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Rights and Freedoms Under the State Constitution: A New Deal for Welfare Rights

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Editor's Note: On March 1, 1996, the Government Law Center of Albany Law School and the Touro College Jacob D. Fuchsberg Law Center co-sponsored a Symposium on State Constitutional Law: Adjudication and Reform. The Touro Law Review published a transcript of the Symposium's proceedings in an earlier issue, see Rights and Freedoms Under the State Constitution, *13 TOURO L. REV. 59 (1996). Prof. Helen Hershkoff participated in the Symposium but, because of the Review's deadline pressure, was not given an opportunity to review the transcript of her remarks prior to publication. We are now happy to correct the record by publishing a revised version of her talk.*

RIGHTS AND FREEDOMS UNDER THE STATE CONSTITUTION: A NEW DEAL FOR WELFARE RIGHTS

Helen Hershkoff*

Legal theorists increasingly recognize the New Deal as a transformative moment in American legal thought. Cass R. Sunstein writes of "constitutionalism after the New Deal" and its implications for regulatory administration.[1] Bruce A. Ackerman

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1. Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 HARV. L. REV. 421 (1987) (urging a reexamination of New Deal constitutionalism,

focuses on the New Deal as part of our nation's continuing founding, describing the ways in which a mobilized "We the People" effected constitutional change outside the formal structure of the Article V amendment process.[2] And Larry Kramer describes the New Deal and its relation to federalism and the political party system.[3] These scholars differ in their interpretive theory and historical narrative. But they nevertheless share a common theme: that federal constitutionalism, whatever its scope and content, cannot be understood without some account of the New Deal.[4]

The New Deal is virtually absent from the literature on state constitutions.[5] In part this may reflect the relative infancy of state constitutional scholarship. Just twenty years have passed since Justice William J. Brennan, Jr. invited state courts to give independent meaning to the liberty-protecting provisions of state constitutional texts.[6] Despite the publication of a casebook[7] and a treatise on state constitutions,[8] the area remains somewhat on

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renewed promotion of Madisonian representation, rejection of status quo neutrality, and reinvigoration of local self-government).

2. 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (focusing on New Deal as "constitutional moment" effecting constitutional change through self-conscious and mobilized activity of "We the People").

3. Larry Kramer, *Understanding Federalism*, 47 VAND. L. REV. 1485 (1994) (discussing New Deal, political parties, and federalism).

4. *See, e.g.*, Larry Kramer, *What's a Constitution for Anyway? History and Theory, Bruce Ackerman and the New Deal*, 46 CASE W. RES. L. REV. 885, 891 (1996) (criticizing Ackerman's notion of "constitutional moments" but acknowledging importance of New Deal to constitutional understanding).

5. *Cf.* JAMES T. PATTERSON, THE NEW DEAL AND THE STATES: FEDERALISM IN TRANSITION ii (1969) (urging New Deal historians to "turn from the excitement of Pennsylvania Avenue to the more prosaic events of Albany, Atlanta, and Santa Fe").

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

7. ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed. 1993).

8. JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (1992).

the margin of academic attention.[9] More important, the New Deal's absence from most state constitutional accounts may reflect their interpretive bias: an approach that Neil H. Cogan describes as "static"[10] and that tends to locate any state constitutional text--whenever adopted or amended--in the political culture of 1789.

The New Deal lacuna is an unfortunate gap in the state constitutional literature. Because state constitutions are relatively easy to amend,[11] many provisions are twentieth-century creations that respond directly to New Deal concerns.[12] In particular, these provisions embody the basic substantive features that commentators associate with New Deal constitutionalism: a repudiation of common law entitlements as the public law baseline, a rejection of status quo neutrality as the metric for distinguishing government action from inaction, and a reformulation of citizenship as encompassing rights to material well being.[13] Some of these clauses lack any explicit federal

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9. The attention it attracts can be less than favorable. *See, e.g.*, James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 763 (1992) (describing state constitutional decision making as "a vast wasteland of confusing, conflicting, and essentially unintelligible pronouncements").

10. Neil H. Cogan, *Moses and Modernism*, 92 MICH. L. REV. 1347, 1352 (1994) (reviewing THE BILL OF RIGHTS AND THE STATES: THE COLONIAL AND REVOLUTIONARY ORIGINS OF AMERICAN LIBERTIES (Patrick T. Conley & John P. Kaminski eds., 1992); JENNIFER FRIESEN, STATE CONSTITUTIONAL LAW: LITIGATING INDIVIDUAL RIGHTS, CLAIMS AND DEFENSES (1992); REFERENCE GUIDES TO THE STATE CONSTITUTIONS OF THE UNITED STATES (1991-94)).

11. *See* Note, *Project Report: Toward an Activist Role for State Bills of Rights*, 8 HARV. C.R.-C.L. L. REV. 271, 296 (1973) (noting "ease of state constitutional amendment").

