FILLING EVERYONE’S BOWL: A CALL TO AFFIRM A POSITIVE RIGHT TO MINIMUM WELFARE GUARANTEES AND SHELTER IN STATE CONSTITUTIONS TO SATISFY INTERNATIONAL STANDARDS OF HUMAN DECENCY

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*422 [ R] ediscovery by state supreme courts of the broader protections afforded their own citizens by their state constitutions . . . is probably the most important development in constitutional jurisprudence of our times. 1 BJustice Brennan

I. Introduction

As the United States enters the 21st Century and many of its citizens have no access to shelter, it is necessary for the United States to ensure that the basic human rights of the poor are protected. 2 In 1941, President Franklin Delano Roosevelt voiced the United States’ commitment toward promoting and safeguarding basic human rights in his famous “Four Freedoms Speech.” 3 The third freedom was freedom from want. 4 During his presidency, Roosevelt commented on the duty of Americans to provide for everyone’s needs: “I see one-third of a nation ill-housed, ill-clad, ill-nourished. The test of our progress is not whether we add to the abundance of those who have much; it is whether we provide enough for those who have too little.” 5

Today, even when a vast number of Americans live in relative economic wealth, numerous people residing in the United States live in abject poverty and without shelter. 6 As Roosevelt expressed sixty years ago, it is imperative the American people work toward providing for those who have too little. 7

Positive rights are a tool Americans can use to guarantee that no one is left out in the cold. An established positive right to
general assistance disallows the legislature from voting away welfare benefits when sections of the population are unable to provide for their basic needs. Numerous state constitutions provide explicit textual support for establishing a positive right to minimum welfare guarantees and shelter. These states’ constitutional welfare provisions allow courts to establish a judicially enforceable right to public assistance. Furthermore, the United States, being party to certain international covenants and treaties, increases a state court’s ability to interpret its state constitution to establish positive rights to internationally recognized norms of human decency.

This article will make clear the importance of establishing a positive right to minimum welfare guarantees and shelter. Second, this article will review the unique ability of state constitutions to grant positive rights and apply heightened scrutiny to claims alleging deprivations of general assistance and shelter. Third, this article will demonstrate how state courts can use international human rights law to protect the poor. Finally, this article will conclude with a brief examination of two cases --Tucker v. Toia and Butte Community Union v. Lewis--which illustrate positive right claims based on the state constitutions of New York and Montana.

II. It Is Necessary for State Constitutions to Provide a Positive Right to Government Aid in the Absence of Democratic or Federal Constitutional Safeguards for the Poor

In the nineteenth and early twentieth centuries, the United States relied on the political process to ensure that everyone was treated fairly when people were not satisfied with the status quo. The wide-spread poverty that existed in the United States caused the extreme capitalism associated with laissez-faire economics to be tempered by a concern and respect for the community. This created an environment where democracy could be relied on to provide adequate safeguards to protect the poor.

The New Deal Era acts as an illustration of democracy working to protect the interests of the disadvantaged because of the economic hardship most Americans were enduring. Due to the collapse of the economy during the Great Depression, both the Social Security Act and the National Labor Relations Act were implemented to address the massive concerns of the poor. In creating these acts, politicians and the electorate expressed concern toward poverty and supported provisions to provide general assistance to the disadvantaged.

In comparison to the nineteenth and early twentieth centuries, the United States has entered a time of relative economic prosperity. The United States’ economic success has resulted in a wealthy middle class satisfied with the status quo. Nonetheless, the poverty rate in the United States “is double that of every continental European country.” In addition, the Census Bureau reports that the nation’s poverty rate is increasing. In 2001, there were 32.9 million people living in poverty, which was 1.3 million more people than in 2000. Homelessness remains a dominant concern, with the number of homeless increasing dramatically as unemployment reached a historic high at 6% in the year 2003. The most recent census reported that at least 2.3 million adults and children are unable to access shelter at least once annually.

In response to the millions of Americans living in poverty and without shelter, it is remarkable that general assistance benefits have not increased. Instead, recent years have seen a marked decrease in welfare benefits. For example, the 1996 Welfare Reform Act resulted in thousands of children and women losing access to welfare benefits. In addition, numerous immigrants and refugees are unable to access even basic general assistance. Furthermore, President Bush’s current focus on increasing military spending has caused drastic reductions in federal programs directed at providing services for the nation’s poor.

The recent trend in cutting welfare benefits indicates that the poor in the United States cannot rely on the democratic process to protect their interests. In fact, the poor have been categorized as a “forgotten group” who are virtually invisible in a democratic system primarily driven by the desires of the wealthy. Michael Harrington, a prominent poverty scholar, commented on the invisibility of the poor in his acclaimed work “The Other America” when he wrote, “[t]hat the poor are invisible is one of the most important things about them. They are not simply neglected and forgotten as in the old rhetoric of reform; what is much worse, they are not seen.”

Voting patterns demonstrate it is unlikely that the majority of Americans will support minimum welfare guarantees. In most elections, it is the wealthy who vote and they refuse to vote against their own economic interests. As a result, politicians will continue to cut taxes and decrease welfare benefits as long as the majority of their constituents are middle-class Americans who have no immediate reason to be aware of the necessity of providing general assistance. This economic self-interest has left America’s poor forgotten, with no voice in the political system.

In times of economic prosperity, there are only three reasons society would care about the chronically poor—fear, altruism, or enlightened economic self-interest. It is unlikely any of these motives will ensure that the needs of the poor are met. Without democratic safeguards, it is essential that state constitutions establish positive rights for the poor including shelter and other services, to prevent welfare benefits from being voted away by a disinterested, wealthy middle class.

Neither does the Federal Constitution provide a mechanism to protect the poor. In the 1960s and 1970s, lawyers for the poor attempted to affirm positive rights to basic needs in the United States Constitution. Their efforts were not successful. Over thirty years ago, the United States Supreme Court refused to find a right to welfare in the Constitution, ruling that this was not a proper consideration for the Court. The Court has refused constitutional claims to housing, public education, and medical services, declaring repeatedly that the government does not owe its citizens any affirmative duty of care.

The Constitution grants negative rights, but not positive rights. In federal terms, the state and federal government are only prohibited “from placing unreasonable restrictions on an individual’s right to . . . obtain . . . safety or happiness.” This focus on negative rights allows the Court to rule that there is no basis for an affirmative right to government aid, even when such aid is necessary to secure basic rights the government itself may not deprive the individual. It is permissible for the “state to stand idly by while citizens fall into indisputably unsafe circumstances, piously assuring such citizens that it is not interfering with their right to pursue and obtain safety.”

