PENN STATE LAW REVIEW

State Courts and Constitutional Socio-Economic Rights: Exploring the Underutilization Thesis

Helen Hershkoff* and Stephen Loffredo**

Comparative constitutional scholars are beginning to recognize the importance of subnational constitutions for law-making and governance.[1] In particular, commentators emphasize that a polity's decision to assign some aspects of constitutional practice to the subnational level significantly affects the political choices available to constitutive units within a larger system and to the system overall.[2] So far, the emerging

* Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties and Co-Director, The Arthur Garfield Hays Civil Liberties Program, New York University School of Law. The author gratefully acknowledges support for this project from The Filomen D'Agostino and Max E. Greenberg Research Fund. As an associate legal director of the ACLU and a staff attorney with The Legal Aid Society, the author was co-counsel or amicus curiae in cases involving state constitutional socio-economic rights to public schooling and indigent assistance.

** Professor of Law and Director, Economic Justice Project, Main Street Legal Services, City University of New York School of Law. The author gratefully acknowledges support for this project from the CUNY School of Law summer research fund. The author is co-counsel in the *Taylor* litigation, and as a staff attorney with The Legal Aid Society and as a consulting attorney for the Urban Justice Center was co-counsel in cases involving state constitutional socio-economic rights to indigent assistance, including McCain v. Koch, discussed in this Article.

An earlier version of this paper was presented on September 22, 2010 at a Symposium on State Constitutional Law sponsored by The Dickinson School of Law of the Pennsylvania State University. We thank Gary Gildin, Justin Robert Long, Alan Tarr and Robert Williams for comments, Brian Leary, Jessica Rubin-Wills, Michael Baum, Craig Dan Haaren, Inayat Ali Hemani, Anderson Heston, Wonjun Lee, and Elina Sheykh-Zade, students at New York University School of Law, for research assistance, and Robert Anselmi and Hetty Dekker for administrative support. We also appreciate the insights of the state court judges who spoke with us: Judith S. Kaye and Albert M. Rosenblatt.

1. *See* John Dinan, *Patterns of Subnational Constitutionalism in Federal Countries*, 39 RUTGERS L.J. 837, 837 n.2 (2008) (collecting sources that evince a "renewed interest in subnational constitutions").

2. *See generally* Ronald L. Watts, *Foreword: States, Provinces, Länder, and Cantons: International Variety Among Subnational Constitutions*, 31 RUTGERS L.J. 941, 958-59 (2000) (discussing possible effects of subnational constitutions encouraging a "multi-sphered polity").

literature largely has focused on the structural aspects of constitutional design, including such features as whether to have a Parliament or a legislature, whether to have a bicameral or a unicameral legislature, and so forth.[3] Although the political space reserved for subnational constitutions also extends to substantive issues, the nascent comparative literature on this subject suggests that constitutive units do not always develop the substantive authority that their constitutions afford them. Rather, commentators observe that "subnational units in federal systems more often underutilize their constitution-making competency than they overutilize it."[4] Some commentators further argue that because of agency costs, subnational constitutional rights may tend to be judicially under-protected or only weakly entrenched in the sense of being subject to easy amendment, reversal by popular referendum, or dilution through legislative backlash.[5]

The United States federal system well illustrates the potential of subnational constitutions—the constitutions of the fifty states—to encourage a poly-vocal approach to substantive issues involving rights and obligations. To take an important example, the federal Constitution is silent on many questions of socio-economic concern.[6] However, almost every state constitution in the United States explicitly addresses important public goods such as education, income assistance, and housing support, and some state courts have tried to enforce these provisions in the face of legislative indifference or recalcitrance.[7] Other state courts, however, treat socio-economic constitutional provisions as nonjusticiable and so underutilize the authority that the state constitution sets out.[8] Inherent in U.S.-style federalism and a vision of states as

3. *See, e.g.*, Tom Ginsburg & Eric A. Posner, *Subconstitutionalism*, 62 STAN. L. REV. 1583, 1585 (2010) ("Our interest is the relationship between the superconstitution and the design of the subconstitution.").

4. Robert F. Williams & G. Alan Tarr, *Subnational Constitutional Space: A View from the States, Provinces, Regions, Länder, and Cantons*, *in* FEDERALISM, SUBNATIONAL CONSTITUTIONS, AND MINORITY RIGHTS 3, 15 (G. Alan Tarr, Robert F. Williams & Josef Marko eds., 2004).

5. *See* Ginsburg & Posner, *supra* note 3, at 1604-06 (distinguishing entrenchment from expansion of rights).

6. *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132-35 (1999) (discussing the Supreme Court's refusal to acknowledge any federal constitutional right to affirmative aid from government).

7. *See id.* at 1135-36 (discussing difference in approach between federal and state constitutions).

8. *See, e.g.*, Robert Deichert, *Note, Honoring the Social Compact: Arguing for a State Duty of Protection Under the Connecticut Constitution*, 33 CONN. L. REV. 1069, 1070 (2001) (explaining that the Connecticut Supreme Court has not interpreted the "social compact" clause of the Connecticut Constitution to create enforceable affirmative rights).

"laboratories of experimentation" is an understanding that state constitutions will differ both from the national Constitution and from each other, and also that state courts will take different approaches in interpreting state documents.[9] However, a serious question is presented if state courts decline to enforce the rights that their subnational constitutions include. This Article explores the subnational constitutional underutilization phenomenon in the context of U.S. judicial enforcement of state constitutional socio-economic rights.[10]

The topic of state court enforcement of state socio-economic rights is important for a number of related reasons. Until recently, most U.S. scholars placed socio-economic rights outside the constitutional domain and beyond the enforcement power of courts.[11] But the experience of national courts abroad—largely that of the South Africa Constitutional Court in recognizing a justiciable right to housing in the *Grootboom*

9. *See* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments. . . ."); *see also* Lawrence Friedman, *Subnational Treasure: "Federalism, Subnational Constitutions, and Minority Rights*," 28 SUFFOLK TRANSNAT'L L. REV. 261, 266 (2005) (observing that "state supreme court justices are scarcely of one mind on the potential reach of their states' constitutional commands"); Hans A. Linde, *The State and the Federal Courts in Governance: Vive la Différence!*, 46 WM. & MARY L. REV. 1273, 1273 (2005) ("The point of federalism . . . lies in the scope it leaves for differences.").

10. In examining the *judicial* underutilization of subnational constitutional rights, we do not address a related but separate question of *litigant* underutilization of such rights. *See* Elizabeth Pascal, *Welfare Rights in State Constitutions*, 39 RUTGERS L.J. 863, 864 (2008) (observing that plaintiffs "have occasionally raised state constitutional claims under social welfare provisions"). Particularly in areas affecting the poor, a lack of legal resources seriously affects the ability to mount any litigation campaign. *See* Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 880-87 (2001) (discussing the economics of positive rights enforcement and stating that "[p]oor individuals and, to a degree, groups representing the poor may lack the resources to advance effectively" constitutional positive rights). Legal services lawyers over the last two decades have been barred by government funders from filing class actions, from asserting constitutional challenges, and from using private funding to fill the gap. *See* David Luban, *Taking out the Adversary: The Assault on Progressive Public-Interest Lawyers*, 91 CAL. L. REV. 209, 220-26 (2010) (discussing federal restrictions on legal services lawyers). In other areas, such as educational adequacy cases, the cost of litigation, in terms of discovery and expert preparation, may dissuade private counsel from asserting state constitutional claims. *See generally* CHARLES R. EPP, MAKING RIGHTS REAL: ACTIVISTS, BUREAUCRATS AND THE CREATION OF THE LEGALISTIC STATE (2009). Whether subnational rights are underutilized by affected communities relative to federal rights, and the relation between legal resources and judicial enforcement of socio-economic rights, are interesting questions, but not the ones that we pursue.

11. Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1243 (2007) (reporting that "[t]he majority view . . . appears to be that poverty and class inequality . . . lie beyond the Constitution's cognizance or concern").

decision[12]—has convinced some skeptics that socio-economic rights may be enforced through judicial remedies that the literature describes as "weak" or "experimentalist" in the sense of affording the political branches broad latitude in devising constitutional remedies.[13] Often ignored in these discussions is the experience of U.S. state courts enforcing state constitutional socio-economic rights and lessons that can be learned from their remedial approaches.

The Article proceeds as follows. Part I provides the framework: it briefly describes state constitutional socio-economic rights in the United States; it identifies the conceptual problems that positive rights have raised in the academic literature; and it describes the theories of judicial review that commentators have offered in response to these problems. Part II examines selected state court decisions in positive-rights cases. The cases are illustrative; we do not purport to be examining a large-N data set. State courts successfully have enforced socio-economic rights for at least the last four decades, and although some of their practices resemble those associated with "weak" and "experimentalist" review, they also involve coercive remedies of a traditional sort. Some state courts, however, persist in treating such rights as nonjusticiable.[14] Part III explores the puzzle of state-constitutional underutilization. This Part surveys possible political science explanations, and then puts forward an alternative reason that might account for a state court's failure to enlist or to develop subnational socio-economic provisions: the state court's inappropriate reliance on federal constitutional doctrines that inhibit federal courts from entering relief against state and local government defendants. These doctrines, we argue, are inapposite in the state court context and ought not to constrain state judicial decision-making. We conclude by urging comparative constitutional scholars to attend more closely to the work of U.S. state courts when they assess the force and importance of constitutionalizing social and economic rights.[15]

12. Gov't of S. Afr. v. Grootboom 2000 (11) BCLR 1169 (CC) (S. Afr.) (involving claims to shelter by individuals who had become homeless when evicted from private land designated for subsidized housing).

13. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW ix (2008) (discussing "weak" review); Michael C. Dorf & Charles F. Sabel, *A Constitution of Democratic Experimentalism*, 98 COLUM. L. REV. 267 (1998) (discussing "experimentalist" review).

14. *See* Pascal, *supra* note 10, at 871 (expressing the view that "state courts have not readily taken up the banner of affirmative rights," focusing on rights to public assistance).

15. *Cf.* Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 YALE L.J. 1750, 1861 (2010) ("Yet it remains a striking fact that there has been more comparative work between American Supreme Court and European and Canadian statutory interpretation methodology than comparative work examining our own state courts.").

I. SOCIO-ECONOMIC RIGHTS AND STATE CONSTITUTIONS: PROBLEMS AND THEORETICAL RESPONSES CONCERNING JUDICIAL REVIEW

"Students of federal systems have tended to focus their attention on the federal constitutions that frame the entire polity while neglecting the constitutional arrangements of the constituent polities," Daniel J. Elazar wrote in 1987.[16] A generation later, scholars concerned with comparative constitutional socio-economic rights continue to give only minimal treatment to the constitutions of America's fifty states and to the decades-long efforts of state courts in enforcing socio-economic rights such as those to schooling, income support, and indigent defense. This Part briefly surveys socio-economic provisions in U.S. state constitutions, considers the conceptual difficulties associated with positive rights in the context of subnational constitutions, and describes theories of judicial review that respond to some of these problems.

A. State Constitutional Socio-Economic Provisions

Many commentators point to the absence of a constitutional commitment to socio-economic rights as a marker of American exceptionalism relative to the rest of the world.[17] The federal Constitution assumes the existence of property rights in its inclusion of a damage remedy for the government's taking of private property for "public use";[18] it also assumes the existence of contract rights by prohibiting the states from "impairing the obligation of contracts."[19] But absent from the text are the so-called positive rights that have become typical features of post-World War II constitutions that deal with such necessities as schooling, health care, job security, and income support.[20] Indeed, commentators underscore that the United States has taken the lead in opposing the inclusion of such rights in international human

16. DANIEL J. ELAZAR, EXPLORING FEDERALISM 174 (1987).

17. *See generally* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, *in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 90, 91-93 (Michael Ignatieff ed., 2005) (discussing absence of welfare rights from federal Constitution in contra-distinction to contemporary foreign constitutions).

18. U.S. CONST. amend. V (providing that no person shall "be deprived of . . . property, without due process of law; nor shall private property be taken for public use, without just compensation"); U.S. CONST. amend. XIV, § 1 (providing that no State shall "deprive any person of . . . property, without due process of law").

19. U.S. CONST. art. I, § 10 (providing that "no State shall enter into . . . any law impairing the obligation of contracts").

20. *See* Lorraine E. Weinrib, *The Postwar Paradigm and American Exceptionalism*, *in* THE MIGRATION OF CONSTITUTIONAL IDEAS 84, 89-91 (Sujit Choudhry ed., 2006) (discussing positive constitutional rights as an aspect of "inherent human dignity"). *See generally* Terence Daintith, *The Constitutional Protection of Economic Rights*, 2 INT'L J. CONST. L. 56, 59 (2004) (distinguishing between property rights and contemporary forms of social and economic rights).

rights regimes.[21] A leading comparative constitutional casebook thus underscores "the marked contrast between Europe and the U.S." in their constitutional treatment of affirmative socio-economic rights: "[a]lthough welfare concerns at one time were high on the American political agenda (President Roosevelt's Four Freedoms included 'freedom from want'), . . . [i]n the U.S. government is not seen to be affirmatively responsible for the welfare of its citizens."[22]

A more complex story emerges when the comparative focus is enlarged to include the subnational constitutions of the fifty states (and even of the territories) in the United States. Here, almost every constitutive unit's constitution refers to socio-economic rights. Some of these provisions entered state constitutions in the twentieth century with the rise of the modern administrative welfare state, but many of them trace back to the state's entrance into the Union or shortly thereafter. Thus, for example, the constitution of Massachusetts, one of the original thirteen states, includes a right to education that dates to the constitution that it adopted in 1780.[23] The states carved from the Northwest Territory were required to include provision for free common schools in their constitutions as a condition of statehood.[24] State constitutions in the United States also are notorious for their susceptibility to amendment,[25] and in some states, the constitution has been amended many times, to add, to remove, and to revise socio-economic provisions.[26]

21. *See* Philip Alston, *Putting Economic, Social and Cultural Rights Back on the Agenda of the United States* 3 (New York Univ. School of Law, Ctr. for Human Rights & Global Justice Working Paper No. 22, 2009) (stating that the U.S. "has played a central role in discouraging and sometimes blocking the development of the concept of economic, social and cultural rights").

22. NORMAN DORSEN, MICHEL ROSENFELD, ANDRÁS SAJÓ & SUSANNE BAER, COMPARATIVE CONSTITUTIONALISM: CASES AND MATERIALS 1354 (2d ed. 2010). Although federal statutes protect certain social and economic interests (such as the right to a safe workplace, the right to join a union, and the right to be free from racial, ethnic, or gender discrimination in the workplace), the regulatory network is not comprehensive and is subject to majoritarian over-ride. *Id.*

23. MASS. CONST. of 1780, pt. 2, chap v., § 2 ("Wisdom and knowledge, as well as virtue . . . being necessary for the preservation of . . . rights and liberties . . . it shall be the duty of legislatures and magistrates, in all future periods of this commonwealth to cherish the interests of literature and the sciences.").

24. *See* Carl E. Kaestle, *The Development of Common School Systems in the States of the Old Northwest*, *in* ". . . SCHOOLS AND THE MEANS OF EDUCATION SHALL FOREVER BE ENCOURAGED": A HISTORY OF EDUCATION IN THE OLD NORTHWEST, 1787-1880, 31, 32 (Paul H. Mattingly & Edward W. Stevens, Jr. eds., 1987) (discussing provisions of the Northwest Ordinance dealing with public schooling).

25. *See, e.g.*, *Note, California's Constitutional Amendomania*, 1 STAN. L. REV. 279, 279 (1949) (referring to "the easy amending procedures of most states" and their use "by the electorate for direct lawmaking"). *But see* Bruce E. Cain & Roger E. Noll, *Malleable Constitutions: Reflections on State Constitutional Reform*, 87 TEX. L. REV. 1517, 1520 (2009) (discussing amendment trends).

26. *See infra* notes 38-41 and accompanying text.

Positive-rights provisions in state constitutions reflect the diversity that is associated with the "states as laboratories" metaphor: they include so-called "progressive" rights that are associated in international circles with the promotion of human dignity—for example, rights to income support, to education, and to housing[27]—as well as collective rights, such as achieving the goal of a healthy environment.[28] But as one commentator observes, regarding state constitutional income-support provisions, "[n]o two constitutional provisions are exactly the same."[29] In addition, some state constitutions include socio-economic provisions that are expected to run not simply against the government, but also against private actors.[30] Commentators tend to equate the practice of extending constitutional norms to private relations—so-called "horizontality"—as a contemporary development, yet at least some of these state constitutional provisions date back to the nineteenth-century and reflect Progressive-era reforms aimed at protecting industrial workers from unfair labor practices and ensuring safe employment settings.[31]

Socio-economic provisions play both a substantive and a structural role in state governance in the sense of defining individual rights and regulating inter-branch relations. The federal government operates under a theory of limited and enumerated powers, which confines federal action to the affirmative grants of authority in the national Constitution. By contrast, state governments build on a theory of plenary power, which presumes a background source of police power. The decision to include socio-economic provisions in a state constitution thus is understood as a mandate to the legislature that narrows the scope of political discretion.[32] In some state constitutions, authority for carrying out particular socio-economic functions is delegated to constitutive units within the state.[33] Finally, some positive rights in state constitutions are intended to alter

27. *See, e.g.*, N.Y. CONST. art. XVII, § 1 (describing the provision of welfare as a "public concern"). *See generally* HELEN HERSHKOFF & STEPHEN LOFFREDO, THE RIGHTS OF THE POOR 3-4 & nn. 29-33 (1997) (discussing state constitutional welfare rights).

28. *See, e.g.*, ALASKA CONST. art. VIII ("Natural Resources").

29. William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 551-52 & app. at 569 (1998).

30. *See* JOHN J. DINAN, THE AMERICAN STATE CONSTITUTIONAL TRADITION 188-204 (2006) (discussing state constitutional provisions involving workplace conditions).

31. *See* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN. L. REV. 1521, 1541-47 (2010) (discussing adoption of constitutional provisions regulating private work-places).

32. *See* Robert F. Williams, *The Brennan Lecture: Interpreting State Constitutions as Unique Legal Documents*, 27 OKLA. CITY U.L. REV. 189, 208 (2002) (discussing plenary theory of legislative authority).

33. *See* Richard Briffault, *The Role of Local Control in School Finance Reform*, 24 CONN. L. REV. 773, 780 (1992) (distinguishing between home rule and special districts for purposes of local control over constitutional functions).

the relation of the judiciary to the other branches of government, serving to expand or to contract the jurisdictional space in which courts review and assess political outputs.[34]

B. The Problems of Positive Rights

Socio-economic rights remain hotly contested features of national constitutions. In the United States, the idea of federalizing a right to income support or to education remains, as Frank I. Michelman has put it, "contentious"[35]—a circumstance reconfirmed by the uproar surrounding the 2010 enactment of a federal statutory right to health care.[36] So it may be somewhat surprising that commentators have not mounted a wholesale attack on the inclusion of socio-economic rights in state constitutions. An indirect criticism of positive rights may draw from concerns that state constitutions are too long, too prolix, too mired in "statutory" detail, and too attendant to matters considered to be trivial from the federal perspective.[37] But it is unusual to find academic articles that target state constitutional socio-economic rights for particular criticism. The dearth of scholarly treatment could reflect a general lack of attention to issues of inequality and social provision,[38] or, alternatively, could signal endorsement of subnational positive rights or at least an attachment to the federalism-grounded idea of having states and localities remain primarily responsible for the provision of social

34. *See generally* John Dinan, *Foreword: Court-Constraining Amendments and the State Constitutional Tradition*, 38 RUTGERS L.J. 983 (2007) (discussing state constitutional amendments that constrain judicial power).

35. Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 FORDHAM L. REV. 1893, 1893 (2001).

36. *See* Editorial, *Health Care Reform and the Courts*, N.Y. TIMES, May 20, 2010, at A26 (discussing negative reactions to enactment of federal health statute); *see also* Puneet K. Sandhu, *A Legal Right to Health Care: What Can the United States Learn from Foreign Models of Health Rights Jurisprudence?*, 95 CAL. L. REV. 1151, 1165-67 (2007) (discussing legislative debates about health care throughout the twentieth century); Virginia v. Sebelius, 728 F. Supp. 2d 768, 788 (E.D. Va. 2010) (declaring portions of the Patient Protection and Affordable Care Act unconstitutional).

37. *See* James A. Gardner, *The Failed Discourse of State Constitutionalism*, 90 MICH. L. REV. 761, 767 (1992) (questioning whether an "intelligible claim" can be made about state constitutions given, among other features, their prolixity and attention to trivia).

38. *See* Loffredo, *supra* note 11, at 1242-44 (noting that academic interest in "the constitutional dimensions of wealth, poverty, and class" has faded dramatically in recent years); *see also* JOHN KENNETH GALBRAITH, THE AFFLUENT SOCIETY 33 (40th anniversary ed., 1998) ("Those who might themselves be subject to equalization have rarely been enthusiastic about equality as a subject of social comment. As a result, there has anciently been a muted quality about debate to the subject.").

services.[39] Or, the lack of scholarly treatment could reflect a continued scholarly indifference to state constitutions and to the tendency, until recently, for comparative constitutional discussion to focus only on national documents.[40]

This is not to say that state constitutional socio-economic provisions do not at particular political moments generate boisterous criticism, triggering the "amendomania" for which state constitutions are notorious.[41] Alabama eliminated a right to education from its state constitution in the wake of *Brown v. Board of Education*;[42] Montana voters altered their constitution to overturn a state supreme court decision that had barred any "arbitrary" exclusion of poor people from the state's general relief program;[43] and California tax payers voted to impose strict revenue-raising limits on the state to limit judicial enforcement of a right to education.[44] But the late twentieth-century has seen a remarkable absence of legislative and popular campaigns to eliminate socio-economic rights wholesale from state constitutions.[45] For this reason alone, the state courts' underutilization of such rights raises a puzzle that is worth exploring. We consider three possible explanations.

1. Positive Rights Are Not Constitutional Rights

State courts' underutilization of state constitutional socio-economic provisions may reflect a lingering skepticism about the legitimacy of "positive rights" and whether they ought to count as rights in any conventional sense. The dominant argument against socio-economic rights has been definitional: rights provide protection against the

39. *See, e.g.*, Kamina Aliya Pinder, *Federal Demand and Local Choice: Safeguarding the Notion of Federalism in Education Law and Policy*, 39 J.L. & EDUC. 1, 1 (2010) (stressing the importance of cooperative federalism to education policy).

40. *See* James A. Thomson, *State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059, 1059-64 (1989) (discussing the academic community's "benign neglect" of state constitutions); *see also* Tushnet, *supra* note 13, at 1-15 (positing that American constitutional law does not include "weak" review but focusing only on federal courts).

41. *See* Donald E. Wilkes, Jr., *First Things Last: Amendomania and State Bills of Rights*, 54 MISS. L.J. 223, 233 (1984).

42. Brown v. Bd. of Educ., 347 U.S. 483 (1954); *see also* Helen Hershkoff, *School Finance Reform and the Alabama Experience*, *in* STRATEGIES FOR SCHOOL EQUITY: CREATING PRODUCTIVE SCHOOLS IN A JUST SOCIETY 24, 26 (Marilyn J. Gittell ed., 1998) (discussing 1956 amendment to Alabama Constitution).

43. *See* Butte Cmty. Union v. Lewis, 745 P.2d 1128 (Mont. 1987); MONT. CONST. art. XII § 3(3) (as amended by MONT. CONST. amend. No. 18, approved Nov. 8, 1988).

44. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2346 (2003) (discussing Proposition 13's restrictions on local property taxation in California).

45. *See generally* Ginsburg & Posner, *supra* note 3, at 1610-11 (noting that "since the 1960s, the number of [state constitutional] revisions has declined dramatically, while amendments are increasing in frequency").

government and so are negative in conception; they do not demand that the government take affirmative action or engage in a protective function.[46] In this vein, a great deal of scholarship has focused on whether the distinction between negative and positive rights is real or apparent, and whether it is entitled to any conceptual weight. Other critics take a consequential approach. Some argue that including socio-economic rights in a constitution exposes other rights to unnecessary jeopardy, for it creates the possibility—and some might say the inevitability—that elected branches will fail to respect such rights and so encourage overall disrespect for constitutional limits.[47] Still other critics oppose including socio-economic rights in a constitution because they object either to the content of such rights or to the demands that such rights will place on governing institutions: they disagree on the merits whether a fair and reasonable society, one that commands our loyalty and our tax dollars, ought to organize, demand, and expend public resources in securing aspects of material well-being at the cost, to some, of personal autonomy.[48] In response, commentators have emphasized that the line between so-called negative and positive rights is unstable.[49] On this view, all rights, whether to free speech or to free association, to counsel in criminal cases or to a civil jury, require affirmative protection from the government, and so depend on the public expenditure of funds and resources.[50]

This is not the occasion to re-examine the debate over the appropriate status of socio-economic rights. It is notable, though, that positive-rights provisions in some state constitutions date to the founding of the Republic. The traditional nature of these provisions as state creations ought to carry some weight even if the federal Constitution does not embrace them. Moreover, elsewhere the legitimacy of socio-economic rights has been confirmed over time by their inclusion in international conventions and in many national constitutions adopted in

46. Cass R. Sunstein, *Social and Economic Rights? Lessons from South Africa*, 11 CONST. F. 123, 123-24 (2000) [hereinafter Sunstein, *Social and Economic Rights?*] (discussing this view).

47. For a discussion of this debate as applied to the South Africa Constitution, *see* Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1 (1992).

48. For a general discussion of these issues, *see* Richard A. Epstein, *Hayekian Socialism*, 58 MD. L. REV. 271, 299 (1999) (referring to "the dangers that come from interferences with contractual freedom and with legal efforts to maintain, from the center, minimum levels of security").

49. *See generally* STEPHEN HOLMES & CASS R. SUNSTEIN, THE COST OF RIGHTS: WHY LIBERTY DEPENDS ON TAXES (W.W. Norton & Co.1999).

50. *Id*.

the post-World War II period.[51] Commentators thus speak of a post-war paradigm that includes the government's protection of material well-being as an aspect of individual dignity.[52] Indeed, even in the United States, President Franklin D. Roosevelt's call for a "Second Bill of Rights" acknowledged the evolving status and fundamental importance of socio-economic rights as legal rights deserving of respect.[53]

For present purposes, the relevant inquiry focuses on whether it is appropriate for states to include such rights in their constitutions. On the one hand, one might argue that with changing circumstances certain material rights are best administered at the national level to avoid having states externalize costs, an argument that Richard A. Posner has pressed and which is only weakly mitigated by doctrines that have developed under the Commerce Clause and the Privileges and Immunities Clause.[54] Codifying national socio-economic rights also may prove to be more effective given the political situation of groups seeking to enforce such rights: those likely to benefit from certain kinds of positive rights may face greater vulnerability at the state and local level, where it is more difficult to form coalitions and funding and resources may be scarce.[55]

On the other hand, it is not unusual in the United States for rights to vary considerably from state to state. Commentators identify "rights federalism" as a basic feature of the American legal scene, both with respect to the content of federal constitutional rights and the variety of

51. *See, e.g.*, Angelina Fisher, *The Content of the Right to Education—Theoretical Foundations* 8-16 (N.Y.U. Sch. L., Ctr. for Hum. Rts. & Global Just. Working Paper, Econ., Soc. and Cultural Rts. Series No. 4, 2004) (identifying right to education in various international conventions). *But see* Cross, *supra* note 10, at 857 (criticizing the concept of positive rights).

52. *See* Weinrib, *supra* note 20, at 89-91.

53. *See generally* CASS R. SUNSTEIN, THE SECOND BILL OF RIGHTS: FDR'S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (Basic Books 2004) [hereinafter SUNSTEIN, THE SECOND BILL OF RIGHTS].

54. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 519-21 (2d ed. Little Brown & Co. 1977) (arguing that the absence of a nationally mandated welfare provision invites states to export poverty, either by setting low benefit levels, or adopting other local policies that discourage in-migration by poor people from other states, and that such efforts distort labor markets and impede the efficient deployment of resources); *see also* Stephen Loffredo, *"If You Ain't Got the Do, Re, Mi": The Commerce Clause and State Residence Restrictions on Welfare*, 11 YALE L. & POL'Y REV. 147, 192-93 (1993) (arguing that state durational residence restrictions on welfare violate the Commerce Clause, in part because they represent economically inefficient attempts to shift costs to other states).

55. *See* FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 335-43 (Vintage Books 1979) (describing special vulnerability of welfare programs funded and administered at the state or local level); *see also* Hershkoff, *supra* note 6, at 1172-73 (discussing disadvantages of local provision of welfare relief).

subnational constitutional rights.[56] As one commentator explains, pointing to the "crazy quilt" of even federal constitutional rights among the states in the U.S., "state and local legal norms . . . are highly variable and create a functionally irregular rights regime."[57] The classic Tieboutian argument supports rights variation: citizens ought to be able to sort themselves by preference, subject only to a minimal federal constitutional floor.[58] Moreover, rights variation among states advances the classic federalism value of "states as laboratories," allowing ideas to percolate up to the national level and avoiding the premature ossification that rights nationalization might produce.[59] Thus, the fact that socio-economic rights vary from state to state may point to significant gaps in the federal Constitution but does not undermine arguments for including such rights in subnational constitutions.

A related criticism of according constitutional status to socio-economic provisions is that, to be efficacious, they require code-like specification that is incompatible with the enduring aspects of constitutional law. Commentators warn that legislators may become "hobbled by the text of the constitution itself."[60] Certainly this criticism has some purchase as applied to subnational constitutions in the United States. State constitutions are long and tend to specify regulatory details that may become obsolete. But this concern does not track an inevitable feature of state constitutions; many states take a lean approach in specifying rights to schooling and welfare: the text sets out the purpose of the constitutional right but omits programmatic details.[61] In such instances, the right provides a traditional form of protection against hostile majorities that may seek to use ordinary politics to subvert important values.[62] The fact that such protection is not as durable as in

56. Cain & Noll, *supra* note 25, at 1530-36 (identifying rights federalism and defending its preservation on social-contract and autonomy grounds).

57. Wayne A. Logan, *Contingent Constitutionalism: State and Local Criminal Laws and the Applicability of Federal Constitutional Rights*, 51 WM. & MARY L. REV. 143, 146 (2009).

58. *See* Aaron J. Saiger, *Local Government Without Tiebout*, 41 URB. LAW. 93, 96-110 (2009) (discussing the arguments for and against Tiebout sorting for public goods).

59. *See* Cain & Noll, *supra* note 25, at 1534 (stating that "[d]eciding which rights should be nationalized is a complex and nuanced exercise . . . [and] allowing some rights variations among the states gives more time to build a national consensus. . . .").

60. Daintith, *supra* note 20, at 88.

61. *See* Regina R. Umpstead, *Determining Adequacy: How Courts are Redefining State Responsibility for Educational Finance, Goals, and Accountability*, 2007 B.Y.U. EDUC. & L.J. 281, 290-91, 297-303 (2007) (giving examples of state constitutional education clauses, which include such terms as "quality," "basic," and "suitable").

62. See Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 INT'L J. CONST. L. 13, 16-17 (2003) (stating that the "[c]onstitutionalization of social-rights guarantees can provide both a prod and a hook for ho-hum forms of judicial action in furtherance of the distributive aims these rights

the federal system is a feature not confined to socio-economic provisions, and provides no basis for excluding such rights from a state constitution.

2. Courts Cannot Enforce Positive Rights

Another recurring criticism of socio-economic rights argues that courts are institutionally incapable of enforcing positive rights, in part because they cannot develop manageable standards for carrying out such rights, and in part because they cannot compel the political branches to respect and effectuate the standards that they seek to impose.[63] The argument takes a universalist tone: courts everywhere, of any design, whether common law or civil law, lack the wherewithal and resources needed to interpret, to declare, to announce, to order, or to compel actions that touch on socio-economic rights. The institutional argument makes an indirect assault on socio-economic rights on the assumption that without the possibility of judicial enforcement, these provisions hold no rightful place in a constitution. But as Albie Sachs, Justice of the Constitutional Court of South Africa, has explained, even if socio-economic provisions are not enforceable "in the same, self-executing way as other rights," they nevertheless may serve other important constitutional purposes: for example, such provisions may serve "as programmatic indicators" that can be used to interpret other justiciable rights and may inform a court's interpretation of due process or equality requirements.[64]

The argument about developing manageable standards focuses on the myriad details that a court must consider in resolving questions that concern social and economic life. Dean Lawrence Gene Sager thus has written that cases involving material rights involve "questions of judgment, strategy, and responsibility that seem well beyond the reach of

represent"); *see also* Burt Neuborne, *Foreword: State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881, 900-01 (1989) (stating that with respect to socio-economic rights, "the most that the state judiciaries can do is to reverse the inertial political burden in this area").

63. *Compare* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? (Benjamin I. Page, Univ. Press of Chicago 1991) (arguing that courts cannot meaningfully affect social and economic change and may trigger unintended and deleterious consequences), with MALCOLM M. FEELEY & EDWARD L. RUBIN, JUDICIAL POLICY MAKING AND THE MODERN STATE: HOW THE COURTS REFORMED AMERICA'S PRISONS (Alfred H. Blumstein & David Farnington, Cambridge Univ. Press 1998) (discussing positive achievements of federal courts in improving prison conditions).

64. Albie Sachs, Essay, *Social and Economic Rights: Can They Be Made Justiciable?*, 53 SMU L. REV. 1381, 1384-85 (2000).

courts in a democracy."[65] Whatever the merits of this argument in some contexts, it seems seriously overstated when applied to state courts—which in their traditional common-law role have developed rules and standards for critical aspects of social and economic life ranging from the marital relationship to property estates, from the employment at-will doctrine to the warranty of habitability, from the doctrine of common carriers to the principle of unconscionability, all of which implicate critical questions of "judgment, strategy, and responsibility." Yet as Judith S. Kaye, former Chief Judge of the New York Court of Appeals has noted, "[n]o one disputes" the common law authority of state courts.[66]

Still, the question remains whether state courts have capacity to compel or to convince the other branches to follow the rules and standards that they announce. Common law doctrines tend to regulate areas of life denominated as private, and judicial capacity may weaken as policymaking requires the development of programmatic strategies, the raising and spending of public money, and the deployment of bureaucratic resources specific to the right (as contrasted with general police, fire, or dispute resolution). As the complexity of enforcement increases, so might the possibility of slippage between compliance and mandate, even where the mandate is expressed in open-ended standards. The polycentric nature of necessary relief heightens the pressure points at which politics or simple indifference can intervene and subvert judicial efforts at enforcement. On the other hand, a gap of this sort is likely to occur whenever the right to be enforced embraces a plural or contested meaning whether denominated "negative"—such as a due process right to the provision of adequate notice before the government's taking of property, a First Amendment right to demonstrate on public streets, or an equal protection right to travel from one state to another—or "positive"—such as a state constitutional right to an adequate education. In all of these contexts the court must devise adjudicative techniques to address anticipated problems in light of the political context and constitutional culture.

3. Judicial Enforcement of Positive Rights Is Anti-Democratic

Even commentators who regard socio-economic rights as justiciable and so capable of judicial enforcement may question whether it is democratically legitimate for courts to enforce these provisions against

65. Lawrence G. Sager, *Thin Constitutions and the Good Society*, 69 FORDHAM L. REV. 1989, 1990 (2001).

66. 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, 10 (1995).

legislative and executive officials.[67] In some situations, the concern is expressed in terms of separation of powers, and so borders on questions of judicial capacity. In particular, positive-rights cases are said to raise complex issues concerning the allocation of scarce resources and the setting of competing priorities that are best left to the political branches. Other commentary ups the conceptual ante and frames the concern in terms of democratic justification and political transparency. But the anti-democratic critique rings hollow when those whose interests are most at stake in the enforcement of socio-economic rights (typically people of limited means) lack equal or meaningful access to democratic processes.[68]

Moreover, a great deal of the democratic critique of judicial enforcement of socio-economic rights assumes a single-court system in which a central constitutional court reviews the regulatory outputs of a national legislature or executive. In the United States, federalism complicates the picture, making it important to disentangle discussions about democratic legitimacy, separation of powers, and federal-state relations. Concerns about democratic legitimacy differ at the state level, where judges throughout the court hierarchy are subject to electoral accountability and state constitutions may be revised through popular action. Although elected judges are not legislators, the nature of their judicial role, given the depth of their common law power, may differentiate their governance function in significant ways from those of the Article III courts. States are not required to conform to the federal version of separation of powers, and in practice legislative and executive departments differ in some states from their federal counterparts.[69] Finally, federalism concerns about having unelected federal judges divest states of sovereign power ought to carry less, if any, weight when applied to a state court reviewing state legislative or regulatory outputs.

67. *See generally* Michelman, *supra* note 62 (raising and answering these concerns).

68. *See* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1278-92 (1993) (arguing that some judicial intervention to protect poor people from disadvantageous political outcomes does not undermine democratic principle because the poor have been undemocratically denied fair access to political processes).

69. *See generally* Hershkoff, *supra* note 6, at 1153-69 (discussing how state judicial systems differ from the Article III system); *see also* Scott R. Bauries, *Is There an Elephant in the Room?: Judicial Review of Educational Adequacy and the Separation of Powers in State Constitutions*, 61 ALA. L. REV. 701 (2010) (citing differences between state and federal separation of powers provisions, but finding no evidence that these differences play a role in educational adequacy litigation).

C. Enforcing Socio-Economic Rights Through "Weak" and "Experimental" Review

As the previous section suggests, scholars have tended to treat socio-economic rights as nonjusticiable on the view that their enforcement invades legislative and executive prerogative and falls outside judicial capacity to design manageable remedial standards. This view has undergone significant revision in the last decade: some commentators credit the South Africa Constitutional Court's decision in *Grootboom*[70] for convincing skeptics that social and economic rights are justiciable constitutional claims.[71] In "an extraordinary decision," one American commentator wrote in 2000, "the Constitutional Court of South Africa . . . set out a novel and promising approach to judicial protection of socio-economic rights . . . [that is] respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met."[72] The *Grootboom* approach consists of recognizing the justiciability of socio-economic rights, but of limiting relief to a judicial declaration that the government has a duty to carry out its constitutional obligation. At least two alternative theories of judicial review now appear in the literature that are supportive of this approach applied generally to socio-economic rights: the first is the theory of "weak form" review and responds directly to questions of the enforcement of positive rights; and the second is the theory of "democratic experimentalist" review and responds to orthogonal questions.

