

WELFARE RIGHTS IN STATE CONSTITUTIONS

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Although nearly two dozen state constitutions contain some type of affirmative guarantee of welfare rights, state courts are extremely reluctant to enforce those rights. This Article applies a comparative approach to the under-enforcement problem by examining how courts in Europe and South Africa wrestle with affirmative rights in their constitutions. The analysis suggests that courts lack the institutional incentives to vigorously enforce welfare rights and instead rely on more familiar modes of judicial review of individual rights claims. Consequently, if U.S. state courts are to take the enforcement of welfare rights seriously, they will do better by utilizing analytic frameworks more recognizable to the state judiciary, such as equal protection.

I. LOCATING SOCIAL RIGHTS IN CONSTITUTIONS

Over a decade ago, Congress passed the Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA),¹ devolving substantial responsibility for implementing welfare to the states. Following this change, state legislatures became a primary arena for contesting the extent and nature of welfare provision. In the courts, state constitutions rarely played a role in the contestation over welfare provision and state governments' newfound role in it. This is somewhat surprising given that

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1. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

twenty-three state constitutions, unlike the Federal Constitution, either implicitly or explicitly empower the government to provide for the poor or indigent of the state.² Devolution of welfare control to the states would thus seem to offer an opportunity to breathe life into these constitutional provisions to expand social welfare at the state level. Yet, this has not happened.

Instead, state courts have shown a pronounced reluctance to enforce a broad range of constitutionally enshrined positive rights, such as care for the needy and environmental protection.³ When plaintiffs have occasionally raised state constitutional claims under social welfare provisions, the courts have almost uniformly deferred to the legislature to determine the substance of these rights.⁴ This approach seems to reflect the frequent concerns raised by scholars about the enforceability of positive rights in constitutions, particularly in regard to separation of powers issues.⁵ Whereas the enforcement of negative rights only demands that a court invalidate legislation or prevent governmental action, positive rights enforcement requires a court to obligate the legislature to act, thus entering into the arena traditionally reserved for the political branches. If social rights are truly unenforceable, they may be meaningless provisions in constitutions, or even undermine constitutional legitimacy.

This Article seeks to address whether social rights can play a meaningful role in state constitutions by taking a broad comparative view. Unlike the U.S. Constitution, many more “modern” constitutions include social rights. Following World War II, European states rewrote their constitutions, adding rights such as adequate housing, minimal subsistence, and employment. By the end of the twentieth century, Eastern Europe and the European Union had followed suit, as did South Africa and other emerging democracies. At least in the industrialized European democracies, the constitutions operated within the framework of extensive welfare states. Whether locating rights to social welfare within constitutions contributed to or reinforced governmental provision of welfare will be the primary focus of this Article. The interplay among constitutional provisions, the courts, and the legislatures within

2. William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 551 (1998).

3. See generally Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1132 (1999) [hereinafter Hershkoff, *Rationality*]; Jose L. Fernandez, *State Constitutions, Environmental Rights Provisions, and the Doctrine of Self-Execution: A Political Question?*, 17 HARV. ENVTL. L. REV. 333 (1993).

4. Hershkoff, *Rationality*, *supra* note 3 at 1145-52. See also *infra* Part I.B.

5. See *infra* Part I.A.

societies more comfortable with government provision of welfare might suggest alternative strategies for giving life to dormant provisions in U.S. state constitutions.

Part I revisits the debates over positive rights and the problems with guaranteeing social welfare in a constitution. The focus then shifts to social rights in state constitutions in the United States and the reluctance state courts have shown in enforcing these rights. The uniform lack of enforcement suggests that state courts either lack the tools or sufficient incentives to effectuate social rights.

Part II addresses how state courts might view social rights differently by examining the case of Germany, as well as other European countries. In fact, no country places social rights in the same category as political or civil rights—the so-called negative rights. Instead, European constitutional courts traditionally defer to the legislature to determine the nature of positive rights. Even courts thought of as more activist than those in Europe, such as those in South Africa, exercise substantial restraint in enforcing social rights. Nevertheless, particularly in Europe, locating these rights in constitutions may establish a “floor” for social welfare, creating a minimal level of the state’s duty of care to its citizens.

Part III then returns to the United States and asks whether constitutionalizing social rights can play any meaningful role in the welfare debate, given the European experience with judicial enforcement and the social context in which these norms operate.

A. The Debate Over Positive Rights

Constitutional scholars differentiate between negative rights—the prohibition on government to interfere with individual behavior—and positive rights—the obligation of government to provide some benefit.⁶ Whereas negative rights can be satisfied without the government taking any action, positive rights always require some type of affirmative governmental action.⁷ Negative rights are generally thought to represent the traditional role of constitutions. Constitutions exist to restrain government action, rather than to determine when governmental inaction would violate the compact

6. The literature on differentiating among constitutional rights is voluminous. *See e.g.*, STEPHAN HOLMES & CASS SUNSTEIN, *THE COST OF RIGHTS* (1999); ISAIAH BERLIN, *FOUR ESSAYS ON LIBERTY* (1970); Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L. REV.* 857 (2001); David P. Currie, *Positive and Negative Constitutional Rights*, 53 *U. CHI. L. REV.* 864 (1986).

7. Cross, *supra* note 6, at 869.

between state and citizen.⁸ The framers of the U.S. Constitution principally feared that a constitution unable to restrain governmental power would result in tyranny.⁹ Many more recent constitutions have been written in the shadow of previous authoritarian regimes, when individual liberties were at the mercy of an unrestrained national government. Even if constitution writers desired to place affirmative obligations on the state, civil and political rights took center stage. According to one observer, “[n]o constitution recognizing the rule of law has yet actually succeeded in practice in turning away from the classical negative understanding of fundamental rights.”¹⁰

Positive rights, however, remain much more controversial as to whether they should be enshrined in constitutions. According to conventional wisdom, social rights are meaningless in a constitution because they are generally unenforceable by courts.¹¹ Since the provision of benefits is the duty of the legislature, a court would raise separation of powers issues by obliging the state to provide specific benefits.¹² In addition, obligations are more likely than limitations on government to create significant budgetary implications, making it less likely that the political branches would enforce a court-ordered obligation to provide some benefit.¹³ This is particularly true in the case of welfare provisions, such as care for the poor, which might require substantial resource allocations by the legislature. Social rights also raise problems in regard to individual remedies. An individual petition based on the government’s failure to implement a constitutional right to a particular benefit does not allow the court to consider the nature of competing claims for the state’s resources or the number of people similarly situated to the plaintiff.¹⁴ Although courts also face limitations in understanding the wider implications of an individual’s claim that the government violated his/her negative rights, the consequences are much greater in the arena of social

8. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271, 2273 (1990).

9. James Madison, in particular, devotes many of his arguments in *The Federalist Papers* to the various constitutional mechanisms designed to prevent any one branch or level of government from usurping too much power.

10. Currie, *supra* note 6, at 898 (citation omitted).

11. See Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1896 (2004).

12. See, e.g., Jonathan Feldman, *Separation of Powers and Judicial Review of Positive Rights Claims: The Role of State Courts in an Era of Positive Government*, 24 RUTGERS L.J. 1057, 1061 (1993); Frank I. Michelman, *The Constitution, Social Rights, And Liberal Political Justification*, 1 INT’L J. CONST. L. 13 (2003).

13. Cross, *supra* note 6.

14. CECILE FABRE, *SOCIAL RIGHTS UNDER THE CONSTITUTION* 176-79 (2000).

rights. For example, if a court were to find that a state's welfare laws do not provide for an individual's minimal subsistence and thus violate a constitutional right to care for the needy, the legislature would then be obligated to revise its laws to provide minimal subsistence for the plaintiff, as well as everyone else similarly classified as needy. The potential for unforeseen, or even recognized, costs creates enormous barriers for courts to enforce social rights.

Despite these obstacles, some scholars argue that the difference between negative and positive rights has been overemphasized. Although free speech, for example, has been interpreted as a negative right preventing government from interfering in a person's ability to communicate freely, it often requires action on the part of the government to see that the right is enforced.¹⁵ Negative rights thus have "complementary positive duties" on the state to make the right effective.¹⁶ The example of desegregation in the United States highlights this point. In *Brown v. Board of Education*,¹⁷ the Supreme Court struck down the "separate but equal" principle in the context of public education as a violation of the Equal Protection Clause. In fashioning a remedy, the Court ordered that the defendants make a "prompt and reasonable start" to desegregating the public schools in their states and remanded the cases to the district court to address the specific plans of the school districts.¹⁸ The Court thus recognized that fulfillment of the Equal Protection Clause required positive action on the part of public school districts. Although it would primarily be the role of the localities to determine the means of desegregation, the courts would oversee this process.¹⁹

Mark Tushnet also argues that the enforceability problem should not delegitimize social rights.²⁰ Constitutionalized social rights need not imply strong individual remedies to have constitutional meaning. While he agrees that strong judicial enforcement of social rights creates separation of powers issues, he argues that purely declaratory rights or rights with weak remedies, such as those reviewed under a rational basis standard, still retain

15. See Cross, *supra* note 6, at 864-65 (critiquing this approach).

16. FABRE, *supra* note 14, at 45-47.

17. 347 U.S. 483 (1954).

18. *Brown v. Bd. of Educ.*, 349 U.S. 294, 300 (1955).

19. *Id.* at 299.

20. Tushnet, *supra* note 11, at 1895. Other scholars emphasize that the lack of judicial enforcement of socioeconomic rights constitutes a failure by the courts to uphold basic individual or human rights. See, e.g., DAVID BILCHITZ, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* (2007); Philip C. Aka, *Analyzing U.S. Commitment to Socioeconomic Human Rights*, 39 AKRON L. REV. 417 (2006).

constitutional meaning.²¹ Constitutional rights do not solely depend on the courts for enforcement; numerous other institutional mechanisms exist in a democratic society that are more suited to positive rights.²² In particular, Tushnet points to a mobilized civil society as the most likely source, using political pressure on the legislature and other political actors to provide substance to social welfare rights.²³

Nevertheless, constitutional rights create expectations that they will be judicially enforced if necessary.²⁴ Constitutional litigation in the United States, rather than political mobilization, has increasingly served the purpose of addressing these expectations for individuals. Consequently, it would likely be difficult for Americans to conceive of constitutional rights as meaningful but not justiciable, where state courts would have no role to play in enforcing their rights.²⁵

B. *Welfare Rights in State Constitutions*

It is an accepted principle of constitutional law that the Federal Constitution contains only negative rights. As Judge Posner so famously extolled, the U.S. Constitution “is a charter of negative rather than positive liberties. . . . The men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them.”²⁶ In a long line of cases, the Supreme Court has clearly stated that there is no constitutional duty on the federal government to provide substantive services for its citizens. In 1970, the Court held that decisions about the allocation of public welfare funds were judicially unreviewable

21. Tushnet, *supra* note 11, at 1900-03. For an alternative approach, see Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT’L J. CONST. L. 391 (2007), which advocates for a strong rights/weak enforceability approach to socioeconomic rights.

