite much affected by the political, economic and social circumstances. The Court might have been concerned also by the public opinion that arguably prevents judicial excess. Therefore, the US Supreme Court has restrained itself over time, as eventually in most economic cases the Court was saying, only legislatures can decide; these were no longer appropriate subjects of judicial review. It does not necessarily mean that the change in judicial behavior has affected the quest for legitimacy of the US Supreme Court. This rather implies that the court has gradually established its legitimacy as a politically conscious institution.

In case of Post-Soviet Constitutional Courts in developing democracies of Eastern Europe, in terms of Epstein, Shvetsova and Knight, the “European-Type Constitutional Courts as Constrained actors” shall view the quest for legitimacy as a long-term process – one that occasionally requires them to trade off short-term policy victories for long-term credibility (and, eventually, policy) gains. Then their future place in their governments may be assured. In the initial stages of the transition to a constitutional democracy, if the legitimacy of the Constitutional Court is low, the Court is least able to accomplish its goals effectively (to Epstein, Shvetsova and Knight, 2001).

In order to ensure their legitimacy, the courts inevitably have to justify their decisions with legal or legal-seeming argumentation because the courts indeed are connected with politics. In constitutional review, the court does not express its own will as the parliament does under the nation’s mandate; rather it reminds the legislature how the nation as the highest power decided on the disputed issue when it adopted the Constitution. How actively courts remind the legislature of the Constitution is the question of judicial activism. Whether they are able to do so is the question of their legitimacy.

It is commonly agreed, that the legitimacy of the strong judiciary in newly independent countries helps the state break with its authoritarian past and develop a constitutional culture that teaches state actors that the legal system cannot be transgressed for political gain (Brewer-Carias 1989; Larkins 1996). But the development of an independent judiciary can be constrained by a weak institutional legacy, limited training and support for judges, and the strength of other political actors.

Eventually, the advancement of the constitutional culture, legitimacy and public interest in the courts are essential factors to facilitate further positive democratic developments over time. These considerations as well as the necessity of the capacity building measures for the judiciary equally apply to the creation and enforcement of the constitution, which is good for the economy, facilitation of the functioning economy and the development of the democratic political setting.
CONCLUSION AND OUTLOOK

The current analysis of constitutional and judicial developments in the USA with regard to the economic issues provides significant conclusions for relatively young institutions of the constitutional review, such as the Constitutional Court of Georgia.

The Constitution cannot be separated from the nation’s development, and the Court cannot be separated from Constitution. There is no clear answer to what is a good constitution for market economy. However, there are several fundamentally important elements in the design of constitutions that will enable rather than hinder economic transitions and economic growth. These elements are: the constitutionally guaranteed economic liberty, as an important constitutional value; the coordination of positive expectations by the constitution, as well as leaving the economy relatively free of government management, which is generally good for economy. Eventually, the constitution, which may be considered as good for the economy, shall secure basic rights and liberties and coordinate positive expectations and it may lack an embodied economic theory, which might fit ill with the dynamic transitions.

In so far as good laws make good citizens and good citizens make good laws, democracy reinforces itself. Self-reinforcement helps a just state to succeed in competition with unjust states. But it is ambiguous, whether a good constitution makes good citizens and good judges, which would make the constitution work well for the economy. Arguably, an active judiciary, which recognizes its constitutional limits, makes the economic rights and liberties efficiently enforceable. Eventually, enforcement of economic rights and liberties would facilitate economic growth. Activist judiciary, which recognizes its’ constitutional limits, - therefore, judicial activism in a positive sense, - can utilize the value of basic economic rights and liberties, which would trigger the economic growth. Moreover, maximizing economic efficiency and growth is a beneficial factor for the overall wealth that contributes to the success of the policymakers.

The foremost goal of the constitution is to impose the rule of law and protect the liberty of citizens. Constitution can be good in defining particular general goal, such as the rule of law and the liberty. Rights and liberties are constructed not only according to the goals, but they are a product of concrete historical experiences with wrongs. Constitutional developments in post-communist countries in transition, such as Georgia, prove that this is true. There have been some attempts in American constitutional history to make the US constitution a better constitution with regard to the economy. The immediate source of the second bill of rights was the Great Depression, as inadequate education, hunger, and unemployment emerged not as inevitable features of free market societies but as human rights violations.

