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## WELFARE RIGHTS IN A CONSTITUTIONAL DEMOCRACY\*

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Some years ago I speculated that persons in our country might have not only moral but constitutional rights to provision for certain basic ingredients of individual welfare, such as food, shelter, health care, and education.<sup>1</sup> That suggestion, which we might call the welfare-rights thesis, has found some strong support,<sup>2</sup> but also has met its share of skeptical, critical, and even derisive rejoinder. Several objections have been lodged: that the concept of welfare rights is fanciful, uncorroborated by legal texts or decisions;<sup>3</sup> that the notion is ill-conceived because there is no justiciable standard for determining when the

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1. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter cited as Michelman, *Welfare Rights*]. See also Michelman, *Formal and Associational Aims in Procedural Due Process*, in DUE PROCESS (NOMOS XVIII) 126, 144-45 (J. Pennock ed. 1977) [hereinafter cited as Michelman, *Formal and Associational Aims in Procedural Due Process*]; Michelman, *States' Rights and States' Roles: Permutations of "Sovereignty" in National League of Cities v. Usery*, 86 YALE L.J. 1165 (1977).

2. See, e.g., L. TRIBE, AMERICAN CONSTITUTIONAL LAW 918-21 (1978); Grey, *Procedural Fairness and Substantive Rights*, in DUE PROCESS (NOMOS XVIII) 182, 197-202 (J. Pennock ed. 1977) [hereinafter cited as Grey, *Procedural Fairness and Substantive Rights*]; Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977). See also Grey, *Property and Need: The Welfare State and Theories of Distributive Justice*, 28 STAN. L. REV. 877 (1976).

3. See, e.g., R. POSNER, ECONOMIC ANALYSIS OF LAW 503-04 (2d ed. 1977).

supposed rights are satisfied; that the courts, in the absence of a justiciable standard, cannot presume to define or enforce these rights without usurping legislative and executive roles;<sup>4</sup> that judicial vindication of these rights would be illegitimate and undemocratic because nothing in our traditional law or written Constitution signifies any general acceptance of the obligations these rights entail;<sup>5</sup> that the claim of rights is misdirected, not in the best interest of the supposed rights-holders;<sup>6</sup> and that the claim is immoral because it attacks the basic liberties of those who would be called upon to satisfy it.<sup>7</sup> These are all forceful objections, and I do not take them lightly. I think, however, that my suggestion about welfare rights can survive them, and ought to be accepted.

Before proceeding, I want to limit my claim by specifying what I mean when I speak of a "constitutional right" to subsistence (or whatever).<sup>8</sup> A person, I want to say, has a legal right to some state of affairs, *S*, if: (1) it is recognized that the person has an interest of his own in *S*; (2) recognition of that individual interest regularly and detectably exerts (or should exert) a practically significant influence on judicial decisions in a direction evidently favorable to fulfillment of the interest; and (3) that influence depends on it being *S* that is at stake, as distinguished from the generality of other interests this person might have, and others have. The personal interest in *S* is thus legally picked out from the mine-run of interests a person has and accorded special weight in the resolution of legal disputes.<sup>9</sup> To this it must be added that I am speaking not just of legal but, more specifically, of constitutional rights—of interests that make a difference in determinations of the legal validity of a statute or action taken under statutory authority.

For illustration, suppose you were asked to consider the truth of these four statements: (1) persons have a constitutional right to be provided with adequately nourishing food to eat, at state expense if neces-

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4. See Frug, *The Judicial Power of the Purse*, 126 U. PA. L. REV. 715 (1978); Monaghan, *The Constitution Goes to Harvard*, 13 HARV. C.R.-C.L. L. REV. 117 (1978); Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

5. See Monaghan, *supra* note 4; Winter, *supra* note 4.

6. See Winter, *supra* note 4. But see R. POSNER, *supra* note 3, at 503-04.

7. See Winter, *supra* note 4. See also C. FRIED, *RIGHT AND WRONG* chs. 5-6 (1978).

8. Cf. R. DWORKIN, *TAKING RIGHTS SERIOUSLY* 90-93 (1977); C. FRIED, *supra* note 7; L. TRIBE, *supra* note 2; Grey, *Procedural Fairness and Substantive Rights*, *supra* note 2; Grey, *Do We Have an Unwritten Constitution?*, 27 STAN. L. REV. 703 (1975).

9. This approach follows Dworkin's notion of rights as "trumps," as distinguished from aims and goals. See R. DWORKIN, *supra* note 8, at xi, 90-91. I also adopt his distinctions among background, legislative, and legal rights. See *id.* at 93, 101.

sary; (2) persons have a constitutional right to a state-subsidized college education; (3) persons have a constitutional right to live freely in household groupings with whomever they choose to associate; and (4) persons have a constitutional right to employment suited to their abilities. Suppose further that existing state statutes generally authorize subsistence allowances and college tuition allowances for needy residents, but deny these benefits to those who have resided in the state for less than a year and to those who live in households not bound together by family ties. These statutes also stipulate that benefits may be cut off without prior notice if suspicions arise about eligibility. Suppose you then observe the following series of judicial decisions and governmental responses: (a) the durational residency requirement for subsistence allowances is held unconstitutional as a denial of the equal protection of the laws, and the state, required by the court either to abolish the allowances altogether or to extend them to new residents, does the latter;<sup>10</sup> (b) the durational residency requirement for college tuition allowances is upheld against equal protection attack;<sup>11</sup> (c) the related-household requirement for subsistence allowances is held to violate the equal protection clause, and the state, ordered to either abolish or extend the allowances, elects to extend them;<sup>12</sup> (d) the court sustains a zoning regulation that bars "unrelated" households from residing in sizable areas or whole municipalities (for no very urgent practical reason that anyone can cite);<sup>13</sup> (e) termination of subsistence allowances without a prior eligibility hearing is held to be an unconstitutional deprivation of "property" without due process of law, and the state responds with a provision for the required pretermination hearings;<sup>14</sup> (f) termination of tuition allowances,<sup>15</sup> and of employment of state college teachers,<sup>16</sup> before a hearing on the asserted grounds for termination is upheld against due process attack.

This series of decisions, I claim, would be evidence of recognition of a constitutional right to the means of subsistence as distinguished from

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10. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

11. See *Starns v. Malkerson*, 326 F. Supp. 234 (D. Minn. 1970), *aff'd*, 401 U.S. 985 (1971).

12. See *United States Dep't of Agriculture v. Moreno*, 413 U.S. 528 (1973).

13. See *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974).

14. See *Goldberg v. Kelly*, 397 U.S. 254 (1970).

15. *But cf.* *Vlandis v. Kline*, 412 U.S. 441 (1973) (invalidating "irrebuttable presumption" of current nonresidency from fact of prior nonresidency).

16. See *Arnett v. Kennedy*, 416 U.S. 134 (1974). See also *Harrah Independent School Dist. v. Martin*, 440 U.S. 194 (1979) (employment not a "fundamental constitutional right").

a right to a college education, to a job, or to live in an "unrelated" household. The series can be construed to reflect a certain imputation of purposes to the several statutory schemes or certain motives to the legislators who enacted them. It is as if the courts somehow know both that the legislature enacted the subsistence allowance in response to what legislators took to be a valid political claim on the part of each resident to be ensured by the state against starvation and malnutrition<sup>17</sup> and that the statutes providing for tuition allowances and teacher employment reflect either a legislative judgment that the total social benefits of these activities exceed their total social costs or an arbitrary outcome of interest-group politics. Given *these* assumptions about statutory purposes, one can easily see how the prior-residency and related-household requirements can be called irrational or discriminatory as applied to the subsistence allowance (because, as is obvious, new arrivals and unrelated-household members need food as much as anyone else), but not as applied to the other programs.<sup>18</sup> One can also see the clear sense in which denial of subsistence, but not of college attendance or a teaching job, on the basis of an erroneous or untested suspicion of noneligibility would deprive a person of "property" without due process of law.<sup>19</sup>

Of course, it is obvious not only that a court generally has no way of making such motivational findings, but also that the crucial finding is directly contradicted in our illustrative case by what the legislature has actually done. Granted that a subsistence allowance meant to satisfy a right to needed food could not rationally or consistently be conditioned on a related-household or prior-residency requirement, it must follow that the legislature, by attaching precisely this condition, has indicated that the satisfaction of subsistence rights and needs was not its aim.

That is just the point I am driving at. In the face of apparently contradictory legislative action, the court treats the statute as though its sole or overriding purpose was to feed the needy-hungry. A necessary, if implicit, premise of this judicial action seems to be that the legislature legally ought to have meant its statute that way (even though it evidently did not). The court treats the statute *as if* the legislature was acting in response to a right to subsistence (even though it evidently

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17. It need not be a claim to be thus ensured *at all costs*. See R. DWORKIN, *supra* note 8, at 92.

18. See generally Linde, *Due Process of Lawmaking*, 55 NEB. L. REV. 197 (1975).

19. See Grey, *Procedural Fairness and Substantive Rights*, *supra* note 2, at 197-202.

was not). It very much looks like a constitutional right is at work. Courts themselves cannot bring social service programs into existence; but when legislatures do so, courts can treat those legislative actions as meant to satisfy rights, with significant consequences for litigation involving statutory interpretation or interaction with constitutional doctrines such as irrational classification.

The series of decisions that I say would be strong evidence of the existence of a constitutional right to the means of subsistence is not a mere fantasy, but a thinly fictionalized report of various decisions handed down by the United States Supreme Court over the six-year period from 1969 to 1974.<sup>20</sup> Some additional decisions of this period could be cited as similarly supportive of the welfare-rights thesis.<sup>21</sup> The thesis, however, cannot be established by any purely empirical method because a number of decisions over the same period and since seem to contradict the thesis by their rhetoric as well as their results.<sup>22</sup> More-

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20. See cases cited notes 10-16 *supra*.

