THE PRESENCE AND PERSISTENCE OF SOCIAL RIGHTS IN U.S. CONSTITUTIONAL LAW

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ABSTRACT

Although the U.S. Constitution is widely described as lacking enforceable social rights, a recent line of cases from the Ninth Circuit recognizes a limited right to shelter. Relying on the Eighth Amendment, the Ninth Circuit held that individuals who lack access to shelter have a limited right to stay on public land with their belongings. The Supreme Court reversed in 2024, portraying the Ninth Circuit's approach as an anomalous departure from accepted constitutional norms.

This Article argues that the Ninth Circuit's decisions were not an aberration but instead exemplify a longstanding and globally common mode of social-rights adjudication. The common assumption that social rights require courts to mandate affirmative provision of goods obscures a second, equally significant form of enforcement: judicial restraints on state action that would deprive people of the basic means of subsistence. Comparative constitutional practice shows that even when constitutions contain explicit social rights guarantees, courts frequently enforce them through negative and procedural protections—invalidating harmful policies or requiring processes that safeguard essential needs—rather than through sweeping commands to provide services. These interventions often arise not from expressly labeled social rights clauses but from civil and political rights, such as due process, property, and prohibitions on cruel treatment.

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Viewed through this lens, U.S. constitutional law has long contained a form of social-rights jurisprudence, particularly in cases involving the very poor. The Ninth Circuit's homelessness rulings fit this pattern: They deploy established constitutional norms to prevent the state from imposing penalties that undermine basic survival. Rather than a brief and anomalous experiment, Martin v. City of Boise *and* Johnson v. City of Grants Pass *illustrate a broader practice of enforcing subsistence rights through limits on governmental power.*

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INTRODUCTION

It is almost a truism that U.S. constitutional law does not protect social rights, such as the right to housing, education, or healthcare. Yet, starting in 2018, the Ninth Circuit found a limited right to shelter in the U.S. Constitution. In the 2018 case *Martin v. City of Boise,* the Ninth Circuit held that the City of Boise could not constitutionally fine or jail people for violating laws against camping on public land if public shelter was unavailable.[1] In a 2022 decision, *Johnson v. City of Grants Pass*, the Ninth Circuit expanded *Martin* to allow those without shelter not only to stay on public lands but also to do so with bedding and belongings.[2] In doing so, it created a constitutional basis for a phenomenon that has become a familiar feature of many cities: homeless encampments.[3] Those who had nowhere to go then had a right to stay on public land with their belongings. And a local government seeking to prevent such urban camping would have to offer an alternative in the form of shelter. The perhaps surprising basis for this right was the Eighth Amendment: Punishing those who have nowhere to go for sleeping on public land would amount to "cruel and unusual punishment[ ]."[4] Put differently, the Ninth Circuit used the Eighth Amendment to create a social right.

Commentators almost immediately began to predict that the Supreme Court would reverse this ruling, and in early 2024 it did.[5] Writing for a six-justice majority, Justice Gorsuch emphasized localities' constitutional authority to develop their own responses to homelessness: "[T]hey may find certain responses more appropriate for some communities than others. But in our democracy, that is

1. 902 F.3d 1031, 1035 (9th Cir. 2018), *amended by*, 920 F.3d 584 (9th Cir. 2019). The relevant ordinances usually seek to prohibit urban camping. As one commentator observes, "[t]hough there are subtle variations between cities, urban camping ordinances typically prohibit sleeping, preparing to sleep, or storing belongings on public property." Ben A. McJunkin, *The Negative Right to Shelter,* 111 CALIF. L. REV. 127, 130 (2023).

2. 72 F.4th 868, 890-91 (9th Cir. 2023), *rev'd*, 144 S. Ct. 2202 (2024).

3. *See* Mila Versteeg, Kevin L. Cope & Gaurav Mukherjee, *The New Homelessness*, 113 CALIF. L. REV. 433, 437 (2025).

4. U.S. CONST. amend. VIII; *see Johnson*, 72 F.4th at 888-92.

5. *See Grants Pass*, 144 S. Ct. at 2206.

their right."[6] He then expressed a familiar concern about the judicial enforcement of social rights. In addressing problems such as homelessness, Gorsuch explained, "judges [cannot] begin to 'match' the collective wisdom the American people possess."[7] Courts, he declared, should not "wrest" this power from local majorities.[8]

What ought we to make of this episode? One conclusion might be that the Ninth Circuit's ruling was a short-lived and ill-fated deviation from accepted constitutional norms. After all, the U.S. Constitution is widely described as lacking in social rights, such as the right to shelter.[9] Though states have a long tradition of enshrining such rights in the text of their subnational constitutions, the U.S. Constitution looks quite different.[10] On this account, the Ninth Circuit's line of cases seems anomalous. Indeed, that is how the Supreme Court's majority portrayed it. As Professors Risa Goluboff and Richard Schragger note, "[t]he Court's opinion reads as if the Ninth Circuit's 'experiment' in a limited right to shelter came out of nowhere."[11]

This Article argues that the Ninth Circuit's homelessness jurisprudence is not an aberration. These rulings participate in a mode of social rights enforcement that is familiar both from the United States's own constitutional history and from the rulings of other high courts around the globe. One reason why this connection may be hard to appreciate is that the term "social rights" is used to mean several different things. One common misperception is that courts can enforce social rights only by demanding that governments provide material goods or welfare-enhancing services. But importantly, courts can also enforce social rights by demanding governmental

6. *Id.*

7. *Id.*

8. *Id.*

9. *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) (finding no right to housing); *see also* Dandridge v. Williams, 397 U.S. 471, 484 (1970) (no right to subsistence); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 35 (1973) (no right to education); Harris v. McRae, 448 U.S. 297, 318, 322 (1980) (no right to healthcare); Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees*, 56 SYRACUSE L. REV. 1, 4 (2005) ("The constitutions of most nations create social ... rights ... but the American Constitution does nothing of the kind.").

10. *See* EMILY ZACKIN, LOOKING FOR RIGHTS IN ALL THE WRONG PLACES: WHY STATE CONSTITUTIONS CONTAIN AMERICA'S POSITIVE RIGHTS 48 (2013).

11. Risa L. Goluboff & Richard Schragger, Grants Pass *and the Vagrancy Revolution Revisited*, 2024 SUP. CT. REV. 191, 205 (2025).

restraint, making it harder for governments to deprive people of their means of survival. This second form of social rights enforcement is the way the U.S. Supreme Court has historically addressed the needs of the very poor.

We develop this argument by demonstrating that many of the countries with explicit social rights in their constitutions enforce them through restraints on government, rather than through mandates for governmental action. There are, to be sure, famous cases in which apex courts have mandated the positive governmental provision of goods in order to realize social rights, but courts often make much more cautious interventions.[12] Rather than issuing sweeping mandates for the governmental provision of goods or services, they often enforce social rights by declaring government action unconstitutional or by requiring the creation of procedural protections before governments can take away social-rights-related entitlements. What is more, such negative interventions do not have to be rooted in provisions that are explicitly labelled as social rights. They can also be found in civil and political rights, such as the right to property, due process, or the prohibition of cruel and unusual punishments.[13]

Through this comparative lens, the social rights rulings of the U.S. Supreme Court come into crisper focus. Similar to other national high courts, the U.S. Supreme Court has enforced social rights through a combination of procedural protections and prohibitions on particular forms of governmental action.[14] In this context, we can recognize the Ninth Circuit's decisions in *Martin* and *Grants Pass* as part of a larger practice within U.S. constitutional law, one that resembles social rights enforcement elsewhere.

The remainder of this Article is organized as follows. Part I lays the conceptual groundwork for our analysis by discussing what social rights are. One reason why social rights in U.S. constitutional law have not been fully recognized is the lack of conceptual clarity surrounding social rights. Part I, therefore, draws a distinction between social rights and positive rights, arguing that these are not the same. Notably, it is possible to enforce social rights through

12. See *infra* Part III for further discussion.
13. *See infra* Part III.
14. *See infra* Part IV.

prohibitions on government, much in the way civil and political rights are enforced.

Part II argues that the negative dimension of social rights has not been fully theorized, in part because the comparative literature on social rights has been so heavily focused on the positive duties implied by social rights. More specifically, scholars have been mostly concerned with the degree to which courts should dictate the affirmative steps required of governments in the fulfillment of social rights and have paid far less attention to the prohibitions they entail.

Part III focuses on the negative obligations entailed by social rights. It reviews cases from around the world in which apex courts have sought to protect existing entitlements but, in doing so, nonetheless protected social rights. It further shows that this kind of social rights review is not always based on social rights themselves but can also be based on traditional civil and political rights.

Part IV then turns back to the United States. It uses a comparative lens to identify cases in U.S. constitutional law that resemble social rights rulings in other countries and demonstrates that, despite the conventional wisdom that the U.S. Constitution lacks social rights, the U.S. Supreme Court has, at times, recognized such rights by enforcing the negative and procedural duties that flow from them. It then situates the Ninth Circuit's homelessness jurisprudence as part of this pattern.

Part V evaluates the trade-offs inherent in this mode of social rights enforcement. It observes that, while the benefits provided are extremely minimal, the advantage of this mode of rights enforcement is that the benefits are immediate and that it does not require courts to engage in the detailed law and policy making that is widely seen as the purview of the political branches.

The last Part concludes with a discussion of social rights in our current period of conservative ascendancy in the federal judiciary. On one hand, it is unsurprising that the conservative Supreme Court overturned a left-leaning ruling by a left-leaning appeals court. On the other hand, the Ninth Circuit's homelessness jurisprudence demonstrates that social rights are a feature not only of our constitutional history, but also of our contemporary moment. The fact that such rights have found even occasional expression in

today's political climate suggests that this way of reading the U.S. Constitution may persist until larger political structures create an opening for it to exert more pressure on the meaning of our fundamental law.

I. WHAT ARE SOCIAL RIGHTS?

Social rights encompass a complex set of related concepts that often lack crisp boundaries. In general, social rights are united by their relationship to their bearers' abilities "to achieve their basic human needs."[15] For example, rights to housing, healthcare, education, social security, food, and water are all typically considered to fall within the category of social rights.[16] Such rights are increasingly common in national constitutions—over two-thirds contain them.[17] The right to shelter—the topic of the Ninth Circuit's line of cases—is found in some form in 41 percent of constitutions in force today,[18] including those of South Africa,[19] Brazil,[20] Spain,[21] Sweden,[22] Greece,[23] Kenya,[24] Portugal,[25] and the Netherlands.[26]

Because social rights emphasize human needs, they are often confused with positive rights. Indeed, legal scholars and practitioners commonly conflate positive and social rights, often using terms

15. David E. Landau, *Social Rights*, MAX PLANCK ENCYC. OF COMPAR. CONST. L. (June 2016), https://oxcon.ouplaw.com/display/10.1093/law:mpeccol/law-mpeccol-e172?print=pdf [https://perma.cc/3GWQ-J26H].

