



# Stanford Law Review

## RETHINKING CONSTITUTIONAL WELFARE RIGHTS

Goodwin Liu

# ARTICLES

## RETHINKING CONSTITUTIONAL WELFARE RIGHTS

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*A generation ago, Harvard law professor Frank Michelman advanced an influential and provocative vein of scholarship theorizing the content and justiciability of constitutional welfare rights. Michelman's writings, which endure as the most insightful and imaginative work in this area, sought to anchor the Supreme Court's welfare rights jurisprudence in a comprehensive theory of distributive justice, in particular John Rawls's theory of justice as fairness.*

*In this Article, I reappraise Michelman's seminal work and argue that his effort to ground the adjudication of welfare rights in a comprehensive moral theory ultimately confronts intractable problems of democratic legitimacy. My thesis is that the legitimacy of judicial recognition of welfare rights depends on socially situated modes of reasoning that appeal not to transcendent moral principles for an ideal society, but to the culturally and historically contingent meanings of particular social goods in our own society. Informed by the central themes of Michael Walzer's Spheres of Justice, I argue that judicial recognition of welfare rights is best conceived as an act of interpreting the shared understandings of particular welfare goods as they are manifested in our institutions, laws, and evolving social practices.*

*On this account, the existence of a welfare right depends on democratic instantiation in the first instance, typically in the form of a legislated program, with the judiciary generally limited to an interstitial role. Further, because the shared understandings of a given society are ultimately subject to democratic revision, courts cannot fix the existence or contours of a welfare right for all time. So conceived, justiciable welfare rights reflect the contingent character of our society's collective judgments rather than the tidy logic of a comprehensive moral theory.*

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*In developing my thesis, I consider two objections: first, that the judicial role I propose is inherently conservative, and second, that it carries an intolerable risk that judges, in the name of interpreting society's values, will impose their own values on society. Using various Supreme Court opinions as examples, I show that both dangers can be avoided when courts employ constitutional doctrine in a dialogic process with the legislature to ensure that the scope of welfare provision democratically reflects our social understandings.*

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## INTRODUCTION

Once a subject of intense interest in the courts and legal academy, the idea that our Constitution guarantees affirmative rights to social and economic welfare has for some time been out of fashion. In 2001, William Forbath observed that “like Banquo’s ghost, the idea of constitutional welfare rights will not die down, but it is not exactly alive, either. No fresh or even sustained arguments on its behalf have appeared for over a decade; only nods, and glancing acknowledgments.”<sup>1</sup> As a doctrinal matter, the prevailing view is that

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1. William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *FORDHAM L. REV.* 1821, 1825 (2001); see Linda Greenhouse, *On the Wrong Side of 5 to 4, Liberals Talk Tactics*, *N.Y. TIMES*, July 8, 2007, at WK3 (“[T]he energy and vision that [once] animated liberal legal scholarship [has] shriveled to the point that . . . enshrining equal education as a fundamental right or making the alleviation of poverty a constitutional imperative sound like left-over fantasies from a bygone age.”). Although the topic has drawn limited scholarly interest in the context of American constitutional law, there is an active literature on social welfare rights in comparative constitutional law. See, e.g., MARK TUSHNET, *WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW* (2008); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 *INT’L J. CONST. L.* 391 (2007); Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 *TEX. L. REV.* 1921 (2004); Katharine G. Young, *The Minimum Core of Economic and Social Rights: A Concept in Search of Content*, 33 *YALE J. INT’L L.* 113 (2008).

issues of poverty and distributive justice should be resolved through legislative policymaking rather than constitutional adjudication.<sup>2</sup> Some commentators (myself included) have argued that such policymaking may yet have constitutional significance if the existence and binding force of constitutional welfare rights are distinguished from the question of judicial enforcement.<sup>3</sup> But it remains a fact of our legal culture that what counts as a constitutional right is deeply shaped by the courts, and for a generation, our courts have steered clear of social or economic rights,<sup>4</sup> even as severe deprivation and inequality continue to pose serious challenges to our commitment to human dignity and equal citizenship.

Things were not always so. During the 1960s and 1970s, welfare rights held a prominent place on the public agenda not only in the legislative process but also in mainstream constitutional discourse.<sup>5</sup> In the Supreme Court, the

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2. See *Harris v. McRae*, 448 U.S. 297, 318 (1980); *Maier v. Roe*, 432 U.S. 464, 471 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 18-37 (1973); *Lindsey v. Normet*, 405 U.S. 56, 74 (1972); *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

3. See, e.g., CHARLES L. BLACK, JR., *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* 131-39 (1997); TUSHNET, *supra* note 1, at 247-58; Forbath, *supra* note 1, at 1888-89; Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L.J. 330, 337-40 (2006); Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1218 (1978); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221 (2006).

4. When I refer to “courts” in this Article, I am primarily concerned with the federal courts, where the problem of legitimacy in recognizing welfare rights is most acute. Although state courts also face a problem of legitimacy in adjudicating welfare rights, the problem is somewhat mitigated by express textual references to welfare rights (e.g., education clauses) in many state constitutions and by the greater political accountability of state judges as compared to federal judges. State courts have played a significant role in protecting educational rights under state constitutions in recent decades. See Michael A. Rebell, *Poverty, “Meaningful” Educational Opportunity, and the Necessary Role of the Courts*, 85 N.C. L. REV. 1467 (2007).

5. See, e.g., John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CAL. L. REV. 305 (1969); Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966); Arthur J. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. REV. 205 (1964); Kenneth L. Karst & Harold W. Horowitz, *Reitman v. Mulkey: A Telophase of Substantive Equal Protection*, 1967 SUP. CT. REV. 39; Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767 (1969); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). Later writings include Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1115 (1986); Erwin Chemerinsky, *Making the Case for a Constitutional Right to Minimum Entitlements*, 44 MERCER L. REV. 525 (1993); and Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987). For skeptical views on constitutional welfare rights, see Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; Philip B. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583 (1968); and Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

subject percolated long enough in equal protection and due process doctrine for us to see justiciable welfare rights as more than an idle aspiration, and the resulting precedents remain on the books.<sup>6</sup> Moreover, as Cass Sunstein has argued, the judicial retreat from welfare rights was a near thing, occurring in the wake of President Nixon's narrow electoral victory in 1968 and his improbable opportunity to appoint four new Justices to the Court between 1969 and 1972.<sup>7</sup> The four Nixon appointees joined Justice Stewart to form a bare majority in *San Antonio Independent School District v. Rodriguez*, the pivotal 1973 case upholding unequal school funding based on differences in local wealth.<sup>8</sup> And yet, for all of *Rodriguez*'s skepticism toward judicial recognition of social and economic rights, the Court felt compelled to reserve the question, still dangling today, whether the Constitution guarantees a minimally adequate level of educational opportunity.<sup>9</sup>

Of course, no prudent advocate would bring this type of claim before the politically conservative Court now sitting. But that is not a reason to leave such questions unattended. "A period of no power is a period for the reformation of thought," the late Charles Black once said, "to the end that when power returns it may be more skillfully, more fittingly, used."<sup>10</sup> In that spirit, I attempt in this Article a small step toward "reformation of thought" on how welfare rights may be recognized through constitutional adjudication in a democratic society.

In approaching this large and difficult subject, my goal is not to offer anything like a comprehensive defense of the justiciability of welfare rights (if such a defense were possible). Instead, I proceed by revisiting an important strand of the subject's intellectual history—the early work of Frank Michelman<sup>11</sup>—to frame the problem of judicial legitimacy, to consider how

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6. See *Mem'l Hosp. v. Maricopa County*, 415 U.S. 250 (1974); *USDA v. Moreno*, 413 U.S. 528 (1973); *USDA v. Murry*, 413 U.S. 508 (1973); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Snidach v. Family Fin. Corp.*, 395 U.S. 337 (1969); *Shapiro v. Thompson*, 394 U.S. 618 (1969); *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Douglas v. California*, 372 U.S. 353 (1963); *Griffin v. Illinois*, 351 U.S. 12 (1956).

7. See CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 149-71 (2004).

8. 411 U.S. 1 (1973); *cf. id.* at 59 (Stewart, J., concurring) ("The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust.").

9. See *id.* at 36; *cf. Plyler v. Doe*, 457 U.S. 202, 221 (1982) (invalidating state denial of public education to undocumented children partly on the ground that education is not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"). "As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." *Papasan v. Allain*, 478 U.S. 265, 285 (1986).

10. Black, *supra* note 5, at 1115. "The way I want to see thought reformed is by our ceasing to view the elimination of poverty as a sentimental matter, as a matter of compassion, and our starting to look on it as a matter of justice, of constitutional right." *Id.*

11. For nearly four decades, Professor Michelman has been the legal academy's

moral theory should inform possible responses, and ultimately to probe the proper role of courts within a dynamic, socially situated account of how constitutional welfare rights come into being. My primary aim is not to determine whether the Supreme Court should presently recognize a constitutional right to education, health care, or some other social good. It is rather to suggest a way of thinking about such questions that captures the socially contingent character of welfare rights and the contours and limitations of the judicial role that flow from it.

My point of departure is Professor Michelman's justly famous 1969 *Foreword to the Harvard Law Review*, titled *On Protecting the Poor Through the Fourteenth Amendment*.<sup>12</sup> In that article, Michelman sought to rationalize an emerging line of equal protection decisions by the Supreme Court under a theory of minimum welfare rights. His key insight was that, in attacking the ills of poverty, claims nominally styled as wealth "discrimination" are better understood as claims of material "deprivation"—that is, as claims of inadequate rather than unequal provision of certain basic goods. This characterization, he argued, provides not only a better descriptive account of judicial decisions on welfare rights but also a better tactical approach for engaging the courts in this area within the limitations of the judicial role. As well-developed as these claims were, however, Michelman said little about the source of the minimum-welfare thesis and why it would be legitimate for courts to act on it.

Four years later, Michelman turned to those issues in a second important article, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*,<sup>13</sup> one of the first and most insightful efforts to bring constitutional theory into conversation with John Rawls's signature work.<sup>14</sup> Michelman argued that Rawls's theory aids the legitimacy of justiciable welfare rights in

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leading theorist on constitutional welfare rights. "No one has thought and written more deeply and imaginatively about constitutional welfare rights than Frank Michelman, and no one has approached the problem from as many fruitful perspectives." Forbath, *supra* note 1, at 1826. In this Article, I focus on Michelman's first two seminal writings in this area. See *infra* notes 12-13. In doing so, I leave unexamined other work in which Michelman insightfully theorizes the existence and justiciability of welfare rights, including Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13 (2003); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987) [hereinafter Michelman, *Possession vs. Distribution*]; and Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 [hereinafter Michelman, *Constitutional Democracy*]. My purpose is not to attempt a synthesis or critique of Michelman's complete work on welfare rights, but rather to use the powerful ideas in his early thought as an angle of incision into a rather complex subject.

12. 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*].

13. Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter Michelman, *Constitutional Welfare Rights*].

14. See JOHN RAWLS, *A THEORY OF JUSTICE* (1971).

two ways. First, by providing a substantive basis for deriving the content of minimum welfare rights, Rawls's principles of justice enable us to see that judges who act on the minimum welfare thesis are responding not to ad hoc intuition but to a systematic moral theory. Second, because the principles of justice under Rawls's theory are what the public would accept in an ideal society with a fully developed sense of justice, judicially enforceable welfare rights serve as an appropriate corrective device in a nonideal society like ours to "cop[e] with evolutionary deficiencies in the public's sense of justice."<sup>15</sup> Michelman sought to ease the tension between democracy and judicial review by positing that constitutional adjudication serves to reveal and clarify the moral principles latent in the public's own evolving sense of justice.

Michelman's reading of Rawls has many interesting complexities, which I examine in due course below. The main theme that emerges is the idea that judicial recognition of welfare rights, instead of appearing "fitful, unprincipled, and apologetic,"<sup>16</sup> can achieve a desired measure of intellectual coherence by appealing explicitly to a comprehensive moral theory. Such a theory would help explain how the judiciary, functioning as a "forum of principle,"<sup>17</sup> may confidently identify and protect welfare rights under the open-textured guarantees of equal protection and due process.<sup>18</sup>

Predictably, Michelman's work has drawn praise from scholars sympathetic to welfare rights<sup>19</sup> and criticism from those opposed to a judicial role in vindicating affirmative rights or economic equality.<sup>20</sup> Yet legal scholars

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15. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1001.

16. *Id.* at 963.

17. Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981), reprinted in RONALD DWORKIN, *A MATTER OF PRINCIPLE* 33-71 (1985).

18. Like Michelman, I use the term "welfare right" to mean an affirmative constitutional right to particular social goods such as "education, shelter, subsistence, health care and the like, or to the money these things cost." Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 962. The substantive notion of a welfare right, however, should not be confused with the particular manner in which it is articulated and enforced through adjudication. As I argue below, courts have a limited role vis-à-vis legislatures in defining and enforcing welfare rights, even as "courts can accord recognition to minimum welfare rights in ways that have a practical bearing on adjudication" under the equal protection and due process guarantees of the Fifth and Fourteenth Amendments. Michelman, *Constitutional Democracy*, *supra* note 11, at 679; *see infra* Parts III.D and IV. Furthermore, narrowing the definition of a welfare right to a right to particular social goods, as distinguished from the money those things cost, plays an important role in my account of the judicial role and, I argue, in Michelman's too. *See infra* text accompanying notes 123-36.

19. *See, e.g.*, Thomas C. Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877, 901 n.56 (1976); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 61 (1977); Tribe, *supra* note 5, at 1066 n.4, 1089; *cf.* Edelman, *supra* note 5, at 24-25 (urging a constitutional right to minimum income while noting that "Michelman seems uncomfortable with the idea").

20. *See, e.g.*, Henry Paul Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117, 118-20, 128 (1978); Winter, *supra* note 5; *cf.* CHARLES FRIED, *RIGHT AND WRONG* 124-31 (1978) (arguing that individuals have a positive right to a fair share of

have devoted little attention to Michelman's careful treatment of Rawls's theory not only as a source of substantive content for welfare rights but also as a framework for legitimizing their recognition by the courts.<sup>21</sup> The most sustained critique of Michelman's reading of Rawls occurs in an article by Professor Forbath arguing that Rawls's theory supports a vision of social citizenship whose entailments go beyond welfare rights to include "a right to decent work" as a core element of the social bases of self-respect.<sup>22</sup> But Forbath was not concerned with Michelman's basic claim that Rawls's theory can help legitimize the justiciability of welfare rights.<sup>23</sup> That claim is what I explore here.

Even as Michelman sought to bring coherence to welfare rights jurisprudence, he worried a great deal about the democratic legitimacy of grounding constitutional adjudication in moral theory. The normative thesis I shall advance begins with the contention that his worries were well justified. However alluring it may be to posit that our Constitution embodies substantive moral principles reflecting the terms of a rational if hypothetical consensus, judicial reasoning in this vein faces serious obstacles to gaining broad public acceptance. As Michelman acknowledged, the derivation of welfare rights through philosophical argument from first principles seems unlikely to capture the ways in which our nonideal society actually develops and understands its moral commitments. Our basic commitments to mutual provision are bound to reflect collective judgments that are more contingent, eclectic, and historically and culturally particular than the neat entailments of a comprehensive moral

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income but not to specific welfare goods).

21. Michelman has been criticized for transforming "[a]rguments about the fourteenth amendment . . . into arguments about the nature of distributive justice." Monaghan, *supra* note 20, at 119; see also John Hart Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 33-39 (1978). But the critiques do not examine Michelman's analysis of Rawls in any detail.

22. See Forbath, *supra* note 1, at 1867-82.

23. Forbath's point was that Michelman's focus on justiciability, while understandable in a historical context where "[w]elfare rights seemed politically possible and possibly immanent in doctrinal developments," *id.* at 1881, led him to interpret the substantive entailments of Rawls's theory too narrowly. In reading Rawls's theory to imply a determinate social minimum conducive to judicial recognition, Forbath argued, Michelman did not trace the full implications of Rawls's vision of a fair system of cooperation among free and equal citizens. See *id.* at 1868-77. That vision, according to Forbath, "fall[s] squarely within the social citizenship tradition" and entails "more than a decent minimum of food, shelter, and other material goods." *Id.* at 1876. Crucially, it entails "a right to earn a livelihood through decent work" because equal citizenship and self-respect cannot be assured without "a measure of economic independence" and "an opportunity to contribute in some recognized fashion to the social enterprise." *Id.* Rather than worry about justiciability, Forbath would address social citizenship claims to legislatures instead of courts and, in so doing, "focus on the substance of our substantive norms" and "follow the path of social citizenship down which Rawls' guidance more naturally points us." *Id.* at 1882. For Michelman's response, see Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893 (2001).



theory. My central claim is that the legitimacy of judicial recognition of welfare rights depends on socially situated modes of reasoning that appeal not to abstract moral principle but to our society's own understandings of our fundamental values.

In elaborating this thesis, I approach the issue of welfare rights through a novel application of the contrasting theoretical perspective developed by Michael Walzer in *Spheres of Justice*.<sup>24</sup> Whereas Rawls sought to elucidate transcendent principles of justice for an ideal society, Walzer proposed an account of distributive justice whose requirements take shape through the history, social practices, and shared understandings of a particular society. On Walzer's theory, fairness in the distribution of social goods cannot be specified by a general formula. It instead turns on the social meaning of each particular good—its nature, purpose, and value—as informed by the evolving culture and traditions of the society where it exists. Importantly, defining a just distribution by reference to shared understandings means that “ordinary men and women” in a given society may “know it concretely [and] realize it in fact.”<sup>25</sup> For this reason, I argue, Walzer's theory provides an attractive paradigm for how courts should approach claims seeking recognition of welfare rights. Instead of invoking moral principles hypothetically agreed to by rational persons denuded of culture and social context, courts should interpret the shared understandings of particular welfare goods as they are manifested in the institutions, laws, and practices of our own society.<sup>26</sup>

Much of this Article is devoted to providing examples and exploring the implications of this interpretive approach. Three implications are worth noting by way of introduction. First, because the existence of any welfare right depends on democratic instantiation of our shared understandings, the judiciary is generally limited to an interstitial role within the context of a legislated

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24. MICHAEL WALZER, *SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY* (1983).

25. *Id.* at xiv.

26. Walzer may seem an unlikely source of theory in support of welfare rights because he argued in a 1981 essay that it is undemocratic for judges to wield the insights of philosophy to constitutionalize rights, including welfare rights, that go beyond basic political rights and antidiscrimination guarantees. See Michael Walzer, *Philosophy and Democracy*, 9 POL. THEORY 379, 387-97 (1981). But Walzer's criticism was directed at the judicial use of political philosophy in the Rawlsian tradition, see *id.* at 388-91 & n.19, and specifically at law professors, including Michelman, who urged the absorption of moral theory into adjudicated law, see *id.* at 391-93 & n.24. In that essay, Walzer did not consider the possibility that judges, as “members of the political community” who are “wise to the ways of a particular legal tradition,” *id.* at 388, might legitimately enforce welfare rights through the interpretive, socially situated modes of reasoning described in *Spheres of Justice*. His later work, by contrast, recognized that such culturally specific reasoning comprises the mainstream work of judges. See MICHAEL WALZER, *INTERPRETATION AND SOCIAL CRITICISM* 20, 22, 39 (1987); cf. Michelman, *Possession vs. Distribution*, *supra* note 11, at 1321-24 & n.11 (noting that Walzer's 1981 essay, unlike his later work, relied on an overly sharp distinction between the discourses of philosophy and law on one hand and the discourses of politics and democracy on the other).

program. Courts do not act as “first movers” in establishing welfare rights not merely because they have limited powers of enforcement as a practical matter, but because conceptually a welfare right does not come into being for a court to recognize without democratic instantiation in the first instance. Second, judicial recognition of welfare rights need not be thoroughgoing in the way that the logical principles of a comprehensive moral theory would suggest. Societal norms, traditions, and understandings vary over time and across social goods, and a constitutional doctrine of welfare rights should be sensitive to such variation. Third, because the shared understandings of a given society are ultimately subject to democratic revision and evolution, judicial intervention cannot fix the existence or contours of a welfare right for all time. As I argue below, the judicial role is best understood as part of an ongoing dialectical process by which legislative judgments are brought into harmony not with transcendent moral principles, but with the values our society declares its own.

Part I of this Article begins with a review of Michelman’s *On Protecting the Poor* and sets up the basic question of judicial legitimacy in recognizing welfare rights. Part II examines Michelman’s answer to the question in his subsequent work, *In Pursuit of Constitutional Welfare Rights*, and concludes that grounding constitutional adjudication of welfare rights in a comprehensive moral theory such as Rawls’s is unlikely to further the democratic legitimacy of the judicial role.

Part III introduces an alternative account of judicial recognition of welfare rights that envisions courts as interpreters of the cultural and historical understandings that attend particular welfare goods. I show that traces of this argument are discernible in Michelman’s own account of justiciable welfare rights, and I then draw on Walzer’s *Spheres of Justice* to elucidate the conceptual character of welfare rights and its implications for the judicial role. After sketching some examples of this interpretive approach to welfare rights, I discuss the important limitations on judicial intervention that the approach implies.

Part IV addresses two objections: first, that the interpretive approach I propose is inherently conservative and insufficiently critical of existing social practices, and second, that the approach carries an intolerable risk that judges, in the name of interpreting society’s values, will instead impose their own values on society. In the end, I argue that both dangers can be avoided when courts apply constitutional provisions such as the Equal Protection Clause or the Due Process Clause through a dialogic process with the legislature to ensure that the scope of welfare provision democratically reflects our social understandings.

Although my intent in this Article is not to offer a general theory of constitutional adjudication, I acknowledge that my argument at times seems to address the general problem of judicial review in a democratic society. The interpretive approach I propose coheres with an important body of positive and normative scholarship challenging the claimed autonomy of judicially declared

constitutional law.<sup>27</sup> Indeed, the idea that constitutional doctrine integrates and expresses widely shared societal values retains its salience even in areas where constitutional text, history, and structure seem to authorize more robust and countermajoritarian forms of judicial review.<sup>28</sup> I will leave to another day an examination of the outer limits of this conception of the judicial role and instead focus my argument here on the modes of articulation and explanation appropriate for constitutional adjudication in an area where the courts have traditionally been vulnerable. As I hope the reader will glean as my argument unfolds, the judicial role I am contemplating is a modest one. Judicial recognition of welfare rights must derive its legitimacy from our shared commitments, and yet today we have no concerted war on poverty to speak of. In this area, as in many others, we cannot hope to change our law without first doing the hard work of changing our politics.

