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Countless articles have been written on judicial review. Some of the best articles in the last two years are in a symposium entitled “The Constitution and the Good Society” in the Fordham Law Review. Others appear in the electronic symposium on the twenty-fifth anniversary of Owen Fiss’ article Groups and the Equal Protection Clause.

In addition to 2003 being the 200th anniversary of Marbury v. Madison, it is the 100th anniversary of the publication of W.E.B. Du Bois’s The Souls of Black Folk. Noting that coincidence reminded me there have been two Justice Marshalls on the Court. Initially I thought that a focus on the second Justice Marshall would provide some forgotten views and counter-point about judicial review and the role of the Court. Obviously it does; but not those I anticipated. The best academic thinking about the meaning of the Constitution, especially about the place and the meaning of equality, has broadened and deepened the jurisprudential views of Justice Thurgood Marshall. Work on race and class is more fully developed. Other aspects or applications of equal opportunity, anti-classification, and anti-subordination principles; and welfare rights and social citizenship views have been developed. And they continue to be developed through sessions like this.

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3. 5 U.S. (1 Cranch) 137 (1803).
In fact, one wonders if there is anything new to be said? I think the answer is yes. It is always "yes." Both in terms of what Mark Tushnet called "ordinary politics," when scholarship focuses on particular applications of current case law; and in terms of what he called times of "constitutional transformation," when scholarship is shaken-up; and even reconceptualized as it was, for instance, in Charles Reich's article The New Property.

I. THE NEW HISTORY

Significantly for understanding the role and impact of the Supreme Court, and appreciating and evaluating the historical aspects of the articles in this Marbury v. Madison Symposium, a number of essays were recently published in a collection edited by two British historians under the title Contesting Democracy, and they revised the standard periodization of history textbooks. The periods proposed will be especially unsettling to constitutional law scholars. The titles of several of the essays and the periods are: State Development in the Early Republic: Substance and Structure (1780-1840); Change and Continuity in the Party Period: The Substance and Structure of American Politics (1835-1885); The Limits of Federal Power and Social Politics (1910-1955).

Most constitutional law casebooks are not structured historically. Brest et al, Processes of Constitutional Decisionmaking is the major exception. Its periodization, which I suspect is generally accepted by constitutional scholars, is indicated by its chapter headings: The Marshall Court; The Taney Court and the Civil War: 1835-1865; From Reconstruction to the New Deal: 1866-1934; Constitutional Adjudication in the Modern World.

The new periodization of the historians, raises questions about this view and places many of the leading Supreme Court cases in new and interesting light. For instance Martin v. Hunter's Lessee, McCulloch v. Maryland, and Cohen v. Virginia

are described as "a potent burst of judicial nationalism," yet as a result there was a "swing of Virginia and the South back to states' rights [which] would constrict nation-state development as the southern periphery continued to dominate the central government indirectly." So while *McCulloch* is studied as the underpinning of an expansive reading of the Constitution, its unintended consequence was an end to state (meaning nation-state) development.

After the three cases mentioned are discussed in a Constitutional Law class, a student will often ask why the government, which obviously now had the authority to do so, did not outlaw slavery. My answer has always been that the slave holding states dominated the government but frankly without concrete evidence. Only recently has that evidence been assembled. Leonard Richards ascertained that between the Constitution and the Civil War, the President was a slaveholder for fifty years, the Speakers of the House were slave holders for forty-six years, slaveholders were chairs of the House Ways and Means committee for forty-eight years, and over half of the Supreme Court Justices were from what became the Confederate States.

Further the three-fifths clause increased the number or seats of the slave-holding states in the House of Representatives. Finally, enough Northerners voted with the South on racial issues to ensure slavery-protecting compromises.

While this all cannot be blamed on the Marshall Court, it seems worth remembering that *Marbury* was still born, in the sense that the Supreme Court did not declare another congressional enactment unconstitutional for about fifty years; and *McCulloch* apparently caused a racist backlash which despite Marshall's almost imperial rhetoric, weakened the national government.

Similarly cases like *Proprietors of Charles River Bridge v. Proprietors of Warren Bridge* and *Mayor of New York v. Miln* at one end and *Wabash, St. Louis and Pacific Railway v. Illinois* at the other, appear differently in the new periodization. All three

14. Id.
15. Id. at 21-22 (citing Leonard Richards, *The Slave Power: The Free North and Southern Domination 1780-1860* (2000)).
16. Id. at 22.
get scant attention in most casebooks. Yet, the cases of 1837 kept the police powers of the States alive, despite the supremacy and commerce clauses; and Charles River Bridge made constitutionally possible the democratic struggle against the concentrations of power developing in the market revolution of the early nineteenth century. Wabash, in 1886, at the other end of this “period” marks the beginning of substantial limitations on the regulatory authority of the States; and a tentative beginning of federal regulation.