22. Tushnet, *supra* note 11, at 1918.

23. *Id.*

24. See, e.g., Helen Hershkoff, *Essay: Welfare Devolution and State Constitutions*, 67 FORDHAM L. REV. 1403, 1428 (1999) [hereinafter Hershkoff, *Devolution*] (discussing how the history of New York’s “care of the needy” constitutional provision created a basic duty of the state to its citizens).

25. Although in favor of weak rights as a means to expand the constitutional basis for social rights in the U.S., Tushnet acknowledges the potential for these rights to gain unenforceable potency. Judges and litigators, operating within existing norms, expect that constitutional rights attach to enforceable remedies. But he does not view purely declaratory rights as necessarily problematic within the U.S. constitutional framework. Tushnet, *supra* note 11, at 1918.

26. *Jackson v. City of Joliet*, 715 F.2d 1200, 1203 (7th Cir. 1983).

unless they violated the Fourteenth or Fifth Amendment.²⁷ Although the Supreme Court, in the same term, seemed to recognize welfare benefits as a property right that could not be denied without procedural due process, the Court did not expand the burden on the state beyond procedure.²⁸ In *San Antonio Independent School District v. Rodriguez*,²⁹ the Court declined to recognize the poor as a suspect class for equal protection analysis. In *DeShaney v. Winnebago County Department of Social Services*,³⁰ the Court held that the Due Process Clause does not create a protective duty on the part of the state. Instead, the Framers relegated that duty to “democratic political processes.”³¹

On the state level, however, constitutions entrust the legislature with the fundamental decision of whether or not to provide basic welfare support. According to one study, twenty-three state constitutions implicitly or explicitly establish protections for the poor.³² These constitutional provisions range from categorical statements of an affirmative obligation on the state to care for the needy, to permissive grants of power to the state to provide such care, to the creation of public agencies to address the needs of the poor without any specific constitutional obligations.³³ Only four states’ constitutions—Alabama, Kansas, New York, and Oklahoma—command the state or their subunits to provide for the poor.³⁴ Alabama’s constitution contains the strongest affirmative language, establishing that “[i]t shall be the duty of the legislature to require the several counties of this state to make

27. *Dandridge v. Williams*, 397 U.S. 471, 487 (1970) (“[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.”).

28. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (“Public assistance, then, is not mere charity, but a means to ‘promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.’ The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.”).

29. 411 U.S. 1 (1973).

30. 489 U.S. 189, 195 (1989) (“The [Due Process] Clause is phrased as a limitation on the State’s power to act, not as a guarantee of certain minimal levels of safety and security.”).

31. *Id.* at 196.

32. Rava, *supra* note 2, at 552.

33. *Id.*

34. I am adopting the typology of state constitutional provisions from Rava, *supra* note 2. Arguably, the constitution of North Carolina also commands its legislature to act in the interests of the indigent, but it does not require the same direct action by the legislature as the other four constitutions in this category. North Carolina’s constitution states, “Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare.” N.C. CONST. art. XI, §4.

adequate provision for the maintenance of the poor.”³⁵ The other three constitutions limit the affirmative language by granting the legislature the power to determine the nature of the welfare provision.³⁶ For example, the New York Constitution states, “The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.”³⁷

Despite the concerns about the budgetary and political implications of locating social rights in constitutions, some scholars argue that state courts are particularly well suited to enforce such provisions. Helen Hershkoff argues most passionately for state courts to enforce affirmative rights.³⁸ Hershkoff contends that state judges, as opposed to federal judges, function within a common law tradition that creates a policymaking role for them.³⁹ Thus, state courts may more easily “instruct” legislatures on how to carry out their affirmative obligations without running afoul of traditional separation of powers issues.⁴⁰ Moreover, since state judges are typically elected and democratically accountable, they can balance the constitutional obligations on the state with the electorate’s concerns over the budgetary implications. Whereas federal judges can avoid the murky territory of positive rights by claiming that unelected judges should not interfere in political questions, state judges retain the “democratic imprimatur” to participate in these debates.⁴¹ State constitutions can then operate as “enabling documents,” providing democratically elected judges the textual authority to address a wide variety of social issues and wade more deeply into the political morass.⁴² Given that the federal government has largely ceded control over social welfare to the states, particularly following the Personal Responsibility

35. ALA. CONST. § 88; *see also* Rava, *supra* note 2, at 555.

36. Rava, *supra* note 2, at 555.

37. N.Y. CONST. art. XVII, § 1.

38. Helen Hershkoff, *Foreword: Positive Rights and the Evolution of State Constitutions*, 33 RUTGERS L.J. 799 (2002) [hereinafter Hershkoff, *Foreword*]; Hershkoff, *Rationality*, *supra* note 3.

39. Hershkoff, *Rationality*, *supra* note 3, at 1169.

40. Hershkoff, *Foreword*, *supra* note 38, at 829. Hershkoff argues that positive rights in state constitutions “offer access points into policymaking.” *Id.*

41. Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893 (1988-89); Robert F. Williams, *Symposium: The Maryland/Georgetown Constitutional Law Schmooze: Juristocracy in the American States?*, 65 MD. L. REV. 68, 73 (2006).

42. Neuborne, *supra* note 41, at 898.

and Work Opportunity Reconciliation Act of 1996,⁴³ state courts have the potential to significantly impact the debate over social welfare benefits, particularly in those states with obligatory constitutional language. As Hershkoff argues, constitutionally entrenched social rights “should thus be understood as constraining the legislature’s otherwise unfettered discretion to choose from among competing policy alternatives,” eliminating those policy choices that “evade, undermine, or fail to carry out” the constitutional provision.⁴⁴ Such provisions, therefore, not only empower, but oblige state courts to participate in the policy debate.

Nevertheless, state courts have not readily taken up the banner of affirmative rights. Decisions interpreting constitutional welfare provisions are rare.⁴⁵ Moreover, state courts apply a deferential rational basis review, making social welfare legislation practically unreviewable under the constitution.⁴⁶ The New York courts have most frequently taken up the state’s affirmative duty to “care for the needy.” In *Tucker v. Toia*,⁴⁷ the court of appeals struck down a portion of the Social Services Law that required minors to obtain a final court order of disposition of financial support against a parent or guardian in order to be eligible for home relief. The court found that the law essentially withheld benefits from minors who were in the process or could not obtain such orders, thus violating article XVII, section 1 of the New York Constitution.⁴⁸ In his decision, Judge Gabrielli noted, “In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution.”⁴⁹ Similarly, in *Aliessa v. Novello*,⁵⁰ the court held that a provision of the state’s Medicaid laws that withheld benefits from legal aliens violated the state constitution under the principle established in *Tucker*.⁵¹ Although the court made clear that it would be willing to strike down any law that withheld

43. Pub. L. No. 104-193, 110 Stat. 2105 (1996).

44. Hershkoff, *Devolution*, *supra* note 24, at 1414.

45. In a simple Westlaw search for judicial citations of the four state constitutional provisions asserting affirmative welfare obligations on the government, the Alabama provision was cited ten times since 1993, the Kansas provision was cited twelve times since 1912, and the Oklahoma provision has been cited ten times since 1908. The exception is New York, whose constitutional provision has been cited by state courts approximately 140 times since its inception in 1938 and another thirty times by New York federal courts.

46. Hershkoff, *Rationality*, *supra* note 3, at 1136.

47. 371 N.E.2d 449 (N.Y. 1977).

48. *Id.*

49. *Id.*

50. 754 N.E.2d 1085 (N.Y. 2001).

51. *Id.* at 1093 (citing *Tucker*, 371 N.E.2d 449).

benefits from a classification of people not based on need, it refused to go beyond that pronouncement.⁵² In *Bernstein v. Toia*,⁵³ a companion decision to *Tucker*, the court of appeals denied a challenge to a New York law that altered the public assistance housing allowance to a flat sum that could not be adjusted based on individual need. The court rejected the notion that article XVII “mandate[s] that public assistance must be granted on an individual basis in every instance”⁵⁴ and clarified that the role of the courts was not to supervise the legislature’s determination of benefits outside the limits expressed in *Tucker*.⁵⁵ In the thirty years since the court of appeals decided *Tucker* and *Bernstein*, the court has not altered the parameters of judicial review under article XVII.⁵⁶

New York’s deferential standard of review mirrors the approach of other state courts, including the other three states with affirmative welfare provisions in their constitutions. In *Atkins v. Curtis*,⁵⁷ the Alabama Supreme Court recognized that “of course there is no way to force the legislature [to require counties to provide for the poor] although it has always undertaken to do so.”⁵⁸ Kansas, another state with affirmative constitutional language to care for the poor, directly adopted New York’s rational basis standard of review, finding no Kansas authority to determine how its constitutional provision should be interpreted.⁵⁹ Although the decision upheld legislation that decreased cash assistance and medical benefits to poor Kansans, the court noted that there might come a time when a reduction of benefits might violate the state constitution without suggesting what that time might be.⁶⁰

By limiting judicial review to situations where benefits have been withheld from a class of persons, the New York and Alabama courts are essentially performing the same equal protection analysis as courts in states

52. *Id.*

53. 373 N.E.2d 238 (N.Y. 1977).

54. *Id.* at 244.

55. *Id.* Judge Gabrielli, writing for the majority in *Tucker*, 371 N.E.2d 449, dissented from the decision in *Bernstein*, 373 N.E.2d 238, 245 (Gabrielli, J., dissenting). However, he did so on the grounds that the new law conflicted with a section of the Social Services law that provided for the consideration of “individual case circumstances,” rather than on state constitutional grounds. *Id.* at 245-46. *See also* Aliessa v. Novello, 754 N.E.2d 1085, 1092 (N.Y. 2001); Rava, *supra* note 2, at 562-63.

56. *See, e.g.*, Aliessa v. Novello, 754 N.E.2d 1085 (N.Y. 2001); McCain v. Bloomberg, 806 N.Y.S.2d 446 (N.Y. App. Div. 2005).

57. 66 So. 2d 455 (Ala. 1953).

58. *Id.* at 458. *See also* Rava, *supra* note 2, at 564.

59. Bullock v. Whiteman, 865 P.2d 197, 201-03 (Kan. 1993).

60. *Id.* at 206.

without affirmative constitutional rights; the affirmative constitutional obligation serves no independent constitutional value.⁶¹ For example, the New Jersey Supreme Court in *Sojourner v. New Jersey Department of Human Services* held that a state law that denied incremental benefits to children born into families receiving benefits under Temporary Assistance to Needy Families did not violate the state constitution's equal protection clause under the court's balancing test.⁶² As in New York's decision in *Bernstein*, the court held that since the law did not withhold all benefits or deprive welfare recipients of the right to bear a child, it did not violate the state constitution.⁶³ In Ohio, the supreme court applied a rational basis standard of review under the federal and state equal protection clauses to uphold a law that cut off state welfare and medical benefits after six months, unless the person was determined to be disabled.⁶⁴ And in a landmark case in Connecticut, the state supreme court upheld a state law terminating cash benefits to indigent citizens after nine months.⁶⁵ The Connecticut court found that despite the state's long history of providing for the poor, the state constitution contained no such affirmative right.⁶⁶

By limiting judicial review to this same equal protection analysis under obligatory welfare provisions in constitutions, state courts are essentially converting a positive right into a negative right. Whereas a positive right would require an affirmative response by the state to provide substance to the constitutional provision, the negative right only prevents the state from encroaching on an individual's right to equal protection under the law. The

61. I am only addressing value as it relates to judicial enforcement, rather than other societal values. See the discussion of Mark Tushnet's arguments, *supra* note 11 and accompanying text.

