

Rights in Twentieth-Century Constitutions

Mary Ann Glendon[†]

Although this symposium has treated the subject of the Bill of Rights in the welfare state primarily within the context of American constitutional law, it is instructive and appropriate to compare the American experience with the experiences of other liberal democratic welfare states. Indeed, if a symposium on this subject had been held in 1991 at a university anywhere except in the United States, its approach almost certainly would have been cross-national from beginning to end. Most of the participants, no doubt, would have been invited to explore how some countries—for example, Canada, Denmark, France, Germany, Italy, Japan, Norway, and Sweden—have managed, more or less successfully, to remain simultaneously committed to political and civil rights, a well-developed welfare state, and a system of constitutional control of legislative and executive action. There would probably have been a session or two devoted to the transition of the East European countries from socialism to constitutional social democracy. Another major topic would have been how commitments made in international human rights instruments have affected national legal systems. Finally, in all likelihood, there would have been sessions devoted to two special cases: first, England, a welfare state without a system of judicial review or a bill of rights (in the modern sense); and second, the United States, a country with a venerable rights tradition and a strong system of judicial review, but with a minimalist welfare state.

In this article, I cannot present such an extended comparative survey. My goal is rather to advance the proposition that American thinking about rights and welfare would benefit from examining the experiences of other liberal democracies,¹ and to speculate about the insights that might emerge from such a comparative

[†] Professor of Law, Harvard University. The University of Chicago, B.A.; J.D.; M.Comp.L. This Article was prepared for *The Bill of Rights in the Welfare State: A Bicentennial Symposium*, held at The University of Chicago Law School on October 25-26, 1991. The helpful comments of Professor Aviam Soifer of Boston University Law School are gratefully acknowledged.

¹ In this Article, I concentrate mainly on nations whose experience is most similar to our own: countries at levels of social and economic development comparable to ours; and

analysis. I do not claim that we will find abroad any answers to the great questions debated by the participants in this symposium. Rather, the benefits I have in mind are more like those to which the great French historian, Fernand Braudel, was referring when he once said:

Live in London for a year, and you will not get to know much about the English. But through comparison, and in the light of your surprise, you will suddenly come to understand some of the more profound and individual characteristics of France, which you did not previously understand because you knew them too well.²

Taking my cue from Braudel, I will reflect, first, on some of the "more profound and individual characteristics" of the United States that we often overlook—because we know them so well. I will then consider some of the special difficulties posed by our distinctive experience with rights and welfare. Finally, I will suggest that heightened awareness of how our country's experience is distinctive can alert us to opportunities for improvement—opportunities that seem, at least theoretically, to be more available to us than to policymakers elsewhere.

I. AMERICAN DISTINCTIVENESS

Many of the issues vigorously debated at this symposium owe their very existence to the simple chronological fact that, when our Constitution and Bill of Rights were adopted, the welfare state as we know it was not even a twinkle in the eyes of the Founding Fathers. Because the overwhelming majority of the world's constitutions have been adopted within the past thirty years,³ there are few other countries where scholars need to ask questions like the following: How does our eighteenth-century design for government fit with our modern regulatory state? Does it matter which branches of government take the lead in deciding what adaptations are necessary? Is it a problem that our welfare state, such as it is, continues to develop without any specific constitutional impetus?

countries where welfare states co-exist with a strong commitment to individual liberty and the rule of law.

² Fernand Braudel, *Histoire et Sciences Sociales: La Longue Durée*, *Annales: Economies, Sociétés, Civilisations* 725, 737 (1958).

³ Three-quarters of the approximately 160 single-document constitutions in the world today have been adopted since 1965. Lis Wiehl, *Constitution, Anyone? A New Cottage Industry*, *NY Times B6* (Feb 2, 1990) (citing Professor Albert P. Blaustein of the Rutgers Law School).

Or, does the deep structure of the Fourteenth Amendment—say, the idea of “protection”—provide a constitutional lodestar for the welfare state after all? The age of our Bill of Rights is thus foremost among the features that distinguish the United States with respect to rights and the welfare state. The first ten amendments to the Constitution, backed up by judicial review, were in place long before our legislatures began to attend systematically to the health, safety, and well-being of citizens. In most other liberal democracies, the sequence has been just the reverse. In Canada, France, and Germany, for example, the foundations of the welfare state were in place well before regimes of constitutional rights appeared.⁴

A second distinguishing feature is that the American Constitution, unlike the constitutions of most other liberal democracies, contains no language establishing affirmative welfare rights or obligations.⁵ A third factor is the conspicuous unwillingness of American governments to ratify several important international human rights instruments to which all the other liberal democracies have acceded. And finally there is the unusual structure of our welfare state, which, much more than elsewhere, leaves pensions, health insurance, and other benefits to be organized privately, mainly through the workplace, rather than directly through the public sector. I will elaborate briefly upon the first three of these factors.

A. Rights Before Welfare

We Americans are justly proud of our long tradition of protecting individual rights, celebrated in this bicentennial year of the Bill of Rights. We also take patriotic satisfaction in that, prior to 1945, we were one of very few countries that protected constitutional rights through judicial review. However, it is worth recalling that American courts seldom exercised the power of judicial review

⁴ Expanded suffrage in the French Third Republic and fear of militant socialism in Bismarck's Germany in the late nineteenth century led those countries to adopt factory legislation, rudimentary social welfare laws, and statutes regulating commerce and public utilities.