1. Weak-form Review

The idea of weak-form review originated with Stephen Gardbaum's identification of a "new Commonwealth" model of judicial review which Mark Tushnet later elaborated, expanded, and renamed.[73] Exponents of this theory offer weak-form review in contrast to American-style review, which is characterized as "strong" and associated with the Article III

70. Gov't of S. Afr. v. Grootboom 2000 (11) BCLR 1169 (CC) (S. Afr.) (involving claims to shelter by individuals who had become homeless when evicted from private land designated for subsidized housing).

71. *See* SUNSTEIN, THE SECOND BILL OF RIGHTS, *supra* note 53, at 228 (arguing that the South Africa Court's approach to social and economic rights "has provided the most convincing rebuttal yet to the claim that judicial protection [of constitutional positive rights] could not possibly work in practice").

72. Sunstein, *Social and Economic Rights?*, *supra* note 46, at 123.

73. Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMP. L. 707 (2001); *see generally* TUSHNET, *supra* note 13.

courts.[74] The exemplar of strong-form review is *Cooper v. Aaron*,[75] where the Court announced that the federal courts, relative to Congress and the President, are "supreme in the exposition of the law of the Constitution."[76] Weak-form review tries to untie the Gordian knot of democratic legitimacy by acknowledging the shared authority of the different branches of government to interpret and carry out constitutional rights that affect socio-economic concerns. Tushnet describes this "'new Commonwealth' model" of review as one in which "courts assess legislation against constitutional norms, but do not have the final word on whether statutes comply with those norms."[77]

Weak-form review should not be confused with minimalist review; rather, "the mark of weak-form review is that ordinary legislative majorities can displace judicial interpretations of the constitution in the relatively short run."[78] Courts retain authority to assess all legislation for conformity with constitutional requirements, but operate in a judicial "middle ground between fundamental rights protection and legislative supremacy."[79] Commentators posit that "weak-form review comes in several variants[,]"[80] and may depend on the nature of the socio-economic right—which Professor Tushnet categorizes as "those that are merely declaratory, those that provide weak guarantees of social provision, and those that are interpreted to provide relatively strong guarantees"[81]—as well as "the relationships among the types of rights, weak and strong, and strong and weak enforcement mechanisms."[82] Commentators posit that "weak" remedies may have a role in enforcing even "strong" rights, for the judicial practice may encourage the use of

74. *See, e.g.*, Rosalind Dixon, *The Supreme Court of Canada, Charter Dialogue, and Deference*, 47 OSGOODE HALL L.J. 235, 242-43 (2009) ("In comparative constitutional scholarship on judicial review, the United States is generally understood as the archetypal model of strong-form—or *final*—judicial review.") (emphasis in original).

75. Cooper v. Aaron, 358 U.S. 1 (1958).

76. *Id.* at 18.

77. TUSHNET, *supra* note 13, at ix; *see also* Mark Tushnet, *State Action, Social Welfare Rights and the Judicial Role: Some Comparative Observations*, 3 CHI. J. INT'L L. 435, 447 (2002) [hereinafter Tushnet, *State Action*] (stating that weak-form review "comes in several variants, but in each a judicial determination of what the constitution requires is explicitly not conclusive on other political actors, who can respond to the court's decision through ordinary politics").

78. Mark Tushnet, *Alternative Forms of Judicial Review*, 101 MICH. L. REV. 2781, 2786 (2003); *see also* TUSHNET, *supra* note 13, at 23 (explaining that "weak-form judicial review provides mechanisms for the people to respond to decisions that they reasonably believe mistaken that can be deployed more rapidly than the constitutional amendment or judicial appointment processes").

79. Gardbaum, *supra* note 73, at 742.

80. TUSHNET, *supra* note 13, at 237.

81. *Id*.

82. *Id*.

other institutional mechanisms for enforcement.[83] Finally, the literature observes that weak remedies may become strong remedies, and vice versa, over time.[84]

2. Democratic Experimentalist Review

Democratic experimentalist review stems from an ambitious project aimed at reconceptualizing government from the Madisonian tri-partite division of power to a "directly deliberative polyarchy" that encourages information-driven solutions to constantly changing problems.[85] The experimental approach—part of efforts at "new governance"[86]—draws lessons from private firm innovations that are pragmatic in spirit, collaborative in design, decentralized in structure, and aimed at developing dynamic solutions that recognize the "volatility and diversity" of contemporary problems.[87] Experimentalism relies on a variety of techniques, including benchmarking, monitoring, and feedback, to ensure that local knowledge is identified, and that it is pooled and that it is shared with others who face similar but contextualized concerns. The theory is not primarily concerned with the judicial enforcement of socio-economic rights, but its principles and justifications lend strong support for such efforts.

Within an experimentalist system, courts play the important coordinative role of ensuring "that subnational experiments fall within the authorizing legislation and respect the rights of citizens."[88] However, the judiciary's role is not limited to policing the periphery, but also extends to interpretations at the core of constitutional rights.

83. *Id*. at 262 (stating "leakage is a more than trivial possibility").

84. *Id.* at 254-56. The literature offers various examples of weak-form review, drawn largely from the Commonwealth. The 1982 Canadian Charter of Rights and Freedoms, Section 33, permits the enactment of laws that are inconsistent with certain Charter provisions subject to a five-year sunset clause. *See* Constitution Act, 1982, being Schedule B to the Canada Act 1982 (U.K.), c. 11, s. 33 (authorizing legislation "notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter"). Similarly, the 1998 British Human Rights Act requires courts to try to interpret statutes consistently with the European Convention on Human Rights. Human Rights Act, 1998, c. 42, § 4 (Eng.); *see* Tushnet, *State Action*, *supra* note 77, at 448. However, failing that, courts must issue a statement of statutory incompatibility to which government ministers are authorized "to respond in a variety of ways, including modifying the statute on their own, introducing fast-track legislation to modify the statute, introducing such legislation in the ordinary course, or doing nothing." *See id.*

85. Dorf & Sabel, *supra* note 13, at 316.

86. *See* Jason M. Solomon, *Law and Governance in the 21st Century Regulatory State*, 86 TEX. L. REV. 819, 822-23 (2008) (referring to the "new governance" as "a series of efforts to reconceive the relationship between the state and those it governs" and as a "critique of the command-and-control model").

87. Dorf & Sabel, *supra* note 13, at 286.

88. *Id.* at 288.

Commentators emphasize that this form of experimentalist system does not currently exist in the United States, but is said to be "emergent" in a number of different contexts.[89] The literature points to state court education adequacy litigation as an early example of an "experimentalist-rights jurisprudence as a dispute shifts from 'merely' how to apply a generally acknowledged right to whether a right 'really' exists in the first place."[90] In place of command-and-control mandates, the experimentalist approach depends on "stakeholder negotiation," "rolling-rule regime," and "transparency," and declines to give "determinate guidance on the question of sanctions," on the assumption that public identification of noncompliance will trigger nonjudicial interventions at improvement.[91] Critics of experimentalist review treat it as only procedural and warn that the approach may be "somewhat hostile to judicial articulation of substantive norms."[92] These criticisms have been particularly sharp as applied to the effect of an experimentalist approach on issues affecting the poor.[93]

II. STATE COURTS AND THE CONTINUUM OF RIGHTS AND REMEDIES

State courts have asserted authority to enforce state constitution socio-economic rights for at least the last four decades.[94] These rights encompass not only individual claims to government-provided services, but also structural claims to public funding for rights-infrastructure such as judicial salaries and indigent defense. The actual experience of state courts over these decades calls into question conventional arguments that courts are not capable of enforcing socio-economic rights and that to do

89. Mark Tushnet, *A New Constitutionalism for Liberals?*, 28 N.Y.U. REV. L. & SOC. CHANGE 357, 358 (2003) (pointing to "the recurrent use of the term emergent in descriptions of experimentalist constitutionalism").

90. Dorf & Sabel, *supra* note 13, at 465, 466 n.686 (discussing Alabama Coalition for Equity, Inc. v. Hunt, No. CV-91-0117-R, 1993 WL 204083, at * 1 (Ala. Cir. Ct. 1993)); *see also* James S. Liebman & Charles F. Sabel, *A Public Laboratory Dewey Barely Imagined: The Emerging Model of School Governance and Legal Reform*, 28 N.Y.U. REV. L. & SOC. CHANGE 183 (2003) (discussing litigation in Texas and Kentucky as examples of the new-governance approach).

91. Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1015, 1067-73 (2004).

92. Alana Klein, *Judging as Nudging: New Governance Approaches for the Enforcement of Constitutional Social and Economic Rights*, 39 COLUM. HUM. RTS. L. REV. 351, 356 (2008); *see also* William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After* Rose, 98 KY. L.J. 789 (2009-2010) (discussing school adequacy litigation in an experimentalist framework).

93. *See generally*, David A. Super, *Laboratories of Destitution: Democratic Experimentalism and the Failure of Antipoverty Law*, 157 U. PA. L. REV. 541 (2008) (criticizing democratic experimentalism in favor of centralized programs for the poor).

94. *See, e.g.*, Hershkoff, *supra* note 6, at 1145-52 (focusing on enforcement efforts in New York).

so requires unusual or unconventional adjudicative techniques. Moreover, the depth and range of state judicial practice suggest that the enforcement of socio-economic rights does not depend on avant-garde doctrinal constructs or unconventional procedures. Rather, the state experience reflects a continuum of practices within the space described in the literature as "weak" and "strong," "conventional" and "experimentalist"; in some cases state court practices are more coercive and more substantive than the literature would suggest, but still are respectful of legislative and executive prerogative; and these state practices use doctrinal and procedural mechanisms that are standard fare for state courts—even if not for U.S. federal courts—that are participatory, facilitative, and conditional in design.[95]

This Part does not attempt a comprehensive examination of the state court experience in enforcing socio-economic rights. Instead, we focus on selected decisions spanning a multi-decade period. These decisions illustrate the structural and individual-rights components of socio-economic rights, they spotlight important adjudicative methods, and they indicate an overall dynamic in the state judiciary's development of remedies. Throughout this Part our emphasis seeks to decouple two dimensions of a court's decision: the interpretive dimension and the remedial dimension. We close by returning to the continuing problem of a state court's treating socio-economic rights as nonjusticiable.

A. Justiciability and Declaratory Relief: Funding for Courts and Schools

As the previous Part showed, one of the abiding objections to socio-economic rights is that their judicial enforcement is "anti-democratic" and violates separation of powers because of the inevitable fiscal impacts of a judicial decree. The fact that the resolution of a constitutional dispute will affect a state's budget priorities ought not presumptively render a case nonjusticiable if the political branches retain discretion to make allocational decisions within constitutional limits. On this view, some state courts, determining the matter to be justiciable, will then enter a judgment that declares the government's failure to meet constitutional

95. *See, e.g.*, Amy L. Moore, *When Enough Isn't Enough: Qualitative and Quantitative Assessments of Adequate Education in State Constitutions by State Supreme Courts*, 41 U. TOL. L. REV. 545, 563-66 (2010). Based on a survey of state court cases involving state constitutional education clauses, the author writes:

> While all of the courts willing to intervene still give much deference to the state legislature, the form of the intervention differs widely; courts will do everything from recommending specified outputs required by the new system to merely presenting self-divined definitions of adequacy. . . . At no point during the review of cases does a court seem to strike out against a legislature in way that violates the separation of powers laid out in each state.

requirements and announces standards that the government can follow to achieve compliance, but does not direct or mandate specific action. We illustrate the relationship between a finding of justiciability and the litigants' request for declaratory relief in two categories of state constitutional cases: the first concerns public funding for courts, and the second concerns public funding for schools.

1. Public Funding for Courts

In *County of Allegheny v. Commonwealth of Pennsylvania*,[96] Allegheny County sought a court order directing the state "to provide all funds necessary for the functioning" of the state's unified court system and "all funds necessary" for the county's courts.[97] The county plaintiff further sought a declaration that it was not obligated to fund its county courts.[98] The Commonwealth Court dismissed the challenge as nonjusticiable, relying on two of what it characterized as "Baker v. Carr" factors,[99] namely, "a textually demonstrable constitutional commitment of the issue to a coordinate governmental branch and impossibility of an appropriate judicial remedy."[100] Looking at the first factor, the trial court held that "the General Assembly . . . has been given the constitutional power to determine what programs will be adopted in our Commonwealth *and how they will be financed*," and that the court was bound by prior Pennsylvania Supreme Court precedent that "the legislature alone . . . must ordain a change" in the funding of the court system since "that power was constitutionally committed to the legislature in the first place."[101] The court did not address explicitly the second factor as a basis for finding the dispute to be nonjusticiable. However, the court did make clear that under certain circumstances a coercive order requiring funding might be appropriate: the court emphasized that although the judiciary has "authority to compel the payment by the local government of those sums of money which are reasonable and necessary for the county judiciary to function . . . unless

96. County of Allegheny v. Commonwealth, 500 A.2d 1267 (Pa. Commw. Ct. 1985).

97. *Id.* at 1268.

98. County of Allegheny v. Commonwealth, 534 A.2d 760, 761 (Pa. 1987), *vacating* County of Allegheny v. Commonwealth, 500 A.2d 1267 (Pa. Commw. Ct. 1985).

99. Baker v. Carr, 369 U.S. 186 (1962).

100. *County of Allegheny*, 500 A.2d at 1269 (citing *Baker*, 369 U.S. at 186). Pennsylvania courts earlier had relied on the *Baker* factors in determining whether a matter was justiciable. *See* Sweeney v. Tucker, 375 A.2d 698, 706 (Pa. 1977).

101. *County of Allegheny*, 500 A.2d at 1269 (citation omitted).

the function of the county court system was impaired by inadequate funding, the courts should not and will not intervene."[102]

On appeal, the Supreme Court of Pennsylvania reversed, finding the matter justiciable.[103] Again the Pennsylvania court turned to the federal justiciability standards of *Baker v. Carr*, but emphasized that even the federal political question doctrine recognizes the power of the court to interpret a constitutional provision and to assess whether manageable standards can be devised to ensure its enforcement.[104] The Pennsylvania court pointed to Justice Brennan's often overlooked distinction between nonjusticiability and lack of federal jurisdiction:

> In the instance of non-justiciability, consideration of the cause is not wholly and immediately foreclosed; rather, the Court's inquiry necessarily proceeds to the point of deciding whether the duty asserted can be judicially identified and its breach judicially determined, and whether protection for the right asserted can be judicially molded.[105]

In affirmatively answering the latter two questions—whether a duty can be identified and its breach can be judicially determined—the Pennsylvania court emphasized that plaintiffs requested only declaratory relief: "Since this is a declaratory judgment action, the court's inquiry concerns the ascertainment of the rights of the parties and whether protection for the asserted right can be judicially molded."[106] The Pennsylvania Court rejected the trial court's reading of the first *Baker* factor, finding instead "that although control of state finances rests with the legislature, that control is subject to constitutional limitations."[107] The appeals court also held that the second *Baker* factor provided no barrier to relief; to the contrary, the matter was justiciable because "the rights of the parties were able to be determined by construction of the relevant statutes and constitutional provisions."[108] The appeals court then entered an order declaring the existing funding scheme unconstitutional and void, but stayed its judgment "to afford the General Assembly an opportunity to enact appropriate funding legislation" consistent with the court's holding.[109]

102. *Id.* at 1270-71.
103. *County of Allegheny*, 534 A.2d at 760.
104. *County of Allegheny*, 500 A.2d at 1270-71.
105. *County of Allegheny*, 534 A.2d at 762 (citing *Baker*, 369 U.S. at 198).
106. *County of Allegheny*, 534 A.2d at 76 (citing The Declaratory Judgments Act, 42 Pa. C.S.A. §§ 7531-7541) (2010).
107. *Id.*
108. *Id.*
109. *Id.* at 765. For the subsequent history to the Pennsylvania case, see *infra* note 131, and accompanying text.

The subject matter of the *Allegheny* lawsuit is unusual, but not unique: other state courts have faced similar state constitutional claims involving the adequacy of funding for specific judicial functions, including judicial salary, and likewise have found the disputes to be justiciable and appropriate for the entry of declaratory relief. In *Maron v. Silver*,[110] for example, New York's highest court issued a declaratory judgment finding that the State's failure to increase judicial salaries for eleven years violated the state constitutional "Separation of Powers Doctrine."[111] Although the court did not enter coercive relief, the opinion underscored its belief that "[w]hen this Court articulates the constitutional standards governing state action, we presume that the State will act accordingly."[112]

2. Public Funding for Public Schools

State constitutional cases involving claims to educational equity and to educational adequacy have received the bulk of attention in the scholarly literature. We emphasize here the relationship between plaintiffs' requests for *declaratory* relief and judicial receptivity to finding that the state constitutional socio-economic claim is justiciable. In addition, typically the state courts couple declaratory relief with on-going supervisory jurisdiction, thus using traditional equitable remedies to enforce rights that seem unconventional because they do not appear in the federal Constitution. As in the Pennsylvania court-funding case, many state courts hearing school financing cases have charted a "third way": these courts have neither renounced judicial power nor exercised it to its full extent, but rather have chosen to "cue" the political branches as to their constitutional duties and then allow those actors time and a zone of permissible discretion within which to meet their constitutional responsibilities.