Whereas critics may argue that social, economic and environmental rights are less fundamental than political and civil rights, supporters could respond that, in the contemporary era, these rights are just as important as traditional rights. Moreover, enshrining these rights in a constitution can serve other purposes from giving rise to judicial decision making. The absence of any social, economic, or environmental rights in the U.S. Constitution is extraordinary when one considers how frequently these rights have been recognized in other countries’ constitutions and in international treaties. Critics have argued that the economic rights as well as social and environmental rights, labeled as “positive rights” are not as susceptible to judicial enforcement as traditional civil and political rights. But proponents of these rights have responded that adoption of constitutional provisions can empower legislators and permit them to secure these rights in the face of contrary judicial decisions. Such provisions can also serve to inspire or admonish legislators to take action in a particular area. Finally, these provisions can give expression to the fundamental goals and values of polity.
Despite strong arguments at the both sides, even though other countries’ constitutions may include a wide range of economic (as well as social and environmental) entitlements, the very nature of these rights makes them difficult to be adjudicated and enforced. However, issues that arise in the constitutional adjudication stand on common level of difficulty and judicial scrutiny seems as feasible (or unfeasible) for economic issue as for the non-economic issue. There is a big variety of economic subjects and it is difficult to fashion a generalization that applies to all. Some subjects may be so inscrutable that judicial review cannot fruitfully cope with them; but this is not a justification for avoiding other economic subjects which are not vaguer than the “personal rights” issues that are the standard coinage of judicial discourse.

Comparative review of different constitutional court’s standing to economic and social rights indicates that the South African Constitutional Court has a “fresh and promising approach” to judicial protection of social and economic rights that directly addresses the most serious concerns of those who believe that such rights cannot be enforced by courts. Following the International Covenant on Economic, Social, and Cultural Rights, the South African Constitution recognizes a wide range of social and economic rights but also acknowledges that the government has limited recourses and cannot respond to all problems at once. Hence the South African constitution obliges the state, in most of the relevant provisions, to “take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of” the relevant right. This approach allows for a degree of judicial enforcement in a way that respects the fact that nations, particularly poor ones or countries in transition, cannot do all that should be done. By itself this point does not demonstrate that the economic, social or environmental rights necessarily belong in a constitution, or that the American approach is wrong and United States should amend its founding document in order to include these rights in explicit and retailed manner. For American, the simpler the better course seems to be Roosevelt’s own: to treat these rights (proclaimed in the second bill) as a set of constitutive commitments, helping define the nation’s deepest principles, But the South African experience shows that some of the strongest objections to constitutionalizing the economic and social rights are misconceived. If courts are asked to protect the rights that Roosevelt identified, they have sensible ways to do so

Notably, communist constitutions were filled with strong guarantees of individual rights – political, civil, social and economic. These guarantees meant nothing in the real world, partly because of the absence of judicial enforcement. It is significant that the constitutions of many nations, with diverse backgrounds, create social and economic rights, whether or not they are enforceable. But the American Constitution does nothing of a kind and it has certain historical, ideological and cultural underpinnings.

Advocates for the more detailed inclusion of such rights in constitutions might hope that such principles will ensure that social and economic rights are taken seriously; when those rights have constitutional status, elected officials might see them as real obligations. But there is a pervasive risk that societies, even democratic ones, will be inattentive to the needs of their most vulnerable members. When the courts are involved, it is more likely that the relevant rights will receive respect. The disadvantage is that judicial involvement might displace reasonable legislative judgments about sensible priority setting.