France adopted a limited form of constitutional control only in 1958, and Canada established judicial review only in 1982. In Germany, though some courts in the Weimar Republic had claimed the power to rule on the constitutionality of laws, constitutional review did not become a significant feature of the legal order until 1951, when the Federal Constitutional Court was established in what was then West Germany. Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany* 6-11 (Duke, 1989).

⁵ Louis Favoreu, *La Protection des Droits Economiques et Sociaux dans les Constitutions*, in *Conflict and Integration: Comparative Law in the World Today* 691-92 (Chuo, 1989).

claimed in *Marbury v Madison*⁶ until the turn of the century, and then the courts deployed the power in a way that may well have impeded the development of the welfare state here for decades.⁷ In the *Lochner* era, when the American Supreme Court engaged in its first sustained adventure with judicial review, legislators in the rest of the industrialized world were busily constructing their infant welfare states on the basis of statutes broadly similar in spirit to those our Court was striking down.⁸

It was not until the active period of constitution-making following World War II that other nations widely adopted bills of rights and institutional mechanisms to enforce them.⁹ At that time, the majority of liberal democratic countries opted for variants of a system developed in pre-war Austria that has come to be known as the "European model" of constitutional control.¹⁰ The principal feature that distinguishes the "European" from the "American" model is that, under the former, constitutional questions must be referred to a special tribunal that deals only or mainly with such matters. Constitutional adjudication is off-limits for other courts in such countries. It is only in the United States, and in the relatively small group of countries that have adopted the "American model," that ordinary courts have the power to rule on constitutional questions in ordinary lawsuits. Many nations that have adopted the European model are still further distanced from our system by the fact that constitutional questions may be presented to the consti-

⁶ 5 US (1 Cranch) 137 (1803).

⁷ As James Q. Wilson has noted,

In the first seventy-five years of this country's history, only 2 federal laws were held unconstitutional; in the next seventy-five years, 71 were. Of the roughly 900 state laws held to be in conflict with the federal Constitution since 1789, about 800 were overturned after 1870. In one decade alone—the 1880s—5 federal and 48 state laws were declared unconstitutional.

James Q. Wilson, *American Government: Institutions and Policies* 83 (Heath, 3d ed 1986).

⁸ See, for France, Leon Duguit, *Law in the Modern State* 32-67 (Allen & Unwin, 1919) (translated by Frida and Harold Laski); and for England, A.V. Dicey, *Lectures on the Relation Between Law & Public Opinion in England During the Nineteenth Century* 259-302 (Macmillan, 1914). See generally Alexander Alvarez, *Dominant Legal Influences of the Second Half of the Century*, in *The Progress of Continental Law in the Nineteenth Century*, 11 *Continental Legal Hist Series* 31, 52-56 (Little, Brown, 1918).

⁹ For a concise survey of the development of judicial review, see Louis Favoreu, *American and European Models of Constitutional Justice*, in David S. Clark, ed, *Comparative and Private International Law: Essays in Honor of John Henry Merryman* 105 (Duncker & Humbolt, 1990).

¹⁰ For a discussion of why the American model was widely regarded as unsuitable for transplant, see id at 106-11, and Mauro Cappelletti, *Judicial Review in the Contemporary World* 53-66 (Bobbs-Merrill, 1971).

tutional tribunal only by other courts *sua sponte*, or by political authorities, but not by private litigants.¹¹

Even among the handful of countries that have adopted a form of the "American model" of judicial review—such as Canada, Japan, and the Republic of Ireland—the United States remains unique. For in those nations, neither the supreme courts nor the lower courts thus far have exercised their powers of judicial review with such frequency and boldness as their American counterparts have exercised at both the state and federal levels. Indeed, to foreigners, the recent burgeoning of state court constitutionalism and the innovative use of injunctions by federal district courts beginning in the 1960s are two of the most remarkable features of the American legal system. Even if judicial activism in the Supreme Court has subsided somewhat in recent years,¹² the relative readiness of American judges at all levels of jurisdiction to deploy their powers of judicial review in the service of a variety of social aims has made the United States the model of a particularly adventurous form of judicial rights protection.

B. What Counts as a Right?

A renowned European legal historian recently compiled a list he described as representing the "basic inventory" of rights that have been accepted by "most western countries" at the present time.¹³ The list includes, first and foremost; human dignity; then personal freedom; fair procedures to protect against arbitrary governmental action; active political rights (especially the right to vote); equality before the law; and society's responsibility for the social and economic conditions of its members.¹⁴ An American reader of this list is apt to be struck both by the omission of property rights, and by the inclusion of affirmative welfare obligations. Yet the list cannot be faulted as description of the law on the books of "most western countries." Welfare rights (or responsibili-

¹¹ Favoreu, *American and European Models* at 112-13 (cited in note 9). But Germany is an exception. There the bulk of the caseload of the Constitutional Court consists of constitutional complaints by private citizens. Kommers, *Constitutional Jurisprudence* at 32-33 (cited in note 4).

¹² I use the word "somewhat" advisedly. See, for example, *Missouri v Jenkins*, 110 S Ct 1651 (1990), in which the Supreme Court in dicta authorized a lower federal court, as part of a desegregation plan, to direct a local school district to levy taxes for capital improvements to schools, even without the normal requirement that the voters approve.