The 1837 Court approved continuation of state and local control over the economy, and the market revolution of that period helps explain why reform movements and third parties focused primarily on control of state and local governments. The major exception being the abolitionists and Free-Soil party in that slavery was a truly national issue.

With Wabash, the power of state and local governments was eviscerated. But more significantly, manifestations of private economic power had become so big and significant that the only effective counterforce could be the national government.

To continue with examples of the new insights revisionist periodization provides there is the infamous and short-lived case of Hamer v. Dagenhart and its “progeny”: the equally infamous to some, but longer-lived Griswold v. Connecticut.

In addition to the obvious humanitarian arguments against child labor, which continue to inspire reform efforts like the student led anti-sweat shop, anti-Nike activities on many college campuses, child labor raised concerns about efficiency and expertise. The assembly line of Ford’s factories and the “one best way” of Frederick Winslow Turner required, if not the “educated” citizen of republicanism, at least a competent worker. So children needed to be in school, not laboring in a field or factory.


25. See Richard Jensen, Democracy, Republicanism, and Efficiency: The Values of American Politics, 1885-1930 in CONTESTING DEMOCRACY, supra note 7, at 160 (stating the progressives’ stance on child labor).
Significant for constitutional evolution was the opposition to child laws led by conservative women’s groups like Women Patriots in Massachusetts and the Catholic Church. They insisted that America’s ideal required a protected enclave for the family. It was also argued that the child labor law was an attempt to “nationalize or sovietize family life.”

Interestingly, the first of these oppositional arguments, while failing in its immediate task, succeeded in at least one very important way. Griswold’s privacy right is traceable back in part to the struggle of the Catholic Church for space to leave its theology unhindered by the state. The second oppositional argument proved prescient in its own way. The “best interests of the child” rule which clearly communalizes child rearing is grounded in the paternalistic, even Platonic, logic which is part of the support for child labor laws.

In this period variously characterized as the Progressive era or the fourth party period,
corruption became a sin. In political discourse, it displaced the personal sins of intemperance and secessionism that had bedeviled the third party system [approx. 1850-1890]. Theologically, the idea was reinforced by the Social Gospelers, ‘the praying wing of Progressivism,’ who preached the replacement of personal sin with public sin... The new morality committed progressives to active intervention in social and economic realms.

Perhaps it is this new sense of “sin” as having a social, even political, aspect that underlies both the passivity of the New Deal court towards economic regulation and its activity in civil rights and civil liberties cases.

This new periodization has the “New Deal” values revolution actually occurring a half-century earlier than it did. And then the Lochner court can be viewed as trapped in a pre-Fordist-pre-Turnerist world, where Turner’s “frontier” provided opportunity to escape from coercive manifestations of private economic power.

I am not unaware of the debate about what Lochner, and the entire jurisprudential era mean. I do not know who has the better of the argument, but I prefer the revisionist view. In any event, Friedman’s case rests almost entirely on media reports and political rhetoric. He fails to recognize that when Bill O’Reilly and Al Franken “have a go at it,” they are not really talking about

what they are talking about. It might be said in response that the media today is not representative, that the rhetoric of earlier days was more reasonable and reliable. Not so, as many have shown. It has always been rough out there.30

While, as I said, I incline towards the revisionist view that there is a defensible equality based dimension to the Lochner Court's thinking, that debate is not my concern today. Rather this introduction is to suggest that we are at a time of "transformation" when the ruling ways of looking at things fail to explain reality. Even long accepted periodizations and understanding of constitutional development are unsettled.

II. THE THEME IS IN THE TITLE

Scholarship over the last half of the twentieth century has established that none of the major structuring or ordering systems of society work the way it should. Each "should" work in a way that a good and just society results. Markets, regulation, litigation, democracy have both endogenous and exogenous limitations. I will, in the briefest summary, outline how and why each of these fail, as preliminary to the question I want to address, which is the place or role of judicial review in such circumstances.

In a world where none of the big structures work as they should people cling to the small systems that do work—like microwave ovens and DVD's. Or they latch on to big ideologic fundamentalisms, if that is not an oxymoron—like religion or patriotism. For some in the legal academy formalism,31 or for others the "dictionary" as the source of meaning for words,32 are the small means to certainty and security. For others it is big things like law and economics33 or democracy34 that guide us through these troubled times.