62. 794 A.2d 822 (N.J. 2002).

63. *Id.* at 169. Since New Jersey has no affirmative right to care of the needy, plaintiffs in this case sued under the state constitution's right to privacy and equal protection clauses.

64. *Daugherty v. Wallace*, 621 N.E.2d 1374 (Ohio 1993) (holding also that Ohio's constitution does not create an affirmative state duty to provide minimal subsistence to its residents under its clause establishing the right to seek and obtain safety).

65. *Moore v. Ganim*, 660 A.2d 742 (Conn. 1995).

66. *Id.* at 754-55 (noting that state supreme court precedent did not even recognize a governmental obligation to remove obstacles to an individual's fundamental civil rights unless those obstacles were of the government's making). Although *Moore v. Ganim* does not rely on an equal protection analysis, the basic principle is the same: the court (and plaintiffs) looked to other constitutional provisions and state history to locate an affirmative state obligation. *Id.* at 769. Finding none, the court applied the same rational basis review of the challenged legislation. *Id.* The case is unique, however, in its comprehensive analysis of history and precedent.

prevailing judicial analysis thus results in no separation of powers issues or problems with the court overstepping its authority.

Although there are some instances where state courts have taken a more assertive stance in locating social rights, they bear little relation to the specific language in the state constitution. In *State ex. rel. K.M. v. West Virginia Department of Health and Human Resources*,⁶⁷ the court found the provision in the West Virginia Constitution establishing the office of the Overseers of the Poor created “the principle that government has a moral and legal responsibility to provide for the poor.”⁶⁸ Nevertheless, the court upheld the bulk of the challenged legislation, finding that the termination of cash benefits after five years did not violate the newfound constitutional duty⁶⁹ but only required a modification of the hearing process to comport with due process.⁷⁰

Regardless of constitutional language, no state court appears to have invalidated legislation on the basis of the amount or type of benefits, nor has a court commanded the legislature to provide minimal subsistence to its citizens. Even Montana’s supreme court did not enforce the state’s constitutional right to welfare outside of the equal protection clause, prior to being rebuked by the voters for its judicial activism in a referendum that eliminated the obligatory affirmative language to provide for the poor.⁷¹ In *Butte Community Union v. Lewis* (“*Butte II*”) the court struck down legislation that withheld welfare benefits for two months from “able-bodied persons.”⁷² In doing so, however, the court stated, “We do not hereby declare

67. 575 S.E.2d 393 (2002).

68. *Id.* at 405. The dissent to this part of the Court’s decision merits repeating: According to the majority, the mere mention of “overseers of the poor” grants to the poor of this State a constitutional right to subsistence. I notice that Art. IX, §2 also says that the county court shall appoint “surveyors of roads.” Using the majority’s method of analysis, does this mean that the State now has a moral and legal constitutional duty to provide every citizen of the State with a sufficient highway? This is doubtless good news to the large number of rural West Virginians who regularly travel on simply awful roads.

Id. at 412 (Maynard, J., dissenting).

69. *Id.* at 406.

70. *Id.* at 409.

71. In 1988, Montana’s voters approved a constitutional amendment that replaced the obligatory language of “shall provide” economic assistance to the needy with permissive language of “may provide.” See Rava, *supra* note 2, at 566. See also Zempel v. Uninsured Employers’ Fund, 938 P.2d 658 (1997) (applying rational basis scrutiny the challenged provision after holding that the heightened scrutiny in *Butte I* and *Butte II* no longer applied following the constitutional amendment).

72. 745 P.2d 1128 (Mont. 1987) (quoting MONT. CONST. art. XII, § 3(3)).

that inhabitants have a constitutional right to public assistance. We do declare that the legislature, in performing its duty under [the economic assistance clause], must not act arbitrarily between classes of entitled persons.”⁷³

The limited and deferential review that state courts give welfare legislation suggests that even explicit constitutional provisions to provide for the needy lack force. The uniformity of this result thus raises questions about why this is the case. Perhaps it is symptomatic of the weakness of state constitutional law overall. As Professor James A. Gardner has vigorously argued, state courts rarely rest their decisions on state constitutional grounds, even when the state constitution offers greater protection of individual rights than its federal counterpart.⁷⁴ If state jurists are so reluctant to rely on their state constitutions in the traditional realm of negative rights, then the less familiar realm of positive rights might create even more barriers to applying state constitutional law. Certainly, the reliance on equal protection analysis of social welfare legislation, rather than creating a unique approach to positive rights, may arise from this “lockstep” approach.⁷⁵ By relying on equal protection analysis to give meaning to social rights provisions, courts are on the more familiar terrain of determining when the government has intruded on individual rights. In addition, the unequivocal position of the Supreme Court regarding social rights might reinforce the obvious reluctance by state judges to enforce their constitutional provisions.

Yet the uniqueness of affirmative rights to state constitutions suggests that there is more to the story than the infirmity of state constitutional law. In the case of positive rights, state courts don’t simply rely on federal constitutional law. They fail to enforce the provisions outside of the Due Process and Equal Protection Clauses, making them all but meaningless. This suggests that state courts either lack the incentives to robustly enforce social rights or feel institutionally constrained to do so. Moreover, despite the pleas emanating from law review articles for litigants to make more frequent use of state welfare provisions as the best available constitutional redress,⁷⁶

73. 745 P.2d at 1133.

74. James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 788 (1992).

75. William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions of Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 550-51 (1986).

76. Helen Hershkoff is the most notable advocate of these provisions. See Hershkoff, *Foreword*, *supra* note 38. But see Sarah Ramsey & Daan Braveman, “*Let Them Starve*”: *Government’s Obligation to Children in Poverty*, 68 TEMP. L. REV. 1607, 1622 (1995) (“The state constitutional analysis is complicated but provides perhaps a greater potential for finding meaningful constitutional protection for poor children.”).

these provisions are rarely cited in judicial decisions. This suggests that litigants do not view the provisions as effective tools of legal argument. One is then left with the question as to whether the enforcement of social rights is simply a problem of restructuring the incentives of state courts or whether social rights fit no better into the state constitutional arena than into the federal arena.

C. Comparative Constitutionalism

In her exhortation to state courts to enforce positive rights, Professor Hershkoff notes that the experiences of other nations might provide valuable insights as to how to overcome the enforcement barrier.⁷⁷ In doing so, she echoes the advice of numerous other scholars to trawl international waters in developing new legal strategies.⁷⁸ The value of comparative constitutionalism has become a more frequent topic of discussion in light of the debates among the Supreme Court Justices over the use of comparative materials.⁷⁹ Proponents of comparative constitutionalism argue that contemporary constitutions share a concern for Immanuel Kant's "cosmopolitan right"—the right of every person to "civilized behavior" at the hands of the government.⁸⁰ Post-World War II constitutions typically go beyond the negative rights of the U.S. Constitution, incorporating a commitment to social solidarity, shared rights and duties of all citizens, and

77. See Hershkoff, *Foreword*, *supra* note 38, at 830.

78. See, e.g., RAN HIRSCHL, *TOWARDS JURISTOCRACY: THE ORIGINS AND CONSEQUENCES OF THE NEW CONSTITUTIONALISM* 222-23 (2004) (setting forth a plea for more comparative work); see also *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* (Vicki C. Jackson & Mark Tushnet eds., 2002).

79. See, e.g., Justice Kennedy's majority decision in *Lawrence v. Texas*, 539 U.S. 558 (2003), in which he explicitly relied on decisions by the European Court of Human Rights to invalidate a Texas sodomy statute, and Justice Scalia's stinging dissent criticizing the reliance on comparative materials as "[d]angerous dicta" because the Court "should not impose foreign moods, fads, or fashions on Americans." *Id.* at 586 (quoting *Foster v. Florida*, 537 U.S. 990 (2002) (Thomas, J., concurring in denial of certiorari)). See also the exchange between Justice Breyer and Justice Scalia at the U.S. Association of Constitutional Law Discussion, American University Washington School of Law, Jan. 13, 2005, <http://domino.american.edu/AU/media/mediaref.nsf/1D265343BDC2189785256B810071F238/1F2F7DC4757FD01E85256F890068E6E0?OpenDocument>.

80. Lorraine E. Weinrib, *Constitutional Conceptions and Constitutional Comparativism*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 3, 15 (Vicki C. Jackson & Mark Tushnet eds., 2002).

the responsibility of government to “protect the dignity of persons.”⁸¹ In that sense, the post-war constitutions share some elements with American state constitutions in their more expansive affirmation of rights and focus on the particularities of the political community. Of course, American state constitutions and European constitutions operate in different normative and social environments. Yet, if constitutionalism is truly about “the fundamental rules and . . . self-understanding” of a community,⁸² then comparative analysis can serve to clarify the nature of that identity and the role of constitutional provisions in fostering it.

The problems with social rights in U.S. state constitutions present a valuable opportunity for comparative constitutionalism. Given the reservation with which state courts approach the interpretation of these rights, the European experience offers a means to examine how social rights might work more effectively in the United States. Although social rights in most state constitutions predate modern European democratic constitutions,⁸³ American state courts still have much to learn from European courts. State courts in the United States have frequently followed the federal courts in “lockstep” well after Justice Brennan appealed to them to develop their own independent jurisprudence.⁸⁴ Thus, state justices often have little experience interpreting their own constitutions.⁸⁵

The European experience with positive rights, however, differs in significant ways from that of the American states. Many post-war European constitutions drew on previous experiments with democratic

81. Donald P. Kommers, *Comparative Constitutional Law: Its Increasing Relevance*, in *DEFINING THE FIELD OF COMPARATIVE CONSTITUTIONAL LAW* 61, 64 (Vicki C. Jackson & Mark Tushnet eds., 2002).

82. Georg Nolte, *Introduction – European and U.S. Constitutionalism: Comparing Essential Elements*, in *EUROPEAN AND US CONSTITUTIONALISM* 9, 10 (2005).

83. For example, section 88 of the Alabama Constitution was adopted in 1901 whereas Kansas adopted its care for the needy provision in 1859. ALA. CONST. art. 10, § 88; KAN. CONST. art. 7, § 4. The care of the needy provision was added to the New York Constitution in 1938, when European interwar experiments with democracy were crumbling. N.Y. CONST. art. 17, § 1. Germany’s Basic Law did not come into force until 1949, whereas the current French constitution came into force under de Gaulle in 1958. *See, e.g.*, DAVID P. CURRIE, *THE CONSTITUTION OF THE FEDERAL REPUBLIC OF GERMANY* 8 -10 (1994); 1958 CONST. (France), available at http://servat.unibe.ch/icl/fr00000_.html.