### I. ON PROTECTING THE POOR

Written in the wake of the Civil Rights Movement and War on Poverty, *On Protecting the Poor* sought to bring intellectual coherence to an emerging line of equal protection decisions loosely united by an anti-poverty thrust. Michelman's central insight was that the Supreme Court's jurisprudence, while conventionally understood as an attack on "wealth discrimination," more accurately reflected an overriding if inexplicit concern that all persons are entitled to a minimum, not necessarily equal, level of provision with respect to certain important goods. As he put it, "the judicial 'equality' explosion of recent times has largely been ignited by reawakened sensitivity, not to equality, but to a quite different sort of value or claim which might better be called 'minimum welfare.'"<sup>29</sup>

In elaborating this view, Michelman drew a distinction between "discrimination," the harm that lies in the stigmatic or dignitary offense caused by governmental classification, and "deprivation," the harm that lies in the nonsatisfaction of certain needs as and when they occur.<sup>30</sup> Although

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27. In recent years, the thesis has been fruitfully and persuasively developed by Robert Post and Reva Siegel. See Robert C. Post, *The Supreme Court, 2002 Term—Foreword: Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4 (2003); Robert C. Post & Reva B. Siegel, *Legislative Constitutionalism and Section Five Power: Policentric Interpretation of the Family and Medical Leave Act*, 112 YALE L.J. 1943 (2003); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CAL. L. REV. 1323 (2006); see also Post, *supra*, at 35-37 & nn.149-65 (collecting sources demonstrating the interdependence of constitutional law and the popular beliefs of the nation).

28. See Terrance Sandalow, *Judicial Protection of Minorities*, 75 MICH. L. REV. 1162, 1185-90 (1977) [hereinafter Sandalow, *Judicial Protection*]; see also Terrance Sandalow, *Abstract Democracy: A Review of Ackerman's We the People*, 9 CONST. COMMENT. 309, 324-25 (1992) (reviewing BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991)).

29. Michelman, *On Protecting the Poor*, *supra* note 12, at 9 (footnote omitted).

30. See *id.* at 10-13.

discrimination and deprivation often go together, the two concepts differ in important ways. First, the remedy for deprivation “need not entail or suggest any ‘equalization’ of treatment or circumstances” of the sort typically sought as relief for discrimination.<sup>31</sup> Relieving deprivation may result in greater equality, but the core remedial principle is adequate provision rather than equalization.<sup>32</sup> Second, unlike discrimination, deprivation is “determined largely without reference to whether the complainant’s predicament is somehow visibly related to past or current governmental activity.”<sup>33</sup> A duty to remedy deprivation is less susceptible to limitation by a requirement of state action. Third, whereas claims of “discrimination against the poor” tend to draw into question the free-market premises of our social order, attacking poverty-related hardships as unjust “deprivation” is less radical.<sup>34</sup> On the minimum welfare view, “a state’s duty to the poor . . . is not to avoid unequal treatment at all, but rather to provide assurances against certain hazards associated with impecuniousness which even a society strongly committed to competition and incentives would have to find unjust.”<sup>35</sup>

In articulating the minimum welfare thesis, Michelman sought to describe the underlying if unstated logic of judicial behavior in a set of equal protection cases purporting to target wealth discrimination. The leading example is *Shapiro v. Thompson*, which struck down a one-year state residence requirement for receipt of welfare benefits.<sup>36</sup> Although the Court rested its holding on the ground that the requirement deterred or penalized poor people in their right to interstate travel,<sup>37</sup> the validity of this rationale “depends upon the prior existence, in the state of former residence, of a public-assistance program

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31. *Id.* at 11.

32. *See id.* at 13 (“[T]he cure [for deprivation] lies more in provision than in equalization.”). Michelman acknowledges that adequacy or minimum provision is a relative concept whose content depends on a society’s “overall level of affluence,” such that “extremity of inequality is suggestive” of “failure to furnish the just minimum.” *Id.* at 18. But the focus of his concern is “not in some repugnant discrimination which may accompany a deprivation, but in the severe deprivation itself.” *Id.* at 8.

33. *Id.* at 13; *see id.* at 11.

34. *See id.* at 27-32.

35. *Id.* at 42; *see id.* at 13-16.

36. 394 U.S. 618 (1969). Earlier cases include *Douglas v. California*, 372 U.S. 353 (1963), which prohibited states from denying counsel to indigent defendants in criminal appeals as of right, and *Griffin v. Illinois*, 351 U.S. 12 (1956), which prohibited states from denying trial transcripts needed for criminal appeals to indigent defendants unable to pay. As Michelman observed, a principled rule against wealth discrimination might have entailed “a graduated schedule of partial subsidies geared to ability to pay,” but “with respect neither to the quality of legal services provided nor to the degree of financial sacrifice required is an equality goal seriously pursued” in *Griffin* or *Douglas*. Michelman, *On Protecting the Poor*, *supra* note 12, at 26. Despite their equality rhetoric, *see Douglas*, 372 U.S. at 357; *Griffin*, 351 U.S. at 19, both cases simply ensure minimum protection in the limited circumstance where price is a complete barrier to access to the desired good.

37. *See Shapiro*, 394 U.S. at 629-31.

to which the migrant had access.”<sup>38</sup> Yet nothing in the opinion hints that the plaintiffs did receive or could have received welfare benefits in their original states of residence. And the Court never considered whether the residence requirement in fact deterred or penalized any person’s decision to migrate.

The weakness of the travel rationale suggests that the heart of *Shapiro* lies elsewhere, and the Court left little doubt about its ultimate concern. The waiting period, according to the Court, denies impoverished migrants “welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.”<sup>39</sup> In rejecting the state’s interest in fencing out poor migrants who seek higher welfare benefits, the Court saw no reason “why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving because she considers, among others factors, the level of a State’s public assistance.”<sup>40</sup> The result in *Shapiro* turns more intelligibly on the judicial intuition that need, not desert, is the only constitutionally valid basis for distributing welfare benefits, which is an indirect way of recognizing that welfare provision has constitutional significance.

Indeed, the travel rationale cannot explain why the Court, after *Shapiro*, upheld residence requirements for access to in-state tuition or divorce proceedings in state court<sup>41</sup> while striking down such requirements for access to state-funded medical care.<sup>42</sup> The answer, as the Court acknowledged in *Memorial Hospital v. Maricopa County*, is that “governmental privileges or benefits necessary to basic sustenance have . . . greater constitutional significance than less essential forms of governmental entitlements.”<sup>43</sup> There the Court recognized medical care to be “as much ‘a basic necessity of life’ to an indigent as welfare assistance,” adding that

[i]t would be odd, indeed, to find that the State . . . was required to afford [the plaintiff] welfare assistance to keep him from discomfort of inadequate housing or the pangs of hunger but could deny him the medical care necessary to relieve him from the wheezing and gasping for breath that attend his illness.<sup>44</sup>

As Laurence Tribe has explained, the language in *Shapiro* and *Memorial Hospital* emphasizing basic human needs “must be taken not as window dressing but as a window into the decisions themselves.”<sup>45</sup>

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38. Michelman, *On Protecting the Poor*, *supra* note 12, at 41.

39. *Shapiro*, 394 U.S. at 627.

40. *Id.* at 632.

41. See *Sosna v. Iowa*, 419 U.S. 393 (1975); *Vlandis v. Kline*, 412 U.S. 441 (1973).

42. *Mem’l Hosp. v. Maricopa County*, 415 U.S. 250 (1974).

43. *Id.* at 259.

44. *Id.* at 259-60.

45. Tribe, *supra* note 5, at 1080.

In these and other cases,<sup>46</sup> the Court did not issue bald declarations of welfare rights or injunctions to create new welfare programs. Instead, the Court played an interstitial role within an existing legislative scheme, invalidating eligibility criteria unrelated to need and imposing procedural safeguards against withdrawal of benefits. Yet the Court's interstitial role should not obscure the existence and guiding influence of constitutional welfare rights in the logic of these cases.<sup>47</sup> Michelman's prescient articulation of welfare rights sounding in minimum entitlement, not unjust discrimination, stands as the enduring insight of *On Protecting the Poor*.

Beyond rationalizing the case law, however, Michelman's article had a normative ambition. His exposition of the minimum welfare view was laced with concern that focusing on "wealth discrimination" not only clouds understanding of judicial behavior but also introduces a host of conceptual and tactical problems. Conceptually, Michelman believed it was too narrow to frame the ills of poverty as wealth discrimination because "[a] severe . . . absolute deprivation may beget no response unless a 'discrimination' suggestive of prevalent, institutionalized, relative deprivation is also present."<sup>48</sup> At the same time, a doctrine against wealth discrimination would be too broad in at least two respects. First, because it "responds to relative deprivation, even [where] the presence of . . . severe absolute deprivation is doubtful,"<sup>49</sup> the

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46. See *USDA v. Moreno*, 413 U.S. 528 (1973); *USDA v. Murry*, 413 U.S. 508 (1973); *N.J. Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969). To be sure, the Court's decisions in this period were not uniformly supportive of welfare rights. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Lindsey v. Normet*, 405 U.S. 56 (1972); *James v. Valtierra*, 402 U.S. 137 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970). But cf. Michelman, *Constitutional Democracy*, *supra* note 11, at 688 (arguing that the latter cases are not inconsistent with the minimum welfare thesis); Tribe, *supra* note 5, at 1082-83 (same).

47. See *Moreno*, 413 U.S. at 533-34 (relying on Congress's stated purpose of alleviating hunger and malnutrition to invalidate exclusion of unrelated households from food stamp program); *Murry*, 413 U.S. at 514 (invalidating exclusion of tax dependents from food stamp program where the exclusion affected persons who are "completely destitute"); *Cahill*, 411 U.S. at 621 (invalidating denial of welfare benefits to families with illegitimate children because "the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate"); *Goldberg*, 397 U.S. at 264 (observing that "welfare provides the means to obtain essential food, clothing, housing, and medical care" in holding that an evidentiary hearing is required before termination of benefits); *Sniadach*, 395 U.S. at 341-42 (noting that "a prejudgment garnishment . . . may as a practical matter drive a wage-earning family to the wall" in holding that notice and a hearing are required before garnishment may occur).

Judicial recognition of welfare benefits as a right of all needy individuals also pervaded many statutory decisions challenging state practices under federal welfare laws. See Forbath, *supra* note 1, at 1859-62 (discussing *King v. Smith*, 392 U.S. 309 (1968), and lower court cases recognizing private rights of action against state welfare agencies, invalidating income attribution rules and restrictions on welfare eligibility, and making injunctive relief available for statutory violations).

48. Michelman, *On Protecting the Poor*, *supra* note 12, at 38; see *id.* at 31-32.

49. *Id.* at 38.

doctrine would have difficulty distinguishing the needs of the poor from the claims of the nonpoor who plausibly suffer wealth discrimination when compared to the rich. Second, the doctrine logically leads to “a kind of disparagement of pricing practices” instead of targeting “nonsatisfaction of a particular want.”<sup>50</sup> Given the ubiquity of pricing practices, actionable wealth discrimination would seem to infect a limitless range of goods from the essential to the trivial. A rule that “appl[ies] non-selectively to the pricing practice and refer[s] not at all to any exceptional attributes in the excepted commodities”<sup>51</sup> cannot answer the question “why education and not golf?”<sup>52</sup>

Tactically, for judges, advocates, and scholars sympathetic to the plight of the poor, the latter concern is what worried Michelman the most. Wealth discrimination, he observed,

is usually nothing more or less than the making of a market . . . or the failure to relieve someone of the vicissitudes of market pricing . . . . But the risk of exposure to markets and their “decisions” is not normally deemed objectionable, to say the least, in our society. . . . We usually regard it as both the fairest and most efficient arrangement to require each consumer to pay the full market price of what he consumes, limiting his consumption to what his income permits.<sup>53</sup>

Michelman warned the Court that, unless it planned to radically alter our market system, judicial opinions with loose language condemning “discrimination against the poor” would generate only false hopes and “mistakenly heard promises.”<sup>54</sup> Moreover, he saved his firmest admonition for welfare advocates and scholars eager to make the Court into an “instrument of income equalization” through claims of “discrimination against the poor.”<sup>55</sup> Such an approach was “tactically ill-advised,” he said, in light of “the possibility that judges specially sensitive to the overbreadth of that formulation will be deterred by its recital from recognizing claims which might have been acceptable if presented without invoking it.”<sup>56</sup>

Interestingly, Michelman never made clear in *On Protecting the Poor* whether he believed the minimum-welfare view or the free-market premises of our economy are, in an ideal sense, fundamentally just. He briefly suggested that the minimum welfare thesis coheres with John Rawls’s notion of justice as fairness, but at that time (two years before the publication of *A Theory of Justice*) Michelman did not clearly endorse or engage the merits of Rawls’s theory.<sup>57</sup> Instead, Michelman’s perspective in 1969 was suffused with lawyerly

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50. *Id.* at 31.

51. *Id.* at 28.

52. *Id.* at 59; cf. Cox, *supra* note 5, at 91 (“Once loosed, the idea of Equality is not easily cabined.”).

53. Michelman, *On Protecting the Poor*, *supra* note 12, at 27-28.

54. *Id.* at 31-32.

55. *Id.* at 32.

56. *Id.*

57. *See id.* at 14-16, 35.

pragmatism. He discussed free enterprise and its inherent inequalities as widely accepted and immovable facts of our social order<sup>58</sup> and then asked, given these facts, what the appropriate role of courts might be in addressing the hardships of poverty. In answering this question, he sought to cabin the theoretical reach of the Court's emerging antipoverty jurisprudence in order to forestall its own undoing. Attentive to the limits of the judicial role, and fearing that an expansive doctrine of economic equality would eventually collapse on itself, Michelman urged a less-is-more approach to welfare rights that "is insistent upon getting what is basic, but is outspokenly explicit in claiming nothing more."<sup>59</sup> He appealed to judicial modesty in characterizing the Court "not as nine (or seven, or five) Canutes railing against tides of economic inequality which they have no apparent means of stemming, but as a body commendably busy with the critically important task of charting some islands of haven from economic disaster in the ocean of . . . free enterprise."<sup>60</sup>

A final observation will take us to the core of the present inquiry. Michelman's normative thesis in *On Protecting the Poor*, while robust and persuasive, is properly stated in a conditional form: justiciable welfare rights should respond to claims of deprivation rather than discrimination *if welfare rights are justiciable at all*. If this last qualifier appears somewhat unexpectedly, it is because we have assumed up to now (or we have assumed that Michelman assumed) the legitimacy of judicial decisions responsive to the minimum welfare thesis. However, Michelman did not address this point in *On Protecting the Poor*. His argument was that welfare rights are *more* justiciable when conceived as claims of minimum protection than as claims of wealth discrimination. But he did not show that claims of minimum protection are properly justiciable *in and of themselves*. Even if the minimum welfare thesis envisions the courts in a more modest role, is it modest enough? Even if "alleviating specific deprivations is a much more manageable task than closing the general inequality gap to acceptable dimensions,"<sup>61</sup> is it manageable enough? *On Protecting the Poor* left these questions unanswered.

Michelman clearly recognized the necessity and difficulty of this last step in the argument. Early in the article, after posing various questions concerning the existence and scope of minimum welfare rights, he dropped this footnote: "This article is part of a continuing study which has as one of its aims the discovery or development of criteria for answering such questions, in a form suitable for judging. *I do not warrant that it can be done.*"<sup>62</sup> So we now arrive

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58. See *id.* at 27-28 ("[T]he risk of exposure to markets and their 'decisions' is not normally deemed objectionable, to say the least, in our society."); *id.* at 32 (defending the minimum welfare view with "the premise . . . that significant income disparities look to be a long-term fixture in American society").

59. *Id.* at 59.

60. *Id.* at 33.

61. *Id.* at 8.

62. *Id.* at 16 n.22 (emphasis added).



at the central question of this Article as well as the departure point for Michelman's next work: how, if at all, can welfare rights be conceptualized so that the assertion and contestation of such rights occur "in a form suitable for judging"?

## II. ONE VIEW OF RAWLS'S THEORY OF JUSTICE

The dissenting Justices in *Shapiro* and kindred cases were quick to emphasize the undemocratic nature of the Court's decisions on behalf of welfare rights. The foremost critic was Justice Harlan, who argued that the doctrinal currents in *Shapiro* "would go far toward making this Court a 'super-legislature.'"<sup>63</sup> The Court is not entitled, he said, "to pick out particular human activities, characterize them as 'fundamental,' and give them added protection under an unusually stringent equal protection test."<sup>64</sup> The theme of judicial illegitimacy likewise appeared in academic commentary contending that "interventions by the Court in the name of the reduction of economic inequality" should be seen "more as a seizure of power than a legitimate exercise of judicial review."<sup>65</sup> The Court's efforts to constitutionalize notions of economic justice prompted Ralph Winter to remark, "Make no mistake about it, *Lochner v. New York* is alive and well in *Shapiro v. Thompson*."<sup>66</sup>

Partly in response to these concerns, Michelman in 1973 published his less famed but more theoretically engaging article, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*.<sup>67</sup> As the title implies, Michelman sought to examine

this not-so-philosophical question: How does [A *Theory of Justice*] bear upon the work of legal investigators concerned or curious about recognition, through legal processes, of claimed affirmative rights (let us call them "welfare rights") to education, shelter, subsistence, health care and the like, or to the money these things cost?<sup>68</sup>

By the end, it is clear that Michelman sees in Rawls's work not only a departure point but also a destination for the question he wants to answer. Rawls's theory of justice, Michelman contends, offers a promising framework—the most promising framework available—for elucidating the content and legitimacy of justiciable welfare rights.<sup>69</sup>

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63. *Shapiro v. Thompson*, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting).

64. *Id.* at 662.

65. Winter, *supra* note 5, at 102; *see also* Bork, *supra* note 5.

66. Winter, *supra* note 5, at 102 (citing *Lochner v. New York*, 198 U.S. 45 (1905)).

67. Michelman, *Constitutional Welfare Rights*, *supra* note 13. Michelman makes clear his awareness of the *Lochner* problem. *See id.* at 968 (acknowledging the need to address "whether, how, or why Professor Rawls' *Theory of Justice*, any more or less than Mr. Herbert Spencer's *Social Statics*, is to become an operative force in constitutional adjudication" (citing *Lochner*, 198 U.S. at 74, 75 (Holmes, J., dissenting))).

68. *Id.* at 962.

69. *See id.* at 1017-19.

The first half of the article addresses “whether [Rawls’s] principles of justice have a substantive content which points to welfare rights and, if so, what specific shape these rights might take.”<sup>70</sup> I shall not be concerned with this discussion, except to note that Michelman makes a convincing case that minimum welfare rights flow more easily from the lexically prior principles of equal basic liberties and fair equality of opportunity<sup>71</sup> than from the Rawlsian precept most often associated with distributive justice, the difference principle.<sup>72</sup> For present purposes, I shall accept Michelman’s general

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70. *Id.* at 968.

71. *See id.* at 976-90. Rawls’s hierarchy of principles presupposes a level of minimum welfare insofar as the priority of equal basic liberties does not take hold “[u]ntil the basic wants of individuals can be fulfilled.” RAWLS, *supra* note 14, at 543. Although Rawls says the principle of equal liberties is not violated by inequality in the “worth of liberty,” *id.* at 204-05, he notes that the priority of liberty is chosen by persons in the original position on the assumption that “their basic liberties can be effectively exercised,” *id.* at 542, and “fully enjoyed,” *id.* at 247. In addition, the liberty principle includes a proviso that equal *political* liberties must be guaranteed their fair value, *see id.* at 224-27, and Rawls’s later work confirms that this proviso entails a minimum level of material and social well-being to ensure that all persons can participate in society as free and equal citizens, *see* JOHN RAWLS, *POLITICAL LIBERALISM* 166 (1993). Further, the principle of fair equality of opportunity also implies basic welfare guarantees. Rawls mentions education, *see* RAWLS, *supra* note 14, at 73, although a broader range of goods seems necessary to ensure equal prospects of success for persons of equal talent and motivation.

72. Because the difference principle directs us to approach distributive justice from the perspective of the least advantaged, it would appear to be an auspicious framework for elaborating minimum welfare rights. Indeed, Rawls equates the position of the least advantaged under the difference principle with the idea of a social minimum. RAWLS, *supra* note 14, at 285-86. However, the difference principle is a “maximizing” precept (“speaking for the bottom, it says that more is better”); it is not a “satisficing” precept that insists on meeting “minimum standards or requirements.” Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 977 & n.48. There is thus no necessary equivalence between the position of the least advantaged under the difference principle and the idea of a social minimum informed by basic human needs. *See* JEREMY WALDRON, *LIBERAL RIGHTS* 250-70 (1993). As a practical matter, however, this need not be troubling for the least advantaged if Rawls is correct that, in a society of moderate scarcity, the social minimum under the difference principle will typically exceed what is necessary for a decent human life. *See* JOHN RAWLS, *JUSTICE AS FAIRNESS: A RESTATEMENT* 127-30 (Erin Kelly ed., 2001) [hereinafter RAWLS, *JUSTICE AS FAIRNESS*].

What is troubling is that the difference principle is indifferent to the level of inequality at the point where the position of the least advantaged is maximized. Rawls generally treats the desire to improve one’s relative standing in society as a problem of irrational envy, not injustice, once the difference principle is satisfied. *See* RAWLS, *supra* note 14, at 143. However, “excusable envy,” *id.* at 546, may occur when the difference principle results in “such large disparities in [primary] goods that under existing social conditions these differences cannot help but cause a loss of self-esteem.” *Id.* at 534. When “[t]he discrepancy between oneself and others is made visible by the social structure and style of life of one’s society,” the least advantaged are “often forcibly reminded of their situation, sometimes leading them to an even lower estimation of themselves and their mode of living,” thereby eroding their self-respect. *Id.* at 535. Rawls concedes that this is “an unwelcome complication” in the difference principle that may require “some adjustment” to include self-respect in the index of primary goods, *id.* at 546, although he does not say how the adjustment should occur. (In later work, he argues that extreme inequality is “very unlikely”

conclusion that “[t]he social minimum is an implication of justice as fairness taken as a whole theory” and that the principles chosen by representative persons in the original position to govern the basic structure of society would provide “adequate assurance . . . for what one specifically needs in order that his basic rights, liberties, and opportunities may be effectively enjoyed, and his self-respect maintained.”<sup>73</sup>

In the second half of the article, Michelman takes up the question left hanging in *On Protecting the Poor*: assuming the Rawlsian social contract entails certain welfare rights, on what grounds is judicial review a legitimate vehicle for recognizing and enforcing such rights? This question will be my focus here.

### A. Judicial Review in Ideal and Nonideal Theory

Michelman’s first step in examining the judicial role is to observe that the welfare rights implicit in Rawls’s principles of justice are implicit in an ideal theory of justice as fairness.<sup>74</sup> In ideal theory, the principles of justice are those that govern “a well-ordered society”—that is, a society “designed to advance the good of its members and effectively regulated by a public conception of justice,” a society “in which everyone accepts and knows that the others accept the same principles of justice, and the basic social institutions satisfy and are known to satisfy these principles.”<sup>75</sup> Rawls insists that the principles of justice be “public” in this sense because he believes that mutual recognition of the

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under the difference principle when equal basic liberties and fair equality of opportunity are secured. RAWLS, JUSTICE AS FAIRNESS, *supra*, at 67.) According to Michelman, the “only available adjustment” is to say, in tension with the difference principle’s maximizing thrust, that “[i]f it is necessary, in order to confirm the bottom’s self-respect, to increase tax-transfer activity beyond the point where the bottom’s income is maximized, we are to do so.” Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 986-87.