21. Compare *Sosna v. Iowa*, 419 U.S. 393 (1975) (one-year durational residency condition on eligibility to sue for divorce in state's courts upheld), and *Starns v. Malkerson*, 401 U.S. 985 (1971) (upholding one-year durational residency condition on eligibility for reduced state college tuition rate), with *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (one-year durational residency condition on indigent person's entitlement to nonemergency medical care at public expense invalid), and *Shapiro v. Thompson*, 394 U.S. 618 (1969) (durational residency condition on availability of AFDC benefits unconstitutional); compare United States Dep't of Agriculture v. *Moreno*, 413 U.S. 528 (1973) (exclusion from food-stamp program of unrelated households invalid), United States Dep't of Agriculture v. *Murry*, 413 U.S. 508 (1973) (exclusion from food-stamp program of households including someone else's claimed tax dependent invalid), and *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973) (exclusion from welfare-subsistence benefits of families with only illegitimate children invalid), with *Mathews v. Lucas*, 427 U.S. 495 (1976) (extra procedural hurdles for illegitimates claiming social security survivors' benefits upheld); compare *Fuentes v. Shevin*, 407 U.S. 67 (1972) (scheme allowing ex parte creditor's repossession of household goods invalid), *Goldberg v. Kelly*, 397 U.S. 254 (1970) (termination of welfare benefits without prior notice and hearing violates due process), and *Sniadach v. Family Fin. Corp.*, 395 U.S. 337 (1969) (ex parte creditor's wage attachment scheme invalid), with *Mathews v. Eldridge*, 424 U.S. 319 (1976) (scheme allowing prehearing termination of social security disability benefits upheld), and *Board of Regents v. Roth*, 408 U.S. 564 (1972) (termination of teacher's employment contract without notice or hearing not a denial of due process). For an in-depth discussion of these cases, see text accompanying notes 130-88 *infra* (appendices). For an argument that recent decisions invalidating restrictions on professional advertising on first amendment grounds, see *Bates v. State Bar*, 433 U.S. 350 (1977); *Virginia State Bd. of Pharmacy v. Virginia Consumers Council, Inc.*, 425 U.S. 748 (1976); *Bigelow v. Virginia*, 421 U.S. 809 (1975), may imply special constitutional solicitude for "the poor man's access to basic needs," see Note, *Access of the Poor to Basic Economic Needs: A New Concern in Freedom of Speech Decisions*, 54 *IND. L.J.* 83 (1978).

22. See *Lavine v. Milne*, 424 U.S. 577, 584 n.9 (1976) (dictum) (no constitutional right to guaranteed minimum support level); *San Antonio Independent School Dist. v. Rodriguez*, 411

over, the Court itself placed the supportive decisions on grounds other than welfare rights, though in a few cases ambiguously.<sup>23</sup>

Many or all of the ostensibly contradictory decisions can be explained away, and the alternative grounds cited by the Court for many or all of its decisions that do, in fact, vindicate welfare claims can be shown to be unsatisfactory.<sup>24</sup> These explanations and showings are too laborious to support a claim that the cases themselves fully make out the existence of any constitutional welfare rights. Still, the cases suggest such rights. The "tension" among their "rhetoric, reasoning, and results," as Professor Tribe puts it, does "reflect an unarticulated perception that there exist constitutional norms establishing minimal entitlements to certain services."<sup>25</sup> These cases could be cited in support of welfare rights should the Court eventually come to see them as a correct conclusion from accepted forms of legal argument. The cases hold a further significance: they show that and how it is possible for courts to act on welfare-rights premises without having to make judgments of degree for which no legal standard can be found, or to take on an unmanageable remedial task, or to arrogate legislative and executive functions. The cases alone do not establish the welfare-rights thesis, but they do go far to answer the first two objections against it—that it is purely fanciful and that it thrusts inappropriate tasks on the courts.

Let us turn, then, to the next objection on my list—the asserted want of an adequate basis in law for the welfare-rights thesis. Welfare-rights claims, the objection runs, have no warrant in legally admissible sources construed by legally acceptable methods, as distinguished from, say, the sources and methods of moral philosophy or from mere judi-

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U.S. 1 (1973) (public school financing based partly on local taxation of widely disparate tax bases, leading to widely disparate per-pupil expenditures, not unconstitutional); *Jefferson v. Hackney*, 406 U.S. 535 (1972) (computation of AFDC payments at a lesser percentage of "need" than used to compute nonsubsistence payments to the elderly and the blind not unconstitutional); *Lindsey v. Normet*, 405 U.S. 56 (1972) (summary judicial procedure for eviction of tenant on ground of rent default or lease violation, without allowing landlord's default on maintenance duties as defense, not unconstitutional; one's interest in shelter not constitutionally protected); *James v. Valtierra*, 402 U.S. 137 (1971) (requirement of special local referendum to approve subsidized housing for poor families not unconstitutional); *Dandridge v. Williams*, 397 U.S. 471 (1970) (maximum limit on per-family welfare grant, regardless of family size, upheld; satisfaction of "most basic economic needs of impoverished human beings" not a constitutionally protected interest).

23. See text accompanying notes 130-50 *infra* (Appendix A).

24. See text accompanying notes 151-88 *infra* (Appendix B).

25. Tribe, *supra* note 2, at 1074. Professor Tribe covers much of the same ground as this article does at notes 21-24 *supra* and accompanying text and in the appendices. See Tribe, *supra* note 2, at 1079-85.

cial preference. Because my proposition is one about *constitutional* welfare rights, we can limit the set of admissible sources to the Constitution itself and concentrate on the question of methods for construing it. That, at any rate, is how I intend to proceed, if only because without treating the constitutional document itself<sup>26</sup> as in some sense a first premise, I see no hope of succeeding in the task of opening minds to the welfare-rights thesis. To locate the rights in an "unwritten constitution,"<sup>27</sup> or otherwise to deny or repress the distinction in principle between law and morality, would accomplish little toward that end. On this occasion then, I intend to proceed as a legal positivist, though, as you must certainly anticipate, a free-thinking one.

For like reasons I shall abstain from modes of constitutional interpretation that seem too manipulable to prove anything to a welfare-rights skeptic. Thus, I shall have nothing whatsoever to do with any "realist" notion that the Constitution says whatever the judges make it say.<sup>28</sup> Less wholeheartedly, but dutifully, I also forswear any allegiance to the idea that certain clauses of the Constitution may be correctly read to call for legislative and judicial observance of the tenets of evolving "conventional morality" or "professed public ideals."<sup>29</sup> By so proceeding, one at least leaves open the possibility of satisfying those who, like Professor Bork, believe not only that "a legitimate Court must be controlled by principles exterior to the will of the Justices"<sup>30</sup> (a proposition with which few would take issue), but also that "system[s] of moral and ethical values" cannot, as such, have any "objective or intrinsic validity"<sup>31</sup> on which legitimate adjudication can rest. In short, what follows will be (even if barely) an "interpretivist" argument, in the vocabulary made current by Professors Grey and Ely; that is, an argument that ties its premises into the documentary Constitution.

Interpretivist the argument is, but hardly literalist or, as one might say, contractualist. The argument will not satisfy anyone who thinks

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26. The "document" speaks through its "structure" and "relationships," as well as through its particular texts. See generally C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* (1969).

27. See Grey, *Do We Have an Unwritten Constitution?*, *supra* note 8.

28. See, e.g., O. HOLMES, *COLLECTED LEGAL PAPERS* 168-69 (1920).

29. See, e.g., Perry, *The Abortion Funding Cases: A Comment on the Supreme Court's Role in American Government*, 66 *GEO. L.J.* 1191 (1978); Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 *YALE L.J.* 221 (1973).

30. Bork, *Neutral Principles and Some First Amendment Problems*, 47 *IND. L.J.* 1, 6 (1971).

31. *Id.* at 10.

that judges overstep the bounds of democratic consent and legitimacy by ascribing to the Constitution any right or mandate that would not be found in it if construed as a contract—duly noting, of course, that it was entered into long ago by parties who intended it to govern their political relationships for an indefinitely long period.<sup>32</sup> The argument will not try to persuade you away from that contractualist view of constitutional adjudication, should it be yours;<sup>33</sup> rather, it will adopt the most conservative, restrained theory of transcontractualist constitutional interpretation I know of—that proposed by Professor John Ely—and try to make the welfare-rights case under that view.

Professor Ely's argument is available to us at this time through a series of three recent articles.<sup>34</sup> It begins,<sup>35</sup> paradoxically, with his considered rejection, as "impossible," of an utterly text-bound approach to constitutional adjudication, of an unqualified "insistence that the work of the political branches is to be invalidated only in accord with an inference whose . . . underlying premise is fairly discoverable in the Constitution."<sup>36</sup> Ely takes this first step despite his endorsement of, and his observation that the Constitution itself evidently embodies, a democratic principle of legitimacy not easily reconcilable with free-form or transtextual review of legislative choices by electorally nonaccountable judges.<sup>37</sup> Acceptance of this seeming paradox of constitutional interpretation is forced on Professor Ely by his conclusion that strict text-boundedness runs into an even more serious contradiction, one so flatly insoluble as to be "dispositive": Interpretivism means "proceeding from premises that are . . . in the document itself," but "the document itself, the interpretivist's Bible, contains several provisions whose invitation to look beyond the four corners of the docu-

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32. *E.g.*, R. BERGER, *GOVERNMENT BY JUDICIARY* (1977).

33. For various reasons to reject the contractualist view of constitutional adjudication, see A. BICKEL, *THE LEAST DANGEROUS BRANCH* 24-26 (1962); L. TRIBE, *supra* note 2, at 451-55, 564-67, 889-96; Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 412-45 (1978) [hereinafter cited as Ely, *Constitutional Interpretivism*]; Greenawalt, *The Enduring Significance of Neutral Principles*, 78 *COLUM. L. REV.* 982, 1014-16 (1978).

34. Ely, *Constitutional Interpretivism*, *supra* note 33; Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 *HARV. L. REV.* 5 (1978) [hereinafter cited as Ely, *Fundamental Values*]; Ely, *Toward a Representation-Reinforcing Mode of Judicial Review*, 37 *MD. L. REV.* 451 (1978) [hereinafter cited as Ely, *Representation-Reinforcing Judicial Review*]. For a vigorous disagreement with Ely's argument—especially his readings of history—see Berger, *Government by Judiciary: John Hart Ely's "Invitation,"* 54 *IND. L.J.* 277 (1979).