12. *See* Jed Rubenfeld, *Reading the Constitution as Spoken*, 104 YALE L.J. 1119, 1169-73 (1995). In these provisions, to use Rubenfeld's terminology, the Great Depression forms the "paradigm case" of the "particular evils ... felt to be intolerable" and "that demanded a constitutional transformation." *Id.*

13. *See, e.g.*, Sunstein, *supra* note 1, at 421-26 (associating New Deal constitutionalism with rejection of common law baseline and of status quo neutrality).

analogue and impose positive duties on state government to provide public assistance, health care, and affordable housing.[14]

This essay begins the task of contextualizing state constitutional provisions in their New Deal history. It also sketches the implications of this history for state constitutional interpretation. I look at this problem by examining Article XVII of the New York Constitution, a Depression-era clause that guarantees the "aid, care and support of the needy"[15] and that has been compared favorably with the humanitarian goals of the United Nations Declaration of Human Rights.[16] At a time when commentators are debating the compatibility of positive rights with liberal constitutional regimes,[17] New York's welfare provision provides an opportunity to revisit many foundational questions of constitutional theory: What is a constitution? What is its domain? What is its relation to material well being? While answers to these questions (indeed, the questions themselves) are largely beyond the scope of this essay, they necessarily form the background concerns.[18]

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14. *See* Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 893-95 & nn.60-82 (1989) (describing positive welfare commitments of some state constitutional texts).

15. N.Y. CONST. art. XVII, § 1. This provisions states: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine." *Id.*

16. *See* PETER J. GALIE, THE NEW YORK STATE CONSTITUTION: A REFERENCE GUIDE 242 (1991) (making international comparison).

17. *Compare* Herman Schwartz, *Do Economic and Social Rights Belong in a Constitution?*, 10 AM. U.J. INT'L L. & POL'Y 1233 (1995) (arguing in favor of positive rights as appropriate constitutional guarantees) *with* Cass R. Sunstein, *Against Positive Rights*, 1993 E. EUR. CONST. REV. 35 (1993) (arguing against positive rights as appropriate constitutional guarantees).

18. This talk focuses on welfare examples in part because, from 1983-1987, I was an attorney with The Legal Aid Society of New York, Civil Appeals & Law Reform Unit, and from 1987-1995, associate legal director of the American Civil Liberties Union responsible for the ACLU's work in the area of race and poverty. The focus has other advantages. In particular, it puts into sharp relief the meaning of the "New Judicial Federalism" and the extent to which states may extend more generous rights and liberties to members of their community.

The topic of this essay also has current practical significance. The end of the AFDC program, and the consequent elimination of any federal safety net for the nation's poor, has raised concerns that states will engage in "a race to the bottom" in the design of their new block-grant welfare regimes.[19] Because the federal constitution has been interpreted to afford no affirmative right to welfare,[20] commentators anticipate that it will provide an ineffective bulwark against local retrenchment.[21] The major constitutional challenges to the new welfare programs are therefore likely to take place in state courts under state constitutional provisions that afford substantive protection to the poor.[22] Paul A. Kahn, among others, has suggested that state courts could thus become the major expositors of fairness norms for the nation's poor.[23] In a state in which 17 percent of the

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19. "AFDC" refers to the Aid to Families with Dependent Children program, 42 U.S.C.A. § 601 et seq. (West 1996). In August 1996, Congress repealed the AFDC program and replaced it instead with a system of block grants that devolves authority for welfare policy on states and localities. *See* HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR (forthcoming 1997) (discussing repeal of AFDC and substitution of system of block grants); Note, *Devolving Welfare Programs to the States: A Public Choice Perspective*, 109 HARV. L. REV. 1984, 1985 (1996) (discussing strong possibility that states will engage in "a race to the bottom" in developing block-grant programs).

20. *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1305-1313 (1993) (describing rise and demise of federal right to welfare).

21. *But see* Laurence H. Tribe, *Unraveling* National League of Cities*: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1065 (1977) (suggesting that elimination of federal statutory support for welfare, and resulting increase in human suffering and social dislocation, might affect Supreme Court poverty jurisprudence).

22. *Cf.* David Firestone, *The Welfare Bill: The City; New York Costs for Its Program Seen as Surging*, N.Y. TIMES, Aug. 1, 1996, at A1 (quoting Mayor Giuliani of New York City that with elimination of AFDC, Article XVII of New York Constitution will require "[t]he state and city . . . to make up that difference" to poor people).

23. *See* Paul W. Kahn, *State Constitutionalism and the Problems of Fairness*, 30 VAL. U. L. REV. 459, 460 (1996) (predicting important

population is officially poor, and more than 1.2 million individuals depend on AFDC and SSI for subsistence,[24] the interpretive stakes are very high.[25]

The approach of this essay is both internal to Article XVII and historical; it takes seriously the idea that the New York Constitution is "a deliberate, considered expression of fundamental values."[26] Part I describes the New York court's decision-making approach to Article XVII and locates the cases within a three-part typology that inversely correlates the strength of judicial review with that of legislative discretion. Part II suggests that the New York court's interpretive approach comports neither with the language nor the history of Article XVII. Part III offers an alternative way to read the text that fits more closely with Article XVII's explicit New Deal commitments and that takes better account of the special institutional position of state courts. Part IV is a brief conclusion.

