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THE COMING CRISIS OF WORK IN CONSTITUTIONAL PERSPECTIVE

Kenneth L. Karst†

I. LIBERTY: WORK AND THE CONSTITUTION OF INDEPENDENT INDIVIDUALS ............................................ 530
II. EQUALITY: WORK, STATUS, AND THE CONSTITUTION OF SOCIAL GROUPS ............................................. 538
III. UNION: WORK AND THE CONSTITUTION OF A NATION ................................................................. 548
IV. A CONSTITUTIONAL RIGHT OF ACCESS TO WORK? ............................................................. 553
V. INTERDEPENDENCE: LAW AND THE EXPANSION OF THE SOCIAL MEANINGS OF WORK ......................... 559

Every month the United States Bureau of Labor Statistics issues a report on employment and unemployment. Even if you are not old enough to remember the Great Depression, you may think, as I do, that a decline in unemployment is good news. But when the number of the unemployed goes down month after month, the people who trade in stocks become fearful that interest rates will be raised. The committee of the Federal Reserve System that regulates those rates has tended to interpret a low level of unemployment as a sign that the economy is "overheating" and in need of a cold-water bath to prevent inflation. The regulators often refer to a five or six percent civilian

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In this project I have drawn heavily on the work and the advice of three colleagues: William Forbath, Joel Handler, and Gillian Lester. My footnote citations to their work cannot fully reflect the magnitude of my debt to them. I am also grateful to Jody Freeman, Robert Goldstein, Gerald López, Gerald McAlinn, Richard Sander, and Jonathan Varat for their thoughtful comments on a draft of this paper.


2 For detailed descriptions of the mechanics of this type of regulation, see generally William Greider, SECRETS OF THE TEMPLE: HOW THE FEDERAL RESERVE RUNS THE COUNTRY (1987). The interest-rates policy is designed to affect economic decisions in a multistage process: (1) Higher interest rates will deter businesses from borrowing in order to expand their operations. (2) If employers cannot expand, they will not want to hire more employees. (3) If there is a big enough surplus of workers at the lowest wage levels, those workers will not have the bargaining power to insist on higher wages. (4) Wage stability at the lowest level will translate into a similar stability higher up the employment ladder.
unemployment rate as the "natural" level, and if Mother Nature should fail to produce the right level on her own, they stand ready to help.³

No one disputes that there is some trade-off between full employment and the avoidance of inflationary pressures. Nor can one deny that workers who are employed benefit from an anti-inflation policy to the extent that it protects the buying power of their wages against erosion. For the moment, it is enough to recognize that our national employment policy is not a full employment policy but a policy to control the demand for labor, keeping unemployment at a level high enough to prevent wages from rising too much.

The bankers who play so strong a role in setting national employment policy would not use a word like "crisis" when talking about work. For them, the main problem associated with work arises when too many jobs are chasing too few potential workers.⁴ And, after all, how can anyone speak of an impending crisis of work if unemployment has dipped below five and a half percent? To answer that question, we need to consider the ways in which the official unemployment rate—an artifact of counting—understates the difficulty millions of Americans face when they seek steady, adequately paid work. For one thing, many who are wholly unemployed have become so discouraged that they have simply stopped looking for work. These people are not counted in the official unemployment figures; if they were counted, the figures would be much greater.⁵ And unemployment for black Americans consistently runs at about

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³ On the "natural" rate of unemployment, see Robert Eisner, Our NAIRU Limit: The Governing Myth of Economic Policy, Am. Prospect, Spring 1995, at 58-63. NAIRU stands for "nonaccelerating-inflation-rate of unemployment." Id. at 58. During most of the 1990s, the rate was set at about 6%. See id. at 59. Now it seems pegged around 5%. See James Risen, A Plea for More Flexibility on Monetary Policy, L.A. Times, Oct. 20, 1996, at D4. The Federal Reserve's economists may be rethinking the model of a natural unemployment rate that almost automatically dictates interest-rate adjustments. See James K. Galbraith, The Surrender of Economic Policy, Am. Prospect, Mar.-Apr. 1996, at 60, 61-64; Risen, supra, at D4. My colleague Richard Sander has reminded me that, in one sense, there is a natural unemployment rate owing to the "friction" of job changes. This rate, he says, would be around 2%.

⁴ See, e.g., Jobless Benefit Claims Take Unexpected Dip, L.A. Times, Sept. 6, 1996, at D2 (anticipating a decline of unemployment below the previous month's rate and quoting Federal Reserve Governor Janet Yellen, who says history suggests that "the economy is now operating in an inflationary danger zone").

twice the rate for whites at any age level. But even this is only part of the story.

The official figures count part-time, temporary, and seasonal workers as employed, even though they may ardently desire steady, full-time work. "Consultants" are counted as employed even when they are self-employed only because they cannot find other work. Despite the recent creation of millions of new jobs, a great many of these jobs offer part-time work or work that is temporary or otherwise contingent. These "permanent temporary workers" generally receive lower hourly wages than those paid to full-time, year-round workers. More disturbingly, in a system that largely ties social...