84. *See* William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977).

85. *See* Gardner, *supra* note 74, at 788.

constitutionalism that incorporated positive rights.⁸⁶ In addition, given that positive rights were written into national constitutions and not just subnational documents, they immediately carry greater weight in promoting the national identity. Post-war constitutional courts had no choice but to interpret these rights, particularly given the socioeconomic problems and questions of identity plaguing Europe following the war. Even as the countries of post-war Europe united to construct strong welfare states, the European constitutional courts still had to wrestle with the questions of how to interpret socioeconomic rights and what role the judiciary was to play in that process.

II. SOCIAL RIGHTS IN EUROPEAN CONSTITUTIONS

The United States is typically held up as the political system in which judges and lawyers reign and the law reflects consummate judicial power. Yet, constitutional review is more firmly rooted in some European constitutions, such as those of France and Germany, which explicitly grant a constitutional court the power to determine the constitutionality of laws.⁸⁷ Moreover, the empowerment of constitutional courts represents a global phenomenon. Increasingly, political elites see the constitutional courts and the constitutionalization of rights as a means to protect their interests against the masses.⁸⁸ European courts, in particular, are more comfortable than their American counterparts in telling legislators what to do, despite the anti-majoritarian implications of doing so.⁸⁹

Powerful constitutional courts come in the context of well-developed welfare states. Since the 1950s, and in many cases before then, European states have predicated their economic systems on the government's responsibility to care for the basic needs of their citizens.⁹⁰ The conflicts of the interwar period leading up to World War II created a shared desire for

86. See, e.g., DONALD P. KOMMERS, *THE CONSTITUTIONAL JURISPRUDENCE OF THE FEDERAL REPUBLIC OF GERMANY* 32-33 (1997) (discussing how the Basic Law adopted individual rights provisions directly from the Weimar Constitution).

87. Michel Rosenfeld, *Constitutional Adjudication in Europe and the United States: Paradoxes and Contrasts*, in *EUROPEAN AND US CONSTITUTIONALISM* 165, 169 (Georg Nolte ed., 2003).

88. HIRSCHL, *supra* note 78, at 42-44.

89. Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 *AM. U. J. INT'L L. & POL'Y* 1233, 1238 (1995).

90. Mark Mazower notes that in Germany and Italy, the "life-ensuring state" had been an element of the previous fascist regimes. MARK MAZOWER, *DARK CONTINENT: EUROPE'S TWENTIETH CENTURY* 299 (1998).

social solidarity and Europe's rapid growth in the 1950s supported this vision.⁹¹ Thus, social rights were constitutionalized in Europe at the same time that these states created the framework of the welfare state. The interpretation of these rights represents a dialogue between the goals of the society as laid out in the constitution and the socioeconomic structure built by legislators. Although the normative environment of the European welfare state differs significantly from that in the United States, the dialogue of European constitutional courts may offer some insights into how social rights relate to the normative environment in which they exist.

A. Germany and the Social State

In many ways, Germany represents the most apt comparison of constitutional traditions with the United States. Unlike other European countries, such as France, Germany permits individuals to bring a constitutional claim.⁹² Germany's long tradition of the *Rechtsstaat*, or law-based state, creates a paramount role for the Constitutional Court to ensure that the political branches obey their constitutional duties and limits.⁹³ The Basic Law,⁹⁴ dating from 1949 and amended in 1990 to incorporate the East German *lander*, marries the principle of the *Rechtsstaat* with that of the *Sozialstaat*, or social state. Article 20 states that Germany is a "social federal state" and Article 28 (1) applies the social state concept to the *lander*.⁹⁵ Whereas the *Rechtsstaat* principle protects individuals from the state—the German incarnation of classic negative rights—the *Sozialstaat* principle creates a duty for the state to realize a "just social order" arising from the needs of the modern industrial society.⁹⁶

What is surprising, then, is that the foundational principle of the social state is limited primarily to these two articles of the Basic Law. German

91. *Id.* at 300.

92. GRUNDGESETZ, [GG] [Constitution] art. 93 (1)[4a] (F.R.G.). See KOMMERS, *supra* note 86, at 14.

93. *Id.* at 36-37. Kommers states that *Rechtsstaat* has no accurate translation in English and implies a broader set of principles than just the rule of law. *Id.*

94. The German Constitution was named the Basic Law because legislators did not want to sanctify what was seen as a transitional document of a divided Germany with the august term of "constitution." When Germany was finally unified in 1990, West German politicians believed that the Basic Law had achieved such a degree of legitimacy that to rename it would undermine that achievement. *Id.* at 31.

95. GRUNDGESETZ [GG] [Constitution] art. 20, 28 (1) (F.R.G.). See also KOMMERS, *supra* note 86, at 241.

96. *Id.*

constitutional makers deliberately avoided including specific positive rights in the constitution.⁹⁷ Instead, the social state principle operates in tandem with other broadly stated human rights, such as the right to human dignity (Art. I (1)), the right to freely develop one's personality (Art. II (1)) and the inviolability of the person (Art. II (2)).⁹⁸ The combination of the social state principle with other constitutional rights has allowed the Constitutional Court to give the principle some concrete meaning.

In the Welfare Judgment of 1951, the Federal Constitutional Court determined that the right to human dignity "did not impose an obligation on the state to protect the individual from material want."⁹⁹ Nevertheless, the legislature still had a duty to "realize the social state" and an individual might have a cognizable claim if "the legislature arbitrarily, that is, without relevant ground, failed to respect this duty."¹⁰⁰ Three years later, the Federal Administrative Tribunal determined that an individual right to welfare for the needy could be construed from the social state principle, but that no remedy against the state could be based solely on this principle.¹⁰¹ In a 1975 judgment, the court found that the social state principle obligated the state to care for "those in need" and to provide those with physical or mental handicaps "the basic conditions for a dignified existence."¹⁰² In another judgment, the German Constitutional Court ruled that a provision of the Federal Child Benefit Act did not violate the social state principle.¹⁰³ But it held that the legislature could not impose taxes that deprived a family of the *Existenzminimum*, or subsistence minimum, based on the social state principle and the constitutional protection of the family.¹⁰⁴ The court stated Article 20(1) of the Basic Law was too vague to serve as a "command to grant a certain amount of benefits."¹⁰⁵ Nevertheless, the state must "provid[e] the basic conditions for a humane existence of its citizens. . . . As long as

97. ROBERT ALEXY, A THEORY OF CONSTITUTIONAL RIGHTS 289 (Julian Rivers trans., 2002).

98. GRUNDGESETZ, [GG] [Constitution] art. 1(1), art. 2(1) and art. 2(2) (F.R.G.). The Basic Law is available in English at <http://www.constitution.org/cons/germany.txt>.

99. BVerfGE 1, 97 (104 f.), translated in ALEXY, *supra* note 97, at 290.

100. *Id.*

101. SABINE MICHALOWSKI & LORNA WOODS, GERMAN CONSTITUTIONAL LAW 30-31 (1999).

102. BVerfGE 40, 121 (133), translated in ALEXY, *supra* note 97, at 290.

103. MICHALOWSKI & WOODS, *supra* note 101, at 31.

104. Stylianos-Ioannis G. Koutnatzis, *Social Rights as a Constitutional Compromise: Lessons from Comparative Experience*, 44 COLUM. J. TRANSNAT'L L. 74, 123 (2005), citing BVerfGE 82, 60.

105. *Id.*

these basic conditions are not at stake, it lies in the discretion of the legislator to what extent social assistance can and is to be granted.”¹⁰⁶

The Constitutional Court has consistently emphasized that it is the duty of the legislature rather than the court to determine the extent and nature of welfare benefits. Rather than apply the social state principle as implying a fixed set of welfare obligations on the state, the court has made clear that the legislature is free to “restructure, discontinue, or weaken” existing social services.¹⁰⁷ Although the court has created a property right in social security benefits, it has not found a constitutional guarantee for the existing welfare system or any particular level of benefits.¹⁰⁸ Nevertheless, Robert Alexy argues that the right to a subsistence minimum is firmly rooted in case law of the Administrative Court and German scholarly opinion, even if it has no definitive constitutional foothold.¹⁰⁹ He defines this right in his somewhat Kafkaesque typology as a “binding subjective definitive right.”¹¹⁰

Elsewhere, the social state principle and the subsistence minimum principle, as its derivative, have been described as somewhere in between a subjective right and a programmatic provision.¹¹¹ In other words, the Constitutional Court sets a low threshold for the legislature to meet while reminding it that a constitutional obligation still exists. The social state clause might be most significant in the welfare context, not as a source of rights for individual litigants, but to “justif[y] social welfare legislation against the objection that it interferes with classical individual freedoms.”¹¹² In that sense, the court becomes a partner with the legislature in sustaining the welfare state even as economic liberalism regains a foothold in continental Europe.¹¹³

106. MICHALOWSKI & WOODS, *supra* note 101, at 31.

107. Koutnatzis, *supra* note 104, at 121.

108. *Id.* Peter Quint, however, sees a more protected interest in the existing social welfare system, “probably insulat[ing] these welfare programs from dramatic curtailment.” Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 AM. J. COMP. L. 303, 307 (1999).

109. ALEXY, *supra* note 97, at 290.

110. *Id.* at 336.

111. Koutnatzis, *supra* note 104, at 116. A subjective right constitutes an individual right to some defined subsistence minimum, whereas a programmatic right establishes an aspirational goal without requiring any specific provision to individual citizens.

112. KOMMERS, *supra* note 86, at 242.

113. See generally Paul Pierson, *Introduction: Investigating the Welfare State at Century’s End*, in, *THE NEW POLITICS OF THE WELFARE STATE* 2-4 (Paul Pierson ed., 2001) (discussing the pressures on the welfare state at the end of the twentieth century).

In addition, the court's interpretation represents an "ideological compromise" between the principles of the *Rechtsstaat* and the *Sozialstaat*.¹¹⁴ Unlike previous German regimes that emphasized one ideology to the detriment of the other, post-war Germany looked to harmonize the two concepts. History warned that the rule of law could only function effectively within a Germany that strove to protect its most vulnerable members. To achieve that balance, the Constitutional Court saw its role as inseparable from that of the legislature. Whereas classical negative rights serve as the primary source of justiciable individual rights, positive rights, particularly in the arena of welfare, serve primarily to demarcate the duties of the state to its citizens. Although individuals might have a cognizable claim against the state if it were to no longer provide the subsistence minimum, that claim could only be based upon specific legislative acts¹¹⁵ and a constitutional claim beyond just the social state principle.

Cases before the Constitutional Court, following the unification of Germany, have only reinforced the limited force of the social state principle as a legal principle. Given the broad role of the state in welfare provision in the German Democratic Republic, and the enormous economic differences between East and West, there was some expectation that the social state principle would suffer strain in the wake of unification. In two cases involving the mass dismissal of public employees in East Germany under the terms of the Unity Treaty, the Constitutional Court upheld the dismissals but required that the government balance them with social welfare measures.¹¹⁶ The court chose not to base its decision on the social state principle,¹¹⁷ but instead relied on Article 12 (occupational freedom) and Article 6(4) (care and protection of mothers).¹¹⁸ The court found that although "proportionate" social welfare measures were constitutionally required, the Unity Treaty contained such measures.¹¹⁹

114. Koutnatzis, *supra* note 104, at 131.

115. *Id.* at 121.

