Journal of Public Policy (2016), 36:4, 521–545 © *Cambridge University Press, 2015*
doi:10.1017/S0143814X15000264

The stability of basic income: a constitutional solution for a political problem?

JURGEN DE WISPELAERE
Institute for Health and Social Policy, McGill University, Canada
E-mail: jurgen.dewispelaere@gmail.com

LETICIA MORALES
Institute for Health and Social Policy and Faculty of Law, McGill University, Canada
E-mail: leticia.morales@mcgill.ca

Abstract: Although basic income has surged in policy interest in recent years, political research has not kept up with the debate in the trenches. In this article, we tackle a political problem any enacting coalition must face: how to ensure the political stability of a basic income over time. We first demonstrate how basic income schemes are particularly vulnerable to processes of policy change discussed in the recent policy feedback literature. We then analyse whether constitutionalising basic income in a Bill of Rights protected by strong judicial review would offer a valuable route for boosting basic income's stability. A careful examination of the decision-making process within judicial review suggests that, caught up in a dilemma between judicial restraint and judicial activism, an enacting coalition would do well not to rely on constitutional mechanisms as the sole avenue for ensuring the political stability of basic income.

Key words: basic income, constitutional rights, judicial review, policy feedback, political stability

Introduction

Basic income is typically defined as an individual's entitlement to receive a regular unconditional payment, independent of other sources of income (or wealth), employment or willingness to work, or living situation (Van Parijs 1992, 1995). Although detailed schemes for basic income show considerable variation (De Wispelaere and Stirton 2004), three core features set it apart from familiar income maintenance programmes such as social insurance or social assistance. First, rather than focussing on a household as the target unit (Atkinson 1998), a regular basic income is calculated

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

and paid out to each (adult) individual. Second, basic income is universal rather than targeted, resembling universal health coverage in some jurisdictions. Although discussion persists on whether to focus on citizens or also include long-term residents, and on whether to restrict access to children or prisoners, basic income's coverage exceeds that of any existing income support scheme (Van Parijs 2004). Third and most controversially, basic income eschews the eligibility conditions present in the vast majority of welfare programmes: it does not require a means or income test; it is independent from work or willingness-to-work conditions; and it refuses to impose restrictions on the use of the basic income grant (Dowding et al. 2003).

Basic income has witnessed a remarkable surge in media and policy attention following the passing of a Citizen's Initiative in Switzerland in October 2013 that proposes to give each adult citizen a monthly stipend of €2,800.[1] The Swiss Initiative is a uniquely high-profile event, but similar political discussions have taken place in countries as diverse as Ireland, Spain, Brazil, Germany, Namibia, South Africa, Iran, Finland, India and Japan in past decades (Caputo 2012). Proponents claim positive effects on income security, unemployment, social exclusion, "discretionary time" and flexibility across the life cycle, and even gender equality among the scheme's many virtues (see, for instance, Van Parijs 1992, 1995, 2004; Standing 1999, 2002; McKay 2001; Groot 2004; Wright 2004, 2006; Offe 2008; Haagh 2011; Birnbaum 2012). Unfortunately, political research has not kept up with the booming policy interest in basic income. Although we know a great deal about the ethics and economics of basic income (Van Parijs 1992; Widerquist 2005, 2013), scholars have only recently started to focus in earnest on the political constraints impeding this proposal or the political strategies required to get basic income moving up on the policy agenda (Van der Veen and Groot 2000; De Wispelaere and Noguera 2012).

This article contributes to the political analysis of basic income by examining the specific question of the *political stability* of basic income. Our interest is in the continued enactment of an unconditional basic income scheme, taking for granted the existence of an enacting coalition at present. It might be thought premature to worry about stability in the absence of a strong probability that basic income could be enacted in the near future. Our view is that, if we are to take the politics of basic income seriously, we also need to concern ourselves with its stability over time.[2]

[1] http://www.reuters.com/article/2013/10/04/us-swiss-pay-idUSBRE9930O620131004. A similar European Citizens' Initiative ran from April 2012 to January 2014 and collected more than 300,000 signatures in the European Union (www.ubie.org).

[2] Scholarly discussion about stability in relation to basic income focusses almost entirely on the motivational question: how to ensure that basic income recipients do not withdraw *en masse* from

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

Stability-proofing basic income requires concessions and compromises that need to be mapped out well in advance of attempts at legislation. The lack of any awareness, let alone sustained analysis, of stability as a consideration in basic income policy development is a serious oversight. In addition, whereas political stability is a problem basic income shares with most policy schemes, its unique design offers an opportunity to further examine and refine existing research in policy stability and change.

This article has two aims. To begin with, we examine the susceptibility of basic income to processes of transformative or gradual change (Streeck and Thelen 2005; Mahoney and Thelen 2010). Political stability is conceptualised in terms of two desirable properties: *resilience* and *robustness*. Resilience refers to the ability of a policy to resist pressure for programme change, resulting either in radical abolishment/replacement or in gradual changes that significantly alter key characteristics of the policy.[3] Robustness ("functional resilience") concerns the ability of a policy to deliver on its intended goals. A policy that lacks robustness may never experience change in legislative rules and regulations, but, nevertheless, fail to deliver the desired outcome.[4] The next section outlines four processes that may affect the political stability of basic income, thus conceived: *replacement*, *layering*, *conversion* and *drift*.

Secondly, we critically evaluate one strategy for boosting basic income's stability: *constitutionalising basic income*. We start our analysis by outlining several reasons why a political coalition in favour of enacting basic income would want to constrain future policy change by enshrining the policy in a Bill of Rights protected by strong judicial review. Drawing on a large literature in jurisprudence and constitutional law, we argue that constitutionalising basic income is not as straightforward a solution as its advocates believe it to be. Judicial review crucially depends on judges interpreting key provisions entailed by a constitutional right to basic income in a manner that conforms to the intentions of the enacting coalition. In reality, as we outline below, constitutional judgements may depart considerably from those views, which in turn suggests that the judicial review process offers insufficiently robust protection of a constitutional right to basic income as envisaged by the enacting coalition.

the labour market (Pérez Muñoz 2014)? In our view, the stability problem has a broader remit than ensuring sufficient motivation to work (De Wispelaere and Noguera 2012).

[3] This precludes any type of "adaptive changes" that do not fundamentally change the nature of the programme. Adaptive changes are both inevitable and serve an important purpose in a dynamic social environment. For this reason, the concept of stability as "constancy" is of no interest to policy design (Hansson and Helgesson 2003).

[4] Insofar as robustness is a result of political decisions, or even "non-decisions", it constitutes the hidden face of political stability (Hacker 2004, 2005).

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

The stability problem: robustness and resilience

Following the path-breaking work of Pierson (1993, 2004), the question of how, why and when policies undergo or resist major transformation has become a central topic of political research (Thelen and Steinmo 1992; Clemens and Cook 1999). Policy change can take the form of a radical transformation, a sudden policy shift that significantly alters the political landscape in a single legislative sweep by *abolishing* an extant programme or *replacing* it with a competitor. More often, however, policy change will take a gradualist or incrementalist approach, employing subterranean political processes such as *layering*, *conversion* or *policy drift* (Streeck and Thelen 2005; Mahoney and Thelen 2010). Although these processes affect all social policy, we believe basic income is particularly susceptible to each of these.

