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DRAFTING A CONSTITUTION: A FRIENDLY WARNING TO SOUTH AFRICA

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I am happy to have received this opportunity to respond to Professor Herman Schwartz's presentation on what South Africa could learn from the American constitutional experience.¹ My views of substantive provisions of the proper constitution differ sharply from those of Professor Schwartz in the American arena, and these differences will surely carry over to a discussion of what South Africa might learn from the American experience, now that it must confront its own tortuous transformation into a democratic nation. My remarks contain a warning against much of the conventional wisdom about what is right and wrong in constitutional building in periods of transition, and I hope that my words will exert a dim cautionary influence during the hectic and tumultuous constitution negotiations that are sure to come, no matter what is said at any academic conference, including this one. Before one can address the questions of transition, however, it is necessary to say something about constitutions more generally. Hence, my plan of operation is to start with the general and then turn to the particular.

I. General Principles

On one point, at least, Professor Schwartz and I agree. Constitutions are written to supply a long term institutional framework, which by design imposes some limitations on the power of any given majority to implement its will.² Moreover, the restrictions on government power that the constitution contains must be selected with great care. For example, the guarantees of individual rights that are contained in that constitution must be sufficiently general, sufficiently desirable, and sufficiently permanent to warrant inclusion in the constitutional hierarchy. No person would choose to establish in a constitution the total budget figure

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1. Herman Schwartz, *Economic and Social Rights*, 8 AM. UJ. INT'L L. & POL'Y 551 (1993).

2. *Id.* at 552.

for the first ten years of operation. On budgetary matters it may be possible to specify the form of taxation (the flat tax is still my preference),³ the systems whereby approval for budgets are obtained, and some limits on the total level of expenditure or the size of deficits. It is clear, however, that no annual or program budgets can be assembled or promulgated through the constitutional process.

What then does one put into a constitution? In dealing with the question of economic rights, Professor Schwartz begins with the distinction, familiar to political theorists, between positive and negative rights.⁴ But he does not quite draw that distinction in the way in which it has been traditionally stated. The traditional view of "negative" rights is congenial with laissez-faire and the creation of the small, nightwatchman state. This view includes the rights to contract, to own property, to sue and to be sued, to testify in court, to make a will and the like.⁵ The emphasis is upon civil capacity to enter into various forms of voluntary transactions, which may be achieved only if the state will prevent others from using force against the individual who seeks to exercise these rights. For Professor Schwartz, however, the list of negative rights does not refer to matters of civil capacity but rather to a very different class of rights — the right to a minimum wage, the right to strike, and so on — which derive from a very different philosophical tradition, and which contemplate active state interference in the operation of, for example, labor markets.⁶ Indeed, the only way these rights could be called negative would be to redefine the term so that it embraces all rights that are enforced by the state through regulation. Positive rights, by contrast, would cover those cases in which the state's involvement in economic affairs requires it to expend public funds for certain particular purposes such as job training programs.

3. See RICHARD A. EPSTEIN, *TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN* 295-303 (1985) [hereinafter *TAKINGS*] (discussing the limitations placed upon income tax by the eminent domain clause).

4. Schwartz, *supra* note 1, at 555.

5. Richard A. Epstein, *Two Conceptions of Civil Rights*, 8 *SOC. POL. & PHIL.* 38, 39-41 (1991).

6. Schwartz, *supra* note 1, at 553. Professor Schwartz writes:

There is not much disagreement about what these economic and social rights are. They include the right to work, to a job, to a minimum wage, to equal pay for equal work, to welfare, to housing, to clothing, to education, to health care, to leisure, to special care for children.

Id.

I fully understand why one should want to protect negative rights, as I have used the term, in a constitution. I can think of no special circumstances in which limitations on contractual capacity make sense, at least in comparison to the extraordinary risks that arise when these limitations are imposed, whether selectively or on a broad gauge. Here too there is an irony, however, for the protection of these negative rights, while at one time respected under cases like *Lochner v. New York*,⁷ is now routinely regarded as being an ill-advised instance of judicial mischief making. Professor Schwartz seems to have overlearned the conventional wisdom, given his willingness to include the minimum wage on his list of constitutional rights.