There is a deeper sense in which Rawls does not conceive of the difference principle as regulating the material well-being necessary to secure self-respect. This is evident in his separation of issues of economic welfare from the preconditions of self-respect. As he explains, the principles of justice are designed to “factor[] the social order into two parts,” with equal basic liberties securing self-respect by “defining the same status for all” while “distributive justice . . . in the relative shares of material means” under the difference principle “is relegated to a subordinate place.” RAWLS, *supra* note 14, at 546; *see id.* at 544 (“The basis for self-esteem in a just society is not then one’s income share but the publicly affirmed distribution of fundamental rights and liberties.”). For Rawls, the difference principle seems to support self-respect not so much by securing a material minimum as by expressing an ethos of mutual concern or “fraternity” that instantiates the Kantian imperative of treating every person as an end, not only as a means. *See id.* at 105-06, 179-80.

73. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 991.

74. *See id.*

75. RAWLS, *supra* note 14, at 453-54. When Rawls speaks of the “institutions” comprising the basic structure of society, he is not referring to specific laws, social programs, or instruments of government such as courts. Instead, he conceives of an institution as “a public system of rules,” or “more generally social practices,” such as “games and rituals, trials and parliaments, markets and systems of property.” *Id.* at 55.

principles and the conformity of institutions to them will reinforce the desire of the citizenry to act as the principles require.<sup>76</sup> According to Rawls, the “stability” of the principles of justice is one of the main reasons they would be chosen by persons in the original position.<sup>77</sup> In a well-ordered society whose institutions are publicly known to satisfy justice as fairness, “those taking part in these arrangements acquire the corresponding sense of justice and desire to do their part in maintaining them.”<sup>78</sup>

Michelman is quick to note that judicial review of welfare rights fits uneasily in the well-ordered society of Rawls’s ideal theory. Although courts may play a legitimate role in statutory interpretation, on what basis can they disturb legislative judgments on constitutional grounds in a society whose members have a well-developed, publicly affirmed, mutually reinforcing sense of justice? The stability of justice as fairness means that the legislators in a well-ordered society, like the citizenry they serve, have internalized the principles of justice and “must tend to act in such a way as to make judicial review superfluous.”<sup>79</sup> It also means that, in cases of legislative error, the public sense of justice is strong enough to bring the system back to equilibrium in a self-regulating manner.<sup>80</sup> Under ideal conditions, there is no reason why judges should be thought to have greater technical or moral competence in securing welfare rights than “conscientious legislators” imbued with a sense of justice.<sup>81</sup> Further, judicial review exacts a social cost by undermining political liberty and eroding the public “sense of duty and obligation upon which the stability of just institutions depends.”<sup>82</sup>

This much of Michelman’s analysis seems sound. But what about the role of judicial review in an imperfect society that is not fully just and where the public sense of justice is underdeveloped? Here, as a matter of “‘non-ideal’ theory,”<sup>83</sup> Michelman argues that justiciable welfare rights are intuitively

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76. See *id.* at 133, 177-78, 454-55. Rawls’s argument for this claim rests substantially on his understanding of human motives and moral psychology. See *id.* at 490-504.

77. See *id.* at 455 (“However attractive a conception of justice might be on other grounds, it is seriously defective if the principles of moral psychology are such that it fails to engender in human beings the requisite desire to act upon it.”).

78. *Id.* at 454; see *id.* at 177.

79. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 993; see *id.* at 994 (noting that “ideal legislators themselves are citizens, animated no less than others by the sense of justice”).

80. Rawls highlights civil disobedience as a corrective measure, see RAWLS, *supra* note 14, at 371-77, but does not mention judicial review.

81. Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975); see Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 995.

82. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 996 (quoting RAWLS, *supra* note 14, at 234).

83. *Id.* at 997. Michelman’s term “‘non-ideal’ theory” should not be confused with Rawls’s use of a similar term. See RAWLS, *supra* note 14, at 245-48 (discussing “nonideal” circumstances where a “less extensive liberty” or “unequal liberty” may be the most just state of affairs in the evolution toward a society with more extensive or more equal liberty).

plausible as a corrective device. In Rawls's four-stage sequence for applying the principles of justice,<sup>84</sup> the framers at the constitutional stage—knowing that strict compliance with the principles of justice cannot be assumed—would be justified in establishing remedial measures, including substantive welfare rights and judicial review, to set the society on a path toward greater realization of justice as fairness. Michelman remains aware of the cost to equal political liberty exacted by judicial review, as well as the risk that employing judicial review to “nurture” the public sense of justice may, “paradoxically, indefinitely stunt the growth of this sense.”<sup>85</sup> But because “welfare rights . . . have a role in promoting the self-respect in whose absence the sense of justice will not flourish—the same self-respect, indeed, that the equal liberties are meant to serve,”<sup>86</sup> the vindication of welfare rights through judicial review may yield a net gain along the common metric of self-respect and thereby strengthen the sense of justice over time. “So there,” Michelman concludes, “we have the uneasy case for judicially enforceable, substantive constitutional rights as a means of coping with evolutionary deficiencies in the public’s sense of justice.”<sup>87</sup>

The case is indeed uneasy in ways we will now explore. An initial objection is that Michelman proceeds on the assumption that, in a nonideal society, judges as a group would not be afflicted with the same underdeveloped sense of justice that afflicts the legislature and the citizenry at large. But the assumption seems questionable for the common-sense reason, captured well by Justice Cardozo, that “[t]he great tides and currents which engulf the rest of men, do not turn aside in their course, and pass the judges by.”<sup>88</sup> Indeed, it is not difficult to think of instances in our history when the courts have lagged behind the evolving public sense of justice.<sup>89</sup> On the other hand, judges do

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84. Rawls describes the four-stage sequence—from the original position to the constitutional stage to the legislative stage to the application of rules in particular cases—as “a device for applying the principles of justice.” RAWLS, *supra* note 14, at 200. In this structured scheme, each stage represents a point of view with increasing availability of knowledge about the economic, social, and political facts of society, and the representative persons at each stage decide on a constitution, laws, and policies from the appropriate perspective. *See id.* at 195-201.

85. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1000.

86. *Id.* at 1001.

87. *Id.*

88. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 168 (1921).

89. *See, e.g.*, *United States v. Morrison*, 529 U.S. 598 (2000) (invalidating civil remedy in federal court for victims of gender-motivated violence partly on the ground that pervasive bias and remedial failures in state justice systems do not comprise “state action” subject to Congress’s remedial power under the Fourteenth Amendment); *Lassiter v. Northampton Election Bd.*, 360 U.S. 45 (1959) (upholding literacy tests for voting that were later prohibited by the Voting Rights Act of 1965); *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923) (invalidating minimum wage), *overruled by* *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937); *The Civil Rights Cases*, 109 U.S. 3 (1883) (invalidating the prohibition on racial discrimination in public accommodations under the Civil Rights Act of 1875); *see also* Siegel, *supra* note 27 (describing the political evolution of the Equal Rights Amendment in

seem relatively well positioned to speak coherently about matters of justice not by dint of their personal characteristics, but by virtue of the political independence, procedural discipline, and reason-giving obligations of their office.<sup>90</sup> We cannot expect complete independence, but we can expect that institutional safeguards likely to be adopted by the framers in Rawls's constitutional stage would put the courts in a favorable position to discern the requirements of justice (assuming, of course, that those safeguards are themselves observed in a nonideal society).

Yet even if the judiciary is institutionally poised to play the role Michelman envisions, an important question remains: on what basis would that role be understood as *legitimate* in a nonideal society? Suppose that the judges in our nonideal society are able and inclined to articulate welfare rights as an entailment of Rawlsian principles of justice. Should they proceed to decide cases on these grounds? If the premise of judicial review is the society's underdeveloped sense of justice, then how do judicial decisions overriding the popular will in the name of welfare rights command the assent of that society? The same underdeveloped public sense of justice that necessitates the institution of judicial review would seem to provide unfavorable conditions for public acceptance of the practice.

Michelman is keenly aware of this knot. Once we are confident that our judges comprehend and are persuaded by rational arguments from moral theory, he says, the exercise of judicial review "turn[s] on how confident the judges are that the theory can be wielded persuasively enough" to win acceptance and "induce compliance" throughout society.<sup>91</sup> Here Michelman is concerned with persuasiveness not in the sense that might appeal to a philosopher or logician, but in terms of whether the derivation of welfare rights from moral theory can, as a practical matter, "be made ultimately compelling to the generality of citizens."<sup>92</sup> The public sense of justice is not static, to be sure, and the courts may be capable of explaining welfare rights through "reasoned argument" from first principles.<sup>93</sup> However, Michelman says, "the possibility remains that the intellectual journey is too difficult and tortured" to be an acceptable mode of judicial reasoning in a society committed to "equal participatory rights."<sup>94</sup> The "understandability of judicial decisions"

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the face of judicial passivity and indifference toward women's rights).

90. See RONALD DWORKIN, A MATTER OF PRINCIPLE 33-71 (1985); Owen M. Fiss, *The Supreme Court, 1978 Term—Foreword: The Forms of Justice*, 93 HARV. L. REV. 1, 12-17 (1979).

91. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1007.

92. *Id.* at 1009.

93. *Id.* at 1008.

94. *Id.* at 1009; see *id.* ("The intrinsic values ascribed by justice as fairness to equal participatory rights, and their connection with the preeminent social good of self-respect, seem to indicate that Rawls contemplates fairly strict limits on the intellectual capacities and exertions that may be demanded of citizens as the condition of their being satisfied that controversial judicial mandates are indeed correct . . ." (citation omitted)).

circumscribes the grounds on which justiciable welfare rights might rest in a participatory democracy.<sup>95</sup>

Michelman's point is not that the average citizen lacks the raw intellect to understand complex moral theory (although neither *A Theory of Justice* nor Michelman's treatment of Rawls is exactly light reading). His point is that the practical efficacy of judicial appeals to moral theory in support of welfare rights varies with the degree to which the society has internalized the sense of justice that moral theory entails.

Here, then, is the nub: certain societies may have reached a stage of development in which shared or overlapping senses of justice are implicit or emergent among the generality of citizens, but not fully and explicitly acknowledged by most of them except, perhaps, in their rarest moments of maximum lucidity and detachment. . . . It seems that societies lying within this evolutionary range have the clearest uses for judicial review that appeals directly to principles of justice. But it also seems that the further such a society is from the actuality of a well-ordered condition—the more primitively developed is its common sense of justice—the greater will be both that society's need for such judicial review and the difficulty its judges will have in holding to a tolerable level the associated costs in participatory inequality which damages self-respect.<sup>96</sup>

Thus, positing judicial review as a corrective measure in a nonideal society does not resolve the justiciability of welfare rights so much as it frames the tension between its necessity and its legitimacy.

### B. *The Uneasy Role of Moral Theory in Adjudication*

This rendition of the countermajoritarian difficulty directs our attention back to the *Lochner* problem. Whatever confidence we may have in the soundness of moral theory as a font of welfare rights, the difficulty lies in the arguable “illegitimacy of transforming any such theory into law—of certifying it for deployment by judges.”<sup>97</sup> In responding to this concern, Michelman draws on an important feature of Rawls's theory that we have not yet explored. As I argue in Part III, it will eventually lead us to a conception of the judicial role in recognizing welfare rights that is different from what Michelman himself suggests.

Until now, we have implicitly treated the derivation of welfare rights from Rawls's principles of justice and the derivation of the principles themselves as a process of logical reasoning starting from a carefully constructed initial choice situation. Rawls explains that his argument for the principles of justice “aims . . . to be strictly deductive” from the premises of the original position and that “[w]e should strive for a kind of moral geometry with all the rigor

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95. *Id.* at 1008.

96. *Id.* at 1009-10.

97. *Id.* at 1017.

which this name connotes.”<sup>98</sup> While lamenting that his theory actually falls short of this, he nonetheless says “it is essential to have in mind the ideal one would like to achieve.”<sup>99</sup> This deductive ideal helps to explain the allure of moral theory as a basis for adjudication.

At the same time, however, Rawls’s theory of justice is not properly understood as the result of a free-standing thought experiment. A recurring theme in his work is that moral theory should describe and cohere with our *intuitive* sense of justice, and that such coherence is a key criterion for the soundness of a moral theory. In “justifying a particular description of the original position,” Rawls says, it is important “to see if the principles which would be chosen match our considered convictions of justice or extend them in an acceptable way.”<sup>100</sup> A satisfactory theory of justice is one that, when applied, validates the everyday moral precepts we feel most sure about. When discrepancies arise, we face a choice between modifying our theory and revising our considered judgments about justice. “By going back and forth, sometimes altering the conditions of the contractual circumstances, at others withdrawing our judgments and conforming them to principle,” Rawls envisions that we will eventually arrive at a “reflective equilibrium” where “our principles and judgments coincide” and where “we know to what principles our judgments conform and the premises of their derivation.”<sup>101</sup> The argument for justice as fairness aims to be deductive once the initial choice situation is specified, but the specification of the original position is irreducibly normative and not itself bottomed on any necessary truth. Rawls thus explains that “[a] conception of justice cannot be deduced from self-evident premises or conditions on principles; instead, its justification is a matter of the mutual support of many considerations, of everything fitting together into one coherent view.”<sup>102</sup>

For Michelman, this conception of moral theory helps to ease the tension inherent in judicial review of welfare rights. It suggests that a court guided by Rawls’s principles of justice is not foisting upon us an abstract moral theory. It is instead “[r]evealing, clarifying, and rationalizing . . . latent moral principles” that we already feel in our bones, so to speak.<sup>103</sup> Of course, coherence between moral theory and our considered judgments is to be expected in a well-ordered society. But even under nonideal conditions, Michelman appears optimistic that a judicial appeal to moral theory in recognizing welfare rights can generate public acceptance if it provides a coherent account of the sense of justice latent in our public institutions, social practices, and legal texts and traditions. His hope is that the tension between moral theory and “popular will and

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98. RAWLS, *supra* note 14, at 121.

99. *Id.*

100. *Id.* at 19.

101. *Id.* at 20.

102. *Id.* at 21.

103. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1001.



understanding” may ultimately be dissolved by making them “convergent.”<sup>104</sup> Toward this end, he invokes Rawls’s insight that

the best account of a person’s sense of justice is not the one which fits his judgments prior to his examining any conception of justice, but rather the one which matches his judgments in reflective equilibrium. . . . [T]his state is one reached after a person has weighed various proposed conceptions and he has either revised his judgments to accord with one of them or held fast to his initial convictions (and the corresponding conception).<sup>105</sup>

Michelman urges us to “see the courts as arbiters in such a process at a public level,” with Rawls’s theory of justice serving “as the provisional ‘conception’ which is thenceforth dialectically to be brought into harmony with the network of ‘considered judgments’ reflected in statutes, customary forms of social behavior, constitutional texts and historical traditions.”<sup>106</sup>

This dialogic portrayal of judicial review renders the divide between moral theory and the public sense of justice more fluid and permeable than it had perhaps seemed at first. However, it is not clear that Michelman has answered the critical problem of intelligibility or “understandability” he posed earlier.<sup>107</sup> It is one thing to say, at a substantive level, that a moral theory implying welfare rights coherently explains or rationalizes the sense of justice latent in popular morality. But it is another to say, at a practical level, that a judicial appeal to moral theory will effectively foster public recognition of that latent sense of justice. A judicial claim that welfare rights cohere with precepts latent in popular morality seems likely to have greater legitimacy if courts articulate that coherence through modes of reasoning that begin not with moral theory but with our considered judgments however particular or contingent they may be. The prospect of courts grounding that coherence in a set of master principles seems destined to be perceived as an imposition, either because we are not prepared to accept the logical implications of the principles across the entire range of possible cases or because we are wary that such rigorous constraints on moral reasoning foreclose other considerations we find relevant in reaching our considered judgments. If reflective equilibrium is to be “a paradigm of judicial review,”<sup>108</sup> then the courts—in their results as well as their modes of explanation—need to meet the public at least halfway.

But Michelman, in the end, is unwilling to give up on moral theory as a basis for adjudication. “[A]s judges go about their business of selectively translating constitutional and statutory offerings into welfare rights,” he says, “they should conscientiously try to clarify in their own minds some systematic moral theory which justifies and accounts for their decisions [and] should not shrink from incorporating such thought in their public explanations of what

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104. *Id.* at 1017.

105. *Id.* at 1018 (quoting RAWLS, *supra* note 14, at 48).

106. *Id.*

107. See *supra* note 95 and accompanying text.

108. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1018.

they do.”<sup>109</sup> In doing so, a court engages in “modes of articulation and explanation under which it can decide the case and maintain its appearance of answering to external principle.”<sup>110</sup>

Yet the insistence on judges “answering to external principle” seems misplaced if only because the type of moral theory they might legitimately wield is one that, according to Michelman, “seeks *ultimate justification* by its claimed coherence with the latent morality of the people.”<sup>111</sup> If that is so, then a firm basis in moral theory does not itself validate judicial recognition of welfare rights. What really counts toward the legitimacy of such adjudication is the correctness and accessibility of the court’s interpretation of latent popular morality, not its traceability to a foundational external principle. Indeed, such interpretation must draw on sources and reasoning independent of moral theory, for how else could it play an ultimately justificatory role in relation to moral theory?

### III. TOWARD AN INTERPRETIVE APPROACH TO JUDICIAL RECOGNITION OF WELFARE RIGHTS

Implicit in Michelman’s resort to moral theory as a foundation for justiciable welfare rights is the impulse to anchor such rights in first principles external and prior to political bargaining over the distribution of social goods. On this account, constitutional welfare rights regulate and constrain politics, comprising a body of law “categorically autonomous from the beliefs and values of nonjudicial actors.”<sup>112</sup> Because such autonomy is especially difficult to maintain in the policy-laden realm of social and economic welfare, moral theory—in particular, the deductive theory that *A Theory of Justice* aspires to be—provides an attractive resource for judges in search of a disciplined mode of reasoning toward objective principles of distributive justice. Such principles may help to facilitate judicial elaboration of constitutional welfare rights in a manner that affirms the autonomy and, in turn, the authority of constitutional law.

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109. *Id.* at 1015. Rawls’s theory leaves Michelman hopeful that “there will someday appear some speculative moral theory which displays . . . sufficiently persuasive and accessible coherence with latent popular morality to deserve judicial recognition.” *Id.* at 1018. According to Michelman, this possibility “may counsel skepticism toward any insistence that the legal and moral orders are, logically and intrinsically, worlds apart” and “denies that adjudication is a process inherently incapable of handling the kind of stuff of which moral philosophy is made.” *Id.* at 1018-19.

110. *Id.* at 1007.

111. *Id.* at 1017 (emphasis added); see *id.* at 1004 (describing Rawls’s theory as one that “ultimately succeeds in justifying itself in terms of coherence with moral views that we can confidently say are those of the society at large”).

112. Post, *supra* note 27, at 7.

As noted at the outset, however, the claimed autonomy of constitutional law has been persuasively challenged on positive and normative grounds.<sup>113</sup> The historical development and binding character of our constitutional understandings demand more complex explanations than a conventional account of the courts as independent, socially detached decision makers that “say what the law is.”<sup>114</sup> The enduring task for the judiciary, as Robert Post has argued, is to “find a way to articulate constitutional law that the nation can accept as its own.”<sup>115</sup> This imperative has special resonance in considering the justiciability of constitutional welfare rights, since the substance of welfare rights is inextricably intertwined with the nation’s changing social and economic norms.

I turn now to develop a contrasting conception of judicial review of welfare rights, one that envisions the judiciary not as a Dworkinian forum of principle but as a culturally situated interpreter of social meaning. The perspective I propose relies on a different approach to moral theory elaborated in the work of Michael Walzer. Like Michelman’s treatment of Rawls, my purpose in examining Walzer is not to reach an ultimate judgment about the philosophical merits of his moral theory, but rather to investigate what bearing the theory might have on the existence and justiciability of welfare rights. At its core, my argument is that welfare rights arise from our shared understandings of particular social goods. Accordingly, the judicial role in recognizing welfare rights is one of interpreting our shared understandings as they are expressed through our institutions, laws, and social practices concerning a given welfare good. On this view, the legitimacy of judicial recognition of welfare rights depends a great deal upon robust democratic instantiation of such rights typically in the form of a substantial legislated program.

In this Part, I begin by observing that traces of this interpretive judicial approach<sup>116</sup> appear in the themes and tensions of Michelman’s own work, in particular his treatment of welfare rights as rights to particular social goods rather than money. Next I examine the socially contingent conception of welfare rights developed in Walzer’s *Spheres of Justice*, and I then offer some examples to illustrate the texture of judicial reasoning that interprets our social understandings in the way Walzer’s theory implies. I conclude this Part by

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113. See *supra* note 27 (collecting sources).

114. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803).

115. Post, *supra* note 27, at 11.

116. In labeling my account of the judicial role an “interpretive” approach, I use the term to mean something different from Ronald Dworkin’s idea of law as an “interpretive concept,” RONALD DWORKIN, *LAW’S EMPIRE* 87 (1986), and from John Hart Ely and Thomas Grey’s notion of “interpretivism” (akin to textualism) in constitutional adjudication, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 1-9 (1980); Thomas C. Grey, *Do We Have an Unwritten Constitution?*, 27 *STAN. L. REV.* 703, 703-06 (1975). The objects of interpretation in my account are not various aspects of judicial practice, as in Dworkin’s theory, or various clauses of the Constitution, as Ely and Grey use the term, but rather a wide array of social practices, norms, and understandings.

discussing two limitations on the judicial role inherent to the proposed interpretive approach. In Part IV, I respond to two objections: first, that the judicial role I envision is too conservative, and second, that judges attempting to interpret society's values may end up imposing their own values on society.

### A. *Michelman Revisited*

In several ways, Michelman's seminal articles seem to gesture toward an interpretive judicial role of the sort I am proposing. First, by reconceptualizing claims of wealth discrimination as claims of unjust deprivation grounded in social contract, Michelman invites us to see the judiciary's role less as a countermajoritarian guardian of minority rights than as a reasoned interpreter of the terms of a social consensus. Under Michelman's account, the courts are not antidemocratic referees in a contest among social groups for self-advantage, but rather conscientious facilitators of the shared understandings that underwrite a fair system of cooperation for mutual advantage.

Second, as just discussed, Michelman suggests that the ultimate ground of justification for judicial reliance on moral theory is the degree to which it coheres with latent public morality. In response to the problem of judicial legitimacy, courts are to bring Rawls's theory of justice "dialectically . . . into harmony" with our considered judgments in a state of reflective equilibrium.<sup>117</sup> Rawls himself later revised his theory to treat justice as fairness as a "political conception" that would be acceptable to citizens of a "democratic society under modern conditions" even if not "suitable for all societies regardless of their particular social or historical circumstances."<sup>118</sup> So conceived,

[w]hat justifies a conception of justice is not its being true to an order antecedent to and given to us, but its congruence with our deeper understanding of ourselves and our aspirations, and our realization that, given our history and the traditions embedded in our public life, it is the most reasonable doctrine *for us*.<sup>119</sup>

As Michelman observed in subsequent work, a principal aim of Rawls's revised theory—and presumably of judges who use the theory to inform their recognition of welfare rights—"is to persuade an audience, already knowing themselves as broadly committed to liberal constitutionalism ('constitutional

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117. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1018.