Basic income and resilience: replacement

The most obvious immediate threat to basic income's political resilience is when a current government faces new circumstances (e.g. a severe budgetary crisis) or a newly elected government decides to legislate against basic income in favour of more selective welfare programmes. According to Pierson (1993), wholesale policy replacement is difficult to realise because policies themselves produce positive feedback that make them resistant to change. Policies exhibit path dependence: "[o]nce actors have ventured far down a particular path, they may find it very difficult to reverse course" (Pierson 2004, 10–11).

We appear to find an example of such path dependence in the case of Alaska's Permanent Fund Dividend (PFD), where since 1982 each resident has received an equal share of the returns to a publicly owned investment portfolio funded by the state's oil revenue (Widerquist and Howard 2012). Once instituted, the PFD has proven remarkably popular and resilient. As Goldsmith pointedly relates, in Alaska today it amounts to "political suicide to suggest any policy change that could possibly have any adverse impact today, or in the future, on the size of the PFD" (2005, 558). The success of the Alaska Dividend may be due largely to local idiosyncrasies, however. Highly contingent factors such as a funding source that "fell from heaven", experience with excessive squandering of public resources in the recent past and even the geography of the State in the far North of the continent (curbing "welfare-magnet immigration") all may count towards its political stability. The interesting question is whether generalisable positive feedback mechanisms such as incentive effects, information effects and learning effects (Pierson 1993) readily apply to the basic income proposal.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

Formally basic income hands each citizen an equal entitlement, but this formal universality betrays the sense in which some are net beneficiaries and others are net contributors and, more importantly, that "the relation between winners and losers is clearly visible" (de Beus 2013, 332). In line with Baldwin's (1990) influential account of complexity producing social solidarity, the increased transparency of a basic income celebrated by its staunch advocates is likely to reduce its political resilience, in particular when the critical support of the middle classes (Korpi and Palm 1998) cannot be taken for granted.[5] Equally, although basic income is often lauded as not requiring a large bureaucracy for its implementation (Standing 1999; Offe 2005), this very fact may endanger its subsequent resilience by not being able to count on a powerful bureaucratic constituency to mobilise against future political pressures for change (Skocpol 1992; Béland 2010). An inability to build up a critical mass of beneficiaries with a strong interest in the continuation of the programme is arguably what allowed the UK Coalition Government to abolish the Child Trust Fund, a scheme with strong similarities to a basic income, within its first week in office.[6] Similar problems may hamper information or learning effects, culminating in an insufficiently robust policy "lock-in".

In addition to the absence of positive feedback, we also must consider the presence of negative or self-undermining feedback effects that play out over time as "initially bearable irritants may remain in place for a long time – and may grow in their impact until they do undermine the stability of a policy regime" (Weaver 2010, 139–140; also Jacobs and Weaver 2014). One way in which negative feedback can affect basic income's resilience is when costs associated with basic income progressively become more *salient to*, or more *concentrated within*, the population. Costs may become more salient where supporters of basic income come to realise (or perhaps mistakenly believe) that they are no longer benefiting from a basic income. Early supporters may have initially accepted the basic income scheme under the assumption that it would protect them against particular social risks, but over time find themselves in a position where they appear no longer vulnerable to such risks. Alternatively, the basic income may turn out not to protect against as broad a range of social risks as initially thought, perhaps because the level of the grant has considerably depreciated. The perceived

[5] This point is particularly relevant where basic income is said to benefit both those suffering economic disadvantage (low income) and economic insecurity (high social risk), and where both groups largely coincide with one another. Rehm et al. (2012) suggests this importantly narrows popular support for a welfare programme.

[6] The Child Trust Fund each year covered more individuals, but failed to produce Pierson-type positive feedback effects because the time horizon between entitlement and actual consumption was too long.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

concentration of the costs of a basic income scheme among "well-defined and tightly networked groups" (Jacobs and Weaver 2014, 10) will likewise increase political opposition.

The cultural framing of basic income receipt in terms of cultural categories of deservingness (van Oorschot 2000) represents a further source of negative feedback effects. Basic income is vulnerable to "symbolic contamination". In cases where the public and elites retain a moral distinction between the deserving and undeserving poor, the lack of "programmatic boundaries" separating these different categories means the "morally tainted status" of one class of recipients ends up polluting those regarded as more deserving (Steensland 2006, 1286), reducing the latter's willingness to mobilise against abolishment or replacement of the programme even where material benefits are present. At that time, "deserving" net beneficiaries and net contributors would join in pressuring politicians to explore alternative options, expanding the menu of options and the possible coalitions, to replace the basic income policy (Jacobs and Weaver 2014).

Basic income and resilience: layering

Where multiple institutional veto players are at play, policy replacement is not a viable political option. However, political resilience can also be threatened through a gradualist process. Layering is a process whereby new rules are grafted onto an existing policy, leading to policy change over time through a process of differential growth (Streeck and Thelen 2005; Mahoney and Thelen 2010). Such additional layers may initially appear innocuous and only over time become threatening to the extant policy framework, by which time they too are institutionally embedded. Layering causes two types of problems. First, competing policy layers may interfere with the smooth running of the original scheme, reducing its effectiveness – strictly speaking, a robustness problem. Second, they may siphon off public and political support as they become more important or salient (Streeck and Thelen 2005). Layering gradually hollows out policy from the inside out by depleting its political oxygen.

At first sight, a universal and uniform basic income may appear immune to layering. In reality, layering may reduce the resilience of basic income policy in two ways. First, most proposals envisage basic income only partially replacing social support programmes. Basic income is customarily regarded as a floor upon which categorical or targeted benefits are built (Van Parijs 1992). The rate at which a basic income scheme is substituted for extant programmes depends primarily on the level of the grant, with generous proposals rendering a larger share of support programmes redundant. In some cases, advocates consider a "partial" basic income pitched below the poverty line as a necessary first step, which would require

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

keeping a large number of programmes in place. However, even when basic income reaches a generous level, targeted programmes such as unemployment insurance, pension supplements or disability assistance would still operate alongside it. Although this additional layer of support programmes has the advantage of offering a more robust level of protection to the disadvantaged, it also entails a constant source of political competition for budgetary and organisational resources. Political opponents of basic income, instead of pushing for radical transformation, may gradually redirect resources away from the unconditional and universal scheme towards the means-tested and categorical layers.

Second, instead of merely diverting resources from one layer to another, political opponents could proactively introduce a new layer of support programmes, which would be hard to resist politically. For instance, White (2003) has proposed a two-tier hybrid model comprising of a generous but conditional "development grant", directed towards supporting socially useful activities such as education or a business start-up, combined with an unconditional but time-limited (and much less generous) basic income. Another hybrid version could pay out a lifetime basic income account on a regular basis with some conditions attached, while retaining a smaller part as a time-limited but unconditional grant to be withdrawn by the recipient at will. Although White (2003) regards these two tiers as largely complementary, in a fiscally constrained policy environment both tiers are equally likely to end up competing over the budget. Over time, this competition would again hollow out the support and resilience of the basic income policy while bypassing any political veto points. In short, because basic income in almost all proposals features as part of an income support package, layering represents a serious long-term stability challenge.

Basic income and robustness: conversion

Both replacement and layering directly affect the political resilience of a policy. Two further processes instead affect policy delivery (or robustness) leaving the policy framework essentially intact.

Conversion is a mechanism whereby existing policy is redirected towards new goals or purposes, or to fit the interests of new actors, by exploiting the gap between those who design policy and those who are in charge of enacting it on the ground (Streeck and Thelen 2005). Policies vary extensively in how much operational discretion they grant street-level bureaucrats, but some level of bureaucratic discretion is unavoidable (Lipsky 1980; Riccuci et al. 2004). If street-level bureaucrats are given the power to interpret regulations in a strict or lax manner, to decide on enforcement or sanctioning, and even to shift budgetary or organisational

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

resources between policy goals, the resulting policy outcome may look very different from what the legislator intended.