As numerous Americans are unable to access shelter and meet their basic needs, it is evident that the democratic process and Federal Constitution do not provide adequate safeguards to protect the interests of the poor. Consequently, it is imperative that individual states take the initiative to protect the poor by guaranteeing access to shelter and minimum levels of general assistance in their state constitutions. An affirmation of positive rights is especially necessary in modern economic times, and in respect to international human rights law, such affirmation should demand a right to adequate standards of living for all.

III. State Constitutions Are Capable of Establishing a Positive Right to Minimum Welfare Guarantees

State constitutions are the proper tool to implement a positive right to minimum welfare guarantees. State constitutions provide textual support for granting a positive right to public assistance and access to shelter. In addition, many states constitutions’ legislative histories, along with public attitudes toward providing shelter and general assistance benefits within the state, further bolster positive right claims to public assistance. Moreover, states are better able to deal with the separation of power issues raised by positive right claims. As such, state courts are capable of providing a heightened level of review to claims asserting deprivation of rights to shelter and general assistance.

A. State Constitutional Welfare Provisions Allow State Court Judges to Affirm a Judicially Enforceable Right to Public Assistance for the Poor

Over a dozen state constitutions have explicit provisions mandating their state to protect the interests of the poor and those with similar financial hardships. This textual base enables state court judges to find that the Equal Protection or Due Process Clause in their state constitution guarantees certain welfare benefits to the poor. Unlike federal judges interpreting the Federal Constitution, state constitutional welfare provisions, arguably, create a judicially enforceable right to various forms of public assistance.
New York serves as the primary example of a state using its state constitution to establish a positive right to government aid. Article XVII of the New York State Constitution states, “[t]he aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.” On the basis of Article XVII, New York courts have prohibited the state from refusing public assistance to needy children based on evidentiary requirements that “have nothing to do with need,” disallowed the state from excluding or reducing benefits to particular groups, such as the disabled to reduce administrative costs, and even called for the state to increase public assistance to ensure that children in New York state are provided with an adequate education.

As seen in New York, state constitutional text affirming a duty to help the poor establishes a number of obligations upon the state. First, state constitutional welfare provisions create a constitutional mandate for the state to provide minimal levels of general assistance to the poor. Second, state constitutional welfare provisions make the state responsible for meeting the needs of the poor, rather than local communities and private groups providing welfare assistance within the state. Third, a textual base for welfare produces a “principle of social citizenship that recognizes the community’s shared responsibility for the well-being of its members.” In summary, state constitutional welfare provisions create a judicially enforceable right to general assistance. This allows state court judges to interpret their state constitution to call for state courts to work with other branches of government to ensure a right to shelter and that other general assistance benefits are provided to the poor.

A prominent example of the importance of having an explicit constitutional base to protect and/or grant rights is Justice Marshall’s use of the Federal Equal Protection Clause to protect voting rights. Without the Federal Constitution containing numerous democratic concerns, it is unlikely Justice Marshall could have found that the Equal Protection Clause protects voting rights. Likewise, state constitutional welfare provisions allow a similar triggering of equal protection and due process protections, when a state has failed to provide a humane standard of living to its citizens.

B. State Courts Are the Proper Forum to Adjudicate Positive Right Claims to General Assistance

State courts have the ability to establish a positive right to general assistance. This ability is not hindered by the Federal Constitution’s failure to grant positive rights. The Federal Constitution provides only a “minimal floor of guarantees for individual rights at the state level.” State courts are free to increase individual rights in their state, noting how the textual base of their state constitution and traditions of their state establish a right to minimum levels of welfare and shelter.

Numerous states already provide a positive right to free public education, since most state constitutions contain explicit guarantees that all children have access to education. For example, in Edgewood Independent School District v. Kirby, the Texas Supreme Court interpreted its constitution to provide a guarantee for an “efficient” education system, meaning that a school district need not only rely on local property taxes in funding education. The prior method of funding education in Texas resulted in the richest school districts in Texas being able to invest thousands more dollars per student than poorer districts. The Texas Supreme Court ordered the state legislature to remedy the inefficient taxing system. As a consequence of the ruling, the state legislature enacted an appropriate funding law which remedied the constitutional violation.

States have determined that where state constitutions provide a guarantee to education, the legislature is obligated to use its power to achieve the guarantee. Whether or not the legislature is adequately meeting these needs is not a political question. State constitutional welfare provisions should be interpreted similarly to the guarantees of adequate education.

Critics opposed to establishing positive rights in state constitutions argue that positive right claims violate principles of federalism and democracy. However, the process of judicial interpretation is not significantly different whether assessing a positive or negative right. As a consequence, state courts do not overstep their bounds any more “when defining the parameters of required legislative action than when defining prohibitions on legislative behavior.”

A right to general assistance and shelter in a state constitution should be understood as merely limiting a legislature’s right to eliminate general assistance benefits to a level where they do not satisfy the promises contained in the state constitution. It is the state court’s proper role to determine the parameters of the state constitution and interpret what the constitution
guarantees to its citizens. Helen Hershkoff, a prominent positive rights scholar, provides a clear example of what a positive right in a state constitution establishes:

Eve says to Adam: “Spend Thursday with me in New York. Travel here however you like.” Eve is directing Adam to rendezvous with her at a designated time and place. He can decide how best to get to New York in time for the Thursday meeting. But suppose Adam decides on Wednesday that he wants to walk, and sets out that night from Boston. Arriving two weeks later, Adam cannot really claim to have met Eve’s request. His discretion to choose how to travel is subordinate to the overall purpose, namely, to meet Eve in New York on an appointed day. Like Adam, a state legislature is free to choose the means by which they can meet their constitutional obligation. However, Eve, being the state court, is certainly able to ascertain when Adam has failed to meet his objective.

When a court determines that the legislature has not provided for the general welfare of their citizens, the court simply requests that the legislature find an appropriate remedy to satisfy the promises contained in the state constitution. The court does not instruct the legislature on the best means to satisfy their constitutionally mandated obligations. The legislative and executive branch are much better suited for determining the allocation of funds, since the courts do not have the necessary resources and skills to make these determinations. This allows the legislature, social services, and welfare recipients to work together to create solutions to poverty and access to shelter. In contrast, a valid negative rights claim completely strikes down a statute created by the legislature, which is much more tyrannical.