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6 See A Common Destiny: Blacks and American Society 294-97 (Gerald David Jaynes & Robin M. Williams, Jr. eds., 1989); Andrew Hacker, Two Nations: Black and White, Separate, Hostile, Unequal 103 (1992) (charting the persistence of the 2-1 ratio in every year from 1960 through 1990). The pattern continues in the 1990s. See Melvin L. Oliver & Thomas M. Shapiro, Black Wealth/White Wealth: A New Perspective on Racial Inequality 24 (1995). On the dramatic rise in black male joblessness since 1970, see Christopher Jencks, Rethinking Social Policy: Race, Poverty, and the Underclass 122-30 (1992). Jencks remarks, "Slack labor markets have always had catastrophic effects on urban blacks .... If we could get the overall unemployment rate back down to 3 or 4 percent, joblessness among blacks would also drop precipitously." Id. at 125.

7 In the following discussion I draw on Joel F. Handler & Yeheskel Hasenfeld, Reform Work, Reform Welfare 84-137 (July, 1996) (unpublished manuscript, on file with author).

8 See Thurow, supra note 5, at 56.

9 See id.

10 The number of temporary and otherwise contingent workers is difficult to calculate with any precision. According to an estimate conducted in 1994, the number of people working for temporary employment agencies on an average day clusters around 1.6 million, a number reflecting rapid growth since 1984. See Developments in the Law: Employment Discrimination, 109 Harv. L. Rev. 1568, 1652 n.29 (1996). The term "contingent workers" is applied to a varied group, including part-time, temporary, seasonal, leased, involuntarily self-employed, contract, and home-based workers. A 1987 estimate placed the total number of contingent workers at a minimum of 29 million people. See Anne E. Polivka & Thomas Nardone, The Quality of Jobs: On the Definition of "Contingent Work," 112 Monthly Lab. Rev. 9, 13 (Dec. 1989) (citing the contingent work force estimate made by Richard S. Belous of the National Planning Association).

The recent growth in part-time jobs has been mainly caused not by worker demand but by a reduced supply of good jobs, or, in Economese, "sectoral shifts in the economy toward industries dominated by low-wage, part-time employment." Chris Tilly, Short Hours, Short Shrift: The Causes and Consequences of Part-Time Employment, in New Policies for the Part-Time and Contingent Workforce 15, 28 (Virginia L. duRivage ed., 1992) [hereinafter New Policies] (emphasis omitted). These shifts mainly reflected "explicit employer strategies to subcontract work and redesign jobs to be carried out by part-time and temporary workers." Eileen Appelbaum, Structural Change and the Growth of Part-Time and Temporary Employment, in New Policies, supra, at 1, 7-8.

11 See Stanley D. Nollen, Negative Aspects of Temporary Employment, 17 J. Lab. Res. 567, 569-70 (1996) (reporting that 1994 average hourly wages of temporary workers were 35% lower than wages of comparable full-time workers). These lower wages, along with the increase in the proportion of workers who are temporarily employed, may partially explain why a reduced official unemployment rate in the past two years has not been accompanied by the inflationary pressures that the Federal Reserve economists expected.
welfare to jobs, these temporary and contingent jobs typically offer no health insurance, no child care, no pension benefits, and little opportunity for advancement. One can only estimate degrees of underemployment; one of the higher estimates is that as much as one-third of the American labor force wants work, wants more work, or has given up on the possibility of finding work. Ultimately, a greater flexibility of employment, including job-sharing itself, may be part of a


13 "[S]ince 1990, the nation's mostly female temp force has mushroomed more than 85%. Yet only 8% of temps receive health benefits; pensions, vacations and sick days are virtually unheard of." Jill Smolowe, The Stalled Revolution, Time, May 6, 1996, at 63.

14 One serious problem for poor people who are part-time or contingent workers is that child care centers are not open during the hours when they work—such hours typically involve weekends, or rotating or changing schedules. These conditions are the norm for working-poor parents. See Sandra L. Hofferth, Caring for Children at the Poverty Line, Children & Youth Servs. Rev. 61-90 (1995).

The system of child care in the United States is analyzed rigorously in William T. Gormley, Jr., Everybody's Children: Child Care as a Public Problem (1995). Gormley's policy proposals are an amalgam of European and American approaches. The basic American approach, of course, is to leave the system to the market—with the predictable result that the working poor are hard pressed. In contrast, most Western European countries see child care as a common good and either provide it or subsidize it. See id. at 8-12. See also Rebecca Blank, Does a Larger Social Safety Net Mean Less Economic Flexibility?, in Working Under Different Rules, 157, 176-79 (Richard B. Freeman ed., 1994) (discussing American and European child care policies).


16 See Thurow, supra note 5, at 56. Thurow breaks down his estimate into the following groups:

- Officially unemployed (then 5.7%) 7.5 to 8 million
- No longer actively looking 5 to 6 million
- Working part-time involuntarily 4.5 million
- Temporary workers 8.1 million
- Contingent (on call) workers 2 million
- Involuntarily self-employed 8.3 million

Id. These categories, he says, add up to about 28% of the work force. See id. They do not include 5.8 million males, aged 25-60, who were once in the work force but are now missing from the labor statistics. See id. Some of these dropouts from the ordinary working economy are, no doubt, recruits into illegal work. See id. Thurow adds these men to reach the "one-third" estimate noted in the text. See id.

