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ESSAY

WELFARE DEVOLUTION AND STATE CONSTITUTIONS

Helen Hershkoff*

INTRODUCTION

In 1996, Congress and the President "ended welfare as we know it," eliminating Aid to Families with Dependent Children ("AFDC") as a federal entitlement and substituting instead a block grant program that devolves responsibility to the states to design and implement assistance programs for needy families. The Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (the "1996 Act") promises a major overhaul of our nation's welfare system on the theory that the states, released from federal requirements, will be more programmatically creative, more democratically accountable, and more fiscally responsible. Whether interstate difference should decide treatment of the poor is normatively contested. Indeed, many

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1. President Bill Clinton came to the White House on a campaign promise to "end welfare as we know it." See Jason DeParle, The Clinton Welfare Bill: A Long, Stormy Journey, N.Y. Times, July 15, 1994, at A1. Although welfare includes many important government programs, it is frequently a shorthand for AFDC, formerly codified as Title IV of the Social Security Act, 42 U.S.C. §§ 601-17 (1994). In 1993, over 14 million people, including 9.5 million children, received AFDC benefits. See Staff of House Comm. on Ways and Means, 103d Cong., 2d Sess., Overview of Entitlement Programs: Background Material and Data on Programs within the Jurisdiction of the Committee on Ways and Means 325 (Comm. Print 1994).


commentators predict that, in planning block grant programs, states will engage in a "race to the bottom," tending to reduce welfare payments, to eliminate social services, and to block the in-migration of indigents. 4

Even before passage of the 1996 Act, 5 the literature on welfare reform raised questions regarding legal responses should a "race to the bottom" ensue and poor people find themselves without a meaningful safety net. 6 Advocates for the poor have typically focused on federal judicial strategies and national solutions. 7 The efficacy of relying on federal courts to restructure and to manage public institutions, however, has come under fire, as some critics question federal judicial capacity to resolve issues that are both polyallocational and redistributive. 8 Moreover, although federal due process should continue to protect poor people against arbitrary governmental action even if welfare is no longer a federal entitlement, 9 the Supreme Court


6. See, e.g., Stephen Loffredo, "If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare, 11 Yale L. & Pol'y Rev. 147, 190-99 (1993) (analyzing under the Commerce Clause "two-tier" welfare systems that cap benefits paid to new state residents); Nancy Morawetz, A Due Process Primer: Litigating Government Benefit Cases in the Block Grant Era, 30 Clearinghouse Rev. 97 (1996) (discussing the availability of due process arguments under a block grant program).


is not likely to find a federal constitutional right to income support should state benefit payments under the 1996 Act drop below minimum subsistence levels.  

Devolution rests on the assumption that, in a diverse nation, states have different preferences for social welfare policies. In thinking through legal responses to devolution, we might take a cue from devolution itself and "think local." Every state has its own constitution, supplemental to the rights of the Federal Constitution, and these documents have their own unique texts, histories, and sets of commitments. To the extent that state constitutions reflect the preferences of specific communities, they show considerable differences from

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11. See Peter H. Schuck, Introduction: Some Reflections on the Federalism Debate, in Symposium Issue: Constructing a New Federalism: Jurisdictional Competence and Cooperation, supra note 4, at 1, 11-14 (assuming diverse regional preferences with regard to welfare spending); Stephen D. Sugarman, Welfare Reform and the Cooperative Federalism of America's Public Income Transfer Programs, in Symposium Issue: Constructing a New Federalism: Jurisdictional Competence and Competition, supra note 4, at 123, 132 (contending that "state-to-state benefit level differences importantly reveal . . . differences in 'taste'"); cf. Lewis B. Kaden, Politics, Money, and State Sovereignty: The Judicial Role, 79 Colum. L. Rev. 847, 854 (1979) (contending that "[d]espite the homogenizing effects of media and mobility on twentieth-century American life, the existence of separate state and local governmental units still provides avenues for expression of the variations in style in different parts of the country").


each other and from the federal document in their approaches to social and economic issues. The Federal Constitution is typically characterized as a "charter of negative rather than positive liberties," and the Supreme Court has so far declined to read the Fourteenth Amendment as affording any "affirmative right to governmental 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." Conversely, the constitutions of some states explicitly create positive economic claims against the government. States also operate within the generative tradition of the common law, which affects their approach to state constitutional interpretation and enhances their institutional capacity to resolve complex social and economic matters. The distinct approach that some state constitutions take toward positive rights puts into sharp relief the "New Judicial Federalism" and the extent to which states may extend rights and liberties that are more protective than those of the Federal Constitution.


17. Positive rights, sometimes referred to as second-generation rights, refer to affirmative claims on government to meet social and economic needs. The literature distinguishes positive from so-called negative or first-generation rights, which afford freedom from government intrusion. See Charles Fried, Right and Wrong 110 (1978) (stating that "[a] positive right is a claim to something . . . while a negative right is a right that something not be done to one"); see also, e.g., Burt Neuborne, State Constitutions and the Evolution of Positive Rights, 20 Rutgers L.J. 881, 893-95 & nn.60-82 (1989) (reviewing state constitutional provisions affecting the poor).


Over the last generation, some state courts have considered whether state constitutional provisions create judicially enforceable rights to forms of social assistance, such as income support, reproductive health services, education and housing. Whether the constitution of a particular state will be interpreted as affording an enforceable right to subsistence—through a jobs strategy or welfare benefits—has new significance as states tailor local, innovative approaches to social welfare policy under the 1996 Act. Legal scholars have paid little attention, however, to devolution's state constitutional framework and to the countervailing pressures that a judicially enforceable, state-created welfare right could have on local block grant efforts. More generally, until recently, little academic attention has been paid to state constitutional economic rights that have no immediate federal parallel. Commentators have focused instead on state constitutional provisions that are identical to those of the Federal Constitution, urging state courts to model themselves on federal practice.
Using state constitutional welfare rights as an example, this Essay argues for an independent state constitutional discourse that resists simply mapping state judicial practice onto federal doctrine. I have explored some of these issues elsewhere. My methodology here consists of a case study of Article XVII of the New York Constitution, a Depression-era provision that guarantees the “aid, care and support of the needy.” 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.’” Lower courts, faced with challenges to the adequacy of state assistance, have uncharacteristically criticized the Court of Appeals for too narrowly construing the legislature’s duty to effectuate Article XVII, as well as the judiciary’s own power to redress state constitutional violations.


28. N.Y. Const. art. XVII, § 1 (providing 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 such means, as the legislature may from time to time determine”); see Hershkoff, supra note 27 (manuscript at 9-14) (discussing the illustrative importance of the New York Constitution). As a staff attorney with the Legal Aid Society of New York and then as an associate legal director of the American Civil Liberties Union, the author participated as counsel or as amicus curiae in state court lawsuits involving New York constitutional claims. See, e.g., Campaign for Fiscal Equity, Inc. v. State, 655 N.E.2d 661 (N.Y. 1995) (involving a state constitutional challenge to state funding of public schools in New York); Asian Americans for Equality v. Koch, 514 N.Y.S.2d 939 (App. Div. 1987) (rejecting a state constitutional challenge to the adoption of zoning amendments creating a special district in the Chinatown neighborhood of New York City), aff’d, 527 N.E.2d 265 (N.Y. 1988); Thrower v. Perales, 523 N.Y.S.2d 933 (Sup. Ct. 1987) (preliminarily enjoining the denial of assistance to homeless destitute persons temporarily residing in municipal shelters).