The basic income debate has failed to appreciate the importance of conversion, largely because administration has become a blind spot due to the assumption that instituting a basic income requires little or no administration. Although basic income implementation is far less cumbersome than the myriad of complex welfare schemes currently in place, recent research has, nevertheless, shown turning a blind eye to persistent administrative challenges is cause for concern (De Wispelaere and Stirton 2011, 2012, 2013). Not only does enacting basic income raise its own distinctive implementation problems, competing administrative solutions to resolving these problems are distinctively political by favouring different sets of winners and losers. For instance, whereas basic income is nominally universal – as all citizens are formally entitled to receive the basic income grant – ensuring that all also effectively receive the basic income they are entitled to requires considerable administrative effort, including maintaining a comprehensive, population-wide "cadaster" and instituting robust payment channels that reach all those eligible. Or, consider the administrative process for detecting and rectifying implementation errors, where the choice between "fire alarm" or "police patrol" types of oversight (Lupia and McCubbins 1994) implies shifting monitoring costs from administrators onto recipients. When implementing basic income, bureaucrats have a range of choices to consider that entail weighing different policy goals within the existing rules, potentially converting the resulting policy outcomes from what was originally intended. Over time, the culmination of relatively discrete implementation choices may seriously affect the robustness of the basic income policy as originally envisioned.

Basic income and robustness: policy drift

Policy drift is a mechanism whereby legislators deliberately fail to update a particular policy in line with changing circumstances, resulting in an inability over time to fulfil its initial goals or to cover new risks (Hacker 2004, 2005).[7] Drift is different from the three processes discussed before in that it relies on *purposeful inaction*, or what Hacker refers to as "non-decisions". Policies are dynamic and always require small adaptations to accommodate changing policy environments. Policy drift arises when an extant policy framework no longer matches up with the external environment, and fails to respond appropriately to the social risks it is meant to

[7] Although policy drift can occur "naturally" through a failure to appreciate relevant background circumstances, Hacker (2004, 2005) insists the failure to respond appropriately is more often a political decision.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

alleviate. The main advantage of drift as a mechanism of policy change is that, instead of having to overcome veto points, it either bypasses them altogether or deploys them to forestall policy amendment. Although superficially it looks like policy is left unchanged, in practice policy effectiveness and robustness have been compromised.

Thinking through the design of a basic income policy suggests the scheme is highly vulnerable to policy drift. The two overarching parameters that determine basic income's outcome are, on the one hand, the level of the grant and, on the other, the extent of coverage. Regarding coverage, as was already discussed in the previous section, universal implementation may require devoting considerable bureaucratic resources to ensuring those entitled effectively receive their grant. Drift in this respect may simply entail political opponents blocking the necessary expansion of administrative resources to secure universal coverage, without in any way altering basic income's nominally universal reach. Drift will play an equally important role in adapting the level of the grant to match evolving social circumstances. For starters, basic income needs to accommodate inflation. Unless an automatic indexing mechanism is included in its initial design (Weaver 1988), the updating of the budget will be easily blocked. In addition, the level of basic income may also require updating to compensate for changes elsewhere in the welfare state safety net: picking up the "slack" when other programmes are failing in terms of coverage or effectiveness, for instance. Resistance to updating the budget may not only run counter to the policy rationale underlying the basic income proposal, but furthermore negatively impact on its robustness.

Brazil provides a telling case of how failure to update from the very start renders basic income legislation void. Under the tireless impetus of São Paulo Senator Eduardo Suplicy Matarazzo, President Lula da Silva enacted Law 10.835 in January 2004. The *Lei de Renda Básica de Cidadania* grants each Brazilian citizen or foreigner with more than five years of residency a Citizen's Income sufficient to meet the minimum expenses of food, education and health regardless of socioeconomic condition.[8] Brazil's Citizen's Income immediately became marred, however, by a provision stipulating that implementing Law 10.835 is subject to a budgetary constraint, which is the prerogative of the federal executive branch (Lavinas 2013, 30). This effectively rendered the legislation hostage to successive governments' refusal to provide the necessary budgetary resources, relegating Brazil's basic income to little more than scrap paper (Lavinas 2013). Brazil's experience can be understood as an extreme case of policy drift, where the

[8] http://www.planalto.gov.br/ccivil_03/_ato2004-2006/2004/Lei/L10.835.htm.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

failure to follow-up on the next stage of policy development prevents a policy from leaving the starting blocks.

Why a constitutional right to basic income?

The processes of replacement, layering, conversion and drift described above all threaten the political stability of basic income over time. Political and institutional conditions constrain which of these processes will be readily available to basic income's political opponents (Hacker 2004, 2005; Streeck and Thelen 2005; Mahoney and Thelen 2010), but generally speaking political stability remains a serious concern. In this section, we briefly review several reasons a basic income coalition would want to consider employing constitutional mechanisms to secure policy stability. Note that these reasons apply to the constituent members of the enacting coalition, independent of the particular reasons why each faction favours a basic income.[9]

When policy consumers – voters as well as organised interest groups – value a policy objective, "they often care not just about winning a near-term gain but about creating an enduring stream of policy benefits" (Jacobs 2010, 99). This general policy precept arguably applies even more to a policy such as basic income, precisely because long-term security either is a stated goal (Standing 1999) or else constitutes a precondition for obtaining other goals, such as promoting autonomy, work-life balance or gender equality (Widerquist et al. 2013). In short, each cohort of basic income proponents has a strong reason to ensure they receive a basic income grant for the *duration of their lifetime*. Moreover, as generational cohorts overlap, this argument in principle extends the expected shelf life of a basic income scheme into perpetuity. In addition, many advocates argue for basic income as a matter of justice, which adds a reason to extend the policy across generations. Van Parijs, for instance, argues that our policy ought to be consistent with "everyone in the present generation getting the highest sustainable basic income, and [it] must benefit everyone in the next generation in the form of a basic income that is at least equal to the present one" (Van Parijs 1995, 40). Put together, these two arguments offer strong reasons to ensure basic income policy is not short-lived.

But why address the stability problem through the mechanism of constitutional protection? Why take the extra step of constitutionalising a

[9] The level of generality implied here bears some similarities to Buchanan's (1997) views on "generality as a constitutional constraint". Buchanan (1997, 171) maintains that a basic income (demogrant) constitutes a legitimate reconciliation between welfare transfers and the generality norm.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

right to basic income when we could institutionalise it "embedded in legislation and enforceable in ordinary public law before the courts and tribunals" (King 2012, 19)? One reason is that constitutional protection seems singularly apt to counter each of the four threats to political stability listed above. First, a constitutional right to basic income would constitute a strong veto point blocking any attempt at outright *replacing or abolishing* basic income legislation, requiring a supermajority to overrule its enactment – at least in jurisdictions comprising a so-called rigid constitutional model (Ferreres 2000). Second, constitutional intervention would also counter *layering*: whereas courts may allow the legislation of additional policy layers, they can disrupt the subsequent shifting of resources from basic income to its competitors. Third, constitutional protection would also protect basic income against *conversion*, for example, by safeguarding against implementation practices falling below the level of universality guaranteed by the imputed right to basic income. Fourth, a constitutional right to basic income finally offers petitioners the means to challenge failures to updating policy in accordance with constitutional rights provisions, countering *drift*. The apparent ability of a single institution to robustly protect basic income against a range of processes that impede its stability counts in its favour.