¹³ Franz Wieacker, *Foundations of European Legal Culture*, 37 Am J Comp L 1, 29 (1989).

¹⁴ *Id.*

ties) have become a staple feature of post-war international declarations¹⁵ and have been accorded a place beside traditional political and civil liberties in the national constitutions of most liberal democracies.¹⁶ It is the eighteenth-century American Constitution that, with the passage of time, has become anomalous in this respect.

As Gerhard Casper has pointed out, these differences regarding the rights that are accorded constitutional status in various countries are not merely a function of the age of the documents establishing those rights. To a great extent, the differences are legal manifestations of divergent, and deeply rooted, cultural attitudes toward the state and its functions.¹⁷ Historically, even eighteenth- and nineteenth-century continental European constitutions and codes acknowledged state obligations to provide food, work, and financial aid to persons in need.¹⁸ And continental Europeans today, whether of the right or the left, are much more

¹⁵ See, for example, the *United Nations Universal Declaration of Human Rights*, adopted by the General Assembly on December 10, 1948:

Article 22

Everyone, as a member of society, has the right to social security and is entitled to realization, through national effort and international cooperation and in accordance with the organization and resources of each State, of the economic, social, and cultural rights indispensable for his dignity and the free development of his personality.

Article 25

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.

The *United Nations Covenant on Economic, Social and Cultural Rights* was opened for signature in December 1966 and came into force a decade later after being ratified by nearly ninety countries, but not, so far, by the United States. The United States did, however, sign the *Universal Declaration* and the *Helsinki Final Act of 1975* (which like the *Universal Declaration* calls for a nonbinding commitment to stated human rights). See generally Richard B. Lillich, *United States Ratification of the United Nations Covenants*, 20 Ga J Intl & Comp L 279 (1990); Louis B. Sohn, *United States Attitudes Toward Ratification of Human Rights Instruments*, 20 Ga J Intl & Comp L 255 (1990).

¹⁶ The formulations vary from the bare recitation in the German Basic Law of 1949 that the Federal Republic of Germany is a "social" state (Article 20), to detailed lists of specific social and economic rights such as those contained in the constitutions of France, Italy, Japan, Spain, and the Nordic countries.

¹⁷ Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 S Ct Rev 311, 318-19 (the Continental concept of the "state" is closer to the Anglo-American notion of the "welfare state" or the "administrative state"). See also Leonard Krieger, *The German Idea of Freedom: History of a Political Tradition* (Beacon, 1957).

¹⁸ See Casper, 1989 S Ct Rev at 319-21 (cited in note 17). Early constitutions used the language of obligation rather than of rights: for example, "It is incumbent on the authorities of the State to create conditions which make it possible for every person who is able to work to earn his living by his work." Norwegian Constitution of 1814, § 110, reprinted in Gisbert

likely than Americans to assume that governments have affirmative duties actively to promote the well-being of their citizens.¹⁹ The leading European conservative parties, for example, accept the subsidization of child-raising families, and the funding of health, employment, and old age insurance at levels most Americans find scarcely credible.²⁰ By contrast, it is almost obligatory for American politicians of both the right and the left to profess mistrust of government.

These divergent attitudes toward the state have found constitutional expression in what are sometimes called “negative” and “positive” rights. The American Bill of Rights is frequently described as a charter of “negative” liberties, protecting certain areas of individual freedom from state interference.²¹ Judge Posner has succinctly stated the position: “The men who wrote the Bill of Rights were not concerned that the federal government might do too little for the people, but that it might do too much to them.”²² The Supreme Court, while willing to accord procedural due process protection to statutory welfare entitlements, has consistently declined to recognize constitutional welfare rights.²³ Chief Justice Rehnquist’s opinion in *DeShaney v Winnebago County Department of Social Services* reaffirmed that the Due Process Clause of the Fourteenth Amendment was “a limitation on the State’s power to act, not . . . a guarantee of certain minimal levels of safety and security.”²⁴

These statements contrast markedly with the attitudes of the post-World War II European constitution-makers who supple-

H. Flanz, *Norway*, in Albert P. Blaustein and Gisbert H. Flanz, eds, 13 *Constitutions of the Countries of the World* 8 (Oceana, 1976).

¹⁹ “[The state achieves legitimacy] not so much through its constitution as through the active, welfare-providing administration.” Casper, 1989 S Ct Rev at 325 & n 69 (cited in note 17) (quoting a treatise by a former constitutional law professor now serving on the German Constitutional Court).

²⁰ See William Pfaff, *Barbarian Sentiments: How the American Century Ends* 25 (Hill & Wang, 1989).

²¹ See David P. Currie, *Positive and Negative Constitutional Rights*, 53 U Chi L Rev 864 (1986), which includes discussion of instances in which the U.S. Supreme Court has found “duties that can in some sense be described as positive” in negatively phrased provisions of the Constitution. Id at 872-80.

²² *Jackson v City of Joliet*, 715 F2d 1200, 1203 (7th Cir 1983).

²³ See, for example, *Lindsey v Normet*, 405 US 56, 74 (1972) (no constitutional right to housing); *San Antonio Independent School District v Rodriguez*, 411 US 1, 30-31 (1973) (no constitutional right to education). The Court in this period did, however, extend procedural due process protection to certain forms of “new property.” See, for example, *Goldberg v Kelly*, 397 US 254 (1970) (welfare entitlements); *Mathews v Eldridge*, 424 US 319 (1976) (social security disability benefits).