I

Article XVII, § 1 provides that the "aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."[27] The New York court[28] has read Article XVII to create a

normative role for state courts in elaboration of fairness norms under state constitutions).

24. *See* U.S. DEP'T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 1996, THE NATIONAL DATA BOOK 474 tbl.735 (calculating "Persons Below Poverty Level, by State: 1980-1994").

25. *See* Vincent Martin Bonventre, *New York's Chief Judge Kaye: Her Separate Opinions Bode Well for Renewed State Constitutionalism at the Court of Appeals*, 67 TEMP. L. REV. 1163, 1164 (1994) (discussing interpretive shift on New York Court of Appeals in favor of robust state constitutionalism).

26. *See* James A. Gardner, *What is a State Constitution?*, 24 RUTGERS L.J. 1025, 1028 (1993) (rejecting idea that state constitutions reflect distinct state differences or thoughtful deliberation).

27. N.Y. CONST. art. XVII, § 1.

28. By "New York court" I mean the state's multileveled judicial system that includes but is not limited to the New York Court of Appeals.

judicially enforceable right to public assistance that is "a fundamental part of the social contract"[29] between New York and its needy residents. At the same time, however, the court has accorded the legislature broad "discretion in determining the means by which this objective is to be effectuated, in determining the amount of aid, and in classifying recipients and defining the term 'needy.'"[30] This Part describes the kinds of issues that Article XVII cases raise and the New York court's decision-making approach to them.

Article XVII cases may be seen as dealing with three aspects of legislative discretion. In the first type of case, the question is whether the state has withheld public assistance from a litigant who meets the state's statutory definition of needy. Here the plaintiff claims membership in a prescribed legal category of poor people to whom the state has extended assistance but complains that she or he has been denied the specified benefit. Type-one cases reflect the positivist conception of entitlement that Charles Reich elaborated in his now classic article, *The New Property*,[31] and that the Court endorsed in its landmark decision, *Goldberg* v. *Kelly*[32]: Welfare benefits "are a matter of statutory entitlement for persons qualified to receive them."[33] Within the positive boundary of the authorizing statute, the state has no discretion to withhold a benefit from a claimant who meets the duly-enacted standard of "needy."

Type-one cases thus ask whether the government has correctly applied a legal norm to a particular individual or class of individuals similarly situated to members of a legislatively defined group. The older view of welfare as a privilege to be granted or denied as a matter of administrative discretion is explicitly rejected in Type-one cases,[34] and the legislature has no

29. Tucker v. Toia, 43 N.Y.2d 1, 7 (1977).

30. *Id.* at 8.

31. Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964).

32. 397 U.S. 254 (1970).

33. *Id.* at 262.

34. *See* Wilkie v. O'Connor, 25 N.Y.S.2d 617, 619 (App. Div. 1941) (describing welfare payments as "charity").

authority to depart from a definition of needy that the political process has itself generated. The court applies in these cases a bright-line approach, without any balancing, thus vigorously enforcing standards that presumably come with the aura of democratic accountability.[35]

The leading case in the Type-one category is *Tucker* v. *Toia*,[36] which involved a challenge to state regulations that had been amended to deny Home Relief benefits to youths who live on their own and do not have a judicial order of support against legally responsible adults.[37] The effect of the amendment, which was adopted to achieve fiscal savings, was to place the burden of obtaining a final judicial order of disposition on the minor child seeking relief.[38] In striking down the provision, the court reasoned that because the legislature cannot directly refuse aid to the needy, it cannot indirectly do so by imposing administrative requirements "having nothing to do with need."[39]

The second question that Article XVII cases can raise concerns the location of the legislative border that defines the statutory concept of needy. Here the claimant is an impoverished individual who is excluded from a state created welfare program but who claims a right to relief because of functional similarity to persons within the existing legislative category. In Type-two cases, the legislature is assumed to possess plenary power to define the standards that construct the statutory category of needy and that limit membership in the group of needy persons eligible for assistance. In the cases so far, the court will rarely accept a substantive challenge to the underinclusiveness of the state's

35. *Cf.* Martha Morgan, Adam S. Cohen & Helen Hershkoff, *Establishing Education Program Inadequacy*, 28 U. MICH. J. L. REFORM 559, 586-94 (1995) (discussing role of democratically enacted, positive state standards in enforcement of state constitutional right to adequate education).

36. 43 N.Y.2d 1 (1977).

37. Home Relief is the state's residual general assistance program and is funded exclusively from state and local sources. *See* N.Y. SOC. SERV. LAW § 158 (McKinney 1996).

38. *See* Tucker v. Toia, 89 Misc.2d 116, 119-20 (N.Y. Sup. Ct. 1977), *aff'd*, 43 N.Y.2d 1 (1977).