However, with regard to the transitional countries in Eastern Europe, such as Georgia, it is essential to have a degree of judicial involvement and enforcement in a way that respects the fact that nations, particularly with the constrained financial means, cannot do all that should be done. It might be preferable for a body of constitutional review to adopt the distinctive South African constitutional approach: most of the basic economic rights and liberties must be protected within
the limits of available resources, but not absolutely. Though ambiguous, provisions of this kind have sometimes been held to be enforceable by national courts, obliging governments to fulfill certain obligations. South African experience shows that a democratic constitution, even in a poor nation, is able to protect those rights without placing an undue strain on judicial capacities.

In every country, at the initial, transitional stage of the development of statehood, defining the rights in the national constitution and establishment of new laws requires interpretation and enforcement, which is an important function of the court. Therefore the judiciary becomes more active and its’ activism is triggered by other institutions and the current economic and social setting. Courts as political actors are required to exercise flexibility necessary with changing and growing institutions in the economy. One of the basic deficiencies for such flexibility is the lack of competence necessary to undertake constitutional control of complex issues including those, related to the free market economy. Yet, capacity building efforts for the judicial branch, public support and increasing legitimacy of the Court facilitates its’ ability to deal with economic issues and draw the right balance between the notions of fairness and efficiency. Just as every other institution, judiciary system develops and establishes itself over time. Notably, in its attempts to deal with some complex issues the Court reflects the change of attitude toward socio-economic problems which the nation itself has undergone.

An essential conclusion follows, that significant is not as much the virtue of the economic rights and liberties in the constitution, but their enforcement, interpretation and protection by Courts. This implies the active role of the courts. Both in the absence of economic (as well as social and environmental) provisions in the US Constitution as well in the systems where these rights are defined in a more broad way – there is one common trouble with them. This trouble is enforcement of these specific rights and how the courts deal with the issue at stake: fairness v. efficiency as well as non-interference in affairs of the other branches of government. With respect to judicial enforcement of economic rights and liberties, the difficulty with such rights does not lie in ambiguity or vagueness but in the limited resources of government and the extreme difficulty of ensuring that these rights are respected in practice. The broader problem is that in order to implement constitutional economic liberties, government officials have to engage in resource allocation and program management. Courts are not in good position to oversee those tasks.

The body of constitutional review as a political actor means that the judicial decisions have implications on policy. For instance, the US Supreme Court has frequently been involved in controversy, as decisions have affected policies determining the basic social and economic (as well as political) structure of the American community. The essential issue in this still unresolved conflict is the extent to which economic affairs should be subject to governmental supervision and control. Most scholars agree that judges should make their decisions within a reference of legal rules and these legal rules provide both guidance and limitations to the exercise of the judicial power. The US Supreme Court response to the New Deal was a significant example of it: such response was not popular, but it was a judicial response and that is all that can be asked of judges. However, US Supreme Court has ultimately declared that in most economic cases, only legislatures can decide; these were no longer appropriate subjects of judicial review.

Even though the Court has expressed the idea that for protection against abuses by legislatures the people should resort to the polls, not to the courts, the Court has still seen itself as the people’s protection against abuses by legislatures. The US Supreme Court has cautiously developed its’ approach to the economic issues and has established two basic criteria in adjudicating the issues, involving the economic policy: the non-arbitrariness and the non-discrimination. Eventually, the rational basis relationship test has been established, which
entailed that a law is constitutional if there is any rational basis to suppose that it will accomplish permissible legislative goals.

The combination of social, economic and political forces had gradually reversed the constitutional doctrines of the US Supreme Court. In the future, decisions about economic or social philosophy would be left largely to legislatures, not to the courts. Notably, at the same time, the US Supreme Court has shifted its attention to the other set of rights and took interventionist, activist position in civil liberties and civil rights. Eventually, the US Supreme Court has what amounts to a mandate for libertarian activism and economic restraint. This could be a consequence of judicial capacity in the realm of economic regulation or judiciary’s position within the political realm.