30. Id. at 452.

31. For example, McCain v. Koch, 484 N.Y.S.2d 985 (Sup. Ct. 1984), aff’d as modified, 502 N.Y.S.2d 720 (App. Div. 1986), rev’d, 511 N.E.2d 62 (N.Y. 1987), involved a state constitutional challenge to the quality of emergency shelter provided to homeless and destitute families. In modifying the trial court’s order preliminarily enjoining
Other state courts, construing their state constitutional welfare provisions, similarly have remitted questions about the adequacy of welfare assistance to politics, according strong deference to legislative policy making in this area. Such an approach, this Essay contends, inappropriately relies on federal practice—which conventionally views a constitution as a source of negative restraint on legislative power—and so misapprehends the role of legislative discretion in a regime of positive constitutional rights. As applied to Article XVII, this approach also overlooks the New York provision’s motivating concerns as reflected in the state constitutional history. Parts I and II of this Essay offer an alternative reading of Article XVII’s text and history on the view that a state constitution comprises not only a set of negative restrictions on government, but also a set of substantive commitments that government owes to its citizens. Part III presents four themes that ought to frame discussions about the role of state constitutional welfare rights under the 1996 Act. Part IV is a brief conclusion that urges state courts to draw from unique state sources in developing an independent and principled approach to their interpretation of state constitutional welfare rights.

502 N.Y.S.2d at 731 (citations omitted).


The New York State Constitution, like more than a dozen other state constitutions, explicitly recognizes the state’s obligation to protect the poor against hunger and privation. The state’s duty flows from Article XVII of the 1938 Constitution, which 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 such means, as the legislature may from time to time determine.” New York’s highest court first construed Article XVII in Tucker v. Toia as establishing a judicially enforceable right to public assistance, holding that the New York State Constitution “unequivocally prevents the Legislature from simply refusing to aid those whom it has classified as needy.” In construing the scope of Article XVII, the Court of Appeals has consistently held, however, that questions about the adequacy of welfare assistance are remitted to legislative discretion. In a broad category of cases, therefore, the court effectively treats Article XVII challenges as political questions that are beyond the power and competence of the judiciary to resolve. This part offers an alternative reading of Article XVII that treats affirmative constitutional rights as constraints on legislative discretion, on the view that rights are not simply trumps that block government action—they are also trumps that compel government action to achieve a prescribed end.

Article XVII opens with words of command, that the legislature provide forms of public assistance to the poor, and concludes with words of permission, affording the state flexibility and open-ended authority to carry out this duty. The clauses are sequential and conjunctive, first imposing a duty on the legislature, and then empowering the legislature to meet its duty through any chosen device. The indi-

34. See, e.g., Ala. Const. art. IV, § 88; Cal. Const. art. 16, §§ 3, 11, art. 34; Haw. Const. art. IX, § 3; Idaho Const. art. X, § 1; Ill. Const. preamble; Ind. Const. art. 9, § 3; Kan. Const. art. 7, § 4; La. Const. art. 12, § 8; Miss. Const. art. 14, § 262; Mont. Const. art. XII, § 3(3); Nev. Const. art. 13, § 1; N.M. Const. art. IX, § 1; N.Y. Const. art. XVII, § 1; N.C. Const. art. XI, § 4; Tex. Const. art. XI, § 2; W. Va. Const. art. IX, § 2; Wyo. Const. art. VII, § 18.
35. N.Y. Const. art. XVII, § 1.
37. See id.
38. See generally Martin H. Redish, Judicial Review and the “Political Question,” 79 Nw. U. L. Rev. 1031, 1031 (1984-85) (explaining that “[t]he so-called ‘political question’ doctrine postulates that there exist certain issues of constitutional law that are more effectively resolved by the political branches of government”).
39. This part draws on Hershkoff, Rights and Freedoms, supra note *, at 640-42.
40. See N.Y. Const. art. XVII, § 1 (“[t]he aid, care and support of the needy . . . shall be provided by the state and by such of its subdivisions”).
41. See id. (“and in such manner and by such means, as the legislature may from time to time determine”).
individual's right to assistance is thus interconnected with the government's power to effectuate that right.\footnote{42}{Cf. Richard H. Fallon, Jr., Individual Rights and the Powers of Government, 27 Ga. L. Rev. 343, 347-60 (1993) (describing the interconnection of individual rights with government power).}

A quick reading of Article XVII might suggest that the state constitution authorizes the legislature to use public funds for welfare—making public assistance a permissible function of government—but that it does not require the legislature to provide any such assistance. This approach to Article XVII would render its first clause, that aid, care, and support “shall be provided by the state and by such of its subdivisions,” dependent on, and subject to modification by, the second clause, that aid, care and support shall be given “in such manner and by such means, as the legislature may from time to time determine.” Such a reading would effectively convert a mandatory duty of the state into a discretionary function, leaving it to the legislature to decide whether to extend assistance and to decide the terms and conditions of relief.

From the perspective of federal constitutional jurisprudence, a discretionary reading of Article XVII has the benefit of familiarity. Although Congress is free to create national public assistance programs, the Supreme Court has made it clear that the Federal Constitution does not mandate the provision of welfare.\footnote{43}{See Dandridge v. Williams, 397 U.S. 471, 484-86 (1970) (finding no federal constitutional right to income support). Justifications for the Court's analysis can be found in Robert H. Bork, The Impossibility of Finding Welfare Rights in the Constitution, 1979 Wash. U. L.Q. 695, 699-701; Richard A. Epstein, The Uncertain Quest for Welfare Rights, 1985 BYU L. Rev. 201, 217-19; Henry Paul Monaghan, The Constitution Goes to Harvard, 13 Harv. C.R.-C.L. L. Rev. 117, 128 (1978); Antonio Carlos Pereira-Menaut, Against Positive Rights, 22 Val. U. L. Rev. 359, 377-82 (1988); Ralph K. Winter, Jr., Changing Concepts of Equality: From Equality Before the Law to the Welfare State, 1979 Wash. U. L.Q. 741, 746-55; and Ralph K. Winter, Jr., Poverty, Economic Equality, and the Equal Protection Clause, 1972 Sup. Ct. Rev. 41, 43.} As Justice Douglas explained in an analogous context, “[t]he Bill of Rights does not say . . . what government must give, but rather what it may not take away.”\footnote{44}{Barsky v. Board of Regents, 347 U.S. 442, 472-73 (1954).} While normatively contested,\footnote{45}{Scholars put forward a range of normative arguments in favor of welfare rights. The classic formulation remains Frank I. Michelman, The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment, 83 Harv. L. Rev. 7, 19-39 (1969); see also See Hershkoff, supra note 27 (manuscript at 3 n.9) (collecting literature).} this view comports with the broader idea that the power to decide social and economic policy belongs to the popular branches of government, subject only to electoral restraint and constitutional limitation.\footnote{46}{See Kent Greenawalt, Policy, Rights, and Judicial Decision, 11 Ga. L. Rev. 991, 1004 (1977) (discussing the democratic defense of legislative policy making).} Discretion—the freedom to make policy that the judiciary must respect—signifies that the legislature is “free to make a choice among possible courses of action or
inaction”⁴⁷ and is understood to be the defining feature of legislative power.⁴⁸

A discretionary reading of Article XVII presents a number of interpretive difficulties. As a formal matter, the general rule is to give effect to every clause in a text.⁴⁹ The discretionary approach fails, however, to give effect to the clause mandating that “[t]he aid, care and support of the needy . . . shall be provided by the state and by such of its subdivisions . . . .” Moreover, such a reading ignores linguistic distinctions between the New York State Constitution and the Federal Constitution that ought to have interpretive salience.⁵⁰ Article XVII has a bifurcated structure, uncommon to the Federal Constitution, but quite typical of state constitutions that afford guarantees to government services. Such provisions often assign affirmative responsibility to the legislature and then grant broad power—frequently without standards—to carry out the constitutional goal. The state constitution thus commits the state to a particular public end, leaving selection of the means for securing that end to the legislature.