118. John Rawls, *Kantian Constructivism in Moral Theory*, 77 J. PHIL. 515, 518 (1980); *see* RAWLS, *supra* note 71, at 11-15 (defining "political conception of justice"). Rawls came to this view after determining that the idea of a well-ordered society, in which justice as fairness is accepted as a comprehensive philosophical doctrine, is unrealistic because a plurality of reasonable yet incompatible comprehensive doctrines (religious, philosophical, or moral) is a normal and inevitable fact of any constitutional democratic regime. *See id.* at xvi-xvii. In contrast to a comprehensive doctrine, Rawls's political conception of justice reflects an "overlapping consensus" endorsed by each reasonable comprehensive doctrine from its own point of view. *Id.* at 134.

119. Rawls, *supra* note 118, at 519 (emphasis added).

democracy') that justice as fairness correctly interprets their broad commitment."<sup>120</sup>

In the articulation of Rawls's theory as a political conception, we can detect a hint of Walzer's emphasis on culturally situated understandings.<sup>121</sup> Yet Rawls's political conception of justice flows not from a recognition of shared social meanings but, to the contrary, from the fact of reasonable pluralism in a society sharing only a liberal conception of persons as free and equal.<sup>122</sup> There is a third theme in Michelman's work, however, that envisions adjudication of welfare rights as having the greater degree of cultural resonance and particularity associated with Walzer's approach. Throughout his 1969 and 1973 articles, Michelman conceives of welfare rights as more than a right to basic income or a right against excessive income inequality. He consistently refers to welfare rights in terms of "a persuasive catalogue of just wants"<sup>123</sup> or a "set of insurance rights" meaning "a right to provision for a certain need—on the order of shelter, education, medical care—as and when it accrues."<sup>124</sup> In tracing the welfare implications of Rawls's theory, Michelman expresses disappointment that the difference principle seems more conducive to supporting an income right than rights to specific basic needs,<sup>125</sup> although he concludes that a social

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120. Frank I. Michelman, *The Subject of Liberalism*, 46 STAN. L. REV. 1807, 1831 (1994) (reviewing RAWLS, *supra* note 71). While acknowledging that the idea of democracy figures more prominently in Rawls's later work, Joshua Cohen has argued that justice as fairness, as originally conceived in *A Theory of Justice*, was intended to capture the principles of justice most appropriate "for a democratic society" even though Rawls himself devoted little attention to the subject of democracy in 1971. See Joshua Cohen, *For a Democratic Society*, in THE CAMBRIDGE COMPANION TO RAWLS 86 (Samuel Freeman ed., 2003). The title of Cohen's article invokes Rawls's claim in the preface to *A Theory of Justice* that justice as fairness "constitutes the most appropriate moral basis for a democratic society." RAWLS, *supra* note 14, at viii.

121. See STEPHEN MULHALL & ADAM SWIFT, LIBERALS AND COMMUNITARIANS 207-08 (2d ed. 1996) (noting the methodological convergence between Rawls's political conception of justice and Walzer's culturally specific understanding of justice).

122. See *id.* at 208-09.

123. Michelman, *On Protecting the Poor*, *supra* note 12, at 14.

124. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 966, 981.

125. See *id.* at 976-88. The difference principle, in directing us to maximize the welfare of the least advantaged, is designed to avoid interpersonal comparisons of satisfaction or utility associated with the consumption of particular goods at particular levels of provision. See RAWLS, *supra* note 14, at 90-92. When applied to income and wealth, the principle

simply pursues any increase in the bottom's income, whether or not large enough to yield a net rise in consumer satisfaction in the face of tax increases and associated incentive and production losses. . . . There can be no implicit insurance-rights package because there is no concern for what the bottom spends (or is able to spend) its income on. Income is income—a primary, an elemental, social good, of which the bottom simply wants and is entitled to as much as it can get.

Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 981. Moreover, Michelman contends, even when the difference principle is applied to the primary good of self-respect, the welfare rights implication is a narrowing of income inequality between top and bottom, not the satisfaction of particular needs. See *id.* at 983-88.

minimum comprised of an “articulated package of basic welfare needs” is implied by justice as fairness taken as a whole.<sup>126</sup>

What accounts for this insistent characterization of welfare rights as rights to provision of particular goods? Given Michelman’s interest in marshaling Rawls’s theory in support of welfare rights, this characterization seems odd since it is in obvious tension with the abstract notion of “primary goods” that Rawls treats as the basic article of distribution.<sup>127</sup> For Michelman, the answer does not lie in the economic literature on the merits of in-kind versus cash provision of welfare benefits.<sup>128</sup> Instead, his explanation is that, however unlikely it is that rights to provision of specific goods will be recognized by the courts, “constitutional minimum-income rights are less likely still.”<sup>129</sup> The satisfaction of particular needs rather than the redistribution of money is more apt to comprise “welfare rights that are *justiciable*—that is, susceptible of convincing recognition and enforcement by officers acting subject to the restraints of judicial office.”<sup>130</sup> According to Michelman, framing welfare rights by reference to specific goods is a “tactical preference” intended to give courts and advocates a “special foothold for challenging legislative judgments”—in other words, to enable welfare rights to “gain effective support from a publicly acceptable form of judicial review and from convincing advocacy in political forums.”<sup>131</sup>

There is a sound intuition here, but Michelman does not unpack it to explain *why* welfare rights as he defines them are more justiciable than income rights. What exactly is the “tactical” advantage or “special foothold” to be gained? How does focusing welfare rights on the provision of specific goods

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126. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 991.

127. RAWLS, *supra* note 14, at 92 (defining primary goods as “things which it is supposed a rational man wants whatever else he wants” or “things which he would prefer more of rather than less”); *id.* (describing primary goods “in broad categories” as “rights and liberties, opportunities and power, income and wealth,” and “a sense of one’s own worth”); *id.* at 93 (“[W]hatever one’s system of ends, primary goods are necessary means.”).

128. Compare Lester C. Thurow, *Government Expenditures: Cash or In-Kind Aid?*, 5 PHIL. & PUB. AFF. 361 (1976) (challenging the conventional view under neoclassical economic theory that government benefits should nearly always take the form of cash instead of in-kind aid), with FRIED, *supra* note 20, at 126-28 (arguing for “a right to a fair share of money income” rather than in-kind aid because it has “the virtue of recognizing the principle of autonomy”), and Winter, *supra* note 5, at 66-77 (arguing that welfare provision in the form of goods and services is inefficient, inequitable, and illiberal). The closest Michelman comes to this debate is a footnote in which he says, without elaboration, that in-kind provision eliminates residual risk of deprivation in “a generally fair system of rewards and transfers,” “obviates any need to place a dollar value from time to time on the whole catalogue of just wants,” and “assures society that transferred purchasing power will not be dissipated on other wants, leaving just wants unfulfilled.” Michelman, *On Protecting the Poor*, *supra* note 12, at 15-16 n.21.

129. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 966.

130. *Id.*

131. *Id.* at 966, 1002-03.

facilitate “publicly acceptable” judicial review or “convincing” political advocacy?

We are inching our way toward a perspective on justiciable welfare rights that seeks its legitimacy in arguments appealing to the concreteness and cultural resonance of particular social goods. The seeds of this perspective are discernible in Michelman’s recognition that “[a] precept for the distribution of material social goods which ignores claims regarding basic needs as such, and is sensitive only to claims regarding money income, will for many of us seem incomplete and thus not fully in harmony with our ‘considered judgments.’”<sup>132</sup> To explain this point, Michelman adds an illustrative footnote comparing two possible responses to the problem that many people “have incomes so low that they cannot obtain basic health care.”<sup>133</sup> One response is to regard the observed fact as “strong evidence that the difference principle is being violated” and, on that basis, to demand additional transfers to raise the income of the least advantaged.<sup>134</sup> But once the legislature determines that “no increase in the bottom’s income is in fact possible,” there can be “no further demands” under the difference principle.<sup>135</sup> An alternative response is to find the existing situation troubling

not only because it suggests that the bottom’s income is not as high as it could be, but also because persons are entitled not to be barred from basic health care by impecunity—recognizing as a natural limitation that the right is exhausted once it can be shown that the bottom’s income is as high as it can possibly be, or that there is no way to free the health-care interest from the impecunity risk without displacing that risk onto some other interest deemed at least equally important. The second [response], then, can demand that the legislature enact a health-insurance program, and the burden of persuasion will then be on those who disagree to show that the natural limitation supports their position.<sup>136</sup>

If the latter response strikes us as persuasive, it is because the italicized phrase reveals more than Michelman seems to recognize. On what grounds can it be argued that “persons are entitled not to be barred from basic health care by impecunity” separate and apart from a claim that “the bottom’s income is not as high as it could be”? It cannot be the difference principle, which speaks only to the income claim. Instead, the argumentative bite of stating a claim about *basic health care* as opposed to the income needed to buy it lies in its appeal to our social understandings of the kind of good that basic health care is. If, as Michelman suggests, claims about health care or education or housing have greater purchase on the public sense of justice than claims about income, doesn’t this have something to do with the particular features of those particular goods as they are understood in our society? The implication is that courts

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132. *Id.* at 982.

133. *Id.* at 982 n.60.

134. *Id.*

135. *Id.*

136. *Id.* (emphasis added).

stand the best chance of harmonizing their recognition of constitutional welfare rights with latent public morality not by attempting to articulate a comprehensive theory of our moral beliefs, but by reasoning in a more specific and contingent way about the distributive norms applicable to particular social goods.

### B. *One View of Walzer's Spheres of Justice*

What Michelman describes as a “tactical preference” turns out to be the camel’s nose into a quite substantive tent of philosophical inquiry concerning welfare rights. The approach I am developing invokes Walzer’s diagnosis that suppressing “the particularism of interest” of individuals partial to their own identities and wants is not the main challenge in constructing a theory of distributive justice.<sup>137</sup> Instead, the main challenge is to reckon with “the particularism of history, culture, and membership” that shapes the notions of justice that ordinary people belonging to a political community can “recognize . . . as their own.”<sup>138</sup> For Walzer, principles of distributive justice are not derived deductively from “a single decision point”<sup>139</sup> or “a single formula, universally applicable,”<sup>140</sup> that is agreed upon by rational parties to a hypothetical social contract. They are elucidated inductively from “the social meanings of the goods at stake” in an actual living community.<sup>141</sup> On this view, whether a distributive pattern is just or unjust cannot be determined in the abstract; the question must be answered by reference to a particular social good and to a particular society’s shared conception of the nature, value, or purpose of that good. By focusing on shared understandings of social goods, Walzer’s account of distributive justice is not only particularistic but also pluralistic: “different social goods ought to be distributed for different reasons, in accordance with different procedures, by different agents; and . . . all these differences derive from different understandings of the social goods themselves.”<sup>142</sup>

In *Spheres of Justice*, Walzer examines the distributive logics that inhere in a wide range of social goods—what he calls “spheres of distribution”—whose

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137. WALZER, *supra* note 24, at 5.

138. *Id.*; cf. WALZER, *supra* note 26, at 15-16 (explaining that, even if exiles, refugees, and stateless people may need a protective “universal (if minimal) morality . . . worked out among strangers,” what ordinary people “commonly want . . . [is] a dense moral culture within which they can feel some sense of belonging”).

139. WALZER, *supra* note 24, at 4; *see id.* (“[T]he first impulse of the philosopher is . . . to search for some underlying unity: a short list of basic goods, quickly abstracted to a single good; a single distributive criterion or an interconnected set; and the philosopher himself standing, symbolically at least, at a single decision point. I shall argue that to search for unity is to misunderstand the subject matter of distributive justice.”).

140. *Id.* at 79 (referring to Rawls).

141. *Id.* at 9.

142. *Id.* at 6.



autonomy must be maintained lest one social good unjustly dominate another.<sup>143</sup> Within the sphere of welfare, Walzer's perspective is similar to Rawls's in that both understand welfare provision to serve the values of social respect and equal citizenship.<sup>144</sup> Thus Rawls and Walzer would likely agree that inadequate medical care is not only "dangerous" to one's physical well-being but also "degrading" to one's social standing and self-esteem.<sup>145</sup> But Rawls does not explore how "the basic wants of individuals"<sup>146</sup>—their specific content, the proper levels and modes of provision—are shaped by social conditions. His theory simply posits a level of material well-being necessary to assure the exercise of basic liberties,<sup>147</sup> from which Michelman gleans a set of "objective biological entailments" that give rise to subsistence rights.<sup>148</sup> Walzer's point is that welfare needs are not susceptible to objective specification in this way. "Though there are some goods that are needed absolutely, there is no good such that once we see it, we know how it stands vis-à-vis all other goods and how much of it we owe to one another."<sup>149</sup> Which goods require mutual provision and how much should be provided are questions that can only be answered within the cultural and historical understandings of a particular society. This is what Walzer means when he says that "[a]ll the goods with which distributive justice is concerned are social goods"<sup>150</sup> and that welfare needs come into existence only as "*socially recognized needs*."<sup>151</sup>

An important implication of Walzer's view is that welfare rights are not static; they evolve as social meanings and conditions evolve. Taking health care

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143. *Id.* at 10; *see id.* at 10-11 ("Dominance describes a way of using social goods that isn't limited by their intrinsic meanings or that shapes those meanings in its own image."). Walzer's survey of social goods encompasses not only familiar welfare goods and money but also hard work, free time, love and kinship, office, recognition, political power, and membership in a political community.

144. *See id.* at 78 ("Goods must be provided to needy members because of their neediness, but they must also be provided in such a way as to sustain their membership."); *supra* notes 71-72 (discussing the relationship of material provision to self-respect and equal citizenship in Rawls's theory).

145. WALZER, *supra* note 24, at 89.

146. RAWLS, *supra* note 14, at 543.

147. *See id.* at 542.

148. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 989.

149. WALZER, *supra* note 24, at 65. Walzer illustrates the point by noting that even a necessary good such as food "carries different meanings in different places." *Id.* at 8.

Bread is the staff of life, the body of Christ, the symbol of the Sabbath, the means of hospitality, and so on. . . . If the religious uses of bread were to conflict with its nutritional uses—if the gods demanded that bread be baked and burned rather than eaten—it is by no means clear which use would be primary.

*Id.*

150. *Id.* at 7.

151. *Id.* at 65; *see also* T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 56-58 (1950) (noting the importance of in-kind welfare provision, as opposed to income equalization, to securing equality of status in societies that undertake such provision).

again as an example, Walzer explains that the notion of rights in this area is not principally a matter of biological need. Over the centuries and even over recent decades, our perspectives on the proper distribution of health care have changed considerably in light of the technical capabilities of medicine, the economic organization of health care delivery, and changing social attitudes toward the importance of physical versus spiritual well-being.<sup>152</sup> To speak of a right to health care would have made little sense in earlier times when the efficacy of medicine compared to faith healing or folk remedies (or doing nothing) was marginal, when medical intervention was not costly or inaccessible, or when religious salvation rather than physical longevity had greater social importance. As these conditions have changed, so have our expectations of health and medical provision. One reason basic health care has become a socially recognized need is our sense that everyone's basic health care needs can, as a technical and economic matter, be met: "People will not endure what they no longer believe they have to endure."<sup>153</sup> Walzer's conclusion that our society has now committed itself "to provide minimally decent care to all who need it" is certainly debatable.<sup>154</sup> But his larger point is that public recognition of such a commitment ultimately turns on a shared understanding of needs refracted through the prism of evolving social practices and historical conditions.

In presenting his theory, Walzer appears to vacillate between the skeptical claim that transcendent principles of justice do not exist<sup>155</sup> and the pragmatic (in the lay sense) claim that such principles, though philosophically conceivable, do not carry any special authority in governing the affairs of a given society with its own history, culture, and traditions.<sup>156</sup> My interest is in the latter claim and its implications for judicial recognition of welfare rights. The important question Walzer poses is: what kinds of arguments are most conducive to making distributive justice not a mere aspiration or philosophical

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152. See WALZER, *supra* note 24, at 86-91.

153. *Id.* at 88.

154. *Id.*; cf. Ronald Dworkin, 'Spheres of Justice': An Exchange, N.Y. REV. BOOKS, July 21, 1983, at 44, 44-45 (arguing that the mixed record of public provision of medical care in the United States allows no clear interpretation of our shared commitment).

155. See WALZER, *supra* note 24, at 5 (rejecting the assumption that "there is one, and only one, distributive system that philosophy can rightly encompass"); *id.* at 315 ("Just as one can describe a caste system that meets (internal) standards of justice, so one can describe a capitalist system that does the same thing."). This skeptical claim has been met with a variety of criticisms decrying Walzer's moral relativism. See, e.g., DWORKIN, *supra* note 90, at 214-20; Brian Barry, *Spherical Justice and Global Injustice*, in PLURALISM, JUSTICE, AND EQUALITY 67, 79 (David Miller & Michael Walzer eds., 1995); Joseph Carens, *Complex Justice, Cultural Difference, and Political Community*, in PLURALISM, JUSTICE, AND EQUALITY, *supra*, at 45, 61-66; Joshua Cohen, Book Review, 83 J. PHIL. 457, 463-64 (1986) (reviewing WALZER, *supra* note 24).

156. See WALZER, *supra* note 24, at xiv ("Justice and equality can conceivably be worked out as philosophical artifacts, but a just or an egalitarian society cannot be."). See generally Walzer, *supra* note 26.

ideal but “a practical possibility here and now” in a given society?<sup>157</sup> His answer, I believe, speaks to the unstated intuition behind Michelman’s insistence that justiciable welfare rights should take the form of rights to concrete and specific goods. In order to render welfare rights persuasive and intelligible to the citizenry, the judge’s task is not to discover and pronounce them from “an objective and universal standpoint” but instead “to interpret to one’s fellow citizens the world of meanings that we share.”<sup>158</sup>

### *C. Some Examples*

Of course, shared understandings are not always easy to discern. How much agreement is required and what counts as evidence of agreement are contested issues, and I address the problems of indeterminacy and judicial activism in Part IV.B below. Before taking up those objections, however, it is important to see that the general mode of reasoning is hardly unfamiliar to courts in light of the many constitutional doctrines that turn on interpretation of social meanings. In some areas, the constitutional text may be said to invite this interpretive approach. Consider, for example, the Eighth Amendment prohibition on “cruel and *unusual* punishments,”<sup>159</sup> whose application invokes the “evolving standards of decency that mark the progress of a maturing society,”<sup>160</sup> or the Fourth Amendment prohibition on “*unreasonable* searches and seizures,”<sup>161</sup> whose application looks to the “reasonable expectation of privacy” that individuals have in our society.<sup>162</sup> But even without these textual hooks, the Court has employed the interpretive approach in construing such guarantees as freedom of speech, equal protection, and due process. Consider, for example, the determination of obscenity under “contemporary community standards”;<sup>163</sup> the identification of “fighting words” based on what “ordinary men know . . . are likely to cause a fight”;<sup>164</sup> the measurement of due process “by that whole community sense of ‘decency and fairness’ that has been woven by common experience into the fabric of acceptable conduct”;<sup>165</sup> the invalidity of gender classifications based on “outdated misconceptions concerning the

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157. WALZER, *supra* note 24, at xiv.

158. *Id.*

159. U.S. CONST. amend. VIII (emphasis added).

160. *Trop v. Dulles*, 356 U.S. 86, 100-01 (1958) (plurality opinion); *see Roper v. Simmons*, 543 U.S. 551 (2005); *Atkins v. Virginia*, 536 U.S. 304 (2002).

161. U.S. CONST. amend. IV (emphasis added).

162. *Bond v. United States*, 529 U.S. 334, 337 (2000); *California v. Ciraolo*, 476 U.S. 207, 218 (1986).

163. *Miller v. California*, 413 U.S. 15, 37 (1973) (internal quotation marks and citations omitted).

164. *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (internal quotation marks omitted).

165. *Breithaupt v. Abram*, 352 U.S. 432, 436 (1957); *see Rochin v. California*, 342 U.S. 165, 173 (1952) (“Coerced confessions offend the community’s sense of fair play and decency.”).

role of females”;<sup>166</sup> or the “reasonableness” of punitive damages under the Due Process Clause.<sup>167</sup>

As Professor Post has argued, such examples show that constitutional law “is not autonomous from culture” and “properly evolves as culture evolves.”<sup>168</sup> In applying these doctrines, courts make judgments informed by state policies, the common law, cultural practices, social facts, historical context, and the everyday “knowledge [of] a literate participant in American culture.”<sup>169</sup> This approach responds to Michelman’s concern for the “understandability of judicial decisions”<sup>170</sup> by orienting a court toward “conceiv[ing] and convey[ing] its judgments within the web of cultural understandings that it shares with the society that it serves.”<sup>171</sup>

We also find instances of this type of judicial reasoning in the area of social welfare. It was famously used to shield welfare legislation from constitutional attack in *West Coast Hotel Co. v. Parrish*,<sup>172</sup> which upheld a state minimum wage law and signaled the beginning of judicial acquiescence to the New Deal. The Court had invalidated an earlier minimum wage law on the ground that

it amounts to a compulsory exaction from the employer for the support of a partially indigent person, for whose condition there rests upon him no peculiar responsibility, and therefore, in effect, arbitrarily shifts to his shoulders a burden which if it belongs to anybody, belongs to society as a whole.<sup>173</sup>

But the Court in 1937, looking candidly to “economic conditions which [had] supervened” and to “recent economic experience,”<sup>174</sup> inverted the moral equities in minimum wage legislation:

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenseless against the denial of a living wage is not only detrimental to their health and well being, but casts a direct burden for their support upon the community. What these workers lose in wages the taxpayers are called upon to pay. The bare cost of living must be met. We may take judicial notice of the unparalleled demands for relief which arose during the recent period of depression and still continue to an alarming extent despite the degree of economic recovery which has been achieved. It is unnecessary to cite official statistics to establish what is of common knowledge through the length and breadth of the land. . . . The

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166. *Craig v. Boren*, 429 U.S. 190, 198-99 (1976); see *J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 135 (1994).

167. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419, 427 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996).

168. Post, *supra* note 27, at 83.

169. *Id.* at 80.

170. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1008.

171. Post, *supra* note 27, at 77.

172. 300 U.S. 379 (1937) (overruling *Adkins v. Children’s Hosp.*, 261 U.S. 525 (1923)).

173. *Adkins*, 261 U.S. at 557-58.

174. *West Coast Hotel*, 300 U.S. at 390, 399.

community is not bound to provide what is in effect a subsidy for unconscionable employers.<sup>175</sup>

Although *West Coast Hotel* did not make the minimum wage constitutionally mandatory, the Court, appealing to “common knowledge,” spoke discerningly on behalf of the community’s evolving moral sense that “[t]he bare cost of living must be met” and that employers must share in the responsibility for meeting the burden.<sup>176</sup>

A similar appeal to changed social understandings informs Justice Douglas’s dissent in *Lindsey v. Normet*,<sup>177</sup> a case concerning landlord-tenant disputes. To expedite resolution of eviction actions for nonpayment of rent, Oregon had established a statutory procedure that, among other things, forbade tenants in eviction actions from litigating affirmative defenses such as the landlord’s failure to maintain the dwelling in habitable condition.<sup>178</sup> Although tenants were allowed to sue landlords on such claims in separate proceedings, an eviction action turned solely on whether the tenant had remained in possession of the premises after defaulting on payment of rent. A group of tenants argued that the eviction procedure violated the Due Process Clause by severing the landlord’s duty to maintain the premises from the tenant’s duty to pay rent. A divided Court upheld the scheme, “see[ing] nothing to forbid Oregon from treating the undertakings of the tenant and those of the landlord as

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175. *Id.* at 399; see Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873, 876, 880-81 (1987) (explaining that *West Coast Hotel* recalibrated the baseline for what constitutes a public “subsidy”).