²⁴ 489 US 189, 195 (1989).

mented traditional negative liberties with certain affirmative social and economic rights or obligations. The idea of government underlying the "positive rights" in European constitutions has a complex history. In part, it represents a transposition to the modern state of the feudal notion that an overlord owed certain protection to his dependents in exchange for their service and loyalty. More proximately, it reflects the programs of the major European political parties—one large group animated by Christian social thought, and another by socialist or social democratic principles. As Casper has observed, it was only natural that peoples accustomed to the notion of a state with affirmative responsibilities would carry that idea forward when they added bills of rights to their constitutions.²⁵

C. International Human Rights

In view of the long-standing American rights tradition, and the recent history of expansive judicial protection of a broad spectrum of individual and minority rights, the third aspect of American distinctiveness may at first glance seem puzzling. I refer to the dubious distinction of the United States as the only liberal democracy that has not ratified a number of important human rights instruments, notably the two United Nations Covenants on Civil and Political Rights, and on Economic, Social and Cultural Rights.²⁶ This reticence, no doubt, is due in large part to our prudent unwillingness to submit to the jurisdiction of international organizations dominated by critics of the United States. But, particularly where economic and social rights are concerned, our reluctance is also attributable to our prevailing ideas about which sorts of needs, goods, interests, and values should be characterized as fundamental rights. Another likely reason is that the American civil litigation system is not well-equipped to handle the potential consequences of characterizing a new set of interests as fundamental rights.²⁷

II. WELFARE RIGHTS AND WELFARE STATES

The reaction of many Americans to the foregoing contrasts might be that we have little to learn from other nations about wel-

²⁵ Casper, 1989 S Ct Rev at 331 (cited in note 17).

²⁶ Alfred de Zayas, *The Potential for the United States Joining the Covenant Family*, 20 Ga J Intl & Comp L 299 (1990); Lillich, 20 Ga J Intl & Comp L 279 (cited in note 15).

²⁷ See notes 50-51 and accompanying text.

fare, and even less about rights. Other Americans, especially reformers who do not regard this American distinctiveness as a badge of honor, might be drawn in the opposite direction, toward viewing the rights or welfare arrangements in other countries as promising models for the United States to follow. Such reform-minded persons might ask: How have constitutional welfare rights worked out in practice? Do the "experiments" of other nations shed any light on what might have happened here had the Supreme Court in the late 1960s and early 1970s found a basis for welfare rights in the Fourteenth Amendment?²⁸ Though I will conclude that those questions lead almost to a dead end, it is instructive to examine why they do not open an especially fruitful line of inquiry.

As it happens, the contrast between the means of implementation of the American welfare system and other welfarist systems is less sharp than it initially appears. Though many countries have included welfare rights or obligations in their constitutions, no democratic country has placed social and economic rights on precisely the same legal footing as the familiar civil and political liberties. In most cases, the drafters have formulated the former somewhat differently than the latter.²⁹ In some countries, for example, the constitutional welfare language is so cryptic as to be meaningless without extensive legislative specification.³⁰ More commonly, the constitutions do specifically enumerate various social and economic rights, but present them merely as aspirational political principles or goals to guide the organs of government as they carry out their respective functions. For example, the Swedish Instrument of Government, in a section entitled "The Basic Principles of the Constitution," provides:

Art. 2 The personal, economic and cultural welfare of the individual shall be fundamental aims of the activities of the

²⁸ See, for example, Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv L Rev 7 (1969).

²⁹ "[T]here are two categories of fundamental rights: immutable and absolute rights that exist whatever the epoch or the reigning ideology; and other rights, known as economic and social rights, that 'carry a certain coefficient of contingency and relativity' and whose recognition is a function of the state of society and its evolution." Favoreu, *La Protection des Droits Economiques* at 701 (cited in note 5).

³⁰ For example, the German republic is a "social" state. German Basic Law of 1949, Art 20. The treaty of German reunification, however, obliges the legislature to consider adding a list of affirmative "goals of the state" to the traditional political and civil rights presently enumerated in the Basic Law. Fred L. Morrison, *Constitutional Mergers and Acquisitions: The Federal Republic of Germany*, 8 Const Comm 65, 70 (1991).

community. In particular, it shall be incumbent on the community to secure the right to work, to housing and to education and to promote social care and security as well as a favorable living environment.³¹

Continental lawyers call such rights "programmatically" to emphasize that they are not directly enforceable individual rights, but await implementation through legislative or executive action, and through budgetary appropriations. Programmatic rights figure prominently in the constitutions of the Nordic countries, as well as in the French, Greek, Italian and Spanish constitutions.

The most interesting case in some ways is Japan, which accepted the American model of judicial review in 1947. In Japan, the catalog of constitutional rights (thanks to the New Dealers in the post-war occupational government) includes much of Franklin Roosevelt's "Second Bill of Rights,"³² some of which are set forth in terms that are not, on their face, programmatic.³³ There is a right to decent minimum subsistence in Article 25, a right to receive an education in Article 26, and a right to work in Article 27.³⁴ In the drafting process, Article 25 was changed from a purely

³¹ Gisbert H. Flanz, *Sweden*, in Blaustein and Flanz, eds, 17 *Constitutions* at 9-11 (cited in note 18).