35. Ely, *Constitutional Interpretivism*, *supra* note 33.

36. *Id.* at 400.

37. *Id.* at 404-11.



ment—whose invitation . . . to become a noninterpretivist—cannot be construed away.”<sup>38</sup>

Professor Ely then proceeds to make his case with respect to three provisions of the Constitution: the ninth amendment,<sup>39</sup> and the privileges-or-immunities<sup>40</sup> and equal-protection<sup>41</sup> clauses of the fourteenth amendment. Arguing through a combination of close attention to text, logical analysis, and historical gloss, he concludes that the ninth amendment “was intended to signal the existence of federal constitutional rights beyond those listed elsewhere in the document;”<sup>42</sup> that the privileges-or-immunities clause not only means “that there is a set of entitlements that all persons are to get,” but was intended as “a delegation to future constitutional decision makers to define and protect certain rights that the document neither lists . . . nor even in any remotely specific way gives directions for finding”;<sup>43</sup> and that “the equal protection clause has to amount to . . . a general mandate to evaluate the substantive validity of governmental choices” by deciding “which inequalities are tolerable under what circumstances”—a question whose answer “plainly will not be found anywhere in the document or the recorded remarks of its writers.”<sup>44</sup>

This first chapter of Ely’s trilogy ends where it began—in paradox. “[E]ven granting that [the three clauses] establish constitutional rights, they do not readily lend themselves to principled judicial enforcement.” Does not minimum respect for the democratic principle of legitimacy then require that the clauses “be treated as if they were directed exclusively to the political branches?”<sup>45</sup> “If [an] approach to judicial enforcement of [the three clauses] cannot be developed . . . that is not hopelessly inconsistent with our nation’s commitment to representative democracy, [one] . . . would have to conclude, whatever the framers may have been assuming, that the courts should try to stay

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38. *Id.* at 413.

39. “The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.” U.S. CONST. amend. IX.

40. “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States . . . .” U.S. CONST. amend. XIV.

41. “[N]or [shall any State] deny to any person within its jurisdiction the equal protection of the laws.” *Id.*

42. Ely, *Constitutional Interpretivism*, *supra* note 33, at 445.

43. *Id.* at 426-33.

44. *Id.* at 438.

45. *Id.* at 447.

away from them."<sup>46</sup>

In the second chapter of his trilogy<sup>47</sup> Professor Ely rejects one approach—actually, a family of approaches—advanced as a solution to the problem of principled adjudication under the open-ended constitutional guaranties, that of judicial identification of “fundamental values.” Ely reviews the various methods available for this type of judicial inquiry and concludes that all are irreconcilable with the democratic principle. Ely rejects, for reasons familiar enough to need no rehearsal here, any approach that allows a judge to “use his own values” as a measure of the legality of legislative choice,<sup>48</sup> or that advances natural law as an objective basis for transtextual judicial review.<sup>49</sup> Ely also observes, as have Professor Bork and others before him, that “an insistence on ‘neutral principles’ does not by itself tell us anything useful about the appropriate content of these principles or how the Court should derive the values they embody.”<sup>50</sup> Next on Ely’s list of false judicial disciplines is “reason” (in the sense of systematic moral philosophy). When highly reputed moral philosophers—*e.g.*, Rawls and Nozick—cannot agree on “fundamental values,” how can judges except by personal and subjective bias or inclination choose among the divergent conclusions toward which their theories respectively lead?<sup>51</sup> “Tradition,” Ely says, “is not a satisfactory answer for a democratic policy because it leads to “the proposition that yesterday’s majority should control today’s.”<sup>52</sup> “Consensus”—implying a judicial search for “conventional morality”—is no better for Ely, because he finds it odd to think that judicial search is a better method for finding morality than simply observing the outputs of democratically organized legislatures, and because “it simply makes no sense to employ the value judgments of the majority as the vehicle for protecting minorities from the value judgments of the majority.”<sup>53</sup>

Certain reservations about Professor Ely’s critique of “fundamental values” as a possible guide in constitutional adjudication may, for pres-

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46. *Id.* at 448.

47. Ely, *Fundamental Values*, *supra* note 34.

48. *See id.* at 16-22.

49. *See id.* at 22-32.

50. *Id.* at 33. *But see* Greenawalt, *supra* note 33.

51. Ely, *Fundamental Values*, *supra* note 34, at 37-38.

52. *Id.* at 42.

53. *Id.* at 52.

ent purposes, be set aside.<sup>54</sup> One reservation, however, requires comment. That a judge cannot properly proceed by simply choosing among competing philosophical theories or systems must, of course, be accepted; but not (if, indeed, Professor Ely means to go this far) that the literature of moral philosophy is irrelevant to proper performance of the judge's task. As we shall see, Ely himself believes that judges must begin a process of normative reasoning from a premise emergent from, if not exactly in, the historical Constitution. There is no reason why judges may not call upon the methods and contents of the philosophical literature to inform and clarify that reasoning process once its constitutionally connected premise is in place.

That gets us to the capstone of Ely's trilogy in which he offers, as a solution for the problem developed in the first chapter, a kind of "ultimate interpretivism," based on the notion of "representation-reinforcement" as a pervasive constitutional value. Ely's argument, you will recall, had left the judges immobilized between two faces of interpretivist methodology—between the demand for judicial abstinence from extra-constitutional dictation of values to the political branches and the demand for loyalty to the explicit constitutional text, including its apparent mandate upon the government to respect certain values or interests left for future definition. The contradiction cannot be denied, but perhaps it can be superseded by moving to a yet more abstract plane of constitutional interpretation, which takes as its premise an implicit value or purpose thought to underlie and pervade the whole constitutional scheme—that of political participation through representation.

This value, as Ely portrays it, is one of "process writ large—[of] ensuring broad participation in the processes and benefits of government."<sup>55</sup> The textual content of the Constitution, its historical setting, and judicial understanding of its purposes since its adoption, all combine to provide a constraining and democratically legitimating rationale for judges in performing their task of "supplying content"<sup>56</sup> to the

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54. With respect to "consensus," for example, Ely perhaps gives too little attention to the possibility of a relevant and judicially detectible gap between day-to-day political behavior and "professed public ideals." Perry, *supra* note 29, at 1215, 1225-31; see Michelman, *Welfare Rights*, *supra* note 1, at 1004-10. Similarly, Ely's dead-hand characterization of "tradition" seems insensitive to the possibility that tradition offers an extrapolable trajectory for evolutionary change. See Tribe, *Ways Not to Think About Plastic Trees: New Foundations for Environmental Law*, 83 *YALE L J.* 1315 (1974).

55. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 34, at 470.

56. *Id.*

open-ended guaranties of the ninth and fourteenth amendments: judges should “focus not on whether this or that substantive value is unusually important or fundamental, but rather on whether the opportunity to participate, either in the political processes by which values are appropriately identified and accommodated or in the accommodation those processes have reached, has been unduly constricted”<sup>57</sup> by the challenged state or governmental conduct.

For full understanding of Professor Ely’s representation-reinforcement thesis and full appreciation of its bearing on the welfare-rights thesis, one must take careful note that he speaks of the Constitution’s pervasive purpose of ensuring participation not only in procedures, but in outcomes; not only in “the political process,” but in the “benefits” and “accommodations” the process yields. Representation and participation hold a substantive as well as a formal dimension for Professor Ely. But, given that he (of course) does not believe that the Constitution generally calls for an equal distribution of the benefits of governmental action, how does he think judges are to distinguish those occasions on which uneven distribution offends the pervasive participation value, without lapsing into the impermissibly subjective search for “fundamental” interests?

We can anticipate the form that the answer must take: it is true of some, but not all, interests affected by government activity that one has these interests simply by virtue of being a person in a republican polity. Deprived of adequate service to those interests, a person cannot function in the roles and relationships contemplated for individuals by the political conception of representative democracy. Assuring “broad participation” in the fulfillment of those interests thus will be specifically “representation-reinforcing” in Professor Ely’s intended sense. (Here, we might note how recourse to the philosophical literature can assist with the logical development of argument from legally derived premises. Ely implicitly seems to rely upon an idea closely akin to that of “social primary goods,” which plays a central role in John Rawls’ philosophy of social justice.<sup>58</sup>)

To sharpen and clarify this idea further, we need to review briefly the reasoning by which Ely works up the idea of participation as a pervasive constitutional value. The key is his portrayal of what he calls “the

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57. *Id.* at 456.

58. See generally J. RAWLS, A THEORY OF JUSTICE 62, 92-93 (1971).

American concept of representative democracy.”<sup>59</sup> This concept he sharply distinguishes from the latter-day vision of interest-group pluralism, in which political society is viewed as a collection of numerous, partially overlapping, narrowly particularistic interest groups—each contending against all the others for the largest possible payoff from the majoritarian legislative process, each conceding some payoff to others in the course of forming ad hoc political coalitions, and each thus emerging over the long run with its vital interests protected and a decent share of the surplus benefits.<sup>60</sup>

Embodied in the original Constitution, claims Ely, was a very different idea about how representation, majority rule, separated powers, and federalism would work to accord roughly equal service to the interests of each person. (It is, to be sure, an idea that our generation is prone to regard as “idealistic,” but one that would come more naturally to generations closer to the influence of Locke and Rousseau, who for this purpose can be yoked together.<sup>61</sup>) This idea rests on the supposition that the interests of each individual pretty much coincide with the interests of all, because the people comprise “an essentially homogeneous group whose interests [do] not vary significantly.”<sup>62</sup> This essentially homogeneous populace will naturally “choose representatives whose interests [intertwine] with theirs,”<sup>63</sup> the representative majority will “govern in the interest of the whole people,” and the result will satisfy the framers’ commitment to the idea that “every citizen [is] entitled to equivalent respect.”<sup>64</sup>

The framers understood, according to Ely, that their society was not perfectly homogeneous and that some constitutional safeguards, in addition to electoral accountability and majority rule, were required to ensure that some interests did not dominate or that some would not be unfairly subordinated. The Bill of Rights and the scheme of separated, divided, and countervailing powers were designed to meet this need.<sup>65</sup>

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59. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 34, at 456, 471.

