ARTICLE

POSITIVE RIGHTS AND STATE CONSTITUTIONS: THE LIMITS OF FEDERAL RATIONALITY REVIEW

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II3I
POSITIVE RIGHTS AND STATE CONSTITUTIONS: THE LIMITS OF FEDERAL RATIONALITY REVIEW

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Many state courts rely on federal standards of review in their state constitutional decisionmaking without considering whether the institutional concerns that justify the federal approach play out differently in the state context. In this Article, Professor Hershkoff questions the premises of federal rationality review as applied to the adjudication of claims to welfare assistance under state constitution poverty clauses. Federal rationality review, she argues, rests on doubts concerning democratic legitimacy, federalism, and separation of powers that are not completely apposite to state common law courts interpreting state constitutional positive rights. When a state constitution mandates the government provision of social services such as welfare, the relevant judicial question should be whether the challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power. Answering concerns that enforcement of positive rights is beyond the institutional competence of state common law courts, Professor Hershkoff proposes an alternative standard to federal rationality review for state court interpretation of state constitutional welfare rights that is consequential in focus and consistent with the provisional nature of state court decisionmaking.

The restraining power of the judiciary does not manifest its chief worth in the few cases in which the legislature has gone beyond the lines that mark the limits of discretion. Rather shall we find its chief worth in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges.¹

Almost thirty years ago, the Supreme Court refused to find a right to welfare in the Federal Constitution, contending that the "administrat-

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tion of public welfare assistance" raises "intractable economic, social, and even philosophical problems" that "are not the business" of the Court. Since then, the Court has rejected constitutional claims to housing, to public education, and to medical services, on the view that the government does not owe its citizens any affirmative duty of care. Endorsing a view of the Federal Constitution as a "charter of negative rather than positive liberties," the Court has resisted acknowledging any "affirmative right to government aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual." Although some commentators question the normative basis for the Court's approach, they generally agree that a fed-

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5 See Harris v. McRae, 448 U.S. 297, 318 & n.20 (1980) (finding no constitutional obligation upon the government to provide financial assistance to indigent women seeking to exercise reproductive choice). But cf. Wendy E. Parmet, Health Care and the Constitution: Public Health and the Role of the State in the Framing Era, 20 Hastings Const. L.Q. 267, 372-19 (1993) (using an analysis of social contract theory and early public health laws to contend that the framers intended not only to empower but also to obligate the government to provide for the public health).

6 See ISAIAH BERLIN, Two Concepts of Liberty, in FOUR ESSAYS ON LIBERTY 118, 122-44 (1969) (setting forth the conventional distinction between negative and positive rights); ROBERT E. GOODIN, REASONS FOR WELFARE: THE POLITICAL THEORY OF THE WELFARE STATE 184-85 (1988) ("It is now well established that certain rights of both a negative ("security") and a positive ("subsistence") kind are not only compatible with but are actually presupposed by all rights claims." (citations omitted)); JEREMY WALDRON, Liberal Rights: Two Sides of the Coin, in LIBERAL RIGHTS 1, 6 (1993) (discussing this distinction, and emphasizing the importance of positive rights to material well-being).


8 DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 196 (1989); cf. Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring) (stating that differences in wealth are "contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion"). The Court has recognized a duty of protection owed by the government to individuals involuntarily committed to state custody. See, e.g., Estelle v. Gamble, 429 U.S. 97 (1976) (holding that prisoners have a right to government-provided medical assistance).

9 Scholars have put forward a range of normative arguments in favor of welfare rights. The classic formulation remains Frank Michelman's. See Frank I. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7 (1969) [hereinafter Michelman, On Protecting the Poor]; see also CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 131-39 (1997) (justifying...
eral constitutional welfare right, even if recognized, would not be judi-

bile to read our Constitution as including either of those two provisions [decent housing and employment for all people]"). See generally A. DELAFIELD SMITH, THE RIGHT TO LIFE (1955) (de-
cially enforceable because of concerns about federalism, separation of powers, and institutional competence.10

Consistent with the states-as-laboratories metaphor,11 the constitutions of the fifty states present a very different framework in which to analyze whether government may stand by and ignore the hunger and homelessness of its citizens. Unlike the Federal Constitution, every state constitution in the United States addresses social and economic concerns, and provides the basis for a variety of positive claims against the government.12 Such positive rights range from the right of children to receive free public schooling,13 to the right of workers on public construction projects to receive “prevailing” wage rates.14 In particular, more than a dozen state constitutions provide explicit protections for the poor.15 Although some commentators treat these state constitutional poverty clauses as cre-

10 See, e.g., Cass R. Sunstein, The Partial Constitution 155 (1993) (suggesting that "the right to welfare, if it exists at all, is a good candidate for membership in the class of judically underenforced constitutional principles"); Laurence H. Tribe, American Constitutional Law 1336 (2d ed. 1988) (referring to "the familiar difficulties with judicial enforcement of affirmative duties"); Amar, supra note 9, at 42 (stating that "[t]here may be a variety of institutional limitations on courts that make them unsuitable for the task of enforcing minimal entitlements"); Thomas C. Grey, Property and Need: The Welfare State and Theories of Distributive Justice, 28 Stan. L. Rev. 877, 900–01 (1976) (suggesting that "it may be that institutional considerations governing the relations between the judiciary and the legislative branch will forever preclude" judicial enforcement of subsistence rights); Michelman, Welfare Rights, supra note 9, at 684–85 (stating that the duty to satisfy unmet human needs "seems to be one that courts acting alone cannot or ought not undertake to define, impose, and enforce"); Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 NW. U. L. Rev. 410, 432 (1993) [hereinafter Sager, Plain Clothes] ("Basic welfare payments ... ought to be understood as constitutional entitlements, the primary provision of which is the constitutional responsibility of nonjudicial governmental bodies."). But see Mark Tushnet, Civil Rights and Social Rights: The Future of the Reconstruction Amendments, 25 Loy. L.A. L. Rev. 1207, 1211–16 (1992) (arguing that social rights such as public assistance are as appropriate a subject for judicial enforcement as are civil rights).


14 See, e.g., N.Y. CONST. art. I, § 17 ("No laborer, workman or mechanic, in the employ of a contractor ... engaged in the performance of any public work [shall] be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.").

ating judicially enforceable rights to welfare, and not merely as aspira-
tional norms, state court judges nevertheless have shown reluctance to
recognize corresponding state duties. Instead, faced with challenges to
the adequacy or availability of welfare assistance programs, state courts
follow the trend of post-Lochner federal constitutional law and accord
great deference to legislative decisions.

In interpreting state constitutional welfare clauses, many state courts
import the federal rationality test into their decisionmaking, but without
considering whether the institutional concerns that are said to justify the
federal approach ought to play out differently in the state court context.
Commentators widely recognize that rationality review — the deferential
mode of scrutiny that the Court applies to “garden-variety socioeconomic
legislation” — is “tantamount to no review at all” and signals that the
Court has reserved the matter for politics. A court applying rationality
review will typically acquiesce in the government’s action without regard
to the “logic of legislative choices,” the “wisdom” of Congressional enact-


\[17\] Cf. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 93 (1977) (distinguishing between concrete and abstract rights, and defining an abstract right as “a general political aim” not subject to judicial enforcement).


\[19\] See, e.g., Moore, 233 Conn. at 589-91 (relying on federal precedent to reject a state constitutional welfare right); In re Davis, 442 N.E.2d 1227, 1231 & n.4 (N.Y. 1982) (applying rationality review to welfare classification, and noting that “other jurisdictions are of the same mind” (citations omitted)); Daugherty v. Wallace, 621 N.E.2d 1374, 1379, 1381 (Ohio Ct. App. 1993) (relying on federal precedent to hold that welfare classifications scrutinized under the state constitutional “happiness and safety” clause are subject to a “basic rationality standard”); Conklin v. Shinpoch, 730 P.2d 643 (Wash. 1986) (declining to find welfare rights in the state privileges and immunity clause and applying rationality review).


ments, or the "fairness" of statutory outcomes. In James Bradley Thayer's classic formulation, rationality review reflects the fact that "the constitution does not impose upon the legislature any one specific opinion, but leaves open ... [a] range of choice; and that whatever choice is rational is constitutional." Rather than promote a substantive conception of the good life, rationality review limits government authority by policing the outer boundaries of power, thus mediating institutional concerns thought to be important and even essential to the sound functioning of the federal system.

This Article offers a critique of the premises of federal rationality review as applied to state constitutional guarantees to welfare. I contend that a state court's reliance on federal rationality review — thereby according extreme deference to state legislative decisions that affect the poor — is misplaced. Federal rationality review rests on doubts concerning democratic legitimacy, federalism, and separation of powers that are inapposite to how state common law courts should function under state constitutions that guarantee public assistance to the poor. When a state constitution creates a right to a government-provided social service, the relevant judicial question should be whether a challenged law achieves, or is at least likely to achieve, the constitutionally prescribed end, and not, as federal rationality review would have it, whether the law is within the bounds of state legislative power. The test of a state welfare law, to borrow from Benjamin Cardozo, should be "one of fitness to an end," for "[t]he rule that misses its aim cannot permanently justify its existence."

This Article is part of a larger project about state courts and state constitutions that I have begun to develop elsewhere. Commentators typically describe constitutional rights as trumps that block the exercise of

23 Beach Comms., 508 U.S. at 313.
28 CARDOZO, supra note 1, at 103.
29 Id. at 66.
government power and thus protect against official abuse. This view of rights is sometimes associated with the view that a constitution is a set of negative restraints rather than an affirmation of positive commitments. State constitutions, however, establish explicit substantive goals that regulate government power and thus declare and serve important normative aims. For example, every state constitution mandates the establishment of free public schools and requires the state to educate children who live within its borders. Similarly, some state constitutions require the state to provide social services and income support to individuals whose indigency threatens their ability to subsist. When the state constitution mandates a specific purpose and thus authorizes the government to carry out the stated goal, the legislature and the governor have a duty to achieve, or at least to help promote, the constitutional mandate. To borrow from D.J. Galligan, a positive constitutional right imposes an affirmative obligation on the state to “realize and advance the objects and purposes for which . . . powers have been granted." So understood, positive rights not only restrain the government’s exercise of power, but also compel its exercise, constraining the government to use its assigned authority to carry out a specified constitutional purpose. Judicial review, in such a regime, must serve to ensure that the government is doing its job and moving policy closer to the constitutionally prescribed end. The enforcement of positive rights thus requires a state court to share explicitly in public governance, engaging in the principled dialogue that commentators traditionally associate with the common law resolution of social and economic issues.

In this Article, I conduct a case study of the New York State Constitution Welfare Clause (Article XVII), which is an example of a state consti-

31 See DWORKIN, supra note 17, at 184–205 (presenting a view of rights as trumps).
33 Commentators differ in their assessment of the importance of these goals, of their relation to state identity and notions of community, and of their legitimacy as constitutional norms. Compare, e.g., Daniel J. Elazar, The Principles and Traditions Underlying American State Constitutions, 12 PUBLIUS 11, 11 (1982) (arguing that state constitutions reflect “competing conceptions of government within particular states” and the values of the people), with, e.g., Robert A. Schapiro, Identity and Interpretation in State Constitutional Law, 84 VA. L. REV. 389, 394 (1998) (questioning the “hunt — often, as I will suggest, a wild goose chase — for characteristic state values and traditions”).
34 D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 30 (1986).
tutional provision that deals with the needs of the poor. The New York Constitution provides that "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." The New York Court of Appeals has interpreted Article XVII to impose "a positive duty upon the State," but to grant the legislature almost unreviewable "discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term 'needy.'

I focus on New York because of the broader lessons that its state constitutional experience presents — not only as an illustrative example, but also as a jurisprudence that provides national guidance. State constitutions reflect specific state circumstances, but they also share many structural and substantive features that allow for meaningful interstate comparison. For this reason, as G. Alan Tarr observes, state constitutional interpretation takes place in the context of "a universe of constitutions," in which state judges actively rely on precedent from other jurisdictions. Courts and commentators justifiably regard New York welfare decisions as templates for fashioning a nonfederal approach to state constitutional questions affecting the poor. Because Article XVII shares textual features with the provisions of other state constitutions, the New York Wel-

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36 As a staff attorney with The Legal Aid Society of New York, Civil Appeals & Law Reform Unit and Homeless Families Rights Project, and then as an associate legal director of the American Civil Liberties Union, I participated as counsel and as amicus curiae in New York cases involving state constitutional claims to education and to welfare. See, e.g., Coalition for Fiscal Equity v. State, 655 N.E.2d 661 (N.Y. 1995) (involving a state constitutional challenge to public funding for New York City public schools); Thrower v. Perales, 523 N.Y.S.2d 933 (Sup. Ct. 1987) (granting preliminary injunction against the denial of cash welfare assistance to homeless destitute persons temporarily residing in municipal shelters).

37 N.Y. CONST. art. XVII, § 1.
39 Id. at 452.
41 See Patrick Baude, Interstate Dialogue in State Constitutional Law, 28 RUTGERS L.J. 835, 847–63 (1997) (setting forth a discussion of sister-state citations in state constitutional decisions); Robert F. Williams, Introduction, 28 RUTGERS L.J. 783, 783 (1997) (observing that because "state constitutions ... contain similar provisions, interpretation by courts and commentators can be influential beyond their territorial boundaries" (quoting Paul A. Freund, Foreword to T.A.E. DICK HOWARD, COMMENTARIES ON THE CONSTITUTION OF VIRGINIA at vii, viii (1974))).
43 See, e.g., Norma Rotunno, Note, State Constitutional Social Welfare Provisions and the Right to Housing, 1 HOFSTRA L. & POL'Y SYMPOSIUM 111, 122 (1996) (observing that "[s]tates which have enacted ... affirmative duties in their constitutions may also serve as models for other states to adopt similar provisions," and relying on New York as an illustrative example).
fare Clause provides a representative example for analytic purposes. Moreover, New York’s welfare jurisprudence is more developed than that of its sister states, making it more likely that its sister courts will look to it for guidance.

My emphasis on New York also comports with the New York high court’s historic role as a “jurisprudential entrepreneur” in developing an independent state law discourse. Since its establishment in 1847, the New York Court of Appeals has generated precedent with reputational effects that are national in scope, and has developed a competitive advantage relative to other state judiciaries in terms of its influence and salience. Several factors account for the court’s current prominence.

At a celebration of the 150th anniversary of the New York Court of Appeals, it was not hyperbolic for one commentator to observe that “no other state court has generated leading case after leading case in every decade for 150 years.” Stewart E. Sterk, The New York Court of Appeals: 150 Years of Leading Decisions, in THERE SHALL BE A COURT OF APPEALS: 150TH ANNIVERSARY OF THE COURT OF APPEALS 49–50 (1997), quoted in Judith S. Kaye, “Year in Review” Shows Court of Appeals Continuing Its Great Traditions, 42 N.Y.L. SCH. L. REV. 331, 332 & n.6 (1998). Examples of such cases are numerous. See, e.g., Braschi v. Stahl Assoc., 543 N.E.2d 49 (N.Y. 1989) (addressing the concept of the same-sex family); Dole v. Dow Chem. Co., 282 N.E.2d 288 (N.Y. 1972) (discussing damage set-off); Palsgraf v. Long Island R.R. Co., 162 N.E. 95 (N.Y. 1928) (establishing the concept of proximate causation); MacPherson v. Buick Motor Co., 111 N.E. 1050 (N.Y. 1916) (establishing manufacturer liability despite a lack of privity of contract); Riggs v. Palmer, 22 N.E. 188 (N.Y. 1889) (establishing the rule that a legatee cannot inherit from a testator whom he has killed to prevent the testator from revoking his will).


See, e.g., Luke Bierman, The Dynamics of State Constitutional Decision-Making: Judicial Behavior at the New York Court of Appeals, 68 TEMP. L. REV. 1403, 1412 (1995) (“The court of appeals historically has been one of the nation’s most important state high courts.”); William J. Brennan, Jr., A Tribute to Chief Judge Charles S. Desmond, 36 BUFF. L. REV. 1, 3 (1987) (dis-
including the court's ability to draw from a rich common law tradition\textsuperscript{50} associated with the writings and decisions of Benjamin Cardozo.\textsuperscript{51} The state's chief judges have also consistently encouraged the development of an independent interpretive approach to state law issues.\textsuperscript{52} To the extent that the local legal culture has created a demand for decisions based on the state constitution, the New York court has responded by investing institutional capital in this area.\textsuperscript{53} Finally, the New York example has


\textsuperscript{53} The legal culture in New York supports the development of an independent state constitutional discourse. \textit{See generally} Thomas W. Church, Jr., \textit{Examining Local Legal Culture}, 1985 Am. B. Found. Res. J. 449 (exploring the idea of a "local legal culture" and its impact on judicial behavior). Legal scholars focus attention on the New York Constitution. \textit{See} Peter J. Galie, \textit{The
global significance as a model for established and emerging democracies that include positive rights in their national constitutions,\(^5^4\) and for international treaties, which since World War II have shown increasing attention to social and economic rights.\(^5^5\) Although the question whether these substantive norms are merely aspirational or can be judicially enforced remains contested,\(^5^6\) New York’s experience in judicially enforcing wel-


\(^5^6\) Compare Henry J. Steiner & Philip Alston, *International Human Rights in Context: Law, Politics, Morals* 269 (1996) (questioning whether economic and social claims should be constitutionalized and whether they are justiciable), with Arthur Selwyn Miller, *Toward a Concept of Constitutional Duty*, 1968 SUP. CT. Rev. 199, 246 n.168 (suggesting that the “judici-
positive rights uncovers many basic assumptions in the broader debate about the justiciability of economic rights.