An illustration from a sister state may be helpful in understanding Article XVII’s structural significance. It also highlights the considerable rhetorical differences between some state constitutional positive rights clauses and the Fourteenth Amendment. Every state constitution in the United States provides for the establishment of a public school system, and in some states, parents and others have challenged the adequacy and equity of the education provided to their children under such provisions.⁵¹ For example, the Massachusetts Constitution declares that “[w]isdom, and knowledge . . . diffused generally among the body of the people [are] necessary for the preservation of [the people’s] rights and liberties.”⁵² It further provides that such diffusion “depend[s] on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people.”⁵³ The education clause then mandates that “it shall be the duty of legislators and magistrates, in all future periods of

⁴⁹ See Marbury v. Madison, 5 U.S. (1 Cranch) 137, 175 (1803) (“If any other construction would render the clause inoperative, that is an additional reason for rejecting such other construction, and for adhering to their obvious meaning.”).
⁵⁰ Although I do not suggest that Article XVII’s text provides an exclusive entry point to its constitutional meaning, the language of a written legal document deserves attention in legal interpretation. See Frederick Schauer, Constitutional Invocations, 65 Fordham L. Rev. 1295, 1296 (1997) (discussing different theoretical approaches to “variations in textual style or degree of detail”).
⁵³ Id.
Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns . . . .”

54. The Massachusetts Supreme Judicial Court has construed this education clause as imposing a judicially enforceable duty on the legislature to design, maintain, and support a public school system that provides the state’s children with an adequate education.55 In so holding, the court confirmed that the legislature possesses discretion to design its educational system, but underscored that the judiciary has an institutional obligation to ensure that any such system comports with the constitutional goal of educational adequacy.56 Numerous other state courts that have considered the issue have rejected the argument that state educational clauses raise a political or otherwise nonjusticiable question simply because the legislature has discretion in operating the state’s public school system.57 Instead, they recognize that where a state constitution man-

54. *Id.* The Massachusetts Constitution’s education clause provides:

Wisdom, and knowledge, as well as virtue, diffused generally among the body of the people, being necessary for the preservation of their rights and liberties; and as these depend on spreading the opportunities and advantages of education in the various parts of the country, and among the different orders of the people, it shall be the duty of legislators and magistrates, in all future periods of this Commonwealth, to cherish the interests of literature and the sciences, and all seminaries of them; especially the university at Cambridge, public schools and grammar schools in the towns; to encourage private societies and public institutions, rewards and immunities, for the promotion of agriculture, arts, sciences, commerce, trades, manufactures, and a natural history of the country; to countenance and inculcate the principles of humanity and general benevolence, public and private charity, industry and frugality, honesty and punctuality in their dealings; sincerity, good humour, and all social affections, and generous sentiments among the people.

55. See *McDuffy v. Secretary of Educ.*, 615 N.E.2d 516, 555 (Mass. 1993) (holding “that the provisions of Part II, c. 5, § 2, of the Massachusetts Constitution impose an enforceable duty on . . . this Commonwealth to provide education in the public schools for the children there enrolled, whether they be rich or poor and without regard to the fiscal capacity of the community . . . .”); see also *Enrich*, supra note 22, at 141-42 (discussing the *McDuffy* rationale); Alexandra Natapoff, 1993: The Year of Living Dangerously: State Courts Expand the Right to Education, 92 Educ. L. Rep. 755, 767 (1994) (same). As an associate legal director of the American Civil Liberties Union, the author participated in the *McDuffy* case as amicus curiae in support of plaintiffs.

56. See *McDuffy*, 615 N.E.2d at 555 (setting forth guidelines defining the content of an adequate education, and stating “we leave it to the magistrates and the Legislatures to define the precise nature of the task which they face in fulfilling their constitutional duty”).

dates a specific government purpose, the legislature is required to use its assigned power to achieve the prescribed end and is subject to judicial review to ensure compliance with the constitutional goal.

The presence of a positive right in a state constitution should thus be understood as constraining the legislature’s otherwise unfettered discretion to choose from among competing policy alternatives. The legislature can choose the means to carry out a constitutional goal, but it cannot claim to meet its constitutional duty if the means chosen evade, undermine, or fail to carry out the prescribed end. The relevant question is thus consequential in focus—asking whether the legislature’s approach furthers or effectuates the constitutional right at issue.58

The force of viewing a constitution not simply as a negative restraint, but rather as a positive constraint on government may be illustrated by a pair of analogies. Consider this story. Eve says to Adam: “Spend Thursday with me in New York. Travel here however you like.” Eve is directing Adam to rendezvous with her at a designated time and place. He can decide how best to get to New York in time for the Thursday meeting. But suppose Adam decides on Wednesday that he wants to walk, and sets out that night from Boston. Arriving two weeks later, Adam cannot really claim to have met Eve’s request. His discretion to choose how to travel is subordinate to the overall purpose, namely, to meet Eve in New York on an appointed day.

Similarly, consider the sergeant who is ordered to select men and go on patrol.59 The sergeant is free to choose the men as he likes. The sergeant’s discretion does not, however, allow him to ignore the order. Nor can he choose the men and assign them activities unrelated to patrol—to frolic or to build a casino. And he cannot choose the men and then fail to equip them for patrol. Even though the command to choose men for patrol is given in open-ended terms, it contains a limit on the sergeant’s discretion that is both internal and antecedent, based on a substantive understanding of what it means to go on patrol.

State constitutional provisions such as Article XVII follow a structure that is common to these stories. The constitutional language commands and authorizes: it commands the legislature to meet the needs of the poor and it authorizes the legislature to achieve the constitutional goal. In some instances, the means that the state chooses will be instrumental to achieving the prescribed end, as, for example, when the state provides day care for poor children to allow their parents to work outside the home. In other instances, the means will be

58. I develop this argument more fully in Hershkoff, supra note 27 (manuscript at 69-72).
constitutive of the end, as for example, when a public assistance grant provides the cash necessary for a family's subsistence. In both instances, the legislature must use its power to effectuate a policy goal that is constitutionally fixed. Although the right is defined in only general terms, it creates "an environment of constraint, of... ideals to be fulfilled" that cabins the legislature's discretion to choose only those means that will actually carry out, or at least help to carry out, the constitutional end.  

To borrow from D. J. Galligan, a positive constitutional right thus imposes on the legislature "a duty to reflect upon the purposes for which powers have been conferred and to put those purposes into practice."

II. THE HISTORY OF ARTICLE XVII

So far I have offered a textual reason for rejecting a discretionary reading of Article XVII that would remit public assistance, like many other social and economic matters, to the vicissitudes of politics. Article XVII's history provides further justification. For the state constitutional provision's motivating concern was to relocate the question of welfare to the realm of rights by imposing on state government a duty to assist the poor deemed to be "as fundamental as any responsibility of government." The New York Court of Appeals has looked to this history to support the view that the state constitution creates a judicially enforceable obligation to provide welfare to individuals who are categorized as needy under positive law. The court has not, however, fully examined the history to make sense of Article XVII's language given the economic and ideological setting of its adoption. Instead, the court has continued to read the text through a federal-law prism that equates legislative discretion with unreviewable power. This part more fully examines Article XVII's intellectual and political history in questioning the interpretive fit between the New York court's deferential approach and the state constitution's normative commitment to welfare assistance. I do not claim that the state constitutional history will yield "specific answers for individual cases."


does, however, provide a background understanding against which to read the text, offering a critical perspective on the Federal Constitution's rejection of positive rights.65 In a more particular way, Article XVII's history also illuminates how devolution and rights-based strategies have fared as social policy, and these successes and failures provide important lessons for courts and other decision makers.66

A. Devolution and American Welfare History

Welfare in the United States is often presented as an evolution from localist to nationalist strategies, as the “Poor Law” philosophy of the colonial era gave way to federal supremacy in the Social Security Act of 1935.67 In this account, the Great Depression is a watershed event, marking the federal government’s recognition that poverty is a national problem that requires federal intervention.68 As commentators recognize, however, the Social Security Act incorporated many of the earlier ideological features of local relief efforts.69 In particular, the

A Constitutional Morphology: Text, Context, and Pretext in Constitutional Interpretation, 19 Ariz. St. L.J. 587, 589 (1987) (suggesting in the federal constitutional context that originalist “values are relevant today, but they cannot settle current disputes: they simply present the modern interpreter with a series of choices about social policies that can be drawn from the Constitution and judicially enforced”).