176. *West Coast Hotel*, 300 U.S. at 399; see WALZER, *supra* note 24, at 82 (arguing that, in social conflicts over public health and welfare regulation, “the ultimate appeal . . . is not to the particular interests [of a regulation’s proponents], not even to a public interest conceived as their sum, but to collective values, shared understandings of membership, health, food and shelter, work and leisure”). Note that *West Coast Hotel* addressed a minimum wage law applicable to women but not men. In addition to changing norms concerning public provision and employer responsibility, the Court also appealed to social understandings of the disadvantages faced by women in the workplace. See *West Coast Hotel*, 300 U.S. at 394 (“[W]oman’s physical structure and the performance of maternal functions place her at a disadvantage in the struggle for subsistence,” and . . . her physical well being ‘becomes an object of public interest and care in order to preserve the strength and vigor of the race.’” (quoting *Muller v. Oregon*, 208 U.S. 412, 421 (1908))); *id.* at 398 (“[W]omen . . . are in the class receiving the least pay, . . . their bargaining power is relatively weak, and . . . they are the ready victims of those who would take advantage of their necessitous circumstances.”). Although these passages seem paternalistic to modern readers, “[t]he historical evidence makes clear that women-only state protective laws, developed in the 1900s through 1920s, resulted from hard-fought advocacy and leadership by a broad coalition of women’s organizations on behalf of low-wage working women.” Ann O’Leary, *How Family Leave Laws Left Out Low-Income Workers*, 28 BERKELEY J. EMP. & LAB. L. 1, 12 (2007); see *id.* at 9 & n.37 (citing DOROTHY SUE COBBLE, *THE OTHER WOMEN’S MOVEMENT* 145-205 (2004); ALICE KESSLER-HARRIS, *OUT TO WORK: A HISTORY OF WAGE-EARNING WOMEN IN THE UNITED STATES* 180-214 (20th anniversary ed. 2003); THEDA SKOCPOL, *PROTECTING SOLDIERS AND MOTHERS: THE POLITICAL ORIGINS OF SOCIAL POLICY IN THE UNITED STATES* 373-423 (1992)).

177. 405 U.S. 56 (1972).

178. See *id.* at 65-66.

independent rather than dependent covenants.”<sup>179</sup> That tenants could pursue their claims against landlords in nonpossessory proceedings was, in the Court’s view, sufficient to satisfy the “[d]ue process require[ment] that there be an opportunity to present every available defense.”<sup>180</sup>

Justice Douglas’s dissent spoke of the tenant’s “fundamental right” to his home.<sup>181</sup> But the thrust of his dissent focused on the way modern understandings of leaseholds, as reflected in the common law, should inform the requirements of due process in an eviction action. Oregon’s statutory scheme, which “ha[d] been in effect for over 100 years,”<sup>182</sup> reflected “the feudal culture in which property law evolved.”<sup>183</sup> In that agrarian culture, Justice Douglas explained, the tenant “‘rented land primarily for the production of crops.’”<sup>184</sup> If he wanted to make his dwelling on the land, “‘it was his business to make that dwelling livable, to see to it that the roof was watertight, that the well was in good shape, and that whatever sanitary facilities there were, were adequate.’”<sup>185</sup> But with industrialization, urbanization, and the rise of multiunit rental property, the feudal model of leaseholds became anachronistic: “‘to require a relatively transient tenant to assume the obligation of repair . . . with respect to his rooms and with respect to plumbing, heating, and other fixtures that were interconnected with other parts and fixtures in the building made no sense at all.’”<sup>186</sup> The duty to repair increasingly shifted to the landlord, but old statutes like Oregon’s continued to treat the leasehold as a conveyance in land separate and distinct from any covenant to repair.

Meanwhile, the common law had evolved toward analysis of urban leaseholds under principles of contract, not property, in response to the social fact that “‘[w]hen American city dwellers, both rich and poor, seek ‘shelter’ today, they seek a well known package of goods and services—a package that includes not merely walls and ceilings, but also adequate heat, light and ventilation, serviceable plumbing facilities, secure windows and doors, proper sanitation, and proper maintenance.’”<sup>187</sup> Noting that Oregon had adopted this

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179. *Id.* at 68. Five Justices comprised the majority, while Justices Douglas and Brennan dissented. Justices Powell and Rehnquist, then newly appointed to the Court, did not participate.

180. *Id.* at 66 (internal quotation marks and citation omitted).

181. *Id.* at 89-90 (Douglas, J., dissenting).

182. *Id.* at 62 n.5 (majority opinion).

183. *Id.* at 86 (Douglas, J., dissenting).

184. *Id.* at 86 n.12 (quoting FRANK P. GRAD, NAT’L COMM’N ON URBAN PROBLEMS, RESEARCH REPORT NO. 14, LEGAL REMEDIES FOR HOUSING CODE VIOLATIONS 110 (1968)).

185. *Id.* (quoting GRAD, *supra* note 184, at 110).

186. *Id.* at 87 n.13 (quoting GRAD, *supra* note 184, at 112).

187. *Id.* at 84 (quoting *Javins v. First Nat’l Realty Corp.*, 428 F.2d 1071, 1074 (D.C. Cir. 1970) (Wright, J.)); see *Javins*, 428 F.2d at 1075 (“In order to reach results more in accord with the legitimate expectations of the parties and the standards of the community, courts have been gradually introducing more modern precepts of contract law in interpreting leases.”).

common law understanding,<sup>188</sup> Justice Douglas explained that if a lease is a contract, then “all defenses relevant to its legality and its actual operation would seem to be within the ambit of the opportunity to be heard that is embraced within the concept of due process.”<sup>189</sup> In other words, a tenant should not be at risk of “los[ing] the essence of the controversy” until he has had a “real opportunity to defend.”<sup>190</sup> Douglas’s point was not that the Due Process Clause itself requires a lease to be interpreted as a contract. His point was that such an interpretation, when consistently validated in the common law, reflects a well-evolved social understanding that properly informs the constitutional notion of fundamental fairness. In his view, Oregon’s archaic eviction procedure violated fundamental fairness by violating that social understanding.<sup>191</sup>

This interpretive approach has also informed judicial decisions concerning education, including *Brown v. Board of Education*.<sup>192</sup> In the first half of *Brown*, the Court reviewed the growing importance of public education in the United States since the Fourteenth Amendment’s adoption<sup>193</sup> and emphasized the need to “consider public education in the light of its full development and its present place in American life throughout the Nation.”<sup>194</sup> This was the prologue to *Brown*’s memorable passage affirming “our recognition of the importance of education to our democratic society.”<sup>195</sup> A crucial element of

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188. See *Lindsey*, 405 U.S. at 87 (Douglas, J., dissenting) (citing *Wright v. Bauman* 398 P.2d 119 (Or. 1965); *Eggen v. Wetterborg*, 237 P.2d 970 (Or. 1951)).

189. *Id.* at 88-89; see *Javins*, 428 F.2d at 1082 (“Under contract principles, . . . the tenant’s obligation to pay rent is dependent upon the landlord’s performance of his obligations, including his warranty to maintain the premises in habitable condition.” (footnote omitted)).

190. *Lindsey*, 405 U.S. at 90 (Douglas, J., dissenting).

191. The outdated Oregon statute in *Lindsey* seems an ideal candidate for the sort of judicial sunset and remand to the legislature proposed by Guido Calabresi. See GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982). In urging a judicial check on statutes that do not “represent[] current majorities” or do not cohere “with a new social or legal topography,” *id.* at 6, Calabresi’s proposal is similar in motivation to the conception of the judicial role described here. Although his book generally opposed the use of constitutional adjudication to implement a judicial check on outmoded statutes, see *id.* at 8-15, as a judge he has argued that constitutional adjudication encompasses the practice of a “constitutional remand” to test whether constitutionally suspect legislation enjoys the contemporary, deliberate support of the people and their representatives. See *Quill v. Vacco*, 80 F.3d 716, 739-40 (2d Cir. 1996) (Calabresi, J., concurring in the judgment), *rev’d*, 521 U.S. 793 (1997); cf. *infra* Part IV.B (discussing application of constitutional remand to social welfare legislation).

192. 347 U.S. 483 (1954).

193. See *id.* at 489-90.

194. *Id.* at 492-93.

195. *Id.* at 493 (“Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a

this temporally situated understanding, the Court explained, is the principle that educational “opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.”<sup>196</sup>

In later cases, however, the fundamental right strand of *Brown* did not appear essential to the invalidity of segregation,<sup>197</sup> and it has largely been eclipsed by the Court’s decision in *San Antonio Independent School District v. Rodriguez* upholding school funding disparities based on local property taxes and declining to recognize education as a fundamental right.<sup>198</sup> Whereas *Brown* offered a nationalizing narrative of education’s “present place in American life” and its importance to “good citizenship” and “even service in the armed forces,”<sup>199</sup> *Rodriguez* invoked a different social understanding rooted in the local concerns that traditionally shaped the organization, governance, and finance of public schools. The Court spoke at length of society’s attachment to local control of education and analyzed the issue of school finance through the values of pluralism and experimentation.<sup>200</sup> According to the Court, the inequitable Texas finance system at issue was not the result of callous majoritarianism, but rather the latest innovation in a series of reforms designed “to extend public education and to improve its quality.”<sup>201</sup>

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principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.”).

196. *Id.* Although the parts of *Brown* discussing segregation’s harms to black children have a more countermajoritarian thrust, *see id.* at 493-94, historical evidence suggests that the decision as a whole was largely in step with evolving national sentiment. *See* Michael J. Klarman, *Brown at 50*, 90 VA. L. REV. 1613, 1621 (2004) (“The Justices in *Brown* did not think that they were creating a movement for racial reform; they understood that they were working with, not against, historical forces.”); *see also* JEFFREY ROSEN, *THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA* 58-63 (2006) (discussing social and political forces that made *Brown* possible).

197. *See* *New Orleans City Park Improvement Ass’n v. Detiege*, 358 U.S. 54 (1958) (per curiam) (summarily extending *Brown* to parks and recreational facilities); *Gayle v. Browder*, 352 U.S. 903 (1956) (per curiam) (same for buses); *Holmes v. City of Atlanta*, 350 U.S. 879 (1955) (per curiam) (same for golf courses); *Baltimore v. Dawson*, 350 U.S. 877 (1955) (per curiam) (same for beaches and bathhouses).

198. 411 U.S. 1, 29-37 (1973).

199. *Brown*, 347 U.S. at 492-93.

200. *See Rodriguez*, 411 U.S. at 49-50.

201. *Id.* at 39 (emphasis omitted); *see id.* at 6-11 (reviewing the history of school finance reform in Texas); *id.* at 55 (“The Texas plan is not the result of hurried, ill-conceived legislation. . . . In its essential characteristics, the Texas plan . . . reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution.”). In 1973, school-finance reform at the state level was just getting underway, and the Court was reluctant to interpose a layer of judicial oversight on that process. In this respect, *Rodriguez* may be seen as consistent with the role of courts within the theory of democratic experimentalism. *See* Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267, 464 (1998) (“Necessarily, judicial review would be more deferential in the early, local stages of an experiment but less so as the state compiles data about its effectiveness.”); *see id.* at 465-66



By “staying our hand,”<sup>202</sup> the Court sought to enable state and local reform efforts to proceed without federal judicial oversight. Indeed, the Court’s reluctance to establish a national legal standard for school finance was perhaps unsurprising given that education did not even become a significant focus of national policy until the Elementary and Secondary Education Act of 1965.<sup>203</sup> In 1973, the Court could credibly assert that local control of education stood out as an exception “[i]n an era that has witnessed a consistent trend toward centralization of the functions of government.”<sup>204</sup>

From today’s vantage point, this interpretation of educational norms no longer seems persuasive, as centralizing trends have eroded local control of public schools in favor of state and increasingly federal authority. The modern understanding of education as a national concern began to take hold in our political culture during the 1980s, with the famed *Nation at Risk* report and President George H.W. Bush’s “education summit” of the nation’s governors.<sup>205</sup> Legislation enacted during the Clinton administration began to establish a federal framework for state-level reforms centered on rigorous academic standards, testing, and strong accountability measures.<sup>206</sup> Under President George W. Bush, the bipartisan No Child Left Behind Act (NCLB) has intensified this path of reform by marshaling education policy and practice toward “[c]losing the achievement gap” and “ensur[ing] that all children have a fair, equal, and significant opportunity to obtain a high-quality education.”<sup>207</sup> Through NCLB, Congress has required states, as a condition of federal education aid, to establish and enforce goals for equitable and adequate performance outcomes. These goals implicate the need for fair distribution of educational resources, although the federal role does not set clear standards for the resources children need in order to meet learning goals. School finance litigation and reform throughout the states have also invoked concepts of equity and adequacy, and have resulted in more centralized funding of public education. All of these changes have occurred as the importance of education to economic success and effective participation in our democratic society has increased substantially.<sup>208</sup>

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(discussing the evolution of school finance adequacy litigation after *Rodriguez* in light of emerging data and “current best practices”); see also *infra* text accompanying notes 327-28.

202. *Rodriguez*, 411 U.S. at 58.

203. Elementary and Secondary Education Act of 1965, Pub. L. No. 89-10, 79 Stat. 27. Even with this legislation, the federal role in education in the 1960s largely centered on school desegregation and compensatory aid for poor children without reaching deeply into matters of curriculum, assessment, accountability, or governance.

204. *Rodriguez*, 411 U.S. at 49.

205. See NAT’L COMM’N ON EXCELLENCE IN EDUC., A NATION AT RISK: THE IMPERATIVE FOR EDUCATIONAL REFORM (1983); MARIS A. VINOVSIS, NAT’L EDUC. GOALS PANEL, THE ROAD TO CHARLOTTESVILLE: THE 1989 EDUCATION SUMMIT (1999).

206. See Improving America’s Schools Act of 1994, Pub. L. No. 103-382, 108 Stat. 3518; Goals 2000: Educate America Act, Pub. L. No. 103-227, 108 Stat. 125 (1994).

207. 20 U.S.C.A. § 6301(3) (West 2008).

208. See JENNIFER CHEESEMAN DAY & ERIC C. NEWBURGER, U.S. DEP’T OF

To be sure, the drift of educational policymaking toward higher levels of government remains contested, as the current debate over NCLB reauthorization reveals. The point of my thumbnail sketch of recent educational history is not that we have definitively reached a point in our public culture where judges should feel confident instantiating a constitutional right to education through one or another distributive principle or institutional reform. It is that a court addressing the issue of educational rights (in some form) would today confront social understandings different from those invoked by the *Rodriguez* Court over three decades ago. Whether the ““overriding importance”” of local control<sup>209</sup> suffices as a justification for inequality in educational opportunity seems open to reexamination in light of the considerable centralization of standard setting and accountability in public education. If the policy context continues to evolve in ways that give substance and institutional form to concepts of equity and adequacy, a well-documented claim of educational inequality or deprivation may one day prompt a court to revisit and distinguish the outdated norms of school finance and organization that prevailed in *Rodriguez*.

#### D. Limiting the Judicial Role

These examples help illuminate two features of the interpretive approach that lessen the risk of judicial overextension at the core of Michelman's concerns in *On Protecting the Poor*. Michelman sought to cabin the judicial role by urging courts to reframe welfare rights as rights to minimum provision rather than equal access. But the judicial role he envisioned was anchored in a moral theory whose logic has equal applicability to the full range of basic welfare goods. The theory seems to imply that a court recognizing a right to adequate education, for example, would inexorably be led to recognize similar rights to basic health care, food, and housing for the same reasons.<sup>210</sup> In *Rodriguez*, the Court worried that a theory so easily extended from one welfare domain to another would leave the judicial role without “logical limitations.”<sup>211</sup>

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COMMERCE, THE BIG PAYOFF: EDUCATIONAL ATTAINMENT AND SYNTHETIC ESTIMATES OF WORK-LIFE EARNINGS 3 (2002) (showing increasing wage premium for additional years of schooling from 1975 to 1999); RICHARD J. MURNANE & FRANK LEVY, TEACHING THE NEW BASIC SKILLS: PRINCIPLES FOR EDUCATING CHILDREN TO THRIVE IN A CHANGING ECONOMY (1996) (discussing the increasing need for cognitive skills in the modern economy); Eric A. Hanushek, *Alternative School Policies and the Benefits of General Cognitive Skills*, 25 ECON. EDUC. REV. 447, 449-51 (2006) (reviewing evidence that cognitive skills are positively correlated with individual earnings).

209. *Rodriguez*, 411 U.S. at 49 (quoting *Wright v. City of Emporia*, 407 U.S. 451, 478 (1972) (Burger, C.J., dissenting)).

210. Indeed, when Michelman mentions these goods, he typically discusses them without differentiation. See Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 962, 966, 989, 1002.

211. *Rodriguez*, 411 U.S. at 37; see *id.* (“How, for instance, is education to be

By contrast, the interpretive approach sketched here is premised on the particularity of social goods and of the social understandings attached to each. In evaluating an asserted right to a particular welfare good, a court does not inquire whether the right is logically entailed by a transcendent principle of justice. Instead, it interprets the historical and cultural understandings that have shaped the meaning and modes of provision of the good in question. To the extent that different understandings attend different social goods, a court may reach different conclusions about the distributive norms applicable to each good. It is significant, for example, that K-12 education, unlike health care, has long been compulsory and almost entirely government-provided in our society. The elements of compulsion and public monopoly give added traction to arguments for distributive fairness, although such arguments, as noted earlier, have historically competed with the tradition of local control and variation. Health care, on the other hand, has characteristics of an entitlement as well as a market commodity within our mixed system of private and public provision. With almost one-sixth of the population uninsured,<sup>212</sup> judicial recognition of a right to basic health care seems unlikely without a foundation of legislative efforts instantiating a societal commitment to universal coverage.<sup>213</sup> In short, because different welfare goods implicate different social understandings, judicial recognition of welfare rights need not occur in a wholesale, across-the-board way. For any particular welfare good, such recognition turns on the evolving social meanings and practices related to that good.

Moreover, the interpretive approach is premised on an institutional perspective on how welfare rights come into being, and this perspective also limits the judicial role. The interstitial nature of the judicial role in enforcing welfare rights—for example, invalidating statutory eligibility requirements or strengthening procedural protections against withdrawal of benefits—is often thought to reflect what Robert Post and Reva Siegel have elsewhere called “the pragmatic horizon of adjudication.”<sup>214</sup> On this view, it is as if welfare rights were always “there” and judicially discoverable but not perfectly enforceable because courts, as a matter of separation of powers, cannot order a welfare program into existence from scratch.<sup>215</sup> This is an argument about institutional capacity, not about the existence of the underlying right.

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distinguished from the significant personal interests in the basics of decent food and shelter?”).

212. See CARMEN DENAVAS WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2007, at 19 (2008).

213. Cf. Pam Belluck, *Massachusetts Sets Health Plan for Nearly All*, N.Y. TIMES, Apr. 5, 2006, at A1; Milt Freudenheim, *Mayo Clinic Proposing a Universal Health Plan*, N.Y. TIMES, Sept. 15, 2007, at C4; Kevin Sack, *California Takes Big Step Toward Universal Health Care*, N.Y. TIMES, Dec. 18, 2007, at A25; Kevin Sack, *San Francisco to Offer Care for Every Uninsured Adult*, N.Y. TIMES, Sept. 14, 2007, at A1.

214. Post & Siegel, *supra* note 27, at 1970.

215. See Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1014 (discussing “the judiciary’s seizing upon a legislative initiative which it could not, within separation-of-powers constraints, have compelled in spite of felt claims of right, for the purpose of

A different account of why courts are generally limited to an interstitial role is one that understands the existence of a welfare right to depend in the first instance on democratic instantiation, typically in the form of a legislated program. As Walzer explains:

It's not the case . . . that members [of a society] have a claim on any specific set of goods. Welfare rights are fixed only when a community adopts some program of mutual provision. There are strong arguments to be made that, under given historical conditions, such-and-such a program should be adopted. But these are not arguments about individual rights; they are arguments about the character of a particular political community. No one's rights were violated because the Athenians did not allocate public funds for the education of children. Perhaps they believed, and perhaps they were right, that the public life of the city was education enough.<sup>216</sup>

From this perspective, courts find themselves playing an interstitial role in effectuating welfare rights not because of separation-of-powers constraints, but because it is only through democratic adoption of a program of mutual aid that a welfare right plausibly comes into being for courts to recognize.

Of course, it is not the case that any legislation providing a needed welfare good instantly gives rise to a cognizable right. What is important is an enactment or a pattern of enactments with sufficient ambition and durability that reflects the outcome of vigorous public contestation and the considered judgment of a highly engaged citizenry. A helpful notion is William Eskridge and John Ferejohn's concept of a "super-statute," which they define as "a law or series of laws that (1) seeks to establish a new normative or institutional framework for state policy and (2) over time does 'stick' in the public culture such that (3) the super-statute and its institutional or normative principles have a broad effect on the law."<sup>217</sup> Welfare rights may be said to originate in enactments whose "normative gravity" is felt "beyond the four corners of the statute" and whose principles become so deeply embedded in our public culture that they "can reshape constitutional understandings."<sup>218</sup> The embedding process occurs "not through a single stylized dramatic confrontation" but

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thenceforth securing and expanding the fulfillment of such claims"); Tribe, *supra* note 5, at 1089-90 ("To say [that the Court plays an interstitial role and cannot prevent government from altogether refusing to help the poor] is not to deny that government has affirmative duties to its citizens arising out of the basic necessities of survival, but only to deny that such duties are perfectly enforceable in court.").

216. WALZER, *supra* note 24, at 78-79.

217. William N. Eskridge, Jr. & John Ferejohn, *Super-Statutes*, 50 DUKE L.J. 1215, 1216 (2001).

218. *Id.* As Eskridge and Ferejohn explain, "super-statutes mediate the tension between democracy or popular accountability and the evolution of higher law at the hands of unelected judges." *Id.* at 1276. Just as Bruce Ackerman's theory of "constitutional moments" explains how our fundamental law evolves outside the formal process of constitutional amendment, super-statutes similarly provide a vehicle for higher lawmaking outside of constitutional moments and the Article V process. *See id.* at 1267-75 (discussing 1 BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991), and 2 BRUCE ACKERMAN, *WE THE PEOPLE: TRANSFORMATIONS* (1998)).