The Article proceeds as follows. Using New York as an example, Part I sets out a typology of current state constitutional welfare practices. The discussion rests on the premise that state constitutional welfare clauses, of which New York’s Article XVII is an illustrative example, require state governments to achieve prescribed social goals that the state judiciaries must enforce. Part II explains that a state court’s use of federal rationality review in cases involving state constitutional positive rights is institutionally inappropriate. Part III offers an affirmative justification for state court judicial review of state constitutional welfare rights, and also answers concerns that such an interpretive project is outside the state judiciary’s institutional competence. Part III then proposes an alternative standard to federal rationality review for state court interpretation of state constitutional welfare rights. The standard that I suggest is consequential in focus and allied in application to the test that is currently used by some state courts in state constitutional cases challenging the adequacy of public school systems. Assessing the adequacy of government-provided services such as income support or public schooling is not easy. But the availability of professional benchmarks and other sources of information to guide the court’s discretion makes a more robust approach to the issue not only judicially manageable, but also consistent with the incremental law-making function of common law courts. Part III’s proposed standard has general implications for the enforcement of affirmative rights and can be applied across jurisdictions, thus contributing to a supranational judicial dialogue about the justiciability of social and economic claims against government. Part IV concludes by urging courts and legislators to resist conforming state constitutional discourse to federal law and instead to develop an interpretive approach that more fully accounts for the affirmative role that state constitutions play in state governance.

ary can aid in the articulation and the furtherance of ... an [affirmative] obligation [to ensure income adequacy]". A similar debate exists in the Eastern European context. Compare Jon Elster, The Impact of Rights on Economic Performance, in WESTERN RIGHTS?: POST-COMMUNIST APPLICATION 347 (Andras Sajo ed., 1996) [hereinafter WESTERN RIGHTS?] (arguing that in countries undergoing economic transformations, "civil and political rights are crucial both for ensuring economic security and for ensuring economic efficiency"), with Ruti Teitel, Constitutional Costs to Free Market Transitions, in WESTERN RIGHTS?, supra, at 361 (contending that economic development and maintenance of socioeconomic rights are often incompatible), and Ruti Teitel, Post-Communist Constitutionalism: A Transitional Perspective, 26 COLUM. HUM. RTS. L. REV. 167, 169-74 & n.13 (1994) (arguing that the decision to include welfare rights in a post-Communist constitution depends on "the nature of the successor society’s response to a predecessor constitutional culture of generally underenforced rights"). I thank Ruti Teitel for her informative discussions of post-Communist constitutionalism and its treatment of positive rights.

I. State Constitutional Welfare Practice

Using New York as a paradigmatic example, this Part sets out a typology of state constitutional welfare cases. State constitutionalism has generally been described (somewhat hyperbolically) as "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements." Although the New York court — as is typical of state courts — has never set out an explicit interpretive methodology for state constitutional welfare claims, it would be wrong to conclude that cases are decided on an ad hoc, haphazard, or incoherent basis. To the contrary, one can read the New York welfare cases as following, at least implicitly, what Mark Kelman has more generally described as a standard form — an analytic construct that organizes factual material into an existing doctrinal frame — that draws significantly from Supreme Court cases applying federal rationality review under the Fourteenth Amendment to social and economic classifications. Using rationality review, federal courts, without recognizing any constitutional right to welfare, enforce statutory entitlements as a matter of due process or equal protection but, absent an explicit racial or gender classification, accord the legislature virtually unfettered discretion in setting benefit levels and conditions of assistance. As this Part shows, Article XVII cases essentially track federal welfare doctrine by drawing a line between cases challenging the state's exclusion of needy people from existing welfare programs and those challenging the adequacy of such programs in meeting the needs of the poor.

A. A Mandatory Obligation: The New York Example

Article XVII of the New York Constitution provides that "[t]he 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

58 Gardner, supra note 49, at 763.
59 See Mark Kelman, Interpretive Construction in the Substantive Criminal Law, 33 Stan. L. Rev. 591, 592 (1981) (discussing "the process by which conscious and unconscious constructs settle doctrinal issues").
60 See generally Tribe, supra note 9, at 1089 & n.100 (discussing Frank Michelman, In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice, 121 U. Pa. L. Rev. 962 (1973), which describes the federal approach to welfare rights cases, and observing that federal courts remedy constitutional violations in such cases through indirect means). De facto racial discrimination is irrelevant to the Court's use of rationality review. See Jefferson v. Hackney, 406 U.S. 535, 546, 551 (1972) (applying rationality review to a claim of racially disparate welfare benefit levels). Moreover, burdening fundamental rights does not consistently trigger heightened review. Compare Lyng v. International Union, 485 U.S. 360, 362-64 (1988) (determining that withholding food stamps from otherwise eligible households in which the working head of the household is on strike is constitutional), with Shapiro v. Thompson, 394 U.S. 618 (1969) (striking down a welfare restriction that withheld benefits from newly arrived state residents). I was co-counsel for amicus curiae in Lyng. The Court has accepted certiorari in a case that may clarify the standard of review to be applied to welfare classifications that infringe on fundamental rights. See Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998) (upholding the grant of a preliminary injunction against implementation of a durational residency requirement for AFDC benefits), cert. granted, 119 S. Ct. 31 (1998).
such means, as the legislature may from time to time determine. The language of the New York Welfare Clause may seem to give the state legislature unfettered discretion in creating policies to fulfill the general directive. Elsewhere, I developed a reading of Article XVII that meets this interpretive concern. I suggested that when a state constitution commits the state to particular public policies, the role of the state court is to ensure that government uses its assigned power to achieve, or at least move closer to achieving, the specified goals. Although the legislature retains discretion over how to implement the state constitutional requirements, its discretion over the various "manners" and "means" is constrained by the constitutional mandate. In exercising review, the court would not itself construct welfare policy, but rather would impose a burden on the legislature to show that the chosen "manner" and "means" are likely to carry forward the specified constitutional aim.

I further argued that a reading of Article XVII that creates a mandatory obligation best translates the Welfare Clause's motivating purposes, as set out in its social and economic context, into present concerns. Adopted in 1938, Article XVII sought to redefine the relationship between citizen and state by establishing a state obligation, deemed to be "as fundamental as any responsibility of government," to assist the poor. A constitutional amendment was needed to make clear that government aid for the poor serves a public purpose for which public funds may be deployed, thus altering the background assumption that relief for the poor is an improper deviation from a baseline of common law entitlements. In addition, I argued that Article XVII sought to empower the state with broad authority in order to ensure that the state has flexibility to deal with the complex problems of poverty. The constitutional provision thus avoids the detailed "statutory" language of earlier constitutions and instead, like many New Deal provisions, assigns power in broad, open-ended terms. The grant of such legislative authority, however, did not oust the judiciary from its essential role as the enforcer of constitutional rights.

B. A Typology of Current State Court Decisions

For heuristic purposes, this Part organizes Article XVII claims into a three-part typology that reflects the different kinds of legislative discretion at play in decisions about the distribution and allocation of public assist-

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61 N.Y. CONST. art. XVII, § 1.  
63 See id. at 1912–13.  
64 See id. at 1913–26.  
65 Id. at 1913 (citing STATE OF NEW YORK, REVISED RECORD, PROCEEDINGS OF NEW YORK STATE CONSTITUTIONAL CONVENTION 2126 (1938)).  
66 See id. at 1921; see also Cass R. Sunstein, Lochner's Legacy, 87 COLUM. L. REV. 873, 874–75 (1987) (discussing the common law baseline in constitutional decisionmaking).  
ance. Any given case is, of course, significantly less tidy than this categorization would suggest. But for analytic reasons it is important to try to separate out the different aspects of legislative discretion that are at issue in welfare rights cases.  

The first category, which I call Type I, consists of cases that challenge the state’s discretion to deviate from laws and regulations that define who is needy for purposes of relief. Judges have developed a bright-line approach to such claims: the state may not deny aid to a person who meets the state-defined standard of need. The usual argument raised in a Type-I claim is that the state's recognition that certain circumstances constitute need automatically mandates providing assistance to a claimant who applies for relief and satisfies the substantive requirements. Type-I claims resonate with the positivist conception of entitlement that Charles Reich elaborated in his now classic article, The New Property, and that the Supreme Court endorsed in its landmark decision, Goldberg v. Kelly. In resolving Type-I claims, the New York courts reject the older view of welfare as a privilege—a so-called “public right”—to be granted or denied as a matter of administrative discretion. Welfare benefits are instead viewed as “a matter of statutory entitlement for persons qualified to receive them.” Type-I claims are not, however, merely state iterations of federal entitlement theory. Under familiar federal constitutional doctrine, the property interests that are protected by federal due process “are not created by the Constitution.” Instead, “they are created and their dimensions are defined by . . . an independent source such as state law.” By contrast, the Article XVII mandate is intended to

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68 This section draws upon the typology set out in Hershkoff, cited above in note 4, at 637-41.
69 The New York Social Services Law provides that “social services officials shall . . . provide [public assistance] to needy persons . . . who are determined to be eligible in accordance with standards of need established [by the state department of social services].” N.Y. SOC. SERV. LAW § 131-a (McKinney 1998).
70 The “standard of need” is a hypothetical measure that the state develops to determine eligibility and benefit levels for welfare programs. Historically, welfare payments have been set at a level less than a state’s standard of need. See Kathryn A. Larin with Kathryn H. Porter, Center on Budget and Policy Priorities, Enough to Live On: Setting an Appropriate AFDC Need Standard at ix (1992).
be enforced against the legislature, as well as against executive agencies; the protected property interests are created by the state constitution itself.

Type-I claims typically involve individuals who are poor, but who cannot — for reasons beyond their control — produce specific documents to prove their eligibility.\(^7\) **Tucker v. Toia,\(^8\)** a leading example of a Type-I claim, involved a challenge to state regulations denying Home Relief\(^7\) payments to youths who were considered indigent under the state’s need standard, but who could not present court orders proving that relatives were not supporting them. Each of the plaintiffs had petitioned the court for such an order, but processing required “several weeks to several months”; in the interim, the state denied benefits.\(^8\) Moreover, some of the plaintiffs were ultimately incapable of obtaining the required court orders because their parents’ whereabouts were unknown.\(^8\) Finding a violation of the New York Welfare Clause, the court reasoned that because the state may not directly refuse to aid the needy, it may not indirectly refuse to do so by imposing evidentiary requirements that “hav[e] nothing to do with need.”\(^8\) As a general matter, Article XVII has been interpreted as requiring the state to provide aid to all needy individuals who attempt in good faith to prove their indigency, even if they cannot support their application with specific documentation.\(^3\)

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7 The social science literature notes the practical difficulties that poor people face when attempting to satisfy bureaucratic requirements for public assistance. See, e.g., MADELEINE R. STONER, THE CIVIL RIGHTS OF HOMELESS PEOPLE: LAW, SOCIAL POLICY, AND SOCIAL WORK PRACTICE 58 (1995) (discussing the impact of verification requirements on the ability of homeless people to secure public assistance benefits). For a discussion of “bureaucratic disentitlement,” see MICHAEL LIPSKY, STREET-LEVEL BUREAUCRACY 99-139 (1980).


79 Home Relief is a state-funded general assistance program for indigents who are otherwise ineligible for federal forms of assistance. See N.Y. SOC. SERV. LAW § 157 (McKinney 1997). See generally HERSHKOFF & LOFFREDO, supra note 15, at 98-105.


81 One plaintiff had received no support from his father, but was nevertheless denied assistance “since he had not obtained a support order against his father, a man whom he has never seen and who abandoned the family home prior to his son’s birth.” Tucker v. Toia, 390 N.Y.S.2d 794, 799 (Sup. Ct. 1977).

82 Tucker, 371 N.E.2d at 452. A similar case is *Minino v. Perales*, 589 N.E.2d 385 (N.Y. 1992), which involved the denial of Home Relief benefits to legal immigrants who, despite their best efforts, were unable to provide the welfare office with information about their sponsor’s income; under state law, a sponsor’s income is presumed available to the alien whether or not it is actually available. In the court of appeals, the state defended its eligibility standard on federal preemption grounds, but the court refused to accept the state’s deviation from the standard of need based on factors unrelated to need. *Id.* at 886.

83 In actual practice, many indigent people in New York continue to be denied assistance because they cannot produce specific documents to prove their eligibility. *See Robinson v. Grinker*, Index No. 4060/87 (N.Y. App. Div. Sept. 9, 1993) (on file with author) (challenging delays in the processing of welfare applications); *see also* Susan D. Bennett, “No Relief but upon the Terms of Coming into the House” — Controlled Spaces, Invisible Disentitlements, and Homelessness in an Urban Shelter System, 104 YALE L.J. 2157, 2208 n.225 (1995) (quoting Stephen Looffredo, counsel in Robinson v. Grinker, who discussed the long delays in the processing of welfare applications).
Type-II claims involve the state's discretion to deny assistance to indigent people for substantive reasons unrelated to need. As the New York Court of Appeals explained in *Lovelace v. Gross*, "the Legislature's discretion to ascertain and define the State standard of need is subject to judicial review and must be exercised reasonably." The idea motivating Type-II claims is that the grant of Article XVII benefits should turn on the factual question of which applicants are financially impoverished, and not on a policy judgment whether to provide aid only to certain categories of indigent people. Thus, for example, in *Lee v. Smith*, the court of appeals struck down the state's refusal to provide Home Relief to destitute, disabled individuals whose primary source of income was federal Supplemental Security Income. The state defended the exclusion as a way to minimize administrative costs. The court found this goal unrelated to the needs of the poor and thus an insufficient basis for "irrevocably assigning the aged, disabled and blind to the Federal program without recourse to State aid, when in many cases this means that they must survive on lesser amounts than are granted to other needy persons in the State." *Lee* is a relatively unusual case: when the state can justify an exclusion as serving the goal of assisting only the economically needy, courts will not usually demand a more precise or finely tailored categorization. In *Barie v. Lavine*, for example, New York's highest court upheld the constitutionality of regulations allowing the temporary suspension of Home Relief benefits to recipients who refused to accept workfare assignments. The court explained: "The Legislature may in its discretion deny aid to employable persons who may properly be deemed not to be needy when they have wrongfully refused an opportunity for employment." By so hold-


86 Id. at 343; see also *Brown v. Wing*, 649 N.Y.S.2d 988, 994 (Sup. Ct. 1996) (invalidating a statute limiting Home Relief benefits in the first six months of state residence on the ground that it classifies welfare recipients by standards other than need).
87 373 N.E.2d 547 (N.Y. 1977).
88 See id. at 251-52.
89 Id. at 252.
91 See id. at 349-50.
92 Id. at 352. The court treated as legally irrelevant the facts that the challenged regulation denied benefits for a fixed period, even after the claimant had accepted the work referral; that plaintiff had missed a single work appointment; and that there was no evidence of "a continuing refusal to accept employment." *Id.* (Jones, J., dissenting). The trial court had found the mandated thirty-day suspension from benefits illegal unless "limited to the period during which the
ing, the court treated positive law as a conclusive presumption that refusal to accept employment demonstrates a lack of need without considering any of the factors that might be behind the refusal. For example, a mother might lack childcare for an infant; an individual might be disabled; a claimant might lack necessary transportation to the worksite; or the employer may have a record of sexual harassment or occupational safety violations. Rather than examine the congruence between statutory means and constitutional ends, the New York courts in Type-II cases effectively ratify legislative policy choices even when the legislature withholds assistance for the purpose of controlling or punishing behavior that is legal although the state considers it to be deviant. Although legislative burdens on fundamental interests usually trigger closer means-end scrutiny in constitutional decisionmaking, the resolution of Type-II claims instead tends to grants great deference to legislative choice, thereby following the "general run" of federal claims involving socioeconomic concerns.

The third category — Type III — involves the state's discretion to define the package of assistance provided to needy individuals. Claims in this category challenge such matters as the level of public assistance pay-

recipient of social service benefits refuses to comply with the Work Rules.” Barie v. Lavine, 358 N.Y.S.2d 572, 575 (Sup. Ct. 1974).


94 Jones v. Blum, 476 N.Y.S.2d 214 (App. Div. 1984), aff'd, 477 N.E.2d 620 (N.Y. 1985), upheld a state regulation that denies assistance to families whose gross income exceeds 150% of the state standard of need, even if the net income actually available to the family is less than the standard of need. See id. at 216. The courts accepted the state's argument that the legislature possessed the discretion to define "need" in this manner. See id. In fact, the New York legislature had made no need determination, but rather piggy-backed on the federal AFDC deeming rule.

In addition, Lovelace v. Gross, 80 N.Y.2d 419 (1992), involved the scope of the legislature's discretion to construct standards defining neediness based on what the court regarded as economic factors. At issue was an eligibility requirement deeming the income of a grandparent with whom a minor child lived to be available to the child even though New York law no longer obligated a grandparent to support a minor grandchild. See id. at 425; see also Home Relief, N.Y. Soc. Serv. Law § 131-c(a) (McKinney 1998); Aid to Families with Dependent Children, 42 U.S.C. § 602(a)(39) (Supp. 1996). The court found it rational to assume that grandparents "will voluntarily share income with their infant grandchildren even though not legally obligated to do so," and that three-generation households will inevitably produce economies of scale that affect an individual child's need for assistance. Lovelace, 80 N.Y.2d at 425.

Finally, in Hope v. Perales, 634 N.E.2d 183 (N.Y. 1994), the court of appeals refused to invalidate the state's denial of funding for medically necessary abortions for women who are ineligible for public assistance, but whose incomes are no more than 185% of the federal poverty line. See id. at 184. "Unlike an indigent woman," the court explained, a plaintiff in these economic circumstances "presumptively has the financial means to exercise her fundamental right of choice." Id. at 188. According to the court, it is "bound to accept the legislative determination that [women in these circumstances] are not indigent or in need of public assistance to meet their medical needs." Id. at 188.