65. Cf. Lawrence Lessig, What Drives Derivability: Responses to Responding to Imperfection, 74 Tex. L. Rev. 839, 854 (1996) (making “the claim that background understandings constitute the meaning of a foreground text, and that one cannot understand what a text means unless one understands these background understandings as well”) (reviewing Responding to Imperfection: The Theory and Practice of Constitutional Amendment (Sanford Levinson ed., 1995)); Kaye, supra note 13, at 423 (stating that “the history that has shaped the values of this State is different in many respects from that which has shaped the consensus in other states, not to mention our nation as a whole”).


67. Social Security Act, ch. 531, 49 Stat. 620 (1935) (codified as amended in scattered sections of 42 U.S.C.); see Robert E. Goodin, Protecting the Vulnerable: A Reanalysis of Our Social Responsibilities 147 (1985) (“The ideology of the Poor Law firmly held that no one should receive public assistance if he was capable of supporting himself.”).


Social Security Act rejected the view, most forcefully presented by the New Deal social workers,\textsuperscript{70} that income support constitutes an essential right of social citizenship, to be extended on equal terms to all members of a community.\textsuperscript{71} Instead, the Social Security Act perpetuated a legal distinction between the "deserving" poor—mothers, children, the old, and infirm, all of whom were presumed to lack control over their economic plight—and the "undeserving"—unemployables and layabouts, seen as voluntarily adopting a life of indolence.

The nationalist story, which emphasizes federal centralization, overlooks the New Deal's most important experiment with devolution: the federal government's decision, in 1936, to return responsibility for general relief—assistance for so-called "unemployables"—back to the states, following termination of the Federal Emergency Relief Administration ("FERA").\textsuperscript{72} James T. Patterson, a leading historian of this era, reports that the reassignment of local responsibility, and the elimination of federal support for some of the "undeserving" poor, produced "desperate" conditions in much of the country, as states were unprepared or unwilling to provide necessary assistance and services.\textsuperscript{73} New York responded to this earlier devolutionary experiment

\textsuperscript{70} Grace Abbott, a leading social worker of the New Deal period, explained in 1939:

Unemployment may, therefore, be regarded in greater or less degree as the inevitable result of our industrial system. Our economic life is based upon it. A democracy which supports this system should, therefore, make adequate and democratic provision for its victims, recognizing the costs of their care as the price it pays for the continuance of the capitalist system.


\textsuperscript{73} Patterson, \textit{supra} note 72, at 78-79. Patterson does not use the term devolution to describe the federal government's termination of FERA. For other accounts of this period, see Josephine Chapin Brown, Public Relief 1929-1939, at 325 (1940) (referring to events "after the liquidation of the FERA at the end of 1935" as a period of "terror for the relief client who could not get a work relief job and who had no sure niche in the developing categorical programs"); and Jacob Fisher, \textit{The Response of}
by expanding its commitment to the poor and by solidifying its power to adopt social welfare legislation.\textsuperscript{74} In particular, the state amended its constitution to include an explicit right to welfare, Article XVII, which was adopted by overwhelming popular vote following the Constitutional Convention of 1938.\textsuperscript{75}

B. Devolution and the 1938 Constitutional Convention

Robert M. Cover has written that "[e]ach constitutional generation organizes itself about paradigmatic events."\textsuperscript{76} For the generation that adopted Article XVII, those events were the Great Depression at home and totalitarianism abroad.\textsuperscript{77} Social and economic conditions at


\textsuperscript{74} See Brock, supra note 72, at 311, 317-323 (reporting that New York was one of only three states "that made stouter efforts to provide new answers to the problem of chronic unemployment or underemployment"); Joan M. Crouse, The Homeless Transient in the Great Depression: New York State, 1929-1941, at 242 (1986) (observing that "[a]t a time when many other states were making their laws more rigorous in an attempt to eliminate potential relief cases, New York was actually assuming a larger responsibility").


\textsuperscript{76} Robert M. Cover, The Origins of Judicial Activism in the Protection of Minorities, 91 Yale L.J. 1287, 1316 (1982); see Robert M. Cover, The Supreme Court, 1982 Term—Foreword: Nomos and Narrative, 97 Harv. L. Rev. 4, 4 (1983) (stating that "[n]o set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning. For every constitution there is an epic . . . "); see also Patrick Baude, Interstate Dialogue in State Constitutional Law, 28 Rutgers L.J. 835, 836 (1997) (arguing that there are meaningful local epics that are important to state constitutional interpretation).

\textsuperscript{77} See Edward A. Purcell, Jr., The Crisis of Democratic Theory: Scientific Naturalism and the Problem of Value 117-38 (1973) (discussing the influence of totalitarianism and economic upheaval on American thinking in the 1930s). The opening speech at the 1938 Convention, by Edward J. Flynn, Secretary of State, urged: "You are assembled during a most critical time in the world's history, when new forms of
the time of the New York Constitutional Convention of 1938 gave shape and content to the delegates’ constitutional concerns. In an important sense, the Convention and subsequent popular vote focused attention on what Frank I. Michelman has termed “demoralization costs”—the potentially destructive reaction of individuals to legal orders that fail to respond to normative claims of need. In the four-year period beginning in 1929, industrial jobs dropped from over one million to little more than 700,000, with a corresponding dip in wages. Unemployment was pervasive. By 1933, more than one and a half million New Yorkers were receiving some kind of assistance and many more needed relief but went unaided. As Harry Hopkins put it, in a speech to the National Council of Social Work that year, “[W]e are now dealing with all classes. . . . It is no longer a matter of unemployable and chronic dependents, but your friends and mine.”

87. Katz, supra note 69, at 219 (quoting Harry Hopkins). Commentators increasingly saw poverty as evidence of “abnormal social phenomena,” the consequence of economic structures and market forces that were largely beyond the control of any individual or family. See, e.g., John Lewis Gillin, Poverty and Dependency: Their Relief and Prevention 5 (3d ed. 1937) (discussing how the “abnormal social phenomenon” of poverty and dependency can illustrate the nature and function of a normal society). Nevertheless, the federal government, under President Hoover’s leadership, persisted in refusing to extend assistance. In New York, by contrast, then-Governor Franklin Delano Roosevelt called on the “responsibility” of “every civilized nation” to “car[e] for those of its citizens who find themselves the victims of such adverse circumstance as makes them unable to obtain even the necessities for mere existence without the aid of others.” Brown, supra note 73, at 89. FDR declared:

While it is true that we have hitherto principally considered those who through accident or old age were permanently incapacitated, the same responsibility of the State undoubtedly applies when widespread economic conditions render large numbers of men and women incapable of supporting government are being created throughout the world and democratic principles are being forgotten.” O’Rourke & Campbell, supra note 75, at 1. This section draws on Hershkoff, Rights and Freedoms, supra note *, at 642-47.