³² The "Second Bill of Rights," which Roosevelt urged in his 1944 State of the Union message, included the following:

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 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.

See Cass R. Sunstein, *Constitutionalism After the New Deal*, 101 *Harv L Rev* 421, 423 (1987) (quoting Roosevelt's "Second Bill of Rights"). See also Cass R. Sunstein, *After the Rights Revolution: Reconceiving the Regulatory State* 21-22 (Harvard, 1990).

³³ See Akira Osuka, *Welfare Rights*, 53 *L & Contemp Probs* 13 (1990). See also Nobushige Ukai, *The Significance of the Reception of American Constitutional Institutions and Ideas in Japan*, in Lawrence Ward Beer, ed, *Constitutionalism in Asia: Asian Views of the American Influence* 114-27 (California, 1979).

³⁴ Property as such is not among the rights protected. It supposedly was excluded in order to conform the Japanese procedural guarantees to the American Due Process Clause as it stood *de facto* after the U.S. Supreme Court accepted "the necessity of direct state intervention in social and economic processes." Osuka, 53 *L & Contemp Probs* at 15-16 (cited in note 33). According to Osuka, the Japanese Constitution "substantially incorporate[d] the fruits of the New Deal." *Id.* at 16. The Japanese Constitution of 1947 is set forth in Hiroshi Itoh and Lawrence Ward Beer, eds, *The Constitutional Case Law of Japan: Selected Supreme Court Decisions, 1961-70* 256-69 (Washington, 1978).

programmatic provision ("In all spheres of life, the State shall use its endeavors for the promotion and extension of social welfare and security, and of public health"), to a proclamation beginning with unvarnished American-style rights language ("All people shall have the right to maintain the minimum standards of wholesome and cultured living."³⁵)

The adoption of the 1947 Constitution was quickly followed, however, by a Japanese Supreme Court decision holding that the right to a minimum standard of decent living in Article 25 was programmatic.³⁶ The government's constitutional welfare obligations, according to that decision, "must, in the main, be carried out by the enactment and enforcement of social legislation [The] state does not bear such an obligation concretely and materially toward the people as individuals."³⁷ In the years that followed, the Japanese Supreme Court has maintained the view that the welfare rights in the Constitution are not judicially enforceable individual rights. In a leading case, *Asahi v Japan*, decided in 1967, the Court held:

[Article 25(1)] merely proclaims that it is the duty of the state to administer national policy in such a manner as to enable all the people to enjoy at least the minimum standards of wholesome and cultured living, and it does not grant the people as individuals any concrete rights. A concrete right is secured only through the provisions of the Livelihood Protection Law enacted to realize the objectives prescribed in the provisions of the Constitution.³⁸

The *Asahi* decision went on to say that government officials would have to determine the minimum standard of living, subject to review for excess or abuse of power.³⁹ In Japan, then, as in the countries where constitutional welfare rights are explicitly programmatic, and as in countries like our own without any constitutional

³⁵ The original programmatic draft proposal was retained as Article 25(2), preceded by the right to a minimum standard of living in Article 25(1). Osuka, 53 L & Contemp Probs at 15 (cited in note 33).

³⁶ *Id* at 17.

³⁷ *Id* at 21.

³⁸ *Asahi v Japan*, translated and reprinted in Itoh and Beer, eds, *The Constitutional Case Law of Japan* 130, 134 (cited in note 34) (citation omitted).

³⁹ *Id* at 135.

welfare rights at all, the welfare state has been constructed through ordinary political processes.⁴⁰

At this point, we might wonder whether the formal differences between the United States and other welfare states have any significance at all. After all, we too have a "program"—the New Deal statutes of the 1930s and 1940s, supplemented by the Great Society statutes of the 1960s—the cornerstones of our welfare state. Specifically, we have both aspiration and implementation in the Social Security Act of 1935, whose preamble declares that the statute is:

[t]o provide for the general welfare by establishing a system of Federal old-age benefits, and by enabling the several States to make more adequate provision for aged persons, blind persons, dependent and crippled children, maternal and child welfare, public health, and the administration of their unemployment compensation laws⁴¹

Similarly, the Housing Act of 1949 calls for "the realization as soon as feasible of the goal of a decent home and a suitable living environment for every American family"⁴²

Should we conclude, then, that the provisions of modern constitutions which commit the state to affirmatively protecting certain economic and social rights have little or no practical consequence? That conclusion seems too strong, if only because such rights at least endow statutes implementing the constitutional "program" with a strong presumption of constitutionality.⁴³ Moreover, the constitutional status of social and economic rights seems likely to have synergistically reinforced welfare commitments by influencing the terms, the categories, and the tone of public, judicial, and legislative deliberation about rights and welfare.⁴⁴ In

⁴⁰ Shortly after adopting the 1947 Constitution, Japan supplemented its pre-war social legislation with a series of important statutes in the areas of unemployment relief, social security, and child welfare. Osuka, 53 L & Contemp Probs at 16 n 5 (cited in note 33).

⁴¹ Preamble, Social Security Act, 49 Stat 620 (1935), codified at 42 USC §§ 301 et seq (1988).

⁴² Housing Act of 1949, 63 Stat 413 (1949), codified at 42 USC §§ 1441 et seq (1988).