A study published in 1994 (and thus based on data collected before the recent decline in the official unemployment rate) estimated that people looking for work outnumbered job vacancies by a factor of six. See Gordon Lafer, The Politics of Job Training: Urban Poverty and the False Promise of JTPA, 22 Pol. & Soc'y 349, 351-52 (1994). The job vacancy rate tends to be considerably lower than the aggregate rate of unemployment; as a result, a relatively large number of unemployed workers are "queuing" for a relatively small number of jobs, even in good times. See Harry J. Holzer, What Employers Want: Job Prospects for Less-Educated Workers 28-29 (1996). In good times and bad, minorities, the young,
sensible response to the crisis of joblessness—but not if part-time workers are still paid lower wages and are still unprotected by private or public health care and pension benefits.\(^\text{17}\)

Among the newly created full-time jobs, many pay the minimum wage.\(^\text{18}\) Most recipients of the minimum wage are not raising families,\(^\text{19}\) and for good reason: even after the increase recently enacted by Congress, one earner's minimum wage is insufficient to bring a family of three up to the poverty line.\(^\text{20}\) The purchasing power of the minimum wage declined sharply in the 1980s and early 1990s.\(^\text{21}\) With that factor compounded by the depressing effects on wages of the large number of Americans who are looking for work, or for more work, real wages for jobs at the lower skill levels have fallen dramatically in the last quarter-century.\(^\text{22}\) These lowest-wage jobs typically offer the slimmest chances for upward movement,\(^\text{23}\) especially for minority workers, who are disproportionately represented in those jobs.\(^\text{24}\) The poverty rate for full-time workers increased by about fifty percent from 1980 to the early 1990s.\(^\text{25}\)

and the least educated experience longer-than-average spells of joblessness and are perceived by employers "at the back of the queue" of potential workers. \(\text{Id. at 29.}\)

\(^{17}\) \textit{See infra} text accompanying notes 166-71.


\(^{21}\) \textit{See id. at 42.}


\(^{23}\) Mobility has been falling, and particularly among low-wage workers. \textit{See MOSHE BUCHINSKY & JENNIFER HUNT, WAGE MOBILITY IN THE UNITED STATES} 2 (National Bureau of Economic Research Working Paper No. 5455, 1996):


The distribution of poverty in American society is not random. It falls most heavily on members of some racial and ethnic minorities, on women, on the young, and on people with limited educational opportunities. Lower-skill manufacturing jobs have disappeared at an alarming rate, giving way to automation and to low-wage competition from overseas workers. Service jobs, once seen as a promising substitute, are becoming automated at a rate that beclouds the earlier optimism. Many Americans have come to fear that their families will fall out of the middle class because relatives or friends have already suffered that fate. In the 1980s, while middle class income and wealth stayed constant, and while the poor were struggling to survive, the rich got much, much richer. The “split society” is here.

In addition to the crisis of slavery and the crisis of the Great Depression, the nation has faced other serious challenges in the realm of work, most notably the wrenching adjustment to industrialization.

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26 The poverty rate among black Americans in 1995 was 29.3%, more than twice the national average, and that rate was exceeded by the poverty rate for “Hispanic” households (a Census Bureau term). See Holmes, supra note 25, at A1, A23.

27 See Handler & Hasenfeld, supra note 7, at 86-92.

28 On the global labor market and the parlous state of left-out workers throughout the world, see Ethan B. Kapstein, Workers and the World Economy, FOREIGN AFF., May-June 1996, at 16. For responses to Kapstein, see Responses: Workers and Economists, FOREIGN AFF., July-Aug. 1996, at 164. Professor Gerald McAlinn, of Aoyama Gakuin University in Tokyo, adds an international dimension to the conventional views about the domestic effects of “cheap foreign labor.” He sees the American commitment to free trade as driven in part by consumerism. Japan, on the other hand, by protecting local producers, has accepted very high consumer prices but achieved relatively full employment. In a September 1996 letter to me he writes, “If American consumers demand Wal-Mart prices, it is difficult to see how America can hope to avoid a spiral into . . . hollowed-out employment . . . .”


30 For sobering accounts of a number of such families, from those of executives whose companies have “downsized” to those of well-paid blue-collar workers whose plants have been closed, see generally KATHERINE S. NEWMAN, FALLING FROM GRACE: THE EXPERIENCE OF DOWNWARD MOBILITY IN THE AMERICAN MIDDLE CLASS (1988).


In 1995 the income gap between rich and poor narrowed triflingly, with the top 20% of households receiving 48.7% of the total national household income, down from 49.1% in 1994. See Holmes, supra note 25, at A23.

and the pains of absorption into the work force of successive waves of poor immigrants. Through all these experiences, work has been one major arena in which America's basic constitutional values of liberty, equality, and national union have been either validated or frustrated. In this Article, I seek to show how these constitutional ideals are infused into the social meanings of work in America. Through this medium, the values of liberty, equality, and union have played a powerful role in constituting individuals, social groups, and the nation itself.