III. GOOD PEOPLE

Some argue that the key requirement for a good or just society is not systems and institutions; rather it is people—good people. William Penn, whose experiences with the King contributed mightily to the development of the jury, was of this

34. See generally Mark Tushnet, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999).
Any government is free to the people under it (whatever be the frame) where the laws rule, and the people are a party to those laws, and more than this is tyranny, oligarchy, or confusion. But, lastly, when all is said, there is hardly one frame of government in the world so ill designed by its first founders that, in good hands, would not do well enough... Let men be good, and the government cannot be bad; if it be ill, they will cure it. But, if men be bad, let the government be ever so good, they will endeavor to warp and spoil it to their turn.

However, James Harrington, at about the same time argued to the contrary:

"Give us good men, and they will make us good laws," is the maxim of a demagogue... But "give us good orders, and they will make us good men" is the maxim of a legislator and the most infallible in the politics.

Madison famously accepted this view as evidenced in his "If men were angels..." So let us begin to look at the imperfect alternatives, to use Neil Komesar's suggestive phrase.

IV. MARKETS

At least since Adam Smith it has been argued that if markets are allowed to operate the wealth and welfare of society will be maximized. The mechanism for this is "the invisible hand."

Assuming that property rights have been defined in ways that internalize costs and benefits resulting from the use of a resource, the economic perspective then focuses on facilitating the transferability of these property rights to ensure that they end up in the highest-valued social uses. The preconditions for successful operation of the market include the presence of a large number of buyers and sellers, none of whom has sufficient power to affect the price of the goods being traded. There also has to be product fungibility or substitutability, and reasonably accurate information available to all participants about price and quality. Finally, there has to be substantial opportunity for competitors to

37. THE FEDERALIST No. 51.
The absence of any of these conditions can be called a market failure that will reduce the likelihood of the common good being achieved. Further, Von Neumann's Prisoner's Dilemma and Garrett Hardin's Tragedy of the Commons make powerful cases that the pursuit of self-interest does not result in the public interest or common good.

For common good to result there needs to be some law, despite findings suggesting otherwise by Ellickson in his important study of how neighbors settle disputes within his schema of norms and rules. His conclusion in *Order Without Law: How Neighbors Settle Disputes* was that neighbors in fact are strongly inclined to cooperate, to be sure. But the cooperative outcomes result not by bargaining around legal entitlements, as Coase’s theorem would indicate. Rather, they develop and enforce “norms of neighborliness” that supersede formal legal rules.

His study was of Shasta County, an area of mostly open range where the cattle ranchers and the other residents form a close-knit group with a lot of personal work-a-day contact with each other. Ellickson acknowledges however that departures from these conditions of reciprocity, the lack of adequate and shared information and ready sanctioning opportunities will inhibit, even prevent, the emergence of norms maximizing the common good. Social imperfections similar to market imperfections will develop especially in more transient, larger and less closely-knit communities than Shasta County. Thus, the law of contracts, whose functions include containing opportunism in non-simultaneous exchanges, reducing transaction costs, filling gaps in incomplete contracts, and distinguishing welfare enhancing from welfare reducing exchanges becomes necessary.

So even in its own terms the market is flawed. When the boundedness of rationality and the finding of Kahneman and Tversky and others are recognized it is clearer why “the market” does not work.

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43. 162 Science 1243 (1968).
47. Amos Tversky & Daniel Kahneman, *The Framing of Decisions and the*
V. REGULATION

When there is a market failure what can be done? There are several options. One could do nothing and rely on the common law to provide a remedy for any harm. The limits of litigation are outlined later in this paper. Anti-trust law, government ownership, taxation and subsidy, or economic or social regulation are the other major options. All of these can be conflated to "regulation."

Cass Sunstein has insightfully identified many of the unintended consequences, even paradoxes, of regulation. He persuasively argues and presents examples of such side effects of otherwise curative governmental action. For instance, he shows how requiring the best available technological fix for a problem can actually retard technological development (the best becomes the enemy of the good) or how "equality" can make things worse (for example, women now pay alimony, and get less alimony than they used to). Thus, the temptation for ever more and more specific regulations which can result in what Weber called the "iron cage" of bureaucracy.

VI. LITIGATION

But can't we rely on litigation to regulate undesirable behavior and remedy wrongs resulting from system failures?