16. *See id.*

17. *See* Courtney Jung, Ran Hirschl & Evan Rosevear, *Economic and Social Rights in National Constitutions*, 62 AM. J. COMPAR. L. 1043, 1053-54 (2014) ("[S]ocial rights are widely present in contemporary constitutions.... [A]pproximately seventy percent of current constitutions contain at least one explicitly justiciable ... social right."); David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1191, 1193, 1195-96 (2011).

18. Jung et al., *supra* note 17, at 1054.

19. S. AFR. CONST., 1996, § 26.

20. CONSTITUIÇÃO FEDERAL [C.F.] [CONSTITUTION] art. 6 (Braz.).

21. CONSTITUCIÓN ESPAÑOLA, B.O.E. n. 311, Nov. 13, 2024, art. 47 (Spain).

22. REGERINGSFORMEN [RF] [CONSTITUTION] 1:2 (Swed.).

23. 1975 SYNTAGMA [SYN.] [CONSTITUTION] 21(4) (Greece).

24. CONSTITUTION art. 43(1)(b) (2022) (Kenya).

25. CONSTITUIÇÃO DA REPÚBLICA PORTUGUESA [C.R.P.], art. 65, English translation available at https://diariodarepublica.pt/dr/geral/en/relevant-legislation/constitution-of-the-portuguese-republic.

26. GW. [CONSTITUTION] art. 22, sub. 2 (Neth.).

such as "positive-social rights," "positive rights," "socio-economic rights," "social, economic, and cultural rights," or "second-generation" rights.[27] We are, therefore, accustomed to thinking of social rights as positive rights—the kinds of constitutional guarantees that require government to intervene actively in social and economic life or redistribute resources, such as food or housing or medical care. It is this apparent requirement for active governmental intervention (rather than mere restraint) that has led many observers to equate the category of positive rights with that of social rights.

For our purposes, however, it is important to distinguish the idea of a positive right—one that requires affirmative intervention on the part of government—from that of a social right—one that concerns people's abilities to meet their basic human needs. This insight is, of course, not new. Writing in the 1980s, philosopher Henry Shue observed that all rights imply both negative and positive duties.[28] Shue argued that it is not rights themselves that can be distinguished as negative or positive but the correlative duties that they impose.[29] On this account, every right implies three kinds of correlative duties, some of which require restraint and others that require action.[30] In order to realize someone's right fully, it is

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27. *See, e.g.*, Cass Sunstein, *Against Positive Rights*, E. EUR. CONST. REV., Winter 1993, at 35, 35-36 (dubbing social and economic rights as "positive rights" without further scrutiny); Mary A. Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 525-26 (1992); SANDRA FREDMAN, HUMAN RIGHTS TRANSFORMED: POSITIVE RIGHTS AND POSITIVE DUTIES 66 (2008) ("[C]ivil and political rights are generally thought to refer to rights which protect individuals against intrusion by the State; while socio-economic rights are rights to protection by the State against want or need."); Ran Hirschl, *"Negative" Rights vs. "Positive" Entitlements: A Comparative Study of Judicial Interpretations of Rights in an Emerging Neo-Liberal Economic Order*, 22 HUM. RTS. Q. 1060, 1071 (2000) ("The term 'positive rights' is often used to describe these basic social rights, since they require the state to act positively to promote the well-being of its citizens, rather than merely refraining from acting.").

28. *See* HENRY SHUE, BASIC RIGHTS: SUBSISTENCE, AFFLUENCE, AND U.S. FOREIGN POLICY 51-53 (40th Anniversary ed. 2020); *see also* Frank I. Michelman, *The Protective Function of the State in the United States and Europe: The Constitutional Question*, *in* EUROPEAN AND U.S. CONSTITUTIONALISM 156, 156 (Georg Nolte ed., 2005) (positing that the state's "protective" function includes both "ensur[ing] provision to all citizens of the means of satisfying certain material interests such as subsistence, housing, health care, and education" and "safeguarding inhabitants effectively against various forms of violation and intrusion at the hands of [others].").

29. *See* SHUE, *supra* note 28, at 37.

30. *See id.* at 52.

necessary to avoid depriving them of the good specified by the right, to protect them from its deprivation, and to aid those who have been deprived of it.[31] Shue argues, therefore, that subsistence rights (like all rights) create both negative and positive duties.[32]

Importantly, then, social rights also create obligations to refrain from particular kinds of action. Consider the negative obligations that flow, for example, from a child's right to education. To realize the right to education, the government must ensure that education is provided. However, this right can also be violated if the government bars a child from attending school. In this sense, the right to education requires that the government refrains from this action. Or take the right to housing: This right can be violated by governments' destruction of peoples' housing or through a deliberate distortion of the market, which deprives some of housing access.[33] For example, in response to the destruction of homes by Nigerian security forces in Ogoni villages, the African Commission on Human and Peoples' Rights held that the Nigerian government had violated its negative obligations under the right to housing.[34] Once again, one of the duties created by the right to housing was that the government refrains from action.

This negative dimension of social rights does not have to amount to an absolute bar on removing access to a social rights-related good or service; it can also serve as a presumption against taking away existing social-rights-related entitlements.[35] We might imagine, for example, that providing social-welfare entitlements creates a reliance interest, or even a property right.[36] Such an entitlement can be taken away only if the government furthers a legitimate aim, considers alternatives, and satisfies core procedural guarantees. These negative obligations have received relatively little attention

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31. *Id.*

32. *See id.* at 53.

33. *Gov't of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1169 (CC) at para. 34 (S. Afr.).

34. *See* Dinah Shelton, *Decision Regarding Communication 155/96*, 96 AM. J. INT'L L. 937, 940 (2002).

35. For a version of this argument in international human rights law, see Comm. on Econ., Soc. & Cultural Rts., General Comment No. 3: The Nature of States Parties' Obligations, ¶ 9, U.N. Doc. E/1991/23, annex III (Dec. 14, 1990).

36. This argument builds on classical work by Professor Reich. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 769 (1964).

from scholars of social rights, but they help us to make sense of the Ninth Circuit's homelessness rulings.

The line of cases that the Supreme Court overturned in *City of Grants Pass v. Johnson* can be viewed as creating a social right by enforcing the negative obligations implied by that right.[37] Homeless people across Oregon had claimed public space to reside on; all the government had to do was not enforce its anticamping ordinances that prevented the homeless from staying in the street.[38] In this vein, Professor Ben McJunkin conceptualizes a "negative right to shelter," which entails the freedom "to undertake self-sheltering activities—from the simple use of blankets or bedding to the erection of temporary encampments in public spaces—free from the threat of criminalization."[39] The line of cases by the Ninth Circuit can be seen as creating such a negative right to shelter—though importantly, some strings were attached, including stipulations that people must be involuntarily homeless and not have access to shelter beds.[40] As we show below, because the literature on social rights has largely been focused on the mode of positive interventions, it has not paid enough attention to the negative dimension of social rights enforcement.

II. SOCIAL RIGHTS ENFORCEMENT: WEAK AND STRONG

The literature on social rights has mostly been focused on the positive duties that flow from social rights. One of the key questions, therefore, has been how courts should enforce requirements for affirmative governmental action. This Part briefly reviews the

37. 144 S. Ct. 2202 (2024).

38. The National League of Cities (which represents nineteen thousand cities and local jurisdictions in the United States and often advises local leaders on legal and policy matters) in the months following *Martin v. City of Boise*, 902 F.3d 1031 (9th Cir. 2018), *amended by*, 920 F.3d 584 (9th Cir. 2019), issued a memo telling cities that *Martin* "doesn't require cities to do anything; instead it requires cities in the Ninth Circuit *not* do something—arrest people experiencing homelessness for sleeping outside in public spaces when they have nowhere else to go." *What the Ninth Circuit's Camping Ruling Means for Housing First Strategies in Cities*, NAT'L LEAGUE OF CITIES (Sep. 19, 2018) (emphasis added), https://www.nlc.org/article/2018/09/19/what-the-ninth-circuits-camping-ruling-means-for-housing-first-strategies-in-cities/ [https://perma.cc/EUT3-DESE].

39. McJunkin, *supra* note 1, at 174-75.

40. For an in-depth discussion, see Versteeg et al., *supra* note 3, at 455-73.

literature; the next Part argues that this debate is not nearly as relevant when courts enforce the negative dimension of social rights and that other questions about social rights enforcement should garner our attention.

A core focus of the social rights literature for at least several decades has been the distinction between weaker and stronger forms of judicial intervention. Strong-form rulings are those in which courts mandate the enactment of specific public policies in order to fulfill social rights.[41] Perhaps one of the best examples of strong-form enforcement is the state constitutional right to shelter in New York.[42] In 1979, in response to a class action lawsuit filed by Robert Callahan and other homeless men, the New York Supreme Court held that the New York Constitution's requirement to provide for "[t]he aid, care and support of the needy"[43] required the City to provide shelter to residents.[44] Specifically, it held that all needy, indigent men were "entitled to board and lodging," and it determined that then-existing shelter spaces were insufficient.[45] It issued a temporary injunction requiring the City to provide shelter, and the parties soon entered into the "Callahan Consent decree," which set out detailed requirements for New York City's homeless shelters.[46] For example, it set standards on the nature and quality of beds and bedding,[47] required regular cleaning and maintenance of shelter

41. *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW 16 (2008).

42. *See* Bradley R. Haywood, Note, *The Right to Shelter as a Fundamental Interest Under the New York State Constitution*, 34 COLUM. HUM. RTS. L. REV. 157, 157 (2002); Christine Robitscher Ladd, Note, *A Right to Shelter for the Homeless in New York State*, 61 N.Y.U. L. REV. 272, 298-99 (1986); McJunkin, *supra* note 1, at 149-51.

43. N.Y. CONST. art. XVII, § 1. The decision also relied on N.Y. SOC. SERV. L. and N.Y.C. ADMIN. CODE.

44. *Ensuring the Right to Shelter: The First Court Decision in* Callahan v. Carey *Requiring the Provision of Shelter for Homeless Men in New York City*, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/wp-content/uploads/2014/07/CallahanvCareyFirstDecision1979.pdf [https://perma.cc/8ACT-Q6P3].

45. *Id.*

46. *See* Callahan v. Carey, No. 79-42582, ¶ 1-19 (N.Y. Sup. Ct. 1981) (Final Judgment by Consent).