116. 84 BVerfGE 133 (1991); 85 BVerfGE 360 (1992). See Quint, *supra* note 108, at 322.

117. The social state clause had been addressed in the parties' briefs. Quint, *supra* note 107, at 322.

118. KOMMERS, *supra* note 86, at 296.

119. Quint, *supra* note 108, at 322. The court, however, found the dismissals of pregnant women and new mothers to be invalid under Article 6(4) of the Basic Law and required some additional measures, such as the extension of contracts where the notice of dismissal was unduly short. *Id.* See also KOMMERS, *supra* note 86, at 296-97.

Despite the harsh economic effects of unification on the East, the *land* constitutional courts have not been much more aggressive in enforcing social rights.¹²⁰ Like some American state constitutions, the German *land* constitutions contain a broad array of social rights. For example, the constitutions of Bavaria, Berlin, Bremen, and Hesse contain explicit guarantees of minimal support.¹²¹ The former states of the German Democratic Republic, in particular, have numerous social rights in their constitutions, from the right to housing and employment to the right of social security.¹²² Yet, many of these rights are listed as “state goals” without a justiciable individual right.¹²³ The Constitution of Saxony, for example, plainly states that social welfare rights cannot serve as the basis of a citizen’s complaint in state constitutional court.¹²⁴ The difference is underscored by the fact that positive rights, such as the right to social security, are listed separately from civil and political rights, and thus are given a different constitutional footing.¹²⁵ Other *land* constitutions qualify welfare provisions with the statement that the obligation of government only extends as far as its ability to provide support.¹²⁶

The *land* constitutional courts are limited further by the federal relationship in Germany. German states depend on the federal government for financing; they have few independent resources to spend on their own programs.¹²⁷ Moreover, many of the social welfare provisions in the *land*

120. In Germany, the *land* governments may establish their own constitutional courts but these courts may only resolve questions arising under the *land* constitution. See KOMMERS, *supra* note 86, at 7.

121. ALEXY, *supra* note 97, at 288-89.

122. Arthur B. Gunlicks, *Land Constitutions in Germany*, 28 PUBLIUS: J. FEDERALISM, Fall 1998, at 105, 121.

123. *Id.* at 122. See also Quint, *supra* note 108, at 312.

124. *Id.* at 312.

125. PETER QUINT, THE IMPERFECT UNION 79 (1997). Interestingly, the Saxony government drafted its constitution when it was dominated by the Christian Democrats (CDU), a party that generally opposed to including positive constitutional rights. The strength of the minority Social Democrats, and the fact that the leaders of the CDU were not strongly opposed to the provisions, led to their inclusion. See *id.* at 80. Perhaps because of the cross-party compromise over the document’s contents, the constitution faced attack from all sides. *Id.* at 81.

126. Gunlicks, *supra* note 122, at 122.

127. Quint, *supra* note 108, at 312-13. Germany has a system of revenue-sharing rather than independent taxation, as in the United States. Although the *lander* have primary responsibility for implementing social programs, partial federal funding for these programs also decreases *lander* financial independence. See, e.g., Hartmut Klatt, *Centralizing Trends in West German Federalism, 1949-89*, in RECASTING GERMAN FEDERALISM 40 (Charlie Jeffery ed., 1999).

constitutions relate to areas such as employment and social security, which are preempted by federal law.¹²⁸ Thus, a command by a *land* constitutional court to a *land* government to implement a particular social welfare provision would raise federalism problems. A 1996 case heard by the Berlin Constitutional Court reflects the limitations on the *land* constitutional courts. The claim argued that mandatory deductions from a man's paycheck for child support payments violated his rights to social security and appropriate living space under the Berlin Constitution because he could no longer afford to pay his rent.¹²⁹ The court dismissed the claim, holding that neither provision offered a cognizable individual right; the provisions only represented state goals.¹³⁰ Nevertheless, the court also noted that if such deductions were to result in actual homelessness—not an issue in this case because the plaintiff could afford some type of housing—then it could find that the state had violated its minimal obligations.¹³¹

Whereas observers of German constitutional law agree that the social state principle places an affirmative obligation on the state, the court has never specified what that obligation is or under what conditions the state will have failed to meet it. Some suggest that a vague notion of *Existenzminimum* represents the floor, below which the legislature cannot fall. Since broad welfare provision still remains the norm in Germany, despite the strains of unification, the court has never reached the question of how it might enforce a ruling that applies the social state principle to welfare legislation. As the guardian of the *Sozialstaat*, the court currently has only the duty to remind the legislature of its obligations. Whether that truly shapes the choices of legislators in their decisions about the provision of social welfare, however, remains unclear.

B. *Social Rights Elsewhere in Europe*

The judicial interpretation of social rights in other European constitutions mirror the interpretation by the German Constitutional Court. Every European constitution contains social rights, many of them much more explicitly laid out than in Germany's constitution. Yet no constitution places these rights on the same constitutional footing as civil or political rights.¹³²

128. Quint, *supra* note 108, at 313.

129. *Id.* at 317.

130. *Id.*

131. *Id.* at 318.

132. Mary Ann Glendon, *Interdisciplinary Approaches: Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 527 (1992).

Instead, most European constitutions include welfare rights as state goals or “programmatically” rights—rights that require legislative implementation and that lack corresponding judicial remedies.¹³³ For example, Section 15 of the Constitution of Finland includes the provision, “Public authorities shall, in the manner stipulated in greater detail by Act of Parliament, secure for everyone adequate social welfare and health services and shall promote the health of the population.”¹³⁴ This reflects the traditional welfare model in Scandinavia, which emphasizes the role of government in providing benefits rather than a “rights-centered approach” based on an individual’s right to subsistence.¹³⁵ Chapter XIII of the Constitution of Ireland is entitled “Directives Principles of Social Policy” and states that, “The principles of social policy set forth in this Article are intended for the general guidance of [Parliament]. The application of those principles in the making of laws shall be the care of [Parliament] exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.”¹³⁶

The European Social Charter applies the notion of programmatic social rights to the European Union. Whereas citizens of Europe have a cognizable claim under the European Convention on Human Rights (ECHR), they cannot present a claim under the Social Charter. Nevertheless, the European Court of Human Rights has been willing to imbue the political rights contained in the ECHR with correlative social rights. In the case of *Airey v. Ireland*,¹³⁷ the petitioner claimed that she could not obtain a legal separation from her abusive husband because she lacked the financial resources to hire a lawyer and since Ireland offered no legal aid for civil cases, she was effectively barred access to the court.¹³⁸ The European Court of Human Rights held that the petitioner’s right to access to the legal system under Article 6 of the ECHR had been violated.¹³⁹ In order to make the civil rights in the Convention effective, the court argued,

133. *Id.* at 528.

134. SUOMEN PERUSTUSLAKI [Constitution] art. 15 (Fin.).

135. Krzysztof Drzewicki & Allan Rosas, *Social Rights in a United Europe*, in SOCIAL RIGHTS AS HUMAN RIGHTS 11, 19 (Krzysztof Drzewicki, Caterina Krause & Allan Rosas eds., 1994).

136. IR. CONST., 1937, art. 45.

137. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) (1979).

138. *Id.* See also Velti-Pekka Viljanen, *Abstention of Involvement? The Nature of State Obligations Under Different Categories of Rights*, in SOCIAL RIGHTS AS HUMAN RIGHTS 43, 54 (Krzysztof Drzewicki, Caterina Krause & Allan Rosas eds., 1994).

139. *Id.*

[F]ulfilment of a duty under the Convention on occasion necessitates some positive action on the part of the State; in such circumstances, the State cannot simply remain passive and “there is . . . no room to distinguish between acts and omissions.” The obligation to secure an effective right of access to the courts falls into this category of duty.¹⁴⁰

Whereas the decision in the *Airey* case suggests that the European court might find reason to flesh out other political rights in the Convention with positive obligations on the state, it has rarely done so.¹⁴¹ The *Airey* case, even after twenty-five years, still stands alone in the European court’s jurisprudence. Perhaps the reason is reflected in Judge Thór Vilhjálmsson’s dissent in the case, reminding his fellow judges, “The war on poverty cannot be won through broad interpretation of the Convention for the Protection of Human Rights and Fundamental Freedoms.”¹⁴² He warns that reading affirmative financial obligations into the Convention’s civil liberties will “open up problems whose range and complexity cannot be foreseen but which would doubtless prove to be beyond the power of the Convention and the institutions set up by it.”¹⁴³

Even some post-communist countries in Europe have begun to interpret the social rights in their new constitutions as programmatic. The expectation of state support outlasted the communist regimes and thus attempts to relegate social rights in the new constitutions to state goals failed.¹⁴⁴ Thus, the constitutions seemed to create cognizable rights for a vast array of social rights, regardless of the obvious inability for most East European governments to carry out these obligations. Despite this “messy arrangement,”¹⁴⁵ however, some constitutional courts have begun to interpret social rights as different from negative political rights, following the approach of their western neighbors. In Hungary, for example, the Constitutional Court held that the right to social security, as stated in Article

140. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) at art. 25 (1979) (quoting *Marckx v. Belgium*, 31 Eur. Ct. H.R. (ser. A) (1979)).

141. See, e.g., *Leading Cases on Economic, Social, and Cultural Rights: Summaries*, Centre on Housing Rights and Evictions (COHRE), ESC Rights Litigation Programme, Working Paper #4 14 (2006), available at www.cohre.org [hereinafter COHRE].

142. *Airey v. Ireland*, 32 Eur. Ct. H.R. (ser. A) 23 (1979) (Vilhjálmsson, J., dissenting).

143. *Id.*

144. Wojciech Sadurski, *Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights*, 65 LAW & CONTEMP. PROBS. 223, 230 (2002).

145. *Id.* at 236.

70E of the constitution, does not create a cognizable right.¹⁴⁶ In other East European countries, the courts have been much more willing to strike down legislation on the grounds of specific social welfare provisions or constitutional provisions of equality, despite the fact that the legislatures have few resources with which to observe these provisions.¹⁴⁷ Moreover, across Eastern Europe, there appears to be no relationship among the extent of social rights in a constitution, the willingness of a constitutional court to apply these rights, and the degree of social welfare provision.¹⁴⁸

The role of social rights in European constitutions remains ambiguous. Whether positive rights are expressly stated in the constitution, as in Ireland, or mostly implied, as in Germany, there exists a shared recognition within these societies that decisions about the provision of public goods lie in the hands of the legislators rather than the courts. As one British observer noted:

[I]t is widely recognized, even by the protagonists of such commitments, that, strictly speaking, they can mean little unless there are concomitant obligations to pursue these objectives and to secure the resources for so doing. To follow the logic inherent in the constitutional recognition of policy objectives this far would, however, plainly entail conflict with the underlying procedural values of a liberal constitution. Consequently, we rarely if ever find such accompanying obligations laid down. Instead, there is faith in the purely persuasive political effect of such commitments: it is believed that their formal embodiment in the Constitution will induce political parties and others in the future to continue to pursue [these objectives].¹⁴⁹

Positive rights thus reflect the post-war concern for social solidarity and the belief that legislators will continue to sustain that cohesion through its social welfare policies. That European constitutional courts hesitate to enforce social rights likely underscores the lack of debate within society over the need for a welfare state, only its parameters.¹⁵⁰ When constitutional courts

146. *Id.*

147. *Id.* at 236-37.