95 Tribe, supra note 10, §§ 16-31, at 1591.
ments, the quality of emergency housing, and the refusal to provide particular kinds of social services as failing to comply with the Article XVII mandate of providing "aid, care and support of the needy." The state's position in such cases is that Article XVII accords the legislature absolute power to define the "manner" and "means" of assistance.

Faced with Type-III challenges, a few lower New York courts have examined the substantive adequacy of the benefit provided. For example, *Fulton v. Krauskopf* concerned the sufficiency of travel allowances given to homeless families to permit a parent to accompany a child to school and back. The city provided a flat grant of eighteen dollars to the parent, and nothing to the child. The court found: "The [policy] does not appear to be adequate. . . . The grants of assistance which are provided are meager enough without requiring that they be depleted by genuine expenses incurred for the schooling of children. No family should have to make the hard choice between eating and education."

However, cases such as *Fulton* are the exception rather than the rule. Type-III claims are dominated by *Bernstein v. Toia*, which upheld New York's adoption of a fixed, capped schedule of welfare grants in place of a system of discretionary special grants. During the egalitarian heyday of the 1960s, special grants — discretionary payments made by case workers to households, upon request, for such everyday things as a child's overcoat or bus fare to the doctor's office — became an important organizing tool

96 See, e.g., *Bernstein v. Toia*, 373 N.E.2d 238, 244 (N.Y. 1977) (upholding flat grants for shelter allowances on the view that Article XVII does not "mandate that public assistance must be granted on an individual basis in every instance"); *RAM v. Blum*, 432 N.Y.S.2d 892 (App. Div. 1980) (rejecting an Article XVII challenge to the state's failure to increase public assistance grants to reflect inflation).

97 See, e.g., *McCain v. Koch*, 511 N.E.2d 62, 62–63 (N.Y. 1987) (affirming on equitable grounds a preliminary injunction requiring government entities "when they have undertaken to provide emergency housing for homeless families with children, to provide housing which satisfies minimum standards of sanitation, safety, and decency").


100 Id. at 984. The court found that it was unreasonable for the City of New York to withhold assistance from children who did not receive free bus passes from the Board of Education, or to refuse to provide additional cash payments to parents whose journey required paying multiple fares for the bus and subway. See id.


102 Id. at 244.
in the political effort to build a “welfare rights” movement.\textsuperscript{103} New York responded by consolidating special grants into a flat grant system; the state narrowed eligibility requirements and defended the revised approach as a cost-cutting measure necessitated by mounting caseloads.\textsuperscript{104} The plaintiffs in Bernstein challenged this policy change, carefully limiting their claim to the government’s refusal “to make exceptions to those schedules when warranted”;\textsuperscript{105} the court, nevertheless, recast the lawsuit as a broadside attack on the flat grant concept itself.\textsuperscript{106} With the case thus reconceived, a ruling in plaintiffs’ favor would have exposed the state to the slippery slope of having to “open [every welfare grant] to adjustment in favor of individual applicants on appropriate showings.”\textsuperscript{107} Recognizing “the constraints of fiscal trimming,” the court first rejected any Fourteenth Amendment challenge on the ground that the consolidation was not without “a rational relationship to the legitimate State interest of seeking to assure optimum realized benefits from available public assistance moneys.”\textsuperscript{108} The court then quickly dispatched the plaintiffs’ state law claims, ratifying (without exploring) the state’s prediction that the flat grant system “is reasonably expected to be in furtherance of the optimum utilization of public assistance funds.”\textsuperscript{109} Without offering any meaningful explanation, the court summarily declared that Article XVII extends only “to questions of impermissible exclusion of the needy from eligibility for benefits, not to the absolute sufficiency of the benefits distributed to each eligible recipient.”\textsuperscript{110} By contending that the administration of pub-


\textsuperscript{104} The Supreme Court upheld the consolidation under federal law in \textit{Rosado v. Wyman}, 397 U.S. 397, 421–23 (1970).

\textsuperscript{105} Bernstein, 373 N.E.2d at 241 (internal quotation marks omitted).

\textsuperscript{106} \textit{See id.}

\textsuperscript{107} \textit{Id.}

\textsuperscript{108} \textit{Id. at 243.}

\textsuperscript{109} \textit{Id. at 244.}

\textsuperscript{110} \textit{Id.}
lic assistance is best handled through the elected branches, the court thus reconciled Article XVII with standard Fourteenth Amendment doctrine.\textsuperscript{111}

This typology describes the various levels of limited scrutiny that the New York court applies in determining whether the legislature has complied with Article XVII. The black-letter rule establishes the state's duty to extend assistance to all individuals who meet the state-defined standard of need. Type-I claims raise questions about how individual claimants can demonstrate that their economic circumstances fall within this statutory category of need. The court has made it clear that the state may not use evidentiary requirements to erect a "papergate" barrier to relief. In Type-I claims, the courts seem to examine procedural requirements closely, using a standard that is somewhat more robust than mere rationality, to determine whether the requirements are associated with an assessment of need. Like Type-I claims, Type-II claims also deal with proof of eligibility, but differ in that they involve substantive conditions — such as immigration status or work participation — that the state imposes as a prerequisite to relief. In these cases, the court has shown far more deference to the legislature's administrative choices, tolerating virtually any condition that can plausibly be described in economic terms as relating to the state definition of need. Finally, Type-III claims challenge the adequacy of benefits provided, thus moving from considerations of eligibility to assistance levels. Type-III claims reflect the court's highest level of deference to legislative decisions; the court largely remits substantive questions of this kind to legislative discretion. The approach has so far tracked federal welfare doctrine, which leaves questions of programmatic sufficiency to Congress and to the states.\textsuperscript{112} Although the court maintains that the issues encompassed in Type-III claims are justiciable, the strong deference that the court affords the legislature effectively converts such claims into political questions and insulates them from judicial review.\textsuperscript{113}

\textsuperscript{111} More recently, in Jiggetis v. Grinker, 553 N.E.2d 570 (N.Y. 1990), the court heard a statutory challenge to the sufficiency of welfare payments for rent under a state law mandating "adequate" allowances "having regard for the physical, mental and moral well-being" of indigent children for whose benefit the payments are made. \textit{Id.} at 573 (quoting N.Y. SOC. SERV. LAW § 350(1)(a)). The court noted that the Bernstein plaintiffs had not challenged the adequacy of the flat grants provided, \textit{see id.} at 574 n.3, and held "that when the Legislature directed that shelter allowances 'shall be adequate,' it imposed a duty on the Commissioner to establish a schedule reasonably calculated for that purpose," \textit{id.} at 575.


\textsuperscript{113} \textit{See generally} Monaghan, supra note 25, at 34 (contending that under rationality review, the Court holds "as a matter of constitutional interpretation, that the political branches are empowered to achieve a broad range of goals"); Robert F. Nagel, \textit{Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine}, 56 U. CHI. L. REV. 643, 643 (1989) (explaining that the political question doctrine "defines where political decisionmaking is appropriate," thereby "mak[ing] an exception to a norm of judicial sovereignty over the fundamental issues called 'constitutional'"); Martin H. Redish, \textit{Judicial Review and the "Political Question"}, 79 NW. U. L. REV. 1031, 1031 (1984–1985) (stating that the "political question" doctrine postulates that
II. RECONSIDERING FEDERAL RATIONALITY REVIEW IN STATE CONSTITUTIONAL WELFARE CASES

Type-III claims best exemplify the state court's use of rationality review, the test that federal courts apply to determine whether social or economic legislation is constitutional. Since the demise of Lochner and the rise of the New Deal state, the Supreme Court has applied in such cases a form of rationality review that typically "requires only that the State's system be shown to bear some rational relationship to legitimate state purposes." On rare occasions, the Court will invalidate laws "rest[ing] on an irrational prejudice" that casts doubt on the asserted governmental purpose. In the usual case, however, as long as the stated goal remains within the permissible scope of state power, rationality review does not police whether a challenged law actually serves its intended purpose.

The prevalent understanding of rationality review — and its most potent criticism — posits that rationality review is not review at all, but rather the withholding of review, indicating a refusal to expend resources on issues that the judiciary locates outside the constitutional domain. Rationality review thus signals the Court's view that a claim does not merit its institutional attention; the claim is instead remitted to another branch of government, to whose judgment, within a very broad parameter, the Court defers.

Most, but not all, of economic life falls under the rubric of rationality review. Gender classifications command closer scrutiny of means, as do classifications that touch on First Amendment interests. Likewise, cer-

there exist certain issues of constitutional law that are more effectively resolved by the political branches of government and are therefore inappropriate for judicial resolution" (citation omitted).

114 See Sullivan, supra note 21, at 60 (referring to "deferential rationality review for garden-variety socioeconomic legislation").

115 San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 40 (1973); see also John Brigham, Constitutional Property: The Double Standard and Beyond, in JUDGING THE CONSTITUTION: CRITICAL ESSAYS ON JUDICIAL LAWMAKING x87, 188 (Michael W. McCann & Gerald L. Houseman eds., 1989) (hereinafter JUDGING THE CONSTITUTION] (stating that "the Court defers to legislative bodies when it reviews a law passed by Congress or a state legislature on economic matters"). In such cases, "purpose" refers to legislative end, not legislative motive. See Robert C. Farrell, Legislative Purpose and Equal Protection's Rationality Review, 37 VILL. L. REV. 1, 7 (1992) (arguing that the legislative purpose/motive distinction should be illusory); Michael J. Perry, Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases, 71 NW. U. L. REV. 417, 422 (1976) (distinguishing between the achievement of objectives and the legitimacy of objectives for due process analysis).

116 See Loffredo, supra note 2, at 1282–84; Sager, Plain Clothes, supra note 10, at 410.

117 See, e.g., J.E.B. v. Alabama ex rel. T.B., 517 U.S. 127, 136 (1996) (declaring that "all gender-based classifications are subject to "heightened scrutiny").

tain claims under the Commerce Clause require a closer means-end fit. Explicit race classifications are per se illegal, but de facto racial classifications receive only minimal scrutiny. As to the rest, Lawrence G. Sager aptly comments:

After threats to speech, religion, and the narrow band of activities that fall under the rubric of privacy, after the disfavor of persons because of their race or gender (or possibly, because of their nationality or the marital status of their parents), and after lapses from fairness in criminal process, the attention of the constitutional judiciary rapidly falls off. By default, everything else falls in the miasma of economic rights. . . . The most vivid discrepancy between constitutional case law and political justice concerns a particular aspect of our economic life — the welfare of the poor.

Rationality review may thus be criticized as lacking "an affirmative view of . . . constitutional values to be upheld," and as motivated only "by a vision of the bounds of judicial behavior." Under the rationality standard, the Court functions as an umpire whose sole job is to maintain legislative power within institutional limits, not to ensure that power is used to reach a prescribed end. Nevertheless, for many courts and commentators, rationality review remains a normative ideal of judicial restraint, reflecting a theory of how the federal court can best retain legitimacy in the face of concerns about democracy, federalism, and separation of powers. This Part sets out the assumptions that support rationality review and illustrates their lack of meaningful fit with the institutional and substantive position of state courts adjudicating state constitutional welfare claims.

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121 Cf. Palmore v. Sidoti, 466 U.S. 429, 433 (1984) (noting that "[p]rivate [racial] biases may be outside the reach of the law, but the law cannot, directly or indirectly, give them effect").
122 Sager, Plain Clothes, supra note 10, at 410-11.
125 See, e.g., Alexander M. Bickel, The Least Dangereous Branch: The Supreme Court at the Bar of Politics 35-45 (1962) (endorsing James Bradley Thayer's view of judicial review in cases involving congressional power and not constitutional limitations).
126 Earlier work in a number of areas has emphasized institutional differences between state and federal courts. See Akhil Reed Amar, A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction, 65 B.U. L. REV. 205, 238 & n.115 (1985) (discussing the institutional differences in relation to congressional control of Article III jurisdiction); Braveman, supra note 16, at 577-78 (discussing the institutional differences in relation to state court enforcement of state constitutional welfare rights); Cohen, supra note 16, at 645-56 (same); Robert M. Cover & T. Alexander Aleinikoff, Dialectical Federalism: Habeas Corpus and the Court, 86 YALE L.J. 1035, 1050-51 (1977) (discussing the institutional differences in relation to criminal justice); Geoffrey C. Hazard, Jr., Reflections on the Substance of Pinnality, 70 CORNELL L. REV. 642, 646-47 (1985) (discussing the institutional differences in relation to the Erie doctrine); Hans A. Linde, Judges,
A. Rationality Review and Positive Rights

Federal rationality review rests on a baseline assumption that the U.S. Constitution does not guarantee positive rights against the government, giving rise to "a concomitant suspicion of any claim that seems to depend on such rights." In a notorious application of this view, the Court found no violation of federal constitutional rights when state social service workers, despite warnings of danger, "took no action" to remove a four-year-old boy from the home of his physically abusive father, who then inflicted "brain damage so severe" on his son that the child was "expected to spend the rest of his life confined to an institution for the profoundly retarded." As the Court explained, 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."

Because the Constitution "is not intended to embody a particular economic theory," proponents of rationality review warn that judicial recognition of unenumerated welfare rights would allow nonelected judges improperly to "read into the Constitution their [own] social preferences." Rationality review thus locates questions about poverty and its treatment in a private realm, outside the constitutional domain, so that relief for the poor is at best a contingency of social policy.

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127 See GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? II (1991) (stating that "there are no constitutional rights to decent housing, adequate levels of welfare, or clear air").

128 DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 204 (1989) (Brennan, J., dissenting). I was co-counsel for amicus curiae urging reversal.

129 Id. at 193.

130 Id. at 195.


133 Cf. Barbara E. Armacost, Affirmative Duties, Systemic Harms, and the Due Process Clause, 94 Mich. L. Rev. 982, 1003 (1996) (stating that "judgments about what combination of goods and services will be provided by the government, how much money is required to supply such services, and how available funds will be allocated ordinarily are made by citizens through their elected representatives").
By contrast, although there is no prototypical constitution, a significant number of state constitutions include an explicit provision of social and economic goals, among them public assistance for the indigent. As Daniel J. Elazar explains, "state constitutions are important determinants of who gets what, when, and how in America because they are conceptual and at times very specific statements of who should get what, when, and how." In this sense, state constitutions resemble regulatory statutes because they prescribe social and economic policies, expressed in the language of positive rights, while according the legislature instrumental discretion to carry out the constitutional mandate. These positive rights are not simply structural limits on governmental power; they are also prescriptive duties compelling government to use such power to achieve constitutionally fixed social ends.

By committing the state to explicit public goals, state constitutions compel state legislatures to enact policies that carry out these goals, and thus alter the terms of political discourse. Bound by an oath of office, state legislators must act in a situation of constrained discretion. Food and shelter are no longer merely aspirational goals of political justice; they are instead a part of the constitutional fabric and a nondiscretionary feature of the legal order. A shortfall in enforcement may not simply be remitted to politics; it instead implicates the judiciary in a collaborative process of elaborating the constitutional mandate. Social and economic concerns of this sort, although viewed by Article III courts as political questions, as within legislative discretion, or as otherwise nonjusticiable, are in many ways standard fare for common law courts. Unlike federal courts, state courts are frequently counted on to resolve constitutional questions that implicate the courts "directly in day-to-day political issues" and that encourage them to act as interdependent members of state government. As former Justice Hans Linde of the Oregon Supreme Court explains, "[s]tate courts settle contests over public offices, pass on the pro-

135 See Daniel Rodriguez, State Constitutional Theory and Its Prospects, 28 N.M. L. Rev. 271, 271 (1998) ("State constitutions create the legal frameworks in which many of the basic regulatory decisions affecting American citizens' lives are made.").
136 Cf. Tarr, supra note 42, at 22 (contending that "the policy provisions in state constitutions may be statements of principle, committing the state to achieve particular ends"); G. Alan Tarr, Understanding State Constitutions, 65 Temp. L. Rev. 1169, 1181-83 (1992) (observing prevalence of "statutory material" in state constitutions).
137 Cf. Stuart A. Scheingold, The Politics of Rights: Lawyers, Public Policy, and Political Change 144 (1974) (arguing that rights alter political discourse by allowing judges "to demonstrate the dangers inherent in the expedient compromises that are the inevitable consequence of political bargaining"); Waldron, supra note 6, at 273 (distinguishing between welfare as a "contingency of public policy" and welfare as a right forming an aspect of "social citizenship").
priety of proposed public expenditures and even of proposed constitutional amendments, often at the suit of mere 'taxpayers.'

Rationality review as currently exercised by Article III courts, however, is designed to block the judiciary's policymaking role and to separate judges from the "political thicket," thereby disabling courts from performing an important institutional role.

B. Rationality Review and Democratic Legitimacy

Rationality review further rests on a theory of democratic primacy, under which "governmental policymaking . . . ought to be subject to control by persons accountable to the electorate." Federal judicial review of government action thus presents a fundamental tension, because it allows unelected Article III judges to override the policy preferences of the people's elected representatives.

Rationality review attempts to mediate this tension by granting a strong presumption of constitutionality to social and economic legislation challenged under the Equal Protection and Due Process Clauses, and requiring the legislature to proffer only a hypothetical or theoretical justification for a challenged policy. In a recent articulation of the standard, the Court stated that "[i]n areas of social and economic policy, a statutory classification that neither proceeds along suspect lines nor infringes fundamental constitutional rights must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for the classification."