60. *See, e.g.*, R. DAHL, A PREFACE TO DEMOCRATIC THEORY (1956).

61. *See, e.g.*, K. ARROW, SOCIAL CHOICE AND INDIVIDUAL VALUES 81-86 (2d ed. 1963) (“idealist” view of majoritarian procedures). On Locke’s understanding of majoritarianism, see W. KENDALL, JOHN LOCKE AND THE DOCTRINE OF MAJORITY-RULE (1941).

62. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 34, at 459.

63. *Id.* at 457.

64. *Id.* at 458. Again, we catch a whiff of philosophy. *See* R. DWORKIN, *supra* note 8, at 180-82, 273-75 (fundamental liberal principle of “equal concern and respect”).

65. *See* Ely, *Representation-Reinforcing Judicial Review*, *supra* note 34, at 459-60.

These devices, however, turned out insufficient to the task. There arose or persisted in American society differences in economic and social status, power, and interest sharper and stabler than the original protective devices could master. Americans learned that the interests of conventionally identifiable, weak, or stigmatized groups might be systematically disregarded. "[A] frontal assault on the problem of majority tyranny was needed. The existing theory of representation had to be extended so as not simply to ensure that the representative would not sever his interests from those of a majority of his constituency, but also to ensure that he would not sever a majority coalition's interests from those of various minorities."<sup>66</sup>

To some extent, Ely notes, the Supreme Court could provide the needed extension by construing and applying the supremacy clause,<sup>67</sup> the commerce clause,<sup>68</sup> and the privileges-or-immunities clause of article four<sup>69</sup> to protect at least one of the obvious victim classes—out-of-staters—against state legislative insensitivity to their interests. By disallowing legislation that treats out-of-staters as a class apart, the Court could tie their interests to those of voting constituents so as to achieve "virtual representation." All too plainly, this device would do nothing for blacks or comparably powerless and effectively underrepresented groups. Ely argues that a disciplined and responsible approach to the problem of adjudication under the fourteenth amendment equal-protection and privileges-or-immunities guaranties would respond to this perception of gaps and failures in the original constitutional scheme of representation designed to ensure "broad participation" in both processes and benefits.

This ultimate democratic aim of "broad participation" is Ely's key to reconciling "what are often characterized as two conflicting American ideals—the protection of majority rule on the one hand, and the protection of minorities from denials of equal concern and respect on the other."<sup>70</sup> Majority rule itself was originally supposed to assure "equal concern and respect" for each person. "Protection of minorities" was a secondary problem that arose only in response to the perception that there *are minorities*—well-defined, easily identified, ill-supplied groups

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66. *Id.* at 462.

67. *See id.* at 467-68.

68. *See id.* at 465-66.

69. *See id.* at 465.

70. *Id.* at 469.

of people—who bear a special risk of effective exclusion from the give-and-take of pluralistic majoritarian politics.

Professor Ely's published work<sup>71</sup> has not yet reached the point of telling us in any detail which rights he believes a representation-reinforcing court can properly "define and protect" as constitutionally safeguarded privileges and immunities,<sup>72</sup> or "which inequalities" a court ought to "find [in]tolerable [and thus denials of equal protection] under what circumstances."<sup>73</sup> We can, however, gather a rough anticipation of his views both from his citation to the work of the Warren Court as a model of the representation-reinforcing mode of judicial review and from his explanations of the representation-reinforcing properties of certain constitutional texts.

Ely plainly has uppermost in mind Warren Court decisions in the fields of voting rights and racial discrimination. The Constitution nowhere mentions<sup>74</sup> state voter qualifications,<sup>75</sup> distribution of voting power,<sup>76</sup> and ballot access,<sup>77</sup> but decisions regarding these matters most obviously exemplify the kind of review Professor Ely considers to be justified by the standard of representation-reinforcement. The Warren Court, according to Ely's theory, properly found that malapportionment denies equal protection and unequal ballot access infringes upon a constitutionally protected privilege (as Ely presumably would have it) not by textual exegesis and related inference, but by imputing to the open-ended clauses the pervasive constitutional aim of "broad participation." As to racial discrimination cases, Ely means, I think, to focus on the Warren Court's sensitivity to social and institutional factors that necessitate more judicial protection for the descendants of the slaves than the mere invalidation of explicit racial classifications in statutes, in order to provide effective assurance of participation on terms of equal respect and concern.<sup>78</sup> The judicial doctrine of "badges and incidents

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71. See notes 33-34 *supra*.

72. See note 43 *supra* and accompanying text.

73. See note 44 *supra* and accompanying text.

74. *Cf.* U.S. CONST. art. I, § 2, ¶ 2 (sets forth qualifications for membership in House of Representatives); *id.* § 4, ¶ 1 (Congress may alter state-created regulations of time, place, and manner of choosing Senators and Representatives).

75. *E.g.*, *Kramer v. Union Free School Dist.*, 395 U.S. 621 (1969); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Carrington v. Rash*, 380 U.S. 89 (1965).

76. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

77. *E.g.*, *Williams v. Rhodes*, 393 U.S. 23 (1968).

78. See, *e.g.*, *Reitman v. Mulkey*, 387 U.S. 369 (1967); *Whitus v. Georgia*, 385 U.S. 545 (1967); *Anderson v. Martin*, 375 U.S. 399 (1964). *Cf.* *Hunter v. Erickson*, 393 U.S. 385 (1969)

of slavery"<sup>79</sup> and the Myrdal vicious-circle notion with which that doctrine connects<sup>80</sup> are thoroughly congenial to the entire drift of Ely's argument. Any doubt would be dispelled by Ely's selection of the "titles-of-nobility" clause—of all things!—as an illustration of a representation-reinforcing constitutional text: "The prohibition against granting titles of nobility seems rather plainly to have been designed to buttress the democratic ideal that all are equals in government."<sup>81</sup>

Having hitched our wagon to Ely's star, we have now reached this position: the Constitution itself commands recognition of transtextual rights not only by the political branches in the first instance, but also (as usual) by the judiciary in case of legislative or executive default, provided only that a "principled . . . approach to judicial enforcement" can be found, one not "hopelessly inconsistent with our nation's commitment to representative democracy" as directly expressed by the Constitution taken as a whole.<sup>82</sup> One seeks, then, a limiting and constraining criterion—a premise for argument aimed at distinguishing between false and true transtextual claims—that is itself rooted in the animating constitutional idea of representative democracy. "Representation-reinforcement" or "broad participation" is just such a criterion. *Ergo*, the judiciary must recognize and enforce rights singled out on the basis of that criterion. So argues Ely.

Suppose that we think of cases governed by rights as appearing in classes or families—each class having an easily identified and agreed-upon core, but an indistinct or contestable margin. Cases spread around those cores more-or-less close to them, and the margins that separate cases governed by a right from those beyond it are as circles with cores at their centers. Its agreed-upon core gives each class an identity and character that allows for intelligible dispute about hard marginal cases—a dispute that can reduce the area of marginal disagreement to a narrow band, if not to a sharp line.

The class of representation-reinforcing rights that Ely wants to identify seems to have a double core (twin foci, as it were), around which the included cases spread in an elliptical shape. One focus is protection

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(Ohio ordinance requiring majority approval of voters to enact any law that regulates real estate sales on basis of race, religion, or national origin unconstitutional); *Loving v. Virginia*, 388 U.S. 1 (1967) (Virginia statute prohibiting interracial marriages unconstitutional).

79. See *Jones v. Alfred H. Mayer Co.*, 392 U.S. 409 (1968).

80. See 1 G. MYRDAL, *AN AMERICAN DILEMMA* 75-76 (1944).

81. Ely, *Representation-Reinforcing Judicial Review*, *supra* note 34, at 474.

82. See note 46 *supra* and accompanying text.



for access on an equal footing to political acts and activities in the narrow sense of voting and standing for office. The other focus is protection against stigmatizing discriminations in treatment that reflect, reinforce, or facilitate systematic bias against one's group in the group-oriented, majoritarian political process.<sup>83</sup> Cases close to both cores, or foci, will lie near the center of the ellipse, well within the boundary of the representation-reinforcing class of rights. Other cases will fall outside the central area, but still within the class near one of the elongated ends of the ellipse. Thus, the case of a poll tax historically used with the purpose and effect of excluding black citizens from the franchise, or the case of a municipal boundary adjustment or at-large voting system deployed with like effect and evident purpose, will lie near the center;<sup>84</sup> but a "crazy-quilt" malapportionment also will be covered by virtue of proximity to the equal-political-footing core, even though class discrimination is not directly involved,<sup>85</sup> and segregation of bathrooms and golf courses will be covered by virtue of proximity to the class-discrimination core, even though political activity is not directly implicated.<sup>86</sup>

To think of representation-reinforcing rights as comprising one class rather than two partially overlapping ones is simply to recognize the practical dynamics that often, though not always, obtain from stigmatizing discriminations or deprivations and political ineffectuality, reciprocally connecting one phenomenon with the other. Maldistribution of formal political power obviously removes or weakens a basic institutional safeguard against systematic maldistribution of status and the resources that support it. Conversely, and perhaps more importantly, inequalities of resources and statuses, especially insofar as visibly correlated with salient group identification, almost certainly constitute a fundamental condition and cause of systematic bias in the functioning of majoritarian political institutions. A world in which racial minority groups are not noticeably differentiated from the majority in terms of social role or material conditions of life almost certainly will be a politically safer world for those minorities. These relationships between po-

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83. Cf. Fiss, *Groups and the Equal Protection Clause*, 5 PHILOSOPHY PUB. AFF. 107 (1976) (antidiscrimination principle is one of several "mediating" principles that stand between the courts and their interpretation of the Constitution).