But why? Initially, I would expect him to defend minimum wage on the merits, at least as it applies to South Africa, but he does not. And what I know about the minimum wage is hardly sufficient to bring aid and comfort to its supporters.⁸ The restrictions on wages that it imposes do not benefit all the poor or even all the working poor.⁹ At one level it reduces the demand for employment so that some workers, often the poorest, least skilled workers, are excluded from the market altogether.¹⁰ Further, while it increases the wages of those fortunate enough to remain in the labor market after the restrictions are imposed, it also induces employers to adopt less efficient terms on other aspects of the employment contract, such as split shifts for workers, so that some of the wage increase is eaten away by alteration in other terms of trade.¹¹ The standard neo-classical arguments thus suggest that the minimum wage hurts workers as much as it does management. Nor does the picture improve when one takes into account the effects on third parties. There is some reason to believe that firms and workers in highly paid (or unionized) industries support the minimum wage because it places greater burdens on the competition than on the firm. Yet at the same time, if the minimum wage increases costs, it will harm consumers. Given this distribution of costs and benefits, why anyone would want to require a minimum wage by constitutional provision, especially without knowing what that wage is or should be, is a mystery to me. It is better that one enshrine no economic and social rights than fasten on one that

7. 198 U.S. 45 (1905).

8. See RICHARD B. MCKENZIE, *THE AMERICAN JOB MACHINE 198-217* (1988) (examining recent proposals for revisions of minimum wage legislation).

9. *Id.* at 205-09.

10. *Id.* at 203.

11. *Id.* at 210-11.

is so destructive to the fabric of society.

If I am opposed of Professor Schwartz's somewhat peculiar sense of negative rights, I am overtly hostile to any proposed constitutionalization of positive rights, for example, a right to medical care or a right to an education. Here the initial question is always: how much of the commodity is to be awarded, for an education can cover anything from minimal exposure to reading and writing to an advanced degree in a scientific subject. Similar uncertainties abound in any ostensible right to health care funded by the state. Given the open-ended structure of the rights, I fear that, at bottom, most of these appear to involve wealth transfers from one group to another. A primary objective of sound constitutional governance is to unleash the forces of production, not those of redistribution. No government has ever been able to generate goods and services, so the redistributive efforts that it undertakes involve taking from some and giving to others. There are enough dangers of excessive redistribution even in a world that has no positive economic or social rights protected by a constitution, and I can hardly believe that there will be *less* redistribution through constitutional mechanisms when more is required. One reason why the Soviet system failed is that its constitution read like a cornucopia. It promised far more than it could deliver.¹² The result was excessive taxation and constant dilution of benefits by a system that could not produce. It hardly makes sense to speak about the right to medical care if persons have to wait forever on lines before they are able to obtain even the most minimal services from a state monopolist. Again, a political void is better than a constitutional mandate to fund rights that are beyond the capabilities of any society to generate. These positive rights may sound grand, but once one asks about their *correlative duties*, the picture looks far less grandiose indeed. Eastern Europe and the Soviet Union should provide their own warning to South Africa.¹³

12. KONST SSSR. (1977). Chapter 7 of the 1977 Soviet Constitution is filled with broad claims but is silent as to how these guarantees are to be funded. Article 39 provides that citizens of the USSR enjoy in full the social, economic, political and personal rights and freedoms listed within the Constitution of the USSR and by its laws. *Id.* art. 39. Article 40 provides that Soviet citizens have the right to guaranteed employment and payment in accordance with the quantity and quality of their work. *Id.* art. 40. Article 41 provides the right to rest and leisure as well as a maximum 41 hour work week, and paid annual holidays. *Id.* art. 41. The free time from work was to allow people to stand on lines to obtain the necessities of life in time of acute shortages. Finally, Article 42 gives Soviet citizens the right to health protection ensured by free, qualified medical care provided by the state. *Id.* art. 42.

13. See Richard A. Epstein, *All Quiet on the Eastern Front*, 58 U. CHI. L. REV.

II. The Perils of Transition

There is, I think, a general moral here in that competitive markets have a capacity to satisfy wants that cannot be matched by any other system. The engine of trade is mutual advantage, and that allows the system to operate without a high degree of compulsion from the center, and to expand the resource base on which, ultimately, the welfare of all citizens heavily depends. It is for just this reason that the set of negative rights, dealing with capacity, that I champion, are so important to any society, rich or poor, regardless of its past.