However, the democratic concerns that motivate rationality review play out very differently in many state court systems. "The 'countermajoritarian difficulty,'" as Barry Friedman explains, "is born of a world in which courts are seen as insulated bodies decreeing rights without regard to popular will." Countermajoritarian concerns may not be as uniformly salient in the state constitutional context, given variations among

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139 Linde, supra note 126, at 248.
140 Colegrove v. Green, 328 U.S. 549, 556 (1946) (Frankfurter, J., plurality opinion).
143 See Barry Friedman, The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy, 73 N.Y.U. L. REV. 333, 335 (1998) ("The 'countermajoritarian difficulty' has been the central obsession of modern constitutional scholarship [—] to the extent that democracy entails responsiveness to popular will, how to explain a branch of government whose members are unaccountable to the people, yet have the power to overturn popular decisions.").
144 James Bradley Thayer presents the classic expression of a strong presumption of constitutionality: courts may invalidate legislative acts when legislators "have not merely made a mistake, but [one] so clear that it is not open to rational question." Thayer, supra note 24, at 144.
state court systems — states vary, among other things, in the way in which judges are recruited, selected, retained, and compensated — but they are all non-Article III decisionmakers. Indeed, in all but a handful of states, state judges are popularly elected and retained. Admittedly, running for office does not transform black-robed judges into representative decisionmakers; an elected court must still weigh constituent preferences against constitutional standards. The fact of judicial election does, however, alter the political vulnerability of state judges, subjecting them to a kind of popular veto that in theory sets a boundary or tether on judicial decisionmaking. Burt Neuborne thus refers to the relation between the people and elected constitutional courts as “a form of


152 See Amar, supra note 126, at 238 & n.115.


155 See Larry W. Yackle, Choosing Judges the Democratic Way, 69 B.U. L. Rev. 273, 284–86 (1989) (distinguishing between representative and judgmental institutions). Elaborating the nature of this judgmental process has proved fertile territory for constitutional scholars. See, e.g., Dworkin, supra note 17, at 1–13. Compare John Hart Ely, Another Such Victory: Constitutional Theory and Practice in a World Where Courts Are No Different From Legislatures, 77 Va. L. Rev., 833, 833–35 & n.4 (1991) (seeking to justify judicial review “on the basis of some characteristic that courts possess in greater measure than ordinary political officials”), with Duncan Kennedy, Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power, 41 Md. L. Rev. 563, 564–65 (1982) (contending that “the only grounds for distinguishing between courts, legislatures and administrative agencies as lawmakers are (i) that the false consciousness of the public requires it or (ii) that the decision maker has a quite specific theory about how his or her particular institutional situation should modify . . . pursuit of political objectives”).
majoritarian ratification” that works to dissolve the democratic problem that rationality review attempts to mediate.\(^{156}\)

Those states that are free of the countermajoritarian difficulty may face the opposite problem — the concern that elected judges, beholden to majoritarian support for their retention, will be reluctant to enforce unpopular rights.\(^{157}\) Some commentators insist that electoral pressure does not in practice undermine state court independence;\(^{158}\) populism’s “grosser threats” may apparently be overcome by granting relatively long judicial tenure during good behavior.\(^{159}\) Despite this either/or form, however, surely the majoritarian difficulty exists along a continuum of effects.\(^{160}\) Recent studies suggest that certain kinds of constitutional cases, particularly those involving capital punishment, may generate strong public reaction and thus subvert judicial independence.\(^{161}\) State constitu-

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156 Neuborne, supra note 15, at 900; see also James Gray Pope, An Approach to State Constitutional Interpretation, 24 Rutgers L.J. 985, 987 n.16 (1993) (noting that “judicial activism at the state level is less ‘countermajoritarian’ than at the national level because in many states judges are elected (and can be unelected”); Lawrence Schlam, State Constitutional Amending, Independent Interpretation, and Political Culture: A Case Study in Constitutional Stagnation, 43 DePaul L. Rev. 269, 309 (1994) (“[C]onstitutional flexibility, measured by the relative facility of the state process for amendment, can serve as implicit popular ratification of interpretive discretion and independence in the courts . . .

157 See The Federalist No. 78, at 529 (Alexander Hamilton) (Jacob E. Cooke ed., 1961) (warning that if judicial appointments are committed “to the people, or to persons chosen by them for the special purpose, there would be too great a disposition to consult popularity, to justify a reliance that nothing would be consulted but the constitution and the laws”); Robert F. Utter, State Constitutional Law, the United States Supreme Court, and Democratic Accountability: Is There a Crocodile in the Bathtub?, 64 Wash. L. Rev. 19, 34 (1989) (“State court decisions are dramatically more vulnerable to democratic influences.”).


161 See Stephen B. Bright, Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?, 72 N.Y.U. L. Rev. 308,
tional welfare cases, which affect a highly unpopular minority and cause significant fiscal pressures, may plausibly fall into this category. Welfare cases might therefore be a situation in which, as Justice Otto Kaus of the California Supreme Court famously put it, “ignoring the political consequences of visible decisions is ‘like ignoring a crocodile in your bathtub.’”

Judicial election thus avoids the countermajoritarian difficulty but may threaten the courts’ rights-enforcing role. Moreover, problems associated with the political dependence of courts (whether because of popular election, gubernatorial appointment, party selection, or legislative retention) may be exacerbated when the state itself is party to the dispute, as will always be the case in state constitutional challenges about the adequacy or availability of welfare assistance. Rationality review does not resolve this majoritarian difficulty, for it simply makes possible the judicial rubber-stamping of legislative choices. A more robust standard of review is necessary to reassure the public that the judge is acting “in a judicial mode,” supporting adjudicative independence while preserving democratic accountability. At the same time, the court’s incremental

324–26 (1997) (discussing the politicized nature of capital cases and their deleterious effects on the independence of elective judges).

162 Julian N. Eule, Crocodiles in the Bathtub: State Courts, Voter Initiatives and the Threat of Electoral Reprisal, 65 U. COLO. L. REV. 733, 739 (1994) (quoting Judge Kaus); see also Melinda Gann Hall, Electoral Politics and Strategic Voting in State Supreme Courts, 54 J. POL. 427, 433 (1992) (indicating that single-member districts, narrow margins of electoral victory, timing, and prior experiences in elected office and reelection campaigns are factors encouraging state supreme court judges to vote strategically so as to minimize electoral opposition); Barry Latzer, California’s Constitutional Counterrevolution, in CONSTITUTIONAL POLITICS, supra note 12, at 149, 169 (presenting a study of “how conservative forces in California compelled a rollback of many of the court’s liberal decisions,” but noting that judges subsequently used judicial review to mitigate some of the constitutional amendment’s adverse effects).

163 See Croley, supra note 153, at 689, 694 (“The majoritarian difficulty asks not how unelected/unaccountable judges can be justified in a regime committed to democracy, but rather how elected/accountable judges can be justified in a regime committed to constitutionalism.”); Yackle, supra note 155, at 285 n.39 (“The essentials of our unhappy experience with elective judges are well known.”).


165 See Redish & Marshall, supra note 164, at 456.


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approach to state constitutional decisionmaking allows the other branches ample space to develop provisional solutions and should stem any criticism that the judiciary is inappropriately behaving as a superlegislature.

C. Rationality Review and Judicial Finality

Rationality review further reflects concern over "the seeming finality of constitutional pronouncement," stemming, in part, from Congress's apparent inability to override constitutional decisions other than through a long and arduous amendment process. Thus, the Court holds an apparent monopoly over constitutional interpretation, giving rise in some circles to the vision of an imperial ruler that usurps power from the people and from democratic institutions. According to this view, the prudent course would be for the Court to avoid constitutional decisionmaking, al-

than that of federal substantive due process). In applying this stricter standard, courts use empirical analysis to determine whether a statute "remed[i]es actual problems that exist." Daniel R. Gordon, Economic Liberty as the Basis of Social Liberty: Bowers Revised in the Context of State Constitutions, 19 Hastings Const. L.Q. 1009, 1026 (1992). By contrast, my colleague Vicki Been informs me that except in a few states, state courts do not engage in strict review of takings challenges.


169 See U.S. CONST. art. V ("The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress . . ."); cf. Stephen M. Griffin, The Nominee Is . . . Article V, 12 Const. Commentary 171, 171 (1995) (criticizing the Article V amendment process).

170 See Christopher L. Eisgruber, The Most Competent Branches: A Response to Professor Paulsen, 83 Geo. L.J. 347, 371 (1994) ("A people who aspire to rule themselves cannot permit any institution, the Supreme Court included, '[t]o speak before all others for their constitutional ideals.'" (citing Planned Parenthood v. Casey, 505 U.S. 833, 868 (1992)); Lawrence Lessig, Constitution and Code: Limitations on Choice-Based Critiques of Cyberspace Regulation, 27 U. Chi. L. Rev. 1, 15 (1996-1997) ("By leaving this practice of Constitution making to judges, we may well have lost the ability meaningfully to address, and resolve, these questions of value."); Robin West, Progressive and Conservative Constitutionalism, 88 Mich. L. Rev. 641, 651 (1990) ("Only by reconceptualizing the Constitution as a source of inspiration and guidance for legislation, rather than a superstructural constraint on adjudication, can we make good on its richly progressive promise."). A similar criticism appears at the subconstitutional level in the literature on administrative review. See, e.g., R. Shep Melnick, Administrative Law and Bureaucratic Reality, 44 Admin. L. Rev. 245, 246 (1992) (stating that judicial review has "discouraged administrators from taking responsibility for their actions and for educating the public"). But see Erwin Chemerinsky, The Price of Asking the Wrong Question: An Essay on Constitutional Scholarship and Judicial Review, 62 Tex. L. Rev. 1207, 1248-53 (1984) (criticizing as oversimplification allegations of "judicial tyranny" in the constitutional context).
ollowing the legislature ample discretionary space to develop policy.\footnote{Cf. Louis Fisher, Constitutional Dialogues: Interpretation as Political Process 85 (1988) (stating that a federal court's "deliberate withholding of judicial power often reflects the fact that courts lack ballot-box legitimacy").} For example, when the majority in \textit{Goldberg v. Kelly} held that due process guarantees welfare recipients a hearing prior to termination of benefits, the "seeming finality"\footnote{Wellington, supra note 168, at 499.} of the Court's pronouncements motivated Justice Black's dissent.\footnote{Goldberg v. Kelly, 397 U.S. 254, 271–79 (1970) (Black, J., dissenting). See Tushnet, supra note 71, at 1082–83 (discussing Justice Black's reluctance to make welfare "experiments" constitutionally required).} Black explained that because "the operation of a welfare state is a new experiment for our Nation," the Court should avoid having "new experiments in carrying out a welfare program . . . frozen into our constitutional structure."\footnote{Goldberg, 397 U.S. at 279 (Black, J., dissenting). The Court has since retreated from the majority's holding in Goldberg. See Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (holding that an evidentiary hearing is not required prior to termination of disability benefits).} Conversely, when Congress can override the Court by a simple majority and a constitutional amendment is not necessary, doubts about judicial legitimacy are somewhat mitigated.\footnote{See Daniel J. Meltzer, Deterring Constitutional Violations by Law Enforcement Officials: Plaintiffs and Defendants as Private Attorneys General, 88 COLUM. L. REV. 247, 293 (1988) ("Doubts about judicial competence, though not eliminated, are mitigated somewhat if Congress has the power to override the initial decisions by judges.").} The availability of this kind of legislative veto offers an explanation for judicial activism under the negative commerce clause.\footnote{Cf. Henry P. Monaghan, The Supreme Court, 1974 Term—Foreword: Constitutional Common Law, 89 HARV. L. REV. 1, 15–17 (1975) (discussing congressional consent doctrine under the Commerce Clause as an aspect of constitutional common law).}

Rationality review thus acts prudentially to limit those areas in which the Court — unelected, undemocratic, and unaccountable — might otherwise assume the role of the Constitution's final arbiter. State court decisions, however, often lack the finality that is associated with Article III review. A state court's decision is of course final as to the parties, but the court does not always have the last word in the articulation of state constitutional doctrine. For one thing, a rampant "amendomania" describes some state constitutional decisionmaking.\footnote{See Donald E. Wilkes, Jr., First Things Last: Amendomania and State Bills of Rights, 54 MISS. L.J. 223, 233 (1984) (using the term "amendomania" to describe frequent state constitutional change by amendment). Wilkes borrows the term from Note, California's Constitutional Amend-omania, 1 STAN. L. REV. 279, 279 (1949). G. Alan Tarr reports: "As of January 1995 the American states had held over 230 constitutional conventions and adopted 146 constitutions. They had also adopted over 6,000 statewide amendments to their current constitutions." Tarr, State Constitutional Politics: An Historical Perspective, supra note 12, at 5; see also Donald S. Lutz, Patterns in the Amending of American State Constitutions, in CONSTITUTIONAL POLITICS, supra note 12, at 24, 31–44 (providing empirical data on state constitutional amendment patterns from 1776 to 1991). The Federal Constitution has been amended 26 times; only four of these amendments overturned the Supreme Court's constitutional interpretation. Alabama's constitution, by contrast, has been amended as many as 582 times. See The Book of the States, supra note 151, at 3–4 tbl.1.1 (listing the frequency of state constitutional amendment); cf. Gerald Benjamin & Melissa Cusa, Constitutional Amendment through the Legislature in New York, in CONSTITU-}

\footnote{See The Book of the States, supra note 151, at 3–4 tbl.1.1 (listing the frequency of state constitutional amendment); cf. Geral}
"incorrigible," subject to change only through the most "obdurate" of processes,\textsuperscript{178} then state constitutions are, by contrast, more plastic and porous, subject to revision through a variety of structural mechanisms absent in Article V.\textsuperscript{179} Perhaps the most acute divergence between Article V and many state constitutional amendment procedures is the citizen initiative, which allows a minority of a state's voters to place a proposed constitutional change on the ballot for consideration by the electorate as a whole.\textsuperscript{180} Because state constitutional amendments are relatively ordinary events in a state's political life,\textsuperscript{181} state court judges can demonstrate a greater willingness to experiment with legal norms,\textsuperscript{182} on the assumption that their judgments comprise only the opening statement in a public dialogue with the other branches of government and the people.\textsuperscript{183}

\textbf{TIONAL POLITICS, supra} note 12, at 47, 53 (stating that "New York's current constitution was amended 207 times between its adoption in 1895 and 1991").

\textsuperscript{178} Sager, \textit{supra} note 168, at 895 ("[T]he Constitution is markedly obdurate to textual change.").

\textsuperscript{179} See \textit{THE BOOK OF THE STATES, supra} note 151, at 5–13 (describing amendment procedures in the fifty states).


\textsuperscript{181} See G. Alan Tarr, \textit{Introduction}, in \textit{CONSTITUTIONAL POLITICS, supra} note 12, at xii, xv ("Far from viewing their documents as sacrosanct and above politics, the states have treated them as political documents to be changed in accordance with the shifting needs and opinions of their citizens.").

\textsuperscript{182} See \textit{Project Report: Toward an Activist Role for State Bills of Rights}, 8 HARV. C.R.-C.L. L. Rev. 271, 294–96 (1973) [hereinafter \textit{Project Report}] (observing that state judges can make bolder decisions in state constitutional cases because of the greater potential for amendment).

\textsuperscript{183} See Cohen, \textit{supra} note 16, at 656 (characterizing state constitutional decisions as the "first statement in a dialogue between the court and the electorate"); John Devlin, \textit{Constructing an Alternative to "State Action" as a Limit on State Constitutional Rights Guarantees: A Survey, Critique and Proposal}, 21 Rutgers L.J. 819, 881 (1990) (describing state constitutional decisions as "interim" statements); Ronald J. Krotoszynski, Jr., \textit{Constitutional Flares: On Judges, Legislatures, and Dialogue}, 83 MINN. L. Rev. 1, 56 (1998) ("[A]t the state level at least, the metaphor of a dialogue between judges and legislators has been grounded in reality."); \textit{Project Report, supra} note 182, at 274 ("[A] decision under the Federal Bill of Rights tends to be more permanent than a decision under a state bill which . . . can be overruled by the electorate in a matter of months.").