Another objection against enforcing positive rights is that such judicial action intrudes into the role of the legislature. By granting positive right claims, many would argue the courts are acting as legislators, not as interpreters of the law. However, on a state level, the judiciary is acting in its traditional and proper role when assuring the legislature lives up to its duties enumerated in the state constitution.

The separation of powers doctrine was formed to prevent governmental tyranny by dividing power between three branches and establishing a system of checks and balances. There was also a functional aspect to separating power to promote efficiency.

State courts failing to enforce positive constitutional guarantees typically argue from a formalist’s viewpoint of the separation of powers doctrine. Formalists believe each branch has specific delegated duties. When there is any aberration from the explicit duties, formalists allege a separation of powers violation has occurred. This approach disallows the court from requiring the legislature to do anything.

However, state courts function differently than federal courts in regard to policy and law-making. State courts have a tradition of setting public policy and participating in making laws. A brief overview of state tort, contract, property, and criminal law enables one to make this discernment. In addition, as former Justice Hans Linde of the Oregon Supreme Court explains, “[s]tate courts settle contests over public offices, pass on the propriety of proposed public expenditures and even of proposed constitutional amendments, often at the suit of mere ‘taxpayers.’” This allows state court judges to have a “higher comfort level” when participating in activities that verge on policy making.

Judicial review is also stronger on the state level than on the federal level. Constitutional framers, on the state level, wrote provisions bolstering judicial review of the legislature. In addition, state constitutions were amended to provide for the election of judges and lower executive branch officials. Only four states do not provide for the election of lower executive branch officials, such as the state’s attorney general, and 41 states elect at least some of their state judges. An elected judiciary provides increased legitimacy to a state court reviewing the actions of the state legislature and lessens any counter-majoritarian arguments. By allowing for the election of judges, states decreased the independence of the judicial branch and made them accountable to the electorate. This allows state courts to play an increased role in determining the constitutionality and rightness of the legislature’s actions.

The separation of power arguments posed by opponents of positive rights, on a state level, are invalid. The judiciary is acting in its traditional and proper role when ruling on positive right claims and assuring the legislature satisfy state constitutional welfare provision.
C. Positive Right Claims to Minimum Levels of General Assistance Warrant Heightened Scrutiny on the State Level

“Consistent with the states-as-laboratories metaphor, the constitutions of the fifty states present a very different framework in which to analyze whether government may stand by and ignore the hunger and homelessness of its citizens.”

Federal rationality review does not acknowledge the difference between enforcing positive right claims on the state level and the federal level. Federal rationality review is suitably described as “the deferential mode of scrutiny the Court applies to garden-variety socioeconomic legislation” and is effectively no review at all. Typically, a court applying rationality review will not even review the logic of the legislature or the outcome of its actions.

Federal rationality review rests its foundation on doubts concerning federalism and separation of powers. These concerns are not justified on a state level, where the counter-majoritarian concerns are not as strong. State court judges are, generally, elected. Granted, “running for office does not transform black-robed judges into representative decisionmakers.” However, it does lessen the counter-majoritarian concerns which are the basis for federal rationality review. Furthermore, it allows increased legitimacy for an elected court’s ability to weigh voter preferences against constitutional standards. Finally, it is important to note that unlike the Federal Constitution, state constitutions contain explicit welfare provisions demanding that its legislature provide for the general welfare of their citizens.

The differences between state and federal positive right claims should allow a state court on a state constitutional welfare challenge to subject the legislation to rigorous scrutiny to determine whether the statute is likely to achieve its goals. A positive constitutional right demands that a state legislature “realize and advance the objects and purposes for which . . . powers have been granted.” Rational basis review completely ignores determining whether the legislature has satisfied their constitutionally mandated duties under the state constitution. Positive rights not only determine what a government can do, but demand the government to achieve certain goals. As a result, state courts must review whether the legislature is moving toward satisfying their obligations under state constitutional welfare provisions. This calls for a greater level of judicial scrutiny than mere federal rationality review.

Federal rationality review, inappropriately, starts from a presumption of constitutionality. The proper approach to positive right claims shifts the burden of proof to the state to justify its legislative enactments as the appropriate means to satisfy the aspirations of the state constitution. Therefore, the proper question is not “How does this policy burden a constitutional right?” but rather, “How does this policy further a constitutional right?”

State courts are less burdened than federal courts by “institutional and prudential constraints.” Therefore, they can apply a more progressive application of the law than federal rationality review to positive right claims. This will allow state courts to ensure that the promises contained in their state constitutions are honored. Moreover, state courts provide a forum to use international human rights law to further bolster support for a positive right to general assistance and access to shelter for the poor.

IV. International Human Rights Law Further Supports a State Court Finding a Right to Minimum Welfare Guarantees in its State Constitution

Although not commonly used by state courts, international human rights law establishes a legal obligation for guaranteeing minimum welfare guarantees and access to shelter. The international consensus is that every nation has a duty to provide shelter and basic general assistance to everyone in its country.

The Supremacy Clause of the Federal Constitution explicitly provides that valid treaties signed and ratified by the United States are the “supreme Law of the Land.” The Supreme Court, from its inception, has expressed a commitment to
enforcing international law: “International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction.”134 As a result, international human rights law provides an additional reason for state courts to interpret their state constitutions to establish a positive right to public assistance.135

As a member of the United Nations (U.N.), the United States has an affirmative duty to provide for the poor.136 The U.N. Charter establishes an obligation upon member nations to promote key human rights.137 The Universal Declaration of Human Rights (UDHR) is the primary document concerned with listing the human rights U.N. members are obligated to protect.138 Under Article 25(1) of the UDHR, “Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care” 439 necessary social services.”139 As the court in Beharry v. Reno140 properly stated: “While the (UDHR) is not a treaty, it has an effect similar to a treaty. It is a declaration published by the General Assembly of the United Nations ‘as a common standard of achievement for all peoples and all nations (citation omitted).’141 Therefore, as a member of the United Nations, the United States has a duty to respect the rights of the poor.