“through a series of public confrontations and debates over time” that engage the citizenry in careful deliberation on matters of substantive principle as well as institutional design.<sup>219</sup>

As one example, consider the role the No Child Left Behind Act might play in the evolution of a constitutional right to education. The present scheme establishes some important normative principles—such as the need to hold all children to a common set of state standards and systemic accountability for closing achievement gaps—that comprise a contested framework for the delivery and organization of education.<sup>220</sup> Whether these principles will “stick” in the public culture depends on whether they are reaffirmed, over vocal objections, in successive reauthorizations of the statute. Education may acquire other right-like qualities if NCLB were to incorporate national academic standards that establish common expectations across states of what constitutes an adequate education,<sup>221</sup> to require education resources to be distributed equitably at all levels and aligned to standards for student performance,<sup>222</sup> to authorize judicial enforcement of school, district, and state obligations under the statute,<sup>223</sup> or to frame its core purpose as enforcing the equal protection or national citizenship guarantee of the Fourteenth Amendment.<sup>224</sup> The substantive and institutional reach of such reforms would provoke vigorous public debate and robust opposition. They could succeed only after exhaustive hearings and serious deliberation, perhaps requiring multiple legislative

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219. *Id.* at 1270; *see id.* at 1273. Jeremy Waldron has argued that legislation is, on the whole, a better process than adjudication for social contestation and decision making about substantive rights because courts, ever concerned about the legitimacy of judicial review, are too often distracted by side arguments over interpretation, doctrine, and precedent whereas the normal function of legislatures is to focus on the actual substance of moral issues. *See* Jeremy Waldron, *The Core of the Case Against Judicial Review*, 115 YALE L.J. 1346, 1380-86 (2006). Unlike Waldron, I do not believe this argument justifies the elimination of judicial review because the legislative process is not always as deliberative as it should be. *See id.* at 1386 (acknowledging that “legislative reasoning [can] be a disgrace, as legislative majorities act out of panic, recklessly, or simply parrot popular or sectarian slogans in their pseudo-debates”); *infra* Part IV.B (discussing the role of courts in promoting “due process of lawmaking”). But Waldron’s insight supports the point that welfare rights must originate in the legislative process if they are to exist as democratically legitimate reflections of the society’s substantive moral commitments.

220. *See* 20 U.S.C.A. §§ 6301(3)-(4), 6311(b) (West 2008).

221. *See* CHESTER E. FINN, JR. ET AL., THOMAS B. FORDHAM FOUND., *TO DREAM THE IMPOSSIBLE DREAM: FOUR APPROACHES TO NATIONAL STANDARDS AND TESTS FOR AMERICA’S SCHOOLS* (2006); DIANE RAVITCH, *NATIONAL STANDARDS IN AMERICAN EDUCATION: A CITIZEN’S GUIDE* (1995); Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2105-13 (2006).

222. *See* EDUC. TRUST, *FUNDING GAPS 2006* (2006); THOMAS B. FORDHAM INST., *FUND THE CHILD: TACKLING INEQUITY AND ANTIQUITY IN SCHOOL FINANCE* (2006); Goodwin Liu, *Improving Title I Funding Equity Across States, Districts, and Schools*, 93 IOWA L. REV. 973 (2008).

223. *See* COMM’N ON NO CHILD LEFT BEHIND, ASPEN INST., *BEYOND NCLB: FULFILLING THE PROMISE TO OUR NATION’S CHILDREN* 75-76 (2007).

224. *See* Liu, *supra* note 3, at 399-406.

attempts over several years. The policies and practices that emerge from a rigorous process of this sort are what provide a foundation for courts to integrate new social understandings concerning educational opportunity into the articulation of constitutional law.

As discussed further in Part IV.B below, courts as well as legislatures participate in the complex dynamics that endow welfare rights with their full shape and normative weight. But such rights cannot be reasoned into existence by courts on their own. The need to tie welfare rights to the shared understandings of our own society, and not to the hypothetical choices of rational persons denuded of culture and context, serves to cabin the judicial role. There is room for judgment, to be sure, in interpreting how a society understands its obligations of mutual provision. But judges faced with this interpretive task should look to the democratic and cultural manifestations of those understandings, knowing that the legitimacy of judicial intervention on behalf of welfare rights ultimately depends on its coherence with the evolving norms of the public culture. The substantive and procedural rigors of the evolutionary process, along with the particularity of the evolution for each welfare good, suggest a more cautious and discriminating judicial role than one that is guided by a comprehensive moral theory.

#### IV. OBJECTIONS

Under the interpretive approach proposed here, constitutional doctrine is properly informed by, not autonomous from, the ongoing evolution of our fundamental values as reflected in our culture and politics. The justiciability of welfare rights depends on a softening of the conventional distinction between law and politics as well as a dynamic conception of judicial and nonjudicial roles. The understandability and legitimacy of the judicial role in this area are more likely to rest on contingent, socially situated judgments than on universal principles that evoke the idealized autonomy of constitutional law.

In this Part, I address two objections to the interpretive approach. First, if the role of courts in adjudicating welfare rights is to interpret our social practices and understandings, how can such interpretation achieve a critical perspective toward those practices and understandings?<sup>225</sup> Second, how can the interpretive approach be implemented without an intolerable risk that judges, in the name of interpreting society's values, will instead impose their own values on society?

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225. Walzer puts the problem this way: "Given that every interpretation is parasitic on its 'text,' how can it ever constitute an adequate criticism of the text?" WALZER, *supra* note 26, at 18.

*A. Conservatism and Criticism*

For Michelman, the adjudication of welfare rights by reference to “external principle”<sup>226</sup> is premised on the need for judges to proceed from a critical perspective that coherently accounts for the felt injustice of existing arrangements. The philosophical method of constructing a point of view abstracted from the features of any particular society is intended to achieve this kind of critical distance from our actual circumstances. Yet judges wielding this approach face problems of legitimacy, as discussed in Part II. The alternative approach of adjudicating welfare rights from a perspective internal to our society is meant to address those concerns.

But an internal perspective—one that appeals to the society’s own evolving norms—invites the objection that it is “intrinsically conservative.”<sup>227</sup> As Joshua Cohen has argued, “[i]f the values of a community are identified through its current distributive practices, then the distributive norms subsequently ‘derived’ from those values will not serve as criticisms of existing practices.”<sup>228</sup> Similarly, Ronald Dworkin contends that an ideal judge, when interpreting the principle underlying the provision of, say, medical care, “must choose, as the ‘correct’ interpretation, that which in his view comes closest to what abstract justice would require.”<sup>229</sup> What abstract justice requires can only be known “by finding and defending general, critical principles of the appropriate sort” and “by struggling . . . against all the impulses that drag us back into our own culture.”<sup>230</sup> “[J]ustice is at bottom independent of the conventional arguments of any particular society,”<sup>231</sup> Dworkin argues, because “it is part of our common political life, if anything is, that justice is our critic not our mirror.”<sup>232</sup>

I will try to show in a moment how judges can wield values expressed in our public culture and institutions to criticize existing practices. But first it may

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226. Michelman, *Constitutional Welfare Rights*, *supra* note 13, at 1007.

227. Cohen, *supra* note 155, at 464.

228. *Id.* at 463-64; *see also* Michael Rustin, *Equality in Post-Modern Times*, in PLURALISM, JUSTICE, AND EQUALITY, *supra* note 155, at 17, 36 (“[T]he idea that justice is circumscribed by shared understandings is an empty one. If this were wholly so, change would be ruled out a priori, since new ideas must by definition of their newness be different from and thus in some respect break with old ones.”).

229. Dworkin, *supra* note 154, at 45. Dworkin argues that the ideal judge, in deciding constitutional questions, “must construct . . . a constitutional theory” that provides “a full political theory that justifies the constitution as a whole.” RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 106 (1977). The judge’s task is to develop the “best” theory that accounts for a particular concept, such as dignity or equality, *see id.* at 128, and to arrive at “his own judgment of the institutional morality of his community” without deferring “to the judgment of most members of that community about what that is,” *id.* at 129.

230. Ronald Dworkin, *To Each His Own*, N.Y. REV. BOOKS, Apr. 14, 1983, at 4, 6 (reviewing WALZER, *supra* note 24), *reprinted in* DWORKIN, *supra* note 90, at 219.

231. Dworkin, *supra* note 154, at 45.

232. DWORKIN, *supra* note 90, at 219.

be helpful to take a closer look at Dworkin's suggestive claim that "justice is our critic not our mirror." For Dworkin, a mirror does nothing more than "uselessly reflect[] a community's consensus and division back upon itself."<sup>233</sup> Yet that is not the only way or the best way of understanding what happens when one holds up a mirror to society. In ordinary parlance, holding up a mirror to society is a way of enabling the society to see, in an uncompromising and critical light, its faults and shortcomings. The idea of mirroring functions as a metaphor for social criticism. When we unpack this metaphor, we find two elements that explain its intuitive force. First, a mirror makes visible the aspects of our society that we ordinarily do not see or would rather ignore. Second, a mirror does more than reflect our social condition; it invites a comparison between that reality and the way we envision it to be. When we hold up a mirror to society, it is as though we see a double image: a reflection of the actual state of society and, in our mind's eye, an image of the society we believe ours to be. This latter image accounts for the critical element in the idea of mirroring. A mirror is a metaphor for social criticism because it candidly reveals the gap between the image we hold of ourselves and the unflattering features of our actual circumstances.

This approach to social criticism should induce some skepticism toward the claim that in constitutional adjudication "it makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority."<sup>234</sup> The Supreme Court's Eighth Amendment jurisprudence offers the most familiar example of how constitutional doctrine can wield majoritarian values in defense of minority interests. There the Court looks to "contemporary values" as expressed primarily in "legislation enacted by the country's legislatures" to discern the existence of a protected individual right.<sup>235</sup> Although this doctrine may seem a special case because the Eighth Amendment expressly bans "unusual" punishment,<sup>236</sup> the Court placed similar reliance on historical and contemporary state practices in reading the Due Process Clause to invalidate the antisodomy law in *Lawrence v. Texas*.<sup>237</sup>

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233. Dworkin, *supra* note 154, at 46.

234. ELY, *supra* note 116, at 69.

235. *Atkins v. Virginia*, 536 U.S. 304, 312 (2002) (quoting *Penry v. Lynaugh*, 492 U.S. 302, 331 (1989)); *see id.* at 315-16 ("[T]he large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it."); *see also Roper v. Simmons*, 543 U.S. 551, 564-65 (2005) (similarly finding "evidence of national consensus against the death penalty for juveniles" based on state laws and practices).

236. U.S. CONST. amend. VIII.

237. 539 U.S. 558 (2003); *see id.* at 568-70 (canvassing American antisodomy laws in the nineteenth and early twentieth centuries, and suggesting that they were directed at predatory or nonprocreative sex, not specifically at private, consensual homosexual activity); *id.* at 570 ("It was not until the 1970's that any State singled out same-sex relations for



When the Court held up a mirror to our society in *Lawrence*, it saw the Texas statute as an aberration to the nation's "laws and traditions in the past half century" demonstrating "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex."<sup>238</sup>

While *Lawrence* and the Eighth Amendment cases invoke the value judgments of a national majority to protect vulnerable groups from the value judgments of a state majority, the use of shared understandings to criticize existing practices is not limited to cases pitting national against state norms. *Frontiero v. Richardson*,<sup>239</sup> for example, addressed the constitutionality of federal statutes imposing different requirements on husbands versus wives to claim housing and medical benefits as "dependents" of uniformed service members. In concluding that gender classifications trigger heightened scrutiny, a four-Justice plurality observed that "over the past decade, Congress has itself manifested an increasing sensitivity to sex-based classifications," citing Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and the Equal Rights Amendment as examples.<sup>240</sup> Congress had passed the benefits statutes challenged in *Frontiero* as recently as 1949 and 1956,<sup>241</sup> but the plurality explained that in the intervening years "Congress itself has concluded that classifications based upon sex are inherently invidious, and this conclusion of a coequal branch of Government is not without significance to the question presently under consideration."<sup>242</sup> In light of the nation's changing gender norms, the plurality found the statutes invalid<sup>243</sup> and laid the groundwork for heightened scrutiny of gender classifications in subsequent cases.<sup>244</sup>

The Court employed a similar mode of reasoning even in a decision as seemingly countermajoritarian as *Romer v. Evans*,<sup>245</sup> which invalidated a Colorado constitutional ballot measure (Amendment 2) barring state and local

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criminal prosecution, and only nine States have done so. . . . Post-*Bowers* even some of these States did not adhere to the policy of suppressing homosexual conduct. Over the course of the last decades, States with same-sex prohibitions have moved toward abolishing them." (citations omitted)); *id.* at 572 (noting state adoption of the Model Penal Code's recommendation against criminalizing private, consensual sexual relations); *id.* at 573 ("The 25 States with laws prohibiting the relevant conduct referenced in the *Bowers* decision are reduced now to 13, of which 4 enforce their laws only against homosexual conduct. In those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct, there is a pattern of nonenforcement with respect to consenting adults acting in private.").

238. *Id.* at 571-72.

239. 411 U.S. 677 (1973) (plurality opinion).

240. *Id.* at 687.

241. *See id.* at 681 n.6.

242. *Id.* at 687-88 (citing, *inter alia*, *Katzenbach v. Morgan*, 384 U.S. 641, 648-49 (1966)). For an illuminating history of how the Court integrated the nation's changing attitudes toward gender equality into constitutional doctrine, see Siegel, *supra* note 27.

243. *Frontiero*, 411 U.S. at 688-91 (plurality opinion).

244. *See* *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976).

245. 517 U.S. 620 (1996).

government entities from adopting laws or policies against sexual orientation discrimination. Central to the dispute was a question of characterization: did Amendment 2 deny gays and lesbians equal protection or, as the state and Justice Scalia put it, “special protection”?<sup>246</sup> Answering this question required the articulation of a legal baseline against which claims of sexual orientation discrimination could be characterized. In defining this baseline, the Court examined Amendment 2’s effect on the legal status of gays and lesbians “in light of the structure and operation of modern anti-discrimination laws.”<sup>247</sup> Because the common law historically “did not specify protection for particular groups” against discrimination in public accommodations,<sup>248</sup> the Court explained, most states have adopted detailed antidiscrimination statutes “enumerating the groups or persons within their ambit of protection.”<sup>249</sup> In our contemporary legal context, “[e]numeration is the essential device used to make the duty not to discriminate concrete and to provide guidance for those who must comply.”<sup>250</sup>

The Court observed that “Colorado’s state and municipal laws typify this emerging tradition of statutory protection”<sup>251</sup> and “have not limited antidiscrimination laws to groups that have so far been given the protection of heightened equal protection scrutiny.”<sup>252</sup> Against the backdrop of state and local laws barring discrimination on the basis of age, military status, marital status, pregnancy, parenthood, custody of a minor child, political affiliation, and physical or mental disability,<sup>253</sup> the Court said:

[W]e cannot accept the view that Amendment 2’s prohibition on specific legal protections does no more than deprive homosexuals of special rights. . . . We find nothing special in the protections Amendment 2 withholds. *These are protections taken for granted by most people either because they already have them or do not need them; these are protections against exclusion from an almost limitless number of transactions and endeavors that constitute ordinary civic life in a free society.*<sup>254</sup>

Thus the Court did not resolve whether protection against sexual orientation discrimination involves equal rights or special rights on the basis of abstract principle, nor did it declare gays a suspect class. Instead, the Court looked to the evolving antidiscrimination norms in Colorado’s positive law and explained that, because antidiscrimination protections are already “taken for granted by most people” as part of “ordinary civic life in a free society,” there was no

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246. *Id.* at 626; *id.* at 640 (Scalia, J., dissenting).

247. *Id.* at 627 (majority opinion).

248. *Id.*

249. *Id.* at 628.

250. *Id.*

251. *Id.*

252. *Id.* at 628-29.

253. *See id.* at 629.

254. *Id.* at 631 (emphasis added).

reason why gays and lesbians should face extra hurdles to enjoying those protections too.

These examples demonstrate how an interpretive approach that appeals to community norms can have critical bite in adjudication. In a society with diverse fonts of lawmaking authority, the institutionalization of an emergent social norm is often partial and incomplete, leaving room for courts to interpret and apply the norm to aberrant policies and practices. In the area of social welfare, this conception of the judicial role does not license courts to declare rights to entirely new benefits or programs not yet in existence. But it does authorize courts, when applying broad constitutional guarantees such as equal protection or due process, to identify and interpret the normative principles that guide extant welfare policies and to use those principles as a basis for assessing the validity of program eligibility criteria, procedures for terminating or reducing benefits, or unequal or inadequate levels of benefit provision.

This view of the judicial role may seem conservative insofar as it envisions courts not instigating but tracking the evolution of shared values that provide a basis for criticizing existing practices. However, this limitation reflects a particular understanding of the nature of social criticism. Although it is possible to criticize the arrangements in a given society from any number of theoretical perspectives, there is little chance that judges can make their decisions persuasive to the rest of society by grounding them in philosophical critique.<sup>255</sup> Again, the mirror metaphor is instructive. Holding up a mirror to society has critical power because it provokes self-recognition. When we see a true reflection of our actual circumstances, its shortcomings draw our attention because we can see in our actual circumstances the basic outlines of our ideal self-image. We measure the practices of our society not against a fixed and universal standard derived by pure ratiocination, but against evolving notions of justice that are intelligible and achievable from the internal standpoint of our own culture. Social criticism, thus understood, is a recursive practice of self-criticism.

We can now see even more clearly why Walzer insists that it would have made no sense to speak of a right to education in ancient Athens or a right to health care in nineteenth-century America. Holding up a mirror to those societies would not have enabled them to recognize the failure of provision as an injustice because they lacked the internal reference points on which such recognition depends. This is not to say that a coherent moral theory urging universal education would have had no traction at all in ancient Athens. If Rawls had been a member of the Athenian Assembly, perhaps he would have convinced some of his fellow citizens.<sup>256</sup> My point is that it would be neither legitimate nor persuasive to the citizenry for a *court* to treat education as a protected right absent a backdrop of laws, institutions, and social

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255. See Walzer, *supra* note 26, at 387-97.

256. See RAWLS, *supra* note 14, at 73, 101, 279 (arguing that equal educational opportunity is essential to effectuating the principle of fair equality of opportunity).

understandings against which failures of provision appear conspicuous and irregular. The mirror metaphor is not meant to provide a complete account of social criticism in all of its possible forms. It is meant to suggest a form of social criticism appropriate for the exercise of judicial review in areas that include welfare rights.

### B. Indeterminacy and Judicial Activism

In interpreting the distributive norms in our welfare policies, institutions, and social practices, courts are neither innovators of moral theory nor instigators of broad social change. But their role is not passive either. It would be a mistake to say that courts “discover” or “describe” our shared understandings, as if those understandings simply exist “out there” as discrete and tidy concepts. The interpretive task requires courts to make socially situated judgments that inevitably foreground certain facets of our collective values while minimizing others as outdated or recessive in the public culture. One reason why adjudication invoking societal values retains a critical edge is that courts exercise judgment in interpreting what our societal values are.

The objection to this conception of the judicial role has two familiar dimensions forcefully stated by John Hart Ely in *Democracy and Distrust*.<sup>257</sup> First, societal values are dynamic and contested; there is rarely if ever a social consensus on important matters. The values of society provide no basis for deciding cases because they can be stated only at a level that is either “uselessly general” or “controversially specific.”<sup>258</sup> Second, even if societal values were determinate and discernible, there is no reason to think that courts are better situated than legislatures to express those values. Although legislatures are “only imperfectly democratic,” it makes no sense to invalidate legislative judgments “on the theory that the legislature does not truly speak for the people’s values, but the Court does.”<sup>259</sup> Both points suggest that appealing to societal values too easily becomes a Trojan horse for imposing the judge’s own values.

These concerns implicate an old debate in which insightful commentators have defended the proper role of courts in discerning and shaping our national values and conventional morality.<sup>260</sup> Rather than rehearse those arguments, I simply note in response to the first concern that, while societal values are often

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257. See ELY, *supra* note 116, at 63-69. Ely’s criticisms were part of his more general thesis that courts, in interpreting the Constitution’s open-ended provisions, have no authority to displace legislative judgments in the name of substantive “fundamental values.” See *id.* at 43-72.

258. *Id.* at 64.

259. *Id.* at 67, 68.

260. See, e.g., Grey, *supra* note 116, at 706-10; Michael J. Perry, *Substantive Due Process Revisited: Reflections on (and Beyond) Recent Cases*, 71 NW. U. L. REV. 417, 443-50 (1976); Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 243-54, 285-311 (1973).

contested and indeterminate, our society has managed to reach broad agreement on such pivotal matters as the illegality of racial segregation,<sup>261</sup> the presumptive invalidity of gender stereotypes,<sup>262</sup> and heightened protection for sexual privacy.<sup>263</sup> To be sure, the societal values that underlie those legal precepts are not so specific as to prescribe a clear result in every case. But by informing appropriate levels of judicial scrutiny, they are far from “uselessly general” in deciding cases. The problem is not that societal values on important issues are inherently indeterminate; societal values evolve, and on some issues they evolve toward what can reasonably be called a social consensus. The problem for courts is to determine, at the moment of decision, whether our collective values on a given issue have converged to a degree that they can be persuasively crystallized and credibly absorbed into legal doctrine. This difficult task requires keen attention to the trajectory of social norms reflected in public policies, institutions, and practices, as well as predictive judgment as to how a judicial decision may help forge or frustrate a social consensus. Yet the task is familiar to common law adjudication and, as noted earlier, pervades the interpretive work of courts on a wide range of constitutional questions.<sup>264</sup>

The more significant objection is the second: in what sense are courts better situated than legislatures to discern and express society’s values? Unlike common law adjudication, and even unlike constitutional adjudication such as judicial review of the reasonableness of police conduct under the Fourth Amendment, judicial review of social welfare policy under the open-textured guarantee of the Equal Protection Clause or the Due Process Clause engages courts in interpreting societal values in the face of legislation already purporting to reflect those values. On what grounds could a court say that a duly enacted statute regulating access to a desired social good does not accurately reflect society’s values? The problem, as Professor Ely put it, is that “the legislature has spoken, and the question is whether the court is to overrule it in a way that can be undone only by the cumbersome process of constitutional amendment.”<sup>265</sup>

The question takes us to the heart of the countermajoritarian difficulty, but it is framed in a way that unnecessarily aggravates the tension between democracy and judicial review.<sup>266</sup> Implicit in Ely’s statement of the problem is

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261. See Civil Rights Act of 1964, 42 U.S.C. § 2000a; *Bolling v. Sharpe*, 347 U.S. 497 (1954); *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

262. See *United States v. Virginia*, 518 U.S. 515 (1996); *Miss. Univ. for Women v. Hogan*, 458 U.S. 718 (1982); *Craig v. Boren*, 429 U.S. 190 (1976); see also *Nev. Dep’t of Human Res. v. Hibbs*, 538 U.S. 721, 736 (2003).