39. *Tucker*, 43 N.Y.2d at 8.

classification.[40] As long as the statutory border is plausibly cast in economic terms, the court is typically satisfied that the legislature has complied with Article XVII's mandate and it does not scrutinize the actual reasonableness of the law. For example, in *Barie* v. *Lavine*,[41] the court upheld the constitutionality of regulations allowing the thirty-day suspension of welfare benefits to Home Relief recipients who refuse without good cause to accept employment. The *Barie* plaintiff had missed a single work appointment, and there was no evidence of "intermittent or multiple refusals ... to accept employment."[42] Nevertheless, the court held that "[t]he Legislature may in its discretion deny aid to employable persons who may properly be deemed not to be needy when they have wrongfully refused an opportunity for employment."[43]

The third question that Article XVII cases can raise concerns the type, amount, and form of assistance that the state has chosen to provide; the challenge is typically to the adequacy of the relief program and the level of benefits that it provides. The leading case is *Bernstein* v. *Toia*,[44] which upheld the state's decision to eliminate a system of special grants in favor of a fixed, capped schedule of benefits.[45] "[T]he Legislature," the court explained, "is vested with discretion to determine the amount of aid."[46] Although the court in Type-three cases typically treats the issue as justiciable, so that plaintiff loses on the merits, in practice the legislature is afforded discretion that is final and beyond review.

The court's approach to Article XVII thus draws a line between challenges dealing with exclusions of needy persons from existing welfare programs and challenges to the adequacy of assistance

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40. For a notable exception, *see* Lee v. Smith, 43 N.Y.2d 453 (1977) (striking down section of New York Social Services Law that excluded SSI recipients from Home Relief program).

41. 40 N.Y.2d 565 (1976).

42. *Id.* at 570 (Jones, J., dissenting).

43. *Id.* at 570.

44. 43 N.Y.2d 437 (1977).

45. *Id.* at 440.

46. *Id.* at 449.

provided under any particular program. The court will review, with varying degrees of intensity, questions of exclusion. But it takes a hands-off approach to questions of adequacy, on the view that these involve choices best left to the electoral process.

II

The New York court's approach to Article XVII is typical of federal constitutional welfare analysis.[47] But it is an approach, this Part suggests, that does not fit with the text or history of Article XVII. In particular, the court fails to protect the poor against the primary danger to which Article XVII is directed: the danger of government indifference to the needs of the poor.[48]

The court consistently invokes legislative discretion as the ground for its hands-off approach to questions of welfare adequacy. Most contemporary discussions of discretion focus on its exercise by judicial and administrative actors. Legislative discretion, by contrast, features as an inevitable part of the political landscape. In a general sense discretion is the defining quality of legislative power: the freedom to make policy choices that the other branches of government must respect. Such discretion leaves the government actor "free to make a choice among possible courses of action or inaction."[49] The electoral

47. Federal constitutional welfare analysis consistently leaves intact decisions about levels of welfare assistance but at times has taken a somewhat tougher look at exclusions of poor people from existing assistance programs. *See* Tribe, *supra* note 21, at 1089 & n.100 (citing Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) (describing federal approach)); *compare* United States Dept. of Agriculture v. Murry, 413 U.S. 508 (1973) (striking down "tax dependent" provision of food stamp act that denied food stamps to otherwise eligible households) *with* Dandridge v. Williams, 397 U.S. 471 (1970) (upholding cap on AFDC payments that limited assistance regardless of family size and actual need).

48. *Cf.* Sunstein, *supra* note 1, at 433 (stating that New Deal constitutionalism is driven by fear of government inaction, just as constitutionalism of founding period was driven by fear of government action).

49. KENNETH CULP DAVIS, DISCRETIONARY JUSTICE: A PRELIMINARY INQUIRY 4 (1969).

process legitimates the legislature's choices and subjects them to control.[50] The idea of discretion as choice is allied in important ways with a negative-rights model of a constitution, which requires government to take no particular action but simply restrains the exercise of power within a prescribed domain. If legislative power is aimless and without commitment, then any legislative choice is plausible. In a world without positive duties, legislative discretion, to use Ronald Dworkin's famous metaphor, is "the hole in the doughnut, ... an area left open by a surrounding belt of restriction."[51]

Discretion as choice--or at least unconstrained choice--makes less sense in a legal regime that commits government to use power for specific purposes. Article XVII was designed to make permanent a basic policy choice that the legislature is mandated to achieve. It thus articulates a substantive commitment, creating "an environment of constraint, of ... ideals to be fulfilled,"[52] which ought to affect the quality and scope of a court's review. To borrow from D. J. Galligan, the duty of a legislature vested with authority such as the kind afforded under Article XVII "is to realize and advance the objects and purposes for which ... powers have been granted.[53] Because the state constitution "is a source of positive law, not merely a set of limitations on government,"[54] judicial review, to keep legislative power within the bounds of law, must constrain discretion so that it achieves the affirmative constitutional mandate.

Article XVII conspicuously does not speak in terms of legislative discretion. It instead has a bifurcated structure of duty and power that is unfamiliar to the federal constitution. Article

50. *See* William A. Fletcher, *The Discretionary Constitution: Institutional Remedies and Judicial Legitimacy*, 91 YALE L.J. 635, 642 (1982) (discussing electoral controls over legislative discretion).

51. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 31 (1978).

52. PHILIP SELZNICK, LAW, SOCIETY, AND INDUSTRIAL JUSTICE 11 (1978) (quoted in Robert C. Post, *The Management of Speech: Discretion and Rights*, 1984 SUP. CT. REV. 169, 207 & n.161 (1984)).

53. D.J. GALLIGAN, DISCRETIONARY POWERS: A LEGAL STUDY OF OFFICIAL DISCRETION 16-17 (1986).

54. Brown v. New York, 89 N.Y.2d 172, 187 (1996).

XVII begins with words of command, mandating the legislature to provide forms of public assistance to the poor ("[t]he aid, care and support of the needy ... shall be provided by the state and by such of its subdivisions") and concludes with words of permission, affording flexibility and open-ended authority to the legislature in its performance of this duty ("and in such manner and by such means, as the legislature may from time to time determine"). The clauses are sequential and conjunctive, first imposing an obligation on the legislature and then empowering the legislature to meet this obligation through the use of any possible device. The individual's right to assistance is thus interconnected with the government's power to effectuate the right.[55]

The design and purpose of Article XVII can only be understood against the background understandings of the New Deal.[56] Robert M. Cover has written that "[e]ach constitutional generation organizes itself around paradigmatic events ...."[57] Article XVII was adopted as a result of the 1938 Constitutional Convention.[58] For the delegates who convened in 1938 to

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55. *See* Richard H. Fallon, Jr., *Individual Rights and the Powers of Government*, 27 GA. L. REV. 343 (1993) (describing interconnection of individual rights and government power).

56. *See* Lawrence Lessig, *What Drives Derivability: Responses to Responding to Imperfection*, 74 TEX. L. REV. 839, 854 (1996) (claiming that "background understandings constitute the meaning of a foreground text, and that one cannot understand what a text means unless one understands these background understandings as well") (reviewing RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995)).

57. Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1316 (1982).

58. The 1938 Constitutional Convention was held pursuant to the 1894 New York Constitution, which required the voters to decide every twenty years whether a convention should take place to amend the constitution. The 1938 convention was the second to take place in New York in the twentieth century. Recommendations from the first, held in 1915, were rejected by popular vote. *See* Frieda Almira Gillette, The New York State Constitutional Convention of 1938, at 1 (1944) (unpublished Ph.D. thesis, Cornell University) (on file with Cornell University Library).

consider amending the New York Constitution, the defining events were the Great Depression and the rise of totalitarianism.[59] If the democratic order was to survive, the state had to forge a new social contract with its members, one that made explicit the government's responsibility to protect its citizens against the misfortunes of an unregulated market. "We are here to do one thing, if nothing else," declared Judge Frederick E. Crane on his election as President of the 1938 Constitutional Convention. "To prove to the world that our form of government does work; that it will work efficiently, and can meet the problems of the day and the necessities of the times ...."[60] Later at the Convention, Senator Robert F. Wagner, Jr. explained that the constitutional goal was to meet "the threat to freedom that comes from another source--from poverty and insecurity, from sickness and the slum, from social and economic conditions in which human beings cannot be free."[61]

Social and economic conditions at the time of the Convention gave shape and content to the delegates' constitutional priorities.[62] In an important sense, the delegates were concerned with what Frank I. Michelman has called "demoralization costs"--the potentially destructive reaction of individuals to legal orders that fail to respond to normative claims.[63] At the time of the Convention, New York was just beginning to lift itself from the

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59. *See* Galie, *supra* note 16, at 25 (stating that the Great Depression made "it difficult for delegates to ignore social and economic issues . . . . The Great Depression had forced public officials to reevaluate their understanding of the role of government in society, labor was a more potent force than it had been in 1915, and the New Deal was in full swing both in the state and nation").

60. VERNON A. O'ROURKE & DOUGLAS W. CAMPBELL, CONSTITUTION-MAKING IN A DEMOCRACY: THEORY AND PRACTICE IN NEW YORK STATE 1 (1943) (quoting speeches of Constitutional Convention).

61. *Id.* at 117.

62. Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272, 285-89 (1986) (describing social and economic conditions at time of 1938 Convention).

63. *See* Frank I. Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214 (1967) (defining demoralization costs).

Great Depression, which had profoundly affected the state's industrial and agricultural base.[64] In the four-year period beginning 1929, industrial jobs dropped from over one million to little more than 700,000, and wages correspondingly fell. Unemployment became pervasive. By 1933, more than one and a half million New Yorkers were receiving some kind of assistance, and many more needed relief but went unaided.[65] As Harry Hopkins put it, in a speech to the National Council of Social Work that year, "[W]e are dealing with all classes. It is no longer a matter of unemployables and chronic dependents, but your friends and mine."[66]

Article XVII had two closely related purposes.