47. *See id.* ¶ 2(c) (requiring that "[e]ach resident shall receive two clean sheets, a clean blanket, a clean pillow case, a clean towel, soap and toilet tissue" and that "[a] complete change of bed linens and towels will be made for each new resident and at least once a week and more often as needed on an individual basis").

facilities, mandated access to bathrooms and showers,[48] and required transportation to shelter facilities.[49] In the following years and decades, additional court orders further specified the contours of the constitutional right to shelter. For example, in response to complaints about noncompliance with the consent order, courts ordered as follows: improvements to plumbing,[50] a reduction of overcrowding in some shelters,[51] the creation of four hundred new beds within twenty-four hours, a halt to the practice of making shelter conditional upon compliance with social service plans, and an end to shelter eligibility rules.[52] Courts also extended the decree to women[53] and to homeless families with children.[54]

Much as Justice Gorsuch did in *Grants Pass*, critics of the New York court's approach to housing rights accused it of encroaching upon the powers of the political branches by substituting judicial judgments for democratic lawmaking.[55] The line of cases has also been criticized for its rigidity and inability to adapt to changing circumstances. As one *New York Times* report notes, because all decisions are litigated, the system has left little room for "iterative learning, or testing and failing and trying again."[56] Instead, any change "would be codified in place, never to be retooled except with

48. *Id.* ¶ 4.

49. *Id.* ¶¶ 2(j), 5, 6(d), 12(e).

50. Eldredge v. Koch, 459 N.Y.S.2d 960, 961 (Sup. Ct.), *rev'd*, 469 N.Y.S.2d 744 (App. Div. 1983); Eldredge v. Koch, 469 N.Y.S.2d 744, 755 (App. Div. 1983).

51. City of New York v. Blum, 470 N.Y.S.2d 308, 311-13 (Sup. Ct. 1983); Doe v. Dinkins, 600 N.Y.S.2d 939, 940-41 (App. Div. 1993).

52. *The Callahan Legacy: Callahan v. Carey and the Legal Right to Shelter*, COAL. FOR THE HOMELESS, https://www.coalitionforthehomeless.org/ourprograms/advocacy/legal-victories/the-callahan-legacy-callahan-v-carey-and-the-legal-right-to-shelter/ [https://perma.cc/45EB-NZ7B].

53. *Eldredge*, 459 N.Y.S.2d at 961; *Eldredge*, 469 N.Y.S.2d at 745.

54. McCain v. Koch, 502 N.Y.S.2d 720, 724, 726-29 (App. Div. 1986), *rev'd in part*, 511 N.E.2d 62 (N.Y. 1987).

55. *See, e.g.*, Susan V. Demers, *The Failures of Litigation as a Tool for the Development of Social Welfare Policy*, 22 FORDHAM URB. L.J. 1009, 1021 (1995) ("The ability of the city and state to develop homeless policy in a deliberative and rational manner was impeded by the need to respond to frequent motions for enforcement of the Consent Decree."); Tamia Perry, Note, *In the Interest of Justice: The Impact of Court-Ordered Reform on the City of New York*, 42 N.Y.L. SCH. L. REV. 1239, 1249-50 (1998).

56. Linda Gibbs, Guest Essay, *New York's 'Right to Shelter' Must Change. The Alternative Is Los Angeles.*, N.Y. TIMES (May 25, 2023), https://www.nytimes.com/2023/05/25/opinion/new-york-city-right-to-shelter.html [https://perma.cc/BX8A-CBXT].

the express consent of the parties and the judge."[57] The inflexibility pushed it to a breaking point during the immigrant influx of the 2020s. Conservative governors in Florida and Texas bussed immigrants to New York City, motivated in part by the City's relatively robust rights to shelter.[58] New York was unable to respond effectively to this dramatic spike in demand for shelter, which escalated calls to abolish the program entirely.[59] Indeed, the policy was the subject of countless negative headlines in 2023.[60] And today, the City increasingly appears to be trying to find work-arounds to its state constitutional obligations.[61]

Cases such as these have led many scholars of social rights to conclude that courts are institutionally ill-suited to their protection.[62] For instance, observing the growing constitutionalization of social rights in the early 1990s, Professor Cass Sunstein observed that courts "lack the tools of a bureaucracy" and "do not have a systematic overview of government policy."[63] Or, as Professor Jeff King explains (though does not endorse) the critique, courts lack the kind of expertise on questions that social rights adjudication poses,

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57. *Id.*

58. *See* A Martínez, Jeevika Verma, Simone Popperl & Amanda Michelle Gomez, *GOP Governors Sent Buses of Migrants to D.C. and NYC—with No Plan for What's Next*, NPR (Aug. 6, 2022, at 10:04 ET), https://www.npr.org/2022/08/05/1115479280/migration-border-greg-abbott-texas-bus-dc-nyc-mayors [https://perma.cc/5ATM-MQXM].

59. *See* Jeffery C. Mays, *New York City Asks for Relief from Its Right-to-Shelter Mandate*, N.Y. TIMES (May 23, 2023), https://www.nytimes.com/2023/05/23/nyregion/right-to-shelter-nyc.html [https://perma.cc/F67M-ZXNG].

60. *See* Ginia Bellafante, *New York's Right to Shelter Is Under Attack. Again.*, N.Y. TIMES (Oct. 6, 2023), https://www.nytimes.com/2023/10/06/nyregion/nyc-right-to-shelter-migrants.html [https://perma.cc/4NM7-LX4M]; Kiara Alfonseca, *New York's Right-to-Shelter Policy Faces Scrutiny amid Migrant Crisis*, ABC NEWS (Sep. 26, 2023, at 14:12 ET), https://abcnews.go.com/US/new-yorks-shelter-policy-faces-scrutiny-amid-migrant/story?id=103498346 [https://perma.cc/UXR7-M35S]; Jeffery C. Mays, *As Migrant Crisis Worsens, New York Leaders Pressure Biden to Do More*, N.Y. TIMES (Aug. 31, 2023), https://www.nytimes.com/2023/08/31/nyregion/migrant-messaging-nyc-adams.html [https://perma.cc/V3QR-22C2]; Anthony Izaguirre, *New York City Moves to Suspend 'Right to Shelter' as Migrant Influx Continues*, AP NEWS (Oct. 4, 2023, at 13:41 ET), https://apnews.com/article/new-york-city-immigration-shelter-eric-adams-480120d5d46d4b85a3c353c628a7d018 [https://perma.cc/6GUR-UDEV].

61. Gwynne Hogan, *New York's 'Right to Shelter' No Longer Exists for Thousands of Migrants*, THE CITY (Dec. 18, 2023, at 05:01 ET), https://www.thecity.nyc/2023/12/18/nyc-right-to-shelter-no-longer-exists/ [https://perma.cc/2FBB-NJWR].

62. *See* Frank B. Cross, *The Error of Positive Rights,* 48 UCLA L. REV. 857, 923-24 (2001).

63. Sunstein, *supra* note 27, at 37.

such as "[d]etermining whether a drug is safe, a building structurally sound, whether a certain test is appropriate for measuring a disability, or whether some proposed procedural right will cause unsustainable problems in a modern bureaucracy."[64] A related critique is that courts' dictating such questions violates the separation of powers, as judges assume lawmaking and regulatory powers.[65]

One possible response to these concerns is that courts should simply get out of the business of enforcing positive rights. Indeed, this was Professor Sunstein's initial position on the issue; he believed the problems with judicially enforced social rights were so large that constitutions should omit social rights entirely.[66] But national high courts have not generally taken this advice. In countries as diverse as Germany and Kenya, national courts have issued opinions enforcing social rights.[67] Social rights enforcement is common, yet there is substantial variation in how courts have done so.

Today, the prevailing academic consensus is that judges can avoid most of these institutional concerns by minimally scrutinizing social policies (or lack thereof), while leaving substantial discretion over implementation to the political branches. The literature calls such interventions "weak" or "minimalist."[68] The argument is that such weaker interventions avoid some of the difficulties inherent in

64. JEFF KING, JUDGING SOCIAL RIGHTS 6 (2012).

65. *Id.* at 4.

66. Sunstein, *supra* note 27, at 36.

67. *See, e.g.*, Malcolm Langford, *The Justiciability of Social Rights: From Practice to Theory*, *in* SOCIAL RIGHTS JURISPRUDENCE: EMERGING TRENDS IN INTERNATIONAL AND COMPARATIVE LAW 3, 3 (Malcolm Langford ed., 2009) (analyzing some two thousand social rights cases from twenty-nine national and international jurisdictions); Malcolm Langford, César Rodríguez-Garavito & Julietta Rossi, *Introduction: From Jurisprudence to Compliance*, *in* SOCIAL RIGHTS JUDGMENTS AND THE POLITICS OF COMPLIANCE: MAKING IT STICK 3-5 (Malcolm Langford, César Rodríguez-Garavito & Julieta Rossi eds., 2017); Siri Gloppen & Mindy Jane Roseman, *Introduction: Can Litigation Bring Justice to Health?*, *in* LITIGATING HEALTH RIGHTS: CAN COURTS BRING MORE JUSTICE TO HEALTH? 1-2 (Siri Gloppen & Alicia E. Yamin eds., 2011); INT'L COMM'N OF JURISTS, COURTS AND THE LEGAL ENFORCEMENT OF ECONOMIC, SOCIAL, AND CULTURAL RIGHTS: COMPARATIVE EXPERIENCES OF JUSTICIABILITY 107-16 (2008), https://www.refworld.org/pdfid/4a7840562.pdf [https://perma.cc/47R3-L7CH]; Colleen M. Flood, Lance Gable & Lawrence O. Gostin, *Introduction: Legislating and Litigating Health Care Rights Around the World*, 33 J.L., MED. & ETHICS 636, 636, 639 (2005).

68. CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 229-35 (2001); TUSHNET, *supra* note 41, at i, xi.

judicial capacity, providing a "middle course" between strong forms of review on the one hand and doing nothing on the other.[69] What is more, the literature has documented important benefits to such minimal interventions. Most notably, it forces interbranch dialogue on social rights-related policies, which can not only force legislative action, but also improve the quality of the legislative response through deliberation.[70]

The textbook example of a weak intervention is the South African Constitutional Court's 2000 housing decision, *Government of the Republic of South Africa v. Grootboom*.[71] The case concerned the eviction of Irene Grootboom and her community (comprised of 391 adults and 510 children) from private land earmarked for low-cost housing, along with the destruction of their makeshift homes.[72] The court held that the Constitution's right to housing required the government to have a well-documented and "reasonable" housing policy in place that takes account of society's most vulnerable, such as Ms. Grootboom and her community.[73] Because the government lacked such a policy, it had violated the right to housing.[74] Notably, the court did not enjoin the eviction or even require the government to provide emergency housing to the complainants. It merely ordered the government to adopt and implement a reasonable housing policy for those in need of housing.[75] It did not put a timeline on this order, as the court seemed to assume that Ms. Grootboom would herself eventually benefit from the housing

69. *See* SUNSTEIN, *supra* note 68, at 233.