Judicial decisions are unwieldy assumed to be instruments of economic policy. But there are some deficiencies of such regulation. Therefore, some scholars place economic issues in the same category as political issues that should be responsibility of elected officials. Separation of powers and democracy principles require political issues to be best dealt by the legislative. It may be also suggested that the economic issues are best resolved in the marketplace. However, both options that the economic issues are best resolved not by the judicial power but in the marketplace or that they should be left solely to the authority of the policy-makers, might be more a danger than a solution to the society. Generally, we may recognize that the restriction of judicial system access to those with ripe, legal disputes may have a dampening effect on the public’s perception of the universal availability of the courts. This would be especially detrimental to post-Soviet countries in Eastern Europe, whose main goal is to establish and strengthen democracy and the legitimacy of democratic institutions.

As regards the dangers of judicial power, judicial activism may be not as much hazardous. Notably, the courts trail rather than lead public opinion, so that legal excess would eventually corrected when the public outcry becomes too great to ignore. Moreover, as judges take an oath to uphold, defend and protect the Constitution they should have no license to abrogate intended limits on the other branches of government. Therefore, for instance, judges have discretion for economic constitutional adjudication given that they apply judicial creativity which is guided by mutually agreed notions of reasoning and argument. Interestingly, the US Supreme Court has developed certain approaches which are regarded as good examples of judicial discretion in operation but a discretion that is both guided and limited; besides, the US Supreme Court’s rulings demonstrate judicial adaptation to the economic realities of the moment but through a cautious development of extant rules and principles.

Remarkably, the process of judicial adaptation is slow; the courts require time and rules change but they do so gradually. The Roosevelt administration expected far too much from the courts. The New Dealers expected the judiciary to be sympathetic to their belief that the times demanded innovative and drastic remedies. But the nature of the judicial function, at least as it was perceived in the 1930s, did not permit the judiciary to change direction sharply. Politicians could do so but not judges. Consequently the New Deal’s difficulties with the court did not result from the political preferences and attitudes of the judges but arose because judges were responding in a judicially proper manner to legislation which claimed significant new powers for the federal government and it was quite natural that the judiciary could not adapt to drastic economic and political changes at once. Hence, the US Supreme Court’s decisions in the economic regulation cases can only be understood within a judicial and legal context. The realist version of judicial decision-making ignores the particular characteristics of the judicial and legal process. It treats the judicial decision-making as just another variant of political decision-making. In doing so, most realists discard all that is unique in judicial decision-making. No-one can deny the impact of the decisions made by the United States Supreme Court on the American
polity, but it is vital to distinguish political impact from the process of decision-making. The impact is political but the decision-making is legal and judicial. Whether the decision-making is “right” or “wrong” may be assessed from the perspective of political science, analyzing judicial activism.

Judicial activism is regarded as negative in case of passive standing of the court, when the court restrains itself to the extent which results in the breach of economic rights. It should be regarded as negative also when the court acts in accordance with other branches of government, that it is supposed to control. On the other hand, excessive judiciary, conducting judicial lawmaking is against the principle of the separation of powers. It could discredit the legislature which, most probably, would use some tools against it such as the American historical experience of “court-packing” etc. This would be mutually detrimental for the public opinion about the court and the other branches of government. American Supreme Court’s example also demonstrates that even though it is a slow and intricate process, the judiciary gradually adapts to the changing political, economic and social circumstances. Eventually, sooner or later judicial activism could be constrained with the political consciousness of the court, as an institution within the political realm. Judicial activism is affected by the public opinion, at the same time judicial activism itself has implications on the public opinion. Eventually, legitimacy is an important factor related to the judicial activism and the court’s ability of constitutional economic adjudication. Court’s capacity to use effectively this authority, is a function if its legitimacy.

US history of judicial review shows that the Court’s role and its legitimacy has been established over time and facilitated by the public opinion. For Georgia at the current stage of democratic development, it is very important to facilitate the development of the independent and strong judiciary and institutions, such as the Constitutional Court of Georgia. As the growth of any organism or institution naturally requires, given that the political ambitions exist, time and environment are the essential factors for such developments.