A second reason for embracing the constitutional route is that an enacting coalition that strongly values basic income – whether on prudential or justice grounds – presumably by default also favours its *maximal* protection. Western liberal democracies have a long tradition of insulating its most cherished rights and freedoms (e.g. freedom of speech, freedom of movement, right to education) from the decisions of legislatures or the executive. The presumption is that courts are uniquely placed amongst the institutions of government to balance individual rights against the political pressures of the collective.

Constitutional protection comes in many forms and degrees. In some jurisdictions constitutional rights are not subject to judicial review at all.[10] Other jurisdictions incorporate their constitutional rights in a process of judicial review, distinguishing between *weak* and *strong* models (Sinnott-Armstrong 2003; Tushnet 2004; Dixon 2007). Canada is an oft-discussed example of the former. The Canadian "notwithstanding clause" gives government the legal power to overrule the Canadian Charter of Rights by legislating "notwithstanding" the constitutional court's negative opinion (Kahana 2002). Although weaker forms of

[10] The Spanish Constitution, for instance, recognises the right to health and the enjoyment of adequate and decent housing, but these rights are nevertheless excluded from the protection of the Constitutional Court (Spanish Constitution Art. 39–52).

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

judicial review impose constraints on the legislator or the executive, critics often insist on a more robust approach. In such a scenario, an enacting coalition could enshrine a right to a basic income in a Bill of Rights, and subsequently have it protected by a constitutional tribunal or a Supreme Court that has the power to overrule legislative decisions, *with immediate and final effect* (Kramer 2001, 6). This strong judicial review model gives courts the power to hold government accountable but equally provides individual petitioners with a remedy in case the state breaches its constitutional mandate. In the remainder of this article, we focus on the strong model of constitutional protection and examine several problems that arise when thinking through the idea of a constitutional right to a basic income. The next section addresses the problem of how to specify the precise constitutional provision to be inserted into a Bill of Rights.

Constitutionalising basic income: type or token?

Three decades ago, the legal scholar John Hart Ely pointed out that "constitutional provisions exist on a spectrum ranging from the relatively specific to the extremely open-textured" (Ely 1980, 13). This observation applies directly to our case, for we can discern two distinct ways of conceiving of a constitutional right to basic income. On the one hand, we can think of basic income as a general framework consisting of a set of core principles – that is, *universality*, *individuality* and *unconditionality*. On the other hand, we can also describe basic income as a *family* of specific models, each of which comprises a detailed policy programme that fills out the "blanks" left open in the general framework approach (De Wispelaere and Stirton 2004). Where the former approach views basic income as a policy *type*, the latter regards it as a set of *tokens* instantiated within a given type. The key question is whether to constitutionally protect "type" or "token"?

Following Kelsen (1928), constitutional theorists appreciate the virtue of clear and accurately written constitutional provisions. Kelsen's approach speaks in favour of inserting a basic income "token" into the constitution, with as many details as possible specified in precise clauses. An example of this approach is Provision 123 of the Mexican Constitution, which regulates the right to work in two long paragraphs totalling 3,726 words. The Mexican Constitution exhibits an extraordinary level of detail and is regarded as a historical exception rather than the norm in constitution building around the world. We can appreciate why an enacting coalition would want to consider this approach: specifying a basic income "token" in

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

considerable detail reduces the need for constitutional interpretation by government officials and the courts ("judicial discretion").[11]

Nevertheless, the Kelsenian approach has at least two disadvantages. First, a degree of indeterminacy appears a necessary condition for reaching political agreement over the adoption of constitutional provisions (Lipkin 1992; Kutz 1993; Waldron 1994). Detailed provisions exacerbate deep and persistent political disagreements, making it practically impossible to reach sufficient agreement amongst all the relevant factions to enshrine basic income in a Bill of Rights. This point applies even where there is a strong enacting coalition on the *general* idea of a basic income policy. By contrast, general constitutional provisions that leave the details to be decided at a later time operate under a "veil of vagueness" that focusses political attention on what is shared amongst the different factions (Gibson and Goodin 1995). Second, one of the characteristics of a constitution is that it aims for stability over time, typically well beyond the generation that passed the document. Embracing generality and abstraction allows a constitution to evolve over time, partially immunising it against becoming prematurely outdated and irrelevant (Ferreres 2000). The possibility of reaching political agreement and the ability to maintain its relevance over time constitute important political and jurisprudential reasons to resist Kelsen's approach; these reasons firmly recommend drafting the relevant constitutional provision along the lines of a general basic income "type" (Horowitz 2002). This is precisely the proposal of the Swiss Initiative, mentioned in the introduction, aimed at amending the constitution with a new Art. 110(a) that grants a constitutional right to an unconditional basic income but leaving legislation to determine the funding and level of the grant.[12]

However, the upside of an approach that eschews detailed provisions in the here-and-now in favour of a general outline carries with it the downside of *inevitably having to figure out those details at a later stage in the enactment process*. Gutmann and Thompson (1996, 35) write that "abstraction purchases agreement on principles at the price of disagreement about their interpretation". In contrast to constitutional scholars who emphasise legal origins and the role of the text (Ben-Bassat and Dahan 2008), we take the view that *constitutional interpretation* is a central feature of the capacity of judicial review to protect constitutional rights.

Applied to our case, the problem is that any basic income "type" admits not just one but numerous "tokens", many of whom imply a genuine trade-off along several dimensions. It would be an exemplary feat of wishful

[11] For a review of a wide range of difficulties in the context of environmental law, similar to the ones we outline, see Brandl and Bungert (1992).

[12] http://www.admin.ch/ch/f/pore/vi/vis423t.html.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

thinking to assume that one can merely derive all the relevant properties of the basic income "token" from the core stipulations of the "type". Instead, such derivation is a classic case of political choice, with different groups of beneficiaries competing for the largest share of the basic income cake (De Wispelaere and Stirton 2013).

To illustrate, political factions will compete over the level of the grant, which represents the relative share of social product spent on basic income as opposed to other social goods. Relatedly, political factions may hold different views on matters such as funding sources (income tax, consumption tax, environmental taxes and so on) or the rate of substitution between basic income and other support programmes. Political factions may disagree on whether the basic income grant is uniform or instead should display variation based on lifestyle or geographical location. Depending on the relative importance they accord to supporting the disadvantaged over social efficiency, political factions dispute how to implement basic income, including the resources spent on its administration. Political factions may oppose each other on how strict we ought to interpret the core properties of the scheme. Can we accept a grant being allocated to a household unit for ease of administration, or does this constitute an infringement of the individuality requirement? Should we regard a weakly conditional policy like participation income (Atkinson 2006) as falling within the boundaries of the constitutional right to basic income?

Constitutionalising basic income effectively relegates the interpretation of these and many related questions to the judiciary. Judicial review may intersect at two points: judges will respond to constitutional challenges of existing legislation but also, more controversially, may be able to affect legislative omission (Brewer-Carías 2014). In either scenario, the question now becomes: can judges be trusted to arrive at the "correct" decision when examining constitutional challenges?