84. See *White v. Regester*, 412 U.S. 755 (1973); *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966); *Gomillion v. Lightfoot*, 364 U.S. 339 (1960).

85. See *Baker v. Carr*, 369 U.S. 186 (1962).

86. See, e.g., *Holmes v. Atlanta*, 350 U.S. 879 (1955) (per curiam).

litical efficacy and group socioeconomic status will enter into the argument now to be offered for identifying welfare rights as among those transtextual rights that ought to be judicially recognized as representation-reinforcing privileges or immunities, or as the negatives of representation-defeating inequalities, under Ely's quasi-interpretivist view of the fourteenth amendment.

Consider for a moment the following assortment of transtextual constitutional rights that actually have been recognized and enforced by the Supreme Court: to bear or not bear children as one chooses;<sup>87</sup> to raise and educate one's children as one chooses;<sup>88</sup> to choose freely one's marital status and partner;<sup>89</sup> to live as an "extended" rather than a "nuclear" family;<sup>90</sup> to remain at liberty if not guilty of crime or a threat to anyone's physical safety, even though a genuine annoyance to others;<sup>91</sup> to travel outside the United States;<sup>92</sup> to migrate and resettle within the United States;<sup>93</sup> and to decline participation in patriotic observances.<sup>94</sup>

Should any or all of these be properly regarded as representation-reinforcing rights? Each can certainly be viewed as a "political" right, protecting choices that when exercised can fairly be called political acts—setting up or nurturing what Ely calls "competing power centers,"<sup>95</sup> expressing or actualizing values that may or may not be conventional ones, raising consciousnesses, "voting with one's feet," and so on.<sup>96</sup> Although political in the broad sense, however, these acts in themselves do not amount to participation—as do acts of voting, candidacy, officeholding, and legislative lobbying and debate—in representative democracy, the political system of last resort envisioned by the Constitution. Nor do the liberties of family choice, child-rearing, or travel directly enable, enhance, or condition effective participation in that political system. To regard them as constitutionally guaranteed

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87. See *Roe v. Wade*, 410 U.S. 113 (1973).

88. See, e.g., *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

89. See *Boddie v. Connecticut*, 401 U.S. 371 (1970); *Loving v. Virginia*, 388 U.S. 1 (1967).

90. See *Moore v. East Cleveland*, 431 U.S. 494 (1977).

91. See *O'Connor v. Donaldson*, 422 U.S. 563 (1975).

92. See *Kent v. Dulles*, 357 U.S. 116 (1958).

93. See *Shapiro v. Thompson*, 394 U.S. 618 (1969).

94. See *Wooley v. Maynard*, 430 U.S. 705 (1977); *West Virginia v. Barnette*, 319 U.S. 624 (1943).

95. See Ely, *Representation-Reinforcing Judicial Review*, *supra* note 34, at 475.

96. See generally Heymann & Barzelay, *The Forest and the Trees: Roe v. Wade and its Critics*, 53 B.U.L. REV. 765 (1973).

under the rubric of representation-reinforcement would leave that criterion virtually boundless, lacking the constraining force on judicial judgment apparently required by the idea of representative democracy itself. If they are proper constitutional rights—a conclusion I am far from wishing to deny—their sources are unwritten ones beyond the purview of this discussion.

Now contrast those liberties with a person's interest in basic education. Without basic education—without the literacy, fluency, and elementary understanding of politics and markets that are hard to obtain without it—what hope is there of effective participation in the last-resort political system? On just this basis, it seems, the Supreme Court itself has expressly allowed that “some identifiable quantum of education” may be a constitutional right.<sup>97</sup> But if so, then what about life itself, health and vigor, presentable attire, or shelter not only from the elements but from the physical and psychological onslaughts of social debilitation? Are not these interests the universal, rock-bottom prerequisites of effective participation in democratic representation—even paramount in importance to education and, certainly, to the niceties of apportionment, districting, and ballot access on which so much judicial and scholarly labor has been lavished?<sup>98</sup> How can there be those sophisticated rights to a formally unbiased majoritarian system, but no rights to the indispensable means of effective participation in that system? How can the Supreme Court admit the possibility of a right to minimum education, but go out of its way to deny flatly any right to subsistence, shelter, or health care?<sup>99</sup>

Some may object that I am guilty of confusing the existence or possession of a right with the worth of the right or the capacity to derive value from it.<sup>100</sup> The right to travel, or publish, or worship, connotes a freedom to do what one has the means to do, not a social undertaking to provide the means. So it must be with rights of democratic participation, no? Well, no. Rights of democratic participation differ from other rights precisely in that they are rights of last resort, ones that, in

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97. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 36 (1973).

98. *E.g.*, R. DIXON, *DEMOCRATIC REPRESENTATION: REAPPORTIONMENT IN LAW AND POLITICS* (1968).

99. *See* *Maher v. Roe*, 432 U.S. 464, 469 (1977) (dictum) (no constitutional right to health care); note 23 *supra*; text accompanying notes 130-88 *infra* (appendices).

100. *Cf.* J. RAWLS, *supra* note 58, at 204 (distinguishing liberty from the worth of liberty). *See also* C. FRIED, *supra* note 7, at 110-11.

the Supreme Court's words, are "preservative of all rights."<sup>101</sup> In Professor Ely's words, they provide a guarantee against "undue constriction" of "the opportunity to participate . . . in the political process by which values are appropriately identified and accommodated," including—and this is crucial—"values" that pertain to the distribution in society of the means of enjoying rights. One might as well say to those who are underrepresented in a malapportioned legislature that their remedy lies through legislative politics,<sup>102</sup> as say to those who lack access to "the basic necessities of life" that their right of democratic participation is not constricted.

If we now let our focus shift from the political-action core to the status-harm<sup>103</sup> core of representation-reinforcement, we find that the argument for welfare rights, as a part of constitutionally guaranteed democratic representation, gains in richness and power. To be hungry, afflicted, ill-educated, enervated, and demoralized by one's material circumstances of life is not only to be personally disadvantaged in competitive politics, but also, quite possibly, to be identified as a member of a group—call it "the poor"—that has both some characteristic political aims and values and some vulnerability to having its natural force of numbers systematically subordinated in the processes of political influence and majoritarian coalition-building. Even if there is no group of "the poor" for which that description holds, it is a blatant fact of national—including constitutional—history that there are groups for which it has held and does hold. It is also a fact—one that can hardly be accepted as accidental—that being a member of, say, the black minority significantly correlates with one's chances of being severely impoverished and, therefore, of carrying marks of poverty that both motivate and facilitate political and social bias. Satisfaction of basic welfare interests thus seems to be a crucial ingredient of any serious attempt to eliminate the vestiges of slavery from the system of democratic representation. The Supreme Court was right on the mark in *Goldberg v. Kelly*: "[W]elfare . . . can help bring within reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . . Public assistance, then, is not mere charity, but a means to 'procure the Blessings of Liberty to

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101. *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 667 (1966) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

102. *See Baker v. Carr*, 369 U.S. 186, 251, 258-59 (1962) (Clark, J., concurring).

103. The notion of "status harm" is developed in Fiss, *supra* note 83.

ourselves and our Posterity.’”<sup>104</sup>

Let me now pause to summarize. First, courts can accord recognition to minimum welfare rights in ways that have a practical bearing on adjudication but do not raise judicially inappropriate questions of definition or problems of enforcement. Second, legal argument does exist for judicial recognition of minimum welfare rights as a direct implication of the written Constitution; indeed, it seems to be a stronger and clearer constitutionally based argument than can be found for a number of presently recognized constitutional rights. If in making this latter point I have belabored the obvious, it is only because I want you to share with me the sense of queerness and paradox suffusing this whole discussion: the queerness, on the one hand, of there being so much trouble about admitting that everyone has a right to the means of subsistence at a minimum social standard of decency; and the paradox, on the other, of even thinking to cast the question in the language of rights or even considering the matter as meet for legal disputation. It is a funny feeling repeatedly echoed by the Supreme Court of the 1970's: “The administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings,” but the questions it raises are questions of “wise economic or social policy,” not of right.<sup>105</sup> “We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill.”<sup>106</sup> “We are in complete agreement . . . that ‘the grave significance of education both to the individual and our society’ cannot be doubted. But the importance of a service . . . does not determine whether it must be regarded as [constitutionally] fundamental.”<sup>107</sup>

Granting that importance is not determinative, is it not highly significant? Obviously, the importance of a service in itself does not *determine* constitutional entitlement to it, precisely because it is *constitutional* entitlement that is in issue: No constitution, no constitutional right. But once it is allowed that there are some—any—constitutional rights beyond those literally spelled out in the constitutional text

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104. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970). Here, again, the argument from a legally derived premise may find guidance and enrichment in the philosophical literature; specifically, in Rawls' notion of the social bases of self-respect as chief among the social primary goods. See J. RAWLS, *supra* note 58, at 440; Michelman, *Welfare Rights*, *supra* note 1, at 983.

105. *Dandridge v. Williams*, 397 U.S. 471, 485-86 (1970).

106. *Lindsey v. Normet*, 405 U.S. 56, 74 (1972).

107. *San Antonio Independent School Dist. v. Rodriguez*, 411 U.S. 1, 30 (1973).

or rigorously deducible from it, then importance just has to become a crucial constitutional variable. This is true partly because interests and claims often conflict or, in other words, rights entail costs, and the significant must take precedence over the petty. It is true also because some rights presuppose others, and some rights, even if not all, presuppose one's having passed beyond the struggle for existence and for the marks of minimum social respect. That is just a simple matter of mundane observation.

Now, if the importance of welfare claims, or the importance of their importance to the question of whether they are rights, is so clear at the level of mundane observation, it must be that the trouble about welfare rights arises not at that level, but at the level of moral and political speculation, or theory, or (please excuse my mention of it) philosophy. The trouble we share about welfare rights seems to be evidence of what some assert<sup>108</sup> and others doubt or deny<sup>109</sup> is an inevitable connection between legal (especially constitutional) reason and speculative or philosophical reflection about matters of ethics and politics. It seems, in short, that the trouble we have with welfare rights as legal claims is a direct counterpart of the doubts these rights engender in a certain sophisticated scheme of political philosophizing that is widely, if hazily, shared among the educated and reflective public, most or all of us to some degree included.