148. *Id.* at 229. According to Professor Sadurski, some East European observers suggest that an *inverse relationship* exists between the extent of social rights and the level of social welfare provision. *Id.*

149. Nevil Johnson, *Constitutionalism: Procedural Limits and Political Ends*, in CONSTITUTIONAL POLICY AND CHANGE IN EUROPE 46, 55-56 (Joachim Jens Hesse & Nevil Johnson eds., 1995).

150. KOMMERS, *supra* note 86, at 242 (discussing the lack of debate within Germany over the social welfare provisions in the Basic Law). Even in the recent debates leading up to the presidential elections in France, the candidates disputed only the nature of the French

choose to refer to social welfare provisions in their decisions, it reminds legislators that welfare provision is constitutionally mandated and not just a matter of government's benevolence.¹⁵¹ Constitutionally entrenched rights thus can "synergistically reinforc[e]" the welfare system.¹⁵² As the *Airey* case made its way to the European Court of Human Rights, for example, the government of Ireland introduced legislation to provide legal aid to indigent residents in family law matters.¹⁵³

In most cases, however, constitutional welfare provisions and judicial application of them buttress the welfare state only at the broadest paradigmatic level. As numerous scholars have pointed out, there is no correlation between the constitutional language of social rights and the extent of welfare benefits provided by the state.¹⁵⁴ Moreover, no one knows whether the constitutional framework could truly provide a solid floor for welfare provision. Since no European state has attempted to dismantle its welfare state, only reduced its size and cost, it is unclear whether or at what point a European constitutional court would find it necessary to command the legislature to fulfill its constitutional duties.

C. *Beyond Europe*

The phenomenon of non-justiciable social rights is not unique to Europe. As Ran Hirschl finds in his comparative study of Canada, New Zealand, South Africa, and Israel, positive rights account for only 10-20% of the litigation reaching the constitutional courts of those countries, with a success rate considerably lower than negative rights litigation.¹⁵⁵ Of these countries, South Africa had the highest number of positive rights cases (22%) and the highest success rate (45%).¹⁵⁶

welfare state, not its continuation. See Charles Bremner, *France Votes Decisively for Change and Sarkozy*, *The Times* (UK) (May 7, 2007), available at <http://www.timesonline.co.uk/tol/news/world/europe/article1756369.ece>.

151. See, e.g., Sadurski, *supra* note 144, at 229 (noting that since constitutional courts can scrutinize a law for its adherence to the social rights in the constitution, this will constrain the legislature's choices).

152. Glendon, *supra* note 132, at 530.

153. *Airey v. Ireland*, 32 Eur. Ct. H. R. (ser. A) (1979) (O'Donoghue, J., dissenting).

154. See, e.g., Glendon, *supra* note 132, at 531; Sadurski, *supra* note 144 (comparing the post-communist countries).

155. HIRSCHL, *supra* note 78, at 105-06.

156. *Id.* at 105-08. This compares with only 13% positive rights litigation in New Zealand with an 18% success rate and 11% of litigation in Israel with a 21% success rate. *Id.* at 106.

In many ways, positive rights litigation in South Africa has been an anomaly. The South African Constitution explicitly guarantees the right to food, water, housing, health care and social security,¹⁵⁷ but “weakens” these rights by stating that the government “must take reasonable measures, within its available resources, to achieve the progressive realization of each of these rights.”¹⁵⁸ Although elsewhere such language might convert the rights into programmatic rights, the South African Constitutional Court has been more aggressive in enforcing these rights.¹⁵⁹ In addition, South Africa is one of the only countries that permit individuals to petition the Constitutional Court solely on the grounds that their social rights have been violated.¹⁶⁰

In the *Grootboom* case, the court ordered the government to refrain from bulldozing an informal settlement established by a group of 900 homeless people.¹⁶¹ Although the court emphasized that the government need only do as much as its resources allowed, it also recognized the obligation on the state to ameliorate the appalling conditions in which many South Africans lived.¹⁶² The court went even further in the *Nevirapine* case.¹⁶³ In this case, the government had refused to sponsor the widespread distribution of Nevirapine—a drug shown to reduce the transmission of the HIV/AIDS virus from a pregnant mother to her unborn child—to all HIV-positive pregnant women.¹⁶⁴ The court rejected the government’s arguments that the drug was experimental and the distribution of it too costly and ordered the government

157. *Id.* at 130; S. AFR. CONST. of 1996, §§ 26, 27.

158. *Id.*

159. The relative progressiveness of the South African Constitutional Court in enforcing social rights has been extensively discussed and debated. *See, e.g.*, David Bilchitz, *POVERTY AND FUNDAMENTAL RIGHTS: THE JUSTIFICATION AND ENFORCEMENT OF SOCIO-ECONOMIC RIGHTS* (2007); Dixon, *supra* note 21; Mark S. Kende, *The South African Constitutional Court’s Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT’L L. 617 (2004); Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. FORUM 123 (2000).

160. FABRE, *supra* note 14, at 175.

161. *Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC) at ¶ 66 (S. Afr.); *see also* HIRSCHL, *supra* note 78, at 133.

162. *Republic of South Africa v. Grootboom*, 2000 (11) BCLR 1169 (CC) at ¶ 66 (S. Afr.) (“It is essential that a reasonable part of the national housing budget be devoted to the homeless, but the precise allocation is for the national government to decide in the first instance.”). *Compare* HIRSCHL, *supra* note 78, at 132 (calling the decision a “landmark” and a “turning point” in the Court’s interpretation of positive rights), *with* Tushnet, *supra* note 11, at 1907 (referring to the decision as an example of the enforcement of weak substantive rights).

163. *Minister of Health v. Treatment Action Campaign (Nevirapine)*, 2002 (10) BCLR 1033 (CC) (S. Afr.).

164. HIRSCHL, *supra* note 78, at 133. *See also* COHRE, *supra* note 141.

to make the drug widely available under Section 27 (right to health care) of the constitution.¹⁶⁵

Whereas the court's command to the legislature in the *Nevirapine* case goes beyond the decisions on social rights of most other constitutional courts, it still employs a "reasonableness" standard of review developed in the *Grootboom* case.¹⁶⁶ The government has no obligation to provide benefits beyond what it can reasonably afford to do.¹⁶⁷ The exception to this standard of review for positive rights is only when the government withholds benefits from a particular class of people,¹⁶⁸ such as in the case of *Khosa v. Minister of Social Development*.¹⁶⁹ The court applied a stricter standard of review to strike down legislation that withheld social grants from permanent residents, placing the burden on the government to show that alternative means could not be found to address immigration problems.¹⁷⁰

The South African Constitutional Court, like its counterparts in Europe, sees its role as "synergistically linked"¹⁷¹ to that of the legislature. In the *Nevirapine* case, the Constitutional Court emphasized the foundational role of the court in the country's democratization. Comparing the use of mandatory orders by the Constitutional Court in South Africa with their use by high courts in other countries, the court remarked,

The various courts adopt different attitudes to when such remedies should be granted, but all accept that within the separation of powers they have the power to make use of such remedies – particularly when the state's obligations are not performed diligently and without delay. . . .

165. HIRSCHL, *supra* note 78, at 133.

166. Sandra Liebenberg, *Needs, Rights, and Transformation: Adjudicating Social Rights* 21-22 (NYU Sch. of Law, Ctr. for Human Rights and Global Justice, Econ. and Social Rights Series Working Paper No. 8, 2005), available at <http://www.chrgj.org/publications/docs/wp/Liebenberg%20-%20Needs,%20Rights%20and%20Transformation.pdf>. *But see* Tushnet, *supra* note 11, at 1908 (noting that in the *Nevirapine* case, the court granted no deference to the government).

167. Liebenberg, *supra* note 166, at 21-22. For an interesting defense of the cautious approach in *Grootboom*, see Dixon, *supra* note 21, at 410-11 (noting that the Constitutional Court lacked the necessary information to assess the potential costs of creating an "enforceable right to basic emergency housing for all South Africans.")

168. 2004 (6) BCLR 569 (CC) at 78 (S. Afr.).

169. See Liebenberg, *supra* note 166, at 21.

170. *Id.*

171. See Glendon, *supra* note 132 and accompanying text.

[D]ue regard must be paid to the roles of the legislature and the executive in a democracy. What must be made clear, however, is that when it is appropriate to do so, courts may – and if need be must – use their wide powers to make orders that affect policy as well as legislation.¹⁷²

The willingness of South Africa’s Constitutional Court to impose obligations on the government comes in a much different context than in Europe. In South Africa, the court emerged as “one of the major arenas for settling questions of transition to and consolidation of multiracial democracy in the new South Africa.”¹⁷³ Whereas in Europe, the constitutional courts left it to the legislatures to achieve social solidarity, in South Africa, the court was perhaps less convinced that the legislature could do so on its own. Given the level of poverty and wealth disparity, achieving the social aspirations of the constitution required greater intervention by the court than the “gentle reminders” used by the European courts.¹⁷⁴ The South African Constitutional Court thus has greater incentives to insert itself into the political dialogue over social welfare, even within the inherent limitations imposed by the separation of powers. For now, social solidarity remains a distant goal. The court fulfills a more assertive role in this context, pushing the legislature towards this goal, rather than defending the foundations of the social welfare system, as in Europe.

III. LESSONS FOR STATE COURTS IN THE U.S.

In Europe, South Africa, and elsewhere, judicial enforcement of socioeconomic rights reflects the institutional role of the courts, the prevailing norms of social welfare provision, and the degree to which the legislature actively pursues that norm. In part, the institutional limitations of courts reflect their historical function, rather than just the confines of separation of powers. Constitutional and supreme courts emerged in the context of democratization and the “political and economic liberalization in

172. *Treatment Action Campaign (Nevirapine)*, 2002 (10) BCLR 1033 (CC), at 112-113.

173. HIRSCHL, *supra* note 78, at 29.

174. In India, another country with significant levels of poverty, the high court has also become more willing to place affirmative obligations on the state under social rights enshrined in the constitution, particularly the right to life. *See, e.g.*, *People’s Union for Civil Liberties v. Union of India & Ors.*, Supreme Court of India, 2001, *cited in* COHRE, *supra* note 141, at 37.

post-authoritarian or quasi-democratic polities.”¹⁷⁵ These courts came into existence as the guardians of society and its citizens against the government, and not as their advocates within the government. As Alexander Hamilton insisted, “the courts of justice are to be considered as the bulwarks of a limited Constitution against legislative encroachments.”¹⁷⁶ Thus, when social rights include directly justiciable individual rights, courts become caught between pressures from social groups to strengthen available remedies, and from legislatures to weaken those remedies.¹⁷⁷ Active and direct judicial enforcement of individual socioeconomic rights, such as a right to minimal subsistence, is simply beyond the institutional capabilities of these courts.