Judicial interpretation and its pitfalls

For judicial review to robustly protect the political stability of basic income against replacement, layering, conversion or drift requires that judges systematically interpret a constitutional basic income "type" in a way that approximates the particular basic income "token" the enacting coalition favours. A failure to interpret the constitutional provisions of the right to basic income in the proper manner effectively means that the resilience or robustness of the basic income scheme is under threat. In this section, we outline reasons that caution against relying on judges for safeguarding the resilience and robustness of basic income.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

The problem of judicial competence

Contemporary jurisprudence acknowledges important limitations on judges' abilities to arbitrate between conflicting views in contexts with a high degree of complexity and requiring specific expertise knowledge (Horowitz 1977; Cross 2000; Morales 2015). Many social and economic rights fit this description, and so would the constitutional right to a basic income. There are reasons to think judicial reasoning is particularly ill-suited to remedy the sort of implementation failures that are likely to mar the robust enactment of a basic income scheme.

For starters, we may deem it constitutionally inappropriate for the courts to decide whether a particular policy requirement violates the criterion of unconditionality, for example, or whether a certain restriction still satisfies universality. Such questions seem to fall into the category of "non-justiciable" matters, a label typically reserved for issues requiring the assignment of resources or priority setting and therefore not considered apt for judicial resolution (Cross 2000; Christiansen 2006). Judicial intervention on resource allocation involves control of the state budget, which arguably falls under the exclusive remit of the legislative and executive branches of government, and critics object that "there are no legal standards which make them capable of resolution by a court" (Gearty 2011, 58). In the absence of clear *legal* standards, courts would just be conducting *politics* by other means – but without being beholden to the appropriate political checks and balances (Horowitz 1977).

Furthermore, the judicial process requires judges to assess governmental policies on the basis of individual cases that are not necessarily connected to one another and to reflect on policy in a fragmented manner. The opposite problem exists as well. Judicial decisions may have consequences for citizens who are situated outside of – and thus not represented by – the judicial process. This is what Fuller (1978) calls the problem of "polycentricity", according to which the adversarial model that characterises much of the judicial process is incapable of resolving general matters (also King 2008). Courts simply may not be the most suitable venue for assessing the kind of complex empirical data and expert evidence that underlies evidence-based social policy. In short, judges that are competent at resolving legal disputes between specific parties nevertheless may not be apt at deciding policy (Fuller 1978; Sossin 1999). Disputes about the scope or content of a constitutional right to basic income would inevitably fall in this category.

Courts are themselves exceedingly aware of these limitations and the controversial tasks they are asked to carry out (Manfredi and Maioni 2002; Dorf 2010). In response, judges have become reluctant to intervene in disputes that go beyond mere arbitration and involve resource allocation,

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

customarily exercising *judicial restraint* or *deference* to the other government branches (King 2012). The opposite action, where judges find in favour of the claimant and order the state to provide resources or otherwise impose a financial burden on the state, is regularly denounced as "judicial activism" or "dictatorship of the judiciary" (Quirk and Bridwell 1995; Kmiec 2004). With pervasive pressure on courts to not intervene in social and economic issues, it is unsurprising to find that judges are reluctant to provide remedies for individual recipients in such cases.

This has been the stance courts have customarily adopted with respect to social welfare legislation (Griffith 1997; King 2008). For instance, in *R v Hillingdon LBC, ex p Puhlhofer, [1986] 1 A.C. 485 (HL)*, the judges refused "to quash the decision of a local authority finding that a small room without facilities at a guest house constituted 'accommodation' for a family of four within the meaning of the Housing (Homeless Persons) Act 1977" (King 2008, 117). Similarly, in *R v Inner London Education Authority, ex p Ali (1990) 2 Admin L.R. 822 (QB)*, the court decided that the council's duty to ensure the availability of sufficient schools constituted a "target duty" not enforceable by individuals (King 2008, 117).

> Where the existence or non-existence of a fact is left to the judgment and discretion of a public body and that fact involves a broad spectrum ranging from the obvious to the debatable to the just conceivable, it is the duty of the court to leave the decision of that fact to the public body to whom Parliament has entrusted the decision making power save in a case where it is obvious that the public body [is] acting perversely (Lord Brightman, *R. v Hillingdon LBC Ex p. Puhlhofer, [1986] 1 A.C. 485*, at 518, cited in King 2008, 117).

This strong judicial attitude of deference to legislative and bureaucratic institutions and processes is not restricted to common law jurisdictions, but is equally prevalent in civil law systems.

Our point is not to challenge the competence of courts to decide on complex social and economic matters (Morales 2015). Instead, *judges themselves have adopted the view that deference to the legislature or the executive is the appropriate default position when faced with polycentric social and economic rights challenges*. This trend towards judicial restraint directly affects the institution of a constitutional right to basic income, as a basic income coalition cannot assume that the mere inclusion of basic income in a constitutional provision guarantees its robust protection. For if courts systematically refer decisions back to the political institutions – as they are wont to do in this particular policy field – the judicial process may do little to protect basic income's political stability.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

The problem of judicial legitimacy

Judicial deference constitutes a problem for the political stability of basic income, but so, paradoxically, does an active judiciary. One of the most important objections addressed to constitutional rights is the "counter-majoritarian difficulty" (Bickel 1962; Graber 1993; Calabresi 1998; Kramer 2001). This objection suggests that strong judicial review lacks the required legitimacy to invalidate, *with immediate and final effect*, decisions adopted by a democratically elected legislature. Critics assert that allowing judges the final say over laws and administrative acts is tantamount to the polity being held hostage by decisionmakers who are neither representative of the will of, nor politically accountable to, the people (Waldron 1999, 2006). "What reason do we have for giving a court, which also disagrees on the issue and must decide by a vote, the power to overturn the decision of the legislature in this case?" (Bellamy 2007, 46). This objection is thought to be particularly pertinent when what is at issue are budgetary, resource-allocation or priority-setting challenges, commonly with a large distributive impact over which political contention persists.

Consider a case pertaining to the social right to housing in Canada. Although the Canadian Charter of Rights and Freedoms does not cover the right to housing, it guarantees all citizens life, liberty and security of the person under Section 7. Defenders of social rights have argued that S.7 of the Charter includes the social right to adequate shelter (Jackman 1988; Porter 2003). However, although they all agree on the protection of this right in general, disagreement about the interpretation of its scope and content persists. In October 2005, the City of Victoria went to court to obtain an injunction against a number of homeless people who set up a tent city in Victoria's Cridge Park. Responding in court, Natalie Adams and several other homeless petitioners argued that the Parks Regulation Bylaw and the Streets and Traffic Bylaw, prohibiting homeless people from erecting any form of temporary overhead protection (tents, tarps, even cardboard boxes), violated their Charter rights. In *Adams*, the Court confirmed that homeless people have the right to erect shelter to protect themselves from the elements when sleeping outside.[13] Many celebrated *Adams* for its recognition that S.7 imposes constitutional limits on government's powers to stop people from trying to shelter themselves (a negative right to shelter). However, the judicial decision does not recognise the provision of adequate housing as a positive fundamental right, leading critics to argue in this case that the Court failed to uphold the "proper" content of S.7 of the Charter (Brodsky 2010, 143).

[13] *Victoria (City)* versus *Adams*, 2009 BCCA 563, 9 September 2008 BCSC 1363.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

Contention is inherent in the determination of the scope and content of social and economic rights, and persists even after courts have decided on the matter. This point is relevant to the constitutional right to basic income, for judicial decisionmaking may bring with it two difficulties given that, as outlined above, the basic income "type" is compatible with multiple basic income "tokens". Most obviously, narrowly conceived, the active intervention of courts may fail to robustly protect the stability of basic income if the constitutional judgement does not (entirely) match up with the intention of the enacting coalition. This leaves an important window of opportunity for political opponents to amend the extant basic income model. Although judges would presumably intervene in cases of outright replacement or abolishment, it is far less certain whether their ruling would adequately counter the hidden, gradual change associated with layering, conversion or drift. In this sense, even when avoiding judicial deference, the nature of the judicial process and judicial decisionmaking means that supporters of basic income cannot trust judges to deliver *their* particular outcome.