⁴³ See Osuka, 53 L & Contemp Probs at 17-18 (cited in note 33).

⁴⁴ For an example of how the constitutional principle of the social welfare state has affected the interpretation of the equality principle in Germany, see the German Constitutional Court decision which held that medical schools could not impose numerical limits on admissions unless they had class size restraints. *Numerus Clausus Case I*, 33 BVerfGE 303 (1972), excerpted in Kommers, *Constitutional Jurisprudence* at 295-302 (cited in note 4). The Court explicitly stated,

Any constitutional obligation [of the legislature] that may exist does not include the duty to supply a desired place of education at any time to any applicant.

countries with an already well-established welfare tradition, constitutional welfare commitments may well have strengthened that tradition, just as our Bill of Rights both emerged from and buttressed the Anglo-American rights tradition.

Nevertheless, there does not appear to be any strict correlation between the strength of constitutional welfare language and the generosity of welfare states, as measured by the proportion of national expenditures devoted to health, housing, social security, and social assistance.⁴⁵ For example, the United Kingdom, with no constitutional welfare rights, devotes proportionately more of its resources to social expenditures than its richer "neighbor" Denmark, where rights to work, education, and social assistance are constitutionally guaranteed. And analogous social expenditures consume considerably more of the budget of the Federal Republic of Germany, whose constitution merely announces that it is a "social" state, than they do in Sweden or Italy, whose constitutions spell out welfare rights in some detail.⁴⁶

If there is a relationship between the constitutional status of welfare rights and the type and strength of a society's welfare commitment, it is only a loose relationship of consanguinity, with both

Id at 300 (bracketed text in excerpt). Of the constitutional right to education, the Court also said,

[We] need not decide whether . . . an individual citizen can use this constitutional mandate as the basis for an enforceable claim [against the state] to create opportunities for higher study.

Id (bracketed text in excerpt).

⁴⁵ Percentages of central government expenditure devoted in 1988 to health, housing, social security, and welfare in selected countries with "high-income economies" are as follows:

Federal Republic of Germany	67.6%
Sweden	55.3
Norway	46.8
Italy	45.8
United Kingdom	44.5
United States	44.0
Canada	43.2
Ireland	42.7
Denmark	42.4

World Development Report 1990 198-99, Table 11 (Central Government Expenditure) (Oxford, 1990).

⁴⁶ Id. One cannot fit the United States readily into such comparisons because of the unique structure of our welfare state. But sophisticated analyses consistently rate us poorly, especially in assisting child-raising families. See Alfred J. Kahn and Sheila B. Kamerman, *Income Transfers for Families with Children: An Eight-Country Study* 182-95 (Temple, 1983); Samuel H. Preston, *Children and the Elderly in the U.S.*, 251 *Scientific Amer* 44 (Dec 1984); Timothy M. Smeeding and Barbara Boyd Torrey, *Poor Children in Rich Countries*, 242 *Science* 873 (Nov 1988).

the constitution and the welfare system influenced by such factors as the homogeneity or diversity of the population; the degree to which mistrust of government has figured in the country's political history; the vitality of political parties; the health of the legislative process; and the intensity of individualism in the culture. Such speculation leads only to the sort of conclusions that make sociology so unsatisfying to many people. It is difficult to become excited about the idea that a host of mutually conditioning factors, of which the constitutional status of welfare rights may be both cause and consequence, determine in numerous ways the shape of a given country's welfare state: its basic commitments, the priorities among those commitments, the spirit in which it is administered, the degree of support and approval it wins from taxpayers, and the extent to which it disables or empowers those who resort to it.

III. WHAT IF . . . ?

Still, a reform-minded American might consider the inconclusiveness of the foregoing analysis a source of encouragement. If the experience of other liberal democracies is any guide, the reformer might contend, according constitutional status to social and economic rights at least does not seem to cause any harm. At the margins, it may well exert a benign influence on the legislative process and on public deliberation by broadening the range of officially recognized social concerns, heightening their visibility, and underscoring their legitimacy. What a pity, the argument would go, that we have not bolstered the legal status of social and economic rights, either by recognizing them in our Constitution, as proposed to the Supreme Court in the 1960s and 1970s, or by ratifying the United Nations Covenant on Social, Economic and Cultural Rights, as the Carter administration advocated in the 1970s.

It would be risky, in my view, however, to draw those inferences from the foreign experience, for reasons that reside, not in the foreign experience, but in distinctive American attitudes toward rights. Americans, for better or worse, take rights very seriously. It is not just the term, but the very idea of "programmatic" rights that is unfamiliar and uncongenial to us. It is thus almost inconceivable that constitutional welfare rights, had they appeared in the United States, would have been regarded by the public or treated by the legal community as purely aspirational. An American, hearing of a "right" that merely represents a goal or ideal, is apt to react as Mark Twain did when he learned that a preacher was condemning the Devil without giving the Devil the opportunity to confront the witnesses against him. "[It] is irregular," he

said. "It is un-English; it is un-American; it is *French*."⁴⁷ Most Americans, like Holmes and Llewellyn, believe that a right-holder should be able to call upon the courts to "smite" anyone who interferes with that right.⁴⁸ Furthermore, we take for granted that behind the courts' orders to respect that right are sheriffs, marshals, and the National Guard, if necessary.