Allen Kamp has identified several factors that limit the effectiveness of litigation. Often the harm is widespread, but too small for an individual to sue; or the harm can be so serious that damages are inadequate (use of thalidomide is an example). Courts are not set up to monitor behavior over extended periods of time; they lack the necessary expertise to deal with many regulatory issues; and there is a high volume which would overwhelm the resources of the courts.

The common law has built-in biases that limit its effectiveness in dealing with new and developing problems (the right of employees to organic and collectively bargain in the early twentieth century was unrecognizable under common law principles). Finally separation of powers and official immunity insulate persons having significant impact on others from judicial scrutiny.


Much contemporary constitutional law theorizing has moved from trying to understand judicial review to calling for its limit, even elimination in a sense. Professor Mark Tushnet has offered a powerful argument to take the Constitution away from the Court and to return it to the people. He has moved beyond concern about the counter-majoritarian dilemma to claims that reliance on the electoral-legislative processes results in both a "populist" understanding of the Constitution and a more active citizenry.\[^1\]

Some have argued to the contrary, that the entire system of government embedded in the Constitution is a "complex, non-majoritarian form of self-government," of which judicial review is only one component. So there is no counter-majoritarian difficulty. Rather it has been argued that judicial review is democratic. It is not democratic in the electoral sense; but rather, impartiality, effective choice, participation, and deliberation make it so.\[^2\]

Public choice theory has shown that at each step in the electoral-legislative processes rational behavior results in less than the public interest or common good. In simplified terms people do not vote, so the elected representatives do not represent; there is in fact no aggregation of private interests. And the representatives do not seek the common good; rather, they seek re-election. They do this by "selling" legislation to contributors and constituencies that support their continuation in office.\[^3\]

A century ago Robert Michels theorized that politics would be dominated by small "rent-seeking" or what we have come to call special interest groups.\[^4\] His findings have been confirmed in theory and practice many times since.\[^5\]

Finally, Kenneth Arrow has questioned whether the legislative process is or can be coherent. His Impossibility Theorem questions whether permanent, positive change can be brought about through voting.\[^6\]

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55. See, e.g., MANCUR OLSON, THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS (1965) (distinguishing the agenda of small groups from that of larger ones).
VIII. THE BALANCING ROLE OF THE SUPREME COURT

It has to be admitted that the Supreme Court has also been subjected to the same kind of withering analysis that the other systems and institutions have been subjected to. So we are looking at just another imperfect alternative in a sense.

Nevertheless, twice in The Federalist Hamilton asserts "that the true test of a good government is its aptitude and tendency to produce a good administration." In The Federalist No. 78 he describes a judiciary secure in its tenure during good behavior as "the best expedient which can be devised in any government, to secure a steady, upright, and impartial administration of the laws." He goes further in the same paper to say, "permanency in office... may... be justly regarded as an indispensable ingredient in [the] constitution, and, in a great measure, as the citadel of the public justice and the public security."

Implicit in this high view of an independent judiciary is the notion of checks and balances. No power, governmental or private, political, social, religious, or economic can be allowed to go unchecked.

Much has been written on the “checking” function of the Court. Its role as both protector of the people from the other two branches of government, and even as protector of the Constitution from the people, has been defended and condemned innumerable times. I myself have written on Madison’s recognition of and concern about private economic power, and the need for a strong government to regulate and control it.

Here, rather than focus on general governmental checks on power, I want to focus on the role of the judiciary in balancing things in the imperfect world we have described.

The balancing I am thinking about is not the balancing frequently used by the Court in cases, both constitutional and otherwise. For instance, to illustrate the routine or “internal” balancing between or among relevant, even competing, values used in deciding cases, one need go no further than the Mathews v.  

58. THE FEDERALIST Nos. 68, 76.
59. THE FEDERALIST No. 78.
60. Id.
Eldridge\textsuperscript{64} test for determining what kind of hearing the due process clause requires in different circumstances. The Court weighs the private interest adversely affected by the government action, the public or governmental interest or purpose supporting its actions, and the risk of an erroneous deprivation of the individual's right because of the lack of the particular additional procedural protection being sought.

Or one can consider the federalism context, specifically that of the dormant commerce clause, where the Court balances the interest of the state in enacting its regulation affecting commerce and the significance of that effect on the national interest in the free flow of commerce.\textsuperscript{65}

Rather, the balancing I am talking of is more like the balance of power in the international realm\textsuperscript{66} or perhaps more precisely the countervailing power concept of Galbraith.\textsuperscript{67} The notion is not the checking or line drawing role of the Court in a civil liberties or human rights case. It is more akin to the aspect of judicial review of administrative agency rule making, where the Court remands a rule back to the agency because the agency failed to consider or undervalued an aspect of the situation that the proposed rule addresses.\textsuperscript{68}

As noted in passing at the beginning of this essay, various conceptualizations of the equality embedded in the Constitution have developed since the \textit{Brown v. Board of Education} decision put equality back at the center of constitutional debate. I want to briefly describe each of those views and propose as an extension of them what has been called a preferential option for the poor.