70. There is a large literature on the value of interbranch dialogue that comes from weaker forms of judicial review. *See, e.g.*, Stephen Gardbaum, *The New Commonwealth Model of Constitutionalism*, 49 AM. J. COMPAR. L. 707, 710, 724, 745-47 (2001); Christine Bateup, *The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue*, 71 BROOK. L. REV. 1109, 1110 (2006).

71. *Gov't of the Republic of S. Afr. v. Grootboom*, 2000 (11) BCLR 1169 (CC) (S. Afr.). For an extended discussion, see Malcolm Langford, *Housing Rights Litigation:* Grootboom *and Beyond*, *in* SOCIO-ECONOMIC RIGHTS IN SOUTH AFRICA: SYMBOLS OR SUBSTANCE? 187, 187-89, 192-94 (Malcolm Langford et al. eds., 2014).

72. *Grootboom*, 2000 (11) BCLR 1169 (CC) at para. 4.

73. *Id.* at para. 41; *see also* S. AFR. CONST., 1996, § 26(2).

74. *Grootboom*, 2000 (11) BCLR 1169 (CC) at para. 41.

75. Kameshni Pillay, *Implementation of* Grootboom*: Implication for the Enforcement of Socio-Economic Rights*, 6 LAW, DEMOCRACY & DEV. 255, 264 (2002) (describing the *Grootboom* order as "declaratory" in nature).

policy.[76] The court took this minimalist approach because, it observed, "[t]he precise contours and content of the measures to be adopted are primarily a matter for the legislature and the executive," and that it was therefore not for the court to "enquire whether other more desirable or favourable measures could have been adopted, or whether public money could have been better spent."[77]

The decision attracted praise from academics and policymakers around the world as an example of how courts could enforce social rights while respecting other branches' expertise.[78] Indeed, the decision caused Professor Sunstein to reverse his earlier opposition to courts enforcing social rights.[79] He describes the decision as "respectful of democratic prerogative and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met."[80] Professor Mark Tushnet likewise describes the case as an example of weak form judicial review that gave the right to housing "some judicially enforceable content" but which also gave the legislature "an extremely broad range of discretion about providing those rights."[81] The comparative literature has largely arrived at the consensus that, to the extent a court is crafting policy details, it is best done in ongoing dialogue with the government and with some amount of discretion for the government. Indeed, academic attention to the case has been so significant that some have observed that this case alone spurred a new canon in comparative constitutional law.[82]

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76. *See Grootboom*, 2000 (11) BCLR 1169 (CC) at para. 41.

77. *Id.* For an analysis of the first years of the South African Constitutional Court, see, for example, JAMES FOWKES, BUILDING THE CONSTITUTION: THE PRACTICE OF CONSTITUTIONAL INTERPRETATION IN POST-APARTHEID SOUTH AFRICA, 242-45 (2016); THEUNIS ROUX, THE POLITICS OF PRINCIPLE: THE FIRST SOUTH AFRICAN CONSTITUTIONAL COURT, 1995-2005, 145 (2013).

78. *See, e.g.*, TUSHNET, *supra* note 41, at 242-44; Eric C. Christiansen, *Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court*, 38 COLUM. HUM. RTS. L. REV. 321, 324 (2007); Rosalind Dixon, *Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited*, 5 INT'L J. CONST. L. 391, 392 (2007); Mark S. Kende, *The South African Constitutional Court's Construction of Socio-Economic Rights: A Response to Critics*, 19 CONN. J. INT'L L. 617, 617 (2004); Linda Stewart, *Adjudicating Socio-Economic Rights Under a Transformative Constitution*, 28 PENN. ST. INT'L L. REV. 487, 496 (2010).

79. SUNSTEIN, *supra* note 68, at 221.

80. *Id.* at 221-22.

81. TUSHNET, *supra* note 41, at 242, 244.

82. *See* David E. Landau, Grootboom *and the One Case (or One Country?) Canon on Social*

III. BEYOND WEAK AND STRONG SOCIAL RIGHTS REVIEW

Although the distinction between strong- and weak-form review has dominated a great deal of the literature on social rights, the strength of enforcement is not especially relevant to cases, such as *Grants Pass*, in which courts are asked to protect social rights by mandating governmental restraint. When courts enforce social rights in this way, there is far less reason for judges to wade into the particulars of spending programs or to engage in a dialogue with legislatures about their design. These kinds of cases, in which courts enforce the negative duties that flow from social rights, pose less concern about the degree to which judges will craft detailed policy in place of legislatures. In fact, one might say that they are the bread and butter of what most constitutional courts routinely do: forcing government restraint.[83]

Indeed, a rather different set of questions presents itself when courts enforce the negative duties created by social rights. Rather than asking about the degree to which courts ought to craft social policy, these cases often arise once social policies have been enacted to meet people's basic needs. Once governments have enabled people to survive through some program or license, courts enforce social rights by asking what kinds of ongoing obligations this situation creates and the circumstances under which these benefits can be constitutionally revoked or denied. When people have identified their own means of survival, outside of governmental programs,

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Rights (Feb. 24, 2012) (unpublished manuscript at 10), https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1142&context=schmooze_papers/ [https://perma.cc/HSH9-MGGF] ("*Grootboom* is important not because it 'solves' the problem of how to enforce social rights in developing countries, but because it helps defuse the tension between judicial review of social rights and the counter-majoritarian difficulty in American constitutional theory. And this has broader implications for the nature of judicial review of all types in a mature democracy like the United States.").

83. *See* David E. Landau, *The Reality of Social Rights Enforcement*, 53 HARV. INT'L L.J. 189, 195-96, 199 (2012) ("[T]he critics of the conventional view are right that social rights enforcement is not always and inevitably different from negative rights enforcement.... A second way in which courts manage the tension is by issuing *negative injunctions* striking down a law and maintaining the status quo, rather than issuing positive orders forcing the state to provide a service. Again, by doing this, the courts are assimilating social rights enforcement into the enforcement of traditional first-generation rights—it is issuing a merely negative remedy for the right.").

courts similarly ask whether government can deprive people of these goods or modes of existence.

These approaches to enforcing social rights are common around the world. In fact, the emphasis on the negative dimension of social rights may be the prevailing approach in most European countries, where courts have generally been cautious to create full-fledged positive rights, notwithstanding the fact that these rights are explicitly enumerated in the constitution. There were several cases in this vein in the wake of the 2008 financial crisis in which apex courts protected social rights from austerity measures.[84] The basic rationale in these cases is that, when social rights are protected in a constitution, the government cannot reduce them in a manner that is disproportionate and without considering alternatives. For example, the Latvian Constitutional Court used the constitution's right to social security to strike down a series of austerity measures that the legislature passed in response to the 2008 financial crisis.[85] Around the same time, the Constitutional Court of Lithuania likewise struck down several austerity measures that would have reduced state pensions for working persons as a disproportionate infringement on the rights to work and receive social security.[86] Likewise, the Constitutional Court of Romania struck down pension cuts as a violation of the right to social security, which could not simply be taken away or cut.[87] These courts, then, enforce the

84. *See* Mila Versteeg, *Can Rights Combat Economic Inequality?*, 133 HARV. L. REV. 2017, 2039-40, 2043 n.163 (2020) (reviewing SAMUEL A. MOYN, NOT ENOUGH: HUMAN RIGHTS IN AN UNEQUAL WORLD (2018)).

85. Claire Kilpatrick, *Constitutions, Social Rights and Sovereign Debt States in Europe: A Challenging New Area of Constitutional Inquiry*, *in* CONSTITUTIONAL CHANGE THROUGH EURO-CRISIS LAW 279, 299 (Thomas Beukers, Bruno de Witte & Claire Kilpatrick eds., 2017); Xenophon Contiades & Alkmene Fotiadou, *Social Rights in the Age of Proportionality: Global Economic Crisis and Constitutional Litigation*, 10 INT'L J. CONST. L. 660, 677 (2012).

86. *See* Lietuvos Respublikos Konstitucinis Teismas [Constitutional Court of the Republic of Lithuania] Feb. 6, 2012, Case No. 46/2010-47/2010-48/2010-49/2010-51/2010-52/2010-70/2010-77/2010-82/2010-83/2010-84/2010-85/2010-86/2010-87/2010-94/2010-100/2010-101/2010-109/2010-114/2010-123/2010-124/2010-128/2010-129/2010-133/2010-134/2010-142/2010-143/2010-1/2011-2/2011-5/2011-8/2011-16/2011-21/2011-23/2011-25/2011-29/2011-32/2011-37/2011-39/2011, https://www.lrkt.lt/en/court-acts/search/170/ta1073/content [https://perma.cc/8SAL-H7UM] (Lith.).

87. *See* Bogdan Iancu, *Romania—The Vagaries of International Grafts on Unsettled Constitutions*, *in* NATIONAL CONSTITUTIONS IN EUROPEAN AND GLOBAL GOVERNANCE: DEMOCRACY, RIGHTS, THE RULE OF LAW 1047, 1075-76 (Anneli Albi & Samo Bardutzky eds., 2019).

negative dimension of social rights: The government cannot simply cut existing entitlements.

The European Court of Human Rights has also enforced social rights in this way. In one notable case, which bears similarity to the Ninth Circuit's line of cases, the court held that Bulgaria could not evict informal squatters without offering an alternative.[88] This case concerned a community of several hundred Roma that had resided in makeshift homes for decades on public land. The court held that their eviction constituted an infringement of Article 8 of the European Convention on Human Rights, which protects private and family life, including the protection of the home.[89] The State could not evict them without considering alternatives, such as legalizing the informal settlement and providing water and sewage facilities. And if eviction were necessary, the State must provide alternative accommodations.[90] This decision is similar to the Ninth Circuit's case law, which, without explicitly recognizing a right to housing, nonetheless protects the homeless from some forced relocations, unless an alternative was made available—that is, shelter.[91]

When courts engage in this type of rights enforcement, protecting people's means of living by preventing the government from withdrawing benefits, they do not always frame it as the enforcement of social rights. Courts have used a range of different rights to protect social rights-related entitlements from the state. One example is the right to property. One court that has used this right to protect social entitlement is the Constitutional Court of Hungary. When the government in the early 1990s implemented austerity to comply

88. *See* Yordanova v. Bulgaria, App. No. 25446/06, ¶ 133 (Sep. 24, 2012), https://hudoc.echr.coe.int/fre?i=001-110449 [https://perma.cc/QZ6Q-VG5X].