263. See *Lawrence v. Texas*, 539 U.S. 558 (2003); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

264. See *supra* notes 159-67 and accompanying text.

265. ELY, *supra* note 116, at 68.

266. One approach to easing this tension is to distinguish the concept of democracy from pure majoritarianism and to analogize judicial review to other well-accepted countermajoritarian practices in our democratic system. See, e.g., Geoffrey C. Hazard, Jr.,

a substantive conception of judicial review whereby a distributive principle, once judicially recognized, serves to constrain the permissible outcomes of democratic decision making. Judicial recourse to a comprehensive theory of justice such as Rawls's tends to further this image of courts gradually but systematically limiting legislative judgment to a range of choices aligned with a particular moral vision. In contrast to Ely's framing, however, judicial review encompasses a range of practices that do not irrevocably "overrule" legislative judgment, and the outcomes of the legislative process span a continuum of democratic legitimacy obscured by the unqualified claim that "the legislature has spoken." The judicial role I have described, in which courts function as interpreters of social norms, envisions a form of judicial review that is less didactic and interventionist and more dialogic and provisional. On this account, judicial review can promote transparency and rationality in the legislative process without imposing rigid boundaries on legislative outcomes. Instead of bluntly overruling the legislature, courts can exercise judicial review in flexible and nuanced ways that invite democratic responses short of a constitutional amendment.<sup>267</sup>

In the remainder of this Article, I sketch a doctrinal approach that implements this modest conception of judicial review in the area of welfare rights. We have already seen numerous examples of how courts interpret and absorb social understandings in the course of constitutional adjudication. My goal here is not to survey the wide range of interpretive techniques in this vein, but to examine in some detail a modest paradigm of judicial inquiry that helps to elucidate rather than frustrate democratic judgments concerning how particular social goods should be distributed.

An instructive starting point is to compare the modes of judicial intervention in two companion cases concerning the federal food stamp program, *USDA v. Moreno*<sup>268</sup> and *USDA v. Murry*.<sup>269</sup> Congress established the food stamp program in 1964 with the dual purposes of strengthening the

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*The Supreme Court as a Legislature*, 64 CORNELL L. REV. 1, 8-11 (1978); Eugene V. Rostow, *The Democratic Character of Judicial Review*, 66 HARV. L. REV. 193 (1952). But cf. JESSE H. CHOPER, JUDICIAL REVIEW AND THE NATIONAL POLITICAL PROCESS 10-29 (1980) (critically appraising this argument). These arguments, while important, are not the focus of my discussion here.

267. For examples of such approaches to constitutional adjudication across a variety of substantive areas, see ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 111-98 (1962); Alexander M. Bickel & Harry H. Wellington, *Legislative Purpose and the Judicial Process: The Lincoln Mills Case*, 71 HARV. L. REV. 1 (1957); Henry P. Monaghan, *The Supreme Court, 1974 Term—Foreword: Constitutional Common Law*, 89 HARV. L. REV. 1 (1975); and Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 504-08 (1982). See also William N. Eskridge, Jr. & Philip P. Frickey, *Quasi-Constitutional Law: Clear Statement Rules as Constitutional Lawmaking*, 45 VAND. L. REV. 593, 619-29 (1992) (discussing methods of statutory interpretation by which the Court reads constitutional values into statutes, subject to clear legislative override).

268. 413 U.S. 528 (1973).

269. 413 U.S. 508 (1973). *Moreno* and *Murry* were decided on the same day.

nation's agricultural economy and alleviating hunger and malnutrition among low-income households.<sup>270</sup> Eligibility for food stamps is determined on a "household" basis, originally defined as "a group of related or non-related individuals . . . living as one economic unit sharing common cooking facilities and for whom food is customarily purchased in common."<sup>271</sup> In 1971, Congress narrowed the terms of eligibility in two ways relevant here. First, it redefined "household" to include only groups of related individuals living together.<sup>272</sup> In *Moreno*, the Court invalidated the exclusion of households comprised of unrelated individuals otherwise eligible for food stamps.<sup>273</sup> Second, Congress excluded from the program any household with an individual aged eighteen or older claimed as a dependent by a taxpayer who is not part of a household eligible for food stamps.<sup>274</sup> This exclusion was struck down in *Murry*.<sup>275</sup> Although both cases resulted in invalidation, they differ in important ways.

In *Moreno*, the Court examined the exclusion of unrelated households against a backdrop of weak legislative justification. After quoting the Food Stamp Act's broad declaration of policy, the Court observed that the challenged exclusion was "clearly irrelevant to the stated purposes of the Act."<sup>276</sup> The only purpose for the exclusion mentioned in the legislative record was "to prevent so-called 'hippies' and 'hippie communes' from participating,"<sup>277</sup> which prompted the Court to say that "a bare congressional desire to harm a politically unpopular group cannot constitute a legitimate governmental interest."<sup>278</sup> Hippies aside, the government argued that "Congress might

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270. See Food Stamp Act of 1964, Pub. L. No. 88-525, § 2, 78 Stat. 703, 703 (codified as amended at 7 U.S.C. § 2011).

271. *Id.* § 3(e), 78 Stat. at 703.

272. See Pub. L. No. 91-671, sec. 2(a), § 3(e), 84 Stat. 2048, 2048 (1971).

273. See *Moreno*, 413 U.S. at 534-38. The "unrelated household" exclusion applied not only to households in which all members were unrelated to each other, but to any household that included a single member not related to the others. Thus, a low-income family eligible for food stamps would lose its eligibility if it took in a needy friend. See *id.* at 531-32 (describing plight of plaintiffs Jacinta Moreno and Sheilah Hejny).

274. See Pub. L. No. 91-671, sec. 4, § 5(b), 84 Stat. 2048, 2049 (1971).

275. See *USDA v. Murry*, 413 U.S. 508, 513-14 (1973).

276. *Moreno*, 413 U.S. at 534. The statute's "declaration of policy" read:

It is hereby declared to be the policy of Congress . . . to safeguard the health and well-being of the Nation's population and raise levels of nutrition among low-income households. The Congress hereby finds that the limited food purchasing power of low-income households contributes to hunger and malnutrition among members of such households. The Congress further finds that increased utilization of food in establishing and maintaining adequate national levels of nutrition will promote the distribution in a beneficial manner of our agricultural abundances and will strengthen our agricultural economy, as well as result in more orderly marketing and distribution of food. To alleviate such hunger and malnutrition, a food stamp program is herein authorized which will permit low-income households to purchase a nutritionally adequate diet through normal channels of trade.

*Id.* at 533-34 (quoting 7 U.S.C. § 2011).

277. *Id.* at 534 (quoting legislative history).

278. *Id.*

rationally have thought” unrelated households to be more likely than related households to abuse the food stamp program by concealing income or by voluntarily remaining poor.<sup>279</sup> But the Court, noting that the original Food Stamp Act already included several anti-abuse provisions, voiced “considerable doubt . . . that the 1971 amendment could rationally have been intended to prevent those very same abuses”<sup>280</sup> and declined to give Congress the benefit of the doubt when it had failed to make its actual purpose clear. The Court went on to explain that “in practical effect” the exclusion did not rationally work to prevent fraud.<sup>281</sup> Although this elicited the predictable charge that the Court had substituted its policy judgment for the legislature’s,<sup>282</sup> there was no record of the policy judgment Congress actually made beyond the exclusion itself.

In *Murry*, by contrast, the purpose for excluding tax dependents was stated clearly in the legislative record. The exclusion “was generated by congressional concern about nonneedy households participating in the food stamp program. The legislative history reflects a concern about abuses of the program by ‘college students, children of wealthy parents.’”<sup>283</sup> While acknowledging this purpose, the Court found the exclusion irrational for several reasons. First, tax dependency indicated only the dependent’s economic status in the prior year; it did not measure current need.<sup>284</sup> Second, a household that included a tax dependent was denied food stamps “even though the remaining members have no relation to the parent who used the tax deduction, even though they are completely destitute, and even though they are one, or 10 or 20 in number.”<sup>285</sup> Third, tax dependency operated as “an irrebuttable presumption” of self-sufficiency even though many tax dependents, including the plaintiffs, received no aid from their nonindigent parents.<sup>286</sup> According to the Court, the

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279. *Id.* at 535.

280. *Id.* at 537.

281. *Id.* at 537-38. Because unrelated persons in an otherwise eligible household could avoid the exclusion by forming several distinct households eligible for food stamps, the Court reasoned, the statute “in practical operation” excluded only unrelated households “so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility.” *Id.* at 538.

282. *See id.* at 545-46 (Rehnquist, J., dissenting).

283. *USDA v. Murry*, 413 U.S. 508, 512-13 (1973) (footnote omitted) (quoting legislative history).

284. *See id.* at 513 & n.2. The exclusion from food stamp eligibility applied during the tax period in which dependency is claimed and for one year thereafter. *See id.* at 509 n.1 (citing statute).

285. *Id.* at 514.

286. *Id.*; *see id.* at 509-11 (describing plaintiffs); *id.* at 515-16 (Stewart, J., concurring) (noting that the exclusion operated as “a conclusive presumption” regardless of “whether [the tax] dependency claim was fraudulent, what the amount of support from the non-indigent taxpayer actually was, whether that support was still available at the time the welfare officials learned of it, or even whether the claimed dependent was still living in the household”) (footnote omitted).



termination of plaintiffs' benefits "without any opportunity for them to prove present need" violated due process of law.<sup>287</sup>

Whereas the Court in *Moreno* looked skeptically upon the absence of express legislative justification, the Court in *Murry* acknowledged the stated justification but focused on the overbreadth of the classification in relation to Congress's policy goal. In both cases, the statutory exclusion was crude and "not happily drafted."<sup>288</sup> But the result in *Moreno* seemed to turn on the infirmity of the legislative process. As the district court in *Moreno* observed, the unrelated household exclusion "first materialized, bare of committee consideration, during a conference committee's consideration of differing House and Senate bills."<sup>289</sup> Its enactment was "hasty, last-minute congressional action," "an obvious afterthought to [Congress's] reexamination of the food stamp program through the normal legislative processes."<sup>290</sup> In light of its feeble legislative pedigree, judicial invalidation of the exclusion had the quality of a remand for legislative reconsideration.<sup>291</sup> *Murry*, on the other hand, did not present questions of legislative process. The result turned squarely on a policy judgment concerning the proper balance between targeting needy households and administrative convenience. The substantive displacement of legislative judgment apparently went too far for Justices Blackmun and Powell, who dissented from the five-to-four decision in *Murry* even as they joined the seven-to-two decision in *Moreno*.

In drawing a contrast between *Moreno* and *Murry*, I do not mean to posit a rigid dichotomy between "procedural" and "substantive" judicial review.<sup>292</sup> The terms are best understood as poles on a continuum of judicial intervention. *Murry* directly engaged the Court in substantive policy judgment, an approach that is generally disfavored though plausibly appropriate in exceptional cases.<sup>293</sup> *Moreno*, however, can be understood as part of a family of judicial

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287. *Id.* at 516-17 (Stewart, J., concurring); *see id.* at 513-14 (majority opinion).

288. *Id.* at 520 (Blackmun, J., dissenting).

289. *Moreno v. USDA*, 345 F. Supp. 310, 312 (D.D.C. 1972) (three-judge court).

290. *Id.* at 315.

291. As the district court said, "[w]e think that it is for Congress—and not this court—to address itself more precisely and upon fuller reflection to the true dimensions of the problem, to state its purpose explicitly, and to tailor its language to that purpose with precision." *Id.*

292. *See* Hans A. Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197, 212-13, 229-30 (1976) (arguing that, because every legislative classification rationally furthers the purpose suggested by the terms of the statute itself, judicial inquiry into legislative purpose inevitably reflects a substantive judgment concerning permissible and impermissible purposes); Note, *Legislative Purpose, Rationality, and Equal Protection*, 82 YALE L.J. 123, 128, 138-54 (1972) (same); *see also* Einer R. Elhauge, *Does Interest Group Theory Justify More Intrusive Judicial Review?*, 101 YALE L.J. 31, 48-66 (1991) (arguing that judicial review of political decision making processes necessarily engages courts in making normative judgments about substantive outcomes).

293. In *Murry*, the overbreadth of the tax dependency exclusion in relation to preventing abuse exceeded the ineffable boundary of "rationality" even to the centrist Justice Stewart. *See USDA v. Murry*, 413 U.S. 508, 514-17 (1973) (Stewart, J., concurring). Stewart

approaches designed to promote “due process of lawmaking” and, in particular, legislative deliberation.<sup>294</sup> The less evidence there is that the legislature has made a conscious and considered policy choice, the less deference the product of the legislative process is entitled to receive in the courts. Judicial insistence on legislative deliberation must be tempered by recognition of “the role of political compromise and the need for legislative flexibility and speed.”<sup>295</sup> But within the practical limits of the legislative process, judicial review can foster greater transparency, rationality, and democratic accountability in policymaking without assessing legislative outcomes for their substantive rationality or their public-interest (as opposed to rent-seeking) content.<sup>296</sup> As *Moreno* demonstrates, courts can do this by requiring legislative articulation of the actual purposes for a given enactment,<sup>297</sup> by inquiring whether the

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was not a Justice quick to wield substantive rationality review even when confronted with “an uncommonly silly law,” *Griswold v. Connecticut*, 381 U.S. 479, 527 (1965) (Stewart, J., dissenting), or with social or economic legislation conceded to be “chaotic and unjust,” *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring).

294. See DANIEL A. FARBER & PHILIP P. FRICKEY, *LAW AND PUBLIC CHOICE: A CRITICAL INTRODUCTION* 118-31 (1991). In addition to judicial insistence on legislative deliberation, Professors Farber and Frickey distinguish two other due process of lawmaking approaches to constitutional adjudication—one focused on institutional legitimacy (i.e., whether a sensitive policy decision was made by the entity best suited to make it), see *id.* at 122, and another focused on procedural regularity (i.e., whether the legislature followed its own rules for making policy), see *id.* at 125. Here I treat procedural regularity as probative of the quality of legislative deliberation.

295. *Id.* at 124.

296. See *id.* at 46, 64, 69-70 (arguing that courts lack manageable standards for distinguishing rent-seeking from public interest statutes); *id.* at 117 (“Judicial sensitivity to the forces that warp political outcomes has greater promise to promote legislative deliberation than does stricter scrutiny of the substance of legislation.”). Some scholars are more optimistic that courts can assess whether legislation properly promotes “public values.” See, e.g., Jerry L. Mashaw, *Constitutional Deregulation: Notes Toward a Public, Public Law*, 54 TUL. L. REV. 849 (1980); Cass R. Sunstein, *Interest Groups in American Public Law*, 38 STAN. L. REV. 29 (1985) [hereinafter Sunstein, *Interest Groups*]; Cass R. Sunstein, *Naked Preferences and the Constitution*, 84 COLUM. L. REV. 1689 (1984).

297. See Sunstein, *Interest Groups*, *supra* note 296, at 69; cf. Gerald Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 47 (1972) (arguing that courts should “require an articulation of purpose from an authoritative state source,” which could include a “state court’s or attorney general office’s description of purpose,” while noting that the requirement “would at least be indirect pressure on the legislature to state its own [purpose]”). Current doctrine licenses courts to hypothesize permissible legislative purposes when reviewing social or economic legislation. See, e.g., *FCC v. Beach Commc’ns, Inc.*, 508 U.S. 307, 315 (1993); *Nordlinger v. Hahn*, 505 U.S. 1, 15 (1992); *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 179 (1980). However, as Justice Powell has explained:

[t]he deference to which legislative accommodation of conflicting interests is entitled rests in part upon the principle that the political process of our majoritarian democracy responds to the wishes of the people. Accordingly, an important touchstone for equal protection review of statutes is how readily a policy can be discerned which the legislature intended to serve. When a legitimate purpose for a statute appears in the legislative history or is implicit in the statutory scheme itself, a court has some assurance that the legislature has made a conscious policy choice. . . . When a legislative purpose can be suggested only by the ingenuity of a government lawyer litigating the constitutionality of a statute, a reviewing court may be

legislature in fact considered the costs and consequences of the provision at issue,<sup>298</sup> and by examining the procedural regularity of the process by which the provision was enacted.<sup>299</sup>

Examples of such judicial inquiry may be found in other social welfare cases. In *Schweiker v. Wilson*, the Court examined a restriction on eligibility for Supplemental Security Income (SSI), a program intended to set “a Federal guaranteed minimum income level for aged, blind, and disabled persons.”<sup>300</sup> From its inception, SSI did not cover inmates of public institutions, with an exception providing for reduced SSI benefits to an otherwise eligible person in a nursing home or other facility receiving Medicaid to cover the cost of the

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presented not so much with a legislative policy choice as its absence.

In my view, the Court should receive with some skepticism *post hoc* hypotheses about legislative purpose, unsupported by the legislative history.

*Schweiker v. Wilson*, 450 U.S. 221, 243-44 (1981) (Powell, J., dissenting) (citing *Moreno* and other cases) (footnotes omitted); see also *Fritz*, 449 U.S. at 180 (Stevens, J., concurring in the judgment) (“[I]f the analysis of legislative purpose requires only a reading of the statutory language in a disputed provision, and if any ‘conceivable basis’ for a discriminatory classification will repel a constitutional attack on the statute, judicial review will constitute a mere tautological recognition of the fact that Congress did what it intended to do.”). Justice Stevens would allow the purpose inquiry to be satisfied not only by “the actual purpose of the statute” but also by “a legitimate purpose that we may reasonably presume to have motivated an impartial legislature.” *Id.* at 181; see Daniel A. Farber, *Backward-Looking Laws and Equal Protection: The Case of Black Reparations*, 74 *FORDHAM L. REV.* 2271, 2275-76 (2006) (discussing Justice Stevens’ unitary approach to equal protection review); Note, *Justice Stevens’ Equal Protection Jurisprudence*, 100 *HARV. L. REV.* 1146, 1158-60 (1987).

298. See Gunther, *supra* note 297, at 46-48.

299. See FARBER & FRICKEY, *supra* note 294, at 125-28. One might object that the due process of lawmaking inquiry “may actually mask an activist judicial stance” if it is unrealistic to expect much deliberation or rationality from the policymaking process. WILLIAM N. ESKRIDGE, JR. ET AL., *CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY* 437 (4th ed. 2007). To be sure, the deliberative capacities of the policymaking process should not be overestimated, but “[f]aith in congressional deliberation about sensitive issues is not entirely misplaced, particularly when courts stand ready to assist the deliberative process through structural and procedural review.” FARBER & FRICKEY, *supra* note 294, at 128; see Sunstein, *Interest Groups*, *supra* note 296, at 78 (arguing that judicial interpretation of equal protection and due process guarantees to “requir[e] justifications [for enacted policies] does serve important prophylactic functions” in statutory and administrative lawmaking); see also J. MITCHELL PICKERILL, *CONSTITUTIONAL DELIBERATION IN CONGRESS: THE IMPACT OF JUDICIAL REVIEW IN A SEPARATED SYSTEM* (2004) (demonstrating through historical evidence that judicial review can promote legislative deliberation on constitutional issues). More fundamentally, if one accepts that deliberation helps to promote the efficacy and accountability of representative democracy, see Sunstein, *Interest Groups*, *supra* note 296, at 38-48 (discussing Madisonian origins of this idea), then there is something odd about criticizing judicial review as undemocratic on the ground that the policymaking process lacks the capacity to enact laws with strong democratic credentials. We can agree that “there is no reason to be naively optimistic about the extent of” civic virtue and legislative deliberation in the political process, “[b]ut if we throw up our hands in disgust at the flaws of the political process, we are unlikely to improve matters.” FARBER & FRICKEY, *supra* note 294, at 61.

300. *Wilson*, 450 U.S. at 223 (quoting S. REP. NO. 92-1230, at 12 (1972)).

person's care.<sup>301</sup> The exception did not extend to adults in public mental institutions because adult treatment at such institutions is traditionally funded by the states, not by Medicaid.<sup>302</sup> While the Court divided five-to-four in upholding the exclusion of adults in public mental institutions, both Justice Blackmun's majority opinion and Justice Powell's dissent pursued a due process of lawmaking inquiry.

Justice Blackmun observed that the linkage between Medicaid and SSI eligibility was mentioned "in no uncertain terms" in the House and Senate reports on the SSI bill.<sup>303</sup> He further explained that, at the same time Congress was considering the SSI bill, it also considered but rejected a proposal to extend Medicaid coverage to all inpatient services in public mental institutions.<sup>304</sup> Because "Congress was aware . . . of the limitations in the Medicaid program that would restrict eligibility for the reduced SSI benefits,"<sup>305</sup> Justice Blackmun concluded, the SSI exclusion at issue "must be considered Congress' deliberate, considered choice."<sup>306</sup> In dissent, Justice Powell noted that the only purpose stated in the House and Senate reports for linking Medicaid and SSI eligibility was "the irrelevant goal of depriving inmates of penal institutions of all benefits."<sup>307</sup> Beyond penal institutions, Powell argued, Congress never "consider[ed] what criteria would be appropriate for deciding in which public institutions a person can reside and still be eligible for some SSI payment."<sup>308</sup> In Powell's view, this "legislative oversight" left the exclusion of adults in state mental institutions with "no relation to any policy of the SSI program"<sup>309</sup> and resulted in "irrational distinctions . . . between equally needy people."<sup>310</sup>

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301. *See id.* at 224-25. In such facilities, Medicaid paid the cost of the person's subsistence and care, and the reduced SSI benefit, an amount not to exceed \$300 a year, provided a "comfort" allowance to buy small items not supplied by the facility. *See id.* at 235.

302. *See id.* at 225. Treatment of children in public mental institutions, by contrast, is covered by Medicaid. *See id.* at 225 n.5, 235-36 & n.18.

303. *Id.* at 235.

304. *See id.* at 235-36.

305. *Id.* at 236.

306. *Id.* at 235; *see id.* at 236 ("[W]e decline to regard such deliberate action as the result of inadvertence or ignorance."). Justice Blackmun went on to "infer from Congress' deliberate action an intent to further the same subsidiary purpose that lies behind the Medicaid exclusion, which . . . was adopted because Congress believed the States to have a 'traditional' responsibility to care for those institutionalized in public mental institutions." *Id.* at 236-37. However, this legislative intent—that the states should be responsible for providing comfort allowances in state-run mental institutions—was proffered by the Secretary of Health and Human Services during the litigation, not by Congress in the legislative record. *See id.* at 237; *id.* at 243-45 (Powell, J., dissenting).

307. *Id.* at 245 (Powell, J., dissenting). The House and Senate reports appear to support Powell's point. *See id.* at 235 (majority opinion) (quoting H.R. REP. NO. 92-231, at 150 (1971) ("No assistance benefits will be paid to an individual in a penal institution."), and citing S. REP. NO. 92-1230, at 386 (1972)).

308. *Id.* at 245 (Powell, J., dissenting).

309. *Id.* at 246-47; *see id.* at 247 ("If SSI pays a cash benefit relating to personal needs other than maintenance and medical care, it is irrelevant whether the State or the Federal

The closely divided decision in *Wilson* reflecting ambiguity in the quality of legislative deliberation stands in contrast to the Court's unanimous decision one year later in *Schweiker v. Hogan*,<sup>311</sup> a case concerning Medicaid eligibility. In 1967, Congress limited federal Medicaid reimbursements for the "medically needy" to persons whose income, after deduction of incurred medical expenses, is less than 133 $\frac{1}{3}$ % of the state Aid to Families with Dependent Children payment level.<sup>312</sup> Congress exempted from this rule the "categorically needy," comprised of low-income SSI recipients (i.e., the elderly, blind, and disabled) whose medical needs automatically qualify for federal Medicaid coverage.<sup>313</sup> In Massachusetts, the scheme resulted in the denial of Medicaid to some Social Security beneficiaries whose income, after medical expenses, was higher than 133 $\frac{1}{3}$ % of AFDC but lower than the income of SSI recipients who automatically qualified for Medicaid.<sup>314</sup>

In a detailed treatment of legislative history, Justice Stevens, who dissented in *Wilson*, said that "[i]n specifically excepting the categorically needy from [the 133 $\frac{1}{3}$ % of AFDC] rule, Congress recognized that this amount could be lower than categorical assistance eligibility levels."<sup>315</sup> Rejecting the claim that "Congress had little idea of what it was doing,"<sup>316</sup> the Court noted that

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Government is paying for the maintenance and medical care; the patients' need remains the same, the likelihood that the policies of SSI will be fulfilled remains the same."').

