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William E. Forbath

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NOT SO SIMPLE JUSTICE: FRANK MICHELMAN ON SOCIAL RIGHTS, 1969 – PRESENT

William E. Forbath*

INTRODUCTION

A. *The Constitution in the Year 2020*

Periods of no power, Charles Black once wrote, are periods for “reformation of thought,”¹ for thinking anew and “thinking large” about visions, goals, and strategies. In constitutional law, as elsewhere, liberals and progressives are out of power. We are on the defensive and are pressed to think small: criticizing countless decisions; defending doctrines and precepts under attack; advancing modest proposals, each apparently a tub on its own bottom, guided by no larger constitutional vision. We cannot afford to overlook the need to think large, about the constitutional bases on which we—or our students—will build anew, when the opportunity comes.

We must take a leaf from our adversaries. In the late 1970s and early 1980s, when their ideas were wildly out of tune with judicial doctrine and mainstream political and academic opinion, right-wing constitutional thinkers set about crafting an alternate account of our constitutional past, an alternate vision of our future, and a cogent set of ideas about the way constitutional law should unfold in every key area of their concerns. In the late 1980s, right-wing constitutional lawyers in the Reagan Justice Department produced a remarkable 185-page document entitled *The Constitution in the Year 2000*,² and the rest, as they say, is history.³

And while history does not repeat itself, it rhymes. So, we need to begin writing *The Constitution in the Year 2020*. One important chapter in that book will address the problems of poverty and economic inequality. Today’s Supreme

* Lloyd M. Bentsen Chair in Law, Professor of History, University of Texas at Austin. Portions of this article draw substantially from William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 *Fordham L. Rev.* 1821 (2001).

1. Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 *Colum. L. Rev.* 1103, 1115 (1986).

2. Off. Leg. Policy, *Report to the Attorney General: The Constitution in the Year 2000: Choices Ahead in Constitutional Interpretation* (U.S. Dept. of J., 1988) (available at <<http://www.americanconstitutionsociety.org/pdf/year2000.pdf>>).

3. See Dawn E. Johnsen, *Ronald Reagan and the Rehnquist Court on Congressional Power: Presidential Influences on Constitutional Change*, 78 *Ind. L.J.* 363 (2003) (discussing the history and impact of the report).

Court tells us that the Constitution affords no protection against desperate want, nor does it confer on Americans any other “affirmative rights” to such basic goods as minimally adequate education or a realistic opportunity to make a livelihood.⁴ These “social rights” are features of most of the world’s constitutions,⁵ and many prominent constitutional courts have been elaborating and (some boldly, some gingerly) enforcing them, some with explicit textual bases, some without.⁶ Today’s conservatives would have us think that social rights and the solicitude for them among the world’s great courts are foreign to American constitutional experience. That is wrong.⁷ What is true, though, is that the current Court’s hostility partly reflects the broader disillusionment with the New Deal and the welfare state, as these are understood in the U.S. polity today. A key aspect of the liberal/progressive project today lies in reinvigorating the old convictions that all Americans are entitled to a modest share in the nation’s wealth, to protection against desperate want, and to the opportunity to make a decent livelihood.

4. See *DeShaney v. Winnebago County Dept. of Soc. Servs.*, 489 U.S. 189, 196 (1989).

5. See Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 S. Ct. Rev. 311, 318-21; Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. Chi. L. Rev. 519, 523-24 (1992) (noting the anomalous nature of the United States Constitution for its lack of affirmative welfare obligations, as compared to the constitutions of other liberal democracies); Avi Ben-Bassat & Momi Dahan, *Social Rights in the Constitution and in Practice* (Hebrew U. of Jerusalem, Sch. of Pub. Policy Working Paper No. 05-03, May 2003) (available at <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=407260>) (examining the constitutional commitment to social rights in sixty-eight countries).

6. For recent comparative accounts of judicial enforcement of constitutional social rights, see Mark Tushnet, *Strong Rights, Weak Courts*, 82 Tex. L. Rev. — (forthcoming June 2004); Mark Tushnet, *State Action, Social Welfare Rights, and the Judicial Role: Some Comparative Observations*, 3 Chi. J. Intl. L. 435 (2002); and Kim Lane Scheppele, *A Realpolitik Theory of Social Rights*, 82 Tex. L. Rev. — (forthcoming June 2004). For the reflections of an architect of the South African Constitution’s social rights provisions, now a justice of that nation’s Constitutional Court, see Justice Albie Sachs, Speech, *Enforcement of Social and Economic Rights* (London Sch. Econ., Feb. 27, 2003) (available at <http://www.lse.ac.uk/Depts/human-rights/Documents/Enforcement_Social_Economic_Rights.doc>); see also the rich collection of research papers in Community Law Center, *Realizing Socio-Economic Rights in South Africa: Progress and Challenges* <<http://www.communitylawcentre.org.za/ser/conferences.php>> (accessed Apr. 24, 2004).

7. In the 1960s and early 1970s, the Supreme Court came extremely close to recognizing such rights in a series of statutory and constitutional cases which produced remedial schemes comparable to several under construction abroad. The Supreme Court’s personnel and the nation’s political climate changed before a jurisprudence of social citizenship took root. See William E. Forbath, *Lincoln, the Declaration, and the “Grisly, Undying Corpse of States’ Rights”: History, Memory, and Imagination in the Constitution of a Southern Liberal*, — Geo. L.J. — (forthcoming 2004); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 Fordham L. Rev. 1821, 1823 (2001) [hereinafter Forbath, *Constitutional Welfare Rights*]; *infra* text accompanying notes 28-61.

On the long history of robust social rights discourse in the legislative and public political domains of constitutional argument and interpretation in America, see William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999) [hereinafter Forbath, *Caste, Class, and Equal Citizenship*] and William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L.J. 165 (2001) [hereinafter Forbath, *The New Deal Constitution*]. It was the rights discourse of New Deal and 1940s America that inspired the social rights provisions of many constitutions around the globe. See Cass R. Sunstein, *The Second Bill of Rights: The Last Great Speech of Franklin Delano Roosevelt and America’s Unfinished Pursuit of Freedom* (prelim. dft. July 26, 2003) (copy on file with *Tulsa Law Review*) (noting the influence on post-World War II constitution-making in Europe, Asia, and Africa, of Franklin Roosevelt’s “four freedoms” and “second Bill of Rights,” and of the Universal Declaration of Human Rights, which Eleanor Roosevelt and others crafted to reflect FDR’s “four freedoms” and second “Bill”). For a more sustained discussion, see Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random H. 2001).

There is substantial disagreement and uncertainty about what kinds of reforms or even what programmatic vision is best suited to carrying forward these commitments in the early twenty-first century; but they remain a defining feature of the nation we believe the Constitution promises to promote and redeem.

So, the authors of *The Constitution in the Year 2020* will have to ponder anew whether, why, and how the Constitution and (a separate question) judicially enforced constitutional law should be interpreted to safeguard these commitments. When they do so, they will find no better interlocutor than Frank Michelman. No one has thought and written more deeply about the question of constitutional social rights. Spanning almost four decades, Michelman's work offers several of the most important approaches to the problems of poverty and economic inequality in the precincts of American constitutionalism.

In this brief essay, I will engage some of Michelman's most important contributions. Partly, I'll do so from the perspective of constitutional theory, partly, from the vantage point of an historian. Only by situating our past thinking in the context of the social movements and political moments that shaped that thinking can we appreciate its distinctive insights—and blind spots. So, I will situate Michelman's classic essays on constitutional welfare rights in the context of the welfare rights movement and its distinctive possibilities and constraints. This contextual account will set the stage for a textual argument, a critical reading of Michelman's reading of Rawls's epoch-making 1971 book, *A Theory of Justice*.⁸ Michelman, I'll suggest, overlooks the extent to which Rawls is critical of welfare state liberalism in favor of a more ambitious constitutional political economy, which Rawls dubs "property-owning democracy." From Rawls, Michelman turned in the 1980s to republicanism, and a key aspect of Michelman's enormously influential contributions to the republican revival was his republican treatment of the distributive dimension of constitutional property claims. Michelman reads republicanism as he reads Rawls; both imply constitutional welfare rights. But the republican tradition is largely hostile to welfare rights; its distributive norms point to the distribution of material opportunities for self support and "independence." Welfare rights, I'll suggest, are better seen as a critique of this distributive dimension of republicanism than as an implication of it.

Happily, these historical and theoretical criticisms are part of a present conversation with Michelman about social rights.⁹ And as a round in that conversation, this essay is gratefully written, taking up not only Rawls and republicanism, but also more recent work by Michelman on social rights and constitutional democracy.

8. John Rawls, *A Theory of Justice* (Harv. U. Press 1971).

9. See Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 1825-27; Frank I. Michelman, *The Constitution, Social Rights, and Liberal Political Justification*, 1 *Intl. J. Const. L.* 13, 25-34 (2003) (available at <http://www3.oup.co.uk/ijclaw/hdb/Volume_01/Issue_01/pdf/010013.pdf>) [hereinafter Michelman, *Constitution and Social Rights*] (discussing Forbath's conception of "social citizenship" rights); Frank I. Michelman, *Democracy-Based Resistance to a Constitutional Right of Social Citizenship: A Comment on Forbath*, 69 *Fordham L. Rev.* 1893 (2001) [hereinafter Michelman, *Democracy Based-Resistance*] (responding to Forbath, *Constitutional Welfare Rights*, *supra* n. 7).

B. *Dialogues with Frank Michelman: First Citizen of the Republic of Letters*

I say gratefully written because, as Jefferson might have put it, Frank Michelman is a first citizen of the republic of letters, and there is no more generous, careful, and imaginative reader in the republic. He reads and engages with the works of fellow citizens everywhere, and every work is made deeper and clearer after Michelman's light has shined on it, exploring unmapped distinctions and uncharted implications and resonances, leaving the work richer and the author gladly indebted.

What's more, Michelman's style of engagement instantiates a dialogical ethics and helps make him an exemplar of some of the ideas his own writings explore. Compare, for just a moment, Michelman's manner of reading with that of one his most important interlocutors: Jürgen Habermas. Habermas reads, critiques, and appropriates, trimming off what doesn't fit and putting the useful parts to work in the ever-enlarging Habermasian machinery. Michelman's mode of appropriation is different, more respectful and also more provisional, more in the way of dialogue than system-building. Michelman is more inclined to put the insights of one school of thought to work in order to reveal the blindness of another. He seems most comfortable in-between.

Consider, for example, the controversies between pragmatists like Rorty and neo-Kantian liberals like Habermas.¹⁰ Inside law schools and elsewhere, it's common to find scholars who seem to think that Rorty or someone else has delivered the knock-out punch to Habermas and his kind, or vice versa. As finely and shrewdly as anyone, Michelman can turn a pragmatist critique of Habermas's categorical distinctions—ethics versus morality; the good versus the right; the principles of justice versus their application, and so on.¹¹ But in contrast to those who line up in one of the two camps, Michelman seems to feel the pull of the neo-Kantian enterprise as strongly as the counter-tug of pragmatism. And he brings them into revealing contact, into a sustained dialogue that Michelman's work enacts.

Another instance of this same dialogical in-betweenness in the work of Frank Michelman is in-between liberalism and critical legal studies (CLS), which

10. Among Rorty's most important works are Richard Rorty, *Philosophy and the Mirror of Nature* (2d prtg., Princeton U. Press 1980); Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge U. Press 1989); and Richard Rorty, *Truth and Progress* (Cambridge U. Press 1998). Habermas's important works include: Jürgen Habermas, *The Theory of Communicative Action* 2 vols. (Beacon Press 1984 & 1987); Jürgen Habermas, *The Philosophical Discourse of Modernity: Twelve Lectures* (Frederick Lawrence trans., MIT Press 1987); Jürgen Habermas, *The Structural Transformation of the Public Sphere: An Inquiry into a Category of Bourgeois Society* (Thomas Burger trans., MIT Press 1989); and Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (William Rehg trans., MIT Press 1996). For a law professor's reading of Rorty, see Joseph William Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L.J. 1 (1984); and of Habermas, see William E. Forbath, *Habermas's Constitution: A History, Guide, and Critique*, 23 L. & Soc. Inquiry 969 (1998).

11. See e.g. Frank I. Michelman, *The Problem of Constitutional Interpretive Disagreement: Can "Discourse of Application" Help?*, in *Habermas and Pragmatism* 113-39 (Mitchell Aboulafai et al. eds., Routledge 2002); Frank I. Michelman, *Family Quarrel*, 17 Cardozo L. Rev. 1163 (1996) [hereinafter Michelman, *Family Quarrel*] (Symposium on Habermas on Law and Democracy).

was a rare enough position, I believe, in the heated politics of Harvard Law School in the 1970s and 1980s. I don't know how this translated in terms of faculty politics, but intellectually, Frank was distinctive: carrying on the liberal problematic—justice, justifiability, justiciability, judicial review, and democracy—while at the same time opening the doors of that discourse to fresh blasts of CLS and feminist insight.¹² From the 1980s, however, we must hasten back to the 1960s, and follow this liberal man of the left back to his engagement with the War on Poverty.

I. WHY WELFARE?: THE WAR ON POVERTY AND THE WELFARE RIGHTS MOVEMENT

Michelman's famous 1969 Harvard Foreword, "On Protecting the Poor through the Fourteenth Amendment,"¹³ was a product of what Michelman called the "great War" in a material as well as a moral sense; we learn in its acknowledgments that the article "was prepared . . . with funds provided by The U.S. Office of Economic Opportunity."¹⁴ The Office of Economic Opportunity was the command center of the Johnson administration's War on Poverty. It created Community Action Agencies, and alongside them, it created the Legal Services Organization (LSO). In addition to law offices in the inner cities, the LSO funded a handful of law school-based back-up centers, including Harvard's, with which Michelman was associated.¹⁵ A great portion of the work of these agencies and inner-city law offices involved "getting poor people to apply for welfare and attacking the social and legal barriers to their receiving it. Centuries-old restrictions were broken down by a combination of civic unrest and federally funded organizing and litigation."¹⁶

A. Why "Welfare"?

Constitutional scholars see the origins of the constitutional welfare rights idea in the Warren Court's Fourteenth Amendment case law and the Court's new solicitude toward the nation's poor. But why was "welfare" the terrain on which 1960s community activists, federal policymakers, and legal advocates and scholars like Michelman came to wage their "War on Poverty"? The answer lies in the constraints and opportunities created by inherited statutory, institutional, and ideological frameworks—the results of the victories and defeats of earlier efforts to forge a more substantive and "social" array of citizenship rights.