I can undertake here only the sketchiest indication of a possible source of the trouble and how it might be overcome. A root of the difficulty, I suggest, is the way we habitually understand and respond to the idea of preinstitutional, "natural" rights—the idea that some entitlements stem directly from an adequate conception of what it is to be a human person and, therefore, must be recognized by any society that aspires not to be monstrous.

That habitual conception displays three significant features. First, a right is understood to be a claim one has against some person (or persons), not against the cosmos or the nature of things; in other words, rights entail duties and duties are owed by persons. Second, *par excellence*, rights and their entailed duties are finite, reciprocal, and, concomitantly, negative in character. Persons are bound to one another by

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108. *E.g.*, B. ACKERMAN, PRIVATE PROPERTY AND THE CONSTITUTION 5 (1977); R. DWOR-KIN, *supra* note 8, at 131-49; D. RICHARDS, THE MORAL CRITICISM OF LAW ch. III (1977); *see* Bayles, *Morality and the Constitution*, 1978 ARIZ. ST. L.J. 561.

109. *E.g.*, Bork, *supra* note 30, at 10; Monaghan, *supra* note 4, at 120 n.18.

an equal, mutual, and finite duty not to encroach actively on a standard zone of personal interest and liberty that each enjoys by right. Positive rights, including welfare rights, pose problems largely because the reciprocity and boundedness of duties seem gravely threatened by the idea of being duty-bound to contribute actively to the satisfaction of other people's interest or needs. Needs are neither equal, nor reciprocal, nor quite finite. They are to some extent unilaterally controllable, inasmuch as one's needs may be traceable to one's prior choices, but the resource requirements of satisfying them may be virtually limitless.<sup>110</sup> Third, the state's functions, *par excellence*, are first, to vindicate rights by preventing, requiring, and punishing violations of duties, and second, to facilitate satisfaction of other interests and needs—themselves not rights—by regulatory and service activities. The state is an enforcer, but not a bearer of duties (save the duty of enforcement).<sup>111</sup> Its emergence does not ipso facto call into existence any new rights.

Please bear in mind that what I mean to sketch here is an accustomed way of conceiving not the class of rights *in toto*, but the subclass of preinstitutional or, in Ronald Dworkin's terminology, background rights—in short, widely held intuitions of inherent personal rights that might claim legitimate, or at least comfortable, expression in transtextual constitutional adjudication. I do not mean, and it is not the case, that the notion of positive rights is beyond our ken. We readily recognize these rights and normally expect judicial enforcement of them, when specifically and deliberately fashioned in contracts, legislation, or constitutions.<sup>112</sup> The features of nonreciprocity and potential boundlessness, which make positive rights seem problematic when considered as a priori claims that *condition* the workings of institutions, are not especially troubling when rights are considered as the end *results* of institutional deliberation and specification.

Of all the writings that treat conscientiously the idea of positive rights to provision for basic needs, none have been more insistent on the problems of voracity and nonreciprocity than those of Charles Fried.<sup>113</sup> Yet remarkably (if unintentionally) the implications of Pro-

110. See generally C. FRIED, *supra* note 7, at 108-31.

111. Even Nozick concedes the duty of protection. See R. NOZICK, *ANARCHY, STATE AND UTOPIA* 112-13 (1974).

112. See C. FRIED, *supra* note 7, at 110.

113. *Id.* See also Fried, *Equality and Rights in Medical Care*, in *IMPLICATIONS OF GUARANTEEING MEDICAL CARE* (J. Perpich ed. 1976).

fessor Fried's argument ultimately harmonize with those I have highlighted in Professor Ely's trilogy. Exposing those implications will incidentally answer the remaining objection to the welfare-rights thesis—that its recognition would ill-serve the interests of its contemplated beneficiaries.

Fried's sensitivity to the dangers of enslavement to other people's needs does not deafen him to the justice of claims to have one's needs met. He explicitly states that "the situation of our fellow men makes an affirmative claim upon us, and that claim supports an argument for positive rights."<sup>114</sup> He recounts sympathetically the argument that "the [basic] needs of our fellow citizens . . . make a peculiarly urgent claim upon us . . . for the deeper reason that they relate to the development and the maintenance of the moral capacities of freedom and rationality."<sup>115</sup> He goes on to observe that "we must maintain life and some modicum of vigor if these capacities are to persist. . . . And the capacities for reason and for free, moral action cannot be taken for granted even when physical survival is assured. For these capacities to be present, the human animal requires certain conditions of nurture and instruction. . . . It also seems that minimal conditions of care and affection are necessary if a capacity to relate to other human beings is to develop."<sup>116</sup> He offers us, in short, an eloquent Kantian brief for welfare rights—one firmly grounded in the imperative to respect and safeguard "the integrity of [each] person as a freely choosing entity."<sup>117</sup>

Fried's own brief, however, falls short of overcoming his concerns about voracity and nonreciprocity—in other words, about the rights of those required to contribute towards satisfaction of the basic needs of others. His solution to the dilemma is to recognize a positive right, but not a welfare right. "The basic, the primary positive right is a right to a fair share of money income—that is, to a fair share of the community's scarce resources."<sup>118</sup> Assured of that income, persons can look out for their own basic needs by voluntary risk-pooling—buying insurance (if and as they choose) against eventualities of needs so unusually expensive that the fair share cash flow will not cover them.<sup>119</sup> As Fried

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114. C. FRIED, *supra* note 7, at 119.

115. *Id.* at 120.

116. *Id.* at 120-21.

117. *Id.* at 109.

118. *Id.* at 128.

119. *See id.* at 126-28.



points out, this approach, in addition to its merit as a solution to the problem posed by voracious needs, has another advantage over schemes for in-kind provisions: it has "the virtue of recognizing the principle of autonomy"; that is, of leaving individuals to define for themselves their needs and priorities.

Yet the fair shares-insurance solution is fatally incomplete for reasons of which Fried is expressly aware, though he fails to trace completely their implications. Fried knows, at any rate, that "the insurance model works well only because we have made the crucial assumption that the distribution of income is fair." If that assumption is false, or even irreducibly controversial, "there may be little else to do but provide for necessities in kind."<sup>120</sup> That is a point with which I agree; indeed, I have made it elsewhere in my own way.<sup>121</sup> But it is too paltry a concession to the problem of the controversiality of the fair-shares question. Fried himself demurs, at least for the time being, to the question of choice among competing principles of distributive justice.<sup>122</sup> More significant, however, is his apparent view that the choice of a principle is inevitably inseparable from the choice of a political constitution and, even more tellingly, is inextricable from constitutionally sponsored political activity. "Fair shares," Fried writes, "emerge from just political institutions and usually represent reasonable compromises between opposing views. Thus, political rights are involved in this institutional complex and their recognition is necessary to validate the justice of the scheme determining fair shares."<sup>123</sup>

In Fried's view, political rights are an a fortiori entailment of a more expansive, Kantian conception of rights, including the positive right to a fair share,<sup>124</sup> because the content of the fair-share right itself can be defined only through politics. It follows, then, that if, as I have argued, there are political rights that themselves are welfare rights, then those welfare rights are a fortiori entailments of Fried's Kantian conception of a system of rights. Fried's system cannot do without the fair-share right; it cannot get to the fair-share right without political rights; and political rights (by an easy step from Fried's own arguments) encom-

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120. *Id.* at 128.

121. See Michelman, *Welfare Rights*, *supra* note 1, at 1002-03.

122. See C. FRIED, *supra* note 7, at 119.

123. *Id.* at 129.

124. See *id.* at 109.

pass welfare rights.<sup>125</sup> Fried's conception thus falls into line with Rawls's—unsurprisingly, given their shared Kantian inspirations—which I have previously described as “imputing to representative persons a structured set of priorities under which the question of generally amplifying one's income simply is not reached until adequate assurance has been made for what one specifically needs in order that his basic rights, liberties, and opportunities may be effectively enjoyed, and his self-respect maintained.”<sup>126</sup>

More germane to present purposes is the convergence of Fried's implicit view with Ely's. It is a virtue of Ely's reading of the Constitution that it forces us to consider seriously whether our commitment to a certain institutional system—that of majoritarian republicanism or representative democracy—does not also commit us to a recognition of an exceptional class of positive rights and, to that extent, to a recognition of the state which that system constitutes as a bearer of affirmative duties. Through a lawyerlike parsing of constitutional text, history, and structure, Ely makes a plausible case for the Constitution's own express recognition of a class of general constitutional rights and (it seems to me) an overwhelming (again, I don't know whether intended) case for inclusion in that class of minimum welfare rights—rights to the indispensable means of effective participation in the institutional system itself.

That system's appeal and its legitimacy have from the beginning resided in its claim to be a universally fair and unbiased process both for translating the background rights into a defined and ordered scheme of legal rights and for determining which additional interest in what measures should be served through the regulatory and resource-gathering capabilities of the state. It seems to be a condition of the system's own legitimacy and, therefore, a duty of the system and its beneficiaries that it be insured against bias arising out of the existence or distribution of unmet needs. The precise content of that duty will vary with historical circumstance, which is a good reason why the duty and its correlative rights should be among those whose definition is always left as “a delegation to future constitutional decision makers.”<sup>127</sup> For sundry reasons that I have previously mentioned, the duty seems to be one that

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125. See notes 114-17 *supra* and accompanying text.

126. Michelman, *Constitutional Welfare Rights and A Theory of Justice*, in *READING RAWLS: CRITICAL STUDIES OF A THEORY OF JUSTICE* 319, 347 (1975).