80. See Crouse, supra note 74, at 53 (stating that “industrial employment fell from 1,105,963 to 733,457 and wages from $1,650,389,000 to $754,367,000”). The number of homeless men seeking temporary shelter in the Buffalo municipal lodging house increased during these years by over 1000%, to over 750,000. See id. at 69. Similarly, the rate of malnutrition per 1000 children under age six in the Mulberry district in New York City increased from 60.3 to 99. See Grace Abbott, Children and the Depression: A National Study and Warning, N.Y. Times, Dec. 18, 1932, at 5. The City Health Department further reported an increase in malnutrition among students, from 13.4% in 1929 to 20.5% in 1932. See id. “Teachers remarked that many young children seemed dazed and distracted in school, as though old before their time. They were undernourished.” Stout, supra note 24, at 41.
As Governor, Herbert Lehman carried forward President Roosevelt's earlier progressive initiatives, and in 1934 convened a Commission on Unemployment Relief (the "Relief Commission") to study and help reform the state's social welfare programs. The Relief Commission's first report, issued in 1936, coincided with the national government's controversial decision to dismantle the Federal Emergency Relief Administration and to return responsibility for general relief back to the states.\(^8\) Without matching federal funds, many states in this period refused or were unable to continue assistance programs for indigents who did not meet the categoric requirements of federal programs, which were largely designed for unemployed workers and mothers.\(^8\) The Relief Commission's report, by contrast, urged New York to maintain its high level of commitment in meeting the needs of all of the state's poor.\(^8\) Recognizing the problem of "unemployables" as a permanent social issue, and not a temporary concern of the Depression, the Relief Commission stressed the need to develop long-term capacity to sustain "a continuing and permanent policy for home relief."\(^8\) The state's "little New Deal" went forward, and in January 1938, Governor Lehman publicly reaffirmed the state's duty to the poor: "government must adhere to the policy of assuring

either themselves or their families because of circumstances beyond their control which make it impossible for them to find remunerative labor. To these unfortunate citizens aid must be extended by government—not as a matter of charity but as a matter of social duty.

Id. at 89-90; see also Bremer, supra note 78, at 57 (quoting FDR's proclamation of January 1932 that responsibility for the Depression is of "a complex and impersonal nature" and "will not be lodged at the door of those who need help today").

82. Edith Abbott, an important member of the social work community, responded to announcements of FERA's proposed dismantlement with an article in the Nation entitled, "Don't do it Mr. Hopkins!":

All who have recognized the miserable incompetence of the old system know that returning to local relief authorities means returning to everything that is reactionary in the field of social welfare . . . . [L]ocal politicians temporarily banished by the resolute orders of the Federal Relief Administration, will return to the welfare controls.

Brock, supra note 72, at 251.

83. See id. at 297. As William R. Brock has chronicled:

In the eighteen months after the last FERA grant, Kentucky, Maryland, Mississippi, and South Dakota withdrew completely from general relief and returned exclusive responsibility to their local governments. Florida, Georgia, Indiana, Kansas, Massachusetts, Nevada, North Carolina, South Carolina, and Vermont voted no funds for general relief but gave some assistance for relief administration. New Jersey and Missouri withdrew completely from general relief, but later had second thoughts and set up state agencies with limited regulatory power.

Id.; see also Fisher, supra note 73, at 62 (reporting that "[h]undreds of thousands of families suffered a reduction in income, in some places were cut off from assistance altogether when federal funds ran out").

84. By way of comparison, in 1934, the average monthly assistance payment per family in New York was $45.12; it was less than $15 in 12 states, including Connecticut, and an average of $23.90 nationally. See Patterson, supra note 72, at 54-55.

85. See Brock, supra note 72, at 319-20 (quoting the Relief Commission's report).
to the needy adequate food, clothing and shelter.”86 The Commissioner of Social Welfare, David C. Adie, wrote that same year: “One of the great tasks of our expanding democracy is to fix minimum standards of physical and cultural existence beneath which no person shall be allowed to fall—barring disasters beyond human control.”87

At the 1938 Constitutional Convention, responsibility for crafting the terms of the welfare right was assigned to the Convention’s Committee on Social Welfare (the “Welfare Committee”), chaired by Edward Corsi, a liberal Republican from New York City. With New York already in the forefront of social welfare policy, the Welfare Committee had two goals. The first goal was to constitutionalize state responsibility for the poor, making it a governmental mandate and not simply a discretionary function. The second goal was to ensure state administrative capacity to carry out this duty.88 Welfare Committee members specifically denounced the failure of other states to meet the needs of the poor in this period, referring, for example, to the “brutal callousness to human suffering . . . witnessed . . . in the State of New Jersey” when the State Relief Council closed in 1936 following FERA’s demise.89

The Welfare Committee held two public hearings before sending a version of the Chair’s proposal to the floor of the Convention, identi-


87. David C. Adie, Foreword to David M. Schneider, The History of Public Welfare in New York State 1609-1866 at ix, xii (1938); see Ingalls, supra note 78, at 49-50 (describing Adie as “an early champion of the ‘new philosophy of collective responsibility’”); cf. James T. Patterson, America’s Struggle Against Poverty 44 (1981) (reporting 1934 statement of Harry Lurie, Chairman of the American Association of Social Workers subcommittee on Federal Action, calling for the “establishment of minimum standards of security applying to the entire population”).

88. Prior to the Convention, Senator Robert F. Wagner, in a speech in Rochester, called for a seven-point program that would place “beyond doubt” and declare in “unmistakable terms” the power and duty of the legislature to enact and finance public welfare laws. O’Rourke & Campbell, supra note 75, at 70; see also id. at 96 n.3 & 161 (stating that “[t]he final objective was to place in the constitution safeguards anticipating possible judicial decisions which would nullify rights such groups now possessed or which might be conferred upon them in the future by a favorable legislature”); Brock, supra note 72, at 349-50 (discussing the constitutional goals of social welfare measures).

89. See All State Relief Ends in Jersey; Local Areas Must Feed 270,000, N.Y. Times, Apr. 17, 1936, at A1. As one social worker commented:

A return to predepression conditions means the unnecessary death of thousands of mothers each year and invalidism for many—a very great many—others; it means inadequate treatment for sick children and for crippled children; it means wholly inadequate resources for the education of parents, through child health centers, in the scientific care of their children; it means that the supervision of the health of most school children will not be provided.

Abbott, supra note 70, at 194-95.
cal in language to the present text of Article XVII. During the floor debate, Chairman Corsi explained:

Here are words which set forth a definite policy of government, a concrete social obligation which no court may ever misread. By this section, the committee hopes to achieve two purposes: First: to remove from the area of constitutional doubt the responsibility of the State to those who must look to society for the bare necessities of life; and, secondly, to set down explicitly in our basic law a much needed definition of the relationship of the people to their government.

Mr. Corsi explained to the delegates that Article XVII was presented as “a charter of human protection for the underprivileged, the destitute and the handicapped of our State.” In an important sense, the amendment solidified a “constitutional moment” as part of the state’s primary law, explicitly changing the state’s obligation to its citizens. As Senator Robert F. Wagner explained on the floor of the 1938 Convention, the constitutional goal was to meet “the threat to freedom that comes . . . from poverty and insecurity, from sickness and the slum, from social and economic conditions in which human beings cannot be free.”

C. Motivating Purpose

Article XVII’s history suggests that the provision has two closely related aims. The first is conceptual and at the level of constitutional purpose: to provide a normative sense of what politics ought to entail by making concern for material well being an essential piece of the state’s duty to its members. The second is strategic and at the level of administrative structure: to afford the state plenary power to carry out its mandatory duty to assist the poor. Article XVII achieved these two purposes by imposing on state government an enforceable duty to meet the needs of the poor, while granting the legislature open-ended authority to achieve that goal. As explained at the Convention: “The Legislature[‘s] . . . hands are untied. What it may not do is . . . shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government.”