Thus, one state chief judge describes the role of her court as "engag[ing] the Legislature in open dialogue [—] especially when the crucible of real-life facts demonstrates that a statute . . . simply does not provide the intended result." Judith S. Kaye, \textit{Things Judges Do: State Statutory Interpretation}, 13 TOURO L. Rev. 595, 603 (1997). An early example of this dialogic relation concerns New York's worker's compensation program. After the establishment of this program, the business community attacked its constitutionality under state law, and the New York Court of Appeals struck it down as "a taking of property without due process of law." Ives v. South Buffalo Ry. Co., 94 N.E. 431, 448 (N.Y. 1911). The people responded by amending the New York Constitution to remove any state prohibition; the legislature enacted a new program; and the court sustained the new legislation under state law. See Edward Hartnett, \textit{Why Is the Supreme Court of the United States Protecting State Judges from Popular Democracy?}, 75 TEX. L. Rev. 907, 933–37 (1997) (recounting the history of New York's first worker's compensation program).
In addition, the availability of common law alternatives to state constitutional decisionmaking may affect the applicability of Article III notions of judicial finality to state welfare rights cases.184 As one state court judge explains, "the common law and state constitutional law often stand as alternative grounds for individual rights."185 A common law approach allows the court to frame an issue in principled terms, while affording the legislature an explicit opportunity to develop programmatic content — before a somewhat more permanent state constitutional solution takes shape.186 For example, whether a "right to die" emerges as a matter of state law could be seen in constitutional terms as a matter of due process, but a state court may prefer a more modest articulation in terms of the "common-law principles of privacy and 'fundamental fairness.'"187 In the welfare context, state courts can define the adequacy of emergency shelter provided by a municipality to homeless families in terms of a state constitutional welfare or due process clause, or it can draw from common law notions of the warranty of habitability.188 The state courts' long tradition as common law generalists affords legitimacy to this nonconstitutional elaboration of public issues and gives the judge an explicit role in policymaking.189 Moreover, "while we may disagree strongly with particular decisions," Dean Harry H. Wellington observes, "we rarely question the authority of common-law courts, even in pivotal cases."190

184 For discussions of the relation between the common law and federal constitutionalism, see Monaghan, cited in note 176, and David A. Strauss, Common Law Constitutional Interpretation, 63 U. CHI. L. REV. 877, 877 (1996).
185 Kaye, Dawn of a New Century, supra note 52, at 15; see also Ellen A. Peters, Capacity and Respect: A Perspective on the Historic Role of the State Courts in the Federal System, 73 N.Y.U. L. REV. 1065, 1070-71 (1998) (explaining, as Senior Justice of the Connecticut Supreme Court, that "[m]any of us who serve on state supreme courts see the creation of an integrated state jurisprudence, without sharp lines of demarcation between constitutional law, statutory law, and judge made law, as part of our judicial responsibility").
186 Cf. GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 165-66 (1982) (describing a form of judicial review in which "the appropriate technique will be to enter into a dialogue, to ask, cajole, or force another body (usually the legislature but sometimes the agencies) to define the new rule"); Kaye, Foreword, supra note 52, at 727, 745 ("By common law solutions . . . courts leave it open for legislatures to fix comprehensive standards . . . .").
187 Kaye, Dawn of a New Century, supra note 52, at 15.
189 See Linde, supra note 126, at 248 (discussing accepted legitimacy of policymaking by common law courts); G. Alan Tarr & Mary Cornelia Porter, Gender Equality and Judicial Federalism: The Role of State Appellate Courts, 9 HASTINGS CONST. L.Q. 919, 920 (1982) ("Historical surveys demonstrate that, far from being a recent development, state court policymaking has been a standard feature of American law.").
190 Wellington, supra note 168, at 486; see Kaye, Dawn of a New Century, supra note 52, at 10-11 ("No one disputes our [common law] role — indeed our responsibility . . . . One might disagree with particular policy choices we make, but no one questions our authority to make them." (citation omitted)). But cf. Robert A. Kagan, Bliss Cartwright, Lawrence M. Friedman & Stanton Wheeler, The Evolution of State Supreme Courts, 76 MICH. L. REV. 961, 978 n.42 (1978) (explaining that "the due process activism" of late nineteenth century and early twentieth century state courts generated great controversy because it was perceived as blocking future legislative action).
Finally, concerns with judicial finality are inapposite at the state level for another reason. Although rationality review allows the Court to avoid unnecessary constitutional decisionmaking, it works as a fairly blunt instrument, leaving little space for interbranch dialogue on important public questions.\(^{191}\) Unlike the federal courts, however, at least some state courts make use of strong hortatory devices, such as the advisory opinion, which in some situations works to foster judicial collaboration with the coordinate branches in resolving complicated public controversies.\(^{192}\) Advisory opinions lack binding effect "within the doctrine of stare decisis,"\(^{193}\) but they "are characteristically viewed as authoritative by all parties."\(^{194}\) Typically involving questions of "internal government mechanics," particularly the scope of government power and the interrelationship between the executive and legislature,\(^{195}\) advisory opinions allow state courts to perform a mediating role in the state system that is said to reduce interbranch conflict and prevent political gridlock.\(^{196}\)

Recent education reform litigation in the Alabama state courts provides a good example of the way in which the advisory opinion can encourage collegial dialogue among the branches of government.\(^{197}\) The plaintiffs in this litigation challenged the adequacy and equity of the Alabama public school system under the Due Process Clause of the Federal Constitution, as well as under various state constitutional guarantees, including a provision requiring the legislature to "establish, organize, and maintain a liberal system of public schools throughout the state."\(^{198}\) After

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\(^{191}\) Article III judges make strategic use of dicta, concurrences, and dissents for this purpose. See generally Neal Kumar Katyal, Judges as Advisegivers, 50 STAN. L. REV. 1709, 1710–12 (1998) (urging a strong advice-giving role for Article III judges).

\(^{192}\) See ALBERT R. ELLINGWOOD, DEPARTMENTAL COOPERATION IN STATE GOVERNMENT 257 (1918) (discussing advisory opinion procedure as a source of interbranch cooperation). I explore this idea further in Herskoff, "Passive Virtues," cited above in note 30.

\(^{193}\) Patrick C. McKeever & Billy Dwight Perry, The Case for an Advisory Function in the Federal Judiciary, 50 GEO. L.J. 785, 790 (1962); see also William A. Fletcher, The "Case or Controversy" Requirement in State Court Adjudication of Federal Questions, 78 CAL. L. REV. 263, 268 (1990) (observing that advisory opinions may be "useful in predicting what the state court might later do," but that they have "neither the force of precedent nor of res judicata").

\(^{194}\) TARR & PORTER, supra note 138, at 43.


\(^{196}\) See McKeever & Perry, supra note 193, at 786 (stating that advisory opinions work to secure "the cooperation of the individual justices with the people's elected representatives in a purely advisory capacity"); Comment, The Advisory Opinion and the United States Supreme Court, 5 FORDHAM L. REV. 94, 96 (1936) (noting that advisory opinions "obviate to some degree the necessity for social conflict"). But see Felix Frankfurter, A Note on Advisory Opinions, 37 HARV. L. REV. 1002, 1006–07 (1924) (discussing the tendency of advisory opinions to weaken "legislative and popular responsibility" in the federal context).


\(^{198}\) ALA. CONST. art. XIV, § 256.
the trial court had entered a liability order against the state, the Alabama Senate asked the Justices of the Supreme Court for an advisory opinion on the legislature’s obligation to obey the decree. Although the Justices acknowledged that the advisory opinion procedure “is not without difficulty,” they rendered a purely hortatory decision advising the legislature on its duty of compliance. In theory, at least, the court’s advice helped the legislature to formulate a response to the judiciary’s finding of constitutional default.

D. Rationality Review and Federalism

Federal rationality review also rests on the related assumption that states and localities are normatively superior to the national government in dealing with the everyday stuff of life: family relations, public schooling, and the like. This view of federalism, which rests on a theory of dual sovereignty, fails to account for what is metaphorically described as the “marble cake” nature of American governance — the extent to which “the national government can and does exercise any function performed by state and local governments.” However, it explains, at least in part, the federal courts’ hands-off attitude toward a cluster of issues that are regarded as inherently local. As Justice Black stated in Younger v. Harris, “the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways.” Rationality review is thus defended on the ground that it works to allocate maximum decisionmaking authority to those entities best suited to deal with “local problems.” Various benefits theoretically accrue from this division: government units are able to develop expertise in specialized areas of law and public life; citizens have greater opportunities

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199 Opinion of the Justices No. 338, 624 So. 2d at 109 (citation omitted).
200 See id. (advising the legislature “that the order has the force of law unless modified by the trial court, until it is modified or reversed on appeal, and the Legislature, like other branches of government, must comply with it”).
201 PAUL E. PETERSON, CITY LIMITS 13 (1981).
203 See, e.g., Jill Elaine Hasday, Federalism and the Family Reconstructed, 45 UCLA L. REV. 1297, 1310 (1998) (observing that “[f]amily law has become the quintessential symbol of federal noninvolvement”).
205 Id. at 44; see also United States v. Lopez, 514 U.S. 549, 581 (1995) (invoking federalism to strike down federal law so “the States may perform their role as laboratories for experimentation”).
to participate in decisions that affect their daily lives; and localities are able to find solutions free from the heavy hand of centralized planning. 207 In addition, state and local governments are said to have the necessary incentives "to advance the relative well-being of their citizens." 208

Federal courts often invoke principles of federalism to justify their refusal to review the substantive sufficiency of welfare and other social programs. 209 The courts contend, first, that it is institutionally improper for unelected federal judges to "second-guess" the policymaking judgments of democratically elected state officials; 210 and second, that the federal courts lack expertise compared to state decisionmakers on these issues. 211 As the Court stated in Dandridge v. Williams, rationality review as applied to the administration of public assistance "is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy." 212

However, federalism concerns disappear altogether when we shift our focus to state court enforcement of a state constitutional welfare right. 213

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208 Jenna Bednar & William N. Eskridge, Jr., Steadying the Court's "Unsteady Path": A Theory of Judicial Enforcement of Federalism, 68 S. CAL. L. REV. 1447, 1469 (1995); see Craig Volden, Entrusting the States with Welfare Reform, in THE NEW FEDERALISM: CAN THE STATES BE TRUSTED? 65, 67 (John A. Ferejohn & Barry R. Weingast eds., 1997) ("[S]tates . . . have better access to information about the needs of recipients and about community employment opportunities . . . along with increased incentives to move people off welfare . . . .").

209 Cf. Lindsey v. Normet, 405 U.S. 56, 68 (1972) ("The Constitution has not federalized the substantive law of landlord-tenant relations . . . .").

210 See Dandridge v. Williams, 397 U.S. 471, 487 (1970); see also Parham v. J.R., 442 U.S. 584, 608 n.16 (1979) ("As the scope of governmental action expands into new areas creating new controversies for judicial review, it is incumbent on courts to design procedures that protect the rights of the individual without unduly burdening the legitimate efforts of the states to deal with difficult social problems."); cf. PHILLIP J. COOPER, HARD JUDICIAL CHOICES: FEDERAL DISTRICT COURT JUDGES AND STATE AND LOCAL OFFICIALS 350 (1988) (exploring the dynamics of institutional reform litigation and how they are affected by "both the more formal doctrinal constraints and the less formal judgmental factors associated with a prudent sense of the court's relationship to the community and its administrative and elected officials").

211 See, e.g., Lewis v. Casey, 518 U.S. 343, 379 (1996) ("State prisons should be run by the state officials with the expertise and the primary authority for running such institutions."); San Antonio Indep. Sch. Dist., 411 U.S. at 41 (contending that Supreme Court Justices "lack both the expertise and the familiarity with local problems so necessary to the making of wise decisions with respect to the raising and disposition of public revenues").

212 Dandridge, 397 U.S. at 486.

213 See, e.g., Cohen, supra note 16, at 651. I do not suggest that state-based programs are a necessary incident of federalism. I intend only the more limited point that state court review of state programs under state constitutional provisions does not present the kinds of federalism concerns that are said to implicate the Tenth Amendment or to raise prudential barriers to Article III court intervention. To the extent that federalism plays a role in state court adjudication, it is an internal concern, implicating such matters as home rule and local control. See Richard Briffault, Our Localism: Part I — The Structure of Local Government Law, 90 COLUM. L. REV. 1, 6-18 (1990) (discussing the structure of local government law).
As Daniel B. Rodriguez observes, "[w]hereas states occupy an essential role in the American constitutional system, there is no equivalent principle of federalism... in state constitutionalism."\(^{214}\) State courts are concerned with separation of powers — but separation of powers in a context quite different from the federal experience because there are no analogous federal constitutional provisions guaranteeing affirmative rights.\(^{215}\) State courts themselves cite an absence of federalism concerns, to justify both their enforcement of positive rights, such as rights to a public education, and their use of non-Article III interpretive techniques.\(^{216}\) As Chief Judge Judith S. Kaye of the New York Court of Appeals explains, "state courts are generally closer to the public, to the legal institutions and environments within the state, and to the public policy process. This both shapes their strategic judgments and renders any erroneous assessments they may make more readily redressable by the People."\(^{217}\) Moreover, state courts do not establish state constitutional remedies of nationwide scope,\(^{218}\) and therefore have greater latitude in devising remedies that respond to local concerns and that reflect the benefits of decentralized learning.\(^{219}\) Indeed, state judicial review may be said to foster the values of federalism by allowing a community to participate in the elaboration of welfare policy; this participation takes place through the interpretive activity of courts,

\(^{214}\) Rodriguez, supra note 135, at 278.


\(^{216}\) See, e.g., Robinson v. Cahill, 62 N.J. 473, 490 (1973) (cautioning against “too expansive a view of a federal constitutional limitation upon the power and opportunity of the several States to cope with their own problems in the light of their own circumstances”); People v. Scott, 593 N.E.2d 1328, 1348 (N.Y. 1992) (Kaye, J., concurring) (“States ... by recognizing greater safeguards as a matter of State law can serve as ‘laboratories’ for national law.”); SouthCenter Joint Venture v. National Democratic Policy Comm., 780 P.2d 1282, 1306 (Wash. 1989) (Utter, J., concurring) (“Federalism allows the states to operate as laboratories for more workable solutions to legal and constitutional problems.”); State v. Seibel, 471 N.W.2d 226, 238 n.1 (Wis. 1991) (Bablitch, J., dissenting) (“States should be encouraged to be the laboratories of the nation.”).

\(^{217}\) Kaye, Contributions, supra note 52, at 56. Burt Neuborne comments:
Whatever the validity of the concern, federal judges have occasionally been pictured as “outsiders,” rendering their controversial decisions subject to more resistance than an equally controversial opinion handed down by the “local” judge. To the extent the “local” judge can be relied upon to check a local majority, some friction may be avoided and the potentially unpopular decision may be received with better grace.


\(^{218}\) See Cohen, supra note 16, at 652–54 (discussing “the limited scope of state court rulings”).

\(^{219}\) See John A. C. Hetherington, State Economic Regulation and Substantive Due Process of Law, 53 NW. U. L. REV. 216, 250 (1958) (contending that “[s]tate courts, since their precedents are not of national authority, may better adapt their decisions to local economic conditions and needs”); cf. People v. Scott, 593 N.E.2d at 1348 (Kaye, J., concurring) (referring to “the role of the Supreme Court in setting minimal standards that bind courts throughout the Nation, and the role of the State courts in upholding their own Constitutions”).
which many see as a "form of self-government." Article XVII cases thus provide a point of entry into a state's democratic life in a way that is alternative and complementary to other government institutions, and that enables citizens to engage more fully in important public decisions.

E. Rationality Review Revisited

A cluster of arguments concerning positive rights, democratic legitimacy, and federalism supports the view that federal rationality review fails to comport with the institutional position of state courts that are asked to review state constitutional welfare claims. As we have seen, the explicit textual commitment of some state constitutions to welfare rights actively engages the state court in the elaboration of substantive norms and also legitimates this interpretive process. In addition, the countermajoritarian difficulty, and attendant concerns about the democratic basis of judicial discretion, carry less force in state systems. In part, this difference exists because some state judges are elected and, in that limited sense, may be regarded as popularly accountable. Moreover, state judges work within a common law tradition that has long accepted policymaking as an important and, indeed, essential aspect of the judicial role. State constitutions are also closer to "ordinary law" in their subject matter and in their ease and frequency of amendment. As such, state court decisions are not the last word in a political conversation, but rather the first, opening a dialogue with the legislature and the people and spurring the development of shared solutions to important public problems. Finally, federalism concerns that give rise in the Article III context to the prudential doctrines of comity and abstention are absent from state systems; instead, state courts, working collaboratively with the elected branches, afford citizens greater opportunities to participate in the process of governance.

III. Toward a New Standard of Review

State constitutional doctrine has yet to account sufficiently for positive rights that guarantee government services. Instead, state courts, including the New York court, have borrowed extensively from federal doctrine, which assumes the absence of welfare rights and accords maximum discretion to the elected branches in setting welfare policy. Arguably, a federal court asked to assess social and economic legislation can limit its review to whether a challenged law is within the scope of legislative power. A state court asked to enforce a state constitutional welfare right, however, faces a different adjudicative task: the court must foster compliance with a substantive norm. This Part contends that a state constitution's


commitment to positive rights requires a reviewing court to examine whether a challenged law actually helps effectuate the constitutional mandate.

In so arguing, I recognize that assessing the adequacy of a state's welfare system is not an easy task. Indeed, it would be foolish to suggest that merely changing the venue of welfare litigation from federal to state court is sufficient to eliminate all doubts about the efficacy or legitimacy of the enterprise. Assuming judicial review is normatively appropriate, however, the question is whether the task, even if difficult, is beyond the court's competence in a world of imperfect institutional alternatives. Scholarly discussion of these questions has, for the most part, occurred within an Article III framework. As I showed in Part II, however, state and federal courts are not interchangeable for analytic purposes. If, by the conventional wisdom, federal courts are remote from the people, state courts are populist; if federal courts are independent of the elected branches, state courts are interdependent; if federal courts are final in their constitutional decisionmaking, state courts are conditional. Equating the comparative competence of federal courts with that of state courts may constitute an essentialist error that further analysis could avoid.

This Part proceeds in three steps. First, it considers whether an affirmative case can be made for judicial review of state constitutional welfare rights. Second, it attempts to meet concerns that judicial review of such rights is beyond the institutional competence of state courts. Finally, it sets out an alternative standard to federal rationality review for assessing whether a state constitutional welfare mandate is fulfilled.

A. The Need for Judicial Review

So far, I have argued that the three institutional concerns that limit Article III enforcement of federal welfare rights — separation of powers, federalism, and democratic legitimacy — should not similarly constrain

\footnotesize{222} See Nicholas Rescher, Welfare: The Social Issues in Philosophical Perspective 133–34 (1972) (observing that welfare planning, while necessary, is not easy, and that a “prime difficulty is that of assuring that the actual effects of a measure in fact conform to its intended objectives”).


state courts from enforcing state welfare rights. Putting aside these concerns, however, does not resolve the more important question whether it would be prudent for state courts to undertake such review. In this section, I consider whether an affirmative case can be made as to why state judicial review would be normatively appropriate.

Unlike the Federal Constitution, but like other similar state constitutional welfare clauses, New York's Article XVII commits the state to a particular policy judgment; Article XVII contains a specific, affirmative command compelling the political branches to provide for the "aid, care and support of the needy." On this issue, at least, the legislator is not merely a conduit for the shifting preferences of voters. She is instead a constitutional agent charged with carrying out a fundamental public policy. Because constitutional principles already inform legislative decisionmaking on welfare matters, one might argue that judicial review is unnecessary and even counterproductive, insofar as it runs the risk of undermining legislative leadership.