127. See note 43 *supra* and accompanying text.

courts acting alone cannot or ought not undertake to define, impose, and enforce. Indeed, the texts themselves would hardly tolerate judicial enforcement in the face of legislative passivity.<sup>128</sup> But suppose that the historical circumstances indicate the existence of unmet welfare needs whose satisfaction is encompassed within the duty. Suppose also that a legislative action—the creation of a governmental program for supplementing incomes or providing services—seems geared towards meeting those needs. What, then, could be more in order than for the courts to treat that legislative action as intended to satisfy constitutional duties and rights when questions arise about how its provisions should be construed, or about how the claims it generates should be held to interact with other constitutional doctrines such as procedural due process or unreasonable classification?<sup>129</sup> Why, then, should courts engaged in these tasks go out of their way to deny that they are responding to claims of constitutional rights?

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128. Claims against others that they affirmatively provide for one's needs (wants, interests) plainly are not "immunities." In modern analytic usage, "privilege," like "immunity," connotes a negative claim, *i.e.*, the pursuit of some activity free of legal liability or sanction. See Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *YALE L.J.* 16 (1913) (In the context of section one of the fourteenth amendment, "privilege" obviously cannot carry its ordinary lay meaning of an indulgence to which one has no institutional claim.). Even if history allows the speculation that "privilege" appears in the fourteenth amendment with the sense borne by "claim right" in the latter day Hohfeldian system, the fourteenth amendment guarantees privileges, like immunities, only against abridgment by the making or enforcement of laws. The purely quiescent state evidently cannot violate the "privileges or immunities" clause. Perhaps under appropriate circumstances it can be said to deny the equal protection of the laws, but only with an obvious strain on usage.

129. See note 118 *supra* and accompanying text.

## APPENDIX A

In the six-year period from 1969 to 1974, the Supreme Court decided a number of cases relevant to the welfare-rights thesis. In this appendix, I discuss cases whose holdings are consistent with the thesis, but which were placed by the Court's opinions on alternate grounds.

*"Right to Travel" Cases*

In *Shapiro v. Thompson*<sup>130</sup> the Court held that durational residency conditions on the availability of AFDC benefits violate the "fundamental right of interstate movement."<sup>131</sup> Yet the Court also found it significant that the challenged requirement operated to "[deny] welfare aid upon which may depend the ability of families to obtain the very means to subsist—food, shelter, and other necessities of life."<sup>132</sup> Similarly, in *Memorial Hospital v. Maricopa County*<sup>133</sup> the Supreme Court found that a durational residency requirement for medical care benefits unconstitutionally infringed upon the right "to migrate" and "resettle" from one state to another.<sup>134</sup> Yet central in its reasoning was the observation that "medical care is as much 'a basic necessity of life' to an indigent as welfare assistance."<sup>135</sup>

*"Irrationality" Cases*

*United States Department of Agriculture v. Moreno*<sup>136</sup> held that the exclusion of unrelated households from food-stamp benefits denied equal protection of the laws because the classification bore no rational relationship to any legitimate purpose of the legislation.<sup>137</sup> *United States Department of Agriculture v. Murry*<sup>138</sup> invalidated as an impermissible "irrebuttable presumption" a provision that excluded from the food-stamp program households that contained another person's claimed tax dependent.<sup>139</sup> *New Jersey Welfare Rights Organization v. Cahill*<sup>140</sup> ruled that the denial of welfare benefits to families containing illegitimate children violated the equal protection clause because "there

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130. 394 U.S. 618 (1969).

131. *Id.* at 638.

132. *Id.* at 627.

133. 415 U.S. 250 (1974).

134. *Id.* at 255.

135. *Id.* at 259 (quoting HEW REPORT ON MEDICAL RESOURCES AVAILABLE TO MEET THE NEEDS OF PUBLIC ASSISTANCE RECIPIENTS, HOUSE COMM. ON WAYS AND MEANS, 87th Cong., 1st Sess. 74 (Comm. Print 1961)).

136. 413 U.S. 528 (1973).

137. *Id.* at 535-36.

138. 413 U.S. 508 (1973).

139. *Id.* at 514.

140. 411 U.S. 619 (1973).

can be no doubt that the benefits extended under the challenged program are as indispensable to the health and well-being of illegitimate children as to those who are legitimate."<sup>141</sup>

*"Procedural Fairness" Cases*

In *Goldberg v. Kelly*,<sup>142</sup> *Sniadach v. Family Finance Corp.*,<sup>143</sup> and *Fuentes v. Shevin*,<sup>144</sup> statutory schemes ran afoul of the due process clause, ostensibly because they authorized interruption of benefit streams or possessory interests without prior opportunity for an evidentiary hearing on the question of legal entitlement, eligibility, or default. Yet in *Goldberg* the Court found it necessary to observe that "welfare provides the means to obtain essential food, clothing, housing, and medical care,"<sup>145</sup> that "from its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders,"<sup>146</sup> that "welfare . . . can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community,"<sup>147</sup> and that "public assistance, then, is not mere charity, but a means to 'procure the Blessing of Liberty to ourselves and our Posterity'."<sup>148</sup> In *Sniadach* the Court plainly relied, in part, on its observation that "a prejudgment garnishment . . . may as a practical matter drive a wage-earning family to the wall."<sup>149</sup> In *Fuentes*, however, the Court—although noting that "a stove or a bed may be . . . essential to provide a minimally decent environment for human beings in their daily lives"—denied that *Goldberg* and *Sniadach* depended, or that in general the due process right to be heard before benefits or possessions are withdrawn depends, on whether or in what sense those benefits or possessions are "necessities."<sup>150</sup>

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141. *Id.* at 621.

142. 397 U.S. 254 (1970).

143. 395 U.S. 337 (1969).

144. 407 U.S. 67 (1972).

145. 397 U.S. at 264.

146. *Id.* at 264-65.

147. *Id.* at 265.

148. *Id.*

149. 395 U.S. at 341-42.

150. 407 U.S. at 89-90.

## APPENDIX B

*Ostensibly Contradictory Decisions That Need Not Be So Regarded*

*Dandridge v. Williams*<sup>151</sup> and *Jefferson v. Hackney*<sup>152</sup> may well be viewed as reflecting the lack of clear standards for defining the *extent* of welfare rights—a feature that may restrict courts to certain indirect modes of acting upon these rights, but does not require repudiation of them.<sup>153</sup> In *Dandridge* Maryland provided welfare assistance to all families that its law defined as needy, but granted somewhat less per capita to larger families. The Court simply had no basis to conclude that the amount allotted to any family fell below the (judicially unspecifiable) minimum welfare-rights standard, or to disregard the State's apparent conclusion that "inherent economies of scale" in larger families justify the use of scaled-down per capita payments for larger families as a good method for "allocating available public funds in such a way as fully to meet the needs of the largest possible number of families."<sup>154</sup> *Jefferson* yields easily to an essentially similar account.

In neither *James v. Valtierra*<sup>155</sup> nor *Lindsey v. Normet*<sup>156</sup> was the principle of an individual's constitutional right to minimally adequate shelter at stake in an ultimate sense. Nothing in that principle requires a state to use, as one of its devices for realizing the right, a requirement that subsidized housing for low-income families be admitted into municipalities where a majority of the residents object (at least until it plainly appears that tolerance for local exclusion makes realization a practical impossibility), or to allow a landlord's default on repair obligations as a defense to a landlord's action for possession on grounds of rent default. On the other hand, the principle would be directly challenged by allowing the state to evict occupants from publicly assisted housing for the needy without prior opportunity for the occupant to contest the eviction on some ground such as lack of need or antisocial conduct.<sup>157</sup> Lower courts have regularly held that such evictions would deprive occupants of property without due process of law,<sup>158</sup> and the Supreme Court has, on the one occasion when the question came before it, reached a compatible result in reliance on an administrative regulation.<sup>159</sup>

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151. 397 U.S. 471 (1970).

152. 406 U.S. 535 (1972).

153. See Michelman, *Welfare Rights*, *supra* note 1; note 22 *supra* and accompanying text.

154. 397 U.S. at 479-80, 484.

155. 402 U.S. 137 (1971).

156. 405 U.S. 56 (1972).

157. See note 22 *supra* and accompanying text.

158. See Michelman, *Formal and Associational Aims in Procedural Due Process*, *supra* note 1.

159. See *Thorpe v. Housing Auth.*, 393 U.S. 268 (1969).

In *San Antonio Independent School District v. Rodriguez*<sup>160</sup> the Court, observing that Texas made some positive effort through its program of state financial assistance to supply its local school districts with means to provide a minimally adequate education and that “no charge fairly could be made that the system fails to provide each child with the opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process,”<sup>161</sup> expressly left open the possibility that “some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [voting and free-expression rights]”<sup>162</sup> and that plaintiffs might have a valid claim “if a State’s financing system occasioned an absolute denial of educational opportunities to any of its children.”<sup>163</sup>

#### *Unpersuasive Alternative Explanations for Welfare-Rights Holdings*

The asserted “right to travel” basis for *Shapiro* and *Memorial Hospital*<sup>164</sup> fails to give an adequate account of *Sosna v. Iowa*,<sup>165</sup> *Starns v. Malkerson*,<sup>166</sup> or *Califano v. Gautier Torres*.<sup>167</sup> If the constitutional objection to residency requirements truly was their actual or likely “chilling effect” on the exercise of interstate migration rights—their actual or likely effect of deterring, encumbering, or practically preventing migration—then the *Sosna* and *Gautier Torres* decisions would be insupportable. The scheme upheld in *Gautier Torres* certainly had the most obvious deterrent potential of all those examined in the right-to-travel and residency-requirement series: all persons receiving social security benefits plainly had to make a heavy, easily calculable sacrifice if they chose to move to Puerto Rico. As for *Sosna*, a year’s denial to new residents of access to a state’s divorce courts certainly seems at least as likely to block or deter migration that might otherwise have occurred as a year’s denial of publicly provided, nonemergency medical care for newly arrived indigents, especially when one notes that the divorce-court exclusion has a potential bearing on the migration choices of the affluent as well as—indeed, almost certainly more than—those of the indigent, but the medical-care exclusion affects only the indigent.

In its *Memorial Hospital* opinion the Court, apparently recognizing the diffi-

160. 411 U.S. 1 (1973).

161. *Id.* at 37.

162. *Id.* at 36.

163. *Id.* at 37.