Horton v. Meskill (*Horton I*),[113] part of the "first wave" of education reform cases,[114] traces to 1974 when similar lawsuits were pending in thirty-six other states.[115] Plaintiffs asserted that Connecticut's decentralized school funding method as applied to the town of Canton

110. Maron v. Silver, 925 N.E.2d 899 (N.Y. 2010).
111. *Id.* at 915.
112. *Id.*
113. Horton v. Meskill, 376 A.2d 359 (Conn. 1977).
114. The wave metaphor first appears in William E. Thro, *The Third Wave: The Impact of Montana, Kentucky, and Texas Decisions on the Future of Public School Finance Reform Litigation*, 19 J.L. & EDUC. 219 (1990); *see also* William E. Thro, *Judicial Analysis During the Third Wave of School Finance Litigation: The Massachusetts Decision as a Model*, 35 B.C. L. REV. 597, 598 & n.4 (1994).
115. *Horton*, 376 A.2d at 361 & n.1 (citing Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars*, 81 YALE L.J. 1303 (1972)).

violated the Connecticut constitution's education clause, which requires provision of free public schools.[116] Plaintiffs sought declaratory and injunctive relief.[117] The trial court rejected defendants' claim of nonjusticiability, finding the requisite adversity between the parties; it rejected a challenge to plaintiffs' standing, ruling that a plaintiff "presently eligible for public schooling" may mount a constitutional challenge to the distribution of funds for public schools; and it rejected defendants' assertion of sovereign immunity on the ground that "sovereign immunity is no defense where a complaint charges officials with violation of a plaintiff's constitutional rights."[118] Notably, the court ruled that the doctrine of sovereign immunity in Connecticut poses no barrier to a proper claim for declaratory judgment, and further, that the declaratory judgment statute must be liberally construed where—as in *Horton* itself—the request for relief "concerns a matter 'of considerable public importance.'"[119] In issuing declaratory relief and retaining supervisory jurisdiction, the court emphasized that "even if the doctrine of sovereign immunity might be a valid defense . . . the defense should not be available where it is of 'considerable public importance' that there should be a judicial determination of the question that is the subject of the action for the declaratory judgment."[120] At the same time, the court underscored that responsibility for reforming the state's public schools rests with the political branches, quoting the Supreme Court's opinion in *San Antonio Independent School Board v. Rodriguez*,[121] that "the ultimate solutions [about education policy] must come from the lawmakers and from the democratic pressures of those who elect them."[122]

On appeal, the Supreme Court of Connecticut affirmed the trial's court entry of a declaratory judgment and its decision to retain jurisdiction over the action.[123] The high court emphasized the distinction "between sovereign immunity from suit and sovereign immunity from liability," emphasizing the judiciary's "duty under a constitutional government such as ours to decide a justiciable controversy as to the constitutionality of a legislative enactment[.]"[124] The state declaratory judgment procedure, the Connecticut court explained, is "peculiarly well adapted to the judicial determination of controversies concerning

116. *Horton*, 376 A.2d at 361.
117. *Id*.
118. Horton v. Meskill, 332 A.2d 113, 119-20 (Conn. Super. Ct. 1974).
119. *Id.* at 120.
120. *Id.*
121. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).
122. *Horton*, 332 A.2d at 120 (quoting *Rodriguez*, 411 U.S. at 58).
123. *Horton*, 376 A.2d at 374-75.
124. *Id.* at 364.

constitutional rights and, as in these cases, the constitutionality of state legislative or executive action."[125] The court further stressed the importance of the trial court's retention of jurisdiction to enter equitable orders later in the lawsuit that could be adapted as the other branches developed solutions.[126]

Education reform efforts in Connecticut have been a long-running saga, riding the "waves" that have been associated with litigation of this sort.[127] For present purposes, it is sufficient to note that later cases largely have conformed to the *Horton I* bifurcated model of an early declaratory judgment allowing the legislature to develop a plan, followed by judicially-centered participatory hearings to determine whether the plan conforms to the constitutional mandate or whether additional relief is warranted.[128] This enforcement pattern persists even as the theory of

125. *Id.* at 365.

126. *Id.* The Connecticut Supreme Court explained:

> The [declaratory judgment] procedure has the distinct advantage of affording to the court in granting any relief consequential to its determination of rights the opportunity of tailoring that relief to the particular circumstances. In a case such as the present one, this circumstance is of special importance because the court, mindful of the proper limitations on judicial intervention, the problems inherent in the complexities of school financing and the presumption that the other departments of our government will accede to this court's interpretation of the state constitution, may properly delay specific direction, affording time for corrective action and avoiding any "serious interference with the performance of their functions and with their control over their respective instrumentalities, funds, and property."

Id. (quoting Joseph D. Block, *Suits against Government Officers and the Sovereign Immunity Doctrine*, 59 HARV. L. REV. 1060, 1061 (1946)). In response to the court's declaratory order, the legislature adopted statutory reforms, which it then amended, and plaintiffs challenged the constitutionality of those revised efforts. *See* Horton v. Meskill, 445 A.2d 579, 581 (Conn. 1982) (citing 1979 Conn. Acts 79-128; 1980 Conn. Acts 80-404; 1980 Conn. Acts 80-473). Various towns and boards of education moved to intervene in the action, and the court denied their request, instead contemplating a two-phased process that would give putative defendant-parties a voice in the remedial stage of the litigation should the legislation be held unconstitutional. *Id.* at 583. The trial court later held the legislature's plan to be "constitutional in design but unconstitutional in part," and the Connecticut Supreme Court reviewed that finding under a standard adapted from federal court review of state apportionment plans, *see* Horton v. Meskill, 486 A.2d 1099, 1106 (Conn. 1985), and, finding error, set aside the trial court's judgments and remanded for further proceedings to determine whether the statutes were unconstitutional and to design appropriate relief. *Id.* As the Connecticut Supreme Court explained: "In litigation that raises constitutional issues that have systemic implications for the operation of government, it is appropriate for a trial court to pursue a joint consideration of right and remedy." *Id.* at 1111.

127. *See* William S. Koski, *Of Fuzzy Standards and Institutional Constraints: A Re-examination of the Jurisprudential History of Educational Finance Reform Litigation*, 43 SANTA CLARA L. REV. 1185, 1188 (2003) (referring to "three waves of reform").

128. *See e.g.*, Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 222 (Conn. 2010) ("In the present case [alleging state constitutional claims to a "suitable" education], the complaint clearly requests a declaration of a constitutional violation, with the precise remedy being left to the defendants in the first instance."); Seymour v. Region

relief has expanded from that of equalizing the funding of educational resources to a thoroughgoing assessment and redefinition of what characterizes an adequate education.[129] The Connecticut court has justified its approach as one grounded in "[p]rudence and sensitivity to the constitutional authority of coordinate branches of government,"[130] while rejecting arguments that socio-economic rights fall outside the judicial power to enforce.[131]

One Bd. of Educ., 803 A.2d 318, 324 (Conn. 2002) ("We . . . consider the question of justiciability on the premise that the plaintiffs seek a declaration of the unconstitutionality of . . . [state statute pertaining to school funding], with the remedy that they propose to be considered by the legislative branch."); Sheff v. O'Neill, 678 A.2d 1267, 1290 (Conn. 1996) ("We have decided [in suit involving claims to "substantially equal" educational opportunity under state and federal constitution provisions] to employ the methodology used in *Horton I*."). For a criticism of the Connecticut court's approach, focusing on *Sheff*, see Justin R. Long, *Enforcing Affirmative State Constitutional Obligations and* Sheff v. O'Neill, 151 U. PA. L. REV. 277, 291 (2002) (reporting that in *Sheff*, "[t]he majority opinion provided plenty of bombast about the importance of finding a remedy, but granted only declaratory relief aimed at politely persuading the general assembly and champagne-popping governor to find a solution using 'energy and good will'" (quoting *Sheff*, 678 A.2d at 1290)). *But see* Justin R. Long, *Demosprudence, Interactive Federalism, and Twenty Years of* Sheff v. O'Neill, 42 CONN. L. REV. 585, 606, 608 (2009) (characterizing *Sheff* as a "liberty-enhancing counterweight to U.S. Supreme Court decisions" that "urges politicians and ordinary people to respond to its holding with democratic vigor, encouraging a popular debate about national constitutional values and priorities").

129. *See* Liebman & Sabel, *supra* note 90, at 204-05 (discussing the shift in theoretical focus of the state court cases).

130. *O'Neill*, 678 A.2d at 1290.

131. *Id.* at 1291 ("'*Our answer is this: a denial of constitutionally protected rights demands judicial protection; our oath and our office require no less of us.'* Our oath, our office and the constitutional rights of the schoolchildren of Hartford, require no less of us in this case.") (quoting Reynolds v. Sims, 377 U.S. 533, 566 (1964)).

The New York Court of Appeals likewise has considered the adequacy of public funding for the state's schools. In 1995, the court declared that the New York Constitution's education clause requires the state "to offer all children the opportunity of a sound basic education." Campaign for Fiscal Equity, Inc. v. State of New York, 655 N.E.2d 661, 666 (N.Y. 1995). That ruling led to a trial at which plaintiffs established that inadequate public funding had deprived children in New York City of "the constitutionally-mandated opportunity for a sound basic education." *Id.* at 667. The appeals court affirmed that finding, and directed the State to ensure, by means of "[r]eforms to the current system of financing school funding and managing schools . . . that every school in New York City would have the resources necessary for providing the opportunity for a sound basic education." Campaign for Fiscal Equity, Inc. v. State of New York, 801 N.E.2d 326, 348 (N.Y. 2003). The court set a deadline for legislative action, and elaborated "signposts" to guide the government in developing an appropriate remedy. *Id.* at 350.

In response to the court's order, the Governor established a state-wide commission to study reform of the education financing system. The point of the process was to compel the legislature to undertake the role that the constitution assigns to it: to investigate problems and devise solutions that reflect reasonable responses to constitutional requirements. Campaign for Fiscal Equity, Inc. v. State, 861 N.E.2d 50, 53 (N.Y. 2006). The commission issued recommendations, and the Governor and State

B. Regulatory Guidance and Injunctive Relief: Emergency Shelter

Another objection mounted against socio-economic rights asserts that courts lack capacity to develop substantive standards to implement affirmative constitutional provisions such as public schooling, health care, or a clean environment. Rather, these rights are said to depend on policy choices that are best assigned to a legislature or administrative agency with the institutional capacity to collect information, assess expert analyses, update solutions, and make tough policy choices. The view that courts lack capacity to develop policy is radically at odds with the traditional role of state courts as common law courts. It also ignores the experience of state courts that have successfully derived constitutional standards from common law principles to guide the enforcement of socio-economic rights.[132]

In *McCain v. Koch*,[133] destitute, homeless families with children in New York City sued the City Department of Social Services, asserting a right to emergency shelter and seeking declaratory and injunctive relief.[134] The trial court entered an interim order directing that "when

Senate endorsed a reform that called for $1.93 billion to remedy the identified problems. *Id.* at 55. The Legislature nevertheless failed to enact the reform before the trial court's deadline, instead appropriating only $300 million in increased educational assistance. *Id*. Judicial proceedings resumed, and the trial court "appointed a blue-ribbon panel of referees 'to hear and report with recommendations.'" *Id*. at 56. After extensive investigation, the referees reported that $5.63 billion were needed to remedy the identified problems, and the trial court confirmed that recommendation. *Id*. However, the Court of Appeals reversed, finding that the Governor's proposed reform package was not unreasonable. *Id*. at 57-58. The court explained: "Our deference to the Legislature's education financing plans is justified not only by prudent and practical hesitation in light of the limited access of the Judiciary "to the controlling economic and social facts," but also by our abiding "respect for the separation of powers. . . ." *Id.*

132. The "standards-based" literature tends to emphasize a court's drawing guidance from standards that are exogenous to the state or to the judiciary, rather than from common law principles. *See e.g.*, Dorf & Sabel, *supra* note 13, at 211-12 (discussing educational standards derived from "monographs prepared by university-based educational research centers").

133. McCain v. Koch, 502 N.Y.S.2d 720 (N.Y. App. Div. 1986).

134. Plaintiffs' claims on appeal rested on the federal and state constitutional equal protection clauses, on Article XVII of the state constitution ("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.") and on federal and state statutes. *See McCain*, 502 N.Y.S.2d at 723, 730, *order rev'd in part*, 511 N.E.2d 62 (N.Y. 1987). An earlier New York consent decree recognized a right to emergency shelter on behalf of single destitute men. *See* The *Callahan* Consent Decree, http://coalhome.3cdn.net//98ddd439f5e1c43409_6gm 6bnxa2.pdf (last visited Oct. 23, 2011); *see also* City of New York v. Blum, 470 N.Y.S.2d 308, 312 (N.Y. Sup. Ct. 1982) (setting forth operating standards for shelters). The intermediate appeals court found that plaintiffs were likely to succeed on the merits of their constitutional and statutory claims to a right to emergency shelter. *See McCain*, 502 N.Y.S.2d at 731.

providing emergency housing for homeless families with children, [defendants must] assure, insofar as practicable, that such housing meets specified minimal standards of health, safety and decency suitable for young children, including placement in light of educational needs."[135] Shortly after, the trial court issued a decision that converted the interim order into a preliminary injunction providing, among other things, that "once the defendants have undertaken to provide emergency shelter . . . the shelter provided should meet reasonable minimum standards."[136] These minimal standards required a bed or crib for each family member "with clean and sufficient sheets and blankets," "a sufficient number of clean towels," "sufficient space," accessibility to "a sanitary bathroom with hot water," sufficient heating, "basic furniture essential for daily living," and window guards and locks on the outside door.[137] The trial court emphasized that in setting "general principles by which the agencies may be guided," it was prescribing standards that "are not immutable nor exhaustive, but indicative of the minimum standards which this society at this time finds acceptable within the meaning of the word shelter," and that the court could equitably enforce compliance with those standards.[138]

Defendants initially appealed to the Appellate Division, the state intermediate appeals court. The Appellate Division affirmed the trial court's declaratory order, emphasizing that plaintiffs based their claims on "mandatory, not precatory, statutory and constitutional directives," and that "such claims present a justiciable controversy even though the activity contemplated on the State's part may be complex and rife with the exercise of discretion."[139] However, the intermediate court vacated the trial court's injunctive order setting out minimum standards for emergency shelter, holding "that the adequacy of the level of welfare

135. *McCain*, 502 N.Y.S.2d at 725 (discussing Interim Order dated June 20, 1983, Special Term (Greenfield, J.)). Three months later, the State Department of Social Services issued a state-wide administrative directive based on the trial court's interim order establishing placement and accountability protocols for the provision of emergency shelter. *Id.* at 725-26 (discussing Administrative Directive 83-ADM-47, providing that local social service departments are "to assist homeless persons in obtaining housing"). The State Department of Social Services also promulgated 18 N.Y.C.R.R. 352.3 (g) & (h), requiring local departments to inspect hotels and motels used for client referrals. *McCain*, 502 N.Y.S.2d at 725-26.

136. McCain v. Koch, 484 N.Y.S.2d 985, 987 (N.Y. Sup. Ct. 1984).

137. McCain v. Koch, 511 N.E.2d 62, 63-64 (N.Y. 1987) (quoting from injunction of June 27, 1984).

138. *McCain*, 484 N.Y.S.2d at 987.

139. *McCain*, 502 N.Y.S.2d at 731 (citing Klosterman v. Cuomo, 463 N.E.2d 588, 596 (N.Y. 1984)).

benefits is a matter committed to the discretion of the Legislature,"[140] but invited the Court of Appeals to revisit its state constitutional decisions in this area.

The Court of Appeals, New York's highest court, vacated this portion of the Appellate Division's order, but in so doing found it unnecessary to address its prior state constitutional decisions.[141] The high court held that a trial court in New York has "power . . . to fashion equitable relief . . . requiring . . . housing which satisfies minimum standards of sanitation, safety and decency" when emergency housing is provided to the destitute.[142] The Court of Appeals explained: "There is no question that in a proper case . . . [the New York trial court] has power as a court of equity to grant a temporary injunction which mandates specific conduct by municipal agencies. . . ."[143] The court further rejected arguments that the action was nonjusticiable: there was no encroachment on executive or legislative prerogative at the time of the initial interim order, because the State Department of Social Services had not yet issued regulations concerning minimum standards, and no conflict developed later because the departmental regulations "are more extensive and stringent than the injunction."[144]

The *McCain* court used two traditional techniques to enforce a right to emergency shelter without declaring that such a right exists under the state constitution. First, the court used a prohibitory injunction to constrain defendants from engaging in rights-violating activity.[145] Second, the court incorporated into its injunction affirmative standards guiding the provision of emergency shelter—standards that can be traced to the common law warranty of habitability and were offered on a

140. *Id.* (citing Matter of Bernstein v. Toia, 373 N.E.2d 238 (N.Y. 1977)). The intermediate court emphasized that it felt bound by earlier decisions of the Court of Appeals and stated:

> The inability of courts to set even minimum standards for meeting "the legitimate needs of each recipient" upon the failure of the Legislature to do so is discouraging, saddening, and disheartening. When thousands of children are put at risk in their physical and mental health, and subject to inevitable emotional scarring, because of the failure of City and State officials to provide emergency shelter for them which meets minimum standards of decency and habitability, it is time for the Court of Appeals to reexamine and, hopefully, change its prior holdings in this area. The lives and characters of the young are too precious to be dealt with in a way justified, as argued, on the ground that the government's efforts are more than token. They may be more than token, but they are inadequate.

Id. (citation omitted).

141. *McCain*, 511 N.E.2d at 65.

142. *Id.* at 62-63.

143. *Id.* at 64.

144. *Id.* at 67.

145. *Id.* at 63-64.

conditional basis until the state's executive officials stepped forward to meet their duty of prescribing minimum standards for such shelter.[146] To borrow from Ellen A. Peters, former Chief Justice of the Connecticut Supreme Court, the *McCain* court's reliance on common law achieved an "accommodation between the two branches" of state governance, using a law-making technique that has "no readily discernible parallel in the federal courts."[147]

C. Program Exclusions and Coercive Mandates: Immigrant Access to Health Care

State courts also have deployed coercive remedies in cases involving socio-economic rights. The coercive remedies in these cases are "strong form" in the sense of involving mandatory directives that defendant must enforce to bring conditions into constitutional compliance; these remedies are not regarded as measures of last resort and should be distinguished from contempt citations or fines that are ordered to punish non-compliance with a court's prior order.[148] The judiciary's use of coercive remedies to enforce constitutional socio-economic rights usually occurs in the context of an on-going service program from which plaintiffs allege they have been excluded for reasons that violate state law.[149] One commentator refers to this form of

146. *Id*. at 63-67.

147. Ellen A. Peters, *Getting Away From the Federal Paradigm: Separation of Powers in State Courts*, 81 MINN. L. REV. 1543, 1556-57 (1997).

148. Professor Tushnet has suggested that the use of coercive remedies might reflect "a dynamic, born of frustration, leading the courts to convert weak remedies into strong ones." Tushnet, *supra* note 13, at 256. The Pennsylvania experience with public funding for a unified court system illustrates well the dynamic that Prof. Tushnet describes. *See* Dana Stuchell, *Constitutional Crisis in Pennsylvania: Pennsylvania Supreme Court v. Pennsylvania General Assembly*, 102 DICK. L. REV. 201, 231-32 (1997) (reporting that after nine years of legislative inaction, the Pennsylvania court ordered the General Assembly to enact a state-wide funding scheme by a fixed date and appointed a master to prepare recommendations for the design of and transition to a new court system); *see also* Matthew J. Zeigler, Marrero v. Commonwealth*: The Commonwealth Court Struggles to Preserve the Political Question Doctrine in Pennsylvania*, 8 WIDENER J. PUB. L. 781, 797 (1999) (discussing appointment of master in judicial funding case). For other examples, see Richard E. Levy, *Gunfight at the K-12 Corral: Legislative vs. Judicial Power in the Kansas School Finance Litigation*, 54 U. KAN. L. REV. 1021 (2006). For examples of a state court's use of contempt or fines as post-judgment enforcement mechanisms, see Tamia Perry, Note, *In the Interest of Justice: The Impact of Court-ordered Reform on the City of New York*, 42 N.Y.L. SCH. L. REV. 1239, 1246-48 (1998) (describing the New York court's enforcement efforts in the *McCain* litigation which included civil contempt, fines, and ordering "the offending officials to stay overnight in the welfare offices [where defendants illegally lodged plaintiffs].").

149. These cases map onto a category that the literature describes as dependent "on democratic instantiation in the first instance, typically in the form of a legislated program, with the judiciary generally limited to an interstitial role." *See* Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203, 203, 245 (2008) (drawing from

relief as "gap-filling."[150] The coercive remedies in these cases are strong-form, in the sense of involving mandatory directives.