The first was to impose on state government a mandatory obligation to provide assistance to the poor. In the pre-New Deal world of *Lochner*,[67] government was expected to remain neutral in the face of market disaster; regulatory intervention of any sort was potentially unconstitutional as a deviation from the common law baseline.[68] Article XVII altered the baseline by making government inaction in the face of individual need unconstitutional. It thus constrained legislative power by mandating its use for a particular purpose, constitutionalizing extensive statutory commitments embodied in the state's revised social services law.[69] "Here are words," the Committee on

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64. For a history of this period in New York, see generally WILLIAM W. BREMER, DEPRESSION WINTERS: NEW YORK SOCIAL WORKERS AND THE NEW DEAL (1984); JOHN D. MILLETT, THE WORKS PROGRESS ADMINISTRATION IN NEW YORK CITY (1938); DAVID M. SCHNEIDER & ALBERT DEUTSCH, THE HISTORY OF PUBLIC WELFARE IN NEW YORK STATE 1867-1940 (1941).

65. *See* JOAN M. CROUSE, THE HOMELESS TRANSIENT IN THE GREAT DEPRESSION: NEW YORK STATE, 1929-1941 53 (1986).

66. ROBERT E. SHERWOOD, ROOSEVELT AND HOPKINS: AN INTIMATE HISTORY 212 (1948).

67. 198 U.S. 45 (1905).

68. *See* Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM L. REV. 873, 874 (1987) (discussing understandings of *Lochner* court).

69. *See* O'Rourke & Campbell, *supra* note 60, at 161 (stating that Article XVII was constitutional safeguard "anticipating possible judicial decisions which would nullify rights" of the poor).

Social Welfare reported, "which set forth a definite policy of government, a concrete obligation which no court may ever misread."[70] The state's duty to meet its Article XVII obligation was to exist "not only in periods of grave emergency, as at present, but even in time of normal unemployment when the need may be reduced in measure but certainly not in nature."[71]

The state undertook this welfare obligation despite federal retrenchment from the relief front. By the time of the Convention, the federal government had dismantled the Federal Emergency Relief Administration, thus returning the problem of general relief to the states.[72] Many states correspondingly reduced their own assistance efforts. New York, by contrast, committed itself in Article XVII to a network of social support far more protective than the Social Security Act of 1935, which contained significant omissions in terms of coverage and benefits.[73] On the floor of the Convention, Committee members specifically denounced the failure of other states to meet the needs of the poor in this period, referring, for example, to the "brutal callousness to human suffering ... witnessed in the State of New Jersey" when the State Relief Council closed in 1936.[74]

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70. STATE OF NEW YORK, REVISED RECORD, PROCEEDINGS OF 1938 NEW YORK STATE CONSTITUTIONAL CONVENTION 2126 (Statement of Edward Corsi, Chair of Convention's Committee on Social Welfare) [hereinafter RECORD].

71. *Id.* Commentators frequently associate the statutory-like detail of state constitutional provisions with distrust of legislative power. As Robert Williams explains, "[T]he insertion of specific 'constitutional legislation'" is intended to "supplant[] legislative prerogatives" on particular social objectives. Robert Williams, *State Constitutional Law Processes*, 24 WM & MARY L. REV. 168, 201-02 (1983).

72. *See* JACOB FISHER, THE RESPONSE OF SOCIAL WORK TO THE DEPRESSION 57 (1980) (describing federal retrenchment from general relief efforts after enactment of Social Security Act of 1935).

73. *See generally* William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986) (discussing political compromises of Social Security Act of 1935).

74. RECORD, *supra* note 70, at 2126; *see also All Relief Ends in Jersey; Local Areas Must Feed 270,000*, N.Y. TIMES, April 17, 1936, at 1 (quoted in Tucker v. Toia, 89 Misc.2d 116, 123 & n.19 (Sup. Ct. Monroe Co. 1977)).

The second purpose of Article XVII was to ensure that the state had full authority to carry out this new constitutional duty. Throughout the early years of the Depression, one of New York's central challenges had been to defend the legality of its relief efforts as an exercise of the police power. As the Convention's Social Welfare Committee stated in its explanatory report, Article XVII was intended "to remove all doubt as to the power of the legislature to authorize relief for those in need and to allocate responsibility therefore to the State and its political subdivisions." As later explained on the floor of the Convention:

> The Legislature may continue the system of relief now in operation. It may preserve the present plan of reimbursement to the localities. It may devise new ways of dealing with the problem. Its hands are untied. What it may not do is shirk its responsibility which, in the opinion of the committee, is as fundamental as any responsibility of government.[75]

By according constitutional status to welfare claims, Article XVII also recognized their priority relative to other government responsibilities. The state's earlier social services law had been interpreted to make assistance available only "as far as possible" and "in so far as funds are available."[76] Under Article XVII, by contrast, welfare was no longer to be a matter of expedience but rather a mandatory feature of the social contract. As a member of the Social Welfare Committee stated on the Convention floor, "We feel that up to that very last penny where somebody needs help to eat and to have shelter and to preserve body and soul, there is a claim on the state."[77] In order to ensure that adequate levels of assistance became available throughout the state, a state mandate was thus substituted for local responsibility.