An active judiciary also presents a more general problem, which gets at the core of the democratic objection against judicial review. As the case of *Adams* above illustrates, constitutional provisions are compatible with multiple legitimate interpretations of the precise scope and content of a social right. Judges may end up agreeing with one faction within the basic income coalition, whereas at the same time opposing the views of the faction that prefers a different basic income "token". Moreover, when the opposing faction constitutes the majority, we effectively have a case of an unelected, appointed judge overruling a democratically elected legislative body (Bellamy 2007). Reliance on the courts in those circumstances may be too high a price to pay for basic income.

Caught in a constitutional trap?

Bringing together the two difficulties outlined in the section above suggests that basic income advocates relying on the judicial process to ensure the resilience and robustness of the scheme may be caught up in a dilemma of sorts. On the one hand, taking into account the complexities of a right to basic income, judges are likely to resort to judicial deference, refusing to rule over a constitutional challenge on the grounds of competence and therefore throwing the final say in the matter back onto the legislature or executive. This effectively leaves the road wide open for political change, be it of a radical or gradual nature. If the purpose of constitutionalising basic income is to insulate policy from political pressure, judicial deference does little or nothing by way of robust protection. In this scenario, enshrining basic income in a Bill of Rights only affects subsequent political attempts at

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

altering the scheme when politicians have "internalised" the constitutional constraint.

On the other hand, an active judiciary "taking it upon themselves to flesh out the content of a generalized […] right and then imposing it on executive agencies" (Gearty 2011, 56) would still not sufficiently guarantee the resilience or robustness of a particular basic income model. Judges may interpret the appropriate scope and content of a constitutional right to basic income in a way that remains at odds with what the enacting coalition had in mind. Recall that what is enshrined in a Bill of Rights is a constitutional "type" compatible with several legitimate "tokens". This opens the road for judicial discretion, which may or may not align with the political intent of either the enacting coalition or, indeed, subsequent political majority views. Although courts always have an important role to play "in making sure that the legal rights for which the state has legislated are properly implemented", the difficulties with the second horn of the dilemma emerge when "judicialisation" hands over "ultimate decision-making authority to the courts" (Gearty 2011, 55). In the second scenario, political stability is again not robustly protected, even when a right to basic income is enshrined in a Bill of Rights and protected through strong judicial review.

Conclusion

An enacting coalition intent on implementing a basic income scheme will have to negotiate many difficulties, chief amongst them the challenge of securing the political stability of basic income post-enactment. As we demonstrate in this article, upon reflection basic income may turn out to be quite vulnerable to several political processes that could erode the policy over time. Despite its universal ambitions, basic income may be unable to secure continued allegiances amongst different interest groups, and consequently fail to produce the positive feedback effects that would allow it to counter attempts at abolishing or replacing the scheme. The presence of negative feedback effects – notably related to persistent cultural categories of deservingness – may further weaken the political stability of basic income. Combined, the absence of positive feedback and the presence of negative feedback effects may result in basic income rapidly being taken off the books, turning it into a short-lived social experiment.

Basic income schemes are also vulnerable to a range of subterranean or hidden political processes of gradual transformation. The interaction between basic income and residual layers of traditional welfare programmes implies continuous competition over tight budgets and scarce organisational resources. At the level of implementation, basic income faces a number of challenges whose resolution opens a window of opportunity

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

for opposing factions to pursue their goals, gradually converting the existing scheme from the ground up into something that only formally resembles what the enacting coalition set out to achieve. Finally, we have suggested basic income is also highly susceptible to policy drift: its simple design partially obscures the need to continuously update the programme in response to changing social circumstances – primarily the level of the grant.

Against this background, it would appear an enacting coalition would do well to anticipate these stability problems, and carefully consider how to ensure that, over time, basic income remains robust and resilient. In this article, we set out to examine one possible route: the constitutionalisation of basic income in a Bill of Rights protected by strong judicial review. Although there are a number of reasons to think constitutional protection offers a particularly interesting avenue for securing the stability of basic income, reflecting carefully on the judicial process and judicial decision-making in constitutional tribunals casts serious doubt on this option. Specifically, the ability of a constitutional right to basic income to guarantee its stability over time would depend crucially on how the constitutional court interprets the relevant provisions. Insights from constitutional law as well as real-world social rights cases suggest basic income could easily become trapped in a dilemma that leaves judges either opting for judicial restraint or taking decisions that may well run counter to what the enacting coalition had in mind. In short, constitutional protection fails to offer robust protection against political challenges to the resilience or robustness of a basic income scheme.

Where does this leave the basic income project? The first step is for basic income advocates to acknowledge the problem of political stability. The second step is to realise that constitutional protection is merely one of several ways to protect social rights over time. Basic income advocates should carefully examine political and institutional options to address the stability problem that do not rely (solely) on judicial review. Several avenues for future research present themselves. A first option might be to search for institutional mechanisms to entrench key features of basic income policy. One example would be to secure an earmarked funding source as in the case of the Alaska Permanent Fund (Widerquist and Howard 2012), which many argue would make it harder for politicians to tap into for other purposes.[14] Other avenues include examining in more

[14] The recent budget crisis in Alaska has put considerable pressure on the Alaska Permanent Fund, leading Senator Bill Wielechowski (D-Anchorage) to propose a constitutional amendment to protect the Fund from political interference. http://www.washingtontimes.com/news/2015/jan/9/first-wave-of-prefiled-legislation-introduced/.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

detail how receipt of a sizeable basic income grant might come to harness some Pierson-like feedback effects, building a strong constituency over time. Framing the basic income grant as an *entitlement* (similar to social security in the United States or the child benefit in Europe), as opposed to social assistance targeted to the poor, will no doubt play a crucial role here (Soss 1999, 2000) – but we still do not know nearly enough about how recipients (and the general population) would regard such grants (Liebig and Mau 2005). In addition, we need to analyse what design features could be manipulated to boost stability, either by firmly embedding basic income into durable institutions or by entrenching it in a powerful constituency. Stability-proofing basic income is a key challenge for those promoting the idea—one that its advocates must turn to sooner rather than later.

Acknowledgements

Previous versions of this article were presented at the 71st Annual Midwest Political Science Association (MPSA) Conference in Chicago, the 2013 NABIG Conference in New York and the 15th BIEN Congress in Montreal. The authors are grateful to Johanna Perkiö and BIEN Finland – Suomen perustuloverkosto for hosting a discussion in Helsinki. The authors are also grateful to the audiences at all these events and to Pablo Yanes, Lindsay Stirton, Cristian Pérez Muñoz and the referees of this Journal for helpful comments.

References

Atkinson A. B. (1996) The Case for a Participation Income. *The Political Quarterly* 67(1): 67–70.

Atkinson A. B. (1998) *Poverty in Europe*. Oxford: Blackwell.

Baldwin P. (1990) *The Politics of Social Solidarity*. Cambridge: Cambridge University Press.

Ben-Bassat A. and Dahan M. (2008) Social Rights in the Constitution and in Practice. *Journal of Comparative Economics* 36(1): 103–119.

Béland D. (2010) Reconsidering Policy Feedback: How Policies Affect Politics. *Administration & Society* 42(5): 568–590.

Bellamy R. (2007) *Political Constitutionalism*. Cambridge: Cambridge University Press.