89. *See id.* ¶¶ 3, 134.

90. *Id.* ¶ 133.

91. *See* Martin v. City of Boise, 902 F.3d 1031, 1049 (9th Cir. 2018), *amended by*, 920 F.3d 584 (9th Cir. 2019). Likewise, the Committee that interprets the International Covenant on Economic, Social and Cultural Right has said that when evicting people from public land, a state has to take "all appropriate measures, to the maximum of its available resources, to ensure that adequate alternative housing, resettlement or access to productive land ... is available." Comm. on Econ., Soc. & Cultural Rts., General Comment No. 7: The Rights to Adequate Housing (Art. 11 (1) of the Covenant): *Forced Evictions*, U.N. Doc. E/1998/22, annex IV, ¶¶ 16-17 (1997). Another similar case comes from Colombia. *See* Corte Constitucional [C.C.] [Constitutional Court], abril 27, 2022, Sentencia T-146/22, Gaceta de la Corte Constitucional [G.C.C.] (vol. X, p.112) (Colom.).

with requirements set by the International Monetary Fund,[92] the Court struck down many of these measures in the name of the right to property.[93] Its key logic was that people had contributed to many of the programs that were on the chopping block, and they therefore had a property right in them. Legal challenges to pension cuts in Greece in the wake of the country's debt crisis were also based on the right to property (though they were not successful).[94] Notably, in these cases, the right to property is deployed much in the same way that other courts have deployed their social rights.[95] Courts have also used equality rights to protect the negative dimension of social rights. For example, the Portuguese Constitutional Court struck down austerity measures as a violation of the right to equality, based on the argument that the benefit cuts were not equally distributed among the population.[96] While these cases are not based on social rights directly, the literature has recognized them as social rights cases.[97]

In contrast to Europe, courts in Latin America have been more willing to enforce the positive dimension of social rights, a phenomenon well-documented in the literature.[98] Many courts in Latin America have insisted that there is a basic minimum, or "minimum core," to social rights that is to be enforced immediately.[99] Much of

92. *See* Kim Lane Scheppele, *A Realpolitik Defense of Social Rights*, 82 TEX. L. REV. 1921, 1944-45 (2004).

93. *See* Alkotmánybíróság (AB) [Constitutional Court], June 30, 1995, MK 56/1995. No. 43/1995 (Hung.) (on social security benefits), *translated in* LÁSZLÓ SÓLYOM & GEORG BRUNNER, CONSTITUTIONAL JUDICIARY IN A NEW DEMOCRACY: THE HUNGARIAN CONSTITUTIONAL COURT 322, 329 (2000).

94. *See, e.g.*, Symboulion Epikrateias [S.E.] [Supreme Administrative Court] 668/2012 (Greece).

95. *See* Versteeg, *supra* note 84, at 2029-30.

96. *See, e.g.*, Tribunal Constitucional (TC) [Constitutional Court], Apr. 5, 2013, Acórdão n.º187/2013, available at http://www.tribunalconstitucional.pt/tc/en/acordaos/20130187e.html [https://perma.cc/8M35-T3BC].

97. *See* Versteeg, *supra* note 84, at 2029-30.

98. *See, e.g.*, Landau, *supra* note 83, at 202, 230.

99. *See* David Landau, *The Promise of a Minimum Core Approach: The Colombian Model for Judicial Review of Austerity Measures*, *in* ECONOMIC AND SOCIAL RIGHTS AFTER THE GLOBAL FINANCIAL CRISIS 267, 270-71 (Aoife Nolan ed., 2014). In international law, this is known as the minimum core requirement. *See, e.g.*, David Bilchitz, *Giving Socio-Economic Rights Teeth: The Minimum Core and Its Importance*, 119 S. AFR. L.J. 484, 484 (2002); International Covenant on Economic, Social and Cultural Rights art. 2(1), Dec. 16, 1976, 993 U.N.T.S. 3; Comm. on Econ., Soc. & Cultural Rts., *supra* note 35, ¶ 10.

the enforcement of social rights in Latin America is done on an individual basis through the mechanism of the *amparo* or *tutela*, but the continent also has seen many examples of more structural, strong-form social rights interventions.[100] Perhaps most famously, the Colombian Constitutional Court has over the years restructured the Colombian healthcare system in major ways.[101]

But, notwithstanding Latin American courts' different posture, the negative dimension of social rights has also played a role. Take, for example, the 2001 financial crisis in Argentina. To prevent a bank run, the government required dollar-based savings accounts to be converted into pesos at an unfavorable rate, causing people to lose much of their savings.[102] Lower courts around the country used the right to property to restore the account balances of middle-class Argentinians.[103] Similarly, in 2002 the Argentine Supreme Court declared a 13 percent cut to public servant salaries carried out in 2001 to be an unconstitutional infringement of the right to property.[104] A year later, in a very similar case, the Inter-American Court of Human Rights also held that pensions are protected by the right to property.[105]

If we think of social-right-related goods and services provided by the government as a form of property, then it is easy to understand why courts might require governments to establish procedural protections for their recipients. After all, constitutional systems commonly place procedural safeguards around property, and courts frequently enforce these requirements by reviewing whether such procedures existed and were followed. While one approach to enforcing social rights is to deem them a kind of property that government is not at liberty to confiscate, another is to allow government to confiscate it only after conducting a hearing or

100. *See* Alicia Ely Yamin & Oscar Parra-Vera, *How Do Courts Set Health Policy? The Case of the Colombian Constitutional Court*, 6 PLOS MED. 147, 149 (2009); Versteeg, *supra* note 84, at 2032.

101. *See* Yamin & Parra-Vera, *supra* note 100, at 147-49 (providing an overview of the Colombian Constitutional Court's restructuring of the country's healthcare system).

102. *See* Catalina Smulovitz, *Judicialization of Protest in Argentina: The Case of* Corraltio, *in* ENFORCING THE RULE OF LAW: SOCIAL ACCOUNTABILITY IN THE NEW LATIN AMERICAN DEMOCRACIES 55, 56-58 (Enrique Peruzzotti & Catalina Smulovitz eds., 2006).

103. *See id.* at 60-63.

104. *Id.* at 59.

105. Five Pensioners v. Peru, 2003 Inter-Am. Ct. H.R. (ser.C) No.98 (Feb. 23, 2003).

engaging in some kind of process that would allow those affected to contest the decision.

Such procedural social rights protections have been particularly important in the context of the right to housing and homelessness. Several courts around the world have mandated that procedures be established before evictions, including those from publicly owned land. In fact, according to Professor Fredman's comprehensive comparative study of housing rights, the most common way that courts have offered protections to the homeless settled on public land is by demanding the provision of procedural protections upon eviction.[106] Take again the example of South Africa, where many homeless people reside in makeshift homes on public land, and where evictions have produced a large body of case law. The South African Constitutional Court considers the provision of alternative arrangements an important factor in making a judicial determination on whether evictions are lawful.[107] Yet, the court does not explicitly deem it a precondition for evictions.[108] Instead, it routinely insists on public consultation and meaningful engagement between local officials and the homeless people.[109] In neighboring Zimbabwe, one scholar argues that the procedural protections against forced evictions are the most significant way that the new Constitutional Court has enforced social rights.[110]

Another example is the famous Indian Supreme Court case *Olga Tellis v. Bombay Municipal Corp.*, in which the Indian Supreme

106. *See* SANDRA FREDMAN, COMPARATIVE HUMAN RIGHTS LAW 278-81 (2018). One might argue that such procedural protections do not provide a housing right at all. If they do, then the procedural protections that attach to social welfare benefits in American constitutional law also qualify as social rights.

107. *See id.* at 291.

108. *See Port Elizabeth Mun. v. Various Occupiers* 2005 (1) SA 217 (CC) para. 28, 58 (S. Afr.). For a discussion, see FREDMAN, *supra* note 106, at 291.

109. *See, e.g.*, *Residents of Joe Slovo Cmty. W. Cape v. Thubelisha Homes* 2009 (9) BCLR 847 (CC) (S. Afr.); *Occupiers of 51 Olivia Rd. v. City of Johannesburg* 2008 (3) SA 208 (CC) para. 5 (S. Afr.). *See generally* Sandra Liebenberg, *Engaging the Paradoxes of the Universal and Particular in Human Rights Adjudication: The Possibilities and Pitfalls of 'Meaningful Engagements'* 12 AFR. HUM. RTS. L.J. 1 (2012) (detailing the South African jurisprudence that developed the meaningful engagement standard).

110. *See* David Tinashé Hofisi, *Social Rights Entrenchment and Legal Traditions in Africa: An Illusory Internationalization?*, *in* THE OXFORD HANDBOOK OF COMPARATIVE HUMAN RIGHTS LAW (Neha Jain & Mila Versteeg eds., forthcoming 2026) (manuscript at 25) (on file with authors).

Court found that the mass eviction of pavement and slum dwellers in Bombay (many of whom were migrants), from the city to their places of origin violated the right to life under the Indian Constitution.[111] While it found that the right to life included a right to livelihood, the court also insisted upon a right for the public to make use of sidewalks that were unobstructed and free from city dwellers.[112] In balancing these two values, the court required the City to follow proper procedures for removing city dwellers, including a right for them to be consulted.[113] The court observed that such a procedure would give the city dwellers "an opportunity that expresses their dignity as persons," while also giving them time to find an alternative option.[114]

Armed with this view of social rights enforcement as frequently negative, procedural, or grounded in property rights, the jurisprudence of the U.S. Supreme Court seems less distinct than it might at first appear.

IV. SOCIAL RIGHTS AND THE U.S. CONSTITUTION

It is certainly true that the text of the U.S. Constitution contains no explicit rights to goods such as food, housing, medical care, or education. It is also inarguably the case that the U.S. Supreme Court has been more reluctant to read social rights as implicit constitutional guarantees than many other high courts worldwide.[115] At times, in fact, the Supreme Court has gone out of its way to explain that the Constitution does not require the government to protect even its most vulnerable citizens from anything but direct government action. In 1989, for instance, the U.S. Supreme Court determined that children have no constitutional rights to protection

111. Olga Tellis v. Bombay Mun. Corp., [1985] Supp. 2 SCR 51.

112. For an extended discussion, see FREDMAN, *supra* note 106, at 280-81.

113. *Olga Tellis*, [1985] Supp. 2 SCR at 91, 98. For a further discussion, including more recent cases, see Mathew Idiculla, *A Right to The Indian City? Legal And Political Claims Over Housing and Urban Space in India*, 16 SOCIO-LEGAL REV. 1, 15-20 (2020).