310. *Id.* at 245; *see id.* at 246 (noting that the SSI benefit at issue is "provided to other institutionalized, disabled patients," including those residing "in a state *medical* hospital or a *private* mental hospital"). Along the lines of a remand to the legislature, Justice Powell said that, consistent with the Medicaid scheme, "Congress rationally could make the judgment that the States should bear the responsibility for any comfort allowance, because they already have the responsibility for providing treatment and minimal care" in public mental institutions. *Id.* at 246. But, in his view, Congress did not *actually* make this judgment and instead "thoughtlessly . . . applied a statutory classification developed to further legitimate goals of one welfare program [Medicaid] to another welfare program serving entirely different needs [SSI]." *Id.* at 239-40.

311. 457 U.S. 569 (1982). The composition of the Court was the same in *Hogan* as in *Wilson*, except for the confirmation of Justice O'Connor to replace Justice Stewart, who joined the majority in *Wilson*.

312. *See id.* at 576-80.

313. *See id.* at 580-82. In the original 1965 Medicaid statute, the categorically needy were defined as individuals who qualified for one of four federal assistance programs serving the aged, the blind, the disabled, and families with dependent children, respectively. *See id.* at 572-73 & n.2. After 1967, federal Medicaid coverage for families with dependent children effectively fell under the rule limiting federal Medicaid assistance to persons with income below 133 $\frac{1}{3}$ % of the state AFDC payment level. In 1972, Congress enacted SSI to replace the separate assistance programs for the aged, the blind, and the disabled. *See id.* at 581-82. The SSI program permits and, in some cases, requires states to provide supplementary income assistance on top of federal SSI benefits. *See id.* at 582.

314. *See id.* at 582-83. The denial of Medicaid caused the plaintiffs in *Hogan* to "have less income available for nonmedical expenses than individuals who—possibly because they never worked and receive no Social Security benefits—are dependent upon public assistance [i.e., federal SSI benefits and state supplementary income payments] for support." *Id.* at 583.

315. *Id.* at 586.

316. *Id.* at 587. Justice Stevens noted that, although the exception from the 133 $\frac{1}{3}$ % of

Congress, from the inception of Medicaid, had prioritized categorically needy persons “who—because of their physical characteristics—were often least able to overcome the effects of poverty,” while regarding medically needy persons—i.e., persons needing assistance “by reason of large medical expenses”—as “‘less needy’” because of “the greater income available to them” and the “ab[ility] to prepare for future medical expenses through private insurance or through participation in the Medicare program.”<sup>317</sup> The prioritization of the categorically needy “was not chosen for administrative convenience,” the Court said, but because Congress had made an explicit policy determination that “[t]hese people are the most needy in the country and it is appropriate for medical care costs to be met, first, for these people.”<sup>318</sup>

*Moreno, Wilson, Hogan*, and other examples<sup>319</sup> demonstrate how judicial review can meaningfully assess the distributive reach of a welfare statute by focusing on the extent of legislative deliberation and democratic legitimacy supporting it rather than on its substantive rationality. The approach situates courts as interpreters of the evolving social understandings that inform the distribution of particular welfare goods. In each of the examples above, the Court began its analysis by identifying the broad, expressly stated purpose of the welfare program and treated that purpose as a deliberate, democratic expression of public values to which implementing provisions are presumed to be aligned.<sup>320</sup> The Court then examined whether the statutory provision at

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AFDC rule for the categorically needy was not added until the conference committee considered the bill, the omission of the exception in the House bill was most likely a drafting error. *See id.* at 587 n.27.

317. *Id.* at 590-91 (quoting H.R. REP. NO. 213, at 66 (1965)). The Court emphasized that the Medicaid statute, while requiring participating states to provide Medicaid coverage to the categorically needy, allowed states to exclude the medically needy entirely from coverage. *See id.* at 589-91 (discussing *Fullington v. Shea*, 404 U.S. 963 (1971) (upholding Colorado’s exclusion of the medically needy from its Medicaid program)).

318. *Id.* at 590 (quoting H.R. REP. NO. 213, at 66).

319. *See, e.g.*, *U.S. R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 190-93 (1980) (Brennan, J., dissenting) (reviewing legislative history of Railroad Retirement Act to show that Congress “never directed its attention to [the] effect” of complex provisions drafted by outside parties resulting in lower benefits for a certain class of railroad workers and that “Congress may have been misled” by witnesses explaining the legislation); *Califano v. Goldfarb*, 430 U.S. 199, 221-22, 223 n.9 (1977) (Stevens, J., concurring) (concluding from legislative history of Social Security Act that “Congress never focused its attention on the question whether to divide nondependent surviving spouses into two classes on the basis of sex” and instead “simply assumed that all widows should be regarded as ‘dependents,’” while leaving open the possibility that “an actual, considered legislative choice would be sufficient to allow this statute to be upheld”).

320. *See* Frank I. Michelman, *Politics and Values or What’s Really Wrong with Rationality Review?*, 13 CREIGHTON L. REV. 487, 509 (1979) (arguing that “majoritarian politics cannot be only the individualistically self-serving activity ‘realistically’ portrayed by economics-minded political scientists and theorists” but “must also be a joint and mutual search for good or right answers to the question of directions for our evolving selves”); *see also* Sunstein, *Interest Groups*, *supra* note 296, at 49-50 (describing equal protection and due process clauses “as a repudiation of the pluralist conception of politics” in favor of a republican principle that legislation must further public values); *cf.* FARBER & FRICKEY,

issue, with effects seemingly at odds with the program's broad purpose, was the result of a conscious and considered policy choice or rather the product of legislative inadvertence, impulsiveness, or inattention. As *Wilson* shows, this due process of lawmaking inquiry does not always yield a determinate answer; there are close cases, as is true of constitutional adjudication generally. The distinctive feature of the approach discussed here is that courts do not "overrule" the legislature in the substantive, antidemocratic sense suggested by Professor Ely. Instead, courts leverage the legislature's own publicly stated commitment to welfare provision and then inquire whether or not apparent qualifications on that commitment comprise part of the social understanding of the commitment itself.

This approach leaves the ultimate contours of the welfare commitment up to democratic determination and evolution.<sup>321</sup> In *Moreno*, although the Court found the unrelated household exclusion "clearly irrelevant" to the purposes stated in the Food Stamp Act's "declaration of policy,"<sup>322</sup> Congress was not foreclosed from revising the program's broad goal of alleviating hunger and malnutrition among low-income households to the more specific goal of providing welfare assistance to traditional families. Such a shift would signal a quite different social understanding of welfare provision (perhaps reflecting earlier notions of the "worthy" and "unworthy" poor<sup>323</sup>), but it is not one that courts can declare substantively off-limits to Congress.<sup>324</sup> Similarly, whether

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*supra* note 294, at 29-33, 45 (warning that "republicanism can verge dangerously on romanticism" but recognizing empirical evidence that how legislators vote substantially reflects their ideology and view of the public interest).

321. Of course, democratically enacted welfare provision remains subject to independent constitutional constraints such as prohibitions on racial discrimination and religious indoctrination. See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 85 (1999) (recounting history of "constitutional bad faith" that "excluded most of black America from the benefits of the main New Deal programs"); Michele Estrin Gilman, *Fighting Poverty with Faith: Reflections on Ten Years of Charitable Choice*, 10 J. GENDER RACE & JUST. 395, 409-13 (2006) (collecting cases where courts have invalidated social service programs that engage in religious indoctrination).

322. *USDA v. Moreno*, 413 U.S. 528, 533-34 (1973) (quoting 7 U.S.C. § 2011).

323. *Cf. King v. Smith*, 392 U.S. 309, 320-27 (1968) (reviewing evolution of the American welfare system from nineteenth-century distinctions between the "worthy" and "unworthy" poor based on perceived moral character, to mid-twentieth-century social understandings expressed in federal policy treating provision of material needs separately from questions of moral fitness).

324. The 1996 welfare reform maintained food stamps as a basic entitlement of low-income households while excluding most legal immigrants from participation. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in various sections of 8 and 42 U.S.C.). Apart from food stamps, the welfare reform law marked a significant revision of our social understanding of federal income maintenance from a basic entitlement to a time-limited benefit. See 42 U.S.C. § 608(a)(7) (2000). The approach I advance in this Article envisions no role for courts in disturbing this latter policy judgment, which Congress made after long debate. *But see* Peter B. Edelman, *Where Is FDR When We Need Him?*, 93 GEO. L.J. 1681, 1685-88 (2005) (reviewing SUNSTEIN, *supra* note 7) (arguing from a countermajoritarian perspective that the 1996 welfare reform law should be judicially reviewed under intermediate scrutiny and

the federal government should treat all institutionalized persons equally in the provision of income assistance (*Wilson*) and whether the “categorically needy” and “medically needy” should have equal eligibility for Medicaid coverage (*Hogan*) are not issues that courts can or should definitively resolve. Instead, what courts can do and should do is to expose such policy choices to critical public debate and to ensure that the scope of welfare provision democratically reflects our social understandings.

In its dialogic features and its ultimate deference to legislative supremacy, the interpretive approach presented here envisions the judiciary not as the final arbiter of societal values but instead as a forum for “ensuring that governmental decisions which touch upon interests that our society regards as fundamental are made through an appropriate process.”<sup>325</sup> The approach may be understood as a species of what Mark Tushnet has called “weak-form judicial review.”<sup>326</sup> It also resembles the judicial role envisioned by the theory of democratic experimentalism developed by Charles Sabel and his collaborators.<sup>327</sup> As they explain, courts can identify performance failures in public institutions by looking to customary practice, industry standards, and norms enacted in positive law, and judicial intervention may loosen political blockages arising from inattention to minority interests, collective action problems, or prisoners’ dilemmas.<sup>328</sup> In these ways, a judicial decision may provide a focal point for political mobilization and cue the policymaking process toward greater deliberation and rationality. At the same time, courts lack authority to prescribe detailed policy solutions or to define with finality or particularity the contours of a social welfare right. A judicial interpretation of our societal commitments may turn out to be erroneous and provoke sustained resistance. In that event, “judges should interpret resistance to the implementation of strong substantive rights as civil society’s mobilization in support of a conception of rights different from the one the judges have offered,” recognizing that “mobilization is itself a way of enforcing what civil society understands social and economic rights to be.”<sup>329</sup>

The practical implementation of a welfare right necessarily involves line-drawing, prioritization, and compromise, much of which is bound to seem arbitrary from the logic of a comprehensive moral theory. But the practicalities,

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found unconstitutional).

325. Sandalow, *Judicial Protection*, *supra* note 28, at 1189.

326. See TUSHNET, *supra* note 1, at 237-58.

327. See Dorf & Sabel, *supra* note 201; Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015 (2004).

328. See Sabel & Simon, *supra* note 327, at 1062-67; see also Dixon, *supra* note 1, at 402 (arguing that courts should play a dialogic role in enforcing social welfare rights because “the legislative process will be subject to a series of blockages arising from both the potential for blind spots and burdens of inertia in the process of lawmaking and implementation”).

329. TUSHNET, *supra* note 1, at 257.



however contingent or ad hoc, cannot simply be regarded as unprincipled concessions, for they may comprise part of the distributive norm to which the society has thus far committed itself. By appealing to the society's publicly declared ambitions and the normative gravity they exert on the legal and policy landscape, courts can discipline the policymaking process to clarify whether limitations on those ambitions truly reflect the terms of a social consensus. Where they do, courts must defer to legislative judgments. But where they do not, the scope of provision of a particular welfare good may be broadened, and the broader scope, though subject to democratic revision, may eventually become part of the social norm underlying the distribution of that good in our public culture. In this way, through a dialectical process of engagement with the political branches and the public they represent, courts may vest the legislated provision of welfare goods with the character of higher law.

### CONCLUSION

On our contemporary social landscape, it may be possible to identify some areas in which courts, playing the role I have described, can legitimately foster evolution of welfare rights. In public education, for example, the largest federal program supporting low-income children—Title I of the Elementary and Secondary Education Act of 1965—from its inception has distributed funding highly unequally across states.<sup>330</sup> Because the statute makes federal allocations to each state proportional to the state's own per-pupil spending,<sup>331</sup> high-spending states such as Massachusetts receive over fifty percent more money per low-income child than low-spending states such as Mississippi.<sup>332</sup> As I have shown elsewhere, this method of allocation lacks a coherent policy rationale, and I have yet to find any purpose for it stated in the legislative history.<sup>333</sup> In the context of an education system now expected to close achievement gaps by socioeconomic status and to prepare children for participation in the national and international economy,<sup>334</sup> the interstate discrimination in federal funding seems overdue for legislative reconsideration.

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330. See Liu, *supra* note 222, at 981-94; Liu, *supra* note 221, at 2094-2100.

331. See 20 U.S.C. §§ 6333(a)(1)(B), 6334(a)(2)(B), 6335(b)(1)(B), 6337(b)(1)(A)(i) (2000).

332. See Liu, *supra* note 222, at 983-84.

333. See Liu, *supra* note 221, at 2098-2100 & n.194; see also WAYNE RIDDLE & RICHARD APLING, CONG. RESEARCH SERV., EDUCATION FOR THE DISADVANTAGED: ALLOCATION FORMULA ISSUES IN ESEA TITLE I REAUTHORIZATION LEGISLATION 15-16 (2000) (reviewing and rejecting various policy rationales for interstate disparities in Title I allocations).

334. See No Child Left Behind Act of 2001, 20 U.S.C.A. § 6301(3) (West 2008) (stating the legislative purpose of closing achievement gaps "between disadvantaged children and their more advantaged peers"); *id.* § 6311(b)(2)(C)(v)(II)(aa) (holding schools accountable for ensuring that "economically disadvantaged students" reach academic proficiency). The high skills needed for effective participation in the national and increasingly global labor market have been a familiar refrain in contemporary education

Another example, closer to home, is California's antiquated and inequitable system of school finance.<sup>335</sup> The core component of the system, developed in the 1970s, has outlived its policy justification and now contributes to systemic inequity.<sup>336</sup> Unlike the Texas system upheld in *Rodriguez*, California's present system is difficult to characterize as having a "thrust [that] is affirmative and reformatory" or as following on a series of "effort[s] to extend public education and to improve its quality."<sup>337</sup> Against the contemporary backdrop of legislated standards and accountability measures

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policy discourse. See, e.g., NAT'L CTR. ON EDUC. & ECON., TOUGH CHOICES OR TOUGH TIMES: THE REPORT OF THE NEW COMMISSION ON THE SKILLS OF THE AMERICAN WORKFORCE (2006); MURNANE & LEVY, *supra* note 208.

335. The serious failings of the California school finance system have been the subject of a comprehensive collection of intensive studies coordinated by the Institute for Research on Education Policy and Practice at Stanford University. See SUSANNA LOEB ET AL., GETTING DOWN TO FACTS: SCHOOL FINANCE AND GOVERNANCE IN CALIFORNIA (2007), <http://irepp.stanford.edu/documents/GDF/summary-paper-final.pdf>. The studies report a broad research consensus that the finance system is "complex," "irrational," "unstable," and "[i]nequitable by any measure." *Id.* at 3; see MICHAEL W. KIRST, EVOLUTION OF CALIFORNIA STATE SCHOOL FINANCE WITH IMPLICATIONS FROM OTHER STATES (2007), [http://irepp.stanford.edu/documents/GDF/STUDIES/03-Kirst/3-Kirst\(3-07\).pdf](http://irepp.stanford.edu/documents/GDF/STUDIES/03-Kirst/3-Kirst(3-07).pdf); THOMAS TIMAR, HOW CALIFORNIA FUNDS K-12 EDUCATION (2006), [http://irepp.stanford.edu/documents/GDF/STUDIES/02-Timar/2-Timar\(3-07\).pdf](http://irepp.stanford.edu/documents/GDF/STUDIES/02-Timar/2-Timar(3-07).pdf).

336. The core component is the "revenue limit," a funding level specific to each district originally pegged to what it spent in the 1972-73 school year. See TIMAR, *supra* note 335, at 12-15. Created by the state legislature in 1972 to limit local property taxes, district revenue limits have gradually equalized over time. See JON SONSTELIE ET AL., FOR BETTER OR FOR WORSE? SCHOOL FINANCE REFORM IN CALIFORNIA 42-59 (2000). But the equalization of revenue limits across districts with widely varying student characteristics has left the special needs of disadvantaged students unaddressed. See *id.* at 87 ("Equal revenues for schools may not be sufficient to provide equal resources to schools with large percentages of disadvantaged students.").

337. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 39 (emphasis omitted); see *id.* at 6-11, 48-49 (reviewing history of Texas school finance system). In *Rodriguez*, the due process of lawmaking theme appears in the Court's observation that:

Texas has acknowledged its shortcomings and has persistently endeavored—not without some success—to ameliorate the differences in levels of expenditures without sacrificing the benefits of local participation. The Texas plan is not the result of hurried, ill-conceived legislation. It certainly is not the product of purposeful discrimination against any group or class. On the contrary, it is rooted in decades of experience in Texas and elsewhere, and in major part is the product of responsible studies by qualified people. . . . One also must remember that the system here challenged is not peculiar to Texas or to any other State. In its essential characteristics, the Texas plan for financing public education reflects what many educators for a half century have thought was an enlightened approach to a problem for which there is no perfect solution.

*Id.* at 55. One would be hard pressed to describe California's present system of school finance either as "the product of responsible studies by qualified people" or as "an enlightened approach" used in other states. Cf. KIRST, *supra* note 335, at 2 ("The result of California's history is a finance system that has no coherent conceptual basis, is incredibly complex, fails to deliver an equal or effective education to all children, and is a historical accretion."); TIMAR, *supra* note 335, at 31 ("The current system of school finance is one that has been cobbled together in response to various pressures over the past thirty-some years. What is missing from the resulting patchwork of policies is an underlying framework or set of principles to guide the system. As a result, the system has little coherence or clarity.").

that enforce performance goals for students and schools, the finance system appears highly anomalous and increasingly ripe for reexamination of the political blockages and inertia that impede reform.<sup>338</sup> Additional examples in other social welfare areas may be supplied by scholars and lawyers versed in policy details.

In examining the role of courts in advancing welfare rights, however, my approach has not been to urge constitutional litigation as a response to political apathy or indifference. To the contrary, the judicial role I envision is one that cannot get off the ground without strong footholds established through the political process. The main implication of my thesis is not that the current policy landscape is fertile with litigation targets, but instead that it will remain barren until we reinvigorate public dialogue about our commitments to mutual aid and distributive justice across a broad range of social goods. Courts can elevate the legal status of distributive norms, but only when those norms have already found some expression in the institutions, policies, and practices of our public culture. This conception of legal evolution is one in which legislative enactments, as much if not more than judicial decisions, “contribute to a complex process by which fundamental law evolves with a strong connection to the people and popular needs.”<sup>339</sup>

In explaining the legitimacy of judicial review in our constitutional democracy, Archibald Cox once wrote:

Constitutional adjudication depends, I think, upon a delicate, symbiotic relation. The Court must know us better than we know ourselves. Its opinions may . . . sometimes be the voice of the spirit, reminding us of our better selves. In such cases the Court . . . provides a stimulus and quickens moral education. But while the opinions of the Court can help to shape our national understanding of ourselves, *the roots of its decisions must be already in the nation*. The aspirations voiced by the Court must be those the community is willing not only to avow but in the end to live by. For the power of the great

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338. See LOEB ET AL., *supra* note 335, at 3 (“Pre-dating the implementation of modern accountability systems, the current finance structure has never been updated to align with the states [sic] accountability system, nor redesigned to help local officials meet student performance goals.”). In state courts, the due process of lawmaking theme has run through judicial criticism of school finance practices based on political compromise instead of analysis of educational needs defined in relation to state-established learning standards. See, e.g., *Montoy v. Kansas*, 120 P.3d 306, 310 (Kan. 2005) (criticizing legislative “failure to do any cost analysis” and crediting district court finding that “the financing formula was not based upon actual costs to educate children but was instead based on former spending levels and political compromise”); *Campaign for Fiscal Equity v. New York*, 801 N.E.2d 326, 348 (N.Y. 2003) (observing that “the political process allocates to [New York] City schools a share of state aid that does not bear a perceptible relation to the needs of City students”); *id.* at 357 & n.17 (Smith, J., concurring) (noting that funding “formulas have consistently failed to measure the actual costs necessary to provide New York City students with a sound education” because school aid is determined by political agreement between the Governor and legislative leaders, with the formulas then reversed engineered to produce the agreed-upon result).

339. Eskridge & Ferejohn, *supra* note 217, at 1276.

constitutional decisions rests upon the accuracy of the Court's perception of this kind of common will and upon the Court's ability, by expressing its perception, ultimately to command a consensus.<sup>340</sup>

The quotation is appealing not least because it manages to capture the "delicate" function of the Court with a somewhat heroic flourish. But Professor Cox's central insight—that "the roots of [the Court's] decisions must be already in the nation"—envelops many layers of complexity in the exercise of judicial review.

By giving voice to our shared understandings, the Court may ultimately command a consensus. But the task cannot be done in one fell swoop, and because the Court unavoidably "labors under the obligation to succeed,"<sup>341</sup> it must approach the task not with an eye toward heroism but with cautious judgment and respectful attention to the evolving understandings of our public culture. Some day yet, the Court may be presented with an opportunity to recognize a fundamental right to education or housing or medical care. But the recognition, if it comes, will not come as a moral or philosophical epiphany but as an interpretation and consolidation of the values we have gradually internalized as a society. As Alexander Bickel explained:

[T]he moment of ultimate judgment need not come either suddenly or haphazardly. Its timing and circumstances can be controlled. . . . Over time, as a problem is lived with, the Court does not work in isolation to divine the answer that is right. It has the means to elicit partial answers and reactions from the other institutions, and to try tentative answers itself.<sup>342</sup>

Should the Court ever reach a "moment of ultimate judgment," its decision will win acceptance only if "in the course of a continuing colloquy with the political institutions and with society at large, the Court has shaped and reduced the question, and perhaps because it has rendered the answer familiar if not obvious."<sup>343</sup>

In the quest for constitutional welfare rights, our political commitments in many areas currently provide too little grist for the judicial mill to render enduring solutions to distributive injustice either familiar or obvious. There is no substitute for the hard work of constructing, contesting, and enacting the distributive commitments in our public culture, and it is there that any effort to engage the courts in adjudicating welfare rights must begin.

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340. ARCHIBALD COX, *THE ROLE OF THE SUPREME COURT IN AMERICAN GOVERNMENT* 117-18 (1976) (emphasis added).

341. BICKEL, *supra* note 267, at 239.

342. *Id.* at 240.

343. *Id.*