12. See e.g. Frank I. Michelman, *Justification (and Justifiability) of Law in a Contradictory World*, in *NOMOS XXVIII: Justification* 71, 79-81 (J. Roland Pennock & John W. Chapman eds., N.Y.U. Press 1986); Margaret Jane Radin & Frank Michelman, *Pragmatist and Poststructuralist Critical Legal Practice*, 139 U. Pa. L. Rev. 1019 (1991).

13. Frank I. Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 Harv. L. Rev. 7 (1969).

14. *Id.* at 7 n. *.

15. See *id.*

16. Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 1842. For a more detailed account, see *id.* at 1838-66.

Put baldly, it was the defeat of key New Deal reforms in the 1930s and 1940s that deprived 1960s advocates of broader channels down which to try to nudge the Court's solicitude. FDR's famous "second Bill of Rights" set forth not welfare but decent work and universal social insurance as the economic rights essential to free and equal citizenship in the twentieth century, but Roosevelt's vaunted right to decent work met defeat at the hands of Jim Crow and the Solid South.

Measures instituting rights to full employment, decent work, and social provision for all Americans enjoyed broad support; yet they expired in the New Deal Congress, doomed by the hammer lock that southern Democratic lawmakers enjoyed by dint of numbers, seniority, and key committee chairs. Hailing from an impoverished region with a populist tradition, most southern Democrats in Congress were staunch supporters of the New Deal until the late 1930s. In exchange for their support, however, they insisted on decentralized state administration and local standard setting of all labor measures, and they demanded that key bills exclude the main categories of southern labor. By allying with northern Republicans, or by threatening to do so, they stripped all the main pieces of New Deal legislation of any design or provision that threatened the separate southern labor market and its distinctive meld of class and caste relations, its racial segmentation, and its low wages. Keeping blacks dependent on local labor markets and poor relief was the principal reason for the segmented and caste-ridden system of social provision and labor rights bequeathed by the New Deal.¹⁷

A quarter-century later, this system underpinned a fairly robust private welfare state of job security, pensions, and health insurance for organized workers in core sectors of the industrial economy. But that meld of public and private rights excluded most African Americans, whose anger exploded in all the large cities of the North, where millions of southern blacks had moved over the preceding decades to escape Jim Crow and rural unemployment. For them, public assistance, primarily Aid to Families with Dependent Children (AFDC), stood as the sole federal protection against poverty.

B. Aid to Families with Dependent Children

Created by the Social Security Act of 1935,¹⁸ originally titled Aid to Dependent Children (ADC) and renamed AFDC in the 1950s, the federal ADC descended from the state-based Mothers' Pensions programs of the early twentieth century, themselves a modern variant of the age-old practice of giving poor relief to "deserving widows."¹⁹ Like the other branches of the Social Security

17. I develop this historical argument in Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 1835-45.

18. 49 Stat. 620 (1935).

19. Winifred Bell, *Aid to Dependent Children* 9 (Colum. U. Press 1965) (internal quotation omitted); see Molly Ladd-Taylor, *Mother-Work: Women, Child Welfare, and the State, 1890-1930*, at 136-66 (U. of Ill. Press 1994); Sonya Michel, *Children's Interests/Mothers' Rights: The Shaping of America's Child Care Policy* 424-79 (Yale U. Press 1999); Theda Skocpol, *Protecting Soldiers and Mothers: The Political Origins of Social Policy in the United States* 73-78 (Harv. U. Press 1992).

Act, ADC was drafted to propitiate the South. So the states could determine AFDC benefits levels, and local administrators enjoyed vast discretion in making eligibility determinations.²⁰

Local administrators used that discretion to buttress low-wage labor markets and to exercise other kinds of disciplinary power. In the South, for example, AFDC officials deemed poor black women “employable mothers,” and kept them off the rolls when their labor was needed in the cotton fields.²¹ More generally, AFDC payments in the South and indeed, in most states, were kept appreciably below official poverty levels. And throughout the nation, local administrators in the early 1960s still vigorously enforced man-in-the-house rules. Through home visits, unannounced nighttime searches, and the like, they removed from the rolls any woman found to be associating with a man, especially if he seemed to live in her house. In this fashion, welfare officers prevented public monies from supporting “immoral women” and “unsuitable mothers”; at the same time, they kept poor men from exploiting AFDC to escape any of the rigors of the low-wage labor market.²² Even for its target universe of impoverished single parent families, AFDC reached a tiny fraction of the whole. Most did not even apply; of those who did, poverty-stricken newcomers to a locale met almost certain rejection. Since colonial times, wayfaring paupers had been “warned off” and forcibly excluded by the custodians of poor relief. Throughout the country, local custodians of AFDC carried on a modern version of this practice. In New York, for example, the very fact that you applied for welfare was presumptive proof of why you had come to the city. Rejected as ineligible, instead of welfare, you and your offspring got tickets on a Greyhound bus bound for home.²³

It was this separate, decentralized, and deeply gendered benefits program, stamped with many of the centuries-old degradations of poor relief, that welfare rights organizers, advocates, and attorneys sought to transform into a dignifying right to a guaranteed income.

C. *The Welfare Rights Movement*

Fostered by the War on Poverty, the welfare rights movement of the 1960s was unique in the annals of American reform, and, as we’ll see, Michelman’s Foreword bears its stamp. Never before, or since, had poor African American women formed the rank and file of a nationally organized social movement. The movement departed from the vocabulary of reform bequeathed by earlier movements for social and economic justice. The welfare rights movement broke the links these older movements had forged between work and citizenship. Like them, the welfare rights movement claimed decent income as a right; unlike them, it did not tie this right to waged work. Generations of reformers had constructed

20. Bell, *supra* n. 19, at 33-34, 63-65, 76-79, 81-82, 108-09.

21. *Id.* at 34-35, 42, 55, 79, 83, 130, 138.

22. *See id.* at 4, 6, 80, 213 n. 7; R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* 57, 85-90, 98, 121-22, 130 (Brookings Instn. 1994).

23. *See Melnick, supra* n. 22, at 77.

their ideals of economic justice for the poor and working classes in a gendered fashion, around the workingman-citizen; decent income and social provision belonged, as of right, to (presumptively white male) waged workers, and to their economic dependents. Poor black women had always toiled outside their homes,²⁴ but they had never been welcomed into the producers' republic of earlier reformers. By the 1960s poor black women had had enough experience in urban labor markets to know that decent jobs were hard to find, and enough experience with workfare programs to think them coercive and demeaning. There was a consumers' republic.²⁵ "Give Us Credit for Being Americans," read the [National Welfare Rights Organization's (NWRO)] placards demanding Sears credit cards for welfare recipients.²⁶ For them a guaranteed adequate income was an unconditional citizenship right, essential to equal respect and an appropriate touchstone of equality in an affluent America.

This rupture with the past was both a strength and a limit of the NWRO. It highlighted the coercive and gendered aspects of older employment-based ideals of economic and distributive justice. Gaining welfare as a matter of right would relieve unwarranted suffering and indignity. But it would not do enough to help poor African Americans make their way into a shared social destiny of work and opportunity. Without other enabling rights to training, decent work, and childcare, welfare rights risked modernizing the badges and incidents of racial and economic subordination instead of abolishing them. Mimicking AFDC also led to the absence of poor men in a movement that claimed to represent the nation's poor and their needs. It led to a rights rhetoric that downplayed the disappearance of decently paid unskilled industrial jobs from the nation's old industrial regions and center cities.²⁷ Welfare rights risked saddling poor African Americans with a new variant of the old racist imagery of blacks as idle and dependent.

But the NWRO played the hand that was dealt it. Perhaps only by mimicking AFDC and building on its provisions could a social movement of the poorest, most powerless Americans have been forged. By making AFDC-eligible women the movement's constituents, welfare rights organizers had something to offer the rank and file, and the rank and file developed a sense of efficacy and entitlement by gaining their demands from the nation's welfare departments. Likewise, AFDC provided a basis for substantial gains through litigation. And the litigation, of course, is what inspired Michelman's work, supporting and supported by the War on Poverty. The rupture between the older ideal of a right to decent work and the new ideal of a right to welfare also stamped Michelman's work in ways we are about to explore.

24. See Jacqueline Jones, *Labor of Love, Labor of Sorrow: Black Women, Work, and the Family from Slavery to the Present* (Basic Bks. 1985).

25. See Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 1850-55.

26. *Id.* at 1851.

27. This was the social fact that civil rights leaders like Martin Luther King and Bayard Rustin highlighted and called on Congress to remedy as a necessary condition for the "full emancipation and equality of Negroes and the poor." Forbath, *Caste, Class, and Equal Citizenship*, *supra* n. 7, at 87.

II. FRANK MICHELMAN'S CONSTITUTIONAL "WAR ON POVERTY"

A. *Welfare Rights in the Courts*

Constitutional scholars today remember *Goldberg v. Kelly*,²⁸ *Shapiro v. Thompson*,²⁹ and a handful of other constitutional decisions bearing on welfare rights, but we tend to forget the hundreds of statutory cases that dramatically broadened eligibility standards and went a remarkable distance toward transforming a grant-in-aid to the states to be administered as meanly as local officialdom saw fit, into a no-strings and no-stigmas national right to welfare.³⁰ These cases saw the Supreme Court and the lower federal courts undertake dozens of remarkable doctrinal innovations and boldly revisionary readings of the statutory text and history.³¹ The whole push of these developments was reflected in the courts' repeated insistence that public assistance for all the nation's needy was, in the Supreme Court's words, a "basic commitment," not charity or largess, but a right.

The Court recognized a private right of action against the state welfare agencies that administered AFDC,³² revising or ignoring jurisdictional rules that seemed to bar the way,³³ and spurning the conventional remedy of federal funding cut-offs in favor of injunctive relief.³⁴ Above all, the Court shoved aside the view, shared by judges, welfare administrators, and members of Congress alike for the first thirty years of AFDC's existence, that under AFDC states had authority to run their own programs, imposing such conditions and standards as they chose, subject only to a handful of limitations listed in the federal statute.³⁵ State and local autonomy over the administration of federal relief had been the southern Democrats' *sine qua non*, and, as we know, the architects of the 1935 Social Security Act, of which AFDC was a part, had provided it. In place of the wide berth they had left for state discretion, the Court created a new presumption: "a heavy burden lay on state lawmakers and administrators to justify any exclusion, test or condition that deviated from the principle of 'actual need.'"³⁶ LSO attorneys persuaded the federal courts to embrace this presumption and to wield it

28. 397 U.S. 254 (1970).

29. 394 U.S. 618 (1969).

30. Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 1862.

31. *Id.* at 1863.

32. See Richard B. Stewart & Cass R. Sunstein, *Public Programs and Private Rights*, 95 Harv. L. Rev. 1195, 1289-90 (1982).

33. See e.g. *Hagans v. Lavine*, 415 U.S. 528, 534-35 n. 5, 537, 541-42 (1974); *King v. Smith*, 392 U.S. 309, 312 n. 3 (1968).

34. See Melnick, *supra* n. 22, at 50.

35. See Bell, *supra* n. 19, at 50; Martha Derthick, *The Influence of Federal Grants: Public Assistance in Massachusetts* (Harv. U. Press 1970); Wilbur J. Cohen, *The Social Security Act of 1935: Reflections Fifty Years Later*, in *The Report of the Committee on Economic Security of 1935*, at 3 (50th anniversary ed., Natl. Conf. on Soc. Welfare 1985).

36. Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 1859.

against hundreds of state rules excluding would-be AFDC recipients.³⁷ Within the federal statutory categories, the federal courts in the 1960s and early 1970s proved extraordinarily willing to treat welfare under AFDC as a right of all needy individuals.

The leading statutory case was *King v. Smith*,³⁸ in which the Court struck down an Alabama man-in-the-house eligibility rule issued by Governor George Wallace in 1964. Under Wallace's rule, Alabama had dropped 16,000 children—ninety percent of them black—from its welfare roll. The three-judge court below had invalidated the rule on equal protection grounds.³⁹ At oral argument, however, plaintiff's LSO attorney sought a statutory ruling. "[I]f the decision goes off as the lower court's did, then very little will have been accomplished. Even if we win in Alabama, HEW will not stop similar practices in other states [where man-in-the-house rules had no such discriminatory purpose or effect]."⁴⁰ A statutory holding, "would give us all we wanted,"⁴¹ providing "a way in which the narrowest of rulings would have the broadest of implications. . . . [G]ive us,"⁴² counsel asked the Court speaking for the NWRO rank-and-file, "a decision interpreting the Social Security Act as having rejected the concept of a worthy and an unworthy poor."⁴³

And the Court did so, giving welfare rights attorneys a reading of the Act that would shape AFDC case law for the next two decades.⁴⁴ In the face of legislative history that ran almost entirely to the contrary, a unanimous Supreme Court concluded that in 1935 Congress had intended that all "needy, dependent children" would be entitled to AFDC benefits, and that states and localities could not enforce their own narrower definitions of eligible parents. Thus, Alabama, in dispersing AFDC, could not decide that Mrs. Smith's occasional visitor and lover (a Mr. Williams with nine children of his own) was a "substitute father" and breadwinner whose visits to Mrs. Smith disqualified her and her children from the federal entitlement.⁴⁵ Chief Justice Warren put aside a wealth of legislative history suggesting that Congress intended precisely to allow states to apply their own standards of "moral character" and "suitability" (acquiescing, as we saw, to the southern Democrats' insistence on local control over "domestic affairs" of race, caste, and the social and economic authority of local white elites). This history might have been relevant at one time, Warren noted, because the "social context" in 1935 was one in which the distinction between the "worthy" poor and

37. See Susan E. Lawrence, *The Poor in Court: The Legal Services Program and Supreme Court Decision Making* 123-48 (Princeton U. Press 1990); see generally Martha F. Davis, *Brutal Need: Lawyers and The Welfare Rights Movement, 1960-1973* (Yale U. Press 1993).

38. 392 U.S. 309 (1968).

39. *Smith v. King*, 277 F. Supp. 31, 41 (M.D. Ala. 1967).

40. Martin Garbus, *Ready for the Defense* 194 (Farrar, Straus and Giroux 1971).

41. *Id.*

42. *Id.* at 194-95.

43. *Id.* (internal quotations omitted).