Bickel A. (1962) *The Least Dangerous Branch: The Supreme Court at the Bar of Politics*. New Haven, CT: Yale University Press.

Birnbaum S. (2012) *Basic Income Reconsidered: Social Justice, Liberalism, and the Demands of Equality*. New York, NY: Palgrave Macmillan.

Brandl E. and Bungert H. (1992) Constitutional Entrenchment of Environmental Protection: A Comparative Analysis of Experiences Abroad. *Harvard Environmental Law Review* 16: 1–100.

Brewer-Carías A. (2014) *Constitutional Protection of Human Rights in Latin America. A Comparative Study of Amparo Proceedings*. Chicago, IL: Chicago University Press.

Brodsky G. (2010) Human Rights and Poverty: A Twenty-First Century Tribute to J.S. Woodsworth and Call for Human Rights. In Pulkingham J. (ed.), *Human Welfare Rights and Social Activism: Rethinking the Legacy of J.R. Woodsworth*. Toronto: University of Toronto Press, 136–160.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

Buchanan J. (1997) Can Democracy Promote the General Welfare? *Social Philosophy and Policy* 14(2): 165–179.
Calabresi S. (1998) Textualism and the Countermajoritarian Difficulty. *George Washington Law Review* 66(5/6): 1373–1394.
Caputo R. K. (ed.) (2012) *Basic Income Guarantee and Politics: International Experiences and Perspectives on the Viability of Income Guarantee*. New York, NY: Palgrave Macmillan.
Christiansen E. (2006–2007) Adjudicating Non-Justiciable Rights: Socio-Economic Rights and the South African Constitutional Court. *Columbia Human Rights Law Review* 38: 321–386.
Clemens E. S. and Cook J. M. (1999) Politics and Institutionalism: Explaining Durability and Change. *Annual Review of Sociology* 25: 441–466.
Cross F. (2000) The Error of Positive Rights. *UCLA Law Review* 48: 857–924.
de Beus J. (2013) The Stability of Basic Income. In Widerquist K., Noguera J. A., Vanderborght Y. and De Wispelaere J. (eds.), *Basic Income: An Anthology of Contemporary Research*. Oxford: Blackwell-Wiley, 331–338.
De Wispelaere J. and Noguera J. A. (2012) On the Political Feasibility of Universal Basic Income: An Analytical Framework. In Caputo R. K. (ed.), *Basic Income Guarantee and Politics: International Experiences and Perspectives on the Viability of Income Guarantee*. New York, NY: Palgrave Macmillan, 17–38.
De Wispelaere J. and Stirton L. (2004) The Many Faces of Universal Basic Income. *The Political Quarterly* 75(3): 266–274.
—— (2011) The Administrative Efficiency of Basic Income. *Policy and Politics* 39(1): 115–132.
—— (2012) A Disarmingly Simple Idea? Practical Bottlenecks in the Implementation of a Universal Basic Income. *International Social Security Review* 65(2): 103–121.
—— (2013) The Politics of Unconditional Basic Income: Bringing Bureaucracy Back In. *Political Studies* 61(4): 915–932.
Dixon R. (2007) Creating Dialogue About Socioeconomic Rights: Strong-Form Versus Weak-Form Judicial Review Revisited. *International Journal of Constitutional Law* 5(3): 391–418.
Dorf M. (2010) Majoritarian Difficulty and Theories of Constitutional Decision Making. *University of Pennsylvania Journal of Constitutional Law* 13(2): 283–304.
Dowding K., De Wispelaere J. and White S. (2003) Stakeholding – A New Paradigm in Social Policy. In Dowding K., De Wispelaere J. and White S. (eds.), *The Ethics of Stakeholding*. Basingstoke: Palgrave Macmillan, 1–28.
Ely J. H. (1980) *Democracy and Distrust: A Theory of Judicial Review*. Cambridge, MA: Harvard University Press.
Ferreres V. (2000) A Defense of Constitutional Rigidity. *Analisi e Diritto* 2000: 45–68.
Fuller L. (1978) The Forms and Limits of Adjudication. *Harvard Law Review* 92(2): 353–409.
Gearty C. (2011) Against Judicial Enforcement. In Gearty C. and Mantouvalou V. (eds.), *Debating Social Rights*. Oxford: Hart Publishing, 1–84.
Gibson D. and Goodin R. E. (1999) The Veil of Vagueness: A Model of Institutional Design. In Egeberg M. and Laegreid P. (eds.), *Organizing Political Institutions: Essays for Johan P. Olsen*. Oslo: Scandinavian University Press.
Goldsmith S. (2005) The Alaska Permanent Fund Dividend: An Experiment in Wealth Distribution. In Standing G. (ed.), *Promoting Income Security as a Right: Europe and North America*. London: Anthem, 553–566.
Graber M. (1993) The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary. *Studies in American Political Development* 7: 35–73.
Griffith J. A. (1997) *The Politics of the Judiciary*. 5th ed. London: Harper Collins Publisher.
Groot L. (2004) *Basic Income, Unemployment and Compensatory Justice*. Dordrecht: Kluwer Academic.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

Gutmann A. and Thompson D. (1996) *Democracy and Disagreement*. Harvard, MA: Harvard University Press.
Haagh L. (2011) Basic Income, Social Democracy, and Control Over Time. *Policy and Politics* 39(1): 43–66.
Hacker J. S. (2004) Privatizing Risk Without Privatizing the Welfare State: The Hidden Politics of Social Policy Retrenchment in the United States. *American Political Science Review* 98 (2): 243–260.
—— (2005) Policy Drift: The Hidden Politics of US Welfare State Retrenchment. In Streeck W. and Thelen K. (eds.), *Beyond Continuity: Institutional Change in Advanced Political Economies*. New York, NY: Oxford University Press, 40–82.
Hansson S. O. and Helgesson G. (2003) What is Stability? *Synthese* 136(2): 219–235.
Horowitz D. (1977) *The Courts and Social Policy*. Washington, DC: The Brookings Institution.
—— (2002) Constitutional Design: Proposals Versus Processes. In Reynolds A. (ed.), *The Architecture of Democracy: Constitutional Design, Conflict Management, and Democracy*. Oxford: Oxford University Press, 15–36.
Jackman M. (1988) The Protection of Welfare Rights Under the Charter. *Ottawa Law Review* 20(2): 257–338.
Jacobs A. M. (2010) Policymaking as Political Constraint: Institutional Development in the U.S. Social Security Program. In Mahoney J. and Thelen K. (eds.), *Explaining Institutional Change: Ambiguity, Agency and Power*. New York, NY: Cambridge University Press, 94–131.
Jacobs A. M. and Weaver R. K. (2014) When Policies Undo Themselves: Self-Undermining Feedback as a Source of Policy Change. *Governance*, doi:10.1111/gove.12101.
Kahana T. (2002) Understanding the Notwithstanding Mechanism. *The University of Toronto Law Journal* 52(2): 221–255.
Kelsen H. (1928) La garantie Juridictionnelle de la Constitution (La Justice Constitutionnelle). *Revue de Droit Publique et de la Science Politique en France et à l'étranger* 44: 221–244.
King J. (2008) The Pervasiveness of Polycentricity. *Public Law* 101–124. Spring.
—— (2012) *Judging Social Rights*. Cambridge: Cambridge University Press.
Kmiec K. (2004) The Origins and Current Meanings of "Judicial Activism". *California Law Review* 92(5): 1441–1477.
Korpi W. and Palme J. (1998) The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries. *American Sociological Review* 63(5): 661–687.
Kramer L. (2001) The Supreme Court 2000 Term Foreword: We the Court. *Harvard Law Review* 115(1): 5–169.
Kutz C. (1993) Just Disagreement: Indeterminacy and Rationality in the Rule of Law. *Yale Law Journal* 103: 997–1030.
Lavinas L. (2013) Brazil: The Lost Road to Citizen's Income. In LoVuolo R. M. (ed.), *Citizen's Income and Welfare Regimes in Latin America: From Cash Transfers to Rights*. New York, NY: Palgrave Macmillan, 29–50.
Liebig S. and Mau S. (2005) A Legitimate Guaranteed Minimum Income. In Standing G. (ed.), *Promoting Income Security as a Right: Europe and North America*. London: Anthem, 209–230.
Lipkin R. (1992) Indeterminacy, Justification and Truth in Constitutional Theory. *Fordham Law Review* 60(4): 595–643.
Lipsky M. (1980) *Street-Level Bureaucracy*. New York, NY: Russell Sage.
Lupia A. and McCubbins M. (1994) Learning from Oversights: Fire Alarms and Police Patrols Reconstructed. *Journal of Law, Economics and Organization* 10(1): 96–125.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