To see the structure of these decisions, consider a New York case involving the exclusion of legal immigrants from the state's Medicaid programs. In 1996, Congress resolved to "end welfare as we know it" and adopted legislation that, among other provisions, drastically restricted the eligibility of legal immigrants for Medicaid and other federally funded assistance.[151] In essence, the 1996 law provided that immigrants admitted as lawful permanent residents could obtain Medicaid from a state program receiving federal financial support, but only if the state elected to cover them; immigrants permanently residing in the United States under color of law ("PRUCOL") were barred from federally-supported Medicaid.[152]

New York has both a federally-supported and a wholly state-funded Medicaid program.[153] The purpose of the latter is to extend medical assistance to certain low-income residents (principally non-elderly, non-disabled adults without minor children) who do not qualify for federally financed Medicaid. Historically, New York had not distinguished between legal immigrants and U.S. citizens in its provision of Medicaid.[154] But on the heels of the federal legislation, the state disqualified broad categories of legal immigrants from receiving state- or federally-funded Medicaid.[155] An amended Section 122 of the N.Y. Social Services Law barred from the state-funded program any

MICHAEL WALZER, SPHERES OF JUSTICE: A DEFENSE OF PLURALISM AND EQUALITY 78-79 (1983) ("Welfare rights are fixed only when a community adopts some program of mutual provision.")); *see also* Amartya Sen, *Human Rights and the Limits of Law*, 27 CARDOZO L. REV. 2913, 2915 (2006) (clarifying a distinction between "human rights" and "actual legislation inspired by the idea of human rights," but questioning whether "the practical relevance of human rights [is] entirely parasitic on legislation that has actually occurred"). The existence of the program mitigates arguments that the right in dispute is indeterminate. *Cf.* TUSHNET, *supra* note 13, at 228 (referring to "reasonable disagreement over what an abstractly described constitutional right means in a particular context"). The democratic-instantiation argument may understate the difficulty of determining whether a program exists. *See, e.g.*, Khrapunskiy v. Doar, 909 N.E.2d 70 (N.Y. 2009) (rejecting claims by aged, blind or disabled persons and legal resident aliens of New York that they are entitled to the same level of state-funded benefits received by aged, blind or disabled citizens under the federal Supplemental Security Income Program).

150. *See* Klein, *supra* note 92, at 369; *see generally* Hershkoff, *supra* note 6, at 1148 (discussing these cases as part of a typology of socio-economic rights enforcement).

151. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered provisions of 8 & 42 U.S.C.).

152. For a fuller description of the complex rules governing immigrant access to Medicaid, see Hershkoff & Loffredo, *supra* note 27, at 198-99.

153. Aliessa v. Novello, 754 N.E.2d 1085, 1089 (N.Y. 2001).

154. *Id.* at 1089-90.

155. *Id.* at 1091-92.

immigrant not eligible for federally-supported Medicaid; the state also imposed a five-year ineligibility period on legal immigrants who entered the U.S. after August 22, 1996, even though federal law gave states the option of extending federally-supported Medicaid to such persons without any waiting period.[156] The state continued to guarantee emergency medical treatment to excluded immigrants.[157] In response to these statutory changes, plaintiffs—a group including immigrants with permanent-resident status and those with PRUCOL status—challenged their exclusion from the state Medicaid program as a violation of Article XVII of the New York Constitution, which guarantees "aid, care and support" to the needy.[158]

The trial court agreed that the statute violated Article XVII and granted declaratory and injunctive relief.[159] The court found that under *Tucker v. Toia*,[160] the state has a mandatory constitutional duty to provide aid to the needy, and may not withhold assistance "solely on the basis of criteria having nothing to do with need"[161]—here, plaintiffs' immigration status. The Appellate Division, the intermediate appeals court, reversed, holding that the restrictions on immigrant eligibility for Medicaid affected only the "manner and level" of medical assistance provided, and did not create a wholesale exclusion on the basis of non-need criteria.[162] Ultimately, the Court of Appeals reversed the Appellate Division, finding that the New York statute violated Article XVII "by imposing on plaintiffs an overly burdensome eligibility condition having nothing to do with need, depriving them of an entire category of otherwise available basic necessity benefits."[163] The court acknowledged that the state constitution "affords the State wide discretion . . . in setting benefit levels," but it declined to treat the statutory exclusion as a provision that "merely set[s] levels of benefits for the needy."[164] Rather, "The concept of need plays no part in the operation" of the statute and thus could not justify the eligibility lines that the legislature had drawn.[165]

Cases that implicate a plaintiff's exclusion from an existing benefit program require the court to assess whether the legislature's action is

156. The description of the N.Y. Medicaid Program is taken from the opinion in *Aliessa*, 754 N.E.2d at 1091-92. The system of exclusion is more complex than the text indicates. *See id.*

157. *Id.* at 1093.

158. Aliessa v. Whalen, 694 N.Y.S.2d 308, 314 (N.Y. Sup. Ct. 1999). Plaintiffs also asserted claims under the federal and state Equal Protection Clauses. *Id.* at 311-14.

159. *Id.* at 316.

160. Tucker v. Toia, 371 N.E.2d 449 (N.Y. 1977).

161. *Whalen*, 694 N.Y.S.2d at 315 (citing *Tucker*, 371 N.E.2d at 452).

162. Aliessa v. Novello, 712 N.Y.S.2d 96, 98 (N.Y. App. Div. 2000).

163. *Id.* at 1093.

164. *Id.*

165. *Id.*

consistent with what commentators have called the "core" of the constitutional commitment; this analytic process engages fairly traditional methods of statutory and constitutional interpretation and the disputes involving these questions present justiciable controversies well within conventional notions of judicial power.[166]

D. The Continuing Problem of False Nonjusticiability

The state experience reflects an increasing understanding of the ways in which socio-economic rights can be treated as justiciable and be judicially enforced both on an individual and on a collective basis. However, as Mauro Cappelletti, the eminent Florentine professor of civil procedure, observed in a related context forty years ago, "A trend . . . is not yet an accomplished reality. Enormous obstacles are in the way."[167] Many state courts continue to treat positive rights provisions as nonjusticiable or defer to legislative decisions without determining whether the government action conforms to constitutional commitments.[168] Indeed, in some categories of state constitutional socio-economic rights, dismissals of cases on nonjusticiability grounds appear to be on the rise.[169] We highlight here three state court decisions illustrating three persistent errors.

1. Decoupling the Court's Interpretive Duty from the Legislature's Remedial Authority

Probably the most profound error that courts make when addressing socio-economic rights is the failure to decouple the court's interpretive duty to construe a constitutional provision from the assessment of whether a different branch of government has complied with the constitutional requirement. Determining whether a right is justiciable

166. Daintith refers to the "core" of the constitutional commitment. *See* Daintith, *supra* note 20, at 87.

167. Mauro Cappelletti, *New Dimensions of Justice*, *in* IN HONOREM OF MAURO CAPPELLETTI (1927-2004): TRIBUTE TO AN INTERNATIONAL PROCEDURAL LAWYER 53, 61 (Marcel Storme & Federico Carpi eds., 2005) (discussing the implications of constitutional law for procedural developments).

168. *See* Pascal, *supra* note 10, at 875 (referring to "[t]he limited and deferential review that state courts give welfare legislation"); Elizabeth Weeks Leonard, *State Constitutionalism and the Right to Health Care*, 12 U. PA. J. CONST. L. 1325, 1392 (2010) (reporting that seven of the states examined "demonstrate a general reluctance to recognize affirmative, enforceable health rights").

169. *See, e.g.*, Laurie Reynolds, *Full State Funding of Education as a State Constitutional Imperative*, 60 HASTINGS L.J. 749, 761-64 (2009) (reporting that during the last decade, "[T]he doctrine [of nonjusticiability] appears to have lost its status as an outlier of limited persuasion [in education financing cases] and has appeared on the scene with new vigor").

requires the court to take an antecedent interpretive act before asking whether the government has violated the constitutional norm or whether enforcement of the norm is committed exclusively to the legislative or executive branch. Thus, the Supreme Court of Washington, relying on *Baker v. Carr*, emphasized that:

> Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution.[170]

Ellen A. Peters, former Chief Justice of the Connecticut Supreme Court, thus has referred to the "dual assignment" of state court judges in state constitutional positive rights cases: "In construing and applying these uniquely state-centered constitutional provisions, state courts . . . must not only define the scope of the affirmative state constitutional obligation at stake, but they must also determine whether the state has fulfilled its constitutional duty."[171] She adds: "Defining the constitutional right is the quintessential judicial obligation, but at least initially, elected officials, rather than judges, can better determine the precise contours of the appropriate policy response."[172]

Within this "dual assignment," state courts possess interpretive responsibility to articulate the scope and nature of the constitution's meaning, even if the other branches possess initial remedial responsibility to effectuate a constitutional duty. Moreover, even as the political branches take steps to cure a constitutional violation, the court retains interpretive authority—using methodological approaches that are typical to state courts—to assess whether the revised legislation or program effectuates the right.[173] The fact that there may be various permissible ways to implement the right does not render a claim of violation nonjusticiable: it remains the court's responsibility to ensure that the core of the right is effectuated.

170. Seattle Sch. Dist. No. 1 v. State, 585 P.2d 71, 84 (Wash. 1978) (en banc) (citing Baker v. Carr, 369 U.S. 186, 211 (1962)).

171. Peters, *supra* note 147, at 1558.

172. *Id.*

173. *See, e.g.*, Montoy v. State, 112 P.3d 923, 929 (Kan. 2005) (emphasizing the court's authority to assess the legislature's compliance with a remedial order); *see also* Vinay Harpalani, Note, *Maintaining Educational Adequacy in Times of Recession: Judicial Review of State Education Budget Cuts*, 85 N.Y.U. L. REV. 258, 259-60 (2010) (presenting a tripartite approach to state constitutional education cases that looks to justiciability, constitutional compliance, and remedial compliance).

Numerous state cases illustrate the binary, yet overlapping nature of this process. As the Connecticut Supreme Court explained in *Sheff v. O'Neill*,[174] involving claims to an adequate, desegregated education:

> [W]e are persuaded that the phrase "appropriate legislation" . . . does not deprive the courts of the authority to determine what is "appropriate." Just as the legislature has a constitutional duty to fulfill its affirmative obligation to the children who attend the state's public elementary and secondary schools, so the judiciary has a constitutional duty to review whether the legislature has fulfilled its obligation. Considerations of justiciability must be balanced against the principle that every presumption is to be indulged in favor of subject matter jurisdiction.[175]

Similarly, in *Maron v. Silver*,[176] the New York Court of Appeals held that the State's failure to increase judicial salaries for a period of eleven years violated the state constitution's "Separation of Powers Doctrine" because of the manner and means that defendants used to adjust court compensation.[177] The New York Court of Appeals rejected the defendants' argument that the judiciary is powerless to adjudicate claims involving budgetary appropriations; it likewise rejected the defendants' argument that the judiciary is powerless to adjudicate claims arising under constitutional provisions that accord discretion to the Legislature in carrying out its constitutional responsibilities.[178] To the contrary, the court stated, "whether judicial compensation should be adjusted, and by how much, is within the province of the Legislature. . . . [H]owever, [the question of] whether the Legislature has met its constitutional obligations in that regard *is within the province of this* Court."[179]

Taylor v. The State of New York[180] illustrates the common conceptual error that results from a court's conflating the question of judicial power to interpret constitutional socio-economic rights with the question of judicial deference to legislative choices in implementing such rights. In *Taylor*, indigent families and individuals challenged New York's failure to increase its basic public assistance grant over a nineteen-year period despite substantial increases in the cost of living

174. Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996).
175. *Id.* at 1276.
176. Maron v. Silver, 925 N.E.2d 899 (N.Y. 2010).
177. *Id.* at 903-05, 915-17. Specifically, the Legislature impermissibly linked its consideration of judicial compensation to "unrelated policy initiatives and legislative compensation adjustments;" in addition, the Legislature's failure to provide a cost of living increase to state judges during the eleven year period caused the real value of court salaries to decline below constitutionally adequate levels. *Id.* at 903-05, 915-17.
178. *Id*. at 917.
179. *Id.* (emphasis added) (citing Marbury v. Madison, 5 U.S. 137, 177 (1803)).
180. Taylor v. State, No. 116370/08, slip op. at 1 (N.Y. Sup. Ct. Apr. 16, 2010).

that left the grant far below the level necessary to meet essential needs.[181] In 2008, when plaintiffs filed their complaint, the basic grant remained at its 1989 level of $137.10 per month for an individual.[182] Plaintiffs alleged that the Legislature's failure to make any fact-based assessment of the adequacy of the grant for a period of two decades and its failure to set the grant at a reasonable level violated Article XVII, the welfare clause of the New York Constitution.[183] After the action was commenced, the Governor proposed and the Legislature approved a thirty percent increase in the public assistance grant, and the trial court subsequently dismissed the amended complaint, holding that Article XVII "explicitly leaves it to the discretion of the Legislature" to set public assistance benefit levels, and therefore the judiciary has no power "to review whether the amount of aid allocated by the Legislature is [constitutionally] sufficient."[184] In so ruling, the *Taylor* court ignored the basic distinction between the Legislature's discretion to design welfare programs—which is entitled to deference under the appropriate standard of review—and the court's own core function of determining whether those programs satisfy the constitutional mandate. As the Court of Appeals earlier had made clear, the state constitution gives the Legislature "discretion" to ascertain and define the State standard of need, but the Legislature's exercise of that discretion must be "reasonabl[e]" and "is subject to judicial review."[185]

2. Recognizing the Manageability of Declaratory Relief

A closely related error involves state courts, relying on federal "political question" criteria to rule claims of socio-economic right nonjusticiable, even where plaintiffs seek only declaratory relief. In 1984, Hans A. Linde, then a Justice on the Oregon Supreme Court, wrote: "If a 'political question doctrine' exists in a state court, I have not heard of it."[186] Since then, state courts have increasingly invoked the federal political question doctrine as grounds for dismissing state constitutional socio-economic cases as nonjusticiable,[187] even where

181. Complaint at ¶¶ 5-9, 17-32, *Taylor*, No. 116370/08 (N.Y. Sup. Ct. Apr. 16, 2010).

182. *Id*. at ¶ 26.

183. *Taylor*, No. 116370/08, slip op. at 2-4 (citing N.Y. CONST. art. XVII, § 1, which obligates the state to provide for "the aid, care and support of the needy").

184. *Taylor*, No. 116370/08, slip op. at 3, 7.

185. Lovelace v. Gross, 605 N.E.2d 339, 343 (N.Y. 1992).

186. Hans A. Linde, *E Pluribus—Constitutional Theory and State Courts*, 18 GA. L. REV. 165, 189-90 (1984).

187. *See* Christine M. O'Neill, *Closing the Door on Positive Rights: State Court Use of the Political Question Doctrine to Deny Access to Educational Adequacy Claims*, 42

declaratory relief is an available remedial option.[188] The error is failing to distinguish declaratory from injunctive relief—a distinction clearly articulated by the Washington Supreme Court in a case involving the constitutionality of that state's public school system:

> Where the question is one of great public interest and has been brought to the court's attention with adequate argument and briefing, and where it appears that an opinion of the court will be beneficial to the public and to other branches of the government, the court may exercise its discretion and render a declaratory judgment to resolve a question of constitutional interpretation. . . . Declaratory procedure is peculiarly well suited to the judicial determination of controversies concerning constitutional rights and, as in this case, the constitutionality of legislative action or inaction.[189]

Pendleton School District 16R v. State of Oregon[190] illustrates how the court may enter declaratory relief as a first step toward the government's achieving constitutional compliance. In *Pendleton*, various school districts and students filed a declaratory judgment action to determine whether the Legislature had failed to fund the public school system at the constitutionally required level.[191] The trial court dismissed all claims and the Court of Appeals (Oregon's intermediate appellate court) affirmed.[192] However, the Oregon Supreme Court reversed in part, holding that plaintiffs were entitled to a declaratory judgment "that the legislature has failed to fund the Oregon public school system at the level sufficient to meet the quality education goals established by law."[193] The court further held that injunctive relief to secure the required funding would not yet be appropriate;[194] the court expected that the declaratory judgment would play a dynamic role in moving the Legislature toward constitutional compliance. This use of declaratory relief, fairly typical of state practice, has been described as "at once more

COLUM. J.L. & SOC. PROBS. 545, 546 (2009) (reporting that seven states have relied on the political question doctrine to dismiss education cases as nonjusticiable).

188. *See* Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 221 (2010) (reversing dismissal of action as nonjusticiable where "at least one of the plaintiffs' desired remedies supports the justiciability of their claims").

189. Seattle Sch. Dist. No. 1 of King County v. State, 585 P.2d 71, 80 (Wash. 1978) (en banc).

190. Pendleton Sch. Dist. 16R v. State, 200 P.3d 133 (Or. 2009).

191. *Id*. at 135.

192. *Id*.

193. *Id.*

194. *Id.* at 145.

active and more restrained" than federal practice, and is an important feature of socio-economic rights enforcement.[195]

3. Treating Socio-Economic Programs as "Established Legislations"

As the previous subpart indicated, some commentators posit that socio-economic rights can be judicially enforced only in the context of an existing legislative program.[196] Certainly once socio-economic rights have been "placed in legislation . . . they stand shoulder to shoulder with other established legislations."[197] Some state courts, however, mistakenly turn this insight on its head, insisting that the government's establishment of a socio-economic program extinguishes the court's power to assess constitutional compliance. *Mixon v. Grinker*,[198] a New York case involving the health and shelter needs of indigent persons with HIV-related illness, illustrates this form of error.[199]

In *Mixon*, indigent homeless persons in New York who suffered HIV-related illness as defined by the AIDS Institute of the State Department of Health claimed a state constitutional entitlement to shelter benefits on par with those provided to needy persons with AIDS as defined by the Federal Centers for Disease Control.[200] Essentially, the plaintiffs wanted non-congregate housing rather than placement in barracks-style shelters with the general homeless population. The trial court denied defendants' motion to dismiss on grounds that the issues were nonjusticiable, and the intermediate appeals court affirmed.[201] About a year later, defendants, without the compulsion of a court order, announced a new policy of providing housing to individuals with plaintiffs' medical condition in "segregated spaces in municipal shelters . . . to house up to 12 individuals with HIV-illness or other medically frail individuals in a dormitory-style room" while maintaining

195. Conn. Coal. for Justice in Educ. Funding, Inc. v. Rell, 990 A.2d 206, 222 (citing Michael Besso, Sheff v. O'Neill: *The Connecticut Supreme Court at the Bar of Politics*, 22 QUINNIPIAC L. REV. 165, 212 (2003)).

196. *See, e.g.*, Lawrence G. Sager, JUSTICE IN PLAINCLOTHES: A THEORY OF AMERICAN CONSTITUTIONAL PRACTICE 87-100, 123-24 (Yale Univ. Press 2004) (discussing Plyler v. Doe, 457 U.S. 202 (1982), as an example of the U.S. Supreme Court's power to protect constitutional welfare norms through adjudication, only once Congress has enacted welfare programs).