The United States is also a signatory to the International Covenant on Economic, Social and Cultural Rights (ICESCR).142 A nation that is a signatory to a covenant, such as the ICESCR, must refrain from acts which would defeat the object and purpose of the covenant.143 The preamble of the ICESCR establishes that “the ideal of free human beings enjoying freedom from fear and want can only be achieved if conditions are created whereby everyone may enjoy his economic, social and cultural rights, as well as his civil and political rights.”144 Specifically, Article 11 of the ICESCR states that: “The States Parties to the present Covenant recognize the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions.”145 The right for people to be free from want is the foundation of the ICESCR.146 A state court establishing a positive right to minimum welfare guarantees respects the United States’ obligation not to interfere with the object and purpose of the ICESCR.

Finally, the United States is obligated to provide basic public assistance to the poor due to their membership in a number of regional treaties.147 Both the American Declaration of the Rights and Duties of Man148 and the American Convention on Human Rights149 require member nations to provide basic general assistance benefits and shelter to their citizens.150

Despite the clear legal basis for international human rights law, federal courts have been reluctant to use it.151 Nonetheless, progressive United States courts have used international human rights law to provide further support for their interpretation of domestic laws.152 International human rights law has been much more influential on a state level.153 For instance, state courts have used international human rights law to provide support for their decisions in areas regarding the right to privacy,154 the right to be free from discrimination,155 the right to freedom of movement,156 the right to basic education,157 and the right to be free from dehumanizing treatment in prisons.158

International human rights law equally has the capacity to allow a state court to find its state constitution establishes a positive right to public assistance. The California Court of Appeals serves as an example of a state court using international human rights law to interpret state welfare statutes. In Boehm v. Superior Court,159 the California Court of Appeals invalidated an action of a county seeking to reduce general assistance benefits.160 The court determined that the minimal levels of assistance provided in the county did not meet the needs for basic food and shelter as required by California law and international standards of human rights.161 The court quoted the Universal Declaration of Human Rights to support its position that the county had a positive duty to provide basic necessities to its citizens.162 The court stated that, “Indeed, it defies common sense and all notions of human dignity to exclude from minimum subsistence allowances for clothing, transportation and medical care. Such allowances are essential and necessary to ‘encourage [self-respect and] self-reliance’. . . in a ‘humane’ manner consistent with modern standards.”163

“As the United States ratifies human rights treaties and as customary international law develops, the Supremacy Clause can be seen both as an invitation and as a command to state judges to insure that rights regarded as fundamental by the international community are fully enjoyed in this nation.”164 Almost all industrialized countries, excluding the United States, are committed to providing minimum welfare guarantees to their citizens.165 It is time for the United States to enter the 21st Century and affirm its international obligation to aid the poor. State courts can fulfill this international mandate to promote basic standards of human decency by interpreting their state constitutions to establish a positive right to general assistance

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and access to shelter. To do otherwise, would be bluntly disregarding international legal obligations, and more importantly, the right of every person to be free from want.

V. New York and Montana--Two Leading Examples of States Protecting the Rights of the Poor

State courts have upheld positive right claims to minimum welfare guarantees. One of the most progressive states in the area of positive rights is New York. Tucker v. Toia, a New York case, is the primary example for establishing a positive right to general assistance on the state level. In this case, the New York Court of Appeals found that Article XVII of the New York Constitution created a fundamental right to minimum welfare guarantees.

Montana also had a progressive state constitution. Unfortunately, this progressiveness diminished when, in 1988, the state constitutional welfare provision in the Montana Constitution was amended granting the legislature much greater discretion in providing for the poor. However, before 1988, the Montana Supreme Court found that the poor were entitled to heightened scrutiny under the Equal Protection Clause of the Montana Constitution, when their ability to attain general assistance was impaired.

A. Tucker v. Toia--New York Affirms a Positive Right to General Assistance in its State Constitution

In Tucker, the legal dispute involved a New York statute that prevented persons under the age of twenty-one, who did not live with a parent or legal guardian, to access general assistance benefits without an order of disposition in support proceedings. The plaintiffs were three individuals under twenty-one who were not living with a parent or relative and had not obtained a disposition. In all three cases, the required disposition would have taken weeks to months to obtain. During this time, the plaintiffs were unable to access any public assistance, even though they would have been otherwise eligible for such benefits. The New York Court of Appeals held the statute violated Article XVII of the New York Constitution.

The New York Court of Appeals recognized that Article XVII of the New York Constitution was written to sustain welfare programs from attack and create a positive duty for New York State to aid the poor, commenting: “[t]he legislative history of the Constitutional Convention of 1938 is indicative of a clear intent that State aid to the needy was deemed to be a fundamental part of the social contract.” As a result of the state constitutional welfare provision, the New York Court of Appeals did not apply rational basis review to the statute in question, but instead looked at the end result of the statute. The result being the inability of many persons under age twenty-one to gain any public assistance for months or ever, if they did not have the necessary disposition to be eligible for public assistance. The court determined the impact of the statute left individuals that fit New York Constitution’s definition of needy without public assistance. As a result, the court found unanimously that the legislature had an absolute duty to provide for these individuals. In New York, Article XVII of the New York Constitution created a judicially enforceable right to public assistance that is “a fundamental part of the social contract” between New York and its needy residents.

In finding the statute unconstitutional, the New York Court of Appeals did not direct the legislature in enacting the legislation. Rather, the court required the legislature to re-write the legislation so needy individuals were not deprived of public assistance. This approach did not violate the Separation of Powers Doctrine since the court did not take part in legislation. The court simply acted as a referee to ensure the New York legislature fulfilled the guarantees explicitly provided for in the New York Constitution. As the chairman of the Constitutional Convention’s Committee on Social Welfare stated, “although the Legislature is given great discretion in this area, it cannot simply ‘shirk its responsibility which . . . is as fundamental as any responsibility of government.’”

Tucker set out a template for a non-federal approach to ruling on concerns regarding the protection of the poor. Article XVII of the New York Constitution has been compared favorably with the Universal Declaration of Human Rights and evidences New York’s commitment to satisfying international customary norms of human decency. In addition, Article XVII of the New York Constitution has not only acted to ensure the needy in New York have access to minimum welfare guarantees, but to shelter as well. States having similar state constitutional welfare provisions in their state constitutions
should follow New York’s example to ensure the interests of the poor are protected.