The European tradition of nonjusticiable programmatic rights, such as in Ireland, avoids this quagmire in that it does not create the expectation that citizens will be able to force the government to provide a particular level of welfare benefits through litigation.¹⁷⁸ Moreover, programmatic rights allow the courts to advise parliament when it violates constitutional guarantees without encroaching upon legislative prerogatives.¹⁷⁹ European constitutional courts are particularly ill-suited to enforce positive rights much beyond programmatic statements, given the prevailing normative environment. Whereas the United States has active judicial review that has little effect on economic disparities in society, countries such as Norway and Sweden maintain much more egalitarian societies “while being less than enthusiastic (to put it mildly) about the American notion of rights and judicial review.”¹⁸⁰ Instead, governmental provision of welfare is left to the political branches and individuals find access points to policymaking through institutions other than the courts, such as trade unions and political parties. So long as welfare state norms continue to exist in Europe, neither the “constitutionalization of rights”¹⁸¹ nor demands by individual litigants will change the basic institutional function of courts to enforce only negative rights.

In South Africa, where the Constitutional Court has been more willing to address individual claims to social welfare under the constitution, it does so

175. HIRSCHL, *supra* note 78, at 32. Although Hirschl argues that this explanation is too broad to explain the variation in constitutional courts and the specific timing of their emergence, it suffices to explain the institutional purpose of the courts.

176. THE FEDERALIST PAPERS, NO. 78, 432, 469 (Clinton Rossiter ed., 1961).

177. Tushnet, *supra* note 11, at 1918. *See also* Dixon, *supra* note 21.

178. Tushnet, *supra* note 11, at 1915.

179. *Id.* at 1899-1900.

180. HIRSCHL, *supra* note 78, at 220. Although this statement describes the Scandinavian countries most accurately, it also applies to Continental Europe.

181. *Id.* at 7.

in a different normative context than in Europe. Unlike in Europe, South Africa lacks a comprehensive welfare state that would render the enforcement of social rights less necessary. In addition, the government must address deep racial divisions in society, and the court, as a major player in the transition to democracy, has assumed a greater responsibility in this process. Given the dynamic process of democratic transition, the court is more willing to accept the simultaneous pressures from the government and society to either expand or contract judicial remedies. Nevertheless, the court differentiates between laws that withhold benefits from a particular class and laws that determine the level of welfare benefits, and, as I discuss *infra*, the approach of South Africa's Constitutional Court does not differ significantly from the approach of some U.S. state courts, such as New York.

The experiences of European countries and South Africa with socioeconomic rights suggest two lessons for American state courts. First, despite Professor Hershkoff's claim that state courts are institutionally well-positioned to enforce social rights,¹⁸² this does not appear to be the case in the United States any more so than in Europe. The institutional differences between state courts in the United States and European constitutional courts are likely insufficient to overcome the well-entrenched function of the courts as the stewards of civil and political rights.¹⁸³ Elected judges and common law traditions might allow state courts to enter into policy debates more readily than their national counterparts, but these differences are unlikely to change the basic structural role of the courts, particularly at the level of the court of last resort in the state. State courts may issue advisory opinions to the other branches,¹⁸⁴ but this is a far cry from a judicial command. The fact that state courts uniformly apply a deferential rationality review to positive rights provisions in state constitutions underscores the institutional limitations of state courts.

Based on these limitations, and other less consequential ones,¹⁸⁵ some argue that socioeconomic rights have no place in state constitutions.¹⁸⁶ Frank

182. Hershkoff, *Rationality*, *supra* note 3, at 1153-54.

183. Hershkoff notes the wide range of differences between state and federal courts, but these differences may have little impact on constitutional interpretation. See Helen Hershkoff, *State Courts and the 'Passive Virtues': Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, 1841 (2001).

184. *Id.* at 1836.

185. See for example Cross, *supra* note 6, for a litany of reasons why positive rights cannot be enforced, from the financial barriers to poor litigants to the potential for backlash by conservative jurists and fearful legislators.

186. See, e.g., Michelman, *supra* note 12, at 16 (discussing democratic and contractarian objections to constitutionalizing social rights).

Michelman, however, argues that if we, as a society, accept the moral obligation to provide for citizens' basic needs, regardless of how we believe the obligation should be fulfilled, then creating a constitutional welfare right both legitimates the obligation and establishes a right of "social citizenship" in the polity.¹⁸⁷ Even if the interpretation of that right is left to "political processes," rather than the judiciary, he contends that it serves as a seedbed for political discussion.¹⁸⁸

Professor Michelman thus suggests a role for socioeconomic rights similar to those of European-style programmatic rights. Yet, in the existing normative context in the United States, is this enough? Perhaps if the U.S. Constitution were to be amended to include a right to "social citizenship," that would be adequate to reshape the normative context and engender the policy debate Professor Michelman desires. But on the state level, nonjusticiable programmatic rights, unless appealed to more frequently by litigants and affirmed more fervently by the courts, are likely to be insufficient to spur renewed debate over state welfare provision. At most, they can serve as a gentle reminder to legislatures that they have a constitutional duty to their most needy citizens.

The frustration for welfare rights advocates in the United States is that the institutional limitations operate in a normative environment that, unlike in Europe, does not position the bulk of responsibility for welfare provision with its governments. Consequently, when state courts mirror the approach of European constitutional courts, the impact on society is different. The courts in states such as Kansas and Alabama, for example, have construed their role not unlike that of the European courts—acknowledging the constitutional right to basic welfare while trusting that the legislature continues to provide some unspecified level of it.¹⁸⁹ Unlike in most European countries, however, that trust is most often misplaced. Absent a normative understanding about the government's responsibility to provide a subsistence minimum, state courts in the United States cannot serve as the guardians of this norm against irresponsible legislators. Instead, by leaving the implementation of constitutional provisions solely in the hands of legislators, they simply abdicate any role of the courts in welfare provision.

Another alternative is to place the responsibility for the promotion of social rights with civil groups and organizations. Douglas Reed, for example, argues that the uniqueness of state constitutional law is not democratically-

187. *Id.* at 14-16.

188. *Id.* at 34.

189. *See supra* notes 57-59 and accompanying text.

elected judges and the malleability of state constitutions, but the role of “popular constitutionalism” in the interpretation of state constitutions.¹⁹⁰ In other words, the meaning of state constitutional rights is actively contested outside a judge’s chambers, both by litigators through legal mobilization and through the ballot initiative process, or other democratic processes.¹⁹¹ In Europe, popular constitutionalism occurs when individuals access decisionmakers via institutions such as unions and political parties.¹⁹² In the United States, as Reed shows with the example of gay rights movements, popular constitutionalism works particularly well where activists can harness identity politics to mobilize supporters and build social movements.¹⁹³ In the context of welfare rights, however, the recipients of the public goods sought may be significantly less willing to identify with movement. Moreover, as the Supreme Court majority in *Rodriguez* emphasized, the boundary lines between the “poor” or “needy” and the rest of the citizenry for purposes of a constitutional right to welfare are blurry as opposed to the dividing lines of race, gender, or sexual orientation.¹⁹⁴ Because constitutional rights offer the promise, however dubious, of a more permanent provision of a public good, the interpretation of those rights purely within the democratic arena cannot supplant the weight of a judicial pronouncement. Although the value of political and legal mobilization should not be discounted, it may depend more heavily on the willingness of the judiciary to champion their goals, at least within the context of welfare rights.

As earlier discussions have demonstrated, however, state judiciaries have not yet been seen as champions for the cause of welfare rights. The most assertive courts, such as in New York, interpret constitutional social rights more similarly to the South African Constitutional Court than courts in Europe, creating a significant but circumscribed role for the judiciary in welfare provision.¹⁹⁵ The New York Court of Appeals and the South African Constitutional Court apply the same bifurcated analysis to interpreting welfare rights. When the claim relates to the provision of welfare benefits, the courts apply a deferential rational basis standard. On issues related to the withholding of benefits from a particular class, however, both courts apply a higher level of scrutiny. The fact that the South African Constitutional Court

190. Douglas Reed, *Popular Constitutionalism: Towards a Theory of State Constitutional Meanings*, 30 RUTGERS L.J. 871 (1999).

191. *Id.* at 890.

192. *See supra* note 180 and accompanying text.

193. Reed, *supra* note 190, at 897-98.

194. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 19-20 (1973).

195. *See supra* notes 47-55 and accompanying text.

has invalidated government policy under the more deferential standard, whereas the New York Court of Appeals has not, says more about the disparity in governance ability between the two polities than any real difference in judicial interpretation.

Based on the European and South African experiences, can state courts expand their role in enforcing socioeconomic rights, or does New York represent the upper bounds of the judiciary's potential? Looking at positive rights from the rosier landscape prior to federal welfare reform, David Currie argues that equal protection clauses make social rights constitutionally superfluous.¹⁹⁶ He suggests that, "the unlikelihood that such affirmative services as welfare payments . . . will be abandoned may make our traditional equal protection principle the practical equivalent in many cases of an absolute duty to provide them."¹⁹⁷ According to Professor Currie, even if social welfare provisions exist, state judges would have no incentives to enforce them.¹⁹⁸ Instead, judges can look to the Federal Equal Protection Clause or its state-level equivalent—particularly if the state constitution offers broader individual protections—to analyze government welfare laws that exclude individuals or limit benefits based on classifications.

The problem with simply relying on the Equal Protection Clause to do the heavy lifting of protecting welfare provision, as Helen Hershkoff has noted, is that federal and state governments have not consistently provided a subsistence minimum to its neediest citizens.¹⁹⁹ Unless social welfare laws classify recipients according to the traditional suspect classes of race, nationality, or alienage, they receive only the most deferential rational basis review from the courts, regardless of whether courts apply federal or state equal protection clauses. Even when states reduce or eliminate benefits to indigent citizens based on their income levels, these changes are presumed to be constitutionally valid, since no state or the federal government identifies the poor as a suspect class requiring heightened scrutiny.²⁰⁰

Although Professor Currie's optimism might have been misplaced, his attention to equal protection analysis offers a potentially more fruitful and familiar avenue for state courts to interpret socioeconomic rights. If courts are unwilling to tell legislatures how to distribute benefits, they might be more willing to do so if the loss or refusal of welfare affects the ability of a particular class of people to participate in representative government or

196. Currie, *supra* note 6, at 887-88.

197. *Id.*

198. *Id.*

199. Hershkoff, *Devolution*, *supra* note 24.

200. Several states do identify the poor as a quasi-suspect class. *See infra* note 199.

undermines constitutionally recognized important interests. By using traditional equal protection categories of the “quasi-suspect class” and fundamental rights, courts can apply heightened scrutiny to laws affecting socioeconomic rights but still remain within their institutional and normative constraints.