The constitutional language, "in such manner and by such means," was thus intended to overcome constitutional doubts about the scope of the state's power in meeting the needs of the

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75. RECORD, *supra* note 70, at 2126.
76. Schneider & Deutsch, *supra* note 64, at 286-88.
77. RECORD, *supra* note 70, at 2126.

poor. It was also intended to afford the legislature broad authority to meet the constitutional goal. Such language was typical of the New Deal,[78] a time of great plasticity and experimentation, when those involved in forging the new regulatory order spoke of the "ideal state ... as a process of becoming."[79] The open-ended language of Article XVII also responded to one of the major criticisms of earlier state constitutions: that their excessive detail prevented the state from meeting new challenges and from adapting to changed circumstances. Article XVII was drafted to encourage innovation and to allow progressive improvement. But nothing in its language or history explicitly or impliedly repeals a New York court's duty to check legislative power and to constrain its use for mandated constitutional purposes.

III

The New York court's approach to Article XVII, especially in Type-three cases, is familiar: it hesitates to scrutinize laws that implicate budget decisions or would require the reallocation of public funds; it hesitates to become involved in areas that seem to require special expertise; and it hesitates to use adjudication to resolve disputes that involve social priorities. Such an approach is unremarkable. For it is a model of judicial power typical to post-*Lochner* federal constitutional adjudication. What is

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78. *Cf. Case Comment, FSLIC Discretion in Insuring State-Chartered Institutions: West Helena Savings & Loan Ass'n v. Federal Home Loan Bank Board*, 91 HARV. L. REV. 1090, 1093-94 & n.25 (1978) (discussing absence of specific criteria in 1934 legislation regulating Federal Savings and Loan Insurance Corporation).

79. Mark Barenberg, *The Political Economy of the Wagner Act: Power, Symbol, and Workplace Cooperation*, 106 HARV. L. REV. 1379, 1413 (1993) (quoting Robert Wagner, *The Ideal Industrial State*, N.Y. TIMES, May 9, 1937, Magazine at 8. Many historians have noted the "experimental" atmosphere of the New Deal period. *See, e.g.*, SUSAN WARE, BEYOND SUFFRAGE: WOMEN IN THE NEW DEAL 6 (1981) (describing "experimental, reformist atmosphere of the New Deal").

remarkable, however, is its lack of fit with the special institutional position of state courts.

State courts differ from the federal in a number of important respects. State courts are uninhibited by concerns of federalism, which federal courts frequently invoke to explain their refusal to second guess local decisions affecting social and economic issues.[80] State courts also carry the advantages and disadvantages of greater political accountability, which afford their decision making an enhanced aura of legitimacy and also works to mitigate concerns about finality.[81] And state courts have the generative power of the common law,[82] giving them a distinct institutional advantage over state legislatures, which often "lack the resources needed for sophisticated policy analysis."[83] Building on the insight of state court difference, I have suggested elsewhere that state courts should assume a more active posture in enforcing state constitutional guarantees.[84] This Part explores this possibility by offering an alternative approach to the New York court's enforcement of Article XVII.

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80. *See, e.g.*, San Antonio School Dist. v. Rodriguez, 411 U.S. 1, 41 (1973) (relying on federalism in rejecting equal protection challenge to disparities in state funding of public schools).

81. *See* Judith S. Kaye, *Contributions of State Constitutional Law to the Third Century of American Federalism*, 13 VT. L. REV. 49, 56 (1988) (contending that "State courts are generally closer to the public, to the legal institutions and the environments within the state, and to the public policy process").

82. *See* Judith S. Kaye, *State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions*, 70 N.Y.U. L. REV. 1, 2 (1995) (discussing policy making role of common law courts).

83. Note, *State Economic Substantive Due Process: A Proposed Approach*, 88 YALE L.J. 1487, 1490 (1979).

84. Helen Hershkoff, *State Constitutions: A National Perspective*, 3 WIDENER J. PUB. L. 7, 9 (1993) (discussing differences between state and federal courts and implications for judicial review). *See* Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212, 1255 (1978) (describing different institutional position of state and federal judiciaries and implications for enforcement of federal constitutional norms).

Let us assume that New York decides to design its new block-grant program by providing cash welfare benefits that are subject to incremental percentage decreases after the first eighteen months of assistance. The stated rationale is that indigent families need economic disincentives to encourage them to seek wage employment.[85] A challenge is filed under Article XVII. In particular, the law suit alleges, the legislature has failed to account for labor market reductions and the lack of available jobs for welfare recipients. A court faced with such a challenge would have to determine whether the legislature's decision to reduce welfare benefits below minimum subsistence levels meets the legitimate needs of the poor. The fact that the legislature has discretion to design a welfare plan, plaintiffs would argue, does not give the legislature discretion to design a plan that does not actually effectuate Article XVII's mandate.