Overall, the current comparative analysis of the US constitutional and judicial system and economy derives significant lessons for the young countries like Georgia as well as it helps to assess and predict judicial developments in transition countries. Constitutional discussion and constitutional judicial disputes about the economic issues shall not be avoided or rejected, because judicial activism is another way in which the democratic statehood functions. In fact, judicial activism - when the judges decide upon complex constitutional cases from the legal point of view by means of argumentative judicial creativity - in transition countries would improve the coherence of the state, promote mutual dialogue as well as develop constitutional reasoning and political culture. On the other hand, such complex issues like the constitutional economic judicial review involves a high degree of judicial responsibility and it can be assessed as a political consciousness of the Court. Judiciary, having the authority of constitutional adjudication, inevitably takes into consideration and adapts to the changing political, economic and social circumstances. Therefore, there is a natural inter-dependence between the economy, the constitution, and the constitutional adjudication of economic issues.

The great task of the Constitutional Court of Georgia as well as any other body of constitutional review must be the defense of constitutionalism itself – the protection of individual liberty (including economic liberties) and human dignity under the “rule of law.” This will be a difficult task, not only because the fears and frustrations of an uncertain, transitional age create pressures which judiciary may find hard to withstand, but also because the Court today is relatively young. Moreover, it is neither institutionally nor politically that strong as the US Supreme Court.
Nevertheless, despite these difficulties, the Constitutional Court of Georgia can play a major role in defending the constitutional order so long as the nation’s commitment to its political heritage remains firm, and so long as the Georgian people continue to regard the Court as the special guardian of that heritage. Sooner or later, directly or indirectly, virtually all of the nation’s major political, social and economic problems become constitutional problems; and the body of constitutional review, through its power to interpret the meaning of the Constitution, ultimately determines the legitimacy of attempts to resolve them. In addition to its participation in the political process, therefore, the contemporary Court must also be an educator, constantly reminding the nation of the Constitution’s meaning and purpose. For ultimately it is the people themselves – through their appreciation of and attachment to the values embodied in their basic law – who must determine whether or not the democratic Constitution and the free market economy will endure for ages to come.

The economic consequences of constitutional adjudication are important to assess, as they may imply that empowering constitutional courts to take part in economic policy is not necessarily desirable. On the other hand, it is widely agreed, that the legitimacy of instrumental reasoning in the court and policy-based arguments about the economic issues are important to safeguard basic economic liberties. The Court, which exercises the constitutional economic judicial review, should not prevent but facilitate efficient economic reforms in Georgia, which would strengthen the country’s independence and democratic values and the principles of the free market economy. The important issue for the Court at stake is to balance the economic considerations of efficiency and legal notion of fairness, which is a tricky task.

It could be accepted from all perspectives, that the fundamental economic rights in a democratic constitution provide a framework of rules in the game of politics. An effective constitution constrains and channels political competition. Judicial activism related to the interpretation and practical application of the fundamental economic rights and liberties, when the Court recognizes its’ constitutional limits, would not deter but facilitate efficient policy-making. That would be generally beneficial for the overall economic growth and political stability. However, the judicial activism could be constrained with the political consciousness of the court, as far as it is an institution within the political realm. Judicial activism is affected by the public opinion, which prevents judicial excess. At the same time judicial activism itself has implications on the public opinion and the courts’ legitimacy.

Similarly like the US Supreme Court, I suppose that the Georgian Constitutional Court could be of assistance to maintain the kind of government stability which makes a continuing democracy possible. The Court should assure the uniform application of national law throughout the country thereby, fortifying the confidence of the society toward this constitutional institution. Moreover, by assuming the difficult task of reviewing complex political-economic decisions which affect individual liberty, the Court would help to maintain a vigorous system of constitutional democracy in Georgia. The Court, like the Constitution is not only an instrument of power – it is also a symbol of restraint. Even if it approves extraordinary exercises of governmental authority, the fact of constitutional judicial review is an important indication that Georgian government is ultimately subject to limitations. Even though its’ decisions might seldom satisfy all of the people, they are manifestations of the concept that all disputes must be resolved peacefully, Aside from its specific functions and powers, therefore, the Constitutional Court of Georgia should be a moral force, representing the institutionalization of the rule of law in Georgian society.

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