As soon as we begin to imagine constitutional welfare rights that are other than programmatic, however, we start down a road that no other democratic country has travelled. That does not mean that we cannot make an educated guess about what consequences would be likely to follow if we made such a trip: recent history suggests that the most likely consequence of according constitutional status to social and economic rights would be something that has not occurred in the other liberal democracies—namely, a great increase in federal litigation.⁴⁹

The crucial question for this symposium about that potential increase in federal litigation—a question whose answer is far from clear—is how private damage actions would affect the structure and performance of the welfare state. Some argue that such litigation would prod government agencies into action, that it would make them more responsive to the needs of the citizens. But it is at least equally plausible that the costs of defending such litigation, plus the occasional high damage award in Section 1983 actions, would prod financially strapped local providers in the other direction, toward cutting back services or eliminating some programs altogether. Unfortunately, there is little empirical data to evaluate the utility of private damage actions in promoting improved social services.

Still, comparing the United States to other countries does illuminate the problem. It demonstrates that we Americans place an unusual degree of reliance on our tort system (both ordinary personal injury litigation and constitutional tort actions) to perform certain social tasks that other advanced industrial nations handle with a more diversified range of techniques—for example, direct

⁴⁷ Mark Twain, *Concerning the Jews*, in 22 *The Writings of Mark Twain: Literary Essays* 263, 265 (Harper & Brothers, 1899).

⁴⁸ Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 *Harv L Rev* 457, 460-61 (1897); Karl Llewellyn, *The Bramble Bush* 85 (Oceana, 1960).

⁴⁹ For example, since the 1960s, Section 1983 has been the second most heavily litigated section of the United States Code. Peter H. Schuck, *Suing Government: Citizen Remedies for Official Wrongs* 199 (Yale, 1983).

health and safety regulation and social insurance.⁵⁰ That reliance, in turn, suggests some further questions: Is our tort system well-suited for all the jobs we presently ask it to do? Do our substantive tort law and our civil litigation system adequately assure timely, fair, and cost-efficient disposition of legitimate claims, while effectively discouraging frivolous ones? If a major reason for court-centered reform efforts in the United States has been "legislative paralysis,"⁵¹ can American legislatures ever be induced to take an active role in improving public services in the areas of health, education, and welfare?

IV. THE UTILITY OF CROSS-NATIONAL COMPARISONS

It may seem to follow from the discussion thus far that, contrary to what I asserted at the outset, Americans have little to gain from consulting other nations' experiences with rights and welfare. Certainly anyone who expects comparative studies to yield specific models for domestic law reform⁵² is bound to be disappointed, for it is fairly clear that no other country has blazed a trail for the United States to follow. Nevertheless, the experiences of other countries may help us to find our own path by heightening our awareness of indigenous resources that we are inclined to overlook or underrate, because, as Braudel put it, we know them too well.

Beginning in the mid-1970s, economics became a constraint for all advanced welfare states. Even the Nordic countries (whose citizens are as proud of their famous cradle-to-grave welfare systems as we are of our Bill of Rights) began to sense that they had reached the limits of high taxation and direct public sector provision of services. In that climate, policymakers abroad have gazed with interest at our relatively greater capacity for governmental and non-governmental organizations to cooperate in the areas of health, education, and welfare, and at our ability, through our sort of federalism, to innovate and experiment with diverse approaches to stubborn social problems.

In some cases, tentative efforts at imitation have followed. In the area of industrial relations, for example, some countries have begun to experiment with American-style laws encouraging collec-

⁵⁰ Basil S. Markesinis, *Litigation-Mania in England, Germany and the USA: Are We So Very Different?*, 49 *Cambridge L J* 233, 243-44 (1990).

⁵¹ *Id.* at 242.

⁵² For a critique of the use of comparative law as a source of "models," see Rodolfo Sacco, *Legal Formants: A Dynamic Approach to Comparative Law*, 39 *Am J Comp L* 1 (1991) (Installment I of II).

tive bargaining rather than the direct state regulation of the terms and conditions of employment that has been traditional in continental Europe.⁵³ Our innovative labor legislation of the 1930s—which has practically fallen into desuetude in the United States—has been seen in France and Germany as the prototype of “reflexive law” (legal norms that aim at facilitating and structuring private ordering, rather than imposing top-down state regulation).⁵⁴ And policymakers abroad have also begun to consider whether some types of social services can be delivered more efficiently and humanely by intermediate associations—churches, unions, community groups, and so on—than by the government. Our voluntary sector, shambles though it may appear to us, is still more vibrant than its counterparts in nations where excessive centralization has nearly extinguished non-governmental initiatives in the areas of health, education, and welfare.⁵⁵

Ironically, these American institutions and experiences are attracting interest abroad just when they are showing the effects of long neglect at home. The United States represents a rare working example, albeit an imperfect one, of what European writers call the principle of “subsidiarity”: the notion that no social task should be allocated to a body larger than the smallest one that can effectively do the job.⁵⁶ The legal apparatus that promotes and facilitates the subsidiarity principle includes federalism, reflexive legal norms that foster private ordering, and programs that use the mediating structures of civil society—such as churches and workplace associations—to help deliver social services.

These aspects of American law are attracting increased attention because every country in the democratic world is experiencing a tension between the two ideals that are linked together in the deceptively bland title of this symposium—a regime of rights and a welfare state. Every country is grappling with a set of problems that are in a general way similar: how to provide needed social aid without undermining personal responsibility; how to achieve the

⁵³ See Mary Ann Glendon, *French Labor Law Reform 1982-83: The Struggle for Collective Bargaining*, 32 Am J Comp L 449, 485-91 (1984).