Mahoney J. and Thelen K. (2010) A Theory of Gradual Institutional Change. In Mahoney J. and Thelen K. (eds.), *Explaining Institutional Change: Ambiguity, Agency and Power*. New York, NY: Cambridge University Press, 1–37.

Manfredi C. and Maioni A. (2002) Courts and Health Policy: Judicial Policy Making and Publicly Funded Health Care in Canada. *Journal of Health Politics, Policy and Law* 27(2): 213–240.

McKay A. (2001) Rethinking Work and Income Maintenance Policy: Promoting Gender Equality Through a Citizens' Basic Income. *Feminist Economics* 7(1): 97–118.

Morales L. (2015) Taking Facts Seriously: Judicial Intervention in Public Health Controversies. *Public Health Ethics* 8(2): 185–195.

Offe C. (2005) Wasteful Welfare Transactions: Why Basic Income Security is Fundamental. In Standing G. (ed.), *Promoting Income Security as a Right: Europe and North America*. London: Anthem, 69–82.

—— (2008) Basic Income and the Labor Contract. *Basic Income Studies* 3(1): 1–27.

Pérez Muñoz C. (2014) The Problem of Stability and the Ethos-Based Solution. *Critical Review of International Social and Political Philosophy*, doi:10.1080/13698230.2014.949602.

Pierson P. (1993) When Effect Becomes Cause: Policy Feedback and Political Change. *World Politics* 45(4): 595–628.

—— (2004) *Politics in Time: History, Institutions and Social Analysis*. Princeton, NJ: Princeton University Press.

Porter B. (2003) The Right to Adequate Housing in Canada. In Leckie S. (ed.), *National Perspectives on Housing Rights*. The Hague: Kluwer Law International, 107–139.

Quirk W. and Bridwell R. (1995) *Judicial Dictatorship*. New Jersey: Transaction Publishers.

Rehm P., Hacker J. S. and Schlesinger M. (2012) Insecure Alliances: Risk, Inequality, and Support for the Welfare State. *American Political Science Review* 106(2): 386–406.

Riccucci N., Meyers M., Lurie I. and Han J. (2004) The Implementation of Welfare Reform Policy: The Role of Public Managers in Front Line Practices. *Public Administration Review* 64(4): 438–448.

Sinnott-Armstrong W. (2003) Weak and Strong Judicial Review. *Law and Philosophy* 22(3–4): 381–392.

Skocpol T. (1992) *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States*. Cambridge, MA: Belknap Press.

Soss J. (1999) Welfare Application Encounters: Subordination, Satisfaction, and the Puzzle of Client Evaluations. *Administration and Society* 31(1): 50–94.

—— (2000) *Unwanted Claims: The Politics of Participation in the U.S. Welfare System*. Ann Arbor, MI: University of Michigan Press.

Sossin L. (1999) *Boundaries of Judicial Review: The Law of Justiciability in Canada*. Scarborough, ON: Carswell.

Standing G. (1999) *Global Labour Flexibility: Seeking Distributive Justice*. Basingstoke: Macmillan.

—— (2002) *Beyond the New Paternalism: Basic Security as Equality*. London: Verso.

Steensland B. (2006) Cultural Categories and the American Welfare State: The Case of Guaranteed Income Policy. *American Journal of Sociology* 111(5): 1273–1326.

Streeck W. and Thelen K. (2005) Institutional Change in Advanced Political Economies. In Streeck W. and Thelen K. (eds.), *Beyond Continuity: Institutional Change in Advanced Political Economies*. New York, NY: Oxford University Press, 1–39.

Thelen K. and Steinmo S. (1992) Historical Institutionalism in Comparative Politics. In Steinmo S., Thelen K. and Longstreth F. (eds.), *Structuring Politics: Historical Institutionalism in Comparative Analysis*. Cambridge: Cambridge University Press, 1–32.

Tushnet M. (2004) Social Welfare Rights and the Forms of Judicial Review. *Texas Law Review* 82: 1895–1919.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press

van der Veen R. and Groot L. (eds.) (2000) *Basic Income on the Agenda: Policy Objectives and Political Chances*. Amsterdam: Amsterdam University Press.
van Oorschot W. (2000) Who Should Get What and Why? On Deservingness Criteria and the Conditionality of Solidarity Among the Public. *Policy and Politics* 28(1): 33–48.
Van Parijs P. (ed.) (1992) *Arguing for Basic Income: Ethical Foundations for a Radical Reform*. London and New York, NY: Verso.
Van Parijs P. (1995) *Real Freedom for All. What (if Anything) can Justify Capitalism?* Oxford: Oxford University Press.
—— (2004) Basic Income: A Simple and Powerful Idea for theTwenty-First Century. *Politics and Society* 32(1): 7–39.
Waldron J. (1994) Vagueness in Law and Language: Some Philosophical Issues. *California Law Review* 82(3): 509–540.
—— (1999) *Law and Disagreement*. Oxford: Oxford University Press.
—— (2006) The Core of the Case Against Judicial Review. *The Yale Law Journal* 115(6): 1346–1406.
Weaver K. (1988) *Automatic Government: The Politics of Indexation*. Washington, DC: Brookings Institution Press.
—— (2010) Paths and Forks or Chutes and Ladders? Negative Feedbacks and Policy Regime Change. *Journal of Public Policy* 30(2): 137–162.
White S. (2003) Freedom, Reciprocity, and the Citizen's Stake. In Dowding K., De Wispelaere J. and White S. (eds.), *The Ethics of Stakeholding*. Basingstoke: Palgrave Macmillan, 79–93.
Widerquist K. and Howard M. (eds.) (2012) *Alaska's Permanent Fund Dividend: Examining Its Suitability as a Model*. New York, NY: Palgrave Macmillan.
Widerquist K., Lewis M. A. and Pressman S. (eds.) (2005) *The Ethics and Economics of the Basic Income Guarantee*. Aldershot: Ashgate.
Widerquist K., Noguera J. A., Vanderborght Y. and De Wispelaere J. (eds.) (2013) *Basic Income: An Anthology of Contemporary Research*. Oxford: Blackwell-Wiley.
Wright E. O. (2004) Basic Income, Stakeholder Grants, and Class Analysis. *Politics and Society* 32(1): 79–87.
—— (2006) Basic Income as a Socialist Project. *Basic Income Studies* 1(1): 1–11.

https://doi.org/10.1017/S0143814X15000264 Published online by Cambridge University Press