90. The Welfare Committee considered and rejected a number of proposals before agreeing to send language to the floor. See Ladd, supra note 63, at 289-91 (analyzing proposed language).
91. Revised Record, supra note 62, at 2126 (statement of Mr. Corsi).
92. Id. at 2125.
94. O’Rourke & Campbell, supra note 75, at 117.
95. Revised Record, supra note 62, at 2126 (statement of Mr. Corsi).
Creation of a right to welfare reflected a complete rejection of Lochner's premise that regulatory intervention to achieve social welfare goals is an unconstitutional interference with a preexisting common law distribution of rights and property. The common law imposes no duty on individuals to assist others who are in distress; by analogy, government has no obligation to assist citizens facing economic trouble. Measured against this common law baseline, government action on behalf of the poor is suspect, for it interferes with a "natural" distribution of obligations and benefits. At the time of the Convention, some analysts thus viewed social legislation on behalf of the poor as outside the realm of general legislation and not an appropriate use of governmental funds. Article XVII challenged these background understandings. Henceforth, government inaction in the face of poverty would require justification. As Mr. Corsi explained on the Convention floor: "What we ask is that such constitutional doubts as exist be removed and the State's obligation be recognized definitely and specifically."

Article XVII thus transformed welfare from an expedient policy choice to a mandatory feature of the social structure. The New York Social Services Law of 1929 had authorized the provision of welfare, but only "as far as possible" and "in so far as funds are available." Welfare was instead a discretionary function, located in the world of


97. See Barbara E. Armacost, Affirmative Duties, Systemic Harms, and the Due Process Clause, 94 Mich. L. Rev. 982, 985 (1996) (observing that just as federal courts are "reluctant to hold the government liable for failures to protect ... there is a whole universe of ordinary tort cases virtually identical to the cases that have been brought under the Due Process Clause"); Peter F. Lake, Recognizing the Importance of Remoteness to the Duty to Rescue, 46 DePaul L. Rev. 315, 316 (1997) ("[I]t is commonly understood that there is no general, nonstatutory duty to rescue another in peril, not even a minimal duty that could be discharged by a riskless warning, absent a special relationship." (citations omitted)).


100. Revised Record, supra note 62, at 2142 (statement of Mr. Corsi); see 6 New York State Const. Convention Comm., Problems Relating to Bill of Rights and General Welfare 482 (1938) (describing constitutional problems of social assistance).

101. See Crouse, supra note 74, at 43; Schneider & Deutsch, supra note 78, at 286-88.
local party patronage. Amending the state constitution and providing that "[t]he aid, care and support of the needy are public concerns and shall be provided by the state" ensured that government relief for the poor would no longer be contingent or contested. Article XVII also rejected the earlier Poor Law ideology that associates poverty with personal fault and places responsibility for the poor on the family and local units. Under the Poor Laws, localities extended relief to the poor in a humiliating fashion and only "to keep the person alive." The rejection of this philosophy, according to a contemporary social worker, meant that relief was henceforth to "be adequate" and not given "to pauperize." As a member of the Welfare Committee explained, "[W]e feel that up to that very last penny where somebody needs help to eat and to have shelter and to preserve body and soul, there is a claim on the state." Other members of the Welfare Committee repeated this view: "They have to eat, they have


103. N.Y. Const. art. XVII, § 1.

104. During the colonial period, for example, New York provided relief to the poor, but required recipients to wear badges with "the letters 'N.Y.' on their clothes" as a sign of public shame. Lester M. Salamon, Welfare: The Elusive Consensus: Where We Are, How We Got There, and What's Ahead 67 (1978). Briefing papers prepared for the Convention explicitly rejected the poor-law mentality that motivated earlier relief efforts: "All past relief experience had been based on pauper-poor-law philosophy, with its accent on private generosity and public scorn. But when unemployment lost its former aspect of individual blameworthiness, and took on the color of public calamity, the old poor-law methods became entirely inapplicable." 4 New York State Const. Convention Comm., State and Local Government in New York 430 (1938); cf. Edith Abbott, Abolish the Pauper Laws, 8 Soc. Serv. Rev. 1 (1934) (urging the states to revise the old poor laws, "not merely because the exigencies of the depression have led to a new concern about poor relief administration but because the so-called 'emergency' relief organizations must, in the not distant future, be supplanted by some continuing machinery vastly superior to the old local poor relief administration").

105. See Gillin, supra note 81, at 206.

106. Id. As the Chair of the Welfare Committee explained to the delegates:

Unemployment, we have learned after nine years of depression and recession, is not a transitory phenomenon and the kind of prosperity that will put all the unemployed back to work is not around the corner.

Unemployment is inherent in our industrial system. It is a natural concomitant of our technological progress. It is a permanent problem which must be met with all the vision and all the courage at our command.

Revised Record, supra note 62, at 2143-44 (discussing a proposed wage and hours amendment to the state constitution).

107. Revised Record, supra note 62, at 2147.
to live, they have to have shelter, and you and I will never rest comfortably, as well off as we may be, unless these people have the necessities of life."

Article XVII's second purpose is related to the first. Having created a new constitutional duty to provide assistance to the poor, the New York Constitution now ensured that the state has authority to carry out this mandate. Like many state constitutions of the nineteenth and early twentieth centuries, the New York Constitution imposed fiscal limits on the state's use of public money for direct relief. The state could not use public credit to provide assistance directly to individuals, and local governmental units operated under similar restraints. New York City, for example, was prohibited under its municipal charter from using public money for outdoor work relief. Article XVII lifted these spending restrictions and clarified that state expenditures on behalf of the poor are a public purpose to be supported by tax and other sources of revenue.

**D. The Uses of History**

The New York Court of Appeals has looked to history in recognizing a judicially enforceable right to welfare under the state constitution. It has failed, however, to consider fully the broader intellectual context of Article XVII's adoption and its implications for welfare rights. Many commentators have described the New Deal as a

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108. Id. at 2172.
109. See Simeon E. Baldwin, Modern Political Institutions 73-74 (1898) (discussing state constitutional limits on state aid and debt); Carl A. Heisterman, Constitutional Limitations Affecting State and Local Relief Funds, 6 Soc. Serv. Rev. 1 (1932) (collecting state constitutional restrictions on poor relief in several states); cf. James Willard Hurst, The Growth of American Law: The Law Makers 31 (1950) (stating that “[t]he most significant formal limits put on the state legislatures related to the power of the purse: i.e., the limitations, or the total prohibition, set upon state debt, on the lending of state credit or other subsidies to private enterprise; and the limits put on local government finance”); Stephen Guardbaum, New Deal Constitutionalism and the Unshackling of the States, 64 U. Chi. L. Rev. 483, 487 (1997) (observing the “specific constitutional constraints on the power of states that had either been imposed for the first time or substantially enhanced during the Lochner era”).
110. These spending limits explain, in part, the administrative structure of the Temporary Emergency Relief Administration (“TERA”), in which state funds were channeled to localities for public assistance, rather than used for direct relief. See Brown, supra note 73, at 90 (describing funding mechanisms under TERA).
112. See Brown, supra note 73, at 7 n.12 (discussing the judicial invalidation of outdoor relief in Brooklyn in 1879, and stating that “[t]he very fact that this could happen shows the unsubstantial nature of the foundation upon which the system of poor relief rests”); Feder, supra note 102, at 186-88 (citing legal difficulties surrounding New York City bond measures designed for poor relief in the period 1893-97); Schneider & Deutsch, supra note 78, at 299 (noting that “the situation was complicated” in New York City due to this clause).
period of great plasticity and experimentation, when those involved in
forging the new regulatory order spoke of the "ideal state . . . as a
process of becoming." Just as the general welfare was recognized
no longer to be "static," but rather "chang[ing] with the times," so
government powers assumed an expansive flexibility to deal with an
enlarged sense of public purpose. Broad authorizing statutes became
standard, leaving the means of implementation to the government
to choose subject to meaningful judicial review.117