Variations on this theme, of course, appear throughout federal discourse. One response would be to acknowledge the possibility of state legislative apathy, and to emphasize the unique features of state court decisionmaking that potentially mitigate the predicted harm. The very modesty of state constitutionalism should facilitate, rather than discourage, legislative initiative, for it invites dialogue with the other branches of government in developing provisional, rather than final, answers to complex social and economic problems. Another response would look skeptically on the claim that we should entrust controversial but fundamental policies to elected representatives. We all know the considerable difficulties that even the "conscientious legislator" faces in transcending ordinary politics and enacting legislation sensitive to public needs. The enactment and implementation of all legislation must hurdle significant barriers, barriers that are even higher for welfare programs.

226 N.Y. CONST. art. XVII, § 1.
227 Cf. HANNA FENICHEL PITKIN, THE CONCEPT OF REPRESENTATION 154 (1967) ("[R]epresenting need not necessarily be of a person or persons; abstractions, too, can be represented in the substantive sense of acting for them.").
228 See, e.g., ARCHIBALD COX, THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT 103 (1976) (stating that "excessive reliance upon courts instead of self-government through legislative processes may deaden a people's sense of moral and political responsibility for their own future"); sources cited supra note 170.
229 Constitutional scholars urge a spirit of provisionalism in Article III constitutional decisionmaking to reflect epistemic limits and post-modern uncertainty. See, e.g., Michael C. Dorf, The Supreme Court, 1997 Term—Foreword: The Limits of Socratic Deliberation, 112 HARV. L. REV. 4, 59 (1998) (calling for "provisional adjudication"); Nagel, supra note 113, at 661 (discussing the relation between the judicial role and the "assumption that the availability of relevant legal standards was a matter of volition and experimentation").
231 See Jonathan R. Macey, Promoting Public-Regarding Legislation Through Statutory Interpretation: An Interest Group Model, 86 COLUM. L. REV. 223, 227–33 (1986); Meltzer, supra note
Indeed, welfare legislation illustrates a classic public choice problem. Although the poor are not a suspect class under federal law for purposes of heightened scrutiny, they tend, nevertheless, as a group to be diffuse and powerless. Political scientists recognize that the poor function as an "ineffectual minority" — prime candidates for the position of Mancur Olson's "forgotten groups," those who "suffer in silence" because they "have no lobbies and exert no pressure." The poor are thus unlikely to attract the attention of their legislators, who will tend to focus on the better organized and better financed groups.

Structural conditions at the state and local level exacerbate the public choice problem. For one thing, the ease of state constitutional amendment allows the people to second-guess an elected representative's reading of welfare requirements. Moreover, the availability of local exit strategies makes an already limited tax base vulnerable to a "form of capital strike," as businesses and households relocate to other areas. Even if taxpayers remain, voters can always retaliate at the ballot box, more directly and precisely than at the federal level. Not surprisingly, poor people — even in political alliance — have never consistently been able to persuade local majorities to enact reasonable public assistance laws.
Centralizing and nationalizing welfare resolved these problems to some extent. First, federal grant-in-aid programs created financial incentives for states and localities to provide assistance; second, federal judicial review created political leverage for the poor. Congress's decision in 1996 to eliminate the AFDC program reverses both of these effects. By devolving block-grant authority to the states, federal law now creates incentives for the states to withhold assistance from poor people who previously received AFDC benefits. Moreover, the law purports to eliminate public assistance as a federal entitlement, and therefore may diminish the force of federal due process claims for loss of assistance.

State judicial review of state constitutional welfare claims would allow the poor to leverage legal activity into political power. The literature on judicially precipitated reform offers no clear account of the relation be-
tween court decrees and social change.

Nevertheless, by allowing the poor a juridical space, the state court provides an important point of entry into political life. Commentators thus analogize the court's function to that of a surrogate "pressure group activity," potentially working to prevent parochial or special interests from subverting a state's constitutional commitment to its poor. 

Judicial review — indeed, the mere threat of litigation — places the claims of the poor "on the table," giving them a salience that they would ordinarily lack. In addition, judicial articulation of state constitutional goals can change political discourse as legal actors internalize judicial explanations and keep them in mind as a matter of course. Judicial review also facilitates productive political activity, "stirring the governmental entities to action to make sure that issues are addressed and choices made."

Doubts may linger as to whether judicial review will discourage legislators from facing up to their constitutional responsibilities. Certainly, the availability of judicial review will protect elected representatives from "taking the heat" for controversial welfare decisions. The usual criticisms of judicial review, however, carry less force when transported to the state court context. Unlike the federal system, where concerns about judicial finality may weigh against Article III intervention, maybe the collabo-

246 See, e.g., Lawrence Baum, Judicial Impact as a Form of Policy Implementation, in PUBLIC LAW AND PUBLIC POLICY 127, 128 (John A. Gardiner ed., 1977) (developing a "compliance model" of judicial impact); Marc Galanter, The Radiating Effects of Courts, in EMPIRICAL THEORIES ABOUT COURTS, supra note 225, at 117, 118 (offering a "centrifugal view" of judicial influence).

247 Cf. Stuart Scheingold, Constitutional Rights and Social Change: Civil Rights in Perspective, in JUDGING THE CONSTITUTION, supra note 115, at 73, 80 (contending that civil rights decisions "serve[] . . . as mobilizing designs contributing to the broadening of American pluralism"); Elizabeth M. Schneider, The Dialectic of Rights and Politics: Perspectives from the Women's Movement, 61 N.Y.U. L. REV. 589, 642 (1986) (suggesting that the radical feminist vision "began with the formulation of rights claims in the courts").

248 See Clement E. Vose, Litigation as a Form of Pressure Group Activity, 319 ANNALS 20 (1958) (presenting a classic account of test-case litigation as a form of political pressure).

249 See Michael W. McCann & Helena Silverstein, Social Movements and the American State: Legal Mobilization as a Strategy for Democratization, in A DIFFERENT KIND OF STATE?, supra note 237, at 131, 137 (contending that "[p]ressure from a legal strategy can be derived simply from the prospect of litigation and the attendant costs, delays, and loss of control over policy disputes that it poses to adversaries both in and outside the state").


252 See Donald L. Horowitz, Decreeing Organizational Change: Judicial Supervision of Public Institutions, 1983 DUKE L.J. 1265, 1282 ("Had the courts not broken the ice on segregation, the civil rights legislation of the 1960's would have been more problematical. There is no straight cause and effect operating here, so much as there is interaction and circularity.").
positive and conditional nature of state decisionmaking, combined with the public choice problem, argue in favor of judicial intervention.

B. Institutional Competence and Welfare Litigation

Even if state judicial review of state constitutional welfare rights may be normatively justified, realization of this enterprise would still have to hurdle three additional arguments. The first relates to the judiciary's lack of institutional capacity to gather the facts necessary for an informed judgment about complicated questions of public policy. The second relates to the absence of manageable standards commanding sufficient social consensus on the redistributive questions associated with welfare questions. The third relates to the likelihood of public resistance to increased welfare payments and the consequent difficulty of judicial enforcement. This section briefly assesses the strength of these arguments as applied to state, rather than federal, actors. It then reconsiders these arguments in light of recent state court decisions involving challenges, under state constitution education clauses, to the adequacy of public school systems.

1. State Courts as Fact Gatherers. — Commentators frequently refer to the courts' limited ability to gather facts about complex social issues. The adversarial system restricts the ability of all courts in the United States to marshal evidence, and state-specific procedures may limit state courts even more. Discovery rules in some states are less generous than under the Federal Rules of Civil Procedure, and disclosure may also be more tightly regulated when the state is a party to the litigation. Moreover, because a legislature has no duty to

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253 Whether this concern is well-grounded with respect to federal courts is beyond the scope of this discussion. There is no question that federal jurisprudence reflects this concern in a number of doctrinal approaches, such as rationality review, void-for-vagueness, and overbreadth, all of which allow a court to avoid examining legislative facts. See Archibald Cox, The Role of Congress in Constitutional Determinations, 40 U. Chi. L. Rev. 199, 213-14 (1971). Nevertheless, when legislative action suppresses a fundamental right in favor of a compelling state interest, see, e.g., West Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 638-40 (1943), or relies on race or gender as an explicit legislative classification, see, e.g., Adarand Constructors, Inc. v. Pena, 515 U.S. 200, 226-31 (1995), a reviewing court will carefully scrutinize legislative facts to ensure that the predicate on which a policy or compelling interest ostensibly rests actually exists. Although the substantive contexts differ, doctrinal requirements in these diverse areas share a structural shape: the government bears the burden of establishing "the factual necessity" of its stated justification by showing "that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate those harms in a direct and material way." Turner Broad. Sys. v. FCC, 512 U.S. 622, 665-66 (1994) (plurality opinion).


256 Until 1993, a party in a New York court action could not use the interrogatory or notice to admit to secure disclosure from the state. See David D. Siegel, New York Practice 511 n.14.
develop a record, the state court lacks the empirical guidance provided by administrative agencies subject to "hard look" review by federal courts. 257

Institutional competence, however, is a comparative question, and the relevant question is whether the state legislature enjoys a comparative advantage258 over the state court. We know the advantages of Congress relative to Article III courts: a well-formed committee structure with staff and resources, virtually year-round sessions, support from resource centers such as the Congressional Research Service and the Congressional Budget Office, and control over the legislative agenda.259 Just as state courts lack the benefits of a Ways and Means Committee to provide assistance with empirical questions,260 so too do many state legislatures.261 Indeed, legislatures in many states suffer from numerous institutional deficits that affect their ability to focus on complex issues in a sustained and informed manner. As Professor John Devlin explains, "[M]any state legislatures meet for only short and intermittent sessions, and the legislators themselves are often only part-time politicians with other livelihoods that re-

257 Administrative "hard look" is a doctrinal device that controls the ways in which agencies carry out their statutory mandates. It is facilitated by the requirement that an agency construct a meaningful record for its decision. The approach responds directly to the need to constrain administrative discretion and to the desire to effectuate values that are at the core of regulatory legislation. Hard look review is thus a quasi-procedural tool with explicit substantive consequences: the court insists on a meaningful decisionmaking process that gives due consideration to legally protected interests and affords reasoned explanation for policy choices made and rejected. Procedural irregularity becomes a signal that a decision lacks empirical support. See Richard B. Stewart, The Discontents of Legalism: Interest Group Relations in Administrative Regulation, 1985 Wis. L. Rev. 655, 666-67; Cass R. Sunstein, Deregulation and the Hard-Look Doctrine, 1983 Sup. Ct. Rev. 177, 181-84.


261 See Hans A. Linde, Observations of a State Court Judge, in Judges and Legislators: Toward Institutional Comity 117, 118 (Robert A. Katzmann ed., 1988) (describing many state legislatures as having "relatively weak institutional structures or traditions of pursuing a complex subject"). Jerry Mashaw writes:

Perhaps no governmental institution is held in as little esteem as our state legislatures. Cataloguing their weaknesses has provided professional employment for generations of political scientists. And telling tales of their inanities, irregularities, and outright dishonesty is a favorite indoor sport for those "in the know" about the state legislative process. Jerry Mashaw, Constitutional Deregulation: Notes Toward a Public, Public Law, 54 Tul. L. Rev. 849, 859 (1980).
qure attention. State legislative staffs are smaller and less regimented than their federal counterparts.262

By subjecting welfare laws to judicial review, and insisting that the legislature demonstrate the empirical bases for its choices, state courts could improve lawmaking by encouraging representatives to consider real world facts, as well as social science evidence, in state policymaking. These legislative facts would then become a part of the record for judicial review and would fill in some of the gaps in the judiciary's own fact-finding capabilities. Professor Kenneth L. Karst explains the healthy effect that judicial attention to facts is likely to have on constitutional adjudication:

While we cannot be sure that exposure of the judge to information will produce a decision based on information, we can hope that the development of the legislative facts will produce something of that effect. If we cannot be certain of informed decisions, we can hope that informed judges will give us better decisions. Such a position requires no apology. After all, much of our constitutional law rests on propositions which cannot be proved. When we hold a truth to be self-evident, we mean we believe it on faith. The traditional American faith in the value of education seems no less justified when applied to judges who make choices of community policy than when applied to the community itself.263

Moreover, the state courts by now have had substantial practice with procedural devices that allow them to utilize the knowledge of other legal actors, to gather facts, and to marshal expertise needed for the enforcement of positive rights.264 They can also look to federal practice for guid-


264 See Ralph Cavanagh & Austin Sarat, Thinking About Courts: Toward and Beyond a Jurisprudence of Judicial Competence, 14 LAW & SOC. REV. 371, 373 (1980) ("Critics of court competence... underestimate the demonstrated ability of courts to evolve new mechanisms and procedures in response to implicit or explicit societal demands.").
ance with such devices. The Brandeis brief, expert testimony, amicus submissions, special review boards, special masters, magistrates, referees, facilitators, election officers, and judicial notice are all established methods for assisting courts in linking their adjudicative power with forms of knowledge that are critical in understanding the effects of law on social life. In addition, through such devices as intervention, amicus curiae briefs, and testimony, courts in both systems can encourage poor people to participate in welfare litigation.
themselves. Such participation helps to secure the cooperation and consent of regulated groups. It also allows the court to benefit from the views and insights of "user groups"—indigent families and children, low-income workers, impoverished seniors, members of the so-called underclass—who have unique information about welfare programs and can describe first-hand the practical consequences of such matters as forms of benefits, levels of assistance, and modes of service delivery.

Finally, even if one assumes that state legislatures are better equipped at fact-gathering than are state courts, it does not follow that legislatures are better positioned to use the information that they collect to achieve constitutional goals. Commentators currently describe legislative discussions about welfare in disparaging terms, as a discourse "marked by scapegoating, stereotyping, and stigmatization." Nor should this description come as a surprise. State legislatures, like all legislatures, are not required to make fact-based decisions—only political ones. Exclusively political considerations may be appropriate when the issue is one that is committed to politics. A state constitutional welfare right, however, is intended to transcend politics, making permanent the state's policy commitment; it therefore requires the principled judgment that commentators conventionally associate with courts.

2. State Courts as Policymakers. — Critics further suggest that because of the lack of social consensus on redistributive issues, state courts are incapable of devising manageable standards for welfare rights cases. The strongest version of this argument posits that "no right answer" exists for cases raising state constitutional welfare claims—indeed, that it is impossible to define any public values at all. A weaker version shifts from substance to process, contending that "objectively right answers" exist, but that their selection legitimately falls to the more democratically

277 On the value of participation in government decisions that affect one's life, see generally Owen M. Fiss, The Structure of Procedure (1979).
278 See Gregory Albo, Democratic Citizenship and the Future of Public Management, in A Different Kind of State?, supra note 237, at 17, 30 (observing that "[l]ong-term improvement of service delivery is contingent upon input from user groups").
279 Loffredo, supra note 2, at 1285; see Cass R. Sunstein, Interest Groups in American Public Law, 38 Stan. L. Rev. 29, 72–73 (1985) (remarking on the absence of deliberative discourse in legislative discussions about welfare).
280 See Hans A. Linde, Courts and Torts: "Public Policy" Without Public Politics?, 28 Val. U. L. Rev. 821, 836 (1994) (stating that legislatures "[p]aradoxically ... have wider opportunities to obtain and consider factual predicates for policy choices, but they are not obliged to make fact-based and rationally efficient policies").
accountable legislature. No one can dispute that welfare raises a myriad of complex questions that defy easy answer. Indeed, they constitute what more generally has been called an "example of indeterminacy," requiring a court to choose from among contested values without any selection criteria, in the face of imperfect information and normative uncertainty.

John Hart Ely observes, however, that "the Court has come generally to recognize . . . that if the issue is otherwise properly before it, its first duty is to try to fashion manageable standards." Indeed, both state and federal courts enforce, more or less successfully, substantive norms, almost all of which are without a determinative edge and require value selection. For example, courts have considered whether a business merger fosters monopolization and concentration; whether an institution's psychiatric practices protect a mentally retarded individual from harm; whether the offering price in a merger comports with the shares' fair


284 Thus, Larry Sager recites the various barriers that a reviewing court must hurdle:

There is at the outset, of course, the very difficult question of how "adequate" welfare and "reasonable" efforts should be cashed out in this context. But even if we assume some rough operational understanding of these defining terms for each minimum entitlement, all this and much more would have to be decided: Should the eligible recipients be given direct benefits, vouchers, or money? Should the program be administered and financed at the local, regional, state, or federal level? Who should staff such programs, and how should the staff be chosen and trained? Who should bear the financial burdens of such programs, and how should the burdens be distributed among them? These are immensely complex questions of social strategy and social responsibility, questions that are linked to an intricate web of extant social services, taxes, and economic circumstances. Sager, Plain Clothes, supra note 10, at 420; see also Amartya Sen, Choice, Welfare and Measurement 446 (1982) (discussing difficulties in the social science process of "assessing . . . [poverty] statistics in line with socially held views as to what counts as poverty"). But see Redish, supra note 113, at 1060 ("The so-called 'absence-of-standards' rationale borders on the disingenuous, because the Supreme Court has never been at a loss to decipher roughly workable standards for the vaguest of constitutional provisions when it so desires.").


288 See Hospital Corp. of Am. v. FTC, 807 F.2d 1381, 1389 (7th Cir. 1986). I thank my colleague Eleanor M. Fox for this reference.

value;290 and whether the economic value of a human life should account for employment possibilities.291 As common law generalists, state courts have broad experience in articulating normative frameworks for complex social and economic issues. In just the last fifty years, state courts have revolutionized legal rules affecting family relations, products liability, and tort immunities.292 From these perspectives, adjudication of state constitutional welfare cases simply iterates a constructive process typical of all areas of law in which substantive norms are enforced.293 Thus, tort law looks to professional custom;294 contract law to merchants’ customs;295 takings doctrine (at times) to “normal behavior”;296 institutional reform cases under the Fourteenth Amendment to “professional judgment”;297 and education cases under state constitution educational clauses to...