197. Sen, *supra* note 149, at 2915.

198. Mixon v. Grinker, 669 N.E.2d 819 (N.Y. 1996).

199. *Id*. For a discussion of the New York Court of Appeals' overall approach to the AIDS epidemic, as well as a criticism of the *Mixon* decision, see Armen H. Merjian, *The Court at the Epicenter of a New Civil Rights Struggle: HIV/AIDS in the New York Court of Appeals*, 76 ST. JOHN'S L. REV. 115 (2002).

200. *Mixon*, 669 N.E.2d at 819.

201. Mixon v. Grinker, 556 N.Y.S.2d 855, 859 (N.Y. App. Div. 1990).

"common eating and bathroom facilities with other shelter residents."[202] Individuals with infectious tuberculosis were excluded from these facilities and were to be referred to a hospital.[203] Plaintiffs challenged the adequacy of this revised shelter program and the court conducted a trial and heard conflicting medical opinions.[204] The trial judge, underscoring that defendants' plan "must, unless irrational, be upheld by the courts which should not determine which of conflicting medical opinions is correct," declared that the challenged program failed even this level of deferential review and that "emergency circumstances" justified judicial intervention because defendants could not "reliably determine promptly" whether shelter residents suffered from drug-resistant tuberculosis, a disease that had "reached near epidemic proportions among the homeless who are HIV infected."[205] The trial court declined to order provision of the same benefits provided to CDC-defined AIDS patients, and it emphasized that it was "unable to state any rules for determining" the adequacy of the housing provided; but it declared that it would be irrational to house more than four persons of the plaintiff class in one congregate room and ordered that "the housing to be provided to plaintiffs contain adequate ventilation, with the adequacy to be certified by the City Commissioner of Health, employing recognized standards appropriate to the illness of the residents."[206]

The Appellate Division, New York's intermediate appeals court, affirmed the trial court's ruling that plaintiffs did not have a state constitutional right to benefits on par with CDC-defined AIDS patients.[207] However, the Appellate Division also held that "[w]hen the government . . . undertakes to provide emergency housing for the homeless, it must do so in a way 'which satisfies minimum standards of sanitation, safety and decency.'"[208] Based on the trial court's fact finding, the intermediate appeals court held that defendants' plan, "even with the trial court's attempted improvements," failed to "provide[ ] for 'the minimum level of habitability which defendants now must meet' in such circumstances."[209] The intermediate appeals court, moreover, rejected defendants' argument that the judiciary lacks interpretive authority in areas involving the "allocation of limited resources," and

202. *Mixon*, 669 N.E.2d at 819-20. After the trial, the CDC revised its definition of AIDS to include previously excluded HIV-related illnesses. *See* Mixon v. Grinker, 595 N.Y.S.2d 876, 879 (N.Y. Sup. Ct. 1993).
203. *Mixon*, 595 N.Y.S.2d at 879.
204. *Id.* at 880.
205. *Id*.
206. *Id.* at 881.
207. Mixon v. Grinker, 627 N.Y.S.2d 668, 672 (N.Y. App. Div. 1995).
208. *Id*. (citing McCain v. Koch, 511 N.E.2d 62, 62-63 (N.Y. 1996)).
209. *Id*. at 673 (citing *Koch*, 511 N.E.2d at 67).

that the court is required to defer to the professional judgments of defendants' medical experts even if contrary evidence is presented.[210] The intermediate appellate court vacated and remanded for a hearing on steps needed to make the provision of shelter to the plaintiffs "minimally habitable," emphasizing that the defendants' plan "must present more than an illusion of protecting the HIV-ill from exposure to tuberculosis."[211]

The Court of Appeals, New York's highest court, reversed.[212] In a six-paragraph opinion, the court held that "judicial scrutiny" is not available once the defendants have "implemented a comprehensive program;" rather, the trial court's role is limited to ensuring enforcement with the defendants' standards and the court lacks equitable authority to devise "standards of minimum habitability."[213] The court provided no meaningful explanation for treating the issue as nonjusticiable, other than to say that the use of equitable authority "is an extraordinary judicial task reserved for a situation when no departmental guidelines exist. . . ."[214] But this statement clearly begs the question of whether administrative determinations are subject to constitutional and statutory review for compliance with law—a question the Court of Appeals, like other courts, has answered in the affirmative, even if subjecting such determinations only to the modest scrutiny of rationality review.[215]

III. EXPLAINING SUBNATIONAL UNDERUTILIZATION OF SOCIO-

210. *Id*. at 673-74. The intermediate appeals court set out an approach that draws on conventional patterns of administrative review:

> While we are cognizant of our role in a tripartite system of government, we decline to adopt the defendants' narrow view which would, in essence, convert the courts into a rubber stamp for any policy developed by municipal and state agencies. If, as here, contradictory evidence has been proffered at a non-jury trial, the court not only has the power, but, in fact, has an affirmative duty to weigh, assess, and evaluate such evidence. In doing so, the court may consider those factors ordinarily considered by a finder of fact in assessing credibility and it need not turn a blind and uncritical eye to the testimony of witnesses who, as authors and proponents of a given policy, have a vested interest in its being upheld. Indeed, when, as here, there is compelling evidence which undermines the purported rationale of an agency's decision or proposal, a court should not fail to act simply out of deference to an agency's proposal, particularly when such a failure would endanger the health and safety of individuals who are among the most vulnerable and least able to obtain redress through the other branches of government.

Id. at 674.

211. *Id*. at 675.

212. Mixon v. Grinker, 88 N.Y.2d 907, 911 (1996).

213. *Id*.

214. *Id*.

215. *See* Merjian, *supra* note 199, at 187 (noting that the "right to challenge governmental actions or decisions as unreasonable, irrational, or arbitrary and capricious is, in fact, well established in New York law").

ECONOMIC RIGHTS

So far we have shown that state courts use a variety of techniques to enforce state constitutional socio-economic rights. The question remains why some state courts—and why some courts within a state—persist in treating state constitutional positive rights as nonjusticiable. In this Part, we set out the underutilization thesis as it applies to state constitutional socio-economic rights and survey some possible explanations based on themes that recur in the political science literature. Next, we contribute to the discussion by offering an alternative legal explanation: that although inter-system differences between state and federal courts ought to justify state court remedial independence in cases involving state constitutional socio-economic rights, the conception of judicial role that informs federal remedial doctrine exercises a constraining effect on state courts that is inhibiting and inappropriate.

A. The Underutilization Thesis and State Socio-Economic Rights

The underutilization thesis posits that subnational units do not fully utilize the constitutional law-making authority that a national state affords them. Thus, a recent study of the subject concludes that "often subnational component units make political, qualitative decisions not to assert their subnational constitution-making competency, not to occupy fully the space legally allotted to them."[216] Here we examine a component of this thesis, namely, the subnational judiciary's underutilization of its authority to elaborate and enforce a subnational constitution's socio-economic provisions. In our view, judicial underutilization must be understood in a temporal context and against a dynamic background that includes such factors as ease of constitutional amendment, judicial selection processes, interstate competition, the constitutional right at issue, and the coalitions and interests that are at stake. We explore in this section three explanations drawn from recurring themes in the literature on state courts: strategic decision making; the attitudinal model; and agency costs.

1. Underutilization and the Strategic Model of Judging

The underutilization thesis is consistent with a strategic model of judicial decision making that assumes "judges account for the reactions of others when advancing their legal or policy preferences."[217] The claim

216. Williams & Tarr, *supra* note 4, at 14-15.

217. Neal Devins, *How State Supreme Courts Take Consequences Into Account: Toward a State-Centered Understanding of State Constitutionalism*, 62 STAN. L. REV.

here is not that judges are corrupt or venal, but rather—to borrow from Judge Posner—that they seek to maximize "the same thing everybody else does."[218] Application of the strategic model in this context builds on a distinctive feature of state courts that is well documented in the literature: the vulnerability of state judges to majoritarian pressure. Unlike federal judges who enjoy life tenure, judges in many states are elected to office,[219] may be recalled or retained by popular vote,[220] and face review through the amendment process.[221] As Otto Kaus, former Justice of the California Supreme Court, put it: "[t]here's no way a judge is going to be able to ignore the political consequences of certain decisions, especially if he or she has to make them near election time. That would be like ignoring a crocodile in your bathtub."[222] The Supreme Court's recent decision in *Caperton* further underscores the effect of campaign contributions on judicial decision making.[223]

State judicial elections, and state judicial selection overall, have acquired greater salience over the last decade. Commentators now generally acknowledge that state judges in elective systems face the threat of popular backlash when ruling in cases that involve unpopular parties or that threaten the raising of taxes.[224] Thus, for example, judges who face ballot-box pressure have been found to be more likely to rule

1629, 1656 (2010) (relying on LEE EPSTEIN & JACK KNIGHT, THE CHOICES JUSTICES MAKE 12 (Cong. Quarterly Inc., 1998)).

218. Richard A. Posner, *What do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 39-40 (1993). Judge Posner focuses, however, on federal appellate judges, not state judges subject to election. *Id.* at 4.

219. *See* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 721 (2010) (reporting that 38 states "rely on elections to select or retain some or all of their judges").

220. *See* Joseph R. Grodin, *Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections*, 61 S. CAL. L. REV. 1969, 1980 (1988) (pointing to the "substantial" risk that judges will "produce results with which the voters will agree"); *see also* Joanna M. Shepherd, *Money, Politics, and Impartial Justice*, 58 DUKE L.J. 623, 629 (2009) (concluding on the basis of an empirical study of 28,000 state cases "that under some retention methods, judges' voting is associated with the political preferences of those who will decide whether the judges keep their jobs").

221. *See* Hershkoff, *supra* note 6, at 1161-63 (discussing state constitution revisability).

222. *Quoted in* Paul Reidlinger, *The Politics of Judging*, 73 A.B.A. J. 52, 58 (1987).

223. Caperton v. A.T. Massey Coal Co., 129 S. Ct. 2252 (2009). *See* Pamela S. Karlan, *Electing Judges, Judging Elections, and the Lessons of* Caperton, 123 HARV. L. REV. 80, 87 (2009) (stating that "[t]he Justices also all recognized the way in which judicial elections might color judges' decisionmaking by creating a personal (and pecuniary) stake related to their desire to retain office").

224. *See* Devins, *supra* note 217, at 1634 (discussing the potential for backlash and the different state-centered methods courts can use "to assess backlash risks"). *But see*, David E. Pozen, *Judicial Elections as Popular Constitutionalism*, 110 COLUM. L. REV. 2047, 2129 (2010) (stating that "[e]lected judges . . . will generally seek to avoid backlash at all costs").

against the accused in a capital case.[225] Cases involving socio-economic rights likewise elicit controversy: the myth of negative rights is that they are revenue neutral and their benefits are equally shared, with positive rights tarred as tax burdens that unduly benefit special interests.[226] Even judges who enjoy longer terms of office may feel vulnerable to majoritarian pressure, for they may be unable to predict the future effects of a lawsuit.[227] Intuitively, these trends may correlate with the increasing number of plaintiff losses in schooling and welfare cases and confirm the strategic explanation.[228]

2. Underutilization and the Attitudinal Model of Judging

A competing explanation relies on the attitudinal model of judging—"that judges are primarily motivated by the desire to implement their ideological agenda."[229] The attitudinal model denies or dilutes the constraining effect of law on judicial decision making: judges instead are "freewheeling" ideologues who render decisions based on their own values.[230] What Alexander Volokh calls "an agenda-driven judge" is a decision maker who wants to implement a "preferred policy as a rule of law."[231] The attitudinal model tends to array judges from "liberal" to "conservative;"[232] political scientists use ideological

225. *See* Stephen B. Bright, *Political Attacks on the Judiciary: Can Justice Be Done amid Efforts to Intimidate and Remove Judges from Office for Unpopular Decisions?*, 72 N.Y.U. L. REV. 308, 324-26 (1997).

226. *See* Sylvia A. Law, *Ending Welfare As We Know It*, 49 STAN. L. REV. 471, 474-75 (1997) (commenting on the "popular" but "incorrect" "conception that supporting the poor is too expensive" and that "excessive welfare expenditures produce government debt and high taxes").

227. *Cf.* David E. Pozen, *The Irony of Judicial Elections*, 108 COLUM. L. REV. 265, 285 (2008) (discussing whether length of judicial term mitigates majoritarian pressure).

228. *See* Roy A. Schotland, *New Challenges to States' Judicial Selection*, 95 GEO. L.J. 1077, 1081, 1084 (2007) (stating that "[j]udicial elections have become nastier, noisier, and costlier" and "attacks aim not at defeating incumbent judges, but rather at raising the turnout of people upset about what they call 'activist' judges"); *see also* Jed Handelsman Shugerman, *The Twist of Long Terms: Judicial Elections, Role Fidelity, and American Tort Law*, 98 GEO. L.J. 1349, 1351 (2010) (stating that "[s]ince the 1980s, judicial elections have become increasingly nasty, noisy, and costly").

229. Alexander Volokh, *Choosing Interpretive Methods: A Positive Theory of Judges and Everyone Else*, 83 N.Y.U. L. REV. 769, 773-74 (2008).

230. Barry Friedman, *The Politics of Judicial Review*, 84 TEX. L. REV. 257, 272-76 (2005) (stating that "[t]he central tenet of the attitudinal model is that the primary determinant of much judicial decisionmaking is the judge's own values").

231. Volokh, *supra* note 229, at 790.

232. *See* Theodore W. Ruger et al., *The Supreme Court Forecasting Project: Legal and Political Science Approaches to Predicting Supreme Court Decisionmaking*, 104 COLUM. L. REV. 1150, 1157 (2004) (stating that "the attitudinal model is quite good at predicting the Justices' array along a particular linear dimension" but it is "not particularly good at situating specific cases ex ante along that linear array").

proxies—usually, judge's political party affiliation at the time of nomination or election[233]—to explain and predict decisional outcomes.[234]

Empirical studies based on the attitudinal model largely have focused on the decision making of the U.S. Supreme Court. However, studies of state court decision making are consistent with the "significant relationships" established in the federal studies. Moreover, the small number of state court studies examining education reform cases likewise report a relationship between a judge's ideology, measured as liberal or conservative, and case outcomes.[235] Understood cautiously, the attitudinal model may help to explain intrastate shifts over time with respect to judicial underutilization,[236] as well as dynamic shifts in underutilization with respect to particular socio-economic rights and not others.[237]

3. Agency Costs and Reduced Monitoring

Underutilization also may be explained through a theory of agency costs that predicts "greater majoritarianism, weaker rights, and more frequent amendment" of a subconstitution.[238] Because the federal government monitors the state for compliance with federal norms, the subnational constitution is assumed to play a less important constraining role on government, producing a polity that is more majoritarian and less rights protective than the federal.[239] Similarly, because the federal Constitution provides a floor for rights protection, citizens and judges are relieved of pressure to be vigilant in their enforcement of state constitutional rights.[240]

Conversely, one might argue that a state constitution acquires greater importance (and the need for judicial monitoring of agency action

233. *See* Richard H. Fallon, *Constitutional Constraints*, 97 CALIF. L. REV. 975, 976 (2009) (stating that "political scientists employing a so-called 'attitudinal model' have achieved notable success in predicting the justices' votes based solely on whether newspaper editorials classified them as 'liberal' or 'conservative' at the time of their nominations").

234. For a discussion of the "major limitations" of the attitudinal model, *see* Michael J. Gerhardt, *Attitudes About Attitudes*, 101 MICH. L. REV. 1733, 1748-55 (2003).

235. *See* Bauries, *supra* note 69, at 719-20 (stressing the need for "further inquiry on a broader scale" before concluding "that judicial attitudes, beliefs, or philosophies are the most likely explanation for the outcomes of education finance litigation").

236. *See, e.g.*, Betsy Griffing, *The Rise and Fall of the New Judicial Federalism Under the Montana Constitution*, 71 MONT. L. REV. 383 (2010) (discussing Montana Court's interpretive retrenchment since the 1990s).

237. *See* Thro, *supra* note 114, at 235 (examining the effect of changes in judicial composition on outcomes in education cases).

238. *See* Ginsburg & Posner, *supra* note 3, at 1602.

239. *See id*. at 1603.

240. *Id*. at 1605 (stating "[o]ur prediction is that the reduction in agency costs at the level of the state may lead to efforts to reduce some rights protections").

increases), in areas that are not subject to federal oversight—an area that embraces socio-economic rights which are absent entirely from the federal Constitution. The "renaissance" of state constitutional law traces in part to in the 1970s, at the end of the Warren Court, when Justice William J. Brennan, Jr. characterized "the Court's contraction of federal rights and remedies on grounds of federalism . . . as a plain invitation to state courts to step into the breach."[241] Many of the cases in which the Court withheld constitutional protection involve such socio-economic issues as care of the poor, public schooling, and housing, all of which fall within the scope of some state constitutional positive rights provisions.[242]

One might argue that the state judiciary's persistent or increasing underutilization of state constitutional socio-economic rights reflects a reaction to federal developments that have signaled an increase in federal monitoring in the relevant substantive areas. During the 1990s, the federal government initiated a number of important programs pertinent to education and welfare that garnered a great deal of political attention. The federal No Child Left Behind Act of 2001,[243] for example, reshaped educational policy by emphasizing standards and testing as significant benchmarks; following the statute's lead, states enacted laws and regulations to make clear what students "are expected to know and be able to do at various stages in their K-12 education."[244] Many commentators predicted a new wave of state education cases, with claims based on the state constitution but theories and proof dependent on national educational standards.[245] Similarly, the national government—ending "welfare as we know it"—eliminated statutory entitlements to public assistance and, in the name of "third-way" politics and

241. *See* William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535, 548 (1986); *see also* Richard Briffault, *Foreword: The Disfavored Constitution: State Fiscal Limits and State Constitutional Law*, 34 RUTGERS L.J. 907, 907 (2003) (stating that "[t]he dominant theme in the resurgent state constitutional jurisprudence of the last quarter-century has been the effort of many scholars and jurists to find in state constitutions a progressive alternative to the conservative turn federal constitutional doctrine has taken in the Burger and Rehnquist eras").

242. *See* Hershkoff, *supra* note 6, at 1132-33.

243. No Child Left Behind Act of 2001, 20 U.S.C. §§ 6301-6578 (2005). For a criticism of the statute, *see* Goodwin Liu, *Interstate Inequality in Educational Opportunity*, 81 N.Y.U. L. REV. 2044, 2051 (2006) (emphasizing that "federal education policy has done little to reduce interstate disparities and, in important ways, reinforces such disparities").

244. James E. Ryan, *Standards, Testing, and School Finance Litigation*, 86 TEX. L. REV. 1223, 1223 (2008).

245. *See, e.g.*, James S. Liebman, *Implementing* Brown *in the Nineties: Political Reconstruction, Liberal Recollection, and Litigatively Enforced Legislative Reform*, 76 VA. L. REV. 349 (1990) (discussing the emergence of standards-based state reform litigation).