114. FREDMAN, *supra* note 106, at 281.

115. *See generally* Mila Versteeg & Emily Zackin, *American Constitutional Exceptionalism Revisited*, 81 U. CHI. L. REV. 1641 (2014) (describing the distinctive nature of American constitutionalism from a comparative lens). By contrast, U.S. state courts have been more willing to enforce such rights, often through rulings grounded in state constitutions. *Id.* at 1696.

against violently abusive parents.[116] The opinion famously declared that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."[117] The Due Process Clause, it explained, is "a limitation on the State's power to act, not ... a guarantee of certain minimal levels of safety and security."[118] The idea here, known as the state action doctrine, is that when private actors (or market forces or bad luck) are a source of danger, the U.S. government is under no constitutional obligation to offer help.[119] This reading of the U.S. Constitution as lacking in any guarantees of safety or wellbeing would seem to rule out the presence of social rights. Indeed, the state action doctrine is often cited as evidence that the U.S. constitutional tradition simply lacks them.[120] However, this doctrine is not the complete story of social rights in U.S. constitutional law.

Despite the state action doctrine, it is possible to discern a tradition of social rights enforcement grounded in the U.S. Constitution. Similar to the foreign high court rulings described above, the U.S. Supreme Court has enforced social rights by requiring some combination of outright governmental restraint and procedural protections before governments can take away the means of survival for economically marginalized people. The Ninth Circuit's recent homelessness jurisprudence fits comfortably in the context of these cases. Indeed, we can view these Ninth Circuit rulings as a recent iteration of a familiar mode of social rights enforcement—one that addresses the needs of those struggling with economic precarity by placing checks on government actions that would make survival even harder. In addition, when the government has already acted, typically by arresting or imprisoning someone, the Supreme Court has enforced affirmative, welfare-enhancing obligations on the

116. *See* DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189, 191, 195 (1989).

117. *Id.* at 195.

118. *Id.*

119. *See* Terri Peretti, *Constructing the State Action Doctrine, 1940-1990*, 35 LAW & SOC. INQUIRY 273, 273-76 (2010).

120. *See, e.g.*, Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?, in* AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS 90, 108 (Michael Ignatieff ed., 2005); Mark Tushnet, *The Issue of State Action/Horizontal Effect in Comparative Constitutional Law*, 1 INT'L J. CONST. L. 79, 88 (2003).

government. In this sense, too, the Ninth Circuit's requirement that the government provide shelter when it gets into the business of clearing people out of public spaces is familiar to our constitutional tradition.

First, let us consider the Court's negative approach to social rights. Similar to high courts in other countries, the U.S. Supreme Court has enforced social rights by making it harder for the government to withdraw social benefits. The high-water mark in this regard occurred in 1970, when the Supreme Court decided *Goldberg v. Kelly*.[121] *Goldberg* concerned a federal assistance program known as Aid to Families with Dependent Children (AFDC).[122] In administering this federal program, states were largely empowered to determine who was eligible for benefits and were therefore in a position to terminate benefits when they determined a beneficiary had become ineligible.[123] This high degree of local discretion left beneficiaries at the mercy of state policymakers' and bureaucrats' moral judgments, sometimes-harassing tactics, and administrative errors.[124] The Court addressed this vulnerability in *Goldberg*.

Though the Court never ruled that the provision of aid to those living in poverty was required by the U.S. Constitution,[125] it did declare that the termination of AFDC benefits without "the opportunity for an evidentiary hearing prior to termination" violated the recipients' right to due process.[126] The Court connected this procedural protection to the concerns for human safety and well-being that define social rights.[127] It cited the district court's determination that terminations from AFDC occurred in the face of recipients' "brutal need"[128] and went on to explain that the program provided "the means to obtain essential food, clothing, housing, and medical care" and that "termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very

121. 397 U.S. 254 (1970).
122. *See id.* at 256 & n.1; Aid to Families with Dependent Children, 42 U.S.C. §§ 601-619.
123. *Goldberg*, 397 U.S. at 256-58, 262.
124. *See id.* at 266, 268.
125. *See id.* at 267.
126. *Id.* at 255, 264.
127. *See id.* at 264-65.
128. *Id.* at 261.

means by which to live while he waits."[129] Noting the desperation this situation would cause, the majority opinion described national responsibility to help people avoid such a desperate and demeaning situation: "From its founding the Nation's basic commitment has been to foster the dignity and wellbeing of all persons within its borders."[130] In a companion case, *Wheeler v. Montgomery*, the Court cited *Goldberg* and ruled that the State must also provide the opportunity for an evidentiary hearing before terminating old-age benefits.[131] In both cases, the reasoning is strikingly similar to the social rights rulings of the Indian Supreme Court and South African Constitutional Court.

Since then, the Supreme Court has also elaborated on the nature of these procedural protections, finding that such an evidentiary hearing has to "closely approximat[e] a judicial trial."[132] Professor Jeff King has observed that the procedural requirements imposed by the Supreme Court are actually stronger than those granted by most foreign courts that are protecting explicitly enumerated social rights.[133] Foreign courts do not typically insist on procedures that approximate a trial but instead require notice or dialogue.[134] The *Goldberg* protections have since been applied to numerous social welfare programs,[135] including when it comes to shelter for the homeless. For example, the D.C. Circuit held in 1983 that the District's statutory shelter protections create such a reliance interest that it may not close a shelter without robust procedures.[136]

Not only did the *Goldberg* opinion describe the nation's commitment to addressing the basic needs of those living in the United States, but it also resembled other countries' social-rights rulings in that it enforced social rights by placing them in the category of property rights. Adopting an argument that law professor Charles Reich first made in his famous 1964 article, *The New Property,* the

129. *Id.* at 264.
130. *Id.* at 264-65.
131. 397 U.S. 280, 281-82 (1970).
132. Mathews v. Eldridge, 424 U.S. 319, 333-35 (1976).
133. Jeff King, *Two Ironies About American Exceptionalism over Social Rights*, 12 INT'L J. CONST. L. 572, 572, 577-80 (2014) (discussing the *Goldberg* case as going beyond what some foreign courts have been willing to do).
134. *See id.* at 579.
135. *See id.* at 588.
136. Williams v. Barry, 708 F.2d 789, 790-91 (D.C. Cir. 1983).

Goldberg majority proposed that social provision in the twentieth century more closely resembled property than charity.[137] The Supreme Court quoted Reich at length, explaining that much of society was organized around the entitlements that government extended to citizens and that such entitlements were not reserved to the poor.[138] Professional licenses, union memberships, pensions and social security payments, stock options, franchises, farm subsidies, and defense contracts were all sources of economic security that "flow[ed] from government."[139] As a result, as Reich had reasoned, all of these entitlements, including welfare benefits, should be protected as forms of property, rather than treated merely as extensions of government largesse.[140] The restraints on government that surround property turned out to be the vehicle through which the Supreme Court offered one of its most robust articulations of social rights.[141]

Not only did the Supreme Court gesture toward expanding the category of property in this era, but it also evinced a willingness to limit states' discretion in their interactions with poor people. In fact, in crafting the idea of the new property, Reich was inspired by his experience with McCarthy-era anticommunist politics and, in particular, by the fate of a doctor who had his medical license revoked after refusing to comply with a subpoena from the House on Un-American Activities Committee (HUAC).[142] Administrative discretion over the means to live, Reich observed, can empower

137. *See* Goldberg v. Kelly, 397 U.S. 254, 262 n.8 (1970) (citing Charles Reich, *The New Property*, 73 YALE L.J. 733 (1964)).

138. *See id.* at 262, 262 n.8.

139. *Id.*

140. *Id.*; *see* Charles Reich, *The New Property*, 73 YALE L.J. 733, 777-85 (1964).

141. This capacity for redefinition is one of property's enduring features. As Jedediah Purdy argues, property has, from its very advent, always been a dynamic, social institution—a legal instrument "evaluated contextually" in light of its ability to promote people's freedom. Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1257 (2005); JEDEDIAH PURDY, THE MEANING OF PROPERTY: FREEDOM, COMMUNITY, AND THE LEGAL IMAGINATION 9-19 (2010). Indeed, a community of "progressive property" scholars is currently devoted to rethinking the institution of property in ways that will better facilitate widespread human flourishing. *See, e.g.*, Gregory S. Alexander, Eduardo M. Peñalver, Joseph William Singer & Laura S. Underkuffler, *A Statement of Progressive Property*, 94 CORN. L. REV. 743, 743-44 (2009).

142. Judith Resnik, *The Story of Goldberg: Why This Case Is Our Shorthand*, *in* CIVIL PROCEDURE STORIES: AN IN-DEPTH LOOK AT THE LEADING CIVIL PROCEDURE CASES 484 (Kevin M. Clermont ed., 2d ed. 2008).

governments in ways that threaten individual liberties.[143] The Supreme Court also grew skeptical about the states' discretion in administering federal antipoverty programs.[144] A year earlier, the Supreme Court decided *Shapiro v. Thompson*, another case concerning AFDC eligibility.[145] This time, the question was not about whether states could suspend or terminate benefits, but whether they could deny benefits to new residents.[146] Here, the Court also protected access to social benefits by restraining the government from imposing eligibility requirements on the benefits program. In this case, it ruled that states could not constitutionally require people to reside in the state for a full year before applying for AFDC benefits.[147] The Court grounded this ruling in an unenumerated right to interstate movement, noting that these residency requirements were clearly intended to prevent potential beneficiaries from taking up residency in the states that enacted them.[148] The Court found that no compelling interest justified the states' infringement on this fundamental right to move freely across the country.[149]

Concern about limiting governmental discretion over people's ability to move freely through the world also animated the majority opinion in *Papachristou v. City of Jacksonville*, which the Court decided three years later.[150] This case was one of a quartet of cases that invalidated laws criminalizing vagrancy.[151] *Papachristou* turned on the finding that these statutes were impermissibly vague.[152] Such vagueness, the opinion explained, was of course

143. *Id.* at 483-84.

144. In *King v. Smith*, the Court interpreted the statute that established AFDC. At the time, many states barred female-headed households from eligibility if the woman in question was found to be cohabitating with a man. This man would then be deemed a "substitute parent," rendering the household ineligible for assistance. The Court invalidated these "substitute father" rules, preventing states from withdrawing social provision because a beneficiary was in a sexual relationship. 392 U.S. 309, 311, 313, 320, 325-37, 332-34 (1968).

145. 394 U.S. 618, 622 & n.1 (1969).

146. *See id.* at 622, 627.

147. *See id.* at 627.

148. *See id.* at 626-27, 638.

149. *See id.* at 629, 633 ("This Court long ago recognized that the nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel throughout the length and breadth of our land uninhibited by statutes, rules, or regulations which unreasonably burden or restrict this movement.").