In his influential book, *Democracy and Distrust*, John Hart Ely argued that the Equal Protection Clause might best serve representative democracy by ensuring access and voice to all individuals, particularly to minorities and disadvantaged groups.²⁰¹ Professor Ely suggests that rather than limit heightened review to the few suspect classifications identified by the Supreme Court, courts should “treat as suspicious” classifications that “disadvantage groups we know to be the object of widespread vilification, groups we know others (specifically those who control the legislative process) might wish to injure.”²⁰² By applying a more intense level of scrutiny to legislators’ intentions in passing the law, Professor Ely argues that courts can determine whether the law is justified by its public purpose or whether it disadvantages a group primarily for the purpose of disadvantaging them.²⁰³ This attention to legislative intent and the expansion of strict or at least stricter scrutiny would thus serve the goal of ensuring representation of all groups in the democracy.

Heightened scrutiny has little application to the sphere of socioeconomic rights if welfare laws only determine the distribution of the state’s economic benefits.²⁰⁴ But if the impact of a law is to effectively undermine the democratic process by reducing political representation or access of the poor, Ely’s approach might have more bite.²⁰⁵ Given the enormous disparities in

201. See generally JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* (1980).

202. *Id.* at 153.

203. *Id.* at 153-55.

204. Ely comments that his analysis would rarely apply to the poor since “failures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery or a stereotypical generalization about their characteristics.” *Id.* at 162.

205. An interesting test of this approach may be the Indiana law that requires all voters to hold valid government-issued identification currently under review by the Supreme Court in *Crawford v. Marion County Election Board*, 128 S. Ct. 1610 (2008), and *Indiana Democratic Party v. Rokita*, 128 S. Ct. 830 (2008). Opponents of the law argue, inter alia, that the law unduly burdens the poor, as well as the elderly and disabled, who may not have a driver’s licenses and lack the means or ability to easily obtain another form of identification. See Brief of League of Women Voters as Amici Curiae Supporting Petitioners, *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (Nos. 07-21, 07-25), 2007 WL 3440941.

political participation between low and higher income groups,²⁰⁶ cuts in benefits or services that place an undue burden on the poor could impinge on democratic participation more frequently than is initially apparent. Several states, in fact, consider the poor to be a “quasi-suspect class,” requiring an intermediate level of scrutiny when a law classifies according to wealth or has a disproportionate impact on the poor; two of these states, Washington and North Dakota, limit application of an intermediate level of scrutiny to laws that implicate an important constitutional right and classify according to wealth.²⁰⁷ The courts have only struck down laws that classify according to wealth in a few instances when they involve an existing constitutional right.²⁰⁸ Notably, neither of these states has a constitutional right to welfare. But Washington’s approach is noteworthy for considering the poor to be a class “not accountable for their status”²⁰⁹ and thus the equivalent of the disadvantaged—and disenfranchised—groups held out for special protection under Ely’s approach.

Whereas treating the poor as a “semi-suspect class” might have little application in states such as Washington that lack an affirmative obligation to aid the poor, it might have greater impact in the states such as New York, where that obligation is constitutionally entrenched. Since equal protection analysis only extends equality to substantive and fundamental rights identified elsewhere in the constitution,²¹⁰ provisions such as article 17 of the New York Constitution offer the “legal hook” for courts to employ a more intense level of scrutiny to laws that disproportionately impact the poor than

206. See SIDNEY VERBA, KAY LEHMAN SCHLOZMAN & HENRY E. BRADY, VOICE AND EQUALITY: CIVIC VOLUNTEERISM IN AMERICAN POLITICS 189 (1995) (“[V]oting is the only act [of political participation] for which the affluent are not at least twice as likely to be active.”).

207. See, e.g., *Baldock v. North Dakota Workers’ Comp. Bureau*, 554 N.W.2d 441, 445 (N.D. 1996) (refusing to apply intermediate scrutiny where the regulation did not classify solely based on wealth and did not implicate “vital interests”); *State ex rel. Sigler v. Sigler*, 932 P.2d 710, 713 (Wash. Ct. App. 1997) (holding that intermediate scrutiny is used in “limited circumstances” that involve a fundamental right, such as physical liberty, and a semi-suspect class not “accountable for its status, i.e., the poor”). A third state, Nevada, recognizes the poor as a quasi-suspect class, without having decided a case on that basis. See *Allen v. State*, 676 P.2d 792, 795 (Nev. 1984).

208. See *State v. Phelan*, 671 P.2d 1212, 1214-15 (Wash. 1983), *superseded by statute on other grounds*, Wash. Rev. Code Ann. § 9.94A.728 (2003) (applying intermediate scrutiny to strike down regulation that did not grant credit for pre-sentence time served by defendants unable to post bail); *State v. Carpenter*, 301 N.W.2d 106 (N.D. 1980) (striking down a statute on equal protection grounds that allowed defendants accused of issuing a check with insufficient funds to provide an affirmative defense by repaying the funds).

209. *Id.* at 1215.

210. See Peter Westen, *The Empty Idea of Equality*, 95 HARV. L. REV. 537, 563 (1982).

the current rational basis analysis. In an analogous situation, in *Board of Education v. Nyquist*, the New York Supreme Court's Appellate Division applied heightened scrutiny to a school financing scheme by declaring the state constitutional right to education to be an important interest, justifying intermediate scrutiny.²¹¹ That approach was subsequently overturned by the court of appeals.²¹²

Thus far, only the Montana Supreme Court has addressed the question of whether an affirmative obligation to provide for the poor constitutes an important interest. In *Butte Community Union v. Lewis* ("Butte I"), the Montana court held the right to welfare was subject to heightened scrutiny under an equal protection analysis.²¹³ The court's analysis focused on the fact that although the Declaration of Rights in the Montana Constitution did not guarantee a right to welfare, which would require strict scrutiny, a right elsewhere contained in the constitution was sufficiently important to justify heightened scrutiny.²¹⁴

In New York, the courts have only directly addressed the constitutional obligation under article 17 as a mandate to the government not to completely exclude the needy from particular benefits.²¹⁵ In applying equal protection, the New York courts have applied heightened scrutiny when benefits are withheld based on suspect classifications, such as alienage.²¹⁶ Nevertheless, laws relating to benefits can often be included in laws that deal with education, voting, or access to the legal system, which not only touch upon

211. 443 N.Y.S.2d 843 (App. Div. 1981), *modified by* 439 N.E.2d 359 (N.Y. 1982) (reversing the lower court's application of heightened scrutiny and applying a rational basis standard).

212. *Board of Education v. Nyquist*, 439 N.E.2d 359 (N.Y. 1982). The court of appeals had previously ruled that education was not a fundamental right. *In re Levy*, 345 N.E.2d 556 (N.Y. 1976). Proponents of a constitutional right to education have been more successful in other states, such as Connecticut. In *Horton v. Meskill*, 376 A.2d 359 (Conn. 1977), the Connecticut Supreme Court applied its state equal protection clause—similar in meaning and application to the federal Equal Protection Clause—to hold that in Connecticut, "the right to education is so basic and fundamental that any infringement of that right must be strictly scrutinized." *Id.* at 371, 373. Woven throughout the majority, concurring, and dissenting opinions is a debate about the role of education in Connecticut's constitutional history and whether it rises to the level of other basic constitutional rights. *Id.*

213. 712 P.2d 1309, 1311 (Mont. 1986).

214. *Id.* at 1313. Many Montana voters were not convinced that this was the appropriate role for the judiciary. Two years after the *Butte I* decision, they approved a constitutional amendment that weakened the constitutional right to welfare, thus effectively overturning the court's groundbreaking decisions in *Butte I* and *Butte II*. See *supra* notes 70-72 and accompanying text.

215. See, e.g., *Aliessa v. Novello*, 754 N.E.2d 1085, 1092 (N.Y. 2001).

216. *Id.* at 1098.

other constitutional rights, but also relate to the ability of the poor to participate in the democratic process, justifying heightened scrutiny. Moreover, if we agree that an affirmative obligation in the constitution reflects the polity's values, reflecting the idea of "social citizenship" as suggested by Michelman, then courts should interpret that obligation as an important interest.

Although some observers decry the reliance on equal protection analysis to address what are essentially substantive rights,²¹⁷ equal protection arguments have become a standard form for defending constitutional rights, particularly as the Supreme Court has scaled back substantive due process. Thus, equal protection offers more familiar terrain for the state judiciary, which is clearly uncomfortable with interpreting and enforcing a substantive right to welfare under the state constitution.²¹⁸ At the same time, it fits within American legal norms of justiciable individual rights, rather than the European tradition of programmatic rights.²¹⁹

Of course, encouraging courts to use equal protection to permit some degree of social rights enforcement assumes that the judiciary has a role to play in this arena. Numerous scholars have argued that relying on judicial enforcement of rights is undemocratic,²²⁰ ineffective,²²¹ and undermines political participation.²²² Yet, perhaps placing judicial enforcement within the confines of equal protection steers a middle course between imploring state courts to aggressively enforce socioeconomic rights if they appear in state constitutions and objecting to any judicial role at all in social welfare provision. Many questions about the level and types of benefits a government should provide, particularly when they affect the broader populace through taxes and budgetary priorities, are best left to the political processes and the messy negotiation of majoritarian politics. Yet, questions about exclusion from or access to benefits, particularly as they affect

217. Westen, *supra* note 210. See also James A. Gardner, *Liberty, Community and the Constitutional Structure of Political Influence: A Reconsideration of the Right to Vote*, 145 U. PA. L. REV. 893, 973-74 (discussing the relationship between equal protection arguments and communitarian democracy in the context of voting rights).

218. See Neuborne, *supra* note 41, at 895 (suggesting that where state constitutions provide textual support for welfare rights, a judge's willingness to apply the state's equal protection or due process clauses to enforce those rights should be greater).

219. See Tushnet, *supra* note 11, at 1918.

220. See, e.g., Hirschl, *supra* note 78.

221. See, e.g., ROSS SANDLER & DAVID SCHOENBROD, *DEMOCRACY BY DECREE: WHAT HAPPENS WHEN COURTS RUN GOVERNMENT* 225-26 (2003).

222. See, e.g., MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 34 (1999).

underrepresented and disenfranchised groups, fit more comfortably into the judicial arena.²²³ Voters and their representatives will still have the power to determine whether the constitution will place responsibility for welfare provision with the legislature and to navigate the myriad of choices of socioeconomic policies. Voting, political organizing, protest and lobbying all offer individuals the opportunity to shape the distribution of benefits. Rather than hijacking this process, state courts can serve as the guardians of individuals whose voices are rarely heard in the politics of economic provision but are often the first to feel its effects.

223. Burt Neuborne, for example, sets a low bar for what state courts can achieve in the arena of positive rights, even while he advocates for state judicial enforcement of those rights. He suggests that “the most that the state judiciaries can do is to reverse the inertial political burden in this area” to create the political support necessary to “alter existing distributional arrangements.” Neuborne, *supra* note 41, at 900-01.