After summarily presenting arguments developed by others that the Constitution can and should be understood as incorporating such as view of equality, I want to offer some thoughts on how the Supreme Court can use a balancing approach to actualize this preferential option of the poor.

**IX. EQUALITY AND THE PREFERENTIAL OPTION FOR THE POOR**

The “preferential option for the poor” that I am suggesting is a substantive element of the Constitution, not just an equal

\begin{itemize}
  \item \textsuperscript{64} Mathews v. Eldridge, 424 U.S. 319 (1976).
  \item \textsuperscript{65} \textit{E.g.}, Kassell v. Consolidation Freightways Corp., 450 U.S. 662 (1981).
  \item \textsuperscript{67} See generally \textsc{John Kenneth Galbraith}, \textsc{American Capitalism: The Concept of Countervailing Power} (1980) (describing restraints on private power as the counter-part of competition).
\end{itemize}
opportunity, or an anti-classification principle. It is even more than an anti-subordination principle. Let me first briefly describe each of the three things that a preferential option for the poor is not.

Equal opportunity is usually understood to accept the unequal state of the world and its "democratic-capitalist" systems. It can be described as a "nightwatchmen" state with its attendant laws to make sure the market operates and people have protection against physical harms. Even anti-discrimination and regulatory laws that most have come to accept, even rely on, would not be allowed. For instance, Richard Epstein rejects even the limited understanding of the police power adopted by the *Lochner* Court. 69

The anti-classification principle prohibits the government from classifying people on the basis of forbidden categories. It permits the government to regulate similar classifying behavior by non-governmental actors across a wide range of human activity. The focus is on individual persons where disputes about alleged violations of the principle are tried before an objective or non-partisan Court. 70

Robin West, crediting Charles Black, argues that these two notions, individuals and courts, when put together create a "very 'tight fit' between, on the one hand, the traditional, anti-discrimination understanding of equal protection, and on the other, both judicial-institutional self understanding . . . and jurisprudential aspiration—'treating likes alike' is an ethical idea at the very heart of the idea of adjudicative law." 71 She adds that Courts do their "moral" work "under pre-existing law." 72

The anti-subordination principle as a subject of legal scholarship has been credited to Owen Fiss' article *Groups and the Equal Protection Clause*. "Anti-subordination theorists [including Derrick Bell and Catharine MacKinnon] . . . argue that law should reform institutions and practices that enforce the secondary social status of historically oppressed groups." 73 The labels used in the literature to communicate this notion resonate in the same place as Justice Harlan's anti-caste language in his *Plessy* dissent, and the concerns about "class legislation" that were common in both

70. See Kathryn Abrams, "*Groups* and the Advent of Critical Race Scholarship* (Fiss e-symposium, Article 10) at 1-3 (August 2002) at http://bepress.com/ils/iss2/art10/ (last visited Jan 26, 2004).
72. Id. at 5-6.
If the three above principles are what a preferential option for the poor is not, what is it and how does it differ from the above?

A preferential option for the poor requires asking at every point of public policy decision making how the choices being considered would affect people at the lower end of the economic ladder. Being poor is not a status, at least not an immutable characteristic or an essentialism. But surely Michael Harrington was right. Metaphors like web, slippery slope, invisibility, and others, sadly including a self-inflicted wound come to mind. I use the ladder metaphor intentionally. I want to capture within the preferential option model among other traditional notions the ideas of leveling up, not down; of requiring “work” to advance; and the neutrality or impersonality of a ladder as the mechanism of that advance.

In more technical legal terms, the preferential option for the poor principle requires an evaluation of all policy choices to see their impact on poor people. If there is a disparate impact the policy choice must be adjusted to “prefer” the poor.

Washington v. Davis’s insistence that disparate impact is not sufficient to heighten judicial concern would certainly not be good law under the preferential option for the poor principle. Rather that opinion would be recognized for what it is, the Plessy of the twentieth century.

Some, even many, might accept such a view of the Constitution; that there is an aspirational duty of the political branches to strive for, even move towards “equal citizenship.” But even those sharing such a view, for a variety of reasons, often see


75. See The Preferential Option for the Poor for the Poor (Richard John Neuhaus ed., 1988) (providing a debate about the meaning of this concept in its theologic and policy contexts).