B. Butte Community Union v. Lewis—Montana’s Innovative Steps Toward Enabling the Equal Protection Clause of the Montana Constitution to Protect the Poor

In Butte Community Union, 193 the Union sought a preliminary injunction to prevent the Director of the Department of Social and Rehabilitation Services from enacting legislation which would disallow able-bodied persons under age fifty, who did not have children, from accessing general assistance. 194 The trial court held that former Article XII, section 3(3), 195 of the Montana Constitution established a fundamental right to welfare, “for those who, by reason of age, infirmities, or misfortune may have need for the aid of society.” 196 As a result, a Montana trial court held the statute in question was unconstitutional. 197 The trial court’s reasoning was similar to that of the New York Court of Appeals in Tucker v. Toia. 198 On appeal, the Montana Supreme Court did not concur with the trial court’s rationale. 199 The Montana Supreme Court found former Article XII, section 3(3), did not provide a fundamental right to general assistance, since it was not listed in Montana’s Declaration of Rights and “is not a right upon which constitutionally guaranteed rights depend.” 200

Instead, the Montana Supreme Court determined that the statute imposed an unconstitutional distinction between indigent people with or without children. 201 The court agreed that the federal rational basis test allows a government to discriminate against a group of people for “the most whimsical of reasons.” 202 To remedy the failure of rational basis review to protect the poor, the Montana Supreme Court created a “meaningful middle-tier analysis,” 203 stating that equal protection under the law is an “essential underpinning of this free society.” 204 Montana enacted a standard of review, similar to intermediate scrutiny, to ensure welfare benefits on the state level receive proper judicial review, although no federally recognized, suspect class was affected. 205

Even though the Montana Supreme Court did not find that the right to basic assistance was a fundamental right on the basis of the former state constitutional welfare provision in the Montana Constitution, Justice Sheehy, in a concurring opinion, did declare that there are positive rights in Montana’s constitution:

> There is however a constitutionally-mandated duty upon the legislature to provide economic assistance “as may be necessary” for the unfortunate who need the aid of society. Art. XII, § 3(3). When that duty is shirked by the legislature, upon whatever pretense, the class discriminated against has at least a constitutional right for redress in the courts. 206

As in New York, the Montana Supreme Court did not feel bound to perform a rational basis review of legislation that impaired the poor’s rights to gain minimum welfare guarantees: “We will not be bound by decisions of the United States Supreme Court where independent state grounds exist for developing heightened and expanded rights under our state constitution.” 207 Equally, other state courts should not follow the Federal Constitution’s example of failing to protect the poor. Rather, state courts should develop innovative methods, as Montana did and New York does, to ensure international standards of human decency are not abridged on the state level.

VI. Conclusion

Positive rights demand that the legislature protect the interests of the needy. “Food and shelter are no longer merely aspirational goals of political justice; they are instead a part of the constitutional fabric and a nondiscretionary feature of the legal order.” 208

International treaties and international human rights law dictate that nations have a duty to provide minimum welfare guarantees to the needy. 209 It is time for the United States to acknowledge its duty to serve the poor. Montana and New York are great examples of states which have taken steps to satisfy international norms of human decency through protecting the positive rights of the poor on the state level.
State constitutions containing a positive right to public assistance and shelter ensure that every person in their state is respected and provided for. It is evident that states are not limited by the Federal Constitution’s failure to protect the poor. States can and must provide greater protection for the needy when negative rights have failed to fill everyone’s bowl.

Footnotes

a1 J.D., magna cum laude, Gonzaga University School of Law, 2002. The author would like to thank, first and foremost, his family for the continual support they have provided. In addition, the author would like to express his gratitude to Professor Lynn Daggett of Gonzaga University School of Law for her initial edits and constantly serving as an example of professionalism and academic excellence. Finally, the author would like to express his admiration to Professor Helen Hershkoff, Professor Burt Neuborne, and Professor Jonathan Feldman for their dedicated efforts in advancing the rights of the poor—this article is a mere reflection of their thorough, thoughtful, and passionate scholarship.


2 See infra pp. 7-9 (providing poverty statistics).

3 Franklin Delano Roosevelt, Eighth Annual Message to Congress (Jan. 6, 1941), in 3 The State of the Union Messages of the Presidents, 1790-1966, at 2855 (Fred L. Israel ed., 1966).

4 Id. at 2860 (“[F]reedom of speech ... [F]reedom ... to worship ... [F]reedom from want ... [F]reedom from fear.”).


7 The State of the Union Messages of the Presidents, 1790-1966, supra note 3, at 2855-60.

8 See infra pp. 13-15 (discussing and listing the textual base for positive rights in state constitutions).

9 See infra pp. 19-32 (evaluating how state courts have the ability to grant a positive right to minimum welfare guarantees and shelter on the state level).

10 See infra pp. 32-40 (explaining how international human rights law creates an international mandate for the United States to respect the rights of the poor).


12 712 P.2d 1309 (Mont. 1986).

Michael M. Burns, *Fearing the Mirror: Responding to Beggars in a “Kinder and Gentler” America*, 19 Hastings Const. L.Q. 783, 835 (1992); see also Neuborne, supra note 13, at 881-83; Robert N. Bellah et al., *Breaking the Tyranny of the Market*, Tikkun, July/Aug. 1991, at 31 (“The Lockean ideal of the autonomous individual was, in the eighteenth century, embedded in a complex moral ecology that included family and church on the one hand and on the other a vigorous public sphere in which economic initiative, it was hoped, grew together with public spirit.”).

See generally Burns, supra note 14, at 835-36; Michael M. Burns, *The Law School as a Model for Community*, 10 Nova L.J. 329, 351 (1986) (“Gone, or at least in hibernation, has been that commitment to community which once provided a balance to the radical individualism that so worried Alexis de Tocqueville when he first examined American life in the 1830’s.”); Neuborne, supra note 13, at 883.


See Feldman, supra note 16, at 1072.


See Burns, supra note 14, at 836-38 (arguing that Americans are disinterested in the concerns of the poor, due to economic self-interest); Neuborne, supra note 13, at 883.


See also Joel Stein, *The Real Face of Homelessness*, Time, Jan. 13, 2003, at 53; Scott J. Croteau, *Rally is a Call to Action Advocates in Marlboro Decry Homelessness*, Worcester Telegram & Gazette (MA), August 21, 2001, at B1 (Diane Dujon, a member of the Massachusetts Welfare Rights Union, spoke out against homelessness in America: “We have more and more homeless people, more families going hungry and we have people becoming so clinically depressed that they have to be hospitalized and nobody is paying any attention.”); Michael Powell, *Homeless Surge in N.Y. Symbol of New Crisis*, Wash. Post, Dec. 23, 2001, at A1 (“In Chicago, homelessness jumped 22 percent, in San Francisco, 20 percent. In Washington, the number of homeless families has risen by 32 percent.”).

See Jonathan M. Barnett, Rights, Costs, and the Incommensurability Problem, 86 Va. L. Rev. 1303, 1303 (2000) (outlining the effect of Reaganomics on homelessness and illustrating how the political process works against the poor); Cimini, supra note 17, at 95-96; Deale supra note 17, at 321 (“Between 1990 and 1994, seventeen states reduced or eliminated their aid for non-elderly poor people without dependent children, and in Ohio, Michigan, Illinois, and Pennsylvania alone, more than 350,000 general assistance recipients had their benefits cut off.”); Stein, supra note 24 at 53, 54, 56, 57 (providing examples of how various states have reduced general assistance benefits to the poor).


Bill Ong Hing. Nonelectoral Activism in Asian Pacific American Communities and the Implications for Community Lawyering, 8 UCLA Asian Pac. Am. L.J. 246, 263-64 (2002) (“In 1996, Congress enacted welfare reform legislation that had a devastating effect on Asian immigrants and refugees. Essentially, most of the federal budget savings that would flow from welfare reform would come at the expense of immigrants and refugees. Supplemental Security Income (‘SSI’) benefits to half a million elderly and disabled immigrants would be cut off as would nearly $4 billion in food stamps to more than one million families.”).

David Broder, Tight Times Reversing a Decade of Health, Education Progress, The State (Columbia, SC), Mar. 2, 2003, at D3; For Peace & Prosperity, Madison Capital Times, May 31, 2003, at 10.A, available at 2003 WL 6346824 (“Fifty years ago, Dwight Eisenhower said, ‘Every gun that is made, every warship launched, every rocket fired, signifies in a final sense a theft from those who hunger and are not fed--those who are cold and are not clothed. This world in arms is not spending its money alone--it is spending the sweat of laborers, the genius of its scientists, the hopes of its children.’”); Robert J. Samuelson, War Meets the Welfare State, Newsweek, April 7, 2003, at 37, 2003 WL 8638737.

Helen Hershkoff, Positive Rights and State Constitutions: The Limits of Federal Rationality Review, 112 Harv. L. Rev. 1131, 1172 (1999) (“Political scientists recognize that the poor function as an ‘ineffactual minority’--prime candidates for the position of Mancur Olson’s ‘forgotten groups,’ those who ‘suffer in silence’ because they ‘have no lobbies and exert no pressure.’”).


See Deale, supra note 17, at 324.

Deale, supra note 17, at 324; Carole Pateman, Participation and Democratic Theory 10 (Cambridge Univ. Press 1970) (observing that “lower socio-economic groups are the least politically active”).

See Deale, supra note 17, at 324; William N. Eskridge, Jr., Politics Without Romance: Implications of Public Choice Theory for Statutory Interpretation, 74 Va. L. Rev. 275, 287 (1988) (arguing that politicians are focused on representing the concerns of groups that are wealthy).

Neuborne, supra note 13, at 884-85.

Id. at 885.
Id. at 886.

Id.; Lockwood, supra note 1, at 3.


Neuborne, supra note 13, at 887.

Lockwood, supra note 1, at 10.

See DeShaney v. Winnebago County Dep’t of Soc. Servs., 489 U.S. 189, 196 (1989); Hershkoff, supra note 30, at 1133.

Lockwood, supra note 1, at 10; see also Griffin v. Illinois, 351 U.S. 12, 23 (1956) (Frankfurter, J., concurring, commenting that differences in wealth are “contingencies of life which are hardly within the power, let alone the duty, of a State to correct or cushion”).

See infra pp. 14-18 (discussing the textual support for a positive right to welfare and shelter in state constitutions).

See John C. Connell, A Right to Emergency Shelter for the Homeless Under the New Jersey Constitution, 18 Rutgers L.J. 765, 804-822 (1987) (outlining New Jersey’s efforts to create a constitutional right to shelter for the homeless in New Jersey. Connell concludes that the text, legislative history, and public attitudes toward the poor in New Jersey when taken together provide an appropriate basis for finding a constitutional right to shelter for the homeless in New Jersey); James A. Gardner, The Positivist Revolution That Wasn’t: Constitutional Universalism in the States, 4 Roger Williams U. L. Rev. 109, 127-28 (1998) (arguing that state constitutions text, history, and structure, and the underlying values of the state allow for state courts to take an increased positivist approach to providing heightened protection on a state level, rather than following the example of federal courts); Hans A. Linde, Are State Constitutions Common Law?, 34 Ariz. L. Rev. 215, 228-29 (1992).

See infra pp. 19-27 (explaining how state courts provide the best forum to adjudicate positive right claims).

See infra pp. 27-31 (discussing how state courts have the ability to provide heightened scrutiny to positive right claims).

See Ala. Const. art. IV, § 88 (placing duty on legislature to require counties to make provisions for the poor); Ark. Const. art. XIX, § 19 (requiring the General Assembly to support institutions which educate the deaf, dumb, and blind); Idaho Const. art. X, § 1 (requiring the establishment of institutions which benefit the insane, blind, deaf, and dumb); Kan. Const. art. VII, § 4 (ordering counties to provide for inhabitants who need the aid of society and allowing the state to participate financially); Ky. Const. § 244A (requiring the General Assembly to pass laws for paying pensions to the elderly); Mass. Const. amend. art. XLVII (making it a public function to supply shelter, food, and other necessities at reasonable rates during times of emergency or distress); Mich. Const. art. IV, § 51 (making public health and welfare a primary public concern and ordering the legislature to pass laws to protect and promote public health); Miss. Const. art. IV, § 86 (making it the legislature’s duty to provide for the care of the insane and for the care of the indigent sick in state hospitals); Nev. Const. art. XIII, § 1 (requiring the state to support institutions which benefit the insane, blind, deaf, and dumb as well as any other benevolent institutions as may be required); N.Y. Const. art. XVII, § 1 (making aid, care, and support of the needy public concerns and requiring the state to provide for such); N.C. Const. art. XI, § 4
(naming provisions for the poor, unfortunate, and orphaned as one of the first duties of the state and requiring the General Assembly to create a board of public welfare); Okla. Const. art. XVII, § 3 (requiring counties to provide for inhabitants who may have claims for aid); Wash. Const. art. XIII, § 1 (requiring the state to support institutions that benefit the mentally ill or developmentally disabled or blind, deaf, or otherwise disabled youths); W. Va. Const. art. IX, § 2 (requiring that overseers of the poor be appointed by the county court); see also Neuborne, supra note 13, at 893-95 (identifying provisions in numerous state constitutions which either mandate or permit public assistance for the poor or less fortunate).

50 Neuborne, supra note 13, at 895.


52 See Tucker, 371 N.E.2d at 451-52; Hershkoff, supra note 30, at 1140-43.

53 N.Y. Const. art. XVII, § 1 (McKinney 2001).

54 Tucker, 371 N.E.2d at 452-53.

55 See Lee v. Smith, 373 N.E.2d 247, 251-52 (N.Y. 1977) (“[I]n New York, the State’s obligation to provide for the needy (N.Y. Const., art. XVII) includes the usual costs of administration ... While the State’s adoption of the SSI program means that the Federal Government generally assumes the costs of administration in providing for the aged, disabled and blind, the State’s duty remains. The obligation cannot be avoided by irrevocably assigning the aged, disabled and blind to the Federal program without recourse to State aid, when many cases this means that they must survive on lesser amounts than are granted to other needy persons in the State.”).

56 Fulton v. Krauskopf, 484 N.Y.S.2d 982, 984 (N.Y. Sup. Ct. 1984) (“The grants of assistance which are provided are meager enough without requiring that they be depleted by genuine expenses incurred for the schooling of children. No family should have to make the hard choice between eating and education.”).


58 Id. at 1430.

59 Id. at 1431.

60 Id. at 1432.

62 Neuborne, supra note 13, at 895.

63 Id. at 895-96.

64 Lockwood, supra note 1, at 10-11.

65 Id. at 10.


67 See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982) (“As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State’s constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.”); PruneYard Shopping Ctr. v. Robins, 447 U.S. 74, 80-81 (1980); Herb v. Pitcairn, 324 U.S. 117, 125 (1945) (acknowledging that for a long period of time the Supreme Court has had no authority to review a state court decision when it rests on adequate and independent state grounds).


69 777 S.W.2d 391 (Tex. 1989).

70 Id. at 394.

71 Id. at 396.

72 Id. at 399.

73 Feldman, supra note 16, at 1059.

74 See supra note 68.

75 Welfare Devolution, supra note 57, at 1413.

76 See Feldman, supra note 16, at 1060.
Id. at 1061.

Id.

Id. at 1087.

Welfare Devolution, supra note 57, at 1414.


Id.

Id. at 1091.

See Hershkoff, supra note 30, at 1138.

See Feldman, supra note 16, at 1061.

Id. at 1060.

Id.


Id.

Id.

Id.

Id.

Id.

Johnson, supra note 88, at 261.

Id.; Hans A. Linde, State Constitutions Are Not Common Law: Comments on Gardner’s Failed Discourse, 24 Rutgers L.J. 927,
97 Johnson, supra note 88, at 261; see also Neuborne, supra note 13, at 897.


99 Johnson, supra note 88, at 261.


101 Id.


103 Id. (“The exceptions are Maine, New Hampshire, New Jersey and Tennessee.”).

104 Id. at 115 n.31 (listing state constitutions which provide for the election of judicial officers); see also Steven P. Croley, The Majoritarian Difficulty: Elective Judiciaries and the Rule of Law, 62 U. Chi. L. Rev. 689, 725 (1995).

105 Hershkoff, supra note 30, at 1158-59.

106 Gardner, supra note 102, at 115.


108 Hershkoff, supra note 30, at 1135.

109 Id. at 1136; Estate of Davis, 442 N.E.2d 1227, 1230-31 (N.Y. 1982) (choosing to apply rationality review to a welfare classification); Daugherty v. Wallace, 621 N.E.2d. 1374, 1385 (Ohio Ct. App. 1993) (determining a rational basis standard should be applied to a positive rights claim to welfare); Conklin v. Shinpoch, 730 P.2d 643, 647 (Wash. 1986) (finding that there was no right to welfare in the state privileges and immunity clause and applying rationality review).

110 Hershkoff, supra note 30, at 1136.

111 Id. (citing Kathleen M. Sullivan, The Supreme Court, 1991 Term-- Foreword: The Justices of Rules and Standards, 106 Harv. L. Rev. 22, 60 (1992); see Stephen Loffredo, Poverty, Democracy and Constitutional Law, 141 U. Pa. L. Rev. 1277, 1284-85 (1993) (“In the meantime, the Court’s laissez-faire jurisprudence poses a dangerous dilemma: the political process provides little security for even the most basic interests of the poor, while the absence of a judicial check on that process has encouraged political discourse and decisionmaking to degenerate into a virtual free-fire zone with respect to the rights and lives of poor people.”); Lawrence G. Sager, Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law, 88 Nw. U. L. Rev. 410, 410-11 (1993) (“After threats to speech, religion, and the narrow band of activities that fall under the rubric of privacy, after the disfavor
of persons because of their race or gender (or possibly, because of their nationality or the marital status of their parents), and after lapses from fairness in criminal process, the attention of the constitutional judiciary rapidly falls off. By default, everything else falls in the miasma of economic rights. Thus, the claim of a person to grow and dispense herbs as a calling would be doomed to the losing invocation of equal protection or due process, and the only claim of a person displaced from her home by governmental activity is compensation for its value. The most vivid discrepancy between constitutional case law and political justice concerns a particular aspect of our economic life—"the welfare of the poor."

112 Hershkoff, supra note 30, at 1136-37; see also James B. Thayer, The Origin and Scope of the American Doctrine of Constitutional Law, 7 Harv. L. Rev. 129, 144 (1893).

113 Hershkoff, supra note 30, at 1154.

114 Id. at 1138; see also Lawrence Gene Sager, Foreword: State Courts and the Strategic Space Between the Norms and Rules of Constitutional Law, 63 Tex. L. Rev. 959, 959 (1984/1985).

115 See supra note 104.

116 Hershkoff, supra note 30, at 1158.

117 See id. at 1158-59; see also Neuborne, supra note 13, at 900 ("Thus, whatever anti-democratic concerns may have inhibited federal judges from enunciating positive poor people’s rights, state judges should not feel sheepish about functioning as modified democratic instruments in seeking to evolve principled rules governing floors for poor people.").

118 Hershkoff, supra note 30, at 1159-60.

119 See supra note 49.

120 See Hershkoff, supra note 30, at 1138.


122 See generally Hershkoff, supra note 30, at 1136.

123 Hershkoff, supra note 30, at 1138.

124 Id. at 1184.

125 Id.

126 Id.

Gordon A. Christenson, Using Human Rights Law to Inform Due Process and Equal Protection Analyses, 52 U. Cin. L. Rev. 3, 3-5 (1982) (arguing that international human rights documents provide a context to establish the equal protection and due process guarantees of state and federal constitutions providing positive rights to a variety of social welfare benefits including shelter); Deale, supra note 17, at 309-320; Lisa Trojnar, Key Human Rights Issues in the New Millenium, 27 Hum. Rts. 8, 8-10 (2000).

Philip Alston, U.S. Ratification of the Covenant on Economic, Social and Cultural Rights: The Need for an Entirely New Strategy, 84 Am. J. Int'l L. 365, 375-76 (1990) (“[I]n general, since, with the sole exception of the United States, all the Western democracies have accepted the validity and equal importance of economic, social and cultural human rights, at least in principle. For example: the Australians had championed those rights even before the UN Charter was adopted in 1945; Dutch courts have applied provisions of the Covenants in domestic cases; the Dutch, Greek, Portuguese, Spanish, Swedish and Swiss Constitutions all explicitly recognize at least some economic and social rights; and the Scandinavians have consistently accorded prominence to those rights in the context of their domestic political agendas.”).

U.S. Const. art. VI, cl. 2 (“[A]ll Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.”).


U.N. Charter art. 55(c).

Bassiouni, supra note 136, at 156-61.


Id.


ICESCR, supra note 142, at 5.

Id. at 7.

Id. at 4-5.


American Convention on Human Rights, Nov. 22, 1969, 9 I.L.M. 673, 1144 U.N.T.S. 123, O.A.S.T.S. No. 36, at pmbl. (“[I]n accordance with the Universal Declaration of Human Rights, the ideal of free men enjoying freedom from fear and want can be achieved only if conditions are created whereby everyone may enjoy his economic, social, and cultural rights, as well as his civil and political rights.”).

American Declaration of the Rights and Duties of Man, supra note 148, at 667 (art. XI), 668 (art. XVI) (Article XI: “Every person has the right to the preservation of his health through sanitary and social measures relating to food, clothing, housing and medical care, to the extent permitted by public and community resources.” Article XVI: “Every person has the right to social security which will protect him from the consequences of unemployment, old age, and any disabilities arising from causes beyond his control that make it physically or mentally impossible for him to earn a living.”); American Convention on Human Rights, supra note 149, at pmbl.; see also Keller, supra note 137, at 609-10.

See generally, Lillich II, supra note 135.

See, e.g., Oyama v. California, 332 U.S. 633, 650 (1948) (citing the United Nations Charter as additional support for invalidating part of California’s racially discriminatory alien land law); Rodriguez-Fernandez v. Wilkinson, 654 F.2d 1382, 1388 (10th Cir. 1981) (using international human rights standards to establish arbitrary detention was prohibited under the relevant federal statute and the Constitution; Alt seems proper then to consider international law principles for notions of fairness as to propriety of holding aliens in detention. No principle of international law is more fundamental than the concept that human beings should be free from arbitrary imprisonment.”); Lareau v. Manson, 507 F. Supp. 1177, 1192-93 (D. Conn. 1980) (determining the United Nations Standard Minimum Rules for the Treatment of Prisoners Aform[s] part of the body of international human rights principles establishing standards for decent and humane conduct by all nations,” and using it to find that the overcrowding of prisons violated the Eighth Amendment).

See Park, supra note 127, at 1260-63.


Pauley v. Kelly, 255 S.E.2d 859, 864 n.5 (W. Va. 1979) (stating that the Universal Declaration of Human Rights appears to proclaim education to be a fundamental right of everyone, at least on this planet”), cited in Park, supra note 127, at n.284.

Sterling v. Cupp, 625 P.2d 123, 130-31 (Or. 1981) (“These federal standards reflect principles also found in nonofficial sources, such as the American Bar Association’s Standards of Criminal Justice and the American Correctional Association’s Manual of Correctional Standards. Indeed, the same principles have been a worldwide concern recognized by the United Nations and other multinational bodies. The various formulations in these different sources in themselves are not constitutional law. We cite them here as contemporary expressions of the same concern with minimizing needlessly harsh, degrading, or dehumanizing treatment of prisoners that is express in article I, section 13.”), cited in Park, supra note 127, at 1261.

223 Cal. Rptr. 716 (Ct. App. 1986).

See id.

Id. at 721.

Id.

Id.

Johnson, supra note 88, at 262.

Deale, supra note 17, at 281.


See Hershkoff, supra note 30, at 1139-43.

See N.Y. Const. art. XVII, § 1. “The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine.” Id.

Tucker, 371 N.E.2d at 451-52.

See Harper v. Greely, 763 P.2d 650, 651-53 (Mont. 1988); Sarah Ramsey & Daan Braveman, “Let Them Starve:” Government’s Obligation to Children in Poverty, 68 Temp. L. Rev. 1607, 1627-28 (1995) (“Specifically, the amendment substituted ‘may provide’ for ‘shall provide,’ and gave the legislature discretion to determine who is needy. The amendment was approved at the general election in 1988 and became effective on January 1, 1989. As amended, Article XII, Section 3(3) of the Montana Constitution now states: ‘The legislature may provide such economic assistance and social and rehabilitative services for those who, by reason of age, infirmities, or misfortune are determined by the legislature to be in need.’”).


See Tucker, 371 N.E.2d at 450.

Id.

Id. at 451.

Id.

Id. at 452.


Id.

Id. at 452-53.

Id. at 452.

Id. at 452-53.


Id. at 451.

Id. at 452.

Id.

Id.


712 P.2d 1309 (Mont. 1986).

Id. at 1310.

Mont. Const. art. XII, § 3(3) (“The legislature shall provide such economic assistance and social and rehabilitative services as may be necessary for those inhabitants who, by reason of age, infirmities, or misfortune may have need for the aid of society.”).

Butte Cmty. Union, 712 P.2d at 1310.

Id. at 1310.

Id. at 1310-11.

Id. at 1311.

Id. at 1312.

Butte Cmty. Union, 712 P.2d at 1314.

Id.

Id.

Id.

Id. at 1313-14; Ramsey & Braveman, supra note 171, at 1627.
Butte Cnty. Union, 712 P.2d at 1314.

Id. at 1313.

Hershkoff, supra note 30, at 1156.

Id. at 1141-42.