The point here is simple. I cannot think of any sound constitutional system that is hostile, or even indifferent, to the protection of property rights, free exchange, and the operation of competitive markets. As noted above, the gains from trade are a permanent feature of all social systems, and survive regardless of time and circumstance. To be sure, people in different cultures prefer different marketbaskets of goods, which means that the products and services that are offered for sale, or the prices that are demanded, will change from one culture to another. But far from showing any defect in the system, it is a sign of how one powerful market mechanism is adaptable in a wide range of cultural circumstances.

A second point about markets must be stressed as well: markets have no memory, and the ability to obtain gains from trade is therefore mercifully independent of existence or extent of any past injustices. This separation of past from future is, above all, of emphatic importance in the South African context. It should be regarded not as an evil, but as a good, for it allows people whose backgrounds and outlooks have been marred and scarred by terrible forms of government oppression to participate in a system in which they can share the gains from trade. Indeed, it is precisely because the gains from trade are so important that I strongly oppose a private antidiscrimination law which I regard, like the minimum wage, to be a tax on freedom and initiative for all people.¹⁴

555, 557-71 (1991) (examining the problems Eastern European nations are facing in their transition to a competitive market system). I regard my gloomy estimations of the situation in Eastern Europe as being vindicated, especially by the problems in the former nation of Yugoslavia. The problems of Eastern Europe, including transitional difficulties and racial tensions, are surely present in South Africa, which does have at least one advantage — well functioning markets in certain sectors, even if entry to these markets has been improperly restricted. It is easier, however, to remove an entry barrier than to create a market from scratch.

14. See generally RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE*

The common counterargument is that while markets do not have memories, the social conditions of an earlier age exert enormous influence forward in time, long after the institutions themselves have been consigned to a deserved oblivion. This is correct at one level. There is no question, for example, that black wages in a free society after apartheid will be reduced in virtue of the inferior education that blacks received under an earlier regime. Yet a means-to-ends question must also be answered. While there may be some educational or income transfer programs that can respond to this difficulty, it is doubtful that any effort to alter the terms of trade in contemporary South African labor markets can undo the damage that has already been done. At the time of the passage of the 1964 Civil Rights Act, the clear consensus was that the United States was not in the business of trying to reshape employment markets in order to undo the ravages of a segregated education system.¹⁵ Over time this limited view of the laws has been rejected, and more aggressive legal doctrines, such as the disparate impact formula of *Griggs v. Duke Power Company*,¹⁶ have been invoked in the effort to overcome the social inertia from the past. But the results are not encouraging. Taking a measure that overstates black progress (relative wages of blacks and whites),¹⁷ essentially there has been no movement on this front roughly corresponding to the dismantling of Jim Crow institutions in the South notwithstanding concerted government action since 1975.¹⁸

AGAINST EMPLOYMENT DISCRIMINATION LAWS (1992) [hereinafter FORBIDDEN GROUNDS] (discussing anti-discrimination laws and the problems of disparate treatment, both currently and historically).

15. MICHAEL I. SOVERN, LEGAL RESTRAINTS ON RACIAL DISCRIMINATION IN EMPLOYMENT 70-71 (1966).

16. 401 U.S. 424 (1971).

17. See generally FORBIDDEN GROUNDS, *supra* note 14, at 242-66. There I argued that the use of relative wages was a defective measure of the effects of the civil rights laws, either on blacks or on the population as a whole. Any reduction in the gap between black and white earnings could be attributable to a decline in white wages as well as an increase in black wages, or indeed some combination of the two. The narrowing of the gap would be desirable if the overall level of wages increased, or perhaps even if it remained constant. But there is no empirical evidence of any overall increase in real wages, and good theoretical reasons to believe that the administrative and allocative costs of the antidiscrimination law have left both white and black workers worse off than they would have been in the absence of the statute.

18. See James J. Heckman & J. Hoult Verkerke, *Racial Disparity and Employment Discrimination Law: An Economic Perspective*, 8 YALE L. & POL. REV. 276, 280-92 (1990) (examining the wages of black workers, the proportion of black to

It is of course desirable to seek to create a "level playing field" after the historical regulations have created unconscionable distortions in labor markets (distortions measured, it must be noted, against libertarian standards). But the process of correction is fraught with pitfalls that make well-intentioned actions highly counterproductive. The antidiscrimination law is no exception. For many blacks in South Africa, an antidiscrimination law says, unless you keep your wage demands at the level of white persons, you are not allowed to compete with them, and thus may well find yourself shut out of the market by the inflexibility of the law's commands. Open markets and private property are the formula for constitutional success.