"compassionate conservatism," triggered new state-based programs.[246] These federal statutory developments, while not preempting state laws in any formal sense, perhaps have acted as a perverse form of "legislative constitutionalism" that signaled a decreased need for state judicial monitoring of state-protected socio-economic guarantees.[247]

B. The Constraining Effect of Federal Remedial Doctrine on State Judicial Self-Conception

The political science explanations of judicial underutilization of state constitutional socio-economic rights share a common view: that law and doctrine do not act as significant constraints on state court decision making. Critics of non-law explanations have argued that the emphasis on strategic and ideological considerations does not capture the effects of these factors when they are intrinsic to law. Thus, for example, Judge Harry T. Edwards, Jr., recently has countered that differences in legal results among federal appellate judges may be explained by "legitimate differences in legal reasoning, properly understood."[248] In this section, we explore whether federal constitutional doctrine acts as a constraint on state judicial practice.[249] Comparative law scholars frequently warn of the dangers of legal transplants. Doctrines or procedures that effectively work in one system may produce deleterious effects in another system given differences in political culture, constitutional frameworks, and other contextual factors. Our hypothesis is that state underutilization of state constitutional socio-economic rights may be traced to an inappropriate reliance on doctrines that are typical to federal public law cases and help to maintain important boundaries—between national power and the states, and between Article III courts and the political branches—but are inapposite and produce negative consequences when relocated to state courts.

246. On the "third way," *see, e.g.*, ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY (1998) (describing a political middle ground between state socialism and laissez-faire capitalism). On "compassionate conservatism," *compare* J. Harvie Wilkinson, III, *Why Conservative Jurisprudence Is Compassionate*, 89 VA. L. REV. 753 (2003), with William P. Marshall, *The Empty Promise of Compassionate Conservatism: A Reply to Judge Wilkinson*, 90 VA. L. REV. 355 (2004).

247. For a discussion of legislative constitutionalism, *see, e.g.*, 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).

248. Hon. Harry T. Edwards & Michael A. Livermore, *Pitfalls of Empirical Studies That Attempt to Understand the Factors Affecting Appellate Decisionmaking*, 58 DUKE L.J. 1895, 1901 (2009).

249. *But see generally* Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004) (discussing the role of doctrine in theories of judicial review).

We argue that these doctrines, aimed at reducing friction between an unelected federal judiciary and elected state officials, are irrelevant to state court litigation—or, at the least, ought to be significantly adapted to account for the different institutional position of the state systems. We first discuss the concept of constitutional constraint. We then explore three federal doctrines that we believe inappropriately inhibit state courts from carrying out their distinct judicial duty in state constitutional socio-economic cases. Finally, we close by linking state judicial underutilization of state constitutional positive rights to the federal court's retreat from "institutional reform" litigation involving state and local government.

1. Constitutional Constraint and State-Federal Judicial Relations

Let us quickly specify what we mean by federal constitutional constraint in the context of judicial underutilization of independent state sources. The Supremacy Clause provides that federal law shall be the "supreme Law of the Land" and that state judges are bound to enforce federal law.[250] Constitutional constraint thus could refer simply to the binding precedential effect of Supreme Court decisions in state cases that implicate federal issues.[251] However, we use the term constitutional constraint in a different, and more foundational, sense; namely, that federal constitutional doctrine, and particularly federal doctrine concerning constitutional remedies, frames state judges' implicit understandings of their role and so of their appropriate relation to the other branches of state governance. To borrow from Richard H. Fallon, Jr., "The Constitution constrains officials most fundamentally and pervasively by helping create the context—including the official roles or offices—in which questions of constitutional constraint and even some questions of official motivation arise."[252] These understandings exist apart from formal state constitutional requirements and despite an absence of formal federal requirement.

We suggest that in many states federal doctrine has been implicitly transplanted into a state's constitutional regime, where it exercises an indirect but pervasive effect in defining the shape and content of the state judge's role: the framing effects of federal doctrine inappropriately

250. U.S. CONST. art. VI, cl. 2.

251. *See* Frederick Schauer, *Precedent*, 39 STAN. L. REV. 571, 592-93 (1987) (discussing the concept of binding precedent). On the complex question of Supreme Court review of state court judgments involving state-law claims, *see, e.g.*, Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 MICH. L. REV. 80 (2002) (discussing the antecedent theory of Supreme Court review).

252. Fallon, *supra* note 233, at 987.

inhibit state judges from fully utilizing the political and legal space created by state constitutional socio-economic provisions. The federal negative-rights model of constitutionalism limits the judicial power and cabins the relation of the national government to the states.[253] Justiciability, a doctrinal consequence of Article III, sets the contours of the state judge's role despite the absence of a case or controversy requirement from many state constitutions.[254] Notions of institutional capacity, rooted in the formal and functional aspects of federal separation of powers, inhibit state judicial activity even in circumstances where the state court enjoys a superior institutional advantage to the state legislature or executive.[255] So, too, we argue that federal remedial doctrine—conceptually related to justiciability and concerns of federalism[256]—constrains state courts in their efforts to enforce state constitutional socio-economic rights despite their traditional font of common law and equitable authority.

The literature repeatedly confirms that state courts significantly rely on federal doctrine—a pattern that goes far beyond what the literature describes as "lock step" interpretation.[257] Abbe R. Gluck, in a recent article on state methods of statutory interpretation, writes that "state courts . . . import without distinction federal-textualist institutional and constitutional arguments and expressly assume that the same justifications hold for the states as well."[258] Richard Briffault points out that state courts rely on federal doctrine even when interpreting state constitutional fiscal and taxpayer provisions that have no federal

253. *See* Michael J. Gerhardt, *The Ripple Effects of* Slaughter-House: *A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409, 414 (1990) ("The debate over the significance of the difference between positive and negative rights is part of the even larger debate on the proper relationship between the federal and state governments with respect to each other and to individual liberties.").

254. *See* Helen Hershkoff, *State Courts and the "Passive Virtues": Rethinking the Judicial Function*, 114 HARV. L. REV. 1833, at 1876-98 (2001) (discussing Article III justiciability doctrine and state judicial power). *See also* Paul J. Katz, *Standing in Good Stead: State Courts, Federal Standing Doctrine, and Reverse-*Erie *Analysis*, 99 NW. U. L. REV. 1315, 1316 (2005) (discussing state statutes that allow "plaintiffs to litigate complaints based on federal law, even though the plaintiffs do not satisfy the injury-in-fact requirement of Article III").

255. *See* Hershkoff, *supra* note 254, at 1882-97 (discussing effect of federal separation of powers doctrine on state justiciability doctrine).

256. *See* Richard H. Fallon, Jr., *The Linkage Between Justiciability and Remedies—And Their Connections to Substantive Rights*, 92 VA. L. REV. 633 (2006) (positing that concerns about remedial manageability affect federal determinations that a case is nonjusticiable).

257. *See* Robert A. Schapiro, *Identity and Interpretation in State Constitutional Law*, 84 VA. L. REV. 389, 419 (1998) (describing the "lure of lockstep" review for state courts in the absence of state community).

258. Gluck, *supra* note 15, at 1858.

analogue.[259] Neal Devins observes generally that "state constitutionalism remains in the shadow of the U.S. Supreme Court and the Federal Constitution."[260] Conversely, commentators report that decisions in state constitutional socio-economic cases do not significantly correlate to separation-of-powers clauses that are unique to state documents.[261] Although these state court practices are pervasive, we emphasize that our argument does not depend on a state court's citation to federal cases. Rather, we are concerned with the constitutive nature of federal doctrine in defining both the state judicial role and the appropriate scope of state judicial remedial power. The unconscious borrowing by one system of another system's law is a form of intellectual homage, but it ignores important distinctions and undermines judicial performance.[262]

2. Federal Remedial Doctrine, Justiciability, and "Our Federalism"

Article III constrains federal judicial power in a number of familiar ways: the demands of separation of powers insist that litigants demonstrate injuries that are "personal and present" before the Court will remedy injuries that implicate collective harms;[263] the New Deal compromise assumes that the Court will defer to Congress on matters involving social and economic concern under the test of rationality review;[264] concerns of federalism tilt the Court against the exercise of jurisdiction in cases involving state defendants;[265] and the theory of enumerated power cabins the Court's equitable and common law law-

259. *See* Briffault, *supra* note 241, at 956 (observing that the state courts employ federal models of deference when interpreting state fiscal limits).

260. Devins, *supra* note 217, at 1636. One might hypothesize that federal law lends either political cover or prestige to state court judges in their decision making.

261. *See* Bauries, *supra* note 69, at 743-46 (Table 1, "Judicial Review Level Separation of Powers Cross Tabulation," and Table 2, "Directional Measures," asking whether "explicit separation of powers clauses in many state constitutions merely [are] superfluous").

262. *Cf.* Martin H. Redish, *The Federal Courts, Judicial Restraint, and the Importance of Analyzing Legal Doctrine*, 85 COLUM. L. REV. 1378, 1401 (1985) (reviewing RICHARD A. POSNER, THE FEDERAL COURTS: CRISIS AND REFORM (1985) and underscoring "that the development of legal doctrine that is internally inconsistent, or that draws artificial or meaningless distinctions, or that disingenuously disregards well-established legal rules, or that inexplicably ignores the rational contours of the provision being interpreted, or that is too ambiguous to apply to future cases, does not constitute legitimate performance of the judicial function").

263. *See* TUSHNET, *supra* note 13, at 247 (citing Sweatt v. Painter, 339 U.S. 629, 634 (1950)).

264. *See* G. Edward White, *The Constitutional Journey of* Marbury v. Madison, 89 VA. L. REV. 1463, 1570 (2003) (noting that the *Carolene Products* compromise affords Congress broad latitude "in the area of economic activity").

265. *See* Erwin Chemerinsky, *The Federalism Revolution*, 31 N.M. L. REV. 7, 18-21 (2001) (discussing federalism limits on federal jurisdiction).

making authority.[266] Taken together, these doctrines dramatically narrow the availability of declaratory and equitable relief in federal constitutional cases involving state defendants. State courts, however, differ structurally from those of the Article III system along a number of different dimensions, and these differences ought to affect the availability of relief against state and local officials in state cases involving state constitutional positive rights.

a. Justiciability and Declaratory Judgments

Some commentators—call them rights equilibrants—hypothesize that remedial concerns have implications for Article III justiciability doctrine.[267] To take two examples, the "redressability" component of Article III standing ties the question of justiciability to an assessment of whether appropriate and effective judicial remedies are available.[268] Similarly, concerns about judicially manageable standards may persuade the court that a claim should be dismissed under the political question doctrine.[269] Conversely, federal justiciability doctrine may constrain an Article III court's remedial authority. The Supreme Court has held, for example, that standing for equitable relief, as distinct from damages, must be independently established.[270] In *City of Los Angeles v. Lyons*,[271] the Court concluded that an African-American man who had been choked into unconsciousness by police officers applying a department-approved restraint had standing to seek damages but not an injunction to stop the practice, because it was "no more than speculation" that he would be subject in future to the policy.[272]

The effects of justiciability doctrine also may be seen in the history of the federal declaratory judgment. It is familiar ground that the Court

266. *See* Judith Resnik, *Constricting Remedies: The Rehnquist Judiciary, Congress, and Federal Power*, 78 IND. L.J. 223, 231 (2003) (discussing how the Rehnquist Court "reframed the power of federal judges by disabling their remedial capacities").

267. *See* Fallon, *supra* note 256, at 637 (stating that the Equilibration Thesis "holds that courts, and especially the Supreme Court, decide cases by seeking what they regard as an acceptable overall alignment of doctrines involving justiciability, substantive rights, and available remedies").

268. *See* Allen v. Wright, 468 U.S. 737, 753 n.19 (1984) (clarifying that the "redressability" component of standing requires that the court have the power and ability to provide meaningful relief for an Article III injury alleged by plaintiff).

269. *See* Baker v. Carr, 369 U.S. 186, 217 (1962) (referring to "a lack of judicially discoverable and manageable standards").

270. City of Los Angeles v. Lyons, 461 U.S. 95, 108 (1983).

271. *Id*.

272. *Id*. In dissent, Justice Marshall criticized the *Lyons* majority for "fragmenting the standing inquiry and imposing a separate standing hurdle with respect to each form of relief," calling the decision a significant departure from the Court's "traditional conception of the standing requirement and of the remedial powers of the federal courts." *Id.* at 127 (Marshall, J., dissenting).

long resisted making declaratory relief available in federal courts—despite its use in state and foreign courts—on the ground that the practice is nonjudicial and outside the Article III power.[273] Although Congress finally enacted a federal declaratory judgment statute and the Court eventually "dispelled . . . doubts" that the declaratory action is unconstitutional,[274] arguably a skeptical residue persists in the special rules that govern this form of relief: in treating the declaratory judgment action as procedural only[275] when determining the existence of federal-question jurisdiction;[276] in standing requirements that withhold declaratory relief in cases where government action produces only generalized harms;[277] and in abstention principles that withhold federal power where declaratory relief implicates state litigation and state

273. *See* Nashville, Chattanooga & St. Louis Ry. Co. v. Wallace, 288 U.S. 249 (1933). In response to *Wallace*, Congress adopted the Declaratory Judgment Act. 28 U.S.C. §§ 2201-2202 (1934).

274. MedImmune, Inc. v. Genentech, Inc., 549 U.S. 118, 126 (2007) ("There was a time when this Court harbored doubts about the compatibility of declaratory-judgment actions with Article III's case-or-controversy requirement."). *See also Recent Case: Declaratory Judgments—Jurisdiction of Supreme Court to Hear Appeal from State Court's Declaratory Judgment*, 46 HARV. L. REV. 850, 850 (1933) (reporting in 1933 that "according to all previous pronouncements of the Supreme Court a suit for 'simply a declaratory judgment' could not constitute a 'case or controversy' within the meaning of Article III"); C.S. Potts, *Some Practical Uses of the Declaratory Judgment Law*, 22 TEX. L. REV. 309, 313 (1944) ("The constitutionality of the Declaratory Judgment Act has now been so fully established that it seems unnecessary here to go into the matter."). *See generally* Andrew Bradt, *"Much to Gain and Nothing to Lose": Implications of the History of the Declaratory Judgment for the (b)(2) Class Action*, 58 ARK. L. REV. 767, 771-91 (2006) (tracing the history of the state and federal declaratory judgment acts and stressing that this form of relief is not limited to preventive relief).

275. *See generally* Donald L. Doernberg & Michael B. Mushlin, *The Trojan Horse: How the Declaratory Judgment Act Created a Cause of Action and Expanded Federal Jurisdiction While the Supreme Court Wasn't Looking*, 36 UCLA L. REV. 529, 532 (1989) (criticizing the Court's "procedural only" view of the Declaratory Judgment Act).

276. The Court in dictum has suggested that a declaratory judgment action against a state official regarding a state enforcement action does not meet the well-pleaded complaint rule. *See* Pub. Serv. Comm'n v. Wycoff, 344 U.S. 237, 248 (1952). *See also* David Sloss, *Constitutional Remedies for Statutory Violations*, 89 IOWA L. REV. 355, 386-88 (2004) (discussing standard for federal jurisdiction for actions seeking only declaratory and not declaratory and injunctive relief); Donald L. Doernberg & Michael B. Mushlin, *History Comes Calling: Dean Griswold Offers New Evidence About the Jurisdictional Debate Surrounding the Enactment of the Declaratory Judgment Act*, 37 UCLA L. REV. 139 (1989) (discussing Congress's concern about justiciability, not federal question jurisdiction, in considering whether to enact a declaratory judgment procedure for the federal courts).

277. *See* Henry P. Giessel, *The Federal Declaratory Judgments Act in Public Law Cases*, 28 TEX. L. REV. 709, 718 (1950) (criticizing the Court's "case or controversy" requirement as unduly limiting the availability of federal declaratory relief). *See also* Edwin Borchard, *The Federal Declaratory Judgments Act*, 21 VA. L. REV. 35, 41 (1934) (presenting similar criticism).

policies.[278] Moreover, the standard for the issuance of a federal declaratory judgment is discretionary,[279] and some courts will decline to enter such relief if the declaration will not resolve the dispute,[280] if its resolution depends primarily on local issues,[281] or if injunctive relief would not be available under the same circumstances.[282]

The Supreme Court treats state declaratory judgments as if they were federal actions for purposes of determining whether federal-question jurisdiction exists;[283] some lower federal courts apply federal law to state declaratory judgments heard after remand or on removal;[284] and commentary about state declaratory judgments draws guidance from federal practice.[285] Transplanting federal declaratory judgment doctrine to state positive rights cases ignores important features of state law. Although many states require a justiciable controversy as a predicate for

278. *See* Wilton v. Seven Falls Co., 515 U.S. 277 (1995) (holding that federal courts have discretion in declaratory judgment actions to defer to state proceedings). *See also* Grace M. Giesel, *The Expanded Discretion of Lower Courts to Regulate Access to the Federal Courts After Wilton v. Seven Falls Co.: Declaratory Judgment Actions and Implications Far Beyond*, 33 HOUS. L. REV. 393 (1996) (attributing the *Wilton* rule to the federal court's desire to control its workload).

279. *See* Alabama State Fed'n of Labor v. McAdory, 325 U.S. 450, 471 (1945) ("The extent to which the declaratory judgment procedure may be used in the federal courts to control state action lies in the sound discretion of the Court.").

280. *E.g.*, Williams v. Ball, 294 F.2d 94, 95 (2d Cir. 1961) (affirming as an appropriate exercise of discretion denial of declaratory relief that would not resolve the controversy).

281. *See* Kim V. Marrkand & Stephen T. Murray, *Declaratory Judgment Suits*, MASSACHUSETTS LIABILITY INSURANCE MANUAL, § 11-1, at *5 (2009) (reporting "that the U.S. Supreme Court has guided federal district courts away from declaratory judgment actions that appear to involve primarily local issues between an insurer and policyholder").

282. *See* Samuels v. Mackell, 401 U.S. 66 (1971).

283. *See* Franchise Tax Bd. of Cal. v. Constr. Laborers Vacation Trust, 463 U.S. 1, 18 (1983) (extending the jurisdiction rule in Skelly Oil Co. v. Phillips Petroleum Co., 339 U.S. 67 (1950) from federal to state declaratory judgments); see also Doernberg & Mushlin, *supra* note 275, at n.208 and accompanying text (observing that under *Franchise Tax Board*, "if the action has been brought under a state provision, one must pretend that it was really brought pursuant to the Federal Declaratory Judgment Act").

284. *See, e.g.*, Huth v. Hartford Ins. Co., 298 F.3d 800 (9th Cir. 2002) (according the same discretion over a state declaratory judgment as a federal declaratory judgment); Steven Plitt & Joshua D. Rogers, *Judicial Abstinence: Ninth Circuit Jurisdictional Celibacy for Claims Brought Under the Federal Declaratory Judgment Act*, 27 SEATTLE U.L. REV. 751, 783-803 (2004) (criticizing Ninth Circuit's expansion of abstention doctrine in *Huth*).