In the face of federal retrenchment from a non-categorical ap-
proach to poor relief, Article XVII constitutionalized the New Deal
spirit by creating a state duty to assist the poor and assigning the legis-
lature discretion to carry out the constitutional goal. The language
chosen—"in such manner and by such means"—was meant to over-
come specific constitutional problems that had developed in earlier
years when the state constitution attempted to broaden the scope of
legislative action but did so by enumerating specific powers, which
then became restraints on government capacity as new situations de-
veloped.118 The 1938 delegates thus adopted language intended both
to mandate and to empower, making government provision of welfare

114. Mark Barenberg, The Political Economy of the Wagner Act: Power, Symbol,
and Workplace Cooperation, 106 Harv. L. Rev. 1381, 1413 (1993) (quoting Robert
Wagner, The Ideal Industrial State, N.Y. Times, May 9, 1937 (Magazine), at 8). Many
historians have noted the "experimental" atmosphere of the New Deal period. See,
e.g., Crouse, supra note 74, at 53 (stating that FDR "recognized the need for experi-
mentation, change, and immediate action"); Susan Ware, Beyond Suffrage: Women
in the New Deal 6 (1981) (describing the "experimental, reformist atmosphere of the
New Deal"); Simon, Rights and Redistribution, supra note 70, at 1447-49 (describing
FERA as "daring, experimental, redistributive, and disrespectful of the lines that sep-
arated workers from nonworkers").


of Public Authority 132-33 (1969); Cass R. Sunstein, Congress, Constitutional Mo-
Deal enactments were marked by "open-ended delegations of authority"). But cf.
Guido Calabresi, A Common Law for the Age of Statutes 5 (1982) (explaining that
"unlike earlier codifications of law, which were so general that common law courts
could continue to act pretty much as they always had, the new breed of statutes [in the
post-New Deal period] were specific, detailed, and 'well drafted'") (quoting Grant Gil-
more, The Ages of American Law 96 (1977))).

117. See, e.g., American Power & Light Co. v. SEC, 329 U.S. 90, 105 (1946) (stating
that judicial acquiescence in legislative delegations of power to administrative agen-
cies is "a reflection of the necessities of modern legislation dealing with complex eco-
nomic and social problems"); Amalgamated Meat Cutters and Butcher Workmen of
administrative delegation subject to review by Congress, the courts, and the public).
See generally Merrick B. Garland, Deregulation and Judicial Review, 98 Harv. L. Rev.

118. Cf. Robert F. Williams, State Constitutional Law Processes, 24 Wm. & Mary L.
Rev. 169, 202 (1983) (connecting popular distrust of state legislatures with "the inser-
tion of specific 'constitutional legislation' into state constitutional texts, thereby
supplanting legislative prerogatives" (citations omitted)). As early as 1920, a com-
mentator explained this general trend in state constitutionalism:
assistance a constitutional duty, with the legislature accountable both to the courts and to the people.\textsuperscript{119} The amendment responded to one of the major criticisms of the state constitution then in force: that its specific elaboration of legislative powers confined the state, depriving it of the flexibility which it needed to adapt to changing circumstances.\textsuperscript{120} The amendment used an open-ended phrase—"in such manner and by such means"—to make clear that the state has broad power to meet the needs of the poor.

The state constitutional history of welfare rights in New York illustrates how a particular state may choose to define the scope of its public obligations in ways that cut against the grain of federal convention.\textsuperscript{121} Federal Constitutional scholars tend to rely on originalist arguments to oppose the judicial recognition of welfare rights;\textsuperscript{122} more generally, federal constitutional scholarship's "turn to history" is said to ratify existing practice by mooring legislative decisions to the deci-

\textsuperscript{119} See Galie, supra note 75, at 238 ("Article XVII established an affirmative social right which any individual may demand from the government. It required the state to assume a major role in the field of social welfare."). Similarly, William R. Brock reports, "Thus New York wrote into its constitution a new concept of public responsibility for welfare and swept away restraints on actions intended to relieve the distress, safeguard the health, and improve the quality of life of the poorest people in society." Brock, supra note 72, at 350.

\textsuperscript{120} See Arthur E. Sutherland, Jr., Lawmaking by Popular Vote: Some Reflections on the New York Constitution of 1938, 24 Cornell L.Q. 1, 1-5 (1938) (stating that the Convention of 1938 sought to provide the state legislature with broad flexibility to deal with social problems).

\textsuperscript{121} Cf. Jack N. Rakove, The Origins of Judicial Review: A Plea for New Contexts, 49 Stan. L. Rev. 1031, 1031 (1997) (explaining that "critical history appeals to those who seek to rescue lost voices of the past from the hegemonic claims of the victors whose triumphs the discipline of history has often served and promoted").

\textsuperscript{122} See, e.g., David P. Currie, Positive and Negative Constitutional Rights, 53 U. Chi. L. Rev. 864, 865-66 (1986) (arguing that "[t]he Framers would have been astounded to hear it contended that by adopting the Bill of Rights they had managed to make mandatory the exercise of a Congressional power to help needy citizens . . . "). But cf. Wendy É. Parmet, Health Care and the Constitution: Public Health and the Role of the State in the Framing Era, 20 Hastings Const. L.Q. 267, 277 (1993) (presenting an originalist argument that "[i]n the framing generation, governments were expected to furnish disease prevention programs and provisions to secure the public health because the Framers believed that governmental authority was tied to the protection of health and safety").
There is a different history, however, that attaches to most state constitutions. In some states, these histories capture the changed social contract between government and its people that came into being in the twentieth century and that resonates with modern constitutions around the world. By conforming state constitutionalism to federal practice, courts and commentators suppress these competing state narratives that thread through our nation’s story, thus foreclosing “a space for freedom and innovation, not in the escape from history, but in choosing which traditions and trajectories to attach ourselves to.”

III. STATE CONSTITUTIONS AND WELFARE REFORM

Underlying devolution is the assumption that the states will construct a set of social policies to reflect their residents’ unique preferences, viewing public assistance as one among a number of social services that voters might want to provide. Article XVII, and state constitutions of which it is illustrative, stems from a different theory of democracy, pointing to a thicker conception of political life that contrasts sharply with the negative-rights model of the Federal Constitution. Under these state constitutions, public assistance programs do not involve a “taste” for welfare, instead of, say, for public tennis...
courts or for a municipal opera. They are, instead, constitutive of a basic duty that the state owes to its citizens, requiring government—as was expressed at the 1938 Convention—to protect its members from "the threat to freedom that comes . . . from poverty and insecurity, from sickness and the slum, from social and economic conditions in which human beings cannot be free." To borrow from Jeremy Waldron, constitutional clauses such as Article XVII make the provision of assistance to the poor not simply a "contingency of public policy, . . . something that might be changed or abolished whenever the administration changes its political hue," but rather an aspect of "social citizenship."

The federal government's current approach to welfare reform grants the states broad authority to develop new assistance programs for the poor. As devolution takes shape at the local level, state legislators need to consider whether their state constitution imposes any independent obligation on them to deal meaningfully with the problems of poverty. State constitutions, of course, differ in their detail and emphasis. Nevertheless, state constitutional welfare provisions share many structural similarities that allow for general reflections on how they can and should influence future reforms under the 1996 Act. This section suggests four broad themes that should frame future discussion of state constitutions as welfare devolution moves forward.

First, state constitutional welfare provisions such as Article XVII establish a principle of government duty to assist the poor. A criticism of this view would posit that a state constitutional welfare right is inconsistent with the 1996 Act, which purports to eliminate any federal entitlement to welfare. Commentators emphasize, however, that entitlements do not conflict with the goals of block grant programs; they are, instead, "mutually reinforcing, not oppositional, categories." Respecting a state constitutional welfare right would in fact reinforce one of the major purposes of the 1996 Act—to enhance state latitude over welfare by encouraging the development of social and economic programs that reflect self-conscious political choices rooted in local governance.