Here, then, is my warning: the problems of transition should not be allowed to obscure these fundamental truths. One great danger is that the drafters of the next South African constitution *will not distinguish clearly between the rectification of past injustices and the adoption of a general socialist economy*, replete with all sorts of fancy economic and social rights. Yet that distinction is critical if any progress is to be made on this front. When one asks what were the injustices of the past regime in South Africa, the answer is both familiar and correct. Large numbers of nonwhite individuals were denied participation in the political process, their land was taken from them, and they were not allowed to enter the marketplace on the same terms and conditions as white persons. The lesson to be learned here is not that socialism is good, but rather that the taking of land (especially without compensation) is bad, and that restrictions on labor markets lead to enormous levels of unnecessary human suffering.

In my view, there ought to be some rectification of these past wrongs. Case by case justice is impossible to achieve when the wrongs were so pervasive and systematic. Trying to match up wrongdoer with victim on a case by case basis is too costly, and the difficulties that the Eastern Europeans are having in implementing their system of case by case restitution should serve as a warning against implementing it in South Africa.¹⁹ Clear title to land is necessary for anyone to make productive investments in the future. By the same token, however, the level

white workers, and the occupations of black workers as measurements of black economic progress).

19. See Katie Hafner, *The House We Lived In*, N.Y. TIMES, Nov. 10, 1991, at 32 (describing the problems of creating a system of compensation when there have been successive acts of confiscation, first by the Nazis and then by the East German and Soviet regimes).

of the wrongs (measured in the world of negative rights, as I have defined them) is so great that it becomes unthinkable to do nothing by way of rectification. Efforts should be made to separate the question of future institutions from that of compensation for past wrongs.

It seems, therefore, both necessary and inevitable to explore the uses and dangers of a *one-time* transfer of all the wealth in the hands of white South Africans, which could be distributed in some way for the benefit of nonwhite citizens of South Africa. The most obvious difficulty with this proposal stems from the words "one time." There is no guarantee that any transfer so ordered will be done only once. If there is a political majority of nonwhites, what is to prevent that majority from trying the same tactic twice when its anticipated ameliorative effects have not "panned out" the first time? Yet if the tactic of race-based transfer systems is regarded as always available, then the response will be a major exit from South Africa by the parties to be taxed. Even the complete confiscation of land and other forms of wealth could well leave South Africa the poorer, because human capital (and some forms of intellectual and physical capital) are portable, and will leave if the levels of taxation are both capricious and high. There is thus a problem of killing the goose that lays the golden egg. And the only way to have any chance to forestall that unhappy outcome is to build in at least one race-based, nonamendable, constitutional provision that requires overwhelming white consent before the next generation of special taxes is imposed.²⁰

Of course, many problems remain before this system of transfers could be put into effect. I am not quite sure what mechanism should be adopted to work these transfers — how much the tax should be, whether it is payable in a lump sum or in fixed amounts of some period of time — and these problems will require enormous deliberation and discussion before they can be resolved. Certainly, however, the adoption of a socialist, or even a statist constitution, will do nothing to rectify

20. As a precedent for such provisions, consider portions of the original American constitution that are not amendable in the ordinary way. Article IV makes it impossible to form a new state out of an old one, or by a merger of parts of two or more states, without the consent of the affected states. U.S. CONST. art. IV, § 3, cl. 1. Relating to the amendment process, Article V provides that "no State, without its Consent, shall be deprived of its equal Suffrage in the Senate." U.S. CONST. art. V. Article V also provides that the power of states to allow the migration or importation of slaves by existing states before 1808 could not be limited by constitutional amendment. *Id.* It is clear that, as with all political power, limitations on amendments may be done for reasons of high principle or political compromise and necessity.

past harms, but will only aggravate the transitional process by creating conditions of general economic austerity. It will also hamper the willingness of the white majority to cede to any constitutional reform because whites will quickly understand that the broad discretion that government officials always possess in a socialist economy can easily be turned against them. If so, their liabilities would not be liquidated, and hence there could be no permanent settlement of past grievances in a way that allows the business of life to go forward in a secure political and economic climate.

There are further corollaries that follow from this program of constrained rectification of past harms. These refer most critically to the problem of majority rule, which will, and should at some point in the future, pass into black hands in South Africa. But the question remains regarding what powers the majority should have, in both economic and social affairs, and more generally, in any issues decided through the political process. Here, I want to take a leaf from Roger Pilon's earlier remarks,²¹ about the uneasy moral status of any system of majority rule, which for all its virtues in combatting dictatorship is not the same as unanimous consent. At one level the frailty of majority rule should lead to a certain level of caution in interfering with competitive processes. There will be less white resistance to majority rule in South Africa if there is some *credible* system of constitutional constraints that limits what that majority can do.