44. See *King*, 392 U.S. 309.

45. *Id.* at 328-30.

the “undeserving” was generally accepted.⁴⁶ Now both society and Congress took a different view, “more sophisticated and enlightened than the ‘worthy-person’ concept of earlier times.”⁴⁷ The evidence that the Congresses that enacted the various post-1935 amendments to AFDC shared the Warren Court’s enlightened perspective was scant at best.⁴⁸ Nonetheless, the Chief Justice proceeded to read the preamble and statement of purpose of the 1935 Act itself to mean that AFDC “was designed to meet a need unmet by programs providing employment for breadwinners.”⁴⁹ Thus,

at the same time that it intended to provide programs for the economic security and protection of *all* children . . . [Congress surely would not have allowed the states] arbitrarily to leave one class of destitute children entirely without meaningful protection. . . . Such an interpretation of congressional intent would be most unreasonable, and we decline to adopt it.⁵⁰

Relying on *King v. Smith*,⁵¹ LSO attorneys went on to challenge a wide variety of state practices. Most northern states had their own, less draconian man-in-the-house rules, like New York’s, which did not disqualify the family, but put some financial burden on the man involved.⁵² The lower courts took a hard line against all such practices, and the Supreme Court upheld them, enshrining a principle of “actual availability.”⁵³ Thus, the much-resented man-in-the-house rule fell by the wayside, its defeat a victory for the welfare rights movement’s vision of woman’s autonomy. Other forms of presumed income also were successfully challenged, and the upshot was that courts indirectly increased family’s benefits.⁵⁴

In the process of expanding their attack on man-in-the-house and other attributed income rules, the courts strengthened the general presumption against all types of state-imposed restrictions. Few facets of AFDC policy escaped scrutiny in the lower courts. State laws penalizing recipients for fraud; laws and regulations denying benefits to aliens; rules on verification procedure, foster care, and emergency assistance—were all struck down.⁵⁵ During the first thirty years of

46. *Id.* at 320, 324-35.

47. *Id.* at 324-25.

48. The year before, in 1967, Congress had enacted amendments to AFDC that penalized states if they failed to reduce the number of illegitimate children on AFDC. “Senator Robert Kennedy complained that ‘the man-in-the-house rule emerges from the conference strengthened rather than weakened’ and joined with other liberals in an unsuccessful attempt to kill the conference report.” Melnick, *supra* n. 22, at 87 (quoting 113 Cong. Rec. 36785 (Dec. 14, 1967)) (internal quotations omitted).

49. *King*, 392 U.S. at 328.

50. *Id.* at 330.

51. 392 U.S. 309.

52. *Van Lare v. Hurley*, 421 U.S. 338, 339-42 (1975).

53. Melnick, *supra* n. 22, at 88-89; see e.g. *Lewis v. Martin*, 397 U.S. 552 (1970).

54. Melnick, *supra* n. 22, at 89.

55. See e.g. *Holley v. Lavine*, 553 F.2d 845, 851 (2d Cir. 1977) (rules excluding aliens); *Md. v. Mathews*, 415 F. Supp. 1206 (D.D.C. 1976) (verification procedures); *Owens v. Roberts*, 377 F. Supp. 45 (M.D. Fla. 1974); *J.A. v. Riti*, 377 F. Supp. 1046 (D.N.J. 1974) (rules penalizing fraud); *Cooper v. Laupheimer*, 316 F. Supp. 264 (E.D. Pa. 1970) (rules on emergency assistance).

AFDC's existence, there had been but one reported federal case interpreting the statute. Then, between 1968 and 1975, the years Frank Michelman wrote his first seminal pieces on welfare rights, the Supreme Court decided eighteen AFDC cases, and the lower federal courts decided hundreds more.⁵⁶

Chiefly through statutory construction, the federal judiciary had gone a great distance toward transforming a grant-in-aid to the states into a no-strings, no-stigma, national right to welfare. But statutory construction could go only so far. It could not establish a decent social minimum as a floor on welfare benefits, or even prevent the states from diminishing payments as they expanded coverage under judicial nudging.⁵⁷ And it could not challenge the exclusions inscribed in the statute's categorical system, forcing Congress to change the system into one embracing all of the nation's poor. If courts were to force these changes, it would be through constitutional adjudication.

At first, LSO relied heavily on constitutional challenges. Residency requirements, as we've noted, carried forward a centuries-old tradition of localities warning out wayfaring paupers. Nine out of eleven lower courts agreed with welfare rights groups and the LSO that these requirements trenched on the welfare recipient's right to travel; to be a member of the national community had always included the right freely to travel among the states.⁵⁸ In *Shapiro v. Thompson*, the Supreme Court agreed that the states' residency requirements unconstitutionally burdened poor Americans' enjoyment of that right.⁵⁹ More than that, Justice Brennan, writing for the Court, seemed to suggest (Justice Harlan, in dissent, called it a "cryptic suggestion"⁶⁰) that strict scrutiny, applying the compelling state interest test to the residency requirement, might be justified for another reason—not the right to travel, but the fact that welfare affects "the ability of the families to obtain the very means to subsist."⁶¹

B. *Goldberg v. Kelly, the "New Property," and the Hard Questions*

Eight lower courts heard LSO challenges to states' summary termination practices, and six held that the due process clause required pre-termination hearings.⁶² In 1970, with its decision in *Goldberg v. Kelly*,⁶³ the Supreme Court upheld the majority view.⁶⁴

Declaring that welfare benefits were "a matter of statutory entitlement . . . [whose] termination involves state action that adjudicates important rights,"⁶⁵

56. See generally Lawrence, *supra* n. 37.

57. See *Rosado v. Wyman*, 397 U.S. 397, 416-17 (1970).

58. Forbath, *Constitutional Welfare Rights, supra* n. 7, at 1862.

59. 394 U.S. 618, 629-31 (1969). On the lower court litigation and rulings against residency requirements, see Frank S. Bloch, *Cooperative Federalism and the Role of Litigation in the Development of Federal AFDC Eligibility Policy*, 1979 Wis. L. Rev. 1, 8-12.

60. *Shapiro*, 394 U.S. at 661 (Harlan, J., dissenting).

61. *Id.* at 627 (majority).

62. Forbath, *Constitutional Welfare Rights, supra* n. 7, at 1863.

63. 397 U.S. 254 (1970).

64. See Bloch, *supra* n. 59.

65. 397 U.S. at 262.

Goldberg encapsulated the previous five years of federal litigation and decisional law. By recognizing private rights of action, stripping broad swathes of discretionary power from local officials, and eliminating non-need based eligibility criteria, this new body of law had *made* welfare benefits into just such rights. The Court seemed to go further, stating more fully and forcefully than ever before the premises behind the “more sophisticated and enlightened” view of welfare it had evoked (and attributed to Congress) in *King*.⁶⁶ In a footnote supporting its assertion that welfare benefits were “a matter of statutory entitlement,” the Court observed,

It may be realistic today to regard welfare entitlements as more like “property” than a “gratuity.” Much of the existing wealth in this country takes the form of rights that do not fall within traditional common-law concepts of property. It has been aptly noted that

[s]ociety today is built around entitlement. . . . Many of the most important of these entitlements now flow from government: subsidies to farmers and businessmen . . . [and] social security pensions for individuals. Such sources of security, whether private or public, are no longer regarded as luxuries or gratuities; to the recipients they are essentials, fully deserved, and in no sense a form of charity. It is only the poor whose entitlements, although recognized by public policy, have not been effectively enforced.⁶⁷

The long quotation was from Charles Reich, whose two enormously influential articles on the “new property” were published in *Yale Law Journal* in 1964 and 1965.⁶⁸ It is an argument about the status of welfare in an era in which “government largess” takes myriad forms and constitutes so much of individual and corporate wealth. In Reich’s account, the welfare recipient belonged to a whole social order of Americans “liv[ing] on government largess.”⁶⁹ “Social insurance substitutes for savings[, and] a government contract replaces a businessman’s customers and goodwill,”⁷⁰ while in between the new pauper and pensioner and the new businessmen stood petty entrepreneurs and tradesmen, the cab driver dependent on his medallion, the tavern keeper and the hunting guide whose livelihoods hinged on their licenses.⁷¹ In Reich’s anxious and nostalgic liberal narrative of American life, political and cultural antagonists, the cab driver or tradesman and the welfare mother, the factory owner and the union worker, were united by their common vulnerability to the state.⁷² In fact, precious few of

66. 392 U.S. at 324-25.

67. *Goldberg*, 397 U.S. at 262 n. 8 (quoting Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *Yale L.J.* 1245, 1255 (1965)).

68. See Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 *Yale L.J.* 1245 (1965) [hereinafter Reich, *Individual Rights and Social Welfare*]; Charles A. Reich, *The New Property*, 73 *Yale L.J.* 733 (1964) [hereinafter Reich, *New Property*].

69. Reich, *New Property*, *supra* n. 68, at 733.

70. *Id.*

71. See *id.* at 758-59.

72. Agency discretion wielded “life and death” power over the livelihoods of one and all. See *id.* at 758.

Reich's disparate forms of "new property" were new.⁷³ But the assimilation of pauper to tradesman and franchise-holder, the equation of welfare benefits with professional licenses and government contracts, was dramatically new, and this did the important discursive and doctrinal work. The "new property" unlike the old was dispensed by the state in "the form of rights or status rather than of tangible goods."⁷⁴ How, then, Reich asked, can the new property fulfill the social function of the old property? How can it serve as an institution that secures the individual a measure of independence from state domination, when it is itself dispensed by the state?⁷⁵ The question sounded in classical liberalism, and so did the answer. If government subsidies, contracts, pensions, and benefits were to serve as a basis for private autonomy and dignified existence, fulfilling the social function of property, then these various forms of largess must enjoy the same legal protections as traditional common law forms of property.

In particular, the new property, like the old, must be protected against arbitrary deprivations and invasions by the state. What the state gave, the state could not take away—at least not without due process. And, in fact, Reich observed, due process case law already had begun in the 1950s to establish that the state could not take away such government-granted goods as an occupational license without "notice and a hearing."⁷⁶ Where the "freedom to earn a living" was implicated, courts recognized that procedural due process's protections of property applied. But welfare too involved livelihood; like traditional livelihoods, it had the potential to provide "a secure minimum basis for individual well-being and dignity,"⁷⁷ but only if the legal order recognized it too as a form of property.

For all its resonance, Reich's argument left many questions dangling, and so did *Goldberg*. First was the question of distributive justice. Conceding that welfare benefits, if recognized as secure legal entitlements, could perform the "social functions" Reich and the Court claimed for them, why were the poor entitled to them? On what distributive premise did they rest? On the face of it, welfare was not a moral equivalent to a professional license or a pension right in a union contract or even to government-based, but partly contributory, social insurance. Effort and exchange were the ordinary normative bases in liberal legal culture for such "property" claims. What was the normative argument that made welfare a cognate right, when on the face of it, welfare differed from the others by distributing goods with neither effort nor exchange to underpin the result?

Second was the question of whether the legal/constitutional order's recognition of welfare as a right had only formal and procedural bite. If the social function of welfare as property was to provide "a secure minimum basis for individual well-being and dignity," then did the entitlement not entail a measure

73. See William J. Novak, *The People's Welfare: Law and Regulation in Nineteenth-Century America* (U.N.C. Press 1996).

74. See Reich, *New Property*, *supra* n. 68, at 738.

75. See *id.*

76. *Id.* at 741.

77. *Id.* at 786.

of substantive constitutional protection—say, against lawmakers’ decision to repeal the entitlement or to diminish it below the minimum?⁷⁸ Or was that kind of recognition of the property-like aspect of welfare strictly a matter of public policy for legislatures to determine?

For Reich the right to welfare seemed to rest on the involuntary nature of individual poverty. “Today,” he wrote in the full text of the passage from which the *Goldberg* Court quoted:

we see poverty as the consequence of large impersonal forces in a complex industrial society . . . [Past eras saw poverty as flowing from individual “idleness” and other moral failings.] It is closer to the truth to say that the poor are affirmative contributors to today’s society, for we are so organized as virtually to compel this sacrifice by a segment of the population. Since the enactment of the Social Security Act, we have recognized that they have a right – not a mere privilege – to a minimal share in the commonwealth.⁷⁹

As an assertion about the commitments inscribed in the nation’s statutes, this is bunk.⁸⁰ As moral reasoning, it also is somewhat odd. We may view compelled sacrifices as affirmative contributions to the commonwealth, but these tend to involve some measure of individual exertion—say, the sacrifices endured as a conscript in a national army. What Reich describes here is more like a casualty loss from the accident of poverty—or rather the accidental loss of a livelihood because American society is “so organized as virtually to compel” one’s exclusion from the labor market. This would point toward welfare as a kind of just compensation.

Of course, the compensation clause is not where the Court looked for constitutional footing. “From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty,”⁸¹ the Court observed, citing and paraphrasing Reich.

Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community Public assistance, then, is not mere charity, but a means to “promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity.”⁸²

So, the Court did not follow Reich in his blunt assertion that welfare was the poor person’s just desert as a conscript in the reserve army of the unemployed. It did suggest that because supra-individual, social forces “contribute” to a person’s

78. *Id.*

79. Reich, *Individual Rights and Social Welfare*, *supra* n. 68, at 1255.

80. In point of fact, the Social Security Act recognized no such right; it provided time-limited unemployment insurance and old-age pensions to those who contributed, mothers’ pensions (ADC), and public assistance for the blind and the elderly poor—those who could not presently or could no longer be expected to work, and nothing at all for the “idle poor.” See Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 68-81.

81. *Goldberg*, 397 U.S. at 264-65.

82. *Id.* at 265 (quoting U.S. Const. preamble).

poverty, welfare should be dignifying and not degrading. Indeed, it implied that assuring that the material bases of “well-being” were available in a dignifying manner stood as a fundamental or “founding” national “commitment.” Reich’s bleak quid pro quo rubbed abrasively against the ideal of equal opportunity. That ideal signified bringing the nation’s poor into a shared world of work and opportunity, not compensating them for permanent exclusion from it. So, the Court cast welfare not as compensation for the jobless poor’s involuntary “contribution” to the economy, but as a means of bringing within their reach “opportunities . . . to participate . . . in the life of the community.” Presumably, this meant that without means of subsistence, the poor could not begin to attain education and decent work or to participate in civic life. Participating in these spheres—not welfare as such—is the social basis of equal citizenship, which is why welfare was more the fruit of the New Deal’s failure to enact social citizenship than its fulfillment. But here, in a case involving the children and grandchildren of the very Americans the New Deal had excluded, the Court was casting welfare provision, in the words of the Preamble, as a step toward including all Americans in a common framework of “Liberty” and “the general welfare.”

With these striking references to the Constitution, the Court seemed to be signaling a willingness to consider whether some constitutional provision might grant a right to welfare for those confronting what the Court called “brutal need.”⁸³ As we’ve seen, this was the push of the Court’s remarkable statutory construction cases—that welfare was an individual entitlement and need the only legitimate touchstone of exclusion from it. The Court’s reference to “the Blessings of Liberty” suggested, in strong echoes of Roosevelt’s “second Bill of Rights,” that a measure of economic security was indispensable to freedom and citizenship.⁸⁴ Even more clearly, the Court spurned the notion that welfare was simply a humanitarian measure; rather, it was a means of bringing “within the reach of the poor . . . opportunities . . . to participate meaningfully in the life of the community.”⁸⁵ Welfare, then, was being cast as a necessary, though not a sufficient, basis of equal citizenship, a step toward including all Americans in a common framework of “Liberty,” a matter of obvious constitutional significance.

Thus, the Court seemed to be verging on judicial recognition of something very much like rights to minimum welfare, education, and other forms of social provision, when the Republican victory in the 1968 presidential election deprived the Court’s liberals of the votes they needed to carry the process forward. In 1969, President Nixon appointed Warren Burger; in 1970, Harry Blackmun, whose first years on the Court saw him aligned with the new Chief; in 1972, Nixon appointed Lewis Powell and William Rehnquist. Who can doubt that four Humphrey appointments, instead of four Nixon appointments, would have made the

83. *Id.* at 261 (quoting *Kelly v. Wyman*, 294 F. Supp. 893, 900 (S.D.N.Y. 1968) (quoting Student Author, *Withdrawal of Public Welfare: The Right to a Prior Hearing*, 76 Yale L.J. 1234, 1244 (1967))) (internal quotations omitted).

84. *Goldberg*, 397 U.S. at 265.

85. *Id.*

*Dandridge v. Williams*⁸⁶ and *San Antonio Independent School District v. Rodriguez*⁸⁷ dissents into majority opinions?

In *Dandridge*, the lower court had built on *Goldberg* and the other welfare rights precedents to strike down Maryland's dollar maximum (of \$250 per month) on welfare grants to poor families. Plaintiffs claimed that the maximum discriminated against poor children in large families, and the court agreed, applying heightened scrutiny to the measure because it affected the constitutionally important interest in welfare, and concluding that the law "cut[] too broad a swath on an indiscriminate basis."⁸⁸ Under the new Chief Justice's leadership, the Supreme Court reversed, announcing that no longer would the Court attend to the details of welfare programs, even if they appeared discriminatory or made harsh distinctions among people equally in need. Acknowledging that "administration of public welfare assistance . . . involves the most basic economic needs of impoverished human beings,"⁸⁹ the Court declared that "the dramatically real factual difference between [welfare regulation and regulation of business or industry provided] no basis for applying a different constitutional standard."⁹⁰

In dissent, Justice Marshall assailed "the Court's emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration."⁹¹ Marshall approvingly invoked the arguments of Michelman and others on behalf of a substantive right to welfare, as well as Article 25 of the Universal Declaration of Human Rights,⁹² which confers just such a right. Thus, he signaled the dissenters' inclination to read the Constitution as conferring something like a right to livelihood. On a *Humphrey*, rather than a *Nixon*, Court, the trajectory of constitutional doctrine after *Dandridge* most likely would have been in the direction of ever more exigent signals that Congress and the States must make up shortfalls between statutory offerings and the real world of "brutal need" and include the statutorily excluded.

C. *Michelman on the Hard Questions: "Minimum Protection," "Just Wants," and "Basic Needs"*

Dandridge, however, lay in the future as Frank Michelman set to work on the unfinished normative underpinnings of constitutional welfare rights. The federal courts had labored mightily in statutory AFDC cases to make need the sole criterion for eligibility. Justice Brennan, in *Shapiro*, remember, even had intimated that need of families for the very means of subsistence might become a member of the new constitutional family of fundamental interests, and thereby

86. 397 U.S. 471 (1970).

87. 411 U.S. 1 (1973).

88. *Dandridge*, 397 U.S. at 484 (quoting *Williams v. Dandridge*, 297 F. Supp. 450, 469 (D. Md. 1968)) (internal quotations omitted).

89. *Id.* at 485.

90. *Id.*

91. *Id.* at 508 (Marshall & Brennan, JJ., dissenting).

92. *Id.* at 521 n. 14.

subject classifications in and exclusions from welfare statutes to strict scrutiny.⁹³ But need had never stood on the same plane as effort or exchange in the distributive norms of common law or constitutional doctrine. Need needed an argument that sounded in distributive justice. Charles Reich's articles did not provide one.⁹⁴ Reich urged courts to attack official arbitrariness and discretion, and the insecurity and indignities they bred. He offered a sociological rationale for treating statutory welfare benefits as rights, but no moral or constitutional argument why courts were obliged to provide for the needy whom lawmakers had left out, or to remedy the shortfalls between statutory offerings and actual need. From the point of view of a legal scholar who sympathized with the welfare rights movement, the need-based right still needed arguments that extended beyond procedural to distributive justice and addressed the right's substantive reach and bounds.

Frank Michelman set out in search of such arguments. He reported on his progress in two pioneering articles, the 1969 Harvard Foreword, "On Protecting the Poor through the Fourteenth Amendment,"⁹⁵ and his 1973 "In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice."⁹⁶ "Protecting the Poor" was an effort to nudge doctrine and doctrinal scholarship toward a theory of judicially enforceable constitutional welfare rights. "In Pursuit of Constitutional Welfare Rights" was a reading of John Rawls's epoch-making book,⁹⁷ examining how Rawls's theory bore on the idea of justiciable welfare rights, and how such an examination, in turn, might illuminate Rawls's theory.

What, asked Michelman, is "the role of courts . . . [in] the great War"⁹⁸ on poverty? He answered with a reading of a handful of recent equal protection decisions—*Shapiro*, which had been decided in the 1968 Term, *Harper v. Virginia State Board of Elections*,⁹⁹ *Douglas v. California*,¹⁰⁰ and a few of their kin. Michelman dubbed these cases the Court's "contribution to the great War."¹⁰¹ *Shapiro*, *Harper*, and *Douglas* all could be read as resting, partly, on a notion of wealth discrimination.¹⁰² Many lower courts¹⁰³ and liberal commentators wishfully

93. See 394 U.S. at 638.

94. The text oversimplifies. Reich, as we saw, did gesture toward a justificatory argument based on compensation: welfare was just compensation for society's more or less conscious choice of a political economy that offered too few decently paid jobs to go around.

95. Michelman, *supra* n. 13.

96. Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. Pa. L. Rev. 962 (1973).

97. See Rawls, *supra* n. 8.

98. See Michelman, *supra* n. 13, at 8-9.

99. 383 U.S. 663 (1966) (holding that state may not condition franchise on payment of tax or fee).

100. 372 U.S. 353 (1963) (holding that state must provide counsel to criminal accused on first appeal as of right, irrespective of court's assessment of probable merits).

101. See Michelman, *supra* n. 13, at 9.

102. *Harper* held that statutes discriminating on the basis of wealth were, like those discriminating based on race, "traditionally disfavored." 383 U.S. at 668. *Douglas* spoke of "that equality demanded by the Fourteenth Amendment where the rich man . . . enjoys the benefit of counsel's [assistance] . . . while the indigent . . . is forced to shift for himself." 372 U.S. at 358. The Court noted that "the evil [in such a situation] is . . . discrimination against the indigent," *id.* at 355, and that "an unconstitutional line has been drawn between rich and poor." *Id.* at 357. In his *Shapiro* dissent, Justice Harlan lamented

read them as signs that the Court might bring the nation's poor into the "inner circle" of judicially protected classes.¹⁰⁴

For his part, Michelman read the decisions differently. The Court, he agreed, was embarking on "the elaboration of constitutional rights pertaining to the status of being poor,"¹⁰⁵ and it had clothed the decisions presaging these rights in the "verbiage of inequality and discrimination."¹⁰⁶ But the "inchoate theories of social justice . . . at the roots"¹⁰⁷ of these cases was ill expressed in the language of "equality or evenhandedness."¹⁰⁸ Applying strict scrutiny to laws that fall unequally on the nation's poor would sweep too broadly; such government action is everywhere. Nor does equality offer a plausible benchmark for answering the question how much protection is "enough." "'As much as' seems to provide just the certainty of measure which 'enough of' so sorely lacks."¹⁰⁹ But would a court be comfortable explaining "why X is entitled to, say, [as much legal assistance on his appeal as] Y in fact has rather than what justice requires?"¹¹⁰ If equal protection, as applied to the plight of poverty, swept too broadly, it also stopped short of the mark, because equal protection implies "a 'state action' qualification upon government's duties to relieve against hazards of poverty."¹¹¹ Yet, it was "less easy to be reconciled to the 'state action' notion when alleviation of certain, specially poignant hardships or crushing disadvantages is thought to be the object. . . . [Then,] the government's noninvolvement . . . may come not as relief but as reproach."¹¹²

the majority's "cryptic suggestion" that welfare constituted a fundamental interest giving rise to the strict scrutiny/compelling state interest test the Court's emergent equal protection doctrine had begun to extend from suspect racial classifications to other invidious discriminations and fundamental constitutional interests nowhere evident in the constitutional text. 394 U.S. at 661 (Harlan, J., dissenting).

103. Thus, the same year as Michelman's "Protecting the Poor," a three-judge district court in New York enjoined a recent change in the state's welfare regulations, which reduced public assistance payments in counties surrounding New York City to levels below those paid to city residents, when they had previously been grouped together. *Rothstein v. Wyman*, 303 F. Supp. 339 (S.D.N.Y. 1969). Applying strict scrutiny to the new classification scheme, the district court wrote, "Receipt of welfare benefits may not at the present time constitute the exercise of a constitutional right"; nonetheless, the court deemed controlling the teaching of *Harper* and *Shapiro*, that classifications creating "inequalities affecting the exercise of fundamental or critical personal rights" must be scrutinized under "a more stringent standard." *Id.* at 346. As in *Harper* and *Shapiro*, so here the court found a conjunction of a "fundamental right" and a "disadvantaged minority"—only here the right was welfare and the minority the poor. While welfare was only an incipient constitutional right, an emergent fundamental interest, *Shapiro* still seemed to the *Rothstein* court to mark the Supreme Court's acknowledgment that "[a]ccess to [the] bare necessities of life" was as "fundamental" as voting. *See id.* at 346-48. And *Douglas* marked a dawning recognition of the poor as a protected minority.

104. *See* John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 Cal. L. Rev. 305, 365 (1969); *see generally* Arthur J. Goldberg, *Equality and Governmental Action*, 39 N.Y.U. L. Rev. 205 (1964); Lawrence Gene Sager, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 Stan. L. Rev. 767 (1969).

105. *See* Michelman, *supra* n. 13, at 16.

106. *See id.*

107. *Id.* at 10.

108. *Id.*

109. *Id.* at 18.

110. Michelman, *supra* n. 13, at 18.

111. *Id.* at 11.

112. *Id.*

Thus, while inequality and discrimination were the doctrinal notions near at hand, they were misleading. The upsetting feature in the equal protection cases involving poverty was not some odious discrimination that might accompany a poor person's deprivation of a good he couldn't afford; what was disturbing was the deprivation itself. So, Michelman sought to use the cases as data points from which to infer the outlines of a constitutional universe of "just wants" or "basic needs." Not equal protection, he insisted, but "minimum protection" was the heart of the matter.¹¹³ Focusing on specific deprivations of basic needs was "a much more manageable task"¹¹⁴ for courts. Michelman strapped himself to the mast of moderation, and vowed to keep "resolutely deaf to [the Court's] superfluous [equality] rhetoric."¹¹⁵ His was a more modest picture of the courts' part in ending poverty: not "railing against tides of economic inequality which they [can't stem], but . . . busy with the critically important task of charting some islands of haven from economic disaster in the ocean of (what continues to be known as) free enterprise."¹¹⁶

After *Dandridge* and *Rodriguez*, it became fairly clear that most of the Justices on the Burger Court would not compel states or Congress to make up any shortfall between statutory offerings and the real world of "brutal need," nor etch out a constitutional universe of just wants, nor subject state laws or practices that fell heavily or arbitrarily on the poor to any exacting constitutional standard. Not unless there were some other, more familiar constitutional value entwined in the case: the fairness of the criminal process, ending the South's disenfranchisement of blacks and poor whites, vindicating the citizen's right to travel among the states of the Union free from discrimination.

Indeed, the idea that "lawyers in criminal courts are necessities, not luxuries"¹¹⁷ harked back to the 1930s and *Powell v. Alabama*;¹¹⁸ it spoke to the Court's special solicitude for the integrity of the judicial process and its sensitivity toward the charge that "the rich man can require the court to listen to argument of counsel before deciding on the merits, but a poor man cannot."¹¹⁹ *Harper*, striking down Virginia's poll tax, seems likely to have been akin to *Powell* in most Justices' minds, completing the dismantling of Jim Crow, rather than identifying the first "islands of [economic] haven"¹²⁰ on a constitutional map of basic needs and just wants.

What is important for us about "Protecting the Poor," however, is not its failed prophecy about doctrinal developments, which, after all, may merely have

113. *Id.* at 13-14.

114. *Id.* at 8.

115. Michelman, *supra* n. 13, at 33.

116. *Id.*

117. *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963) (holding that indigent felony defendants entitled to state-funded trial counsel under the Sixth Amendment).

118. 287 U.S. 45 (1932) (holding that indigent defendant in capital case entitled to state-financed counsel under the Sixth Amendment).

119. *Douglas*, 372 U.S. at 357.

120. Michelman, *supra* n. 13, at 33.

been the upshot of Nixon's razor-thin victory in the 1968 election. What matters here is the Foreword's optimism about the open-ended quality of those developments and its identification of courts and author with the "great War" on poverty. As we noted, "Protecting the Poor" was written with "funds provided by" the command center of that "War" and while Michelman was associated with Harvard's LSO back-up center.¹²¹ The Harvard Center litigated special education and school desegregation cases; like other LSO offices, its occupants saw themselves battling against the intertwined evils of racism and poverty, training scores of LSO attorneys and working with community organizations.¹²² Unlike other back-up centers, like Columbia's, it lacked a strong "movement" tilt, and had nothing quite like Columbia's close ties with the NWRO.¹²³

Intellectually, however, Michelman joined the NWRO and the attorneys and policy mavens surrounding it in their sharp break with inherited rights discourse. In contrast with the NWRO, "Protecting the Poor" and "In Pursuit of Constitutional Welfare Rights" do not defend a guaranteed income but instead a bundle of "insurance rights" (to food, shelter, health care, education). But in common with the NWRO, Michelman breaks the link with work. His constitutional welfare rights are unconditional. Thus, with the NWRO, Michelman rejects the centuries-old distinctions between "worthy" and "unworthy" candidates for public provision. There are no distinctions here between the disabled and able-bodied, the ill-fated and blameworthy, the widowed and promiscuous, the earnest job-seeker and the shiftless and idle.¹²⁴ Instead, Michelman means to summon forth a theory of distributive justice that is insistently unsatisfied by a political economy affording everyone a "fair opportunity"—through "full employment," "income transfers," and the like¹²⁵—to provide for everyone's basic needs or just wants. "Protecting the Poor" requires "more"; it requires basic needs or just wants "will be met when and as felt, [regardless of] . . . effort, thrift, or foresight."¹²⁶

Michelman does not dispute that justice requires the kind of political economy that enables everyone to make a decent living through decent work. At one point, he even notes that a participant in a Rawlsian assembly might well seek—in addition, and perhaps even prior to, insurance rights—assurance of some of social citizenship's mainstays in the form of full employment, income supplements, and the like.¹²⁷ But apart from this passing observation, work in all its forms—waged and unwaged, dignifying and demeaning, decently rewarded and

121. *Id.* at 7 n. *.

122. See generally Marian Wright Edelman, *Lanterns: A Memoir of Mentors* (Beacon Press 1999). Edelman was a director of the Harvard Center on Law and Education.

123. See Forbath, *Constitutional Welfare Rights*, *supra* n. 7, at 1855-59.

124. Michelman welcomes the challenge—to answer the "compelling . . . objection to welfare rights, that such rights signify redistribution from the prudent and industrious to those who have culpably failed to grasp opportunities to provide for their own security." Michelman, *supra* n. 96, at 969.

125. See Michelman, *supra* n. 13, at 14 n. 18.

126. *Id.* at 14.

127. *Id.* at 15 n. 21.

socially valued and not—does not figure at all in Michelman’s account of the constitutional dimensions of the “great War” on poverty.¹²⁸ In this, of course, Michelman departs from the social citizenship tradition I have reconstructed and chronicled elsewhere.¹²⁹ It sought to find or include these norms in the Constitution—to serve, in much the same terms that Michelman applies to welfare rights, as touchstones for “convincing advocacy” and “foothold[s] for challenging legislative judgments”¹³⁰ that fell short of assuring decent work opportunities and decent livelihoods for all.¹³¹

This lacuna results in an argument for welfare rights that assigns those rights social work they cannot do; they cannot secure the social bases of self-respect and mutual respect in American life. Or so I will suggest. But I will do so in the context of a critical reading of Michelman’s reading of Rawls, to which we must turn.

III. A CRITICAL READING OF MICHELMAN ON RAWLS AND WELFARE RIGHTS

A. *The Difference Principle and Constitutional Political Economy*

What was afoot in the courts shaped the way Michelman approached Rawls’s *A Theory of Justice*. When Michelman turned in earnest to Rawls, he did so with a mind to asking

[h]ow . . . the book [bore] upon the work of legal investigators concerned or curious about recognition, through legal processes, of claimed affirmative rights (let us call them “welfare rights”) to education, shelter, subsistence, health care and the like, or to the money these things cost.¹³²

The answer was a vexed one. Michelman rested welfare rights on a distributive principle of “minimum protection” or “just wants”; Rawls offered something different. The chief basis for welfare rights or for “the money these things cost” in *A Theory of Justice* was Rawls’s difference principle.

The difference principle, you’ll recall, states that institutionalized inequalities must be justified by dint of being in the interests of the least

128. One might think that such social citizenship principles as a right to work are absent from Michelman’s constitutional theorizing, because they lie beyond anything courts could hope to contribute to the anti-poverty campaign. But it seems fair to say that for the Michelman of these two essays, “minimum protection” constitutes the full reach of the Constitution’s—and not merely the constitutional courts’—“protection of the poor.” No Constitution seen from the vantage point of civil society or of Congress would contain any different rights or equality norms. As we’ll see, *infra* text accompanying notes 172-78, Michelman does address constitutional advocacy in political fora, and he casts the social minimum for constituting equal citizenship in the same mold. “Insurance rights” remain the constitutional ticket, whether in Congress or in the courts.

129. See Forbath, *Caste, Class, and Equal Citizenship*, *supra* n. 7.

130. Michelman, *supra* n. 96, at 1003.

131. *Id.* at 1002-03. Compare Michelman’s language about welfare rights arguments in political fora to the statements of New Dealers, which I quote in some detail, in *Caste, Class, and Equal Citizenship*, *supra* n. 7, suggesting that constitutional social and economic rights should serve as standards for the polity to judge “the acts of legislatures and executives.”

132. Michelman, *supra* n. 96, at 962.

advantaged.¹³³ Inequalities that do not redound to the benefit of those at the bottom are illegitimate. For Rawls, this principle is not cashed out through income standards or transfer payments alone; it must imbue the general “organization of the economy,” and the distribution of wealth, power, and authority as well as income.¹³⁴ Because his focus rests on welfare, however, Michelman reads the difference principle with an eye to income. “Even apart from the quest for justiciability,”¹³⁵ he writes (and we will return to that quest), “the difference principle is unsatisfactory”;¹³⁶ for Rawls seems interested simply in maximizing the income of those at the bottom, irrespective of whether that income is adequate to meeting basic needs,¹³⁷ or whether it substantially exceeds that level.¹³⁸ Moreover, Michelman finds it difficult to feed the “primary good of self-respect”¹³⁹ into the machinery of the difference principle, because the good of self-respect “does not seem to fit the difference principle’s ‘more is better’ attitude.”¹⁴⁰ Yet, from the point of view of liberal constitutional theory, the centrality of self-respect and equal respect in Rawls’s theory are an important part of his appeal.

Michelman does find some support for a just wants/insurance rights approach to welfare elsewhere in Rawls’s theory. While the difference principle is uncongenial, it is possible that Rawls’s equal liberty principle or his principle of fair equality of opportunity, or even “justice as fairness” as a whole implies a bundle of “insurance rights” such as Michelman is championing.¹⁴¹ Mainly, however, Michelman focuses on explicating and assessing the difference principle as a source of welfare rights.

133. See Rawls, *supra* n. 8, at 100-01; John Rawls, *Political Liberalism* 283 (Colum. U. Press 1996). Michelman explicates and criticizes the difference principle in “In Pursuit of Constitutional Welfare Rights,” *supra* n. 96, at 976-88.

134. See Rawls, *supra* n. 8, at 7-11, 54.

135. Michelman, *supra* n. 96, at 982.

136. *Id.*

137. “A precept for the distribution of material social goods,” writes Michelman, “which ignores claims regarding basic needs as such, and is sensitive only to claims regarding money income, will for many of us seem incomplete and thus not fully in harmony with our ‘considered judgments.’” *Id.*

138. Michelman states:

Income-transfer activity is simply to be intensified just up to the point where any further intensification lowers total output so much that the bottom’s absolute income begins to fall even as its relative share of total consumer satisfaction continues to rise. Under the difference principle, that is all there is to it. There can be no implicit insurance-rights package because there is no concern for what the bottom spends (or is able to spend) its income on. Income is income—a primary, an elemental, social good, of which the bottom simply wants and is entitled to as much as it can get.

Id. at 981.

139. *Id.* at 983.

140. Michelman, *supra* n. 96, at 983.

141. After all, fair equality of opportunity implies a right to education, and that right entails “subsistence or health or freedom from extreme environmental deprivation,” for without them, “how could educational offerings effectuate fair equality of opportunity?” *Id.* at 989. So too, the “[e]njoyment of basic liberties” like freedom of speech has “fairly straightforward and objective biological entailments,” which spell subsistence and the other insurance rights. *Id.* Finally, the “preeminent good of self-respect may imply welfare rights reaching beyond those biological entailments,” although Michelman does not explore how. *Id.* at 990.

Unlike the “‘more is better’ attitude” of Rawls’s difference principle, Michelman’s “just wants” theory provides a touchstone for determining the metes and bounds of welfare provision that seems directly tied to equal respect.¹⁴² Beyond the point at which welfare provides a decent minimum of social goods, it seems wiser to allow considerations of economic incentives and market efficiency to hold sway. As a rational actor behind Rawls’s “veil of ignorance,” one might well prefer assurance that one’s “just wants” be satisfied, and for the rest one might prefer to wager that one’s individual capacities were at least middling as the market measures things—and choose against the “more is better” attitude of the difference principle.

Certainly, Michelman makes a valuable point about the vulnerability of the difference principle from the point of view of calibrating welfare rights or a minimum income. However, we risk being misled if we look at the difference principle only from this perspective. From it, we might surmise that what separates Rawls’s views about social and economic rights from Michelman’s is simply a quarrel over what form of income redistribution to enshrine in the Constitution—minimum income pegged to the difference principle, or minimum welfare rights pegged to just wants. In fact, neither of these alternatives captures Rawls’s view of how the principles of justice, including the difference principle, bear on constitutional political economy. Rawls devotes great attention in *A Theory of Justice* to just this subject; what he writes makes plain, I think, that he would include constitutional baselines respecting work and participation in the economic order, as well as welfare.

Despite the tension he uncovers between the primary good of self-respect and the “more is better” attitude of the difference principle applied to income, Michelman is right in suggesting that the difference principle is concerned with the social bases of self-respect and mutual respect. Indeed, it concerns them more than it does the rational actor’s calculus of consent regarding income shares. When Rawls writes about consent, he is concerned about what it takes to make each person a consenting member—a charter member—of society. He is concerned not only, or even primarily, with rational choice, but with contract, undertaking, and commitment¹⁴³—more precisely, with consent and commitment to the social enterprise, and, conversely, with the conditions which turn consent and commitment into submission and subjection. This is the problem Rawls dubs the “strains of commitment.”¹⁴⁴ Under an unjust political economy, such as ours, there are millions of citizens who cannot plausibly see themselves as members of a

142. Michelman may have been the first sympathetic critic of Rawls to suggest that the difference principle and the income guarantee it entailed were not the only nor the most compelling principle that could be derived from Rawls’s original position. A just wants principle might fit the bill better. For a thoughtful later reading, canvassing the critics and making these points in greater detail, see Jeremy Waldron, *Liberal Rights: Collected Papers 1981-1991*, at 250-70 (Cambridge U. Press 1993).

143. Rawls, *supra* n. 8, at 176 (“[W]hen we enter an agreement we must be able to honor it even should the worst possibilities prove to be the case. . . . Thus the parties must weigh with care whether they will be able to stick by their commitment in all circumstances.”).

144. *Id.* at 145, 176, 423. For a thoughtful discussion of this theme in Rawls, see Waldron, *supra* n. 142, at 259-63.

political community organized in their name to promote their interests and capacities. Instead of supporting their capacities for commitment we have strained them to a breaking point.

What, then, *are* the political-economic bases of consent and commitment? More important, writes Rawls, than “a high material standard of life”¹⁴⁵ in securing “a just and good society . . . is meaningful work in free association with others, these associations regulating their relations to one another within a framework of just basic institutions.”¹⁴⁶ That is why, as you will recall, the difference principle reaches beyond income to the distribution of wealth and power; it concerns shared authority no less than a fair share of goods. This is the key difference between Rawls’s constitutional political economy—which he dubs a “property-owning democracy”¹⁴⁷—and the political economy of the welfare state. “In a welfare state,” he writes in a 1987 preface to *A Theory of Justice*, “the aim [of political institutions] is that none should fall below a decent standard of life By contrast, in a property-owning democracy the aim is to carry out the idea of society as a fair system of cooperation over time between citizens as free and equal persons.”¹⁴⁸ The “background institutions of property-owning democracy . . . try to disperse the ownership of wealth and capital, and thus to prevent a small part of society from controlling the economy and indirectly political life itself.”¹⁴⁹ “The idea is not simply to assist those who lose out through accident or misfortune (although this must be done), but instead to put all citizens in a position to manage their own affairs and to take part in social cooperation on a footing of mutual respect”¹⁵⁰

In a word, Rawls’s precepts for political economy fall squarely within the social citizenship tradition. His political economy of citizenship bears a strong family resemblance to those of the Populists, Progressives, and New Dealers who fashioned the variants of social citizenship thought in America. Like them, he holds that one cannot be a consenting, charter member, a “citizen,” of the national community without decent work, a measure of economic independence, and at least a small share of authority over the governance of one’s work and shared economic life.

Whether one rests one’s normative claim for welfare rights on some variant of Rawlsian liberalism, as Michelman does in the work we have been considering, or one relies on the republican tradition, as he does in the essays we take up later, a key part of the argument for welfare rights is this: These rights are necessary to secure the social bases of self-respect (the main concern in Rawls) and of independence and mutual respect or equal standing (republicanism’s primary emphasis). In sum, welfare rights are necessary to a liberal republican (or, if you

145. Rawls, *supra* n. 8, at 290.

146. *Id.*

147. John Rawls, *Preface for the French Edition of A Theory of Justice*, in *Collected Papers* 415, 419 (Samuel Freeman ed., Harv. U. Press 1999).

148. *Id.*

149. *Id.*

150. *Id.*

prefer, a republican liberal) conception of equal citizenship. Yet, plainly the social bases of equal citizenship consist of more than a decent minimum of food, shelter, and other material needs. They also demand a right to earn a livelihood through decent work; they require an opportunity to contribute in some recognized fashion to the social enterprise as well as to civic and political life. This broader view of the material dimensions of constitutional equality has a better mooring in the empirical literature that treats the social and economic underpinnings of self-respect¹⁵¹ and mutual respect¹⁵² among women and men in today's America—and a better mooring in our constitutional history.

B. Justiciability—A Concern for Judicial Competence and Legitimacy

The family resemblance we found between Rawls and earlier proponents of social citizenship is one that critics like Sandel studiously smudge over, in order to claim that Rawls has abandoned the “formative” project of developing good citizens.¹⁵³ Michelman is as careful and generous a reader as dwells in the republic of letters; he does not smudge over these aspects of Rawls's political economy, but openly puts them aside to carry on with “minimum protection” and constitutional welfare rights. Probably Michelman would have invoked justiciability as reason enough to have put other social citizenship norms to one side, both in reading Rawls and in his own constitutional theorizing. “Justiciability,” indeed, was Michelman's reason for seeking insurance rights, even though he conceded that it was “easier and more natural to find in Rawls [a right to a] guaranteed money income”¹⁵⁴ or, more generally, a “right[] against excessive or unnecessary inequality of wealth or income.”¹⁵⁵ Justiciability has two dimensions here. The first concerns institutional capacity, or “judicial competence” in legal process-ese. The second concerns the degree to which a given norm is formally law-like,

151. See e.g. William Julius Wilson, *When Work Disappears: The World of the New Urban Poor* (Alfred A. Knopf 1996); Arthur H. Goldsmith et al., *The Psychological Impact of Unemployment and Joblessness*, 25 J. Socio-Econ. 333 (1996); Amartya Sen, *The Penalties of Unemployment* (Banca D'Italia, Working Paper No. 307, 1997).

152. Of course, complex patterns of respect, deference, and degradation form around class and occupational hierarchies, but all the empirical literature suggests that the most salient border between minimum respect and degradation in today's class structure falls along the line between those who are recognized by organized society as working and providing a decent living for themselves and their families, and those men and women at the bottom of the nation's class hierarchy who are not. See e.g. Joel F. Handler & Yehekel Hasenfeld, *We the Poor People: Work, Poverty, and Welfare* (Yale U. Press 1997); Katherine S. Newman, *No Shame in My Game: The Working Poor in the Inner City* (Alfred A. Knopf 1999). On the experience of women in regard to the identities of housewife and “[waged] working woman” and the dilemmas of self-respect and social recognition as a full and equal member of American society, see Vicki Schultz, *Life's Work*, 100 Colum. L. Rev. 1881, 1883 (2000) (arguing that for women, no less than men, the right to participate in decent work is indispensable to equal citizenship; canvassing empirical literature showing that “a robust conception of equality [for women] can be best achieved through paid work, rather than despite it.”).

153. Michael J. Sandel, *Democracy's Discontent: America in Search of a Public Philosophy* 6 (Harv. U. Press 1996); see Michael J. Sandel, *Liberalism and the Limits of Justice* (Cambridge U. Press 1982); cf. Rawls, *supra* n. 8, at 259 (noting that not only their capacity for self-respect but more broadly “the sort of persons [citizens] want to be as well as the sort of persons they are” are shaped by the political economy they live under).

154. Michelman, *supra* n. 96, at 966.

155. *Id.*

determinate, and objective in its application. This dimension of justiciability obtains whether the setting is the courtroom, the legislature, or the constitutional convention, when “constitutional amendment is the chosen avenue of reform.”¹⁵⁶ In any of these fora, one must be concerned that the norms one is crafting or deriving from more general constitutional texts are such norms about which one can say with some measure of certainty that this constitutional requirement has or has not been—or is or is not in the process of being—met.

Begin with judicial competence. Here, surely the starting point must be “compared to what?” Is a right to decent work any more beyond judicial capacities or more insulting to separation of powers constraints than the rights to welfare, health care, and decent housing with which Michelman conjures? With the former as with the latter, a number of competency and separation of powers concerns arise, and a variety of judicial strategies are open.

The concerns and the strategies are familiar, and Michelman briefly surveys several.¹⁵⁷ “[P]erplexing questions of economic feasibility”¹⁵⁸ may arise; a decree fulfilling a “claimed housing [or employment] right [might] leav[e] the bottom worse off, on the whole, than it now is.”¹⁵⁹ But, says Michelman, such questions “do not seem different in essence from other issues that courts have deemed judicially triable.”¹⁶⁰ And in respect of housing and school finance, as well as other social citizenly matters, judicial experience has grown since 1973, particularly if one takes account of developments abroad and in America’s state courts.¹⁶¹ Courts have found credible ways to assess claims of glaring failure on the part of national and subnational governments to address and meet guarantees of social rights. But it must be admitted that this body of constitutional (as distinct from statutory-interpretive) judicial experience has not addressed work and employment; and certainly, it is plausible that the many-sided determinants of the availability of decent work might counsel against a judicial role in interpreting and enforcing this as opposed to other social rights. I want to leave this possibility hanging, to be revisited when more of Michelman’s and my own thoughts about judicial and non-judicial interpretation and enforcement of social rights are on the table.

156. *Id.* at 967.

157. *See id.* at 1004-10.

158. *Id.* at 1006.

159. Michelman, *supra* n. 96, at 1006.

160. *Id.*

161. For a chastened but positive assessment of judicial contributions in the education financing arena, see Martha Minow, *Just Education: An Essay for Frank Michelman*, 39 *Tulsa L. Rev.* 547 (2004). On the South African Constitutional Court’s interventions in the domain of housing, see Michelman, *Constitution and Social Rights*, *supra* n. 9, at 17-18, 26-27. Most strikingly, perhaps, has been the work of German constitutional courts, at both the national and subnational levels, in respect of constitutional rights to housing and to a decent livelihood. See Peter E. Quint, *The Constitutional Guarantees of Social Welfare in the Process of German Unification*, 47 *Am. J. Comp. L.* 303 (1999). For a general discussion of constitutional adjudicatory experience with social rights, see Cécile Fabre, *Social Rights under the Constitution: Government and the Decent Life* 152-81 (Oxford U. Press 2000).

“More plausible” than the argument for adjudicative incompetence, notes Michelman, “is the notion of remedial incompetence.”¹⁶² Courts have no way of enforcing social rights without the raising and appropriating of public funds and the creation of new administrative structures. Such actions are not only under the control of the other branches, but also “involve[] a complex of subsidiary but vitally important choices which the judiciary lacks all basis for making.”¹⁶³ One response to this problem is “a judicial mandate to legislative, executive, or administrative officers to prepare, submit, and carry out a corrective plan.”¹⁶⁴

Separation of powers presents a different order of concern. Here, Rawlsian principles, on Michelman’s account, may collide. Judicial vindication of substantive welfare rights may come at too high a cost “in participatory inequality [as between the judiciary’s and the citizenry’s respective roles in identifying the social rights to which a society’s shared principles of justice commit it] which damages [the citizen’s] self-respect.”¹⁶⁵ The trade-off between “justice in participatory rights and justice in substantive rights,”¹⁶⁶ may demand judicial forbearance. Or at least, it may demand that courts “not cut welfare rights out of the whole cloth of speculative moral theory.”¹⁶⁷ Likewise, I’d add, for the same reason, courts ought to forebear from cutting social citizenship rights out of the whole cloth of interpretative recollection of extra-judicial constitutional tradition.

But such judgments do not exhaust the question of whether judges should ever allow such a theory to inform their application of “due process and equal protection guaranties in their formal and non-substantive aspects”¹⁶⁸ to statutory materials. Here Michelman takes inspiration from the lower federal courts’ pre-*Dandridge* readiness to find in equal protection a command to invalidate even seemingly plausible classifications among potential eligibles¹⁶⁹ and generally to put the statutory programs’ limitations and qualifications under strain, in the name of making need alone the valid criterion. Too, he finds in cases like *King v. Smith* studies of how courts can find in AFDC and kindred legislation statutory rights that amounted to “justice-inspired [legislative] supplementation of the constitutional catalogue.”¹⁷⁰ Certainly, this is a credible way to interpret the Court’s reading of Congress’s intent against the grain of legislative history and of Congress’s knowing acquiescence in state practices the Court went on to condemn. Unprepared to declare the existence of such a constitutional right (and so openly and irrevocably to constrain Congress), the Court nonetheless was prepared to expand and deepen the limited and qualified commitments Congress had made.

162. Michelman, *supra* n. 96, at 1006.

163. *Id.*

164. *Id.*

165. *Id.* at 1010.

166. *Id.*

167. Michelman, *supra* n. 96, at 1010.

168. *Id.*

169. *See id.* at 1011-12.

170. *Id.* at 1011.

Not only is this a plausible reconstruction of the interaction between Court and Congress, but it is suggestive of how a judiciary mindful of the constitutional dimensions of work and participation could read statutory material in the area of labor and employment.¹⁷¹ In the case of statutory work and employment rights, however, a court would not need to rely on “enlightened,” emergent, contemporary notions of democracy and justice. Nudging state or federal agencies to construe their congressional mandates in ways that leaned toward inclusion or actual availability of work opportunities, courts could proceed in a somewhat more conservative interpretative style, relying on old, not emerging or “enlightened” elite understandings of equal rights and constitutional equality.

C. *Justiciability and Problems of Indeterminacy and of Constraints on Democracy in Public Political Fora*

“In Search of Constitutional Welfare Rights” holds that welfare rights are the best vocabulary for expressing a constitutional commitment to a social minimum, partly by dint of their supposedly greater crispness and formal, determinate applicability. Donning the hat of counselor to hypothetical constitution-framers, Michelman says this: If you want to lay a basis for “convincing [constitutional] advocacy in political forums,”¹⁷² then state your commitment to a social minimum in the form of “insurance rights.”¹⁷³ To rely on a more Rawlsian vocabulary “would [fail to] give . . . advocates any special foothold for challenging legislative judgments.”¹⁷⁴ Of course, here Michelman is comparing insurance rights to Rawls’s difference principle. The comparison that interests us, however, is a different one.

Is the legal-rhetorical foothold supplied by a right to decent housing any more secure from contending interpretations than that provided by a right to decent work? We need not belabor the point. Michelman concedes it in a recent engagement with the arguments I am raising here.

“If we . . . compare a social-citizenship conception with a welfare-right conception of a positive constitutional guarantee in the economic sphere, we can see that neither sort of conception trumps the other on the scale of justiciability.”¹⁷⁵ Indeed, the examples Michelman chooses are those we’ve been employing. He points to the welfare right found in the present South African Constitution, “to have access to adequate housing,” a welfare right whose “progressive realization” the state must take “reasonable” steps “to achieve.”¹⁷⁶ And he asks whether such a right registers any higher on the scale of justiciability “than would a declared duty of the state to do the best it can to maintain an

171. For a like-minded account of possible readings of the Wagner Act, see Mark Barenberg, *Democracy and Domination in the Law of Workplace Cooperation: From Bureaucratic to Flexible Production*, 94 Colum. L. Rev. 753 (1994).

172. Michelman, *supra* n. 96, at 1002.

173. *Id.*

174. *Id.* at 1003.

175. See Michelman, *Democracy-Based Resistance*, *supra* n. 9, at 1896.

176. *Id.*

economy and society in which everyone who wants it has access to respectable, fulfilling, adequately remunerated work.”¹⁷⁷ The answer, he concedes, is no.¹⁷⁸

If the welfare-right conception has an edge in respect of “concerns about constitutional-legal form,”¹⁷⁹ it is on the scale of what Michelman now calls “narrowness.”¹⁸⁰ This is a concern distinct from justiciability. It does not concern courts’ remedial competence or democratic deficits, nor whether a given norm is too general and wide-open-to-competing-interpretations. Rather, it concerns how widely or narrowly a norm “preempt[s] major public policy choices from the ordinary politics of democratic debate and decision.”¹⁸¹ More than a welfare right, “a constitutional social-citizenship right . . . reach[es] in a hundred directions . . . into the deepest redoubts of the common law and the most basic choices of political economy a modern society can make.”¹⁸²

Certainly, if my historical scholarship is right about the way these rights have figured in public political discourse and debate about everything from currency to education to industrial organization, then Michelman is right. And note: Michelman’s point pertains independently of the scope of judicial enforceability, as long as we presume our public officials to be conscientious.

Here, Michelman’s thinking merges with the social citizenship tradition’s conception of how its norms would bear on democratic lawmaking—not via judicial review, but instead by directly constraining participants and the standards they apply and the arguments they offer in debates and decisions about public policy-making. Over against the charge of non-“narrowness” or democracy-stymieing, Michelman offers a defense on behalf of social citizenship norms. It is precisely the “blatant ‘non-justiciability’ of a social-citizenship right—its utter lack of mechanical applicability to any hard or contested question of public policy . . . [that] saves it from charges of contrariety to democracy.”¹⁸³ Instead of thwarting democracy, social citizenship norms would mark a “gain for democracy . . . [by] impos[ing] a certain constraint on how citizens and their elected representatives would frame and approach sundry questions of public policy.”¹⁸⁴ That is, the norms would demand of all concerned an “exercise[] of . . . judgment . . . [about] which choice will best conduce to the social citizenship of everyone.”¹⁸⁵

By invoking Michelman present to respond to Michelman past, we have strayed from Michelman on Rawls and welfare rights in 1973. The burden of this foray into the present has been to suggest that Michelman’s insistence on the justiciability of social and economic rights in non-judicial fora was a product of the politics and doctrine of the day. Today, doctrine and politics afford neither the

177. *Id.*

178. *See id.*

179. *Id.* at 1895.

180. *See* Michelman, *Democracy-Based Resistance*, *supra* n. 9, at 1895-96.

181. *Id.* at 1895.

182. *Id.* at 1897.

183. *Id.* at 1898.

184. *Id.*

185. Michelman, *Democracy-Based Resistance*, *supra* n. 9, at 1898 (emphasis omitted).

same possibilities nor their concomitant constraints, and we do better to pursue the path of social citizenship down which Rawls and our home-grown ideals of social citizenship direct us. Or as Michelman observes in reference to a fuller version of the criticisms leveled here, if we count ourselves among those who “maintain that constitutional law outside the courts can figure importantly in the conduct of public affairs [and] that contention outside the courts over constitutional-legal meanings and obligations very possibly can be . . . a site for democracy in action,”¹⁸⁶ then should we not put justiciability issues aside, and ask: “Is there any reason why we who take this view should hesitate to embrace a social-citizenship conception of constitutional social rights, in preference to a welfare-right conception, assuming we find the former to be morally the more appealing conception?”¹⁸⁷

There is more to say about the interaction of social-citizenship norms and democratic politics and lawmaking, and more of Michelman’s insights and qualms to consider. We may yet conclude that a sparser set of social rights, a set of social minima, ought to enjoy constitutional pride of place, over against the broader, more historically rooted, and, perhaps, “morally . . . more appealing” social-citizenship conception that I have put forward. We may yet conclude that judicial safeguards should obtain for essential welfare rights but not for the social citizenship principle. And we may find ourselves, with Michelman, in the grip of genuine dilemmas. But further consideration should await a reading of Michelman’s republican case for welfare rights. This brings us to his turn to history, and his thoughtful reading of Progressive constitutionalism.

IV. MICHELMAN’S REPUBLICAN CASE FOR WELFARE RIGHTS

A. *The Distributive Dimension of Constitutional Property Rights and the Problem of Legal Form*

By the late 1970s, the Court had begun to cut the solicitous strands of doctrine well short of substantive welfare rights, declaring ever more categorically that its Constitution confers “no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property”¹⁸⁸ Liberal constitutional scholarship grew more theoretical as the Court grew more conservative. Theorists acknowledged the limits of judicial competence and legitimacy in the area of affirmative rights. They began to reflect on the “gap between the reach of constitutional case law and the reach of the Constitution.”¹⁸⁹ They built up more general, less court-centered accounts of constitutional democracy as a system of self-government.

186. Michelman, *Constitution and Social Rights*, *supra* n. 9, at 28.

187. *Id.* at 28-29.

188. *DeShaney*, 489 U.S. at 196.

189. See Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. Rev. 410, 419 (1993).

For his part, Michelman made civic republicanism and contemporary pragmatism and critical theory his own, and brought them into an internal dialogue with liberal constitutional theory. Out of this emerged a profound series of reflections on the dilemmas of constitutional self-government, the tensions between popular sovereignty and the rule of law, the nature of adjudication, and, most germane here, the “possessive” and “distributive” conceptions of constitutional property rights.¹⁹⁰ Written in 1986, Michelman’s exploration of the tensions between these two kinds of property norms sets out to reconstruct the republican logic and history of the distributive side of constitutional property claims, to suggest why this side has been the recessive one in constitutional law, and to join issue with those, like Michael Walzer, who object for staunchly democratic reasons to the constitutionalization of “welfare claims as rights.”¹⁹¹

Michelman seized hold of the founders’ venerable republican conviction that “security of property holdings was [not just a matter of] private self-interest”,¹⁹² it was “of general political concern.”¹⁹³ Material independence was “viewed as indispensable if one’s independence and competence as a participant in public affairs was to be guaranteed.”¹⁹⁴ This maxim had obvious bearing on the anti-redistributive, property-protecting provisions in the founders’ Constitution; but it also implied a *distributive* imperative. This imperative, too, found support in much that the founders wrote and did. But it found no obvious expression in the provisions and architecture of their Constitution. The distributive norm was deferred, Michelman suggests. Given the prospect of westward expansion, the founding generation could envision “a freehold beneath every household . . . supporting the freeholder’s independence.”¹⁹⁵ As long as this state of affairs continued, the Constitution’s possessive regard for property was sufficient to answer the founders’ distributive concerns.

By the end of the nineteenth century, however, a “Progressive critique” of this constitutional arrangement had emerged. With the rise of industrial capitalism, a regime of anti-redistributive property rights—so the critique ran—might itself “constitute undemocratic relationships of power and subjection.”¹⁹⁶ On this account, persons—wage earners, tenant farmers, and others—“subjected to the proprietary power of others lacked . . . the material foundations of independent political competence.”¹⁹⁷ In short, with the rise of large-scale

190. See e.g. Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 Fla. L. Rev. 443 (1989); Frank Michelman, *Law’s Republic*, 97 Yale L.J. 1493 (1988); Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 Iowa L. Rev. 1319 (1987) [hereinafter Michelman, *Possession vs. Distribution*]; Frank I. Michelman, *Foreword: Traces of Self-Government*, 100 Harv. L. Rev. 4 (1986); Radin & Michelman, *supra* n. 12.

191. Michelman, *Possession vs. Distribution*, *supra* n. 190, at 1320-21. The essay by Michael Walzer which Michelman addresses is Michael Walzer, *Philosophy and Democracy*, 9 Pol. Theory 379 (1981).

192. Michelman, *Possession vs. Distribution*, *supra* n. 190, at 1329.

193. *Id.* (emphasis omitted).

194. *Id.* at 1329.

195. *Id.* at 1332.

196. *Id.* at 1335.

197. Michelman, *Possession vs. Distribution*, *supra* n. 190, at 1335.

corporate enterprise and its impact on the legal-political-intellectual culture of the late nineteenth century, the distributive and anti-redistributive sides of our tradition's constitutional understanding of property claims were set on a collision course. Once it was firmly recognized that "uncontrolled so-called private power"¹⁹⁸ exposes individuals to subjection, it behooved government to act. "Logically, however, the state cannot offer protection . . . by the same formal law that would protect absolutely against redistributive political 'interventions.'"¹⁹⁹ Accordingly, while the Progressive critique largely succeeded in undoing the regime of anti-redistributive property norms, it did not succeed, on Michelman's account, in supplanting those norms with distributive ones. Indeed, Michelman implies that the Progressive reformers never sought to embed such distributive norms into constitutional discourse. They hardly could have hoped to do so, it appears in his view, since distributive norms, whatever their claim to constitutional status, seem to place an unbearable burden on our commitment to formally realizable, objective, "law"-like standards as the sole, legitimate *lingua franca* in the province and discourse of the Constitution.²⁰⁰

As you might guess, I am on all fours with Michelman and he with me all the way to the last point. There, as an historical and interpretative matter, we seem to part ways in modest degree; for I read the Progressives, and their forebears and descendants, stretching from the 1880s to the 1940s—generations of reformers which, following Michelman, for present purposes, I'll simply call Progressives—somewhat differently. As I've encountered them in years of reading, these generations of Progressives found no insoluble tension inherent in the effort to "cast *substantively appealing and defensible* distributive norms"²⁰¹ as constitutional standards. They did not neglect "the classical negative understanding of fundamental rights"²⁰² (in the thick of *Lochnerism*, how could they?), nor the appeal that understanding made to a deep-seated image of constitutional norms as "strongly objective"—abstract, simple, formal—and, thereby, law-like. But they treated the grip of these ideas on "the American constitutional imagination"²⁰³ as contingent and contestable—via tools Michelman knows well: pragmatism, context, a "changing Constitution." Thus, as I've shown elsewhere in needlepoint detail, their view was this: the need to make the constitutional tradition's distributive imperatives into direct claims against the state did not compel divorcing constitutional from political economic discourse; it did demand dethroning the courts and installing Congress and the "active branches" as the nation's new "constitutional political economists."²⁰⁴

198. *Id.*

199. *Id.* at 1336.

200. *See id.* at 1337.

201. *Id.* at 1321.

202. Michelman, *Possession vs. Distribution*, *supra* n. 190, at 1321 (quoting David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. Chi. L. Rev. 864, 889 (1986)) (internal quotations omitted).

203. *Id.*

204. *See* Forbath, *Caste, Class, and Equal Citizenship*, *supra* n. 7, at 51-57.

In tandem with this reallocation of interpretive authority, I've shown how Progressives set about the hermeneutic task of translating "the 'old and sacred possessive [common-law based and anti-redistributive] rights' of property and labor"²⁰⁵ into new "social and economic rights," to enable "a return to values lost in the course of . . . economic development' and 'a recovery' of the old rights' once robust social meaning."²⁰⁶ The "active branches" and the citizenry itself, so Progressives and, later, New Dealers contended, were better suited to the task of interpreting and applying the new "social meaning" of constitutional property norms—in part for the kinds of justiciability reasons Michelman highlights, but also because they sought to advance a more dialogic and democratic mode of constitutional interpretation and decisionmaking.

Interestingly, if I am right about this history, I do no more than provide an ancestry for the revisionist aspect of Michelman's argument about the forms of constitutional law and democratic politics.²⁰⁷ Michelman's urging is this: If we can but relax the hold of our inherited ideal of legality in favor of a revised and more pragmatic one, then we might open the space for a fuller consideration of "distributive property claims . . . [in] the province[] and discourse[] of constitutional law."²⁰⁸

B. *Republicanism vs. Welfare Rights*

Perhaps because his attention rests so largely upon the seeming tension between distributive norms and "legal" ones, and perhaps because his proof text is Walzer's critique of the idea of constitutional legalization of welfare rights, the latter remains Michelman's only specification of what a modern distributive constitutional property claim—deserving of our more ample consideration—might be. As a result, another, perhaps equally deep, tension goes unexplored. That is the tension between the modern welfare rights claim and the republican underpinning Michelman claims for it.

Republican maxims hold that a measure of material independence is a necessary basis for political competence and standing. That is Michelman's normative baseline. But in the republican outlook he invokes, such citizenly

205. *Id.* at 69 (quoting Franklin D. Roosevelt, *Message to Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934)*, in *The Public Papers and Addresses of Franklin D. Roosevelt*, vol. 3, 291-92 (Random H. 1938)).

206. *Id.* (quoting same) (internal quotations omitted). Nor were these reform thinkers unmindful of the problem Michelman identifies of mediating between distributive and possessive property claims. See Michelman, *Possession vs. Distribution*, *supra* n. 190, at 1321. Progressive reformers like Brandeis and Commons devoted vast attention to reconciling the various possessive property claims of employers with such social rights as minimum livelihoods and unemployment insurance and with the claims of employees, as of right, to a voice in the governance of the enterprise. It is true, though, that their efforts at reconciliation, while principled, did not take the form of "strongly objective standards" but were rather more contextual and pragmatic. See e.g. John R. Commons, *Legal Foundations of Capitalism* (Macmillan 1924).

207. Ancestors who were, at least until World War I, largely blind to what we now know—and what post-war Progressives began to surmise—about the democratic resources in rights, "higher law," and judicial authority.

208. Michelman, *Possession vs. Distribution*, *supra* n. 190, at 1324.

standing and competence have always been bound up with the status of one who fulfills some recognized, responsible role in the social enterprise—one who “earns” her measure of material security and “independence.”²⁰⁹ We certainly may find, as far back as the seventeenth and eighteenth centuries, support in both “liberal” and “republican” texts for the view that the poor have a subsistence claim on society’s resources. In truth, that claim was well-defended by Locke; it is there, too, in the writings of Adam Smith.²¹⁰ But that is a far cry from making this longstanding claim a basis for citizenship in the sense of full membership in the political community. Neither Locke, nor Smith, nor Madison and Jefferson in the “republican” texts Michelman relies on,²¹¹ nor later renderings of liberalism and republicanism, up to and including Professors Rawls and Sandel—none of these lend support to the idea of making public assistance *simpliciter* the material base of citizenship. That base, that dignifying social minimum, must rest on some socially recognized contribution on a person’s part to the common enterprise.

V. WELFARE VS. SOCIAL CITIZENSHIP RIGHTS

A. *Thus Far: The Social-Citizenship Conception Is the Better One*

This broader, more participatory conception of social citizenship may not be necessary in every liberal democratic society today to assure a person’s standing as an “equal participant in public affairs.” But to use a phrase with which Michelman recently has conjured, this account seems firmly embedded in America’s “constitutional identity.”²¹² The longstanding links between work, equal respect, and citizenship seem constitutive of “who we think we are and aim to be as a

209. See William E. Forbath, *The Ambiguities of Free Labor: Labor and the Law in the Gilded Age*, 1985 Wis. L. Rev. 767 (tracing this theme in republican discourse of political and legal elites and labor reformers in U.S. from 1780s to 1880s); Forbath, *Caste, Class, and Equal Citizenship*, *supra* n. 7, at 13-15, 18-19, 26-51 (same, adding inflections of theme in women’s, African American, and agrarian movements, and carrying forward into 1890s-1930s).

210. Regarding Locke, see e.g., John Locke, *Two Treatises of Government* 170 (Peter Laslett ed., Cambridge U. Press 1960) (poor man has a right to “Title to so much out of another’s Plenty as will keep him from extream want”); Thomas A. Horne, *Property Rights and Poverty: Political Argument in Britain, 1605-1834*, at 48-65 (U.N.C. Press 1990); and Richard Ashcraft, *Liberalism and the Problem of Poverty*, 6 Crit. Rev. 493, 497 (1992) (demonstrating that Locke and classical liberalism emphasize natural right to subsistence; they see “poor relief [as a] constitutive and necessary feature of any legitimate society”). Regarding Smith, see e.g., Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* vol. 1, 80 (Edwin Cannan ed., 6th ed., Methuen & Co. 1950) (“No society can surely be flourishing . . . of which the far greater part of the members are poor and miserable.”); Istvan Hont & Michael Ignatieff, *Needs and Justice in the Wealth of Nations: An Introductory Essay*, in *Wealth and Virtue: The Shaping of Political Economy in the Scottish Enlightenment* 1 (Istvan Hont & Michael Ignatieff eds., Cambridge U. Press 1983) (identifying meeting needs of poor as Smith’s theoretical axis for assessing political-economic arrangements).

211. For a Madison or Jefferson, poor relief left paupers still “dependent” and, therefore, unqualified for citizenship. They favored ample material opportunities (they even occasionally championed rights to property in “full and absolute dominion”) for all white men willing and able to exploit them, and charity or coercion for the rest. See Forbath, *Caste, Class, and Equal Citizenship*, *supra* n. 7, at 13-14 (discussing and quoting from the Madison and Jefferson texts relied on by Michelman and other constitutional welfare rights defenders like Sunstein).

212. See Frank I. Michelman, *Morality, Identity and “Constitutional Patriotism,”* 76 Denv. U. L. Rev. 1009, 1025 (1999).

politically constituted people, [of] where we think we have come from and where we think we are headed.”²¹³

The idea that welfare rights fit well with either a liberal or a republican understanding of the material bases of equal citizenship was first forged in the context of the welfare rights movement, as a scholar’s contribution to that inspiring struggle. But the movement, like any social movement of subordinate people, was sharply constrained. It played the hand that history and the White House dealt it. Its programmatic vision, its strategy and goals, all were shaped by the social provision and institutional resources at hand to address black poverty—AFDC, LSO, and the Community Action Agencies. But nothing about this conjuncture gave any assurance that welfare rights were the right solution to the problem of social and economic exclusion confronting poor black citizens. Black leaders like King and Rustin plainly thought otherwise; they called for a “Negroes’ New Deal” that emphasized decent work. As a normative matter, and as a constitutional one, I have suggested, they were right.

The vision of citizenship fashioned by the welfare rights movement also was shaped by the fact that the movement’s constituents were women and mothers. King and Rustin had nothing to say about this fact, and precious little to say about gender equality in general. But everything we know about welfare and work suggests that generous and guaranteed welfare provision—however morally imperative it may be—cannot do the main work of securing gender equality for poor women. That also demands reconstructing the low wage labor market, striving to assure decent jobs for women, no less than men, and providing enabling rights, as well, to training and child care and old-age pensions, as well as provision and incentives that enable and encourage equitable sharing of dependent-care.

A liberal society that prizes the dignity of the individual, if it is an affluent one that can afford a guaranteed income that protects all against desperate want, must do so. To refuse is, in Rawls’s terms, to put an unbearable and unjust strain on individuals’ commitments to the social compact. But that is not enough. Equal citizenship also requires social citizenship. Or, as Michelman most recently put the claim on our joint behalf:

[We cannot] call on everyone . . . to submit their fates to a democratic-majoritarian lawmaking system, without also committing our society, from the start, to run itself in ways designed to constitute and sustain every person as a competent and respected contributor to political exchange and contestation and furthermore to social and economic life at large.²¹⁴

Once one embraces the view that the Constitution must vouchsafe the minimum social conditions of democratic lawmaking, one cannot leave the question of social citizenship where Michelman first left it in his Rawlsian and republican arguments. One cannot leave the work- and economic-independence-and-participation-related aspects of social citizenship to the give and take of

213. *Id.*

214. Michelman, *Constitution and Social Rights*, *supra* n. 9, at 25.

ordinary politics. Specification of what counts as decent work or recognized but non-waged contribution (such as child- or elder-care), and how, at a particular time, the nation ought to go about assuring such opportunities to all, of what counts as a decent livelihood at said time, of what counts as incapacity, and of what quantum of income should separate those, not incapacitated, who avail themselves of “welfare” or a guaranteed income versus those who “work”—all these issues and more may and, practically, *must* be addressed through political and market processes. But if social citizenship guarantees are prerequisites to political equality, then, at the most general level, these commitments must precede ordinary politics; otherwise, a broad swathe of the citizenry would be denied—as today they are denied—a constitutionally fair opportunity to act as citizen-participants in the very debates and decisionmaking upon which their citizenly standing depends.

As I’ve noted, Michelman, in his most recent work on constitutional social rights, seems to sign on to the “Forbath-style constitutional guarantee of social citizenship.”²¹⁵ In that work, he rehearses the justiciability issues, which had preoccupied him in his first, 1973, engagement with Rawls. These problems of “judicial role and competence” he says, should be the “least of our concerns.”²¹⁶ “Judges who know their business . . . can find both properly adjudicative standards for testing claims of social-rights violations and worthwhile, properly judicial remedies for violations when found.”²¹⁷

B. A New Dilemma: Does the Social Citizenship Conception Require Abandoning Justiciability?

More troubling than justiciability, Michelman argues, are two other sorts of objections. One is the problem of constraining democratic decision-making, which we’ve already glimpsed; the other objection goes to the “non-transparency” or lack of “ascertainability” of the social citizenship guarantee. For a constitutional order to be legitimate, all its core commitments must be such that citizens can see or ascertain that their “fellow citizens and their government [are] really complying with [them].”²¹⁸ Without this quality of “transparency” or “ascertainability,” how could one expect a reasonable citizen reasonably to assent to the constitutional order? The dilemma with the social citizenship guarantee, then, is that it is (a) a prerequisite for a legitimate liberal democratic constitution,²¹⁹ yet, at the same time, (b) deeply problematic in virtue of its “raging indeterminacy” and the fact that, therefore, “it will almost always be impossible for anyone to say decisively

215. *Id.* at 27; see *id.* at 29 n. 61 (noting the “persuasive case for the moral superiority of the social-citizenship conception”).

216. *Id.* at 13.

217. *Id.* at 15 (footnote omitted). Courts, therefore, “exercising constitutional review in entirely conventional, nonworrisome ways almost certainly can play a useful role in the promotion of the distributive aims of social rights guarantees.” Michelman, *Constitution and Social Rights*, *supra* n. 9, at 15.

218. *Id.* at 31.

219. *Id.* at 26, 30, 32.

whether [that guarantee] is or is not being pursued in earnest."²²⁰ In other words, the social citizenship requirement seems to land its proponents in contradiction. The constitutional regime is not legitimate if it does not include the guarantee; but it also is not legitimate if any of its basic guarantees are "such that citizens cannot judge whether those guarantees in fact are being kept, or at least at all times being pursued in good faith."²²¹

At the end of the day, however, Michelman puts both of these "deeper objections" to the social citizenship guarantee to rest; and he does so through the same device. "Rawlsian thought," he suggests, "offers a way out of this bind":²²² loosening the constitutional requirements of social citizenship from "rights" to "directive principles"²²³ (as that phrase is used in several of the world's constitutions to denote judicially non-cognizable but nevertheless basic and binding commitments²²⁴), or what Rawls would call "a constraint on public reason."²²⁵ The upshot is a constitutional order in which "the basic negative liberties—freedoms of conscience and expression, for example"²²⁶ require "fully firm, strict, and reliable substantive guarantees of compliance,"²²⁷ while "the rest of social citizenship"²²⁸ stands as a requirement that every lawmaker "and indeed every voter stands ready . . . to explain and defend all their votes, on matters affecting the structural conditions of social citizenship, as expressions of their honest best judgments about which choice is most conducive to assurance of social citizenship for all . . ."²²⁹ The distinction Michelman draws between "the basic negative liberties" and "the rest of social citizenship" makes plain that by "the rest

220. *Id.* at 30. Thus, suppose that "effective social citizenship on fair terms for all who seek it" is, indeed, among the principles to which the government must "visibly be committed . . . in order that the total governance system may be one that meets the . . . standard" of constitutional legitimacy. *See id.* And suppose that lawmakers this year have

replaced welfare with workfare, increased by one half the budget allocation for job training, reduced the minimum wage by one-third, extended the collective bargaining laws to cover employers of as few as ten workers, abolished rent control, budgeted an annual sum of 30 billion crowns for housing allowances and job training, increased income tax rates by five percent, reduced the prime lending rate by two percentage points, doubled the size of the employment discrimination mediation corps, and approved a new tariff schedule somewhat less protective than its predecessor, in exchange for reciprocal concessions from abroad.

Michelman, *Constitution and Social Rights*, *supra* n. 9, at 30-31. Is the government complying with the constitutional guarantee of social citizenship? "Raging indeterminacy of this sort seems to disqualify a clause like [the social citizenship guarantee] from figuring as a required component in a complete and legitimating constitutional agreement." *Id.* at 31.

221. *Id.* at 32.

222. *Id.*

223. *Id.*

224. Thus, for example, the Irish Constitution and the Indian Constitution (following the Irish model) both contain a list of social rights in a part headed "Directive Principles of Social Policy." Its opening paragraph states: "The principles of social policy set forth in this Article are intended for the general guidance of the [Parliament]. The application of those principles . . . shall not be cognisable by any Court under any of the provisions of this Constitution." Art. 45, Constitution of Ireland, 1937.

225. Michelman, *Constitution and Social Rights*, *supra* n. 9, at 32 n. 65 (quoting and citing Rawls, *supra* n. 133, at 216-20, 223-27) (internal quotations omitted).

226. *Id.* at 32.

227. *Id.*

228. *Id.*

229. *Id.*

of social citizenship” he here means not only the right to decent work or other rights we have labeled participatory, but rather all affirmative social rights including “welfare” rights.²³⁰

This shift from rights to directive principles seems to put Michelman’s answers to his three objections in conflict with one another. Michelman’s answer to the judicial overreaching objection is to underscore that courts can play a modest but valuable role in securing social rights, while abiding by more or less determinate, law-like standards for testing rights claims and ordinary views about the boundaries of courts’ institutional competence and authority. Michelman’s answer to the democracy- and transparency-based objections is to propose making social rights into not-rights-but-directive-principles fit not for courts, but for citizens and lawmakers in view of their “raging indeterminacy,” and in virtue of the modest but valuable role that constitutional directive principles can play as “constraints on” or “inflections of” public reason and deliberation.

In other words, Michelman seems to be ascribing a contradictory nature to the social citizenship guarantee. If the guarantee, conceived as “a right or set of rights,” is “such that citizens cannot judge whether [they] in fact are being kept,” then one is hard-pressed to imagine how such “a right or set of rights” could yield judges “properly adjudicative standards for testing claims of social-rights violations and worthwhile, properly judicial remedies for violations when found.”

C. *“Raging Indeterminacy”?: Normative and Practical Bases for Sorting Social Citizenship into Rights and Directive Principles*

There are various possible ways out of this contradiction; the best route may be this. Perhaps, in the absence of statutory specification, some social citizenship norms are and others are not reasonably well-suited for courts to help enforce. This, we saw, was Michelman’s view back in 1973, when he contrasted Rawls’s difference principle, as an equality guarantee, to welfare rights to food, shelter, health care, and education. The latter lent themselves to a measure of judicial enforceability; the former did not. Of late, however, Michelman has embraced enlarging the circle of social rights to include, for example, decent work; and this may have contributed to inclining him to the view that judgments about the “progressive realization” or “good faith pursuit” of any and all social rights are imbued with so many controvertible policy choices and trade-offs that they ought properly be made by the polity and not the courts.

But transmuting social rights into judicially non-cognizable directive principles comes at an obvious price; for as Michelman recognizes, courts can play a useful role in promoting (at least some elements of) social citizenship. So, it is worth asking whether there is a case for sorting out social citizenship guarantees into sub-categories of rights and directive principles. With the mediating idea of

230. See Michelman, *Constitution and Social Rights*, *supra* n. 9, at 33 (contrasting “formal, legal guarantees of . . . the core, basic negative liberties” with “confidence that public reason . . . prevails in public decisionmaking over matters affecting . . . social citizenship”).

directive principles in hand, we will not be drawn, as Michelman was in 1973, to conflate the justiciability of a particular element of social citizenship with an answer to the question whether that element carries important constitutional weight and significance.

So, let us return to the comparison and contrast between the “welfare right” to housing or shelter and the “social-citizenship right” to decent work. Along some important dimensions of justiciability, we have noted, neither of these rights trumps the other. We also have seen that the availability of decent work is a state of affairs which may have a uniquely large and disparate set of potential policy levers surrounding it, running to everything from childcare and job training to the prime lending rate, tax and tariff policies, public investments and employment, and beyond. This leads Michelman to query whether anyone, including presumably a court, could “say decisively whether [the guarantee] is or is not being pursued in earnest.” But practical complexity is not all that may importantly distinguish the social citizenship guarantee from welfare rights, like the right to housing.

Practical complexity is linked to complexities of social meaning and of cultural contention and change. What it means to ensure that no member of the community is homeless or without adequate shelter is not self-evident; but the range of plausible meanings is vastly more definite and exigent than what it means to ensure “decent work” for all, or to sustain every member as “a competent and respected contributor to political[,] . . . social, and economic life at large.”²³¹

D. Imagining Welfare Rights and Social Citizenship in America in 2020

Imagine an America in the year 2020 constitutionally committed to welfare rights and likewise committed to guaranteeing social citizenship for all. In that America, if some are homeless, they should be entitled to say that the Constitution requires that government act in some fashion to ensure an increase in the supply of available, affordable housing—and to ensure emergency shelter in the meantime. But if some are “jobless,” say by dint of a rash of outsourcing of jobs overseas, ought they be entitled to say that the Constitution requires that government act to increase the supply of full-time jobs? Putting all practical difficulties and impediments aside, there would remain the question whether that response—vindicating the asserted entitlement to a new “full-time” job—would be the only or the best way to sustain those newly jobless Americans as “competent and respected contributors” to social and economic life.

Many, I am sure, would think not. Posed with this question and a chance to deliberate about it, many Americans would probably observe that too many people are laboring their lives away, and that the overwork of some contributes to the unemployment and poverty of others. They might contend that a better response to the moral and material injuries of joblessness would include a broader distribution of decent work, combined with a compensating social wage—in cash,

231. *Id.* at 25.

or in health insurance or other goods, so that more Americans had decent work and more Americans also had more time for family, community, and other things besides earning wages. Thus, as polities, large or small, considered how to make good on the social citizenship guarantee, there surely would be good faith normative disagreement about striking the balance between (a) the freedom-enhancing virtues of ensuring decent, dignified livelihoods through income guarantees and publicly funded social insurance and (b) the “participation” and “individual responsibility” values served by requiring people to “earn” those livelihoods via, say, a greater emphasis on public investment and job creation.

More narrowly, many Americans would hold that some part of the joblessness problem—and the loss of social and self-respect joblessness produces—might be better addressed by remunerating and dignifying the work of child or elder care than by creating new full-time jobs outside the home. Some might even suggest incentives to encourage men, in particular, to spend more time in those pursuits, and to see them as a fair avenue for fulfilling a part of their role as “respected contributors.”²³² Finally, many Americans, as always, would contend that access to education and the wherewithal to pursue it are an essential alternative response to joblessness, at least for those who aspire to some kind of work for which their present education level has not outfitted them. And this is just a brief sampling of the kind of normative debate, contestation and change that we have every reason to expect would attend the process of honoring a social citizenship guarantee in the year 2020.

So, a crucial difference between welfare rights and the broader right of social citizenship lies not simply along the dimension of practical complexity but also along the intersecting dimension of normative indeterminacy. The normative meaning of the social citizenship guarantee seems properly subject to a level of good faith disagreement, contestation and change that is quite different from welfare rights to food, clothing, shelter, or even education. In an America constituted by both kinds of guarantees, the response to homelessness, and the incapacitation and indignity it threatens, must be some kind of home; but the response to the marginality and exclusion threatened by joblessness may rightly be more open-ended. It properly entails ongoing reevaluation of what we mean by “full time” and “work” and “respected contribution.” And if that is so, then there is good reason to conceptualize welfare rights as rights, and the social citizenship guarantee as a directive principle.

Welfare rights are suited, in ways we’ve already canvassed, to some non-trivial measure of judicial oversight, even though enforcing them to the hilt is well beyond the courts’ domain. Since they are essential to constituting every American as a free and equal member of the polity, it seems folly to forsake the

232. For acknowledgement by the present Court of the constitutional stakes in ensuring that men bear an equal share of the work of family care, see *Nevada Department of Human Resources v. Hibbs*, 123 S. Ct. 1972 (2003) (holding that because the unequal distribution of family care between women and men contributes to women’s social and economic inequality, public employment practices that perpetuate this inequality amount to constitutional injuries, which Congress is empowered to redress under the Fourteenth Amendment).

judiciary's contribution. The social citizenship guarantee is no less essential, but because of the wide-open practical and normative choices encircling it, that guarantee presents distinct and intractable justiciability problems. It makes sense, therefore, to deem it a directive principle. So, Michelman's recent reliance on "Rawlsian thought" for the idea of transmuting social rights into directive principles or "constraints on public reason" seems to me half right.²³³ If instead we divvy up the constitutional universe of social rights into rights and directive principles, perhaps, we better serve the competing concerns which prompted Michelman.

Such a division might help insure against an obvious danger posed by the full-scale morphing of rights into directive principles: while the polity deliberates, and public reason unfolds, people starve. Good faith disagreement shades imperceptibly into dawdling and indifference. And the voices of those at the margins weaken. Judicially cognizable welfare rights might provide a hook and a prod, to use Michelman's own metaphors, for securing the livelihoods of those at the margins, boosting slightly their ability to participate in the polity's conversations about its directive principles, about what it means to sustain everyone as a participant and contributor. What is more, the simpler we make the cognizable essentials of social citizenship, the more vigorously our constitutional courts might provide stays against political failures.

Today, social provision, social rights, even the social safety net are in tatters and disrepute. The working poor constitute a growing part of the nation's labor force, and the scandal of overwork, demeaning conditions, and impoverishing wages for millions of Americans goes largely unaddressed. During this dry season, no scholar has done more than Michelman to keep intellectually alive and vivid the view that high constitutional values and commitments are at stake in how America responds to poverty and material inequality. As we ponder the shape and the practice of social rights and social citizenship in a progressive Constitution for the year 2020, we are lucky to have Frank Michelman to begin the conversation.

233. I note that Rawls himself, in *Political Liberalism*, did not draw the category of "constitutional essentials" as narrowly as Michelman seems to suggest. In addition to the basic negative liberties like freedom of conscience, Rawls also holds that "a social minimum providing for the basic needs of all citizens" also belongs in the category of "constitutional essentials" requiring fully firm, strict, and reliable substantive guarantees of compliance. See Rawls, *supra* n. 133, at 228-29 & n. 23 (noting that Rawls finds himself "accepting Frank Michelman's view as stated in 'Welfare Rights and Constitutional Democracy'"). Thus, what Rawls leaves out of his category of "constitutional essentials" (and puts into the category of principles that instead must serve as "constraints on public reason") seems closer to what I am suggesting: the difference principle and fair equality of opportunity. See *id.* at 226-29.