Pathways to Justice: Positive Rights, State Constitutions, and Untapped Potential

Dustin Coffman
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By: Dustin Coffman*

ABSTRACT

Positive rights, as a concept, are nothing new. Though they may not have always had such a deceptively unequivocal name, positive rights have existed in various forms and mediums throughout history. They’ve been utilized, underutilized, and, in some cases, outright ignored. At their core, positive rights are the imposition of an obligation upon the state to fulfill some declared right or benefit. One basis for this imposition is that because citizens give up certain rights by being parties to the “social contract,” they should be entitled to certain positive protections guaranteed by the state created by way of said “contract.” Examples of positive rights range widely, including the right to education, right to welfare, workers’ rights, environmental rights, and the right to housing.

Many foreign constitutions explicitly provide for positive rights found in their constitutions. And, in the context of international human rights, the Universal Declaration of Human Rights clearly and unmistakably advocates for various positive rights. In contrast, the United States Constitution does not contain any positive rights, and the United States Supreme Court has held that the federal Constitution does not obligate the state to provide for its citizens. As an integral part of a federalist system of government, however, the individual states within the United States are not governed solely by the federal Constitution. They each have their own constitutions, and one can find a litany of examples of positive rights such state constitutions. These positive rights provisions did not appear by accident or chance but were the result of the effort put forth by reformists, activists, advocates, and lawyers who sought to
codify the government’s affirmative duty to act in support of its citizens. This Article examines these individual strands of history, discusses the subsequent judicial enforcement (or lack thereof) of such provisions, and ultimately advocates for continued efforts to expand the breadth of positive rights provisions already present and to amend state constitutions to add additional protections.
### TABLE OF CONTENTS

**INTRODUCTION** ................................................................................. 184

**I. DEFINING CONSTITUTIONAL RIGHTS** .................................... 187  
A. Negative Rights ................................................................. 187  
B. Positive Rights ................................................................. 188

**II. POSITIVE RIGHTS IN THE FEDERAL, INTERNATIONAL, AND FOREIGN CONTEXT** ............................................. 190  
A. No Positive Rights in the Federal Constitution ................ 190  
B. President Roosevelt’s Second Bill of Rights .................... 194  
C. Universal Declaration of Human Rights ......................... 197  
D. Foreign Constitutions and Positive Rights .................... 200

**III. POSITIVE RIGHTS AND STATE CONSTITUTIONS** .......... 203  
A. A Brief History of Positive Rights in State Constitutions .... 203  
B. Right to Education ......................................................... 205  
C. Environmental Rights ..................................................... 207  
D. Worker’s Rights ............................................................. 211  
E. Right to Welfare/Aid ....................................................... 214  
   i. New York .......................................................... 215  
   ii. Kansas ................................................................. 216  
F. Positive Rights in Open Textured Provisions ................. 217

**IV. STATE CONSTITUTIONAL PROVISIONS AND THEIR USEFULNESS FOR ADVOCATES GOING FORWARD** .... 219  
A. Opposing Views ............................................................. 219  
   i. Cross – Explicit Positive Rights Will Make Things Worse .......... 220  
B. Litigating Positive Rights ............................................... 222  
C. Amending State Constitutions to Add Additional Positive Rights ................................................................. 224

**CONCLUSION** ..................................................................................... 227
INTRODUCTION

On any given night in the United States, there are approximately 580,000 people experiencing homelessness. Nearly forty percent of those 580,000 are in “unsheltered locations such as on the street, in abandoned buildings, or in other places not suitable for human habitation.” There are nearly half a million homeless/houseless people in a nation that so proudly proclaims itself to be the “richest country in the world.” With such excessive wealth, it is indisputable that the government has the capability to house its homeless population. But having the capability to do something is only half of the equation. If the state does not wish to voluntarily actualize such assistance, then what if doing so was not voluntary? This same sentiment can be applied to a variety of social and economic issues. The imposition of a governmental obligation to act

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2 See id.


4 Binyamin Appelbaum, America’s Cities Could House Everyone if They Chose to, N.Y. TIMES (May 15, 2020), https://www.nytimes.com/2020/05/15/opinion/sunday/homeless-crisis-affordable-housing-cities.html?searchResultPosition=1 (“Even if the cost per person were twice as high, the nation’s homeless population could be housed for $10 billion a year — less than the price of one aircraft carrier.”).

5 See, e.g., Emmanuel Saez & Gabriel Zucman, We can afford Medicare for All…, POLITICO (Nov. 25, 2019).
towards public needs is not a novel idea. Positive rights, or the requirement that the state ensure that certain material standards for its citizens are met, have been around in the United States for centuries.

If asked to point to where such rights may be found, though, many citizens would be lost. The reason for this is that most people would immediately go to the federal constitution or rely on fundamental principles that underpin the legal instrument. “American rights, we are often told, protect their bearers from tyrannical government by forcing the government to restrain itself from intervening in social and economic life. These rights do not mandate more government or offer protection from threats that do not stem directly from government itself.” This is not an incorrect conception when one’s analysis is limited to the federal constitution. It is, however, an incomplete one. State constitutions often have strong and explicit positive rights, and these provide a door to litigating human rights and ensuring the government takes care of its needs.


7 See id.
8 Id. at 2.
The positive rights found in state constitutions are a strong—but often underutilized—tool in the arsenal of advocates and lawyers who endeavor towards the betterment of the living, learning, and working conditions of the citizenry by way of judicial enforcement. And such advocates should earnestly lobby for an increase in and broadening of the positive rights in state constitutions.

This Article will advance its thesis by first examining and comparing positive and negative rights. In so doing, a definition of positive rights will be provided. From there, the discussion will turn to an analysis of positive rights at the federal level (or lack thereof), and contrast federal positive rights trends in the United States with international and foreign instruments and constitutions. Because there are no positive rights in the United States Constitution, the analysis will turn to those found in state constitutions. Specifically, this Article will analyze the history of positive rights provisions within state constitutions and then examine trends relating to specific positive rights (i.e., right to education, environmental rights, workers’ rights, and welfare rights). Having set the historical context for positive rights in state constitutions, this Article will then turn to the usefulness of such provisions for contemporary advocates. And, though arguments will be present both for and against such advocate usage, the goal of the discussion will be to emphasize the untapped and idle nature of positive

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10 Anna Maria Gabrielidis, Human Rights Begin at Home: A Policy Analysis of Litigating International Human Rights in U.S. State Courts, 12 BUFF. HUM. RTS. L. REV. 139, 140 (2006) (“[B]ecause state constitutions often have stronger positive and substantive rights to interpret, it is in state courts that human rights litigation can be most effective.”).

11 See discussion infra Section I.

12 See discussion infra Section II.

13 See discussion infra Section II.
rights provisions in state constitutions.  

I. Defining Constitutional Rights

   A. Negative Rights

   In order to fully understand what may be accomplished by tapping into positive rights, one must first cognize positive rights. And, in order to do so, one must understand the distinction between positive and negative rights. Governmental power within the United States—which is a federalist system of government—is allocated between the state and federal government.  

   Having a federalist system as context for this Article, it only makes sense to utilize illustrative examples from both state and federal sources. To this end, the ‘rights’ allotted by the Federal Constitution and its state counterparts can be safely characterized as “negative” and “positive” rights. When reviewed on its own, however, the Federal Constitution is clearly an amalgamation of negative rights, not positive ones. Being negative in nature, the rights contained within the Federal Constitution aim to prohibit the government from engaging in conduct that would violate the rights.

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14 See discussion infra Section IV.
15 See Federalism, CORNELL L. SCH. LEGAL INFO. INST. https://www.law.cornell.edu/wex/federalism (last visited April 20, 2022).
17 Fishkin, supra note 16, at 33 (“It is a truism that ‘the Constitution is a charter of negative rather than positive liberties.’”) (citing Jackson v. City of Joliet, 715 F.2d 1200, 1203 (8th Cir. 1983)).
188 BENEFITS & SOCIAL WELFARE LAW REVIEW Vol. 24.2

contained therein. For example, the Fourth Amendment grants a negative right to be free from unreasonable searches and seizures by the government.

As a more general statement, negative rights represent defensive declarations against infringement by the government.  

"[T]he citizen can assert a negative right against the government, which then may be barred from invading aspects of the individual's liberty or property." Negative rights, being a limiter on state power, is a useful tool for the individual. They are, additionally, a useful tool for society at large. When wielded in the metaphorical hands of the citizenry, negative rights may function as a shield against governmental abuse. Battles and skirmishes, however, are rarely won with a shield alone.

B. Positive Rights

In carrying the metaphor onwards, "[i]f negative rights provide a shield, positive rights extend a sword, entailing affirmative claims that can be used to compel the state to afford substantive goods or services as an aspect of constitutional

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19 U.S. CONST. amend IX; see District of Columbia v. Heller, 554 U.S. 570, 645 (2008) ("[T]he Fourth Amendment describes a right against governmental interference rather than an affirmative right to engage in protected conduct, and so refers to a right to protect a purely individual interest."). Stevens, J. dissenting; Belzer, supra note 18.

20 Foreword: Positive Rights and the Evolution of State Constitutions, supra note 9, at 809.

21 See id.

22 See Positive Rights and State Constitutions: The Limits of Federal Rationality Review, supra note 9, at 1137-38 ("Commentators typically describe constitutional rights as trumps that block the exercise of government power and thus protect against official abuse.").
duty.”

Positive rights, in contrast to their negative counterpart, obligate the government to act in furtherance of a specified goal. The goals may range substantially, from ensuring children receive free public schooling, to protecting the poor, but at the heart of such enumerated goals is the imposition of action onto the state.

As some scholars have noted, one simple method to distinguish positive and negative rights is to picture a world without government. In this hypothetical, each and every negative right would be inevitably fulfilled, for there would be no state to infringe upon said right. This abridged hypothetical is, clearly, operating within the presumed context that negative rights may only be infringed by governmental actors, and not private entities. The individual could fully utilize their right to free speech or free exercise of their religious beliefs. Conversely, no positive right (e.g., the right to a minimally adequate living standard) in this world-without-government would be fulfilled, for the fulfillment of positive rights inherently necessitates the existence of a government to act.

As useful as thought-provoking hypotheticals may be, one need only look to the revered pages of the federal and state constitutions. In interpreting the federal constitution, the United States Supreme Court has rejected any “affirmative right to

23 Foreword: Positive Rights and the Evolution of State Constitutions, supra note 9, at 809.
27 Id.
28 Id. (citing Frank B. Cross, The Error Of Positive Rights, 48 UCLA L. REV. 857, 866 (2001)).
government aid, even when such aid may be necessary to se­
cure life, liberty, or property interests of which the government
itself may not deprive the individual.”\textsuperscript{29} The federal constitu­
tion, therefore, does not impose any obligation upon the state
to provide aid or assistance to anyone, regardless of their need.
In sharp contrast, every state constitution contains provisions
that address social and economic concerns, require action by
the respective state government, and can be said to create pos­
itive rights.\textsuperscript{30}
These positive rights provisions within state constitutions
will be at the heart of this Article, for it is in those lines of ink
that the hands of the state may be forced in the pursuit of social
and economic causes. The following sections, however, ana­
lyze endeavors at the federal level to incorporate certain posi­
tive rights, international efforts to improve the social and eco­
nomic well-being of persons all around the world, and foreign
constitutions that contain provisions akin to positive rights. In
doing so, the goal of these next sections is to make clear that
the negative-rights-only approach adopted at the federal level
by the United States is not, by any means, the objectively cor­
rect way to respect the dignity and humanity of a citizen body.

II. Positive Rights in the Federal, International, and For­
eign Context

A. No Positive Rights in Federal Constitution

As discussed briefly above, “the Constitution only protects

\textsuperscript{29} See, e.g., Deshaney v. Winnebago County Dept’ of Soc. Servs., 489 U.S. 189,
196 (1989); King v. State, 818 N.W.2d 1, 64 (Iowa 2012) (J. Appel, dissenting); Posi­
tive Rights and State Constitutions: The Limits of Federal Rationality Review, supra note
9, at 1133.

\textsuperscript{30} See Positive Rights and State Constitutions: The Limits of Federal Rationality Re­
view, supra note 9, at 1135; Bauries, supra note 16, at 316.
negative rights and does not guarantee basic human needs.”

This is worth discussing in greater detail at this point because the pathway by which the United States Supreme Court reached this stage was not linear. To provide an abridged analysis of this trajectory, this section will analyze several influential cases.

In Goldberg v. Kelly, the United States Supreme Court held that welfare benefits counted as new property, and, as such, were entitled to the protection of the federal constitution’s due process clause. “Under the Due Process Clause, people are entitled to a hearing only if they can show that their “life, liberty, or property” is at stake. But since the nation’s beginning, welfare benefits had been seen as a mere privilege, not a right.” Such benefits, therefore, were certainly neither “liberty” nor “property” within the original meaning given to those terms within the federal constitution. Despite this—and in an interesting twist—the Court in Goldberg flatly abandoned the right-privilege distinction, and instead ruled that welfare was a form of constitutional “property.” In so holding, the Court made note of the “brutal need” of welfare recipients and reasoned that—in the face of such need—“to cut off a welfare

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31 Gabrielidis, supra note 10, at 140.
34 Sunstein & Barnett, supra note 32 (citing Flemming v. Nestor, 363 U.S. 603, 611 (1960)).
35 See id.
36 See Goldberg, 397 U.S. at 262 n. 8 (“It may be realistic today to regard welfare entitlements as more like ‘property’ than a ‘gratuity.’ Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property.”); Sunstein & Barnett, supra note 32.
recipient . . . without a prior hearing of some sort is unconscionable. Thanks to Goldberg, the government must, to avoid violating the Due Process Clause, provide a hearing before it terminates welfare benefits. Some scholars and advocates believed that Goldberg signaled an eventual recognition of positive rights within the federal constitution by the United States Supreme Court. That anticipation and hope, however, would become frustrated by the Court in the years to follow. For example, the United States Supreme Court, though having found that welfare benefits cannot be terminated without a hearing, has refused to recognize a right to welfare in the federal constitution. The Court has also rejected claims that the federal constitution creates a positive duty upon the state to provide: housing, a free

38 See Sunstein & Barnett, supra note 32.
39 See Cross, supra note 32, at 860.
40 See id.
42 Lindsey v. Normet, 405 U.S. 56, 74 (1972) (“We do not denigrate the importance of decent, safe, and sanitary housing. But the Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality, . . . .”); W. Dennis Keating, Commentary on Rent Control & the Theory of Efficient Regulation, 54 BROOK. L. REV. 1223, 1226 (1989).
public education,\textsuperscript{43} or medical services.\textsuperscript{44} The Court rejected such recognition of rights over rather persuasive arguments in favor of such findings.\textsuperscript{45}

Then, in \textit{DeShaney v. Winnebago County Dept. of Social Services}, a case discussed above, the Court put to rest much of the hope for any recognition of positive rights within the federal constitution.\textsuperscript{46} Opining for the majority, Justice Rehnquist made clear that the purpose of the Due Process Clause “was to protect the people from the State, not to ensure that the State protected them from each other. The Framers were content to leave the extent of governmental obligation in the latter area to

\begin{itemize}
\item \textsuperscript{44} See Harris v. McRae, 448 U.S. 297, 318 & n.20 (1980); \textit{Positive Rights & State Constitutions: The Limits of Federal Rationality Review}, supra note 9, at 1133.
\item \textsuperscript{45} See Frank I. Michelman, \textit{The Advent of a Right to Housing: A Current Appraisal}, 5 HARV. C.R.-C.L. L. REV. 207, 209-12 (1970) (providing a legal and ethical argument in favor of a constitutional right to be housed); Susan H. Bitensky, \textit{Theoretical Foundations for a Right to Education Under the U.S. Constitution: A Beginning to the End of the National Education Crisis}, 86 NW. U. L. REV. 550, 553 (1992) (“Doctrines interpreting the Constitution are rich with possible theoretical bases for asserting an unenumerated affirmative right to education. Specifically, the right may be found implicitly to arise from the Fourteenth Amendment’s Due Process Clause and Privileges or Immunities Clause, the First Amendment’s Free Speech Clause, and from another implied constitutional right, the right to vote.”); Wendy E. Parmet, \textit{Health Care & the Constitution: Public Health & the Role of the State in the Framing Era}, 20 HASTINGS CONST. L.Q. 267, 331 (1992) (“If, with the Framers, we recognized that governments have authority because they have obligations, then their fulfillment of those obligations to further the common good and to protect the public health could well be seen as part of the political measure by which we as a society judge the legitimacy of our laws.”).
\item \textsuperscript{46} See \textit{DeShaney v. Winnebago County Dept. of Social Services}, 489, U.S. 189, 199 (1989).
\end{itemize}
the democratic political processes." Because of DeShaney and other similar decisions, the legal debate over many social and economic concerns at the federal level must operate within the framework of sub-constitutional privileges. 48

Though the United States Supreme Court has declined to read implied positive rights into the federal constitution, one cannot help but wonder, what if such rights were explicitly found therein. To play such a fanciful game of “what if,” one need only ponder how different things may be if a 20th century President, Franklin D. Roosevelt [hereinafter President Roosevelt], had been successful in his call for a Second Bill of Rights.

B. President Roosevelt’s Second Bill of Rights

“Against the backdrop of the Great Depression, and the threat from fascism, [President] Roosevelt was entirely prepared to insist that government should “protect individualism” not only by protecting property rights but also by ensuring decent opportunities and minimal security for all.” 49 His insistence would reach its culmination in his proposal for a “Second Bill of Rights” during his 1944 State of the Union Address.50

In establishing the importance of such positive rights, President Roosevelt explained that the nation “cannot be content, no matter how high that general standard of living may be, if some fraction of our people—whether it be one-third or one-

47 Id. at 196.
48 See Parmet, supra note 45.
49 Sunstein & Barnett, supra note 32.
fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.”51 He discussed the negative rights provided in the Federal Constitution but asserted their shortcomings when promulgated in isolation. According to President Roosevelt, the people of the nation had begun to grasp that genuine individual freedom requires economic security and independence.52 “In our day these economic truths have become accepted as self-evident. We have accepted, so to speak, a Second Bill of Rights under which a new basis of security and prosperity can be established for all—regardless of station, race, or creed.”53

As he continued his State of the Union, President Roosevelt went on to provide the rights that would later become known as the “Second Bill of Rights.”54 The rights he advocated for are all positive rights.55 These positive rights include:

The right to a useful and remunerative job in the industries or shops or farms or mines of the Nation;

The right to earn enough to provide adequate food and clothing and recreation;

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every businessman, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies

51 Id.
52 Id.
53 Id.
54 Id.
55 Id.
at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment;

The right to a good education.\textsuperscript{56}

Though this Article has described President Roosevelt’s Second Bill of Rights as a series of potential amendments to the federal constitution, he himself may not have viewed them as such.\textsuperscript{57} As some scholars have noted, “[President] Roosevelt himself did not argue for constitutional change . . . He wanted the Second Bill of Rights to be part of the nation’s deepest commitments, to be recognized and vindicated by the public, not by federal judges.”\textsuperscript{58} He did, however, clearly and unambiguously request Congress “explore the means for implementing this economic Bill of Rights.”\textsuperscript{59}

So, if the intention was not to amend the federal constitution, what then was going to be the mechanism for enforcement and obligation? According to legal scholar Cass R. Sunstein, President Roosevelt’s intention was “that the Second Bill should be seen in the same way as the Declaration of

\textsuperscript{56} Id.

\textsuperscript{57} See Sunstein & Barnett, supra note 32 (citing Cass R. Sunstein, \textit{SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER} (2004)).

\textsuperscript{58} Id.

\textsuperscript{59} Roosevelt, State of the Union Address, supra note 50.
Independence—as a statement of the fundamental aspirations of the United States, which we might see as the nation’s constitutive commitments.”60 In light of the United States Supreme Court’s rulings towards the latter half of the 20th century, perhaps this aspiration on President Roosevelt’s part was a bit naive.

Despite his best intentions, and efforts to emphatically change the societal values of the nation, President Roosevelt’s hopes have not yet been fully materialized.61 But the legacy of the Roosevelts has not ever been, and should never be viewed as, reductive solely to the actions of President Roosevelt. Eleanor Roosevelt, as will be discussed in the forthcoming section, was herself a trailblazer for positive rights. Because, as axiomatic as it is to say, the efforts of both influential 20th century figures cannot be overstated as they relate to the topic at hand.

C. Universal Declaration of Human Rights

It is impossible (or at least ill advised) to conduct an analysis of positive rights without discussing the Universal Declaration of Human Rights [hereinafter the “UDHR”]. The UDHR was finalized in 1948 under the leadership of Eleanor Roosevelt and publicly endorsed by American officials at the time.62 Though a milestone in its own regard, the UDHR has also served as a guide for the development of foreign

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60 Sunstein & Barnett, supra note 32, at 215 (citing Cass R. Sunstein, SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER (2004)).

61 Id. (“Much of the time, the United States seems to have embraced a confused and pernicious form of individualism, one that has no real foundations in our history. This is an approach that endorses rights of private property and freedom of contract, and respects political liberty, but claims to distrust ‘government intervention’ and to insist that people must largely fend for themselves.”).

62 Id. at 209-210.
The UDHR provides an interesting array of rights, and in doing so highlights negative and positive rights coexisting. Articles 1-21 of the UDHR provide for negative rights that, in many respects, mirror those found in the U.S. Constitution’s Bill of Rights. Articles 22-30 of the UDHR, however, promulgate positive rights, or things that a citizen is entitled to, and a government should be obligated, to provide if necessary. Article 25(1) provides that everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services, and the right to security in the event of unemployment, sickness, disability, widowhood, old age, or other lack of livelihood in circumstances beyond his control. Article 26(1) provides an explicit right to education, which “shall be free, at least in the elementary and fundamental stages.” Article 22, in turn, makes explicit that every human being has a right to social security. Then, in Article 23(1), the UDHR proclaims that everyone “has the right to work, to free choice of employment, to just and favourable conditions of work and to protection against unemployment.”

63 See Universal Declaration of Human Rights, UNITED NATIONS, https://www.un.org/en/about-us/universal-declaration-of-human-rights (last visited Apr. 21, 2022) (“[The UDHR] sets out, for the first time, fundamental human rights to be universally protected . . . The UDHR is widely recognized as having inspired, and paved the way for, the adoption of more than seventy human rights treaties, applied today on a permanent basis at global and regional levels . . .”).
65 Universal Declaration of Human Rights, arts. 1-21, G.A. Res. 217 A (III) (1948)).
66 Id. at arts. 22-30.
67 Id. at art. 25(1).
68 Id. at art. 26(1).
69 Id. at art. 22.
70 Id. at art. 23(1).
same line, the UDHR states that “[e]veryone who works has the right to just and favourable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.”71

In providing for these rights, the UDHR is meant to function “like a global road map for freedom and equality.”72 It was “adopted by the newly established United Nations on 10 December 1948, in response to the “barbarous acts which . . . outraged the conscience of mankind” during the Second World War.73 Despite the clear importance of the rights contained within the UDHR, it “is not a legal document and therefore cannot be invoked as a source of legal obligation, although there are compelling arguments for “viewing all or part of the Declaration as legally binding, either as a matter of customary international law or as an authoritative interpretation of the UN Charter.”74 It is, nevertheless, worth discussing positive rights within the context of the United States because the UDHR, along with other international human rights instruments, because they have been so influential elsewhere in developing a firm grasp of what obligations a government should owe its citizens are part of the social contract.75 The UDHR’s impact on foreign conceptions of governmental obligations will be discussed in greater detail in the next section.

71 Id. at art. 23(3).
73 Id.
74 Gabrielidis, supra note 10, at 146.
75 See id.
D. Foreign Constitutions and Positive Rights

As mentioned above, the UDHR is not a legally binding instrument. Many of its provisions, however, have made their way into the constitutions of states around the world, including Finland, Spain, Ukraine, Romania, Syria, Bulgaria, Hungary, Russia, and Peru. The current Constitution of Finland, for example, states that “[e]veryone shall be guaranteed . . . the right to basic subsistence in the event of unemployment, illness, and disability and during old age as well as at the birth of a child or the loss of a provider.” The Constitution of Spain announces, “[t]o citizens in old age, the public authorities shall guarantee economic sufficiency through adequate and periodically updated pensions.” To paint with a broader brush, the constitutions of Ukraine, Romania, Syria, Bulgaria, Hungary, Russia, and Peru all contain and recognize select positive rights. As another example, “Section 26 of the Constitution of South Africa provides that everyone has the right to access to adequate housing. Section 27 provides that everyone has the right to sufficient food, water, healthcare services, and social security.”

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77 Sunstein & Barnette, supra note 32; see Cass R. Sunstein, SECOND BILL OF RIGHTS: FDR’s UNFINISHED REVOLUTION & WHY WE NEED IT MORE THAN EVER 141 (2004) (“Many of the world’s constitutions simply borrowed their provisions on social and economic rights from the [UDHR].”).

78 Sunstein & Barnette, supra note 32 (citing FIN. CONST. ch. 2, § 19(2)).

79 Id.

80 Id. (citing SPAIN CONST. tit. 1, § 2, ch. III, art. 50).

As a somewhat ironic and recent example, the interim Iraqi Constitution, which was drafted with help from the United States—and later lauded by the Bush administration—provides "[t]he individual has the right to security, education, health care, and social security."\textsuperscript{82} It also proclaimed that the government "shall strive to provide prosperity and employment opportunities to the people."\textsuperscript{83} This historical context is, again, ironic.\textsuperscript{84} The United States, which has been so blissfully content to deny any constitutional obligation on its federal part to provide for its citizens, was eager to see that such steps would be taken on the other side of the world. The United States pushed for the incorporation of positive rights in a country in which it had ravaged the economy, the people, and the culture.\textsuperscript{85} Positive rights were "valuable" there, but not here.

Among the nations that have incorporated positive rights into their constitutions, many have faced the issue of how to judicially enforce said rights.\textsuperscript{86} "A great deal of litigation on these issues has come from Europe especially Eastern Europe, where courts have actively protected social and economic..."
rights."87 Latvia’s Constitutional Court, for example, held that foreign nationals working in the country under temporary residence permits had the right to unemployment benefits under the right to social insurance promulgated within the Constitution.88 “The Polish Constitutional Court invoked the right to housing to invalidate an eviction law that did not guarantee poor people adequate replacement housing.”89 Such litigation, however, has not been restricted to European nations. In South Africa, its Constitutional Court has held that “the constitution required not only a long-term plan to provide low-income shelter but also a system to ensure short-term help for people with no place to live.”90 In so doing, it held that the rights of 900 plaintiffs who had built themselves temporary shelters, only for those to be destroyed, had had their constitutional rights violated.91 Interestingly, the constitutional violation was not the destruction of their temporary homes, but by the government’s failure to establish a “program to provide ‘temporary relief’ for those without shelter.”92

As evidenced by these cases, courts have the means and ability to enforce positive rights found in national constitutions.93 Courts here in the United States are no less equipped than those in Europe or Africa. Nevertheless, and as will be discussed in greater detail to come, there are those who argue such positive rights cannot be judicially enforced. But, because there are no positive rights found in the federal constitution, such a test of federal courts cannot even be had. Those positive rights found in many foreign constitutions, despite seemingly

87 Id. at 215.
88 Id.
89 Id. at 216.
90 Id. at 222.
91 Id. at 220.
92 Id.
93 See id. at 215-222.
working out fine in said other countries, are not found in the Constitution of the United States, “and anyone familiar with decisions like that in DeShaney v. Winnebago County Department of Social Services will understand that claims to positive state assistance will not be judicially read into our national constitutional law any time soon.”94 In the meantime, however, resourceful advocates and lawyers would be naïve to overlook the positive rights found in many (if not all) state constitutions.

III. Positive Rights and State Constitutions

A. A Brief History of Positive Rights in State Constitutions

Before diving into modern applications of the positive rights found in state constitutions, it is worth briefly setting the historical stage. As of 1868, there were 37 states in the union.95 Of those 37, 28 states “recognized a fundamental state constitutional duty to provide a public-school education as a matter of their formal, positive state constitutional law.”96 But this only speaks to the land, not to the people themselves. As of 1868, 92% “of all Americans . . . lived in states whose constitutions imposed [a state constitutional duty to provide a public-school education] on state government.”97 In terms of more general welfare and aid, just nine states in 1868—a clear minority—provided for the creation and maintenance of public

94 Michelman, supra note 81 (citing DeShaney v. Winnebago County Dept. of Social Services, 489 U.S. 189, 195 (1989)).
97 Id. at 109.
institutions whose aim was to aid those in need. 98

“Since the eighteenth century, some state constitutions have included a range of social and economic provisions, touching on such concerns as public hospitals for the indigent infirm and public schools for resident children.” 99 As an example, the Massachusetts Constitution, which was drafted nearly a decade before the United States Constitution, and in language drafted by John Adams, required the state to promote education. 100 The Massachusetts Constitution specifically recognizes “the duty of legislatures and the magistrates, in all future periods of this commonwealth, to cherish the interests of literature and the sciences.” 101 More broadly speaking, the constitutions of those states that emerged from the Northwest Territory all contain explicit guarantees of public support for public schooling. 102

With this historical context in mind, the next sections will turn to more specific positive rights contained within state constitutions. In addition to describing the provisions themselves, the goal of the forthcoming paragraphs is to also shed light onto how such provisions have been used by advocates to further the well-being of the citizens of the states.

98 Id. at 111 (“A typical clause provided, ‘Institutions for the benefit of the insane, blind, and deaf and dumb shall always be fostered and supported by the State, and be subject to such regulations as may be prescribed by the general assembly.’”).
99 Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 813.
100 Id.; Zackin, supra note 6, at 67.
101 Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 813.
102 Id.
B. Right to Education

By 1905, 40 states had common school provisions within their state constitutions. Most pointedly, “many of these common school mandates were included by Southeastern states during Reconstruction or added to frontier states’ original constitutions.” It is necessary to note, however, that just because a state had a common school provision within its constitution did not mean it would actually develop a common school system immediately after ratification. Though every state constitution requires its respective state to provide a school system in which children may receive an education, most state constitutions do not explicitly provide for a “right to education.” Instead, the education provisions contained within many state constitutions convey an implied ‘right to education’ by mandating that state legislatures establish free and common schools.

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103 See Zackin, supra note 6, at 71.
104 Id.
105 Id. (“Some states did not create statewide common school systems until many years after their constitutions established the requirement. For instance, though Indiana [had a common school provision within its constitution by at least 1825], the state’s government would not actually establish a system of public schools until 1852.”) (citing Edward Reisner, The Evolution of the Common School 343 (New York: The MacMillan Company, 1930)).
106 See id. at 68; Education, CORNELL L. SCH. LEGAL INFO. INS., https://www.law.cornell.edu/wex/education (last visited May 1, 2022).
107 Zackin, supra note 6, at 68; see ARK. CONST. art. 14, § 1 (“The State shall ever maintain a general, suitable and efficient system of free public schools . . . .”); COLO. CONST. art. IX, § 2 (“The general assembly shall, as soon as practicable, provide for the establishment and maintenance of a thorough and uniform system of free public schools throughout the state . . . .”); CONN. CONST. art. 8, § 1 (“There shall always be free public elementary and secondary schools in the state. The general assembly shall implement this principle by appropriate legislation.”); DEL. CONST. art. X, § 1 (“The General Assembly shall provide for the establishment and maintenance of a general and efficient system of free public schools . . . .”); HAW.
206  *BENEFITS & SOCIAL WELFARE LAW REVIEW* Vol. 24.2

require state Boards of Education to manage the system of commons schools, that state governments manage school funds, and that state governments finance schools through taxation and appropriation.\(^{108}\) It is also common for state constitutions to contain provisions requiring state legislatures to promote intellectual, scientific, moral, and agricultural improvement.\(^{109}\)

These provisions did not appear out of nowhere. They were not the result of an accident or happenstance. They were not the philanthropic endeavors of the wealthy elites. The right to education, as it appears in its many variations, was the result of the determination of educational leaders and delegates to state constitutional conventions.\(^{110}\)

After the New Mexico Constitution was ratified, for example, educational advocates argued that “[i]t is the state’s duty to see to it that every child has equal opportunity for an education, that after every district has done it utmost for the education of its children, the state should supply whatever else is needed to bring equality of

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\(^{108}\) Zackin, *supra* note 6, at 68; see, e.g., IOWA CONST. art. IX, div. I, § 1 (“[t]he educational interest of the State, including Common Schools . . . shall be under the management of a Board of Education.”); TEX. CONST. art. VII, § 1 (“[i]t shall be the duty of the Legislature of the State to establish and make suitable provision for the support and maintenance of an efficient system of public free schools.”)

\(^{109}\) See, e.g., CAL. CONST. art IX, § 1; IND. CONST. art. 8, § 1; NEV. CONST. art. 11, § 1; IOWA CONST. art. IX, div. 2, § 3.

\(^{110}\) Zackin, *supra* note 6, at 70 (“[E]ducational leaders and delegates to state constitutional conventions were entirely clear about their intention to create new governmental duties, or obligations, and they drafted constitutional provisions precisely for this purpose.”).
opportunity with richer districts.”

In California, district-level taxation began to outpace taxation at both county and state levels by 1920. “The California Teachers’ Association spearheaded a movement to amend the constitution to further centralize school financing [out of concern that the legislature would not raise sufficient taxes].” This push by California educators and advocates represents another example in a long list of educational reformers pursuing constitutional provisions in order to force the legislature to make political change. A true innovative turn, however, occurred in the late 20th century as educational advocates began to “use courts in an attempt to reshape states’ systems of educational financing.” As this endeavor hit a wall in federal courts by way of the United States Supreme Court’s ruling in San Antonio Independent School Dis. v. Rodriguez, “advocates of education ... responded ... by challenging systems of education financing on state constitutional grounds and in state courts.”

C. Environmental Rights

“Environmental rights are instructive neither because they are very old nor because they address an area of American life which we might least expect to find positive rights, but because they emerged at a time in which we might least expect environmentalists ... to have cared about the content of state

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111 Id. at 73 (citing Education & Equality of Taxation, 8 N. M. J. OF EDUC., SANTA FE 9 (May 1912).
112 Id. at 85.
113 Id.
114 Id. at 86.
115 See id.
116 Id. at 98.
During the 1960s and 1970s, broad environmental rights and protections arose within state constitutions. Advocates in this field argued that negative rights were simply not enough to provide meaningful protection within the context of environmental health. Yet, despite living in a time of unparalleled federal attention to environmental issues, these advocates “still lobbied to include rights to environmental protection in their state constitutions.”

Between 1964 and 1978, the constitutions of fourteen states were amended to address the state’s role in environmental protection. The Illinois Constitution, for example, provides that “Each person has the right to a healthful environment. Each person may enforce this right against any party, governmental or private, through appropriate legal proceedings....” The Rhode Island constitution provides that:

[I]t shall be the duty of the [state] to provide for the conservation of the air, land, water, plant, animal, mineral and other natural resources of the state, and to adopt all means necessary and proper by law to protect the natural environment of the people of the state by providing adequate resource planning for the control and regulation of the use of the natural resources of the state and for the preservation, regeneration and restoration of the natural environment of the state.

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117 Id. at 146.
118 Id. at 147.
119 Id.
120 Id. at 149.
121 Id. at 150.
122 ILL. CONST. art. XI, § 2.
123 R.I. CONST. art. I, § 17.
Nine state constitutions added provisions akin to a requirement that the state legislature provide for the control of pollution and to ensure the quality of air, water, and other natural resources. In lobbying for such protections, environmental advocates couched their endeavors as a “mere expansion of a role that states had long played in protecting the public’s health.”

In pushing for positive environmental rights, the goal was, functionally, “to enable public interest litigation on behalf of environmental protection.” And, through this litigation, environmentalists hoped to “ease the scale from judges’ eyes and to usher in a new era, in which courts would recognize implicit constitutional rights to environmental protection.”

If no implied rights would be found, however, the advocates wanted to ensure there were explicit provisions upon which they could rely as well. In pursuing such litigation, and any subsequent appeals, environmental advocates hoped to not only change policy through the courts, but also to shape public opinion by bringing environmental issues within the realm of public discourse. Though they persevered with this noble goal, the “judicial doctrine did not develop in the way that the champions of positive [environmental] rights had hoped.”

While some state supreme courts have recognized the

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124 See Zackin, supra note 6, at 150.
125 Id. at 154-55 (“Like protection of the public’s health, state governments had been involved in the management of natural resources since the nineteenth century, . . . Constitutional conventions in several states identified the new rights to clean air and water, or to clean and health environments as extensions of the older provisions about the management of state-owned lands and waters.”).
126 Id. at 173.
127 Id. at 175.
128 Id. at 189.
129 Id. at 190.
importance of environmental protection, few have provided “a particularly robust defense for environmental rights.” Montana’s Supreme Court, for example, has departed from the trend of a majority of state supreme courts and taken a more environmentally protective approach. In Montana Environmental Information Center v. Department of Environmental Quality, the court held that the right to a clean and healthful environment, which was provided in Article IX, § 1 of the Montana Constitution, was “interrelated and interdependent” with the rights guaranteed by Montana’s Declaration of Rights. As a result, if state action implicates this environmental right then strict scrutiny applies, and said state action will only survive if the state can demonstrate a compelling interest and that its action is closely tailored to achieving that interest. Then, in Cape-France Enterprises v. Estate of Peed, the Montana Supreme Court explicitly applied this same strict scrutiny analysis to private action and parties.
D. Worker’s Rights

In addition to a right to education, and environmental rights, positive rights may also present in the form of workers’ rights. Eight-hour workdays, laborer’s liens, safe workplace conditions, minimum wages, and protection from blacklisting are all examples of positive rights that can be found in various state constitutions. It is necessary to recognize, however, that these labor provisions “were almost always written with only white workers in mind,” and many proponents of them were “often quite clear about their desire to exclude immigrant labor from eligibility for public works projects.” Additionally, these workers’ rights provisions were often written to apply only to women, people in dangerous industries, and those employed by the state.

Despite these narrow applications, the workers’ rights provisions did apply to a fair number of employees within the state. Presently, fifteen states have constitutional provisions related to working conditions. Fourteen states have provisions related to the hours that may be worked in a day or week. Seven states have provisions setting a minimum wage for workers. And four states have provisions protecting employees against blacklisting. As an interesting—and somewhat depressing aside—Iowa’s Constitution does not contain any of these aforementioned protections. As of 1940, forty-three states have at least one labor protection contained within

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136 Zackin, supra note 6, at 110.
137 Id.
138 Id.
139 Id. at 111.
140 Id.
141 Id.
142 Id.
143 See id.
To dive a bit deeper, it is worth examining some specific examples of these labor provisions and rights. Article X § 24(a) of Florida’s Constitution provides “All working Floridians are entitled to be paid a minimum wage that is sufficient to provide a decent and healthy life for them and their families, that protects their employers from unfair low-wage competition, and that does not force them to rely on taxpayer-funded public services in order to avoid economic hardship.” In New York, “[n]o laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, shall be permitted to work more than eight hours in any day or more than five days in any week, except in cases of extraordinary emergency.” The payment of prevailing wages is so important in New York State that it is embodied in the state’s Constitution. New York Constitution Art. I, § 17 provides “No laborer, worker or mechanic, in the employ of a contractor or sub-contractor engaged in the performance of any public work, . . . shall he or she be paid less than the rate of wages prevailing in the same trade or occupation in the locality within the state where such public work is to be situated, erected or used.” Thus, under New York’s Constitution, if a government agency enters into a contract involving the employment of laborers, workmen, or mechanics, and said contract concerns a public works project, then those laborers,
workmen, and mechanics employed must be paid the prevailing wages for their services.\textsuperscript{149}

In New York, employees also “have the right to organize and to bargain collectively through representatives of their own choosing.”\textsuperscript{150} It is important to point out that this is not limited to particular types of employees engaged in public works, unlike the aforementioned sections found in § 17.\textsuperscript{151} When these labor provisions have been reviewed by New York Courts, they have held that these protections—being explicit in the New York Constitution—cannot be abrogated by “legislative enactment; no regulation of statutory bodies or private institutions; no court action can stand in violation of that command of the State Constitution. Nor should a court permit such explicit language to be rendered meaningless by its action.”\textsuperscript{152}

The labor protections found in state constitutions, like its educational and environmental counterparts, were the result of lobbying by labor advocates.\textsuperscript{153} “[L]abor organizations used constitutional rights to tell state legislatures what they had to do while simultaneously telling courts what they could not do.”\textsuperscript{154} These advocates pursued state constitutional rights that would require governments to “extend themselves in order to protect laborers’ leisure, their health and their lives.”\textsuperscript{155} Their endeavors were widespread, and, in many respects rather successful.


\textsuperscript{150} N.Y. CONST., ART. 1, § 17.

\textsuperscript{151} See N.Y. CONST. art I, §17.


\textsuperscript{153} See Zackin, supra note 6, at 130 (“[L]abor advocates desired a constitutional amendment that would establish a universal eight-hour day.”).

\textsuperscript{154} Id. at 143.

\textsuperscript{155} Id. at 144.
"[T]he proponents of protective labor regulation understood the constitutional provisions they championed as positive labor rights, even when they did not use those terms. The statements of labor leaders, progressive lawyers, and constitutional convention delegates make clear that [state constitutional guarantees relating to workers' rights] were intended to create obligations on government to intervene, placing itself between employers and laborers, and providing protection from the often brutal conditions market capitalism had created."156 According to some scholars, state constitutional litigation has become increasingly relevant to workers and those interested in workers' rights.157 There exists opportunity for advocates and lawyers to leverage the labor protection provisions contained within many state constitutions to support workers.158

E. Right to Welfare/Aid

The final set of positive rights that are commonly found in state constitutions and that will be discussed herein relate to welfare. "States, of course, are free to provide their residents with substantive rights to welfare benefits, as long as federal funds are not involved. Some states do so, while others do not."159 Some states, such as New York, contain provisions explicitly providing substantive rights to welfare benefits.160 Other states, such as Connecticut, do not. And, as will be discussed below, some states, such as Kansas, contain explicit provisions relating to a right to welfare, but the courts have

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156 Id. at 108-9.
157 See, e.g., id; Sparks, supra note 145.
158 Sparks, supra note 145.
160 Id.
interpreted the right very narrowly.\textsuperscript{161} For the purposes of illustration, this section will analyze and compare New York’s constitutional right to welfare with that of Kansas.

\textit{i. New York}

New York’s Constitution is a bit unique as compared to other states, for it contains a provision that creates a legally enforceable right that requires the state to provide minimal subsistence benefits.\textsuperscript{162} The \textit{Tucker v. Toia} Court addressed the state’s constitution in the following case excerpt:

In New York State, the provision for assistance to the needy is not a matter of legislative grace; rather, it is specifically mandated by our Constitution. Section 1 of article XVII of the New York State Constitution declares: “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”.

This provision was adopted in 1938, in the aftermath of the great depression, and was intended to serve two functions: First, it was felt to be necessary to sustain from constitutional attack the social welfare programs first created by the State during that period (cf. People v. Westchester County Nat. Bank, 231 N.Y. 465, 132 N.E. 241); and, second, it was intended as an expression of the existence of a

\textsuperscript{161} Id.; see Moore v. Ganim, 660 A.2d 742, 750 (Conn. 1995) (“Contrary to the plaintiffs’ contention, we are persuaded that article first, § 10, incorporates no governmental obligation to provide minimum subsistence. We further are persuaded that neither the preamble nor article first, § 1, imposes on the government an affirmative constitutional obligation to provide minimal subsistence to the poor.”).

\textsuperscript{162} 3 Local Gov’t L. § 19.3, FN 7.
positive duty upon the State to aid the needy.\textsuperscript{163}

In \textit{Tucker v. Toia}, the New York Court of Appeals held that section 1 of article XVII of the New York Constitution imposes upon the State an unambiguous affirmative duty to aid the needy.\textsuperscript{164} In \textit{Tucker}, the Court reviewed a New York Statute that barred home relief aid to a person who, under the age of 21, did not live with a parent or legally responsible relative, unless said person under the age of 21 commenced a support proceeding against their parent or relative. In so doing, the Court held that this statute was unconstitutional because it “contravenes the letter and spirit of section 1 of article XVII of the Constitution.”\textsuperscript{165} In short, Article 17 §1 of the New York Constitution prevents the State from simply refusing to aid those whom it has classified as needy.\textsuperscript{166}

\textbf{ii. Kansas}

The Kansas Supreme Court has held that Kansas’ Constitution commands that counties of the state shall provide for the poor and those who have claims upon the sympathy and aid of society.\textsuperscript{167} Specifically, under the Kansas Constitution, counties have a \textit{duty} to provide for those inhabitants who, by reason of age, infirmity, or other misfortune, may have claims upon the sympathy and aid of society.\textsuperscript{168} According to the Kansas Supreme Court, however, has made clear that “[n]either

\begin{itemize}
\item \textsuperscript{163} Tucker v. Toia, 371 N.E.2d 449, 451-52 (N.Y. 1977).
\item \textsuperscript{164} \textit{Id.}
\item \textsuperscript{165} \textit{Id.}
\item \textsuperscript{166} \textit{See id. at 452.}
\item \textsuperscript{167} \textit{See e.g., Bullock v. Whiteman, 865 P.2d 197, 202 (Kan. 1993); Caton & Starr v. Osborne County, 205 P. 341 (Kan. 1922).}
\item \textsuperscript{168} \textit{Bullock, 865 P. at 183 (quoting State ex rel. Mitchell v. Jackson County Board of Social Welfare, 171 P.2d 651 (Kan. 1946)).}
\end{itemize}
the state constitution nor our state statutes mandate that [state]
provide assistance on an individual basis or meet in full meas­
ure all the legitimate needs of each recipient.”

F. Positive Rights in Open Textured Provisions

While the previous subsections have dealt with state con­
stitutional provisions that explicitly provide for positive rights,
such is not the end of the discussion. Some state courts have
traded open textured provisions, such as state equal protec­
tion provisions and happiness and safety clauses as lending
support for social and economic claims. Minnesota’s Consti­
tution “specifically recognizes the right to ‘life, liberty or prop­
erty’ . . . , but does not attempt to enumerate all “‘the rights or
privileges secured to any citizen thereof.'” Based on its read
of this provision, the Minnesota Supreme Court in Thiede v.
Scandia Valley found a “cognizable claim for damages to rem­
edy forced eviction from home.” Noting its state constitu­
tional protections of due process and equal protection, the
New Jersey Supreme Court in Southern Burlington Cnty.
N.A.A.C.P. v. Mount Laurel Tp., invalidated municipal zoning
laws that excluded low and moderate income families by fail­
ing to provide for a variety and choice of housing.

169 Id. at 189 (citing Bernstein v. Toia, 373 N.E.2d 238, 243 (N.Y. 1977)).
“Just Words”: Common Law & the Enforcement of State Constitutional Social and Eco­
nomic Rights].
171 Thiede v. Town of Scandia Valley, 14 N.W.2d 400, 405 (Minn. 1944).
172 “Just Words”: Common Law & the Enforcement of State Constitutional Social and Economic Rights, supra note 170, at 1538 n. 87 (citing Thiede, 14 N.W.2d at 405).
(N.J. 1975).
“promote public health, safety, morals or the general welfare.”174 The municipality’s zoning plan, which was clearly meant only for the affluent, was contrary to the general welfare, and thus violated the New Jersey Constitution.175 These decisions are, however, rather anomalous when contrasted with a majority of state court decisions relating to positive rights found in open textured provisions.176

As some commentators have noted, most courts will simply not even consider arguments for affirmative governmental obligation based on certain open textured provisions such as happiness and safety clauses.177 In Daugherty v. Wallace the Ohio Court of Appeals became “the only case expressly to consider an argument for affirmative governmental obligation based upon a “happiness and safety” clause.178 While the court acknowledged the difficulties the plaintiffs would face by having their access to welfare aid cut after six months, it nevertheless held that a statute limiting benefits to a period of six months did not violate their state constitutional right to seek and obtain safety.179 Thus, even if a plaintiff were to overcome the massive hurdle that is convincing a court to consider an argument for a positive right arising out of a happiness and safety provision, the court is unlikely to rule in their favor.180

As discussed above some state courts have placed affirmative duties upon the government based on open textured

174 Id. at 725; see N.J. CONST. Art I, § 1 (“All persons are by nature free and independent, and have certain natural and unalienable rights, among which are those of enjoying and defending life and liberty, of acquiring, possessing, and protecting property, and of pursuing and obtaining safety and happiness.”).  
177 See e.g., Grodin, supra note 176.  
178 Id. at 31.  
179 See id. (citing Daugherty v. Wallace, 621 N.E.2d 1374 (Ohio Ct. App. 1993)).  
180 See e.g., id.
provisions. Others, however, have either not yet considered such arguments or have simply ruled that the open textured provisions do not create positive rights.\textsuperscript{181} While the ambiguous and broad language often employed in open textured provisions can theoretically create an argument for imposing a duty on the government to act, said argument is likely going to fail or not make the list of arguments raised on appeal. It is precisely for this reason that advocates should rally for the inclusion and expansion of explicit positive rights in state constitutions. If, however, there is not a strong explicit positive right upon which one can argue—or even if there is—an advocate should still raise an argument based on open textured provisions. The worst-case scenario is the court rejects the argument, but the best-case scenario is an expansion of positive rights found in state constitutions. As the saying goes, you miss 100% of the shots you don’t take.

IV. State Constitutional Provisions and Their Usefulness for Advocates Going Forward

A. Opposing Views

Before diving directly into potential benefits to be derived from the usage of contemporary positive rights found in state constitutions, or the suggestion that state constitutions should

\textsuperscript{181} See, e.g., “Just Words”: Common Law & the Enforcement of State Constitutional Social and Economic Rights, supra note 170; Grodin, supra note 176 (noting the few several state courts who have even considered the argument that “happiness and safety” clauses in their respective constitutions impose affirmative obligations onto the state seem to have all rejected such arguments); Robert Deichert, Note, 181, 33 Conn. L. Rev. 1069, 1080-1 (2001) (“Indeed, many states with constitutional provisions that provide strong textual support for a duty of protection have declined to interpret their constitutions expansively in this context.”).
be amended, it is only fair to look at arguments for and against such goals. There are, as will become clear below, scholars on both sides of this debate. Despite this, however, this Article remains fixed to its thesis that state constitutions can provide pathways to improving the material well-being of many by way of the positive rights found therein.

i. Cross – Explicit Positive Rights Will Make Things Worse

As one legal scholar, Frank Cross, has pointed out “an explicit positive right going beyond that in current state constitutions, enforceable by individuals, would prompt greater judicial activism in the area.”\(^\text{182}\) To Cross, this inherently presents a challenge because the potential consequences will be uncertain.\(^\text{183}\) He goes on to predict that “there is a high probability that judicial involvement will only make things worse for the beneficiaries of the positive rights.”\(^\text{184}\)

Cross argues that the act of recognizing positive rights is likely to have a net negative impact on those who should theoretically benefit from such recognition.\(^\text{185}\) It is clear that positive rights may be vague and indeterminate. This “lack of conceptual clarity,” according to Cross, represents a “serious obstacle” to their implementation.\(^\text{186}\) While quite vague, these terms could be defined and given greater determinacy over time.\(^\text{187}\) However, Cross contends that “[e]ven if we could define precisely what the poor were entitled to, there remains the

\(^{182}\) Cross, supra note 32, at 900-901.

\(^{183}\) Id.

\(^{184}\) Id. at 901.

\(^{185}\) Id.

\(^{186}\) Id.

\(^{187}\) Id.
question of what program would effect that entitlement. . . . A positive right to an outcome does not demand that it be achieved through such direct assistance."\footnote{188} And, "[t]he advocates of judicially enforceable positive rights turn to the historical record for proof of the relative inadequacy of statutory assistance and then immediately ignore the historical record of judicial assistance. . . . On balance, [however,] Congress and the Executive branch have been more favorable to the interests of disadvantaged groups than have the courts."\footnote{189}

\textit{ii. Hershkoff – Explicit Positive Rights Will Better Things}

Most of this Article has been an attempt at establishing positive rights as a useful tool, so it is not necessary to expend a great deal of time further discussing the benefits. To discuss positive rights without directly incorporating Helen Hershkoff’s opinion would be, however, a disservice to the underlying goal. “A state constitutional welfare right, however, is intended to transcend politics, making permanent the state’s policy commitment; it therefore requires the principled judgment that commentators conventionally associate with courts.”\footnote{190} Despite Cross’ contention, Hershkoff is convinced that courts adjudicating many positive rights’ cases would be able to develop manageable standards that draw guidance from external sources of information.\footnote{191} There is no doubt that doing so would be difficult. “We can acknowledge the difficulty, however, and still insist that a state court rise to the

\footnotesize{\textit{\textsuperscript{188} Id. at 902.} \\
\textit{\textsuperscript{189} Id. at 922.} \\
\textit{\textsuperscript{190} Positive Rights & State Constitutions: The Limits of Federal Rationality Review, supra note 9, at 1179.} \\
\textit{\textsuperscript{191} See id. at 1182.}}
challenge rather than abdicate its own constitutional duty by yielding entirely to the other branches.” 192 Just like those advocates who came before, be they educational reformists, environmentalists, or labor unionists, the courts can be a useful mechanism for enforcing positive rights and ensuring the state actually fulfill its constitutional obligations.

B. Litigating Positive Rights

Impact litigation—also known as strategic litigation—is the practice of bringing specific lawsuits based upon particular claims with the underlying goal of effectuating societal change. 193 Impact litigation cases may rely on arguments arising out of statutory law or constitutional rights. 194 An iconic example of impact litigation is Brown v. Board of Education, which—through requiring desegregation of public schools—fundamentally changed society and its values. 195 Through impact litigation, public interest groups, advocates, and lawyers can successfully hold the government accountable for the obligations imposed upon it. 196

Many courts, in recent years especially, have been tasked with interpreting and enforcing positive rights. 197 “Their experience underscores the practicability, but admitted

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192 Id.
195 Schuck, supra note 193 (noting another iconic example was the Supreme Court’s holding in Roe v. Wade).
196 See generally id.
197 See Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 828.
uncertainty, of the judicial effort." Some courts have examined the right to education, and of those some have decided to enforce the positive right. Similarly, courts have wrestled with the right of the impoverished to receive public assistance, a right promulgated in several state constitutions. In so doing, numerous courts have enforced claims against the state for failing to satisfy this positive right. These decisions, though not alone sufficient, represent an energizing push by concerned groups. They also demonstrate that—despite any supposed difficulty raised by potential ambiguity with explicit positive right provisions—courts can successfully create judicially manageable standards. As a related point, commentators such as Cross, who believe positive rights provisions lack sufficient clarity to be judicially manageable, seem to miss the fact that courts—federal and state—contend with imprecise and ambiguous provisions quite frequently.

198 Id. (citations omitted).
199 See Ala. Coal. for Equity, Inc. v. Hunt, No. CIV.A 90-883-R, 1993 WL 2004083, at *1 (Ala. Cir. Ct. 1993) ("the Court finds . . . that the present system of public schools in Alabama violates the constitutional mandate of art. XIV, § 256, and the provisions of art. I §§ 1, 6, 13 and 22 of the Alabama Constitution, because the system of public schools fails to provide equitable and adequate educational opportunities to all schoolchildren . . . "); but see King v. State, 818 N.W.2d 1, 27 (Iowa 2012) (holding that any failure of the state to establish statewide educational standards, assessments, and teacher training, recruitment, and retention programs did not amount to deprivation of a fundamental right even if education could amount to a fundamental right, a matter which the Court deferred to a later date).
200 See Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 828.
201 See, e.g., id. (citing Thrower v. Perales, 523 N.Y.S.2d 933, 937 (N.Y. Sup. Ct. 1987)).
202 Cross, supra note 32, at 901.
203 See, e.g., District of Columbia v. Heller, 554 U.S. 570, 582-84, 635 (2008) (interpreting the Second Amendment as guaranteeing an individual right to possess and carry weapons in case of a confrontation, such that a categorical ban on handguns and prohibiting firearms from being functional in the home violated the
Certainly, not every case has resulted in an outcome that broadens or truly gives life to the positive rights cited in the argument. But this effort is not in vain even when the court rules unfavorably, for a positive impact on public discourse is in itself a small victory. This public discourse, in turn, can have a dramatic effect on broadening the positive rights available, a point to be discussed in greater detail in the next section.

C. Amending State Constitutions to Add Additional Positive Rights

Every state constitution has undergone significant changes since its inception, with the addition of positive rights being among such amendments. And, in many respects, these amendments were reflective of a change in public opinion as it relates to the affirmative duty upon the state to provide...
welfare when necessary.206 In some states, such as New York, the constitutional history surrounding the incorporation of positive rights (e.g., welfare rights) demonstrates how a state may choose to impose an obligation upon itself while still defining the scope of said obligation in a pragmatic way.207 Again, there are those who profess concern that explicit positive rights will negatively impact those who such provisions seek to help because of confrontational or improper judicial enforcement. Social groups and advocates involved in the drafting process, however, “may draft constitutional rights not only to judicialize conflicts, but also to insulate particular kinds of statutes from courts’ power to nullify them.”208 The ability to tailor new state constitutional provisions to both balance the needs of the masses with the capabilities of judicial enforcement is what makes this option so appealing. Impact litigation, for all of its potential benefits, will always be inherently limited by the words presently found in state constitutions. Creative arguments can only carry such advocacy efforts so far. But, if social groups can successfully broaden the playing the field by adding additional or amending presently found positive rights, then the state will be forced to act, especially if

206 See id. ("[Amendments to state constitutions] reflect[] common law developments and, more recently, welfarist assumptions, which have enlarged the catalogue of traditional rights and interests that the court may interpret and enforce.") (citing Helen Hershkoff, Welfare Devolution & State Constitutions, 67 FORDHAM L. REV. 1403, 1428 (1999).

207 See Helen Hershkoff, Welfare Devolution & State Constitutions, 67 FORDHAM L. REV. 1403, 1427 (2001) (citations omitted); Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 814 (“And during the Great Depression, New York amended its constitution to include a right to public assistance.”).

208 Zackin, supra note 6, at 94 (“While constitutions can create the basis for litigation, they can also ensure that... courts are unable to rule particular statutes unzackinconstitutional.”); see Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 804-05 (2001) (“[S]tate constitutional amendment processes offer opportunities for populist participation that differ significantly from the federal experience.”).
subsequent impact litigation is explored.

The process of amending state constitutions, though having been done before, will not be easy. Such substantial change rarely is, especially when the goal is to make the government bear more duties. This challenge is made all the more complicated by a lack of a firm understanding of the conceptual distinctions between negative and positive rights.\textsuperscript{209} As previously discussed, many United States' citizens struggle to grasp how positive rights would function while still preventing too much governmental entanglement in social and economic life.\textsuperscript{210} As Hershkoff has put it, “[t]he persistence of the distinction [between positive and negative rights] is not merely linguistic but rather underscores the fact that positive rights, characterized as enforceable legal provisions, remain contested features of a liberal democratic regime.”\textsuperscript{211}

It is for this precise reason that a clear understanding of what positive rights are must be fundamental to any endeavor to shift public discourse. It may very well be the case that most do not see a constitutional need for positive rights. Advocates, however, do not need to convince most people when seeking to amend state constitutions. They simply need to convey what positive rights are and what the incorporation of them may accomplish to enough motivated individuals who will, in turn, push their respective legislatures. This very method has been done time and time again by public interest groups throughout the history of various state constitutions.\textsuperscript{212} “As such, they offer access points into policymaking, encouraging and encouraged

\textsuperscript{209} Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 810-11.
\textsuperscript{210} See Zackin, supra note 6, at 2.
\textsuperscript{211} Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 811.
\textsuperscript{212} See e.g., id. at 70; Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 810-11.
by popular mobilization, and so both instantiating and transforming the political culture.”

Because this Article has utilized the metaphor of positive rights being a sword already, it only makes sense to continue here. If charging into a battle, the present author would rather be armed with a claymore than with a kitchen knife. The same can be said if entering the arena of the courts to hold the government accountable for its obligations to its people.

CONCLUSION

The positive rights found in state constitutions offer a pathway to justice that is often overlooked. These rights are a strong tool in the arsenal of advocates and lawyers who seek to improve the quality of life of their figurative (or in some cases literal) neighbor. A review of history demonstrates that the inclusion of positive rights in state constitutions was not done by accident. Nor were these provisions promulgated as legislative fluff or pleonasm. The right to a free education, workers’ rights, environmental rights, and every positive right in between were deliberately placed in state constitutions as a means to accomplish an end. The present era is ripe with potential violations of these positive rights by the state.

213 Foreword: Positive Rights & the Evolution of State Constitutions, supra note 9, at 829.


215 See Zackin, supra note 6, at 70.

216 See generally, e.g., Haley Moehlis, Opinion: For Iowa’s public schools, respect equals funding (Feb. 9, 2022), https://www.desmoinesregister.com/story/opinion/columnists/iowa-view/2022/02/09/public-schools-respect-equals-funding-magic-question/6707265001/ (noting that the funding for Iowa schools has increased below the rate of inflation despite the state boasting a $1.2 billion
Utilizing impact litigation, contemporary advocates can endeavor towards the betterment of the living, learning, and working conditions of the citizenry by way of judicial enforcement of state constitutional positive rights.

To further this cause, advocates should also earnestly lobby and push for an increase in and broadening of the positive rights in state constitutions. Impact litigation coupled with lobbying efforts may be successful in its own right, but there is a derivative benefit to be had as well. By engaging in these efforts, advocates can bring social and economic issues into the public discourse. Public opinion, like the metaphorical sword that is positive rights, can itself be a weapon or tool. In a time where so many people are struggling to get by, advocates would be naïve to go into the fray with their negative-rights-shield only.