290 See Jay W. Eisenhofer & John L. Reed, Valuation Litigation, 22 DEL. J. CORP. L. 37, 44 (1997) (“It has been long-recognized that ‘fair value’ does not mean ‘fair market value’ as market value is not determinative of price in an appraisal proceeding.”).


292 See e.g., Lawrence Baum & Bradley C. Canon, State Supreme Courts as Activists: New Doctrines in the Law of Torts, in STATE SUPREME COURTS: POLICYMAKERS, supra note 147, at 83–85 (describing “dramatic changes in tort law since World War II”).

293 See Jack M. Beermann & Joseph William Singer, Baseline Questions in Legal Reasoning: The Example of Property in Jobs, 23 GAL. L. REV. 911, 916 (1989) (describing the role of baseline analysis in legal reasoning); Scott & Macklem, supra note 54, at 77–78 (discussing judicial enforcement of the International Covenant on Economic, Social, and Cultural Rights, and explaining that “where a state is required to progressively achieve the realization of a benefit not initially enjoyed by all at the time of constitutional entrenchment, the baseline or point of reference against which state action would be assessed by the judiciary would be a moving one”).


295 See, e.g., Western Indus., Inc. v. Newcor Canada Ltd., 739 F.2d 1198, 1202, 1204 (7th Cir. 1984). In this case, the court found trial court error in refusing to permit qualified industry executives to testify that consequential damages were “unheard of” in their trade, id. at 1202, on the ground that “if the custom of the trade is that the buyer shall not receive consequential damages, it is a binding though silent term of the contract and overrides the provisions” in the Uniform Commercial Code, id. at 1204. See also Chris Williams, The Search for Bases of Decision in Commercial Law: Llewellyn Redux, 97 HARV. L. REV. 1495, 1499 (1984) (reviewing LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983)) (stating that courts applying the Uniform Commercial Code were obliged to scrutinize the habits of merchant litigants in order to delineate the extent of each merchant’s business commitment) (quoting TRAKMAN, supra at 35–36).


297 Youngberg v. Romeo, 457 U.S. 307, 323 (1982) (holding that the state’s treatment of an involuntarily committed mentally retarded person violates due process “only when the decision . . . is such a substantial departure from accepted professional judgment, practice, or standards as to demonstrate that the person responsible actually did not base the decision on such a judgment”); see also Susan Stefan, Leaving Civil Rights to the “Experts”: From Deference to Abdication Under the Professional Judgment Standard, 102 YALE L.J. 639, 685 (1992) (“In resolving affirmative claims for government services, courts follow an adjudicatory path that appropriately involves the professional judgment standard.”)
evolving educational practice. So, too, can courts adjudicating welfare cases develop manageable standards that draw guidance from external sources of information. No doubt evaluating the adequacy of grants is difficult, and certainly more difficult than developing standards for evaluating categorical requirements unrelated to need. We can acknowledge the difficulty, however, and still insist that a state court rise to the challenge rather than abdicate its own constitutional duty by yielding entirely to the other branches. Indeed, in difficult cases, the state court’s most appropriate stance may be to acknowledge openly the limits of the judicial process — to “[f]ace up to indeterminacy” — and to use its power of review to encourage the coordinate branches to work together to develop conditional responses to constitutional questions. The state court can thus contribute to the more effective implementation of positive rights by encouraging, and insisting upon, the gathering of information, the testing of methods, and the “learning by monitoring” that commentators associate with improved decisionmaking.

3. State Courts as Rights Enforcers. — Finally, commentators suggest that public recalcitrance — the electorate’s apparent unwillingness to fund increases in social service delivery — poses an insuperable bar to judicial enforcement of welfare norms. It is too late in the day to deny that the judicial enforcement even of negatively phrased rights has marked fiscal consequences on state budgets. Yet courts, both federal and state, have ordered the desegregation of schools, the provision of


300 See Dorf & Sabel, supra note 124, at 288 (discussing ways in which courts encourage rolling best-practice rulemaking by other legal actors).


302 See JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS: PHILOSOPHICAL REFLECTIONS ON THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 164 (1987) (noting that “[o]ne of the largest barriers to the acceptance of welfare rights as universal human rights is the belief that they are simply too expensive for many countries today”).

303 See id. (observing that negatively phrased rights, by “impos[ing] restraints on actions — such as a right against torture — often rule out tactics that are cheap and dirty and thus require more costly or difficult tactics to be used,” and that “[r]ights that require the provision of protections will necessitate an expensive police and legal system”).

health care to the mentally retarded,\textsuperscript{305} the expansion of the franchise,\textsuperscript{306} the provision of public defenders to the indigent accused,\textsuperscript{307} compensation for the public use or for the restriction of private use of private property,\textsuperscript{308} and the provision of transcripts to indigent civil litigants\textsuperscript{309}—all with a clear understanding that the remedial decree causes a reallocation of budget priorities and possible increases in public taxes.\textsuperscript{310}

Even as a matter of federal law, there is a well-settled rule that a constitutional claim cannot be defeated by the government’s lack of funds.\textsuperscript{311} Nevertheless, the idea that taxes might be adjusted to fulfill a state constitutional welfare right seems unimaginable.\textsuperscript{312} I do not deny that the transparency of budget effects in welfare cases could alter the public’s reaction to a judicial decree. And certainly, courts usually do not—and should not—involves themselves directly in the raising of public money. Even the federal courts, however, will order tax levies when a governmental defendant fails utterly and repeatedly to remedy a violation of the Fourteenth Amendment.\textsuperscript{313} Because state judges are closer to local problems, familiar with local needs, and are the products of local political processes,\textsuperscript{314} they may be better positioned than federal judges to deal realistically with the fiscal consequences of decisions; to work collaboratively with the other branches to devise new constitutional solutions; and to encourage the public to consider long-term benefits of welfare policies as well as any short-term costs.

\textbf{C. A Jurisprudence of Consequences}

Theorists have no complete account of how judges create new legal doctrine.\textsuperscript{315} This section nevertheless attempts to sketch out what state

\begin{itemize}
\item \textsuperscript{305}See Youngberg v. Romeo, 457 U.S. 307, 324 (1982).
\item \textsuperscript{307}See Gideon v. Wainwright, 372 U.S. 335, 344 (1963).
\item \textsuperscript{308}See First English Evangelical Lutheran Church of Glendale v. County of Los Angeles, 482 U.S. 394, 322 (1987).
\item \textsuperscript{309}See Griffin v. Illinois, 351 U.S. 12, 18-20 (1956).
\item \textsuperscript{310}See Horowitz, \textit{supra} note 252, at 1266 (commenting on the prevalence of "judicial budgeting").
\item \textsuperscript{311}See Frank H. Easterbrook, \textit{Civil Rights and Remedies}, 14 HARV. J.L. & PUB. POL’Y 103, 107 (1991) (arguing that a federal court’s finding of federal constitutional violation “implies an obligation to raise money” that is itself enforceable by the federal court).
\item \textsuperscript{312}Cf. William E. Nelson, \textit{Two Models of Welfare: Private Charity Versus Public Duty}, 7 S. CAL. INTERDISC. L.J. 295, 297 (1998) (observing that an ideological concern of welfare law prior to the Great Society was “protection of the public purse” (quoting \textit{In re Cook}, 198 N.Y.S.2d 582, 584 (1960))).
\item \textsuperscript{313}See, e.g., Missouri v. Jenkins, 495 U.S. 33, 57 (1990) (allowing the levying of taxes despite statutory limitations “in order to compel the discharge of an obligation imposed . . . by the Fourteenth Amendment”).
\item \textsuperscript{314}See Kaye, \textit{Contributions}, \textit{supra} note 52, at 56.
\item \textsuperscript{315}This broader question is beyond the scope of this Article; however, other commentators have addressed the issue. See, e.g., Victoria F. Nourse, \textit{Making Constitutional Doctrine in a Realist Age}, 145 U. PA. L. REV. 1401, 1404 (1997) (characterizing doctrine as “a practice that develops within institutions, not simply as the random acts of individual judges”); Edward Rubin &
\end{itemize}
judicial review of state constitutional welfare questions might entail, while recognizing, to use Justice Frankfurter’s apt phrase, the “intractability of any formula to furnish definiteness of content for all the impalpable factors involved in judicial review.”

A state court faced with a state constitutional welfare challenge ought to subject a legislative classification to rigorous scrutiny to determine whether the provision is likely to effectuate the constitutional goal. Whereas federal rationality review starts from a presumption of constitutionality, the proposed approach would shift the burden of proof, imposing a duty on the state to justify its legislative choices as a well-grounded means of moving toward a prescribed constitutional goal. In the process of review, the state court would provide a set of institutional arrangements enabling other legal actors — the legislature, social service departments, welfare recipients themselves — to develop and share information about workable alternatives that might reasonably carry out the state constitutional welfare mandate. The proposed standard should not be conflated with some form of heightened scrutiny that asks, “How does this policy burden a constitutional right?” The question is instead, “How does this policy further a constitutional right?”

I use the term “consequential” to describe this process of assessing whether a state action is likely to achieve a mandated policy. A consequentialist approach obviously brings to the surface questions about the effect of legal pronouncements on society and juridical actors. While recognizing the indeterminacy of legal rules, the proposed standard rests on the pragmatic view that legal constructs shape public life and have impor-


316 Universal Camera Corp. v. NLRB, 340 U.S. 474, 476 (1951); cf. Gunther, *supra* note 202, at 48 (“The model is, in sum, not a simple formula capable of automatic problem-free application. It is a suggestion of a direction for modest interventionism with substantial promise of feasibility . . . .”). Federal rationality review determines whether a legislative act is ultra vires, or outside the scope of assigned power. The standard that I suggest might be called “ultra meta” review: the court’s function is to ensure that legislative efforts do not fall outside the constitutional goal. I thank Alexis Jervis, a classics scholar, for help with the term.

318 Cf. Nickel, *supra* note 303, at 153 (stating that “[t]he right to life concerns results, not institutional specifics”).

tant applications in people’s lives. The term is not meant to suggest that
the court should uphold only those laws that promote the best possible
constitutional effects. Nor does the emphasis on having the court assess
the consequences of challenged legislation or policies entail a mechanistic
view of the relation between judicial decisionmaking and social change.
For one can believe that there is no single “right” answer to complex social
problems and still maintain that laws should be purposive in design.

By requiring the court to assess the likelihood that a challenged law
will achieve a desired result, a consequentialist approach to judicial re-
view raises what Robert H. Mnookin has elsewhere called “the prediction
problem” — the difficulty of knowing (as distinct from evaluating) the ef-
facts, anticipated as well as unanticipated, of alternative approaches to a
problem. The associated difficulty of boundary marking, or distin-
guishing one law from another in a politically complex context, further
complicates judicial review, for it requires the court to focus its attention
on a component of a comprehensive issue, rather than develop an inte-
grated approach. These difficulties, however, are not unique to welfare
adjudication but rather pervade adjudication in general. Yet in a variety
of situations even federal courts incorporate consequentialism into their
decisionmaking, as, for example, when the Supreme Court determines
whether stare decisis ought to bar the overruling of precedent. Moreover,
commentators increasingly emphasize the need for the Court to “pay[] greater attention to the likely consequences of its decisions and to

320 As a philosophical term, consequentialism refers to “those theories that assess the moral
value of actions according to the amount of ‘good’ (or ‘bad’) consequences that result from them.”
Christopher J. Peters, Foolish Consistency: On Equality, Integrity, and Justice in Stare Decisis,
Choice Theory, Value Pluralism, and Democratic Politics, 90 COLUM. L. REV. 2121, 2143 (1990)
(criticizing a view of consequentialism that defines choices “only in terms of the outcomes they
generate” and noting that this “perspective excludes what might be called the expressive dimen-
sion of choices, namely, the meanings that outcomes have as a result of having been chosen in dis-
tinctive ways, in distinctive contexts, and for particular reasons”). This expressive dimension,
however, may give undue emphasis to private, rather than public, concerns.
322 Robert H. Mnookin, The Enigma of Children’s Interests, in THE INTEREST OF CHILDREN,
supra note 285, at 16.
323 Frank I. Michelman identifies this difficulty as a problem of assessing the economic ration-
ality of legislation. He explains, “A measure viewed in isolation might seem utterly crazy, yet be-
come quite understandable when one saw it as the political compensation paid to some group in
return for its support on some other measure.” Frank I. Michelman, Politics and Values or What’s
Michelman’s view, “what marks off a legislative output as eligible for independent appraisal of its
economic rationality is just that the legislature has been willing — by enacting it separately — to
let it stand or fall on its own merits.” Id. at 500.
324 See, e.g., Planned Parenthood v. Casey, 505 U.S. 833, 854 (1992) (considering “the consist-
ency of overruling” Roe and emphasizing the need for “gaug[ing] the respective costs of reaffirm-
ing and overruling a prior case”).
the empirical assumptions underlying its doctrines." Despite the difficulties, the state court — by initiating a process of discussion among affected actors — can help to facilitate provisional assessments of welfare policies and to foster coordinated responses.

D. Why Education and Not Welfare?

Some observers of state constitutional law contend that state courts have already developed independent standards of review for positive state constitutional provisions and are no longer content just to interpret them in the same manner as federal courts. In this regard, perhaps the most notable state constitutional developments have been in the area of school finance, where state courts increasingly rely on a consequentialist approach to review the sufficiency of public school systems under state education clauses. Most, if not all, of the institutional concerns that supposedly prevent judicial enforcement of state constitution welfare rights apply in equal measure to state constitution educational cases. Indeed, as a basis for declining to locate a right to education in the Federal Constitution, the Court drew an explicit analogy between education and welfare, but characterized the former as perhaps even the harder case. This section briefly looks at the progress of public education reform in the state courts, and then considers the lessons that are applicable to welfare enforcement.

The earliest efforts at reforming the public schools through the judiciary occurred in the federal courts and focused on the dismantling of the de jure system of segregation that characterized our nation’s schools well

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325 Dorf, supra note 229, at 8; see David M. Trubek, Where the Action Is: Critical Legal Studies and Empiricism, 36 STAN. L. REV. 575, 587 (1984) (noting "the pragmatic view that to speak of a legal rule in isolation, as opposed to in application, or as a factor in social relations, [is] to speak nonsense"); cf. Jody Freeman, Collaborative Governance in the Administrative State, 45 UCLA L. REV. 1, 5 (1997) (presenting a collaborative model of agency decisionmaking focusing on "adaptive problem solving").

326 Robert W. Gordon has criticized certain uses of provisionalism for reflecting a form of resignation "that accepts at face value an idealized instrumental view of the role of law in society[.]") Robert W. Gordon, Historicism in Legal Scholarship, 90 YALE L. J. 1017, 1037 (1981). He calls on scholars to try "something else" that would explicitly "incorporate the critics' perspective." Id. at 1037. The proposed standard attempts to meet this challenge.

327 Cf. Michelman, On Protecting the Poor, supra note 9, at 59 (asking "why education and not golf?").

328 See, e.g., Kaye, Dawn of a New Century, supra note 52, at 12 ("[T]he promise inherent in Justice Brennan's challenge has made giant steps toward fulfillment.").

329 The sheer volume of litigation in this area is extraordinary; over twenty states have had at least some segment of their public education systems overturned as a result of state court litigation. See Hershkoff & Loffredo, supra note 15, at 301 n.15 (noting cases that have invalidated school finance systems on state constitutional grounds).

330 The Court explained: "Education, perhaps even more than welfare assistance, presents a myriad of 'intractable economic, social and even philosophical problems.' . . . [W]ithin the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 42 (1973) (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970), and Jefferson v. Hackney, 406 U.S. 535, 546 (1972)).
into the twentieth century.\textsuperscript{331} Later, beginning in the 1960s, litigation shifted from a strategy based on race to one based on class, as part of a broader movement to reduce the significance of economic inequity in public life.\textsuperscript{332} These equality-based school finance lawsuits are said to have faltered for reasons relating to doctrine, political theory, and strategy. First, the federal judiciary refused to recognize a fundamental right to education under the Fourteenth Amendment, thus rejecting plaintiff’s claims in a garden-variety application of rationality review.\textsuperscript{333} Second, courts considered equality to be an unmanageable engine of social change, to be avoided as a basis for judicial intervention in areas traditionally left to local politics.\textsuperscript{334} Third, equality provided an inherently weak strategy to improve educational quality, for it left intact the basic distribution of public funds for education.\textsuperscript{335}

A later generation of school reform lawsuits turned from equal protection, whether under federal or state law, to state constitution education clauses,\textsuperscript{336} thereby expanding the focus from an emphasis on fiscal equity to a broader view of educational sufficiency.\textsuperscript{337} In this “new wave” of school reform cases,\textsuperscript{338} state courts explicitly attempt to construct a manageable definition of educational adequacy for constitutional purposes by grappling with issues such as the public mission of public schools, the mo-


\textsuperscript{333} See Rodriguez, 411 U.S. at 54–55 (rejecting an equal protection challenge to the policies of Texas public school system and refusing to find broad differentials in per-pupil expenditures among the state’s public school districts unconstitutional). Finding no fundamental right to education under the Fourteenth Amendment, the Court rebuffed the plaintiff’s claim by applying “the traditional standard of review, which requires only that the State’s system be shown to bear some rational relationship to legitimate state purposes.” \textit{Id.} at 40. The California Supreme Court had earlier applied heightened scrutiny to a similar challenge under both the California and Federal Constitutions. See Serrano v. Priest, 487 P.2d 1241, 1250 (Cal. 1971). The Supreme Court, however, has suggested that the decision to withhold absolutely educational services from a distinct minority group would violate the Fourteenth Amendment. See Plyler v. Doe, 457 U.S. 202, 230 (1982).

\textsuperscript{334} As the New Jersey Supreme Court explained in Robinson v. Cahill, 303 A.2d 273, 283 (N.J. 1973), equality is “unmanageable if it is called upon to supply categorical answers in the vast area of human needs, choosing those which must be met and a single basis upon which the State must act.”