R. Sunstein, Legal Reasoning and Political Conflict (1996)) (discussing the place of welfare rights in thick and thin conceptions of federal constitutionalism).

128. O'Rourke & Campbell, supra note 75, at 117 (citation and internal quotation marks omitted).


experience. Nor would a state constitutional welfare right deprive state legislators of discretion to develop welfare policy. A state legislature retains authority to experiment and to innovate—constrained only by the constitutional goal that public assistance programs actually assist the poor, and not punish the poor for their economic distress.

Second, state constitutional welfare provisions establish a principle of state responsibility for meeting the needs of the poor, curtailing devolution’s assumption that subsidiary units are best placed to make decisions about social welfare programs. Subsidiary units are often smaller units, and are believed to have a greater structural capacity to protect human rights and to encourage participation values. Small communities do not, however, always protect minority civil rights, they do not always produce greater opportunities for citizen participation, and they do not always have the resources to carry out the social welfare preferences of their members. As Paul E. Peterson has observed, localities rarely define their community purposes as “the enhancement of the material well-being of workers, the poor, or minorities.” Given interregional variances in wealth, race, and capacity, as well as the greater likelihood of special interest capture of

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135. See Edward L. Rubin, The Fundamentality and Irrelevance of Federalism, 13 Ga. St. U. L. Rev. 1009, 1014 & n.20 (1997) (stating that on “an empirical basis, it has often been the national government, not state governments, that has encouraged citizen participation and programmatic experimentation” on welfare issues).

136. See Richard Briffault, Our Localism: Part II—Localism and Legal Theory, 90 Colum. L. Rev. 346, 438 (1990) (contending that the “jurisdictional separation of wealth and need that results from the fragmentation of most metropolitan areas into a central city surrounded by a multiplicity of suburbs perpetuates interpersonal as well as interlocal economic and social inequalities”).

137. Paul E. Peterson, City Limits 31 (1981). To the contrary, “limits on local government . . . require that local governments concentrate on developmental as against redistributive objectives.” Id. at 69.

local communities, state primacy—not local control—is critical to the enforcement of a state constitutional welfare right.

Third, state constitutional welfare provisions establish a principle of social citizenship that recognizes the community's shared responsibility for the well-being of its members. The 1996 Act assumes that welfare promotes dependence in citizens and prevents them from developing individual potential. Article XVII, by contrast, regards economic stability as a precondition of political life, of social inclusion, and of personal dignity. A state attempting to reform its welfare system should consider new strategies that are adapted to ensure long term self sufficiency for those who are currently poor. Reform, however, must address present needs in light of economic fact, not social stereotype, seeking to realize the normative goal of social citizenship.

139. See, e.g., Martha Derthick, New Towns In-Town: Why a Federal Program Failed at xv (1972) (discussing the capture of low-income housing funds). A state mandate for the provision of welfare services is thus warranted from a public choice perspective, for the ease of local exit options could facilitate middle class deflection from local welfare solutions, leaving the poor locked into towns that lack fiscal capacity to carry out social service delivery. For example, to the extent that welfare reform will attempt innovative solutions linked to education and jobs training, there is likely to be a mismatch between local employment supply and the needs of indigent residents; transportation, housing, and education deficits are likely to compound the problem. These factors, combined with the vulnerability of localities to narrow interest group capture, make the concept of state duty central to a devolutionary approach.

140. The normative justification for local control of public assistance is far less weighty than that of local control of public education. Courts have tended to treat local control of schools as a constitutional or quasi-constitutional imperative, in part because it is perceived as implicating a parent's right to raise her child. Commentators increasingly question the basis for this approach. See, e.g., Richard Briffault, The Role of Local Control in School Finance Reform, 24 Conn. L. Rev. 773, 784 (1992) (questioning the role of local control in state constitutional school finance cases); Georgette C. Poindexter, Collective Individualism: Deconstructing the Legal City, 145 U. Pa. L. Rev. 607, 663-64 (1997) (arguing that city boundaries are "inapposite to modern social and economic development"). But see Mark C. Gordon, Differing Paradigms, Similar Flaws: Constructing a New Approach to Federalism in Congress and the Court, in Symposium Issue: Constructing a New Federalism: Jurisdictional Competence and Competition, supra note 4, at 187, 220-21 (emphasizing the importance of localities in welfare devolution).


143. Some commentators argue that AFDC-style welfare benefits may no longer be relevant to dealing with the problems of poverty. For example, Herbert J. Gans maintains that, "what is needed is more drastic: a job-centered economic security program for all Americans in occupational and related economic difficulties . . . ." Herbert J. Gans, The So-Called Underclass and the Future of Antipoverty Policy, in Myths About the Powerless: Contesting Social Inequalities 87, 97 (M. Brinton Lykes et al. eds., 1996) (emphasis in original).
Finally, state constitutional welfare provisions establish the principle of judicial enforcement, on the view that state courts will work collaboratively with the other branches of government to elaborate social and economic rights. I argue elsewhere that judicial review of state constitutional welfare rights creates important incentives for state public officials to face up to constitutional goals. These judicially created incentives pose an essential counterweight to the structural tendencies of state legislatures to ignore the needs of constituents who lack conventional forms of political access. Moreover, commentators have warned that the 1996 Act encourages the states to reduce their commitment to the poor because it allows the states to "reap financial rewards either from cutting benefits levels or from helping (or forcing) recipients off welfare." Judicial review leverages the political strength of groups that lack strong alliances or electoral power, moving their concerns onto a legislative agenda and creating political resources for future use. Moreover, by creating additional opportunities for citizens to participate in political life, judicial review will foster federalist values and allow policy questions to be discussed within a framework of principle.

**Conclusion**

This Essay responds to concerns that the process of welfare devolution will leave the poor worse off than they were under the previous system of federal statutory entitlements. I suggest that state court interpretation of state constitutional welfare rights could provide a significant source of protection for the poor, but only if state courts develop an independent methodological approach that recognizes the

144. See Hershkoff, *supra* note 27 (manuscript at 52-57).


146. Craig Volden, *Entrusting the States with Welfare Reform*, in *The New Federalism: Can the States Be Trusted?* 65, 92 (John A. Ferejohn & Barry R. Weingast eds., 1997) ("[S]tates will reap financial rewards either from cutting benefit levels or from helping (or forcing) recipients off welfare."); cf. Paul E. Peterson, *The Price of Federalism* 126 (1995) (anticipating that under the then proposed welfare reform bill, "the race to the bottom is almost certain to intensify").

147. See Michael W. McCann, *Rights at Work: Pay Equity Reform and the Politics of Legal Mobilization* 277 (1994) (stating that litigation opens up "new ideological and organizational possibilities for expanding rights and increasing power"); Joseph L. Sax, *Defending the Environment: A Strategy for Citizen Action at xviii* (1970) ("[C]ourts can be used to bring important matters to legislative attention, to force them upon the agendas of reluctant and busy representatives.").

significant differences between state constitutions and the Federal Constitution. State constitutional welfare provisions, of which Article XVII of the New York Constitution is illustrative, can be interpreted in lockstep with federal constitutional law—or they can be interpreted in a principled manner that reveals the alternative, and even transformative, possibilities that state constitutions present for civil life.¹⁴⁹ This Essay contributes to the effort to establish an independent but principled state constitutional practice by developing the historical material needed for meaningful interpretive activity.

¹⁴⁹ See Jack N. Rakove, Original Meanings: Politics and Ideas in the Making of the Constitution 10-11 (1996) (stating that “[historical] research can lay an evidentiary basis for originalist interpretation, but it can also undermine critical assumptions on which invocations of original meaning depend, and expose the flawed conclusions they reach”).