77. See Anne L. Alstott, Work v. Freedom: A Liberal Challenge to Employment Subsidies, 108 YALE L.J. 967 (1999). Also see Board of Regents v. Roth, 408 U.S. 564 (1972), where Justice Marshall in dissent argued in the words of a former law clerk, that “everyone had a right to a government job unless the government had a good reason not to give the applicant a job.”


little or no role for the Courts.  

To see just what role judicial review might have in this world where nothing works, where all alternatives are imperfect, but where there is a constitutionally recognized preferential option for the poor, requires both a more specific and detailed presentation of the "positive" constitution such a preference implies, and recognition of the limited competence of the Court.

X. POSITIVE CONSTITUTIONALISM

In a new book Welfare and the Constitution, Sotirios Barber presents a compelling case for viewing the Constitution as a charter of positive benefits requiring balance rather than a charter of negative liberties requiring checking. He summarizes the negative-liberties model of the Constitution as assuming that, for better or worse, the Constitution leaves government's provision of goods and services, from national defense to pensions and schools, to the play of pluralist political forces represented by elected officials whose decisions are legally restricted solely by judicially declared fundamental rights and structural principles . . . it guarantees exemptions from governmental action, not rights to governmental benefits. It imposes no unconditional duty to provide, and therefore it guarantees no right to any substantive benefit beyond access to the system of interest representation.

As a consequence of this constricted view of government it has been held by courts and scholars, that there is no "unconditional federal constitutional duty to provide any substantive benefit to anyone—no constitutional duty to provide police protection, for example, even to a child of four against the reasonably predictable, because repeated, violence of a disturbed parent." This is a reference to DeShaney v. Winnebago (the Dred Scott case of the twentieth century). Barber further refers to lower federal court opinions finding no constitutional right to police or fire protection. In other words, the Constitution does not even require the nightwatchman state that even libertarians favor. If that is the case, just what does the Constitution do? As Barber argues, even Hobbes imposes the minimum duty to provide people with security from private violence. So let us put the negative

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81. Id. at 5.
82. Id. at xii.
83. Id. at 5.
84. Id. at 26-28. There is language in Supreme Court opinions revealing a sense that passivity in the face of wrong is inconsistent with good government.
liberties view aside as another non-functional, even dysfunctional, system.

Barber outlines the framework of government set forth in *The Federalist* as an historic or originalist argument that the Constitution properly understood obliges government to affirmatively pursue the well-being of all responsible persons. He argues: "*The Federalist* generally reflects the instrumentalist or ends-oriented language and logic of the Constitution's Preamble." These ends are described by Publius variously as "the solid happiness of the people," "the real welfare of the great body of the people," "Justice," and "the public good." Thus, "Publius's overriding concern for the ends of government brings him to an understanding of governmental powers" that finds not just "mere authorizations but a fiduciary duty to pursue the ends for which the powers were granted in the first place."

In a more philosophic vein Barber argues that all government action (or inaction) is redistributive to some one or another. That is, it is non-neutral. This is consistent with the causation analysis underlying Coase's theorem. He cites both critics and supporters of the welfare state for the proposition that "all acts of government are either immediately redistributive or protective of prior redistributive acts." He further argues that a categorical distinction between state action and private action is "beli(e)d" by the reality that permitting something (slavery or abortion are his examples) is "tantamount to protecting it by enforcing the criminal and civil laws against those who cannot stop it save by unlawful or tortious behavior."

Robin West reaches a similar conclusion on the basis of the text of the fourteenth amendment. She focuses on the words that are relied on to require "state action" and argues rather than prohibit just irrational state action, they equally prohibit "state inaction in the face of private power".

The words are "no state shall deny..." West says "deny" should be understood as including "fail," or "refuse," or "neglect" to take action. To deny is to not give. In these terms then the

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See Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (stating “[t]he government of the United States has been emphatically termed a government of laws and not of men. It will certainly cease to deserve this high appellation, if the laws furnish no remedy for the violation of a vested legal right”); Ward v. Love County, 253 U.S. 17, 24 (1920) (stating that “this court has said on several occasions, ‘the obligation to do justice rests upon all persons, natural and artificial’”).