285. *E.g.*, Pete Schenkkan, *UDJA Declaratory Judgments in Texas Administrative Law*, 9 TEX. TECH. ADMIN. L.J. 195, 201-04 (2008) (discussing the significance of *MedImmune* for Texas cases); Willy E. Rice, *Insurance Contracts and Judicial Decisions Over Whether Insurers Must Defend Insureds That Violate Constitutional and Civil Rights: An Historical and Empirical Review of Federal and State Court Declaratory Judgments 1900-2000*, 35 TORT & INS. L.J. 995 (2000) (analysis of state and federal declaratory judgments involving insurance company duty to defend).

a declaratory judgment action, justiciability doctrine in many states is less restrictive than its federal counterpart;[286] moreover, state courts in various contexts have emphasized the need to interpret the justiciability requirement "leniently," liberally, or in favor of the public interest.[287] In addition, while the majority of states have adopted a version of the Uniform Declaratory Judgment Act,[288] some states, unlike the federal system, treat the declaratory procedure as mandatory, and not as discretionary. For example, Texas courts are "duty-bound to declare the rights of the parties."[289]

b. Federalism, Sovereign Immunity, and Statewide Injunctions

Concerns of federalism likewise inhibit federal courts from exercising power or imposing remedies in constitutional cases involving state defendants. These concerns find expression in a number of related doctrines. The common law principle of sovereign immunity, as well as the Eleventh Amendment, sharply limits the federal courts' power to adjudicate constitutional cases involving state-government defendants and forecloses certain kinds of equitable remedies even in cases where jurisdiction is available. The Court has held that Congress lacks power under Article I of the federal Constitution to abrogate a state's sovereign immunity, and that Congress can do so only when acting under its

286. *See* Note, *Declaratory Judgments in Constitutional Litigation*, 51 HARV. L. REV. 1267, 1275 (1938) (discussing the effect of the absence of a "case or controversy" requirement "in most state constitutions" on the constitutionality of the declaratory procedure).

287. Ryan R. Dreyer, Case Note: *Civil Procedure—Discouraging Declaratory Actions in Minnesota—The Res Judicata Effect of Declaratory Judgments in Light of State v. Joseph*, 29 WM. MITCHELL L. REV. 613, 619 n.40 (2002) (stating that "[a]lthough the constitutional requirement of justiciability generally requires genuine or present controversy, this requirement is viewed leniently in actions for declaratory judgment"); Sean Gay, Note, *Declaratory Relief and Sovereign Immunity in Oregon: Can Someone Tell Me if I Turned Square Corners?*, 40 WILLAMETTE L. REV. 563, 569 & n.36 (2004) (discussing Oregon's liberal rule of construction for declaratory judgments). Professor Borchard argued against limiting the declaratory procedure to justiciable controversies. *See* E.M.B., *The Declaratory Judgment Constitutional*, 31 YALE L.J. 419, 420-21 (1922) ("Whether this limitation is essential is questionable.").

288. *See* Daniel Maldonado & Steven Plitt, *The Practical Ramifications of Dual Sovereignty in Prosecuting Declaratory Judgment Actions Against State and Federal Governments*, 14 CONN. INS. L.J. 445, 445 & n.4 (2008) (collecting state statutes). *See generally* Edwin M. Borchard, *The Uniform Act on Declaratory Judgments*, 34 HARV. L. REV. 697, 697 (1921) (discussing the history of the Act).

289. Pub. Util. Comm'n of Tex. v. City of Austin, 728 S.W.2d 907, 910 (Tex. App. 1987). Similarly, the Arizona declaratory judgment statute is a "pure grant of jurisdiction by the state legislature, not a grant of discretionary jurisdiction." *See* Plitt & Rogers, *supra* note 284, at 787.

Section 5 power,[290] but only if the remedy has "congruence and proportionality" with the "conduct transgressing the Fourteenth Amendment's substantive provisions."[291] Federal statutes affecting social and economic conditions typically are enacted pursuant to Article I; this means that even if an officer suit can be filed under the theory of *Ex parte Young*,[292] a federal *court* will be barred from ordering retrospective remedies against state defendants because of the budgetary implications of the equitable decree.[293] Indeed, the Court has expanded the notion of sovereign immunity to foreclose Congress from imposing the "indignity" of federally created state-court remedies against states that violate federal law.[294] Even where congressional power is not at issue, principles of "Our Federalism" act as an equitable restraint on judicial remedial authority on the view that the unelected federal courts should not interfere with the executive and legislative activities of sovereign states.[295] Thus, in *Rizzo v. Goode*,[296] the Court reversed the issuance of an injunction against the Philadelphia Police Department—despite findings of racially motivated police brutality—on the ground that the plaintiffs had failed to demonstrate a "real and immediate injury" and so the case was not justiciable. Justice Rehnquist emphasized, however, that even if the matter were justiciable, abstention would be warranted:

290. *Compare* Fitzpatrick v. Bitzer, 427 U.S. 445 (1976) (affirming Congressional power to abrogate state sovereign immunity under Section 5 of the Fourteenth Amendment), *with* Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) (holding that the Indian Commerce Clause does not authorize Congress to abrogate state sovereign immunity and, further, that an *Ex parte Young* action is not available to fill the remedial gap where Congress has enacted a remedial scheme).

291. Fla. Prepaid Postsecondary Educ. Expense Bd. v. Coll. Sav. Bank, 527 U.S. 627, 639 (1999); City of Boerne v. Flores, 521 U.S. 507, 520 (1997) ("There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.").

292. *Ex parte Young*, 209 U.S. 123, 155-56 (1908).

293. *See*, *e.g.*, Edelman v. Jordan, 415 U.S. 651 (1974) (barring prospective injunction for federal statutory welfare benefits wrongfully withheld in violation of federal law by the state).

294. *See* Alden v. Maine, 527 U.S. 706, 749 (1999); *see also* Fed. Mar. Comm'n v. S.C. State Ports Auth., 535 U.S. 743, 760 (2002) ("The preeminent purpose of state sovereign immunity is to accord States the dignity that is consistent with their status as sovereign entities.").

295. *See* Erwin Chemerinsky, FEDERAL JURISDICTION 854 (Aspen Publishers 5th ed. 2007) (discussing extension of the abstention doctrine of Younger v. Harris, 401 U.S. 37 (1971), "to limit a federal court's ability to adjudicate constitutional challenges to state and local executive conduct").

296. Rizzo v. Goode, 423 U.S. 362 (1976); *see also* O'Shea v. Littleton, 414 U.S. 488 (1974) (reversing injunctive relief on grounds of ripeness in suit challenging intentional racial discrimination by municipal court system).

> [T]he principles of federalism which play such an important part in governing the relationship between federal courts and state governments . . . have applicability where injunctive relief is sought, not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local governments.[297]

Finally, federalism provides support for the Court's refusal to locate positive rights in the Fourteenth Amendment or in other enumerated provisions of the Constitution.[298]

Federal doctrines of judicial restraint are aimed at ensuring political space for state regulatory activity. The doctrine holds no purchase when a state court seeks to enforce a state constitutional right against a state official. At a formal level, the Eleventh Amendment constrains the Article III courts, but does not pertain to a state's amenability to suit in its own courts on state–law claims. Nor should these immunity principles, even broadly conceived, have any bearing on the availability of declaratory relief. The history of the state declaratory judgment procedure reflects a clear understanding that the device would be available to test the constitutionality of state legislation, a view that Professor Borchard repeatedly made in his influential writings on the subject.[299] Second, to the extent the Court has justified its immunity doctrine on a need to preserve "representative government" in the states,[300] extending this principle to the states undermines the principle of federalism that *Alden* is intended to protect. The result, limiting state law-making, is particularly inapt where the state, through its state constitution, has undertaken regulatory responsibility that the federal

297. *Rizzo*, 423 U.S. at 380.

298. *See* Gerhardt, *supra* note 253, at 416 ("For every positive right . . . [the Fourteenth Amendment] imposes, the federal courts' power increases with a corresponding decrease in both state autonomy and resources.").

299. *See* Borchard, *supra* note 288, at 711 (discussing use of the declaratory judgment procedure to challenge the constitutionality of legislation); *see also* Note, *Challenging the Validity of a Federal Tax by Means of the Declaratory Judgment*, 44 YALE L.J. 1451, 1453 (1935) ("The declaratory judgment is admirably suited to the determination of broad constitutional questions, since it gives to both the citizen and the administration an early declaration of rights before expensive commitments are made.").

300. Alden v. Maine, 527 U.S. 706, 751 (1999) ("If the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State . . . not by judicial decree mandated by the Federal Government and invoked by the private citizen."); *cf.* Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 431 (2002) (stating that the Court's federalism doctrine limits Congressional regulatory capacity to "preserve spheres in which state and local governments are the exclusive lawgivers").

Constitution does not address.[301] Third, federal immunity doctrine, as traced to the radiating effects of the Tenth Amendment,[302] also is justified as a way to maintain the political accountability of state and federal officials as distinct decision makers.[303] State judicial decrees do not implicate accountability concerns of this sort; although separation of powers may be pertinent, judicial participation in the enforcement of a state constitutional socio-economic right reflects the distinct structure and institutional capacities of the different state branches of government.

c. Common Law Power, Equitable Authority, and Constitutional Remedies

Finally, the movement into a post-*Erie* universe has affected understandings of the scope of federal common law and equitable authority to craft remedies that—unlike the Takings Clause of the Fifth Amendment—are not specified in the constitutional text.[304] As Professor Fallon has written, "The founding generation almost certainly expected the courts to implement the Constitution through a scheme of common law remedies—but in a pre-*Erie* conceptual universe in which it was apparently not understood (as it is today) that law is necessarily the product of some duly authorized state or federal lawmaker."[305] The last forty years have witnessed a constricting of federal common law and equitable authority: the Court has withheld declaratory relief where it would produce a coercive effect similar to that of an injunction,[306] limited equitable power to those forms of relief that existed at the time of

301. In such settings, the conservative values of federal unelected judges would be constraining state majoritarian and judicial outcomes. *Cf.* Fallon, Jr., *supra* note 300, at 434 (stating that "[i]n many if not most cases, judicial protection of federalism has the effect of limiting liberal forces and doctrines . . .[as well as] outcomes that [by state and local decision makers] that judicial conservatives find substantively objectionable").

302. U.S. CONST. amend. X (providing that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people"). *See* Helen Hershkoff, *Horizontality and the "Spooky" Doctrines of American Law*, 59 BUFF. LAW REVIEW (forthcoming 2011).

303. New York v. United States, 505 U.S. 144, 166-68 (1992). *But see* Neil S. Siegel, *Commandeering and Its Alternatives: A Federalism Perspective*, 59 VAND. L. REV. 1629, 1632 (2006) ("It is not clear that political accountability is a Tenth Amendment value, let alone one that the Court is charged with vindicating broadly and aggressively through a categorical rule.").

304. Erie R. R. Co. v. Tompkins, 304 U.S. 64 (1938).

305. Richard H. Fallon, Jr., *Why and How to Teach Federal Courts Today*, 53 ST. LOUIS U. L.J. 693, 717 (2009); *see also* Ann Woolhandler, *The Common Law Origins of Constitutionally Compelled Remedies*, 107 YALE L.J. 77, 82 (1997) (tying "the history of constitutional remedies in diversity to the development of constitutional remedies more generally").

306. *See* Samuels v. Mackell, 401 U.S. 66 (1971).

the founding,[307] and disclaimed federal common law power to create causes of action to redress the federal Constitution as well as to enforce federal statutes absent express legislative authorization.[308]

Theoretical support for these trends comes from a view of the Article III courts as "federal tribunals," cabined within the separate domains of the different branches and lacking inherent remedial authority.[309] As Justice Scalia wrote for the Court, justifying its refusal to imply a private enforcement mechanism for a federal statute, "Raising up causes of action where a statute has not created them may be a proper function for common-law courts, but not for federal tribunals."[310] Wherever one stands in this debate,[311] state courts remain common-law generalists with equitable and inherent authority to create law, shape policy, and devise remedies.[312] Moreover, this law-making policy is an accepted feature of state governance, essential to the development of the rules and standards governing contracts, torts, property, and family relations, and so integral to a system of separated powers that "blur[s]" the formal categories of federal law.[313]

3. Socio-Economic Rights and "Institutional Reform" Litigation

The Court's narrowing of the federal court's remedial authority perhaps has been most pronounced in a category of cases known as

307. *See* Grupo Mexicano de Dessarrolla, S.A. v. Alliance Bond Fund, Inc., 527 U.S. 308, 333 (1999) (rejecting use of injunction to preserve assets because the remedy "historically" was not available at equity).

308. *See* Corr. Servs. Corp. v. Malesko, 534 U.S. 61 (2001) (limiting *Bivens* remedy). *But see* Susan Bandes, *Reinventing* Bivens*: The Self-Executing Constitution*, 68 S. CAL. L. REV. 289, 303-21 (1995) (questioning the view that separation of powers and lack of institutional capacity prevent the federal courts from enforcing the Constitution).

309. *Compare* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175, 1178-80 (1989) (discussing the incompatibility of common law decision making with Article III limited power), *with* Peter L. Strauss, *Courts or Tribunals? Federal Courts and the Common Law*, 53 ALA. L. REV. 891 (2002) (challenging Justice Scalia's argument).

310. Alexander v. Sandoval, 532 U.S. 275, 287 (2001) (quoting Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilvertson, 501 U.S. 350, 365 (1991) (Scalia, J., concurring in part and concurring in judgment). *But see* D'Oench, Duhme & Co. v. FDIC, 315 U.S. 447, 469-70 (1942) (Jackson, J., concurring) ("Were we bereft of the common law, our federal system would be impotent.").

311. *See* Martha A. Field, *Sources of Law: The Scope of Federal Common Law*, 99 HARV. L. REV. 881, 885 (1986) ("The appropriate bounds for federal common law have always been unclear."). For the classic defense of the Article III court's common law power, *see* Henry J. Friendly, *In Praise of* Erie*—and of the New Federal Common Law*, 39 N.Y.U. L. REV. 383 (1964).

312. *See* Harry H. Wellington, *The Nature of Judicial Review*, 91 YALE L.J. 486, 486 (1982) (observing that "[w]hile we may disagree strongly with particular decisions, we rarely question the authority of common-law courts, even in pivotal cases").

313. Ann Woolhandler & Michael G. Collins, *Judicial Federalism and the Administrative States*, 87 CALIF. L. REV. 613, 619 (1999).

"institutional reform," "structural reform," and "public law" litigation—cases seeking to enforce federal constitutional or statutory rights against state or local governments.[314] Federalism figures prominently in criticisms of such actions, with the court justifying its hands-off approach as essential to protect state autonomy.[315] Federal decrees in such cases are said to "involve the taking over of institutions of state or local government"[316] and thus are illegitimate because "the Constitution does not permit the federal courts to exercise their remedial powers to engage in the structural reform of local institutions and local government."[317] Moreover, as the Court explained in *Horne v. Flores*,[318] vacating a federal order concerning a state's non-compliance with the federal Equal Education Opportunities Act, "Federalism concerns are heightened when . . . a federal court decree has the effect of dictating state or local budget priorities."[319] Separation of powers likewise figures into the discussion, usually focusing on the federal court's limited power to devise equitable remedies—such as desegregation orders—in the absence of congressional authority.[320]

The label "public law" litigation now routinely extends in academic literature to state court litigation involving state constitutional socio-economic rights.[321] But there may be perverse consequences to attaching a label that grows out of federal practice to the state courts. Discussions of public law litigation share certain premises about the judicial function—about the ways in which courts function, the ways courts interact with the other branches, and the ways in which constitutional rights are elaborated and enforced—that are said to create institutional and conceptual problems for the practice. These premises, however, diverge from the situation of state courts when asked to enforce state

314. The canonical reference is Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). *See* Sabel & Simon, *supra* note 91, at 1082 ("The Rehnquist Court has been unsympathetic to public law litigation.").

315. *See* John C. Jeffries & George A. Rutherglen, *Structural Reform Revisited*, 95 CALIF. L. REV. 1387, 1387 (2007) (referring to "the issues of federalism inherent in the management of state and local institutions").

316. Paul J. Mishkin, *Federal Courts as State Reformers*, 35 WASH. & LEE L. REV. 949, 971 (1978).

317. John Choon Yoo, *Who Measures the Chancellor's Foot? The Inherent Remedial Authority of the Federal Courts*, 84 CALIF. L. REV. 1121, 1123 (1996).

318. Horne v. Flores, 129 S. Ct. 2579 (2009).

319. *Id*. at 2594. *But see id*. at 2621 (Breyer, J., dissenting) (questioning whether the case, involving the state's failure to comply with a federal statute, involves "'institutional litigation'").

320. *Id*. (criticizing the Court's use of inherent remedial authority and raising separation of powers concerns).

321. *See* Sabel & Simon, *supra* note 91, at 1022-29 (characterizing state constitutional education cases as public law litigation).

constitutional socio-economic rights.[322] By assimilating state practice to the federal model, commentators indirectly may be inhibiting state courts from utilizing the political space that federalism is intended to promote.

C. Institutional Differentiation and State Constitutional Enforcement

The state court's underutilization of state constitutional socio-economic rights is a complex phenomenon. Certainly the political science models have some explanatory force. But it is a commonplace that institutional design affects constitutional enforcement. We have tried to show that federal remedial doctrine may be exercising a constraining effect on state courts in their assumptions about the justiciability of positive rights and their willingness to use common law and equitable authority in devising remedies.

While we do not wish to overstate the institutional differences between federal and state courts, state court practice that mimics the federal ignores significant differences that appropriately ought to affect the shape and nature of judicial review in positive rights cases.[323] Discretion always has played an important role in federal doctrine, with prudential restraint favoring the political branches and the states. The resurgence of state constitutional cases emerged partly as a response to the gap created by the Court's exercise of discretion in favor of the status quo, in terms of withholding federal jurisdiction and federal remedies, and its insistence that disputes involving welfare, housing, and education be reserved to the states and so placed outside federal constitutional protection. It would be perverse if Article III remedial doctrine, narrowly interpreted in federal public law cases in the name of federalism, inhibited state courts from participating fully in state constitutional disputes involving "areas of core state responsibility."[324]

CONCLUSION

State courts, no less than state legislatures, serve as important "laboratories of experimentation" in our federal system. We have seen that some state courts have made use of their traditional common law and equitable authority to devise an array of remedial strategies for the enforcement of state constitutional socio-economic rights. In certain respects, the approaches deployed by these courts resemble similar

322. In some states, for example, the constitution guarantees a judicial "remedy" for "every injury." *See* Thomas R. Phillips, *The Constitutional Right to a Remedy*, 78 N.Y.U. L. REV. 1309, 1311 (2003).

323. *See* Williams, *supra* note 32, at 229 (referring to the "uniqueness . . . of American state constitutions" and trying "to link these differences to state constitutional interpretation approaches that differ from federal constitutional interpretation").

324. Horne v. Flores, 129 S. Ct. 2579, 2593 (2009).

endeavors abroad, where national constitutional courts have confronted claims of socio-economic right under their national constitutions. Though largely unheralded, the engagement of these state courts with positive rights antedates efforts abroad, and offers alternative strategies to those seen in foreign courts. These state practices deserve considerably more attention and credit. Equally worthy of attention is the extent to which a federal conception of judicial power has continued, in visible and insidious ways, to influence state judicial practice and to inhibit state courts from playing their distinctive roles in the enforcement of state constitutional rights.