\textsuperscript{335} See Martha I. Morgan, Adam S. Cohen & Helen Hershkoff, \textit{Establishing Education Program Inadequacy: The Alabama Example}, 28 U. Mich. J.L. Reform 559, 560 (1995) (“Under an equity theory, a school system could be judged legally satisfactory even if students are receiving ... the same poor education.”).


\textsuperscript{337} See id. at 1107.

tivating aims of educational clauses, and the range of programs that seem conducive to carrying out these goals. In doing so, judges have taken a consequentialist approach to their decisionmaking; as the New Jersey Supreme Court explained in the landmark Robinson decision, "the end product must be what the Constitution commands.

The judicial process of elaborating enforceable standards of educational adequacy has been slow and incremental. The earliest state cases worked in the shadow of the Supreme Court's decision in San Antonio Independent School District v. Rodriguez, which emphasized the impact of funding disparities on educational policy. State judges thus looked almost exclusively to funding inputs (the level of state funding provided for public schools on a per capita basis) as the measure of educational sufficiency. Over time — and in the best common law tradition — courts and litigants successfully expanded their definition of "input" by developing more sophisticated perspectives on public schooling. The latest state cases, taking their cue from education research on effective school practices, have enlarged their focus to include educational outputs and their relation to educational inputs, and emphasize the constitutional goal of providing programs that enable all of a state's children to learn and to succeed. Recognizing that society's existing commitment


341 Id. at 294.


343 See id. at 4-9. See also Kenneth Fox, The Suspectness of Wealth: Another Look at State Constitutional Adjudication of School Finance Inequalities, 26 CONN. L. REV. 1139, 1147 (1994).

344 Factors include the purpose of public schooling under specific state educational clauses; professional standards, both national and regional, that define the constituent elements and goals of education at different grade levels; and an explicit recognition of the need for evolution and flexibility in reforming any bureaucratic institution. See Julie K. Underwood, School Finance Adequacy as Vertical Equity, 28 U. MICH. J. L. REFORM 493, 513-19 (1995) (tracing evolution of input factors in state constitution educational cases).

345 See EFFECTIVE PROGRAMS FOR STUDENTS AT RISK viii (Robert E. Slavin, Nancy L. Karweit & Nancy A. Madden eds., 1989) (presenting "the best available information on what is known now about effective programs for students at risk of school failure, particularly those who are currently served in compensatory and special education programs"); FOURTEENTH ANNUAL YEARBOOK OF THE AMERICAN EDUCATION FINANCE ASSOCIATION, REFORMING EDUCATION: THE EMERGING SYSTEMIC APPROACH (Stephen L. Jacobson & Robert Berne eds., 1993) (examining school reform initiatives in the U.S. and abroad); GARY NATRIELLO, EDWARD L. MCDILL & AARON M. PALLAS, SCHOOLING DISADVANTAGED CHILDREN: RACING AGAINST CATASPROPH45-138 (1990) (reviewing some positive consequences of educational and social programs designed for disadvantaged children); Robert Berne, Preface to OUTCOME EQUITY IN EDUCATION xi (Robert Berne & Lawrence O. Picuss eds., 1994) (collecting scholarly papers "to summarize existing knowledge and [to] put forward recommendations to enable [New York] to define and implement policies to achieve outcome equity").
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does not suffice to effectuate the constitutional purpose, these cases also confront ways to expand public support for school reform. Enforcement of the judiciary’s remedial decrees has not proved easy and has required state courts to engage in a process of persuasion and coercion. Progress reports suggest, however, that implementation, while arduous, has been somewhat effective in terms of improving educational conditions and altering the terms of public discourse.

Litigation in Alabama illustrates well the state court’s new, consequentialist approach to state constitution educational questions. Harper v. Hunt involved the constitutionality of Alabama’s public school system under its state constitution educational clause. In entering an order of liability against the state, the state court first developed a normative baseline against which to assess educational sufficiency: nine capacities that all Alabama students must have to ensure an opportunity to achieve. State and national standards on inputs and outputs provided benchmarks in evaluating the constitutional right and the state system’s current programmatic content. Moreover, the state court interpreted the Alabama Constitution to “impl[y] a continuing obligation to ensure compliance with evolving educational standards” by providing “an education that will in fact benefit [students] by offering them appropriate preparation for the responsible duties of life.” The court did not specify how the nine capacities that define educational adequacy were to be effectuated. Instead, the court articulated broad principles, directing the Alabama Board of Educa-

346 See Douglas S. Reed, The People v. the Court: School Finance Reform and the New Jersey Supreme Court, 4 CORNELL J.L. & PUB. POL’Y, 137, 172 (1994) (discussing public opposition to tax increases to pay for improved educational opportunities ordered by the New Jersey court).


350 The clause provides that the legislature “shall establish, organize, and maintain a liberal system of public schools throughout the state for the benefit of the children thereof between the ages of seven and twenty-one years.” ALA. CONST. art. XIV, § 256.

351 See Alabama Coalition for Equity, Inc., 624 So.2d at 165-66.

352 See Morgan, Cohen & Hershkoff, supra note 335, at 586-94 (discussing the role of benchmarks in state constitutional interpretation of education rights).

353 Alabama Coalition for Equity, Inc., 624 So.2d at 154.
tion and the Legislature to develop programmatic policy, and appointed a facilitator to help develop information about workable approaches to carry out the state constitutional mandate.

The Alabama court, like other state courts addressing alleged violations of state constitutional provisions, proceeded on the assumption that it was establishing a structure for institutional reform, and not fixing the precise content of such reform for all time. The remedial decree, for example, contemplated that the plaintiffs could return to court to adapt its provisions in light of circumstances, intended and otherwise, that developed once the process at reform began. Moreover, the state court candidly faced the limits of its institutional competence while making innovative use of procedural devices — such as establishment of a facilitator’s office — to gain access to multi-faceted information from government and private actors. The Harper case, like other school finance lawsuits, has not achieved immediate success, but social reform always involves a long and incremental process.

At some level, the lessons of these education cases should be transferable to the welfare context. Both education and welfare involve important, contested values that require a strong mix of institutions, programs, and funding to carry out explicit constitutional mandates. I believe that although a genuine difference exists between the enforcement of education and welfare rights, the difference is not one of institutional competence. It is, instead, a political difference relating to theories about equality and the limits of redistributionist aims in American society. Guaranteeing a public education comports well with accepted ideas about equality of opportunity. Members of a society have a strong self-interest in supporting public schools; the idea of a level playing field holds intuitive appeal. Welfare payments, however, in this context seem to implicate the more controversial collectivist goal of achieving equality of resources. Because the idea of public assistance is itself so politically charged, even when the legislature votes to provide benefits, the state court’s remedial options seem limited in

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354 See Helen Hershkoff, School Finance Reform and the Alabama Experience, in Strategies for School Equity, supra note 347, at 24, 24, 30.
355 See id. at 29.
356 See, e.g., ARYEH NEIER, ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE (1982) (describing the slow and not always predictable trajectory of efforts to secure judicially precipitated social reform); James B. Jacobs, Judicial Impact on Prison Reform, in PUNISHMENT AND SOCIAL CONTROL: ESSAYS IN HONOR OF SHELDON L. MESSINGER 63, 73 (Thomas G. Blomberg & Stanley Cohen eds., 1995) (recounting history of incremental changes in prison conditions and concluding “that judicial intervention in prisons has been the most significant vehicle of prison reform in the latter quarter of the twentieth century”); James S. Liebman, Desegregating Politics: “All-Out” Desegregation Explained, 90 COLUM. L. REV. 1463, 1587–96 (1990) (discussing the “massive” and ongoing resistance to school desegregation that followed Brown).
357 For examples of how courts outside the U.S. interpret and enforce positive rights, see Scott & Macklem, cited in note 54, at 77–82, in which the authors discuss Canadian examples.
358 See generally Amy Gutmann, DEMOCRATIC EDUCATION (1987).
This political difference, however, makes collaboration between the court and other branches more imperative, for the difference provides no legitimate reason to underenforce values to which the state constitution is committed.

E. Implications for Welfare Litigation

The implications of the proposed consequentialist approach for welfare rights enforcement can be seen in a series of examples that track the current typology of Article XVII decisionmaking. Recall that Type-I cases require the state to provide assistance to individuals who are indigent as defined by state positive law, even where the applicant cannot produce a specific document as proof of need. Assume a state program that provides special assistance to battered women on the view that as a group they have greater economic needs. To avoid fraud, the state requires applicants to produce a court order of protection as proof of prior battery. Imagine an applicant who has been too frightened to file a police report or to seek help from a court, but who does seek medical attention and confides details of her domestic abuse to a nurse at a local emergency room. The woman applies for assistance and is denied benefits because she cannot document her eligibility through the standard mode of proof. This situation presents a classic Type-I claim, and the court should apply a bright-line rule, requiring the state to provide assistance, as long as the application is corroborated by, for example, a letter or affidavit from the emergency-room nurse, even if not accompanied by the required order of protection. Arguably, the New York judiciary's approach to Type-I claims already goes this far, preventing the state from indirectly refusing aid to the needy through documentation requirements "having nothing to do with need."

Type-II claims, which bar the state from picking and choosing from among categories of indigents, would involve different reasoning under the proposed standard. Consider a state policy of giving transportation allowances to indigent children so that they can travel to and from public school. The state denies the allowance to a U.S.-born child because her parents are noncitizens. Under the Lee principle, the state has no discretion to withhold assistance, for otherwise the child of noncitizen parents will have to "survive on lesser amounts than are granted to other

361 Tucker v. Toia, 371 N.E.2d 449, 452 (N.Y. 1977); see supra pp. 1147–48
362 See supra pp. 1148–49.
needy persons in the State."363 The state cannot plausibly defend the exclusion in economic terms,364 and existing doctrine would forbid the differential treatment.

A more difficult Type-II claim would arise when the state excludes a category of indigents from a public assistance program and plausibly describes the exclusion as serving the constitutional goal of meeting the needs of the poor. For example, assume a state program that imposes a five-year cap on welfare assistance, on the view that employable individuals should not develop habits of welfare dependency. Under federal rationality review, the state has almost absolute discretion to structure eligibility requirements. With a more rigorous form of means-end scrutiny, however, the reviewing court is required to take a closer look at the welfare exclusion and examine whether the means chosen to enforce Article XVII — an arbitrary cut-off after a fixed number of years — can be expected to meet an indigent's legitimate need for public assistance under current labor market conditions.365 Hence, using the proposed standard, the court would carefully review the regulation at issue in Barie v. Lavine,366 which imposed an automatic, thirty-day suspension of welfare benefits on a recipient who failed to attend a workfare interview, to determine whether the denial was in fact linked to a refusal to accept employment. Under the facts presented, I suggest that the Barie plaintiff would now prevail in her Article XVII claim.

Type-III claims involve the legislature’s discretion to define the package of assistance that the state provides to needy individuals. Assume that the state adopts a “tough love” approach to welfare and fixes family benefit levels at one-half of the federal poverty level of $15,600 for a family of four,367 subject to incremental percentage decreases in cash assistance for each year on welfare.368 The state defends the adequacy of its payment standard, first by citing its exclusive power to set the “manner and . . . means”369 of public assistance, and second, by justifying the benefit level as a way to encourage self-sufficiency.370 Federal rationality review would accept this defense as a knock-down argument, effectively reducing Article XVII’s mandate to a discretionary government function that can be satisfied through provision of a mere peppercorn of assistance. The pro-

364 To the extent the provision is designed to discourage immigration to the U.S., the state is legislating in an area in which the federal government has exclusive control. See HERSHKOFF & LOFFREDO, supra note 15, at 41 & n.224.
366 357 N.E.2d 349 (N.Y. 1976); see supra pp. 1148–49.
367 See HERSHKOFF & LOFFREDO, supra note 15, at 1 (describing generally the federal poverty index).
368 See Welfare Working Group, supra note 365, at 20–21.
369 N.Y. CONST. art. XVII, § 1.
370 See Welfare Working Group, supra note 365, at 15, 22.
posed standard, by contrast, demands that the court make a more critical examination of the means-end nexus, by undertaking an empirical analysis of the law’s substantive sufficiency.

In our hypothetical Type-III claim, the court would presumably look, in part, to professional benchmarks involving minimum cost-of-living standards to determine the adequacy of the proposed benefit levels. Indeed, the court can contribute to the evolution of these benchmarks by examining successful or model practices in other states or abroad, to the extent that they inform the situation at hand. Analogies can also be drawn to other substantive cases dealing with the cost of raising a family: child support orders require courts to determine how much it takes to raise a child within the financial framework of an individual family; wrongful death awards require human life to be valued in terms of lost wages, family roles, and other factors; and statutory challenges to welfare payments require a court to assess the validity of a state’s standard of need against economic measures of well-being. Other sources can be found in the Bureau of Labor Standards and federal research on the poverty standard. These standards are not “professional” in a scientific sense, because “the drawing of poverty lines [is] a social process — not merely a


technical economic exercise."\textsuperscript{375} These standards do, however, provide benchmarks as a source of guidance for the court and the legislature in their elaboration of program and policy. In this process, the court can draw together the social knowledge that lays dormant in the poor themselves — offering a forum for their insights and drawing the legislature's attention to their views. And, finally, it can uncover the assumptions made about poverty and the poor and subject those assumptions to closer examination in light of state constitutional commitments.

\textbf{IV. Conclusion}

As states begin to administer their welfare block grants,\textsuperscript{376} advocates may turn to state courts for interpretation of state constitutional welfare provisions.\textsuperscript{377} The standard of review that state courts use in these cases could have a constitutive effect on public policy, profoundly affecting the shape of welfare reform for the next generation. State courts have faced considerable barriers, however, in developing a principled approach to state constitutional interpretation.\textsuperscript{378} As an academic field, state constitutionalism is still in a state of infancy,\textsuperscript{379} and has not yet fully developed the interpretive material needed for what Burt Neuborne calls "a successful adjudicative enterprise."\textsuperscript{380} More importantly, state constitutionalism remains intellectually isolated from a great deal of public law scholarship.\textsuperscript{381} Constitutional law courses at U.S. law schools not only ignore state consti-


\textsuperscript{376} See supra notes 242–243 and accompanying text.


\textsuperscript{379} See Bierman, supra note 49, at 1404 (observing that "only in the last half of the twentieth century has significant attention been paid to the state constitutional phenomenon").


\textsuperscript{381} Cf. Kahn, supra note 377, at 459 ("State constitutionalism has always seemed a poor stepsister to federal constitutionalism.").
tutions, but also more generally avoid any comparative approach. Constitutional theorists are as unlikely to consider the Utah Constitution as they are the Swiss constitution. This scholarly gap reflects an intellectual bias: the tendency to conflate questions of how a civil society can and should constitute itself with the more specific question of how the Federal Constitution does and should resolve this problem. State constitutions that deviate from the federal model, because they are longer, more detailed, or concerned with such matters as local government or direct democracy, are often dismissed in the literature (if mentioned at all) as nonconstitutional. State constitutions indeed contain a number

382 See Linde, supra note 138, at 933 (noting that the “general constitutional law courses, which everyone takes, create the impression that contemporary majority opinions and dissents in the United States Supreme Court exhaust the terms as well as the agenda of constitutional litigation”).


384 See J.M. Balkin & Sanford Levinson, The Canons of Constitutional Law, 111 HARV. L. REV. 964, 1004 (1998) (discussing the absence of comparative materials from the standard pedagogic canon of constitutional law); Lawrence Lessig, The Limits of Lieber, 16 CARDOZO L. REV. 2249, 2253 (1995) (discussing the perceived irrelevance of “cross-national constitutional experience” to U.S. constitutional thinkers). Bruce Ackerman notes the “emphatic provincialism” of federal constitutional practice and theory: “[t]he standard judge or lawyer would hardly raise an eyebrow when told, for example, that existing American law on capital punishment or welfare rights offends basic constitutional principles as the rest of the civilized world has come to understand them.” Bruce Ackerman, The Rise of World Constitutionalism, 83 VA. L. REV. 771, 773 (1997). For a counterexample, see Gerald L. Neuman, Casey in the Mirror: Abortion, Abuse and the Right to Protection in the United States and Germany, 43 AM. J. COMP. L. 273 (1995), in which the author compares German and U.S. federal constitutional approaches to a positive right to protection against harm.


388 See Tarr, supra note 12, at 2 (observing that “to those enamored of the federal model, most state constitutions appear decidedly ‘nonconstitutional’”). In 1893, Lord Bryce criticized state constitutions for including “a great deal of matter which is in no distinctive sense constitutional law but general law, ... matter therefore which seems out of place in a constitution because it is better fit to be dealt with in ordinary statutes.” I LORD BYRCE, THE AMERICAN COMMONWEALTH 443 (3d ed. 1895); see Gardner, supra note 49, at 819–20 (referring to state constitutional provisions involving corporations, interest rates, prisons, and bingo as embracing “concerns entirely absent from the U.S. Constitution that are handled on the federal level exclusively as legislative matters” and dismissing those provisions as the result of “a frivolous people who are unable

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of provisions — relating to public obligation, private autonomy, and government ordering — that are wholly outside the Federal Constitution. Such provisions, I suggest, should not be viewed as merely thicker elaborations of a national norm; to the contrary, they may potentially constitute democratic arrangements that “contest the meaning of American political life” as the Federal Constitution defines it. This Article provides an independent framework that allows state courts to act with greater fidelity to these alternative state constitutional norms.

389 For example, every state constitution obligates the state government to establish a system of free public education. See Robert M. Jensen, Advancing Education Through Education Clauses of State Constitutions, 1997 BYU EDUC. & L.J. 1, 3.


391 Some state constitutions permit legislators to perform administrative functions. See Devlin, supra note 262, at 1250 (discussing different models whereby legislators perform administrative functions).