85. BARBER, supra note 80, at 39.
86. Id.
87. Id.
88. Id. at 14.
89. Id. at 52-53.
90. West, supra note 71, at 3.
Constitution requires affirmative governmental action in the face of unacceptable private conduct.\textsuperscript{91} She reminds us that the \textit{Civil Rights Cases} in fact assumed there was a governmental remedy for the wrongs in those cases, most probably in a form related to the common law duty to serve imposed on certain businesses.\textsuperscript{92}

Importantly in this regard, recent scholarship has shown that in the nineteenth century governments have acted positively to protect people from abuses of private power, and to promote the people's welfare. In the words of William Novak, "It was an epoch in which strong common law notions of public prerogatives and the duties and obligations of government persisted amid a torrent of private adjudication and constitution writing."\textsuperscript{93}

XI. BUT CAN IT BE DONE?

What of the limited competence of the Court to determine social needs, to set priorities, and evaluate the distributive consequences of decisions according a preferential option for the poor?\textsuperscript{94}

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91. \textit{Id.} at 2.
94. One preliminary aspect of the problem that has received scant attention is the judicial oath of office. Each judge solemnly swears or affirms that he or she will administer justice without respect to persons, and do equal right to the poor and the rich. The judges also swear to faithfully and impartially discharge and perform all the duties incumbent upon them according to the best of their abilities and understanding, agreeably to the Constitution and laws of the United States. They end by invoking God's help.

These words go back to Deuteronomy and Leviticus of the Jewish Bible. Deuteronomy 1:16-17 charges the judges to:

You must give your brothers a fair hearing and see justice done between a man and his brother or the stranger who lives with him. You must be impartial in judgment and give and equal hearing to small and great alike. Do not be afraid of any man, for the judgment is God's. Should a case be too difficult, bring it to me and I will hear it.

The Jerusalem Bible, Reader's Edition. Leviticus 19:15 is more succinct but to the same effect: "You must not be guilty of unjust verdicts. You must neither be partial to the little man nor overawed by the great; you must pass judgment on your neighbor according to justice." The Jerusalem Bible, Reader's Edition.

On its face oath seems to preclude a preferential option for the poor. But especially in the Biblical context it is clear that the core meaning of the oath is otherwise. The message is that the stranger or exile is a neighbor, and the poor and the rich are equal. Deuteronomy makes it clear that if all that is too difficult to understand, God will handle it. That is because the criteria for judging is righteousness, an attribute of God.

In more secular terms, the oath requires constant awareness of the
Sotirius Barber frankly acknowledges the "bad news" this question implies. Barber agrees, "the complex, contingent, and unpredictable character of policies for facilitating any conception of well-being, together with the time-sensitive balance of needs involved in concrete funding decision—and the ultimate need for public support—place most of the responsibility on legislators and their voting constituents."

Is that the end? Must we return the poor to outside the door? I think not!

Certainly empirically oriented studies like Rosenberg's *The Hollow Hope*[^96] and Powers and Rothman's *The Least Dangerous Branch*[^97] demand judicial restraint. Judicial overreaching through imposed remedies has contributed to constitutional ossification and actually hurt intended beneficiaries in many instances.

But the Courts also need a dose of humility especially under the preferential option for the poor principle in judging the facts of a case. The other Justice Marshall regularly insisted that the Court recognize the "reality" of the lived experience of the poor. He considered the gory details of trial records in the light of his own experience and saw things the other Justices would overlook, misunderstand, or undervalue. For instance in *Illinois v. Perkins*, the majority had characterized the questioning by the police of a prisoner as a "conversation." Justice Marshall quoted from the actual transcript and recharacterized it as an "interrogation" requiring *Miranda* warnings.[^98]

More directly, dissenting in *U.S. v. Kras* which found the imposition of filing fee for petitioning the bankruptcy court constitutional, he wrote "no one who has had close contact with poor people can fail to understand how close to the margins of survival many of them are."[^99] His "most impassioned statements came in cases dealing with the governments role in regulating the lives of poor people."[^100]

[^95]: BARBER, *supra* note 80, at 152.
[^100]: TUSHNET, *supra* note 77, at 103.
The first verse of Robert Conquest's poem of praise for George Orwell captures the power and effect of Thurgood Marshall.

Moral and mental glaciers melting slightly
Betray the influence of his warm intent.
Because he taught us what the actual meant
The vicious winter grips its prey less tightly.\textsuperscript{101}

Rather than returning to ideologic determination of “facts” that Justice Peckam manifest in describing the working conditions in bakeries,\textsuperscript{102} and as the Court has done in recent cases, especially \textit{Board of Trustees v. Garrett}\textsuperscript{103} where they turned a long history of oppression, forced dependence, and segregation, and lack of treatment into a finding of deep, long standing care and concern. Rather than viewing leftovers, the crumbs of conscience from the majority, as proof of the power of the recipients, as some Justices did, the inequality should be seen for what it is.\textsuperscript{104} In the words of Justice Thurgood Marshall “it is perfectly proper for judges to disagree about what the Constitution requires. But it is disgraceful for an interpretation of the Constitution to be premised upon unfounded assumptions about how people live.”\textsuperscript{105} In another opinion he characterized this factual determination of the majority as “callous indifference to the realities of the life for the poor.”\textsuperscript{106}

Recognizing these empiric and epistemologic dangers Barber reluctantly concludes that “a specification of benefits may fall short of the general welfare or eventually even defeat it . . . some may even have reservations about specifying a general right of responsible persons actually to enjoy the minimum necessities of a decent life.” He does however allow for a “right . . . to dutiful effort and progress” from the government.\textsuperscript{107}

Roberto Gargarella in his Fiss e-symposium article concludes that there ultimately is no way to make this happen. He opts finally for presence or “voice,” by providing that subordinated groups have a member on the Court.\textsuperscript{108} Despite the value of focusing on voice, this specific suggestion seems a reflection of all that is wrong with identity politics.

In the world of “imperfect alternatives” Neil Komesar urges a return to a Madisonian, even Harringtonian, focus on institutions.

\textsuperscript{102} See Lochner v. New York, 198 U.S. 45 (1905).
\textsuperscript{103} Board of Trustees v. Garrett, 531 U.S. 356 (2001).
\textsuperscript{105} Kras, 409 U.S. at 460.
\textsuperscript{107} Barber, supra note 80, at 57.
\textsuperscript{108} Roberto Gargarella, \textit{Group Rights, Judicial Review, and “Personal Motives”} (Fiss e-symposium Article 3).
One need not agree with Komesar's specifics to recognize the practical wisdom in his approach. So what can the Court do? In addition to its traditional "checking" role, the Court can recognize that each of the systems of the society is "imperfect" and it can adopt the "balancing" role proposed here. But how would that work?

In eleventh amendment cases and in the early debate about Supreme Court review of state court decisions the Court has relied at least in part on the "good faith" of other branches of government, rather than ordering them to do or not to something. Judicial opinions are crafted to influence behavior beyond that required by the Court's order in a particular case. The Court can more forcefully nudge decision-makers to a preferential option for the poor.

Further beyond hope and a friendly nudge now and again, there are cases like Kadrmas and Garrett where just the slightest sensitivity to reality, to say nothing of a preferential option, would lead to results different than under current law.

To actualize what might otherwise remain unansweredor an unfelt nudge, or insensitivity to facts, Courts could require Congress and agencies to manifest their consideration of the interests and needs of the poor. While the experience of the Courts with "impact" statements and cost-benefit analysis is not all positive; clearly some of it has been efficacious. Professor Michelman has referred to the feasibility of "judicial mandate(s) to legislative, executive, or administrative officers to prepare, submit, and carry out ... corrective plan(s)."

Finally, scholars like Susan Sturm have begun to suggest ways for courts to develop this balancing role by focusing "on developing the institutional competence of [itself and] other actors to pursue equality norms." She articulates something like the "balancing" role of the Court being proposed when she says, "The judiciary becomes involved when ... there is a strong indication that particular systems and practices are failing in ways that fall

109. See generally KOMESAR, supra note 38.
110. See Alden v. Maine, 527 U.S. 706, 755 (1999) (writing "The good faith of the States thus provides an important assurance that" the Constitution and federal law will be complied with).
111. See Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 362 (1816) (stating "We have not thought it incumbent on us to give any opinion upon the question whether this Court has the authority to issue a writ of mandamus ... to enforce the former judgments").
within the purview of generally articulated equality aspirations.\textsuperscript{114} The experiences of Courts I have mentioned and the scholarship of Komesar and Sturm and others suggest the feasibility of an approach combining an opening up of the other imperfect institutions to the voice of the poor, some feasible form of poor people's impact statement, and shifting burdens like in pre-emptory juror challenge cases.

This "preference" will (help) balance the working of political-economic systems of society by insuring that the plight of the poor is both visible and recognized as a necessary consideration in governmental decision-making. It will also increase the inclusiveness and effectiveness of the American Dream machine that judicial review was to Chief Justice Marshall in this imperfect world of ours.

\textsuperscript{114} Susan Sturm, Owen Fiss, \textit{Equality Theory, and Judicial Role} (Fiss e-symposium Article 18) at 7.