Courts enforce positive claims of this sort more often than the conventional literature acknowledges. Even federal courts enforce claims to particular services or ensure compliance with substantive duties of care. Thus, for example, federal courts enforce positive claims to damages for compensable takings under the Fifth Amendment[86] as well as positive claims to treatment and care by the mentally retarded and the mentally ill under the Fourteenth Amendment.[87] On a subconstitutional

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85. The hypothetical is modeled roughly on proposed welfare legislation submitted by Governor George Pataki on November 13, 1996 to implement the Personal Responsibility, Work Opportunity, and Medicaid Reconciliation Act of 1996. *See* The Welfare Working Group, *The Association of the Bar of the City of New York's Review of the Pataki Welfare Plan*, 52 THE RECORD OF THE ASSOCIATION OF THE BAR 13, 13 (1997).

86. *See, e.g.*, Dolan v. City of Tigard, 512 U.S. 374 (1994). The Takings Clause of the Fifth Amendment provides: "[N]or shall private property be taken for public use, without just compensation." U.S. CONST. amend. V.

87. *See, e.g.*, New York State Ass'n for Retarded Children, Inc. v. Carey, 393 F. Supp. 715 (E.D.N.Y. 1975) (challenge to conditions in Willowbrook State School). The author was co-counsel in this action from 1979-1985. The Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or

level, federal administrative agencies police compliance efforts by regulated industries and also determine the substantive compatibility of agency rules with statutory norms.[88] State courts enforce (and indeed create) common law duties of care, the execution of which may be committed to the discretion of the duty holder, such as a corporate officer or other representative in a fiduciary position of trust.[89] And state courts enforce state constitutional provisions guaranteeing a range of positive rights, such as the right to an adequate education.[90]

These positive rights cases provide a useful analogy for a New York court asked to review the adequacy of the state's welfare efforts. Certain threads appear in the cases that can potentially be woven into a standard of review. At a minimum, Article XVII review should entail a procedural component in which the court takes a "hard look" at the legislative record and determines whether the challenged law rests on empirical support or on speculation and stereotype.[91] Searching review of this sort serves a number of important goals. As with clear statement rules, the hard look approach forces the legislature to take its Article XVII responsibilities seriously and to engage in meaningful deliberation on an issue of profound social importance. The hard look approach also insists that the legislature assume political accountability for its choices because it must now create a decision-making record and make that

property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." U.S. CONST. amend. XIV.

88. *See, e.g.*, Motor Vehicles Manufacturers Ass'n v. State Farm Ins. Co., 463 U.S. 29, 42 (1983) (defining arbitrary and capricious standard of review).

89. *See* Jay P. Moran, *Business Judgment Rule or Relic?* Cede v. Technicolor *and the Continuing Metamorphosis of Director Duty of Care*, 45 EMORY L. J. 339 (1996) (discussing judicial enforcement of business judgment rule).

90. *See* Morgan, Cohen & Hershkoff, *supra* note 35, at 561 & n.11 (pointing to Kentucky, Massachusetts, New Hampshire, and New Jersey as states in which state courts have enforced state constitutional rights to adequate education).

91. *See, e.g.*, United States v. Lopez, 115 S. Ct. 1624 (1995) (reviewing legislative fact finding under Commerce Clause).

record available for public scrutiny. And the hard look approach polices the legislative process to ensure that impermissible factors do not taint the ultimate regulatory classification.

In addition, Article XVII review must entail a substantive component. The court has to consider whether the legislature's choices will reasonably effectuate the goal of meeting the legitimate needs of the poor. As in any case involving an affirmative claim to government services, the court will first have to develop a baseline or norm against which to assess the adequacy of the state's response. So, for example, in the private sphere, child support orders require a judicial determination of how much it takes to raise a child within the financial parameters of a particular family.[92] Similarly, courts in public law cases typically rely on professional standards in developing a baseline to assess the constitutional adequacy of such things as prison conditions or the care of children placed in foster care.[93] Professional norms afford an important starting point in the analysis. But they do not replace the court's responsibility to facilitate the evolution of standards through the process of common law constitutionalism.

IV

Article XVII promises the poor of New York a "New Deal" in welfare rights: a commitment that their legitimate claims will be heard and enforced in the political process. It is easy for elected representatives to overlook the needs of underresourced constituents or casually to mistreat them. By taking a serious look at the legislature's enforcement of Article XVII, the court

92. *See* Nan D. Hunter, *Women and Child Support*, *in* FAMILIES, POLITICS, AND PUBLIC POLICY: A FEMINIST DIALOGUE ON WOMEN AND THE STATE 203-15 (Irene Diamond ed. 1983) (discussing role of standards in child support orders).

93. *See* Susan Stefan, *Leaving Civil Rights to the "Experts": From Deference to Abdication under the Professional Judgment Standard*, 102 YALE L.J. 639 (1992) (discussing professional judgment standard under Fourteenth Amendment).

can take a step to improve law making in an area of constitutional priority. In this essay, I have tried to sketch out the contours of what an alternative approach to poor people's claims under Article XVII might entail. It is only the beginning of a conversation on this issue. But the importance of the project should be clear. For in constraining the legislature to achieve a constitutional goal, the court, in Benjamin Cardozo's phrase, reveals its "chief worth": "in making vocal and audible the ideals that might otherwise be silenced, in giving them continuity of life and of expression, in guiding and directing choice within the limits where choice ranges."[94]

94. BENJAMIN CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 94 (1921).