164. See notes 130-35 *supra* and accompanying text.

165. 419 U.S. 393 (1975).

166. 326 F. Supp. 234 (D. Minn. 1970), *aff’d*, 401 U.S. 985 (1971).

167. 435 U.S. 1 (1978) (right to travel not infringed by statutory scheme that pays nonsubsistence social security benefits to persons residing in the 50 states, but cuts off benefits to those who move to Puerto Rico).

culties implicit in a doctrine that treats *deterrence* as the factor selectively tying residency requirements to the right of interstate migration (the migration right invalidating the residency requirement only when one of a select class of benefits is at stake), proposed instead that the *penalty* is the key concept.<sup>168</sup> The key benefit-specific question, then, is whether the denial of a benefit to new arrivals operates to "penalize" migration. Exactly how the notion of "penalizing" differs from that of "detering" has never been made clear. One conceptually satisfactory answer is that a penalty represents a state's expression of hostility towards new arrivals or of deprecation towards their personal interests and needs. But if that is what a "penalty" signifies, then denying new arrivals the advantages of reduced college tuition fees that other bona fide residents enjoy is clearly within the category, and *Starns* is inexplicable.

The only remaining possibility is that "penalizing" the choice to migrate means exacting a price for its exercise (in temporarily withheld benefits), which in some sense is "too high" or "disproportionate." If so, then from what sources has the Court contrived the moral scale according to which having to wait a year for free emergency medical care (which few will ever need) is too high a price, but having to wait a year for divorce-access or tuition benefits is not? Must not the Constitution itself somehow be the source?<sup>169</sup> Does not there emerge, then, the categorical notion of a constitutional right to be provided, in case of need, with "the basic necessities of life?"<sup>170</sup>

The *Moreno-Murry-Cahill* series of cases discussed earlier<sup>171</sup> also merits further examination. The Court explained *Moreno* as simply a case of a classification that bore no rational relationship to any legitimate purpose of the legislation in which it appeared. The evident purposes of the food-stamp legislation, in the Court's view, were to absorb agricultural surpluses and to feed the hungry. Excluding otherwise eligible unrelated households had nothing to do with either of those purposes. Furthermore, insofar as one can infer from the exclusion itself an additional purpose to disadvantage those who choose to live in unrelated households, a "bare congressional desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest."<sup>172</sup> But the matter is not so clear. It is perfectly possible to view the congressional purpose in *Moreno* not as that of "harming" those who choose to live communally, but as providing a special kind or degree of support for traditional family units. It might be, in the dissenting opinion's words, "that the basic unit which . . . [Congress] was willing to support with federal funding through food stamps is some variation on the family as we know it—a house-

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168. 415 U.S. at 257-58.

169. See notes 19-21 *supra* and accompanying text.

170. 415 U.S. at 259.

171. See notes 136-41 *supra* and accompanying text.

172. 413 U.S. at 534 (emphasis in original).



hold consisting of related individuals.”<sup>173</sup> That it is constitutionally impermissible for government to offer preferential support to traditional family groupings, but leave unconventional or unrelated households to shift for themselves, is not a view that can be fairly ascribed<sup>174</sup> to a Court that would shortly rule as this one did in *Belle Terre v. Boraas*<sup>175</sup> and, subsequently, in *Moore v. East Cleveland*.<sup>176</sup> Justice Douglas’ opinion for the Court in *Belle Terre* undermines his suggestion in *Moreno* that the constitutional defect in the unrelated-households exclusion is its encroachment on a freedom-of-household-association specially protected by the first amendment.<sup>177</sup> In sum, the no-rational-relationship-to-purpose reasoning used by the *Moreno* Court depends upon the restriction of statutory purpose to that of feeding the needy. This restriction itself is either a judicial *coup de main* or a manifestation of a constitutional right to needed food (since it cannot be a right to live in an unrelated household).

A basically similar critique applies to *Murry*. For some reason the Court chose to base its decision in *Murry* on “irrebuttable presumption” rather than “rational basis” analysis. “Irrebuttable presumption” as an independent basis for constitutional invalidation has since run into severe academic criticism and judicial retrenchment. In fact, the Court’s refusal to accept an “irrebuttable presumption” claim in *Weinberger v. Salfi*,<sup>178</sup> a case bearing close structural similarities to *Murry* (except that the benefit involved—survivors’ benefits under social security—was not so directly subsistence-related), forced the *Salfi* Court to reanalyze *Murry* as a “no rational relationship” case.<sup>179</sup> Thus understood, *Murry*, like *Moreno*, must at bottom rest on a constitutional right to be furnished with needed means of subsistence.

*Cahill* requires a somewhat different treatment. Ostensibly, the constitutional objection to excluding families with children, all of whom are illegitimate, from AFDC benefits is that the exclusion constitutes invidious discrimination against the more-or-less “suspect” class of illegitimates. But that understanding of the decision has difficulty surviving *Mathews v. Lu-*

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173. *Id.* at 546 (Rehnquist, J., dissenting).

174. See Michelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 *IND. L.J.* 145, 189-94 (1977-1978).

175. 416 U.S. 1 (1974) (ordinance restricting land-use to one-family dwellings and defining family as more than one person related by blood, adoption, or marriage, or not more than two unrelated persons living as single household upheld as valid land-use legislation aimed at family needs).

176. 431 U.S. 494 (1977) (ordinance that limits occupancy of dwelling to particular members of family, excluding others related by blood, invalid under due process clause of fourteenth amendment).

177. *United States Dep’t of Agriculture v. Moreno*, 413 U.S. 528, 541-42 (1973) (Douglas, J., concurring).

178. 422 U.S. 749 (1975).

179. *Id.* at 772.

*cas.*<sup>180</sup> *Lucas* challenged a social security statute that provided survivors' benefits to all dependent children of deceased, covered individuals. The statute required illegitimate children, however, to prove actual dependency (according to defined criteria), but presumed the dependency of legitimate children without specific proof. In upholding the statutory scheme, the Court, of course, had to disavow any idea that statutory discriminations disadvantageous to illegitimates as a class are ipso facto "invidious" and unconstitutional. In distinguishing *Lucas* from *Cahill*, the Court viewed the purpose of the social security survivors' benefit in *Lucas* as identical with that of the AFDC payment in *Cahill*, i.e., to provide income for persons in need. But in *Lucas*, unlike *Cahill*, the statute did not exclude an illegitimate claimant from the benefit if his need was demonstrably genuine; if he proved dependency, he could collect. The Court further observed in *Lucas* that administrative convenience could justify excusing legitimate children from specifically proving dependency. But the "administrative convenience" justification is secondary to the observation that the *Lucas* scheme, unlike that in *Cahill*, will not result in deprivation of needed income to those who really need it; thus, it seems that need, rather than illegitimacy, is the truly operative constitutional factor in *Cahill*. The recent decision in *Lalli v. Lalli*,<sup>181</sup> which rejected an illegitimate's claim of unconstitutionally discriminatory treatment under state inheritance laws and sharply limited the opposite-tending decision in *Trimble v. Gordon*,<sup>182</sup> is consistent with this view. Inheritance does not directly implicate "the basic necessities of life" as do AFDC and, to a lesser degree, survivors' benefits.

What remains to be considered is whether or how far the due process explanation for *Goldberg*, which established a constitutional right to an evidentiary hearing prior to termination of AFDC benefits, should be taken to negate any inference from that decision of a constitutional right to the means of subsistence. The language of the *Goldberg* opinion supports this inference<sup>183</sup> as does the Court's subsequent affirmation in *Mathews v. Eldridge*<sup>184</sup> that ordinarily "something less than an evidentiary hearing prior to adverse administrative action [is sufficient]" to satisfy the right to due process.<sup>185</sup>

In the *Eldridge* case the Court upheld against due process attack a scheme for terminating social security disability benefits that assured prior notification to the recipient of the grounds for the proposed termination, offered a pretermination opportunity for written submissions by the recipient, delayed

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180. 427 U.S. 495 (1976).

181. 439 U.S. 259 (1978).

182. 430 U.S. 762 (1977).

183. See text accompanying notes 145-48 *supra*.

184. 424 U.S. 319 (1976).

185. *Id.* at 343.

the opportunity for an evidentiary hearing until after termination, and provided for retroactive payment of interim benefits if the post-termination hearing held the cutoff to have been erroneous. The Court distinguished *Goldberg* in part on the ground that the AFDC payment at stake in *Goldberg*, unlike the social security disability benefit in *Eldridge*, represented the irreducible means of subsistence. It would be too facile, however, to infer from this distinction alone any judicial apprehension of a right to subsistence. The Court's point, or one of its points, was that an interim deprivation of subsistence payments cannot practically be remedied by retroactive payment following a post-termination hearing (what will have happened in the meantime to the claimant mistakenly denied the means of subsistence?), but the same is not true of an interim lapse of disability payments (although a lapse might have forced the claimant to go "on welfare" in the meantime). Thus, one might have no more of a constitutional right to subsistence payments than to disability payments, but denial of a pretermination hearing could be a deprivation of property without due process with respect to the former type of benefit but not to the latter.

The force of that argument, however, is at least partially diminished by *Dixon v. Love*,<sup>186</sup> which upheld a state scheme for revocation of a driver's license prior to any evidentiary hearing in the case of a license held by a man employed as a truck driver.<sup>187</sup> The Court opined that the interim deprivation, if later shown to have been mistaken, could not be compensated adequately by a retroactive payment. Accordingly, the Court had no way to distinguish *Goldberg*, except to observe that "a driver's license may not be so vital and essential as are social insurance payments on which the recipient may depend for his very subsistence."<sup>188</sup> It might be argued that reliance on this distinction still does not signify recognition of a right to subsistence, as distinguished from a right to due process, because as *Eldridge* clearly holds, the determination of what process is constitutionally "due" depends in part on the gravity of the personal interest at stake. But that argument just takes us back again to the question of whence the Court derives its scale for weighing "gravity," if not from the Constitution.

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186. 431 U.S. 105 (1977).

187. *Id.* at 112-15.

188. *Id.* at 113.