More to the point, our uneasiness with majority will should lead us to adopt, with more enthusiasm than American judges have shown, the compromise between majority will and minority rights that is contained in the takings clause of the Fifth Amendment of the American Constitution: "nor shall private property be taken for public use, without just compensation."²²

The United States Supreme Court, when asked to construe this provision, has decided, in effect, that over broad domains there is no conflict between the dictates of majority will and the requirements of the takings clause. The Court has basically decided that all general forms of economic regulation (including those which authorize tenants to remain in perpetuity on their landlord's premises) are "mere" forms of economic regulations that do not rise in dignity to the level of compensable takings.²³ Only a narrow class of physical occupations by government

21. Roger Pilon, *On the First Principles of Constitutionalism: Liberty, then Democracy*, 8 AM. U.J. INT'L L. & POL'Y 531, 537 (1993).

22. U.S. CONST. amend. V.

23. See *Yee v. City of Escondido*, ___ U.S. ___, 112 S. Ct. 1522 (1992) (hold-

for its own use, for example, taking land for a post office, automatically merits constitutional protection. Outside of this narrow class of takings, the government is free to regulate or not at its own pleasure.

In principle the major question under the takings clause is whether this effort to split property into two parts is intellectually sustainable. In my own view it is clearly not. The dangers of majority rule are every bit as great with respect to regulation as they are with occupation, for it should never be supposed that restrictions are imposed solely to limit the value of property to its owners. Rather, that cost is incidental to creating benefits for the political group that is in favor of the laws.

Instead of preserving an untenable distinction, the entire scope of regulation should be made to adhere to the basic compromise between majority rule and minority rights that is found in the takings clause.

The key compromise is this: the majority may rule on these economic affairs, but while it sets the general rules, it must not discriminate against the minority which is bound by its rules. Within a corporate context, this rule would provide that the majority of shareholders could set the dividend level for common stock, but once that level is set, then it must pay the same dividend to the minority as it pays itself. Carried over to the public arena, the injunction means that when the state wishes to impose burdens on some of its members for the common good, it must do so equally. The disproportionate impact of the burdens imposed become key.²⁴ Where the benefits and burdens of a statute are equal in form and in fact, no cash compensation is required because the majority has not favored itself, and has therefore protected the minority by a nondiscrimination provision. The overall welfare is advanced because no majority will vote for a system that hurts itself, and therefore, it will not vote for a system that hurts the minority protected against unbridled majority will. But where the majority has discriminated against a minority, compensation is required to equalize the ultimate burdens and to discourage those unwise political schemes that might pass if unwise programs could be funded out of the hides of some embattled minority.

The adoption of this principle for the relationship between majority

ing that a rent control ordinance did not constitute a physical taking of an owner's property). *See also* Penn Central Transp. Co. v. City of New York, 438 U.S. 104 (1978) (finding that the city's landmark preservation law did not create a taking of property within the meaning of the fifth amendment). *But see* TAKINGS, *supra* note 3, at 263-73 (attacking current takings jurisprudence).

24. *See* TAKINGS, *supra* note 3, at 195-215 (criticizing the disproportionate impact test as not truly identifying or correcting inequalities in eminent domain issues).

and minority rule, once the rectification for past wrongs is dealt with separately, is critical to the maintenance of democratic institutions in South Africa. Without it, the white political majority will never yield control to the black electoral majority. Without it, the forms of central planning will sap the overall operation of the system, and lead to the inexorable expansion of government. In a nation where political distrust will continue long after all practical compromises have been reached on constitutional matters, the case for *small, limited* government is far stronger than it is in nations where the homogeneity of the population reduces the risk of expropriation, discord, and conflict that are present not only in the former nation called Yugoslavia, but everywhere people are divided amongst each other.

The nature of the warning bears repetition: do not confuse rectification of past wrongs with the creation of large socialist states. Work desperately to achieve a final resolution of claims stemming from past wrongs in order to get on with the future. No one who believes in small government can, or should, underestimate the evils brought on by a system of apartheid. But by the same token, no architect of a South African constitution should ignore the dangers of socialism or unbridled majority excesses, even of one's own friends.