⁵⁴ “Reflexive law” is an expression used by some legal sociologists to designate an alternative to direct regulation, in which legal norms shape procedures to coordinate interaction among social subsystems, rather than prescribe outcomes. See Gunther Teubner, *Substantive and Reflexive Elements in Modern Law*, 17 L & Society Rev 239, 276 (1983).

⁵⁵ For a comparison of non-governmental service organizations in the Netherlands, England, Israel, and the United States, see Ralph M. Kramer, *Voluntary Agencies in the Welfare State* (California, 1981).

⁵⁶ Markus Heintzen, *Subsidiaritätsprinzip und Europäische Gemeinschaft*, 46 Juris-tenzeitung 317 (1991).

optimal mix of markets and central planning in a mixed economy; and how to preserve a just balance among individual freedom, equality, and social solidarity under constantly changing circumstances. The problem of “the Bill of Rights in the Welfare State” is nothing less than the great dilemma of how to hold together the two halves of the divided soul of liberalism—our love of individual liberty and our sense of a community for which we accept a common responsibility.

Below the surface of that dilemma lies a more serious one. Neither a strong commitment to individual and minority rights, nor even a modest welfare commitment like the American one, can long be sustained without the active support of a citizenry that is willing to respect the rights of others; that is prepared to accept some responsibility for the poorest and most vulnerable members of society; and that is prepared to accept responsibility, so far as possible, for themselves and for their dependents. We should make no mistake about the fact that liberal democratic welfare states around the world are now demanding certain kinds of excellence in their citizens to a nearly unprecedented degree. They are asking men and women to practice certain virtues that, even under the best of conditions, are not easy to acquire—respect for the dignity and worth of one’s fellow human beings, self-restraint, self-reliance, and compassion.

The questions that seldom get asked, however, are these: Where do such qualities come from? Where do people acquire an internalized willingness to view others with genuine regard for their dignity and concern for their well-being, rather than as objects, means, or obstacles? These qualities do not arise spontaneously in *homo sapiens*. Nor can governments instill them by fear and force. Perhaps there are alternative seedbeds of civic virtue besides families, neighborhoods, religious groups, and other communities of memory and mutual aid. If there are, however, history provides scant evidence of them. It is hard to avoid the conclusion that both our welfare state and our experiment in democratic government rest upon habits and practices formed within fragile social structures—structures being asked to bear great weight just when they are not in peak condition. The question then becomes: What, if anything, can the government do to create and maintain (or at least to avoid undermining or destroying) social conditions that foster the peculiar combination of qualities required to sustain our commitments to the rule of law, individual freedom, and a compassionate welfare state?

CONCLUSION

In a large, heterogeneous nation such as the United States, this question about the underpinnings of civic virtue is particularly urgent. It has been constantly repeated since Tocqueville said in the 1830s that America was especially well-endowed with moral and cultural resources—with vital local governments, and with a variety of associations that stood between citizens and the state.⁵⁷ As with our natural resources, however, we have taken our social resources for granted, consuming inherited capital at a faster rate than we are replenishing it. Indeed, like an athlete who develops the muscles in his upper body but lets his legs grow weak, we have nurtured our strong rights tradition while neglecting the social foundation upon which that tradition rests.

We Americans, with our great emphasis in recent years on certain personal and civil rights, have too easily overlooked the fact that all rights depend on conserving the social resources that induce people to accept and respect the rights of others. Perhaps it is time, therefore, to take a fresh look at our constitutional framework, and to recall not only that the Bill of Rights is part of a larger constitutional structure, but that its own structure includes more than a catalog of negatively formulated political and civil liberties. As Akhil Reed Amar has pointed out, scholars, litigators, and judges who concentrated single-mindedly in the 1960s and 1970s on judicial protection of individual and minority rights permitted other important parts of our constitutional tradition to fall into obscurity.⁵⁸ As it happens, those parts of the tradition that have been in the shadows—federalism, the legislative branch, and the ideal of government by the people—have an important bearing on maintaining the social capital upon which all rights ultimately depend.

And so, by a long and circuitous route, a cross-national approach to rights and the welfare state points back toward the American Constitution and toward the “Madisonian understanding that individual liberty and strong local institutions need not be at cross-purposes with one another.”⁵⁹ If America’s endangered social environments do indeed hold the key to maintaining simultaneously a liberal regime of rights and a compassionate welfare state, then we must start thinking about how both rights and welfare, as

⁵⁷ Alexis de Tocqueville, *Democracy in America* 126-33 (Oxford, 1953).

⁵⁸ Akhil Reed Amar, *The Bill of Rights as a Constitution*, 100 *Yale L J* 1131, 1133-37 (1991).

⁵⁹ *Id.* at 1136.

currently conceived, affect those social environments. Reflecting upon our own tradition, moreover, should give us pause before indulging the disdain for politics that underlies so much current thinking about legal and social policy. One of the most important lessons of 1789 the world learned anew in 1989: that politics is not only a way to advance self-interest, but to transcend it. That transformative potential of the art through which we order our lives in the polity is our best hope for living up to our rights ideals and our welfare aspirations in the coming years.