150. *See* Papachristou v. City of Jacksonville, 405 U.S. 156, 168, 170 (1972).

151. *See* Goluboff & Schragger, *supra* note 11, at 203, 205.

152. *See Papachristou*, 405 U.S. at 162.

convenient for police departments but endangered people's ability to move through the world with a "feeling of independence and self-confidence, the feeling of creativity."[153] Not only were these "amenities" an accustomed feature of American life, but they "dignified the right of dissent, and ... honored the right to be nonconformists and the right to defy submissiveness."[154] They "encouraged lives of high spirits."[155] *Papachristou* is not usually described as a ruling about social rights, and it is true that it does not address the states' role in providing access to material goods. However, similar to the cases that prevented states from restricting access to social-benefits programs, it grappled with the rights of the economically marginalized and announced a governmental obligation to respect their autonomy and dignity.[156]

The Ninth Circuit's homelessness jurisprudence fits into this line of cases that enforce the rights of the very poor by restraining government.[157] By preventing government from criminalizing public camping when no other shelter was available, the Ninth Circuit recognized a (very limited) right for the very poor to move through the world and to take up public space.[158] Echoing the concerns that animated *Shapiro* and *Papachristou*, it limited states' authority to exclude people from public spaces, creating a right to use public resources to survive.[159] This public resource could be a publicly run shelter, simply a patch of land in a park, or other public space. One might say, then, that the Ninth Circuit effectively created a *license* to a piece of public land.[160]

Though the Ninth Circuit's ruling in *Grants Pass* did not establish procedural requirements the way *Goldberg* and its progeny did, the opinion took similar notice of the brutal need faced by those whose means of survival the state had chosen to revoke.[161] The

153. *Id.* at 164, 170 (citing Thornhill v. Alabama, 310 U.S. 88, 97-98 (1940)).

154. *Id.* at 164.

155. *Id.*

156. *See id.* at 170-71.

157. *See* Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019), *rev'd*, 144 S. Ct. 2202 (2024); Johnson v. City of Grants Pass, 50 F.4th 787, 811, 813 (9th Cir. 2022).

158. *See Martin*, 920 F.3d at 617; *Johnson*, 50 F.4th at 812-13.

159. *See Martin*, 920 F.3d at 617; *Johnson*, 50 F.4th at 812-13.

160. *See* ELIZABETH COOKE, LAND LAW 175 (3d ed. 2020); Bruce R. Huber, *The Durability of Private Claims to Public Property*, 102 GEO. L.J. 991, 1025 (2014).

161. *See Johnson*, 50 F.4th at 813; Goldberg v. Kelly, 397 U.S. 254, 264, 267-71 (1970).

City of Grants Pass had attempted to distinguish its own ordinance from the bans on public sleeping that *Martin* invalidated by prohibiting not sleeping, itself, but the use of bedding materials, stoves, or structures.[162] The Ninth Circuit's response rejected this distinction, emphasizing the material needs of those sleeping on public land.[163] To ban the use of bedding in Grants Pass, the Ninth Circuit found, was no different from a ban on sleeping itself: "Faced with spending every minute of the day and night outdoors, the choice to use rudimentary protection of bedding to protect against snow, frost, or rain is not volitional; it is a life-preserving imperative."[164] As the Supreme Court did in *Goldberg*, the Ninth Circuit declared that the state could not constitutionally deprive people of their means of survival without ensuring that some small measure of protection (in this case an available public shelter, rather than an evidentiary hearing) was first in place.[165]

Thus far, we have described the Ninth Circuit's homelessness jurisprudence as restraining government, but one might also read it as imposing an affirmative (or quasi-affirmative) obligation. After all, if government chooses to criminalize homeless encampments on public land, it must affirmatively devote resources to the provision of alternative sources of shelter. In this respect, it resembles the large body of U.S. case law that requires the government to offer affirmative protections when it has created a threat to someone's life, liberty, or property.[166] Perhaps the clearest example of such protections concerns prisoners' rights.[167] In theory, a state need not imprison anyone, but when it does, the Court has ruled that the Constitution requires it to treat prisoners a certain way; they are entitled to food, medical care, and even law books.[168] Professor David Sklansky describes these obligations as "quasi-affirmative

162. *Johnson*, 50 F.4th at 808.

163. *Id.* at 808-09, 812.

164. *Id.* at 808 n.27, 809 n.28.

165. *Id.* at 812-13; *Goldberg*, 397 U.S. at 261.

166. *See, e.g.*, Marvin Zalman, *Prisoners' Rights to Medical Care*, 63 J. CRIM. L., CRIMINOLOGY & POLICE SCI. 185, 185-94 (1972).

167. *See id.* at 185 n.2, 190 n.41.

168. *See* David A. Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 VA. L. REV. 1229, 1230 (2002).

rights" in that they place "constitutional conditions" on government action.[169]

Criminal procedure offers another example of quasi-affirmative rights.[170] The Sixth Amendment, for example, grants criminal defendants a host of trial rights, including the right to notice of charges, to confront witnesses, to assistance of counsel at government expense for the indigent, and to compulsory process.[171] The provision of these procedural protections requires government to take affirmative steps, including the dedication of resources.[172] The Ninth Circuit's requirement that, if a city seeks to ban the homeless from public spaces, it must first make other shelter available can be understood similarly as a quasi-affirmative obligation triggered by the state's own actions.[173]

Finally, while the Supreme Court criticized the Ninth Circuit's homelessness jurisprudence for limiting local governments' authority to address a pressing social problem, this very limitation on local discretion is, of course, one of the hallmarks of the Supreme Court's own prior social rights rulings.[174] The welfare rights cases decided in the late 1960s and early 1970s hinged on the idea that a range of federal benefits were not merely charitable programs over which states, their cities, and bureaucrats could exercise enormous discretion, but rather were entitlements attended by rights which

169. *See id.* at 1230, 1235-36.

170. *See id.* at 1230.

171. *Id.* at 1238-39.

172. Professor Jeff King observes that another way in which the U.S. courts create positive rights is through structural injunctions. *See* JEFF KING, JUDGING SOCIAL RIGHTS 271-72 (2012).

173. *See* Johnson v. City of Grants Pass, 50 F.4th 787, 813 (9th Cir. 2022), *rev'd*, 144 S. Ct. 2202 (2024); Sklansky, *supra* note 168, at 1230. One might even say that the obligation to allow homeless people to reside in public spaces entailed an obligation for the government to create public land and make it available to the homeless. Of course, public land is plentiful, so maybe this positive obligation does not amount to much at all. But as a thought experiment, we might ask whether, in a hypothetical town with no public land at all, a government could still constitutionally criminalize sleeping on others' private property without their consent by those who have no access to any of their own property. In such a scenario, one might argue that the government has little political recourse but to procure land and provide a license for its use to those with nowhere else to go at night. In reality, of course, some public land is available in all towns, and all the government must do is refrain from acting by allowing the homeless to remain on public land unmolested.

174. *See Grants Pass*, 144 S. Ct. at 2212.

localities could not violate.[175] The Supreme Court's invalidation of antivagrancy statutes also took aim at the "unfettered discretion" with which these statutes endowed the police.[176] The judiciary's enforcement of social rights, indeed the enforcement of rights in general, entails a limitation on the discretion of governments. Whether we focus on their quasi-affirmative or negative features, *Martin* and *Johnson* are not idiosyncratic or unprecedented experiments, but recognizable forms of social rights enforcement.[177]

V. TRADE-OFFS IN THE ENFORCEMENT OF SOCIAL RIGHTS

None of this is to say that enforcing quasi-affirmative obligations, creating prohibitions on government, or requiring the establishment of procedural requirements is the best way to enforce social rights.[178] The largest drawback of this form of social rights enforcement may well be its extremely limited nature. Rulings that bar the state from jailing the homeless when no other shelter is available, for instance, or that require an evidentiary hearing before terminating someone's welfare benefits are an extremely minimal (one might say laughably inadequate) response to profound material deprivation.[179] The freedom to sleep under bridges is, after all, a parody of the law's concern for the rights of the poor.[180]

Even so, one possible advantage of this approach to social rights enforcement is that it helps to blunt the critique that courts have usurped the role of legislatures or strayed beyond the bounds of their expertise. Rather than requiring that courts evaluate or craft antipoverty programs, courts operating in this mode merely tell

175. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970); Dandridge v. Williams, 397 U.S. 471, 487 (1970); Shapiro v. Thompson, 394 U.S. 618, 633 (1969); King v. Smith, 392 U.S. 309, 334 (1968).

176. Papachristou v. City of Jacksonville, 405 U.S. 156, 168 (1972) ("Another aspect of the ordinance's vagueness appears when we focus, not on the lack of notice given a potential offender, but on the effect of the unfettered discretion it places in the hands of the Jacksonville police.").

177. *See* Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019); *Johnson*, 50 F.4th at 812-13.

178. *See* Sklansky, *supra* note 168, at 1230.

179. *See Goldberg*, 397 U.S. at 261; *Johnson*, 50 F.4th at 811-13.

180. ANATOLE FRANCE, THE RED LILY 95 (Frederic Chapman ed., Winifred Stephens trans., 1910) ("[T]he majestic equality of the law[ ] ... forbid[s] rich and poor alike to sleep upon the bridges ....").

states when they impermissibly revoked people's means of survival. When there are more detailed policy-like decisions to be made, these tend to concern the adequacy of procedural protections. These sorts of determinations—such as what constitutes enough of a hearing, what kinds of notice are required, whether people are allowed legal representation—resemble the questions courts routinely decide in the realms of administrative and criminal law and therefore fall more squarely within the traditional purview of the judiciary.

Another possible advantage to enforcing the negative duties created by social rights is that rulings prohibiting certain forms of action can usually be put into effect right away without jeopardizing social benefits programs. Public provision generally takes more time than public restraint. It is cruel irony that in two famous instances of affirmative social rights enforcement, the individuals at the center of these cases, Ms. Grootboom and Mr. Callahan, died homeless.[181] The programs that the courts had ordered to be put in place on their behalf never benefited them.[182]

However, some have also expressed concerns about the immediate benefits, namely that they give the wrong incentives and may benefit the wrong people. Some of these concerns are expressed in the context of court rulings that order the government to provide goods and services to individual litigants. Such rulings are common in Latin America, as courts routinely order the government to provide social rights-related goods and services to individual litigants.[183] Commentators have observed that easy access to court-created benefits has taken the pressure off the political branches to find more structural solutions.[184] It has also resulted in many middle-class litigants being the main beneficiaries of these court-

181. *See Gov't of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1169 (CC) at para. A(3)-(4), L(2) (S. Afr.); *Ensuring the Right to Shelter: The First Court Decision in* Callahan v. Carey *Requiring the Provision of Shelter for Homeless Men in New York City*, COALITION FOR THE HOMELESS, https://www.coalitionforthehomeless.org/wp-content/uploads/2014/08/CallahanFirstDecision.pdf [https://perma.cc/RN6W-5CS8].

182. *See Gov't of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1169 (CC) at para. L(2) (S. Afr.); COALITION FOR THE HOMELESS, *supra* note 181.

183. *See* ADAM S. CHILTON & MILA VERSTEEG, HOW CONSTITUTIONAL RIGHTS MATTER 167, 170-71, 176-77 (2020).

184. For a case study on the right to healthcare in Colombia, see *id.* at 194-95, 199-201.

created social rights-related goods and services, as the poor rarely litigate.[185]

A related concern is that rights against eviction without an alternative shelter being provided will distort social policy making by encouraging squatting. Both the South African Constitutional Court and the Indian Supreme Court have refrained from ordering the government to provide an alternative because they were concerned it would have created the wrong incentives.[186] The Indian Supreme Court, for example, has worried that this has incentivized people to claim public land.[187] As it observed, "[t]he promise of free land, at the taxpayers cost, in place of a jhuggi, is a proposal which attracts more land grabbers" and "[r]ewarding an encroacher on public land with [a] free alternate site is like giving a reward to a pickpocket."[188] The South African Constitutional Court has expressed similar concerns with people jumping the queue to access housing programs by occupying public lands and then invoking shelter protections when the state seeks to evict them.[189]

Here, again, the very minimalism inherent in the Ninth Circuit's limited right to shelter helps to shield it from this critique.[190] By creating a qualified right to urban camping, the Ninth Circuit created a set of obligations that were immediate, not to evict people without an alternative, but likely not lucrative or rewarding enough to create strong incentives for those with homes to exploit it.[191] It seems unlikely that long-term urban camping is desirable to anyone but the nation's poorest. The right also provides no method to jump the queue on social welfare benefits, as cities may determine whether to provide shelter.[192] This kind of judicial intervention, then, is immediate, and the remedies it offers are sufficiently minimal to avoid concerns about perverse incentives.

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185. *See* Landau, *supra* note 83, at 199-202, 214, 218; Octavio Luiz Motta Ferraz, *Harming the Poor Through Social Rights Litigation: Lessons from Brazil*, 89 TEX. L. REV. 1643, 1661-62 (2011); CHILTON & VERSTEEG, *supra* note 183, at 170.

186. *See* FREDMAN, *supra* note 106, at 290-91.

187. *See id.* at 290. Fredman does not endorse this position, but she states it. *See id.*

188. Almitra H. Patel v. Union of India, AIR 2000 SC 1256, 1258-59 (2000) (India).

189. FREDMAN, *supra* note 106, at 291.

190. *See* Martin v. City of Boise, 920 F.3d 584, 617 (9th Cir. 2019); Johnson v. City of Grants Pass, 50 F.4th 787, 813 (9th Cir. 2022).

191. *See Martin*, 920 F.3d at 617; *Johnson*, 50 F.4th at 813.

192. *See Martin*, 920 F.3d at 617.

CONCLUSION: SOCIAL RIGHTS AND OPPORTUNITY STRUCTURES

We have argued that the Ninth Circuit's homelessness jurisprudence shares a mode of social rights enforcement with high court rulings both abroad and within the United States. At least within the United States, however, these rulings can seem more similar to a relic of the late 1960s and early 1970s than an active site of welfare-oriented lawmaking. Those Supreme Court decisions were never overturned,[193] but their potential to transform the nation's constitutional obligations to the poor was never realized. Soon after this cluster of cases, Nixon's judicial appointments turned the Court in a decidedly libertarian direction, and in the decades that followed, the legislature became increasingly hostile to the social benefits programs on which these rulings had focused.[194] At the end of the twentieth century, Congress repealed the AFDC and replaced it with a new program of public assistance which was more conditional and which purposefully endowed the states with far more administrative discretion.[195]

A quarter of the way into the twenty-first century, the prospects for social rights may be even bleaker still. Not only are social rights claims unlikely to receive a warm reception in the current U.S. Supreme Court, but the entire administrative welfare state, developed to ensure Americans' material security in the wake of the Great Depression, is now facing a crisis of political and constitutional legitimacy.[196] The federal bureaucracies that might once have realized the promise of social rights find themselves increasingly disempowered, if not dismantled.[197]

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193. *See* Goldberg v. Kelly, 397 U.S. 254, 261 (1970); Shapiro v. Thompson, 394 U.S. 618, 633 (1969); Papachristou v. City of Jacksonville, 405 U.S. 156, 171 (1972).

194. Sunstein, *supra* note 9, at 106-08.

195. *See generally* Noah Zatz, *Welfare to What?*, 57 HASTINGS L.J. 1131 (2006) (examining the transition from the AFDC statutory regime to welfare programs that conditioned receipt of aid on more demanding characteristics of the recipient).

196. *See* Gillian E. Metzger, *Foreword: 1930s Redux: The Administrative State Under Siege*, 131 HARV. L. REV. 1, 30 (2017).

197. *See* Russell Muirhead & Nancy L. Rosenblum, *Trump and the Perils of Ungoverning: Institutions Under Assault Will Not Deliver for Americans,* FOREIGN AFFS. (Jan. 23, 2025), https://www.foreignaffairs.com/united-states/trump-and-perils-ungoverning [https://perma.cc/9Q47-BPX8].

Our goal here is certainly not to predict an imminent explosion of social rights rulings grounded in the U.S. Constitution, but to emphasize that such rights are neither wholly absent from our federal case law nor entirely missing from contemporary politics. Contrary to those who claim that social rights are either dead or antithetical to U.S. constitutionalism, we see federal constitutionalism as seeded with a concern for the poor[198] and social rights rulings that occasionally crop up even in today's relatively poor soil.

It is not only the Ninth Circuit that has recently enforced a federal social right. In 2020, the Sixth Circuit found a right to literacy in the U.S. Constitution.[199] The case began in 2016 when students in Detroit argued that their basic rights had been violated because, in the Detroit school system, teachers had insufficient training, classes were held without necessary textbooks or supplies, and school buildings were so decrepit and unsafe that they rendered learning impossible.[200] A three-judge panel ruled in their favor, declaring that access to literacy is a fundamental right grounded in the substantive due process protection guaranteed by the Fourteenth Amendment.[201] The opinion explained that "[i]t may never be that each child born in this country has the same opportunity for success in life, without regard to the circumstances of her birth."[202] "But even so," the panel continued, "the Constitution cannot permit those circumstances to foreclose *all* opportunity and deny a child literacy without regard to her potential," because "[p]roviding a basic minimum education is necessary to prevent such an arbitrary denial, and so is essential to our concept of ordered liberty."[203] In some ways, the Sixth Circuit's reasoning is an even more robust defense of social rights than the cases we have described in the body of this essay.[204] Though the opinion is careful to distinguish the

198. In addition, the fact that many state constitutions contain mandates to establish school systems and explicit duties to protect the poor demonstrates that such constitutional guarantees are already an established feature of American rights culture. *See* Versteeg & Zackin, *supra* note 115, at 1683, 1685, 1690.

199. Gary B. v. Whitmer, 957 F.3d 616, 662 (6th Cir. 2020), *vacated*, 958 F.3d 1216 (6th Cir. 2020) (mem.).

200. *See id.* at 620-21.

201. *See id.* at 662.

202. *See id.* at 654.

203. *Id.* at 654-55.

204. *See id.* at 662.

right to education from rights to goods such as food and shelter, this decision did not simply restrain the state or establish procedural safeguards; it enforced the affirmative duties that flowed from a social right.[205] Yet, the Sixth Circuit vacated this ruling when it voted to rehear the case en banc, and later dismissed it as moot because Governor Gretchen Whitmer had, by that time, reached a settlement with the plaintiffs.[206] Although the right to literacy is not binding federal law, the case resulted in the state legislature's investment of an additional $94.4 million dollars in Detroit's schools.[207]

These glimmers of social rights are surely cold comfort to those who would look to the U.S. Constitution to combat immediate hardships or mitigate today's soaring inequalities. Though their short-term power is limited, their long-term potential may not be. Many ideas that at one time seemed entirely beyond the pale have eventually triumphed as the new common sense and law of the land.[208] It is a mistake, therefore, to overindex on the current composition of the Supreme Court when we evaluate the possibilities inherent in particular constitutional claims.

Constitutional interpretation can undergo massive transformations as the larger political environment changes. Scholars of social movements have long noted that the movement's success depends not on the presence or absence of their particular grievances, but rather on the larger political, economic, and demographic structures in which these movements operate.[209] In other words, structural changes such as war, depression, and migration create new openings for political action and new possibilities for success.[210] This dynamic also applies to constitutional rights claims. Their

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205. *See id.* at 658.

206. Gary B. v. Whitmer, 958 F.3d 1216, 1216 (6th Cir. 2020) (mem.); Ethan Bakuli, *Detroit's $94 Million 'Right to Read' Lawsuit Settlement Is Finally Coming Through for DPSCD*, CHALKBEAT (July 7, 2023, at 15:37 ET), https://www.chalkbeat.org/detroit/2023/7/7/23787399/detroit-public-schools-right-to-read-settlement-whitmer-emergency-management/ [https://perma.cc/8AWC-WD7F].

207. *See* Bakuli, *supra* note 206.

208. JEFFREY K. TULIS & NICOLE MELLOW, LEGACIES OF LOSING IN AMERICAN POLITICS 143-44 (2018).

209. DOUG MCADAM, POLITICAL PROCESS AND THE DEVELOPMENT OF BLACK INSURGENCY: 1930-1970 60 (1982).

210. *See id.* at 40-41.

success depends on openings within the broader political system. There is evidence, for example, that state courts enforce education rights against the state more readily when the national economy is stronger.[211] On an even larger scale, the ideas that defined the New Deal revolution in constitutional law developed for decades before the Great Depression swept Franklin Delano Roosevelt into office, allowing him to shape a Court that would embrace them.[212] Even the attack on the administrative state that has recently gained so much traction spent many decades on the fringes of legal thought before President Trump's judicial appointments rendered it influential.[213] The kinds of political commitments that social rights convey might also develop in bits and stall until changing political structures create another opportunity for their expression.

211. *See* Ethan Hutt, Daniel Klasik & Aaron Tang, *How Do Judges Decide School Finance Cases?*, 97 WASH. U. L. REV. 1047, 1051-52, 1086, 1099 (2020).

212. *See* Metzger, *supra* note 196, at 52.

213. *See id.* at 52, 66-67.