I shall not be arguing for judicial recognition of a constitutional right to decent work. American courts lack the capacity to enforce a constitutional right to stable, adequately compensated work—or even to define the contours of such a right with a serviceable particularity. The main responsibility for confronting the crisis of work rests with other policymakers, both in and out of government. Yet, this Article's exploration of the meanings of work does have two instrumental purposes. The first is to look to our basic constitutional commitments for guidance, as legislators and others plan their responses to the shortage of decent jobs. The second purpose is to use the field of work to illustrate a more general point: that the values of liberty and equality are interwoven essentials of our national union. By understanding some of the relations of work to community, perhaps we can better appreciate the interdependence of citizens.

In the half-century since the Second World War, American workers have bought into the market economy in a social contract that runs something like this: If you are willing to work hard, your family will be secure. Underlying this bargain are two related expectations: jobs will be available—"full employment" was the term in the Truman years—and social welfare programs will cushion the blows when the employment market changes. The corollary is that continued growth in the ranks of the unemployed and underemployed portends a constitutional crisis for the nation. Shrinking employment opportunity at any level is a seedbed for racial and ethnic scapegoating. And, although most of us say that scapegoating is an unacceptable political tactic, the effectiveness of the tactic suggests that some of us may be more frightened than we care to admit.

33 For elaboration of this point, see infra Part IV.
34 More or less the same bargain was struck in Western Europe. See Kapstein, supra note 28, at 16, 20-21.
Our current conditions do not compare with the crime of slavery that tore the nation apart in the nineteenth century. But for millions of Americans, the modern social contract is in breach, and, down this road, the threat to national union does seem comparable to the threat we faced in the 1930s. Very likely, the crisis of work will not come to a head the day after tomorrow. But if today's part-time and contingent workers are, as they now seem, the model of things to come—if they are, indeed, the advance guard of a "disposable American workforce"—then none of us among the comfortable should take for granted the stability of our constitutional order. The motto, "Liberty and Justice for All," has a hollow ring for people who are left out. If we do not respond to today's indicators of the coming crisis of work, then the politics of alienation, in this era of the radio talk show and the Internet, may take a violent turn. Surely the violence would be met by repressive measures, and just as surely those measures would encroach upon the liberties of all citizens. I am under no illusion that viewing the impending crisis of work in the constitutional perspectives of liberty, equality, and national union will head off the crisis. Still, if there are lessons to be learned from an exercise so limited in scope, we had better learn them.

I

LIBERTY: WORK AND THE CONSTITUTION OF INDEPENDENT INDIVIDUALS

Our starting point is the basic constitutional value of liberty. But if you mention the word "work" to one who is employed, liberty may not be the first thought that comes to mind. Indeed, when the ideas of work and freedom are linked in conversation, chances are that the speaker is wishing for a freedom from work. A hard-working friend of mine often quotes the old Italian saying, dolce far niente, how sweet to do nothing. For countless millions, work is a chore, a burden to be borne, a source of anxiety and conflict. In Studs Terkel's memorable words, for a large proportion of Americans work is "a Monday through Friday sort of dying," a kind of "violence—to the spirit as well

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37 I have in mind the paramilitary groups who are already using the Internet to exchange revolutionary rhetoric and bomb recipes. Two weeks before the 1995 bombing of the federal building in Oklahoma, the FBI issued a warning to its intelligence bureaus concerning the recruitment of local police officers into antigovernment militias. See Richard A. Serrano, Militias' Ties to Public Safety Officials Feared, L.A. TIMES, Oct. 13, 1996, at A1.
as to the body." So, these people might ask, what is so liberating about work?

 Probably the most vivid answers to that question would come from people who are unemployed. They seek work not for its own sake, but for the rewards it brings, both tangible and intangible. As far back as the colonial era, New Englanders invested work with an almost religious character, and white Americans generally spoke of the dignity of work, recognizing that work had much to do with defining the person. Yet, it was not work in general that they dignified, but the autonomy that was both expressed and reinforced by the free choice to work. The delegates to the Constitutional Convention reflected this attitude in the wicked bargain that recognized a sharp distinction between free persons and slaves. The legal conditions of free men (such was the usual locution) came to be defined in contrast to slavery. If a slave was dependent, bound by law to work for another's profit and under that person's control, a free citizen was independent, mobile, with the liberty to work in one pursuit or another, and for his or her own family's benefit. To be a citizen is to be a respected and responsible participant in the public life of the community. Even in those early times, work was a medium through which a free man might demonstrate that he was a citizen.

 Today, I concede, other social meanings of work usually are more conspicuous. Once when the state governor was preventing the University of California from giving its employees a cost-of-living pay raise, a distinguished logician in the UCLA philosophy department said to me, with perfect logic, "It isn't the money. It's what you can buy with the money." Most obviously, jobs are "the entry tickets to provisions." Whatever other meanings work may bear, for most of us it is a crucial means of sustaining ourselves and our families. Work can be a teacher, offering the chance to learn tasks at increasing levels

40 For a modern philosopher's elaboration of this sentiment, see Amartya Sen, Inequality Reexamined 31-38 (1992).
42 On the contrast between the Privileges and Immunities Clause and the Fugitive Slave Clause, see infra Part III.
43 I have discussed the constitutional principle of equal citizenship in Kenneth L. Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment, 91 Harv. L. Rev. 1 (1977), and at greater length in Belonging to America: Equal Citizenship and the Constitution (1989).
44 See University of California; Still Retrenching, The Economist, June 28, 1975, at 60.
of authority and increasing levels of pay. Central to "the American dream" is the notion that a free and independent individual can rise to a better condition through hard work, and that his or her family can join in the rise. Especially vital to family security today are the health care and pension benefits that attach to many jobs. Where there are young children, decent child care becomes an additional family concern.

To speak of family status and family security is to recognize that work means much more than a paycheck; it is the exercise of responsibility. The responsibilities involved in work extend not just to our loved ones but to our coworkers, and even to the larger community. Work is still seen as connected to the citizenship values of respect, independence, and participation. In our society, as much as anywhere else in the world, work is a means of proving yourself worthy in your own eyes and in the eyes of others. Even a person who hates his or her job can understand the idea of "[t]he dignity of work and of personal achievement."

Two examples may help put human faces on these abstractions. First, along the Interstate highways in California, a number of rest-area parks are maintained by people who live in sheltered environments because they are mentally impaired. It is hard to imagine any other public program that has more purely positive results. These people are making themselves useful, and their work gives added positive meaning to their lives; they show it in the way they talk and in the way they carry themselves. My second example needs only to be stated: Every reader knows people of retirement age who have chosen not to retire. Many of these people continue to work because they want to think of themselves as active and independent. Work, even when we complain about it, can be a major source of individual self-realization.

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46 Knowledge learned from a job is often applied to other realms of life. See Melvin L. Kohn, *Unresolved Issues in the Relationship Between Work and Personality, in The Nature of Work*, supra note 32, at 36, 42-43.


49 Shklar, supra note 48, at 1.
Many years ago I was at a big party, among strangers. Some small talk had suggested that the woman next to me was a teacher in a local school. Lacking anything better to say, I opened with, "So, you’re a school teacher?" Her reply was chilly: "It’s what I do; it’s not who I am." I was duly chastened; of course there is more to a person than the way she earns her living. But there is also truth in the comment, "You become your job." Work shapes individual identities in ways both general and particular. Consider such terms as initiative, dependability, industry, attention to detail, and cooperativeness—or still more general terms such as work habits or the work ethic. Terms like these—or their opposites accenting irresponsibility and sloth—are internalized, made a part of the individual worker’s sense of self. Furthermore, particular jobs have their own socializing effects, from the do-it-by-the-book mindset of the clerks in a welfare office to the hypermasculinity of the "splicers" who maintain heavy cables that are strung on towers and under the ground.

The idea that we become our jobs has another dimension: the work we do affects other people’s evaluations of us. Prominent among the social meanings of work is a rough popular status-ordering of types of work. These status evaluations are strongly influenced by differences in pay, but they are also affected by other kinds of perceptions that are widely shared: the power associated with the job (police officer), the importance of the work to society at large (school teacher), the difficulty of entry into the job (opera conductor), the individual’s independence in performing the task (architect), the complexity of the work (scientific researcher), the level of creativity demanded by the work (sculptor), or the level of training required (veterinarian). These public perceptions of what we do—or, more precisely, our assumptions about other people’s perceptions—become part of our own sense of what our work is worth, and, more generally, what we are worth as individuals.

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50 Terkel, supra note 38, at 102.
51 See generally Kohn, supra note 46, at 36. Kohn concludes that the exercise of self-direction in work is a positive influence on the worker’s sense of self. “People thrive in meeting occupational challenges.” Id. at 42.
54 These orderings are unscientific. Any pretense of exact measurement and ranking of occupational status ought to be examined closely. For a careful exploration of the difficulties associated with systems of occupational classification, see Deborah C. Malamud, Class-Based Affirmative Action: Lessons and Caveats, 74 Tex. L. Rev. 1847, 1872-77 (1996).
55 Studs Terkel’s interviews, taken as a whole, show that the positive values I have listed in the text are experienced by relatively few workers outside the professions. See generally Terkel, supra note 38, passim. The comments of the majority of his interviewees
What happens to individuals and families when the formal freedom to work becomes hollow because stable work with a decent wage, decent health and retirement benefits, and access to decent child care just isn’t available? Most obviously, family income is sharply reduced. But other harms of unemployment and underemployment are less tangible, growing out of the positive social meanings that Americans have invested in work:

—If stable, adequately paid work is a source of independence, its absence means dependence on others.

—If stable, adequately paid work is an avenue to personal achievement, its absence signifies failure.

—If stable, adequately paid work offers advancement up the socio-economic ladder, its absence means that one’s social station is either fixed or in decline.

—If stable, adequately paid work provides family security, its absence means insecurity.

—If stable, adequately paid work elicits the esteem of others, its absence means shame.

Considerations like these undoubtedly have influenced the Justices who have nourished a number of constitutional guarantees that are not in any formal sense related to the freedom to work. Consider, for example, the application of the Equal Protection Clause to education. When the Supreme Court held that Texas could not constitutionally exclude undocumented alien children from public schools, Justice Brennan’s opinion for the Court decried the irrationality of creating a permanent lower caste. One unspoken link in this reasoning is that education is the basis for many employment opportunities, the first step on the occupational ladder for the independent individual. The subject of work was also in the minds of the Justices who first recognized a woman’s constitutional right to choose to have an abortion, and who two decades later preserved that right in the

emphasize their sense of powerlessness and unimportance, and the routinization of their work. See id. Yet the abstract idea of work continues to hold its attractions.

56 On the Privileges and Immunities Clause of Article IV, see infra Part III. To the extent that the right to travel may rest on this Clause, travel for the purpose of working is built into the substance of the right. But the right to travel has also been explained on other constitutional grounds, most notably the Equal Protection Clause. See, e.g., Zobel v. Williams, 457 U.S. 55, 60 n.6 (1982). Sometimes the right to travel is called a right to migrate. See id. at 67 (Brennan, J., concurring) (discussing the “principle of free interstate migration”). One typical reason for migrating is to seek employment in a new state.


58 Similarly, when Chief Justice Warren, writing for the Court in Brown v. Board of Education, described education as “the very foundation of good citizenship,” surely he had in mind a conception of citizenship as participation that went well beyond voting. 347 U.S. 483, 493 (1954).

face of an assault that almost destroyed it. In the latter case, the plurality opinion was explicit: "The ability of women to participate equally in the economic and social life of the Nation has been facilitated by their ability to control their reproductive lives." Both of these rights are explainable in the constitutional vocabulary of equality; but they also sound in the vocabularies of individual liberty, independence, and free access to work.

Given decisions of this kind, it may seem incongruous that the Supreme Court in the modern era has not given constitutional recognition to a free-standing right to work. Even in the days when the Court was invalidating wage-and-hour laws and other governmental restrictions on the liberty of the employment contract, the Justices gave no hint of any individual right to be afforded work. The liberty in question was a formal freedom from governmental regulation of private bargains, grounded on a formal equality of right—and never mind the huge differences in the bargaining power of employers and workers. But even this formal legal equality could be submerged. For one example among many, a potential worker who claimed a freedom to be idle might be imprisoned because his idleness was made into the crime of vagrancy, but the idea of imposing on potential employers a correlative legal duty to provide work was unthinkable. Any asser-

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61 Id. at 856 (plurality opinion) (citation omitted).
62 For three decades the Supreme Court recognized the liberty of contract as a preferred freedom. In *Lochner v. New York*, as every law student learns, the Court struck down a state law that prohibited the employment of bakers for more than sixty hours a week. 198 U.S. 45, 64 (1905). The Court's opinion, to the dismay of labor leaders, set great store by the liberty of employees to contract to work longer hours. The doctrinal change came in *West Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937), in which the Court sustained a state regulation of women's wages.
63 American law, at least from the time of the Revolution, had consistently represented "working life in voluntaristic terms, as a network of self-interested relationships created more or less spontaneously by the participants themselves, whose capacity so to act was guaranteed by their constitution as . . . formally equal citizens benefiting equally from protection of their private rights." CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC xv (1993) (footnote omitted). The Supreme Court adopted this view as the law of the land when it invalidated an act of Congress forbidding interstate railroads to hire employees under "yellow dog" contracts that prohibited membership in labor unions: "the employer and the employee have equality of right, and any legislation that disturbs that equality is an arbitrary interference with the liberty of contract . . . ." *Adair v. United States*, 208 U.S. 161, 175 (1908).
64 See DAVID MONTGOMERY, CITIZEN WORKER: THE EXPERIENCE OF WORKERS IN THE UNITED STATES WITH DEMOCRACY AND THE FREE MARKET DURING THE NINETEENTH CENTURY 83-89 (1993). "There is, in just principle, nothing which a government has more clearly the right to do than to compel the lazy to work; and there is nothing more absolutely beyond its jurisdiction than to fix the price of labor." Id. at 88-89 (quoting JOEL BISHOP, 1 NEW COMMENTARIES ON THE CRIMINAL LAW 273-74 (1892)). Idleness alone did not constitute the crime of vagrancy; the "idle rich" committed no crime. Vagrancy meant being idle with no visible means of support. See, e.g., id. at 84 ("Massachusetts led the way to new legislation with an act of 1866 increasing the punishment meted out to 'idle persons who,
tion of an employer’s constitutional duty would encounter the “state action” limitation that had been read into the Fourteenth Amendment, and a statute imposing a similar duty would be an unconstitutional invasion of the employer’s sphere of private liberty. Nor could any comparable duties be imposed on the states or Congress. Government’s constitutional duty was noninterference, and no one in authority thought that judges could compel legislators or executive officials either to employ the unemployed or to take other positive action on their behalf.

William Forbath has shown that another, more positive vision of freedom in the world of work was available during this very period. At a minimum, this alternative view of “free labor” would uphold wage-and-hour laws, but it also envisioned a “right to remunerative labor,” to be vindicated by such means as cooperative ownership, reform of the system of finance, and legislation enhancing workers’ rights to govern themselves in the workplace. Since 1937, the Supreme Court has not treated the liberty of the employment contract as a preferred freedom. But, by the time this change was effected, a more fundamental doctrinal limitation had become firmly established: the very idea of a constitutional right to liberty had been reduced to a negative freedom from governmental interference. Although some modest revision of this doctrine may be possible, no one should expect our

not having visible means of support, live abroad without lawful employment . . . or place themselves in the streets . . . "') (emphasis added).

Other instances of early American law’s uses of formal equality to justify asymmetries of power favoring employers are explored in detail by Tomlins, supra note 63, at 223-92.


66 See, e.g., Lochner, 198 U.S. at 64.


Rejecting this view of free labor, the courts treated employers’ rules as part of the employment contract and thus protected employers with the constitutional liberty of contract against legislative interference. See Montgomery, supra note 64, at 43-51.

68 For a critical analysis of negative liberty (including property protections) as the core of American constitutional rights, see David Abraham, Liberty without Equality: The Property-Rights Connection in a “Negative Citizenship” Regime, 21 L. & Soc. Inquiry 1 (1996). Frank Michelman, commenting on Abraham, makes the valuable point that some kinds of affirmative claims on government are implicit in some kinds of negative liberty—for example, an affirmative right to police protection to defend the individual’s freedom from violence. See Frank I. Michelman, Anti-Negativity as Form, 21 L. & Soc. Inquiry 83, 85-87 (1996).

On formal liberty in the field of employment, see Forbath, Free Labor, supra note 67, at 815. Forbath illuminates how this formal view of freedom in the employment context was grounded in a classical liberal vision of the idea of “free labor.” See id. at 800-14.
courts to contribute in any direct way to resolving a crisis of work. The unemployed have a formal constitutional freedom to work, but only if work is available.

In the nineteenth century, American law began to confront two stark systems of dependency, both of which centered on control over work and its rewards. The system of slavery succumbed to constitutional amendment and congressional legislation only after four years of carnage. Married women's economic subordination to their husbands eroded more gradually through legislation and judicial interpretation, in a process that took more than a century. In each of these cases, ending the dependency meant freeing identifiable clients (enslaved persons, married women) from the legal control of identifiable patrons (slaveholders, husbands). Without success, labor leaders of the post-Civil War era argued for their reforms as a means to remove the legal foundations of their "wage slavery." The law's intended role in all these cases was to dissolve or redefine particular legal relations that bound clients to patrons. Some post-bellum advocates would have gone further than the abolition of slavery. They sought a land reform that would put land in the hands of the former slaves, whose labor had been so important an element in the land's value. Even before the Civil War, married women had argued for a share of marital property on the basis of the contributions of their own work to the family's income and wealth. In contrast, the victims of today's crisis of work have no one in particular to be independent from, no one in particular who has controlled their destinies and whom they have enriched. To put it more abstractly, the shortage of decent work offers no specific legal relation, the abolition of which can lead the unemployed and underemployed from dependence to independence.

69 This point is discussed further infra Part IV.
72 In 1864 William Whiting, Solicitor of the War Department, wrote to the Committee on Public Lands of the House of Representatives, calling for just this sort of redistribution of lands. *See William Whiting, War Powers Under the Constitution of the United States* 469-78 (43d ed. 1871). A modest redistribution was begun on some lands administered by the Freedmen's Bureau, but even this program was largely thwarted by President Andrew Johnson's amnesty decree. *See Eric Foner, Reconstruction: America's Unfinished Revolution*, 1863-1877, at 153-70, 183-84 (1988).
73 *See Siegel, supra note 70, passim.*
When people who lack work have no one in particular to blame for their condition, it is natural for them to turn the blame inward.\textsuperscript{74} Demoralization is a state of mind. It encompasses the sense of dependence and failure, the loss of others’ respect—in short, the individual’s sense of exclusion from the community of equal citizens.\textsuperscript{75} The worst thing about being down and out is not that you are down, but that you are out.

\section*{II}
\textbf{Equality: Work, Status, and the Constitution of Social Groups}

The positive social meanings of work in America have survived through four centuries, despite the dependency and degradation of slavery on the plantations and the reduction of workers to cogs in the machinery of the mills and factories that began the industrial era.\textsuperscript{76} Even today, the actual experience of work might be meaningless drudgery, might be degradation—might, in fact, be violence\textsuperscript{77}—but the \textit{idea} of work retains its strong connections with the liberty-oriented ideas of independence, self-expression, personal satisfaction, security, and even dignity. These are sunshine words, but let us take note of a cloud. Americans have also understood a worker’s liberties to be imbued with notions of “getting ahead,” of competitive individualism in a zero-sum game of status dominance. If work in America were a food product, the list of ingredients on the label would place individualism first.

When we change the perspective from liberty to equality, we do not leave this competitive atmosphere behind. Work is still a prize, a subject of contention, a means of gaining status and denying status to others. Indeed, a legal claim to equality is most likely to succeed when it is cast as a claim to equal liberty. The major difference in this equality-oriented perspective is that questions about the equal status of indi-

\textsuperscript{74} For a poignant exploration of this phenomenon a generation ago, see ELLIOT LIEBOW, TALLY’S CORNER: A STUDY OF NEGRO STREETCORNER MEN (1967) (chronicling the experience of inner-city blacks on a street corner in Washington, D.C.). Sadly, conditions among inner-city black Americans have deteriorated since Liebow wrote, with results that are similarly demoralizing and similarly destructive of community. See WILSON, supra note 22, \textit{passim}.

\textsuperscript{75} A work force may itself be seen as a community. In such a case, loss of the job may be the most obvious form of exclusion from the community, but it is not the only form. For the employee who is the target of racial or sexual harassment on the job, one serious harm is the loss of community, the sense of being treated not as a valued participant in the team’s joint enterprises but as a racial or sexual object.

\textsuperscript{76} See RODGERS, supra note 47, at 125-26.

\textsuperscript{77} See TERKEL, supra note 38, at xiii.
individuals tend to resolve into the comparison of social groups. To think about the crisis of work in the perspective of the constitutional value of equality, we must look at the interactions of group status with claims of equal liberty, that is, equal access to work.

The label "unemployed" not only locates an individual in a group, but it also taps into a fund of meanings conventionally attached to the group and its members. Consider this question: When someone is described as unemployed, what meanings come to mind? My own mental pictures of unemployment tend to be the faces of particular people I knew during the Depression, some of them quite close to me. As the old black-and-white newsreel clips make clear, the faces are not smiling. But many Americans today, asked to envision the face of unemployment, would likely see a single mother or a young black man. As we saw earlier, both of those faces have some statistical connection with the distribution of probabilities in real life. In fact, if I had reversed this process of visualization, asking readers to envision a young black male or a single mother, the resulting collection of mental pictures might well have reflected the same unhappy statistics. Abstractions invite stereotyping, the wholesale attachment of meanings to social groups.

In the past generation Americans have become accustomed to the idea that law can be used to help liberate the members of social groups from the harmful effects of negative stereotyping. Historically, however, American law in the main has not only reflected prevailing group stereotypes but reinforced them, most notably in the world of work. A clear example, by now a cliché, is the old Illinois law, embodying a view of women as domestic and dependent, that limited admission to the bar to male applicants. When the Supreme Court upheld the law's validity in 1872, this traditional picture of women was given the imprimatur of the Constitution. To etch the picture even more deeply, one Justice explicitly wrote the stereotype into a concurring opinion. In his view, the individual qualities of Myra Bradwell, whose application had been rejected, were irrelevant. The law's disqualification of women from legal practice was justified, he said, because "woman"—the abstraction that identified a group—was divinely destined for the offices of wife and mother, not for the lawyer's tasks.

This extreme case illustrates the vicious cycle of legal discrimination and the reinforcement of a social group's inferior status. A law excluding women as a group from a particular kind of work is

79 See supra text accompanying notes 26-27.
80 See Bradwell v. Illinois, 83 U.S. (16 Wall.) 130 (1872).
81 See id. at 141 (Bradley, J., concurring).
founded on assumptions about the incapacity of women to do that work. In turn, the law itself contributes to the social definition of the group in two ways. First the law portrays women as unqualified; then it denies women the opportunity to prove they can do the job. Similar vicious cycles were maintained by the Jim Crow laws and, even after the demise of those laws, in the practices of public and private employers.

Imagine that we are in a southern town in 1966. If no black person has ever been a police officer in the town, then many white citizens will interpret the failure of the police department to hire a black applicant as the applicant's own failure, a "natural" result of the incapacity of black people. Stereotypes have a way of perpetuating themselves; no one in the town will have expanded his or her collection of mental pictures by actually having seen a black officer on the job.

But our modern civil rights legislation expresses the hope that a similar process of acculturation can work in the opposite direction, and to some degree the hope is justified. Once black officers are seen on the street and black executives are seen in the board room, once women lawyers are seen in court and women electricians are seen at the construction site, the social meanings of membership in groups defined by race or sex will begin to be altered by experience. Work is a teacher not only for the individuals who are employed but also for others who see those individuals performing their tasks. A similar process also operates in less positive directions, with group stereotypes affecting job status. When a particular job is seen as "woman's work," for example, the job itself may well be undervalued.82

Much of America's history of race relations, and other intergroup relations, could be written with a focus on the world of work. Today, an author who described slavery as a form of workplace discrimination would be understood to be indulging in irony. But the basic rationalization offered for slavery was that the people who were enslaved were inherently dependent, were not qualified for anything better—indeed, were not quite persons in the fullest sense. Their very enslavement was offered as proof that black people as a race were, as Chief Justice Taney said in the Dred Scott Case opinion, "an inferior class of beings," incapable of bearing the burdens of free citizenship.83 This pattern of circular rationalization is familiar even today. By the same sophistry, women can't be "splicers" because they aren't macho

82 The job title "secretary" lost both work responsibility and status when it came to be applied mainly to women. See Joan Wallach Scott, The Mechanization of Women's Work, Sci. Am., Sept. 1982, at 167, 172, 184.
83 Dred Scott v. Sandford, 60 U.S. (19 How.) 393, 404-05 (1856).
enough. In sum, the status of a social group strongly affects the work opportunities of the group's members, and, in turn, the kinds of work allowed to those members affect the group's status.

From medieval England to modern America, work has been seen as discipline, not only in the sense of orderliness but in the sense of government—of control. This meaning comes to the fore when we consider the relation of work to inequalities of status among social groups. When young American women first went "out to work" in the textile mills, they were virtually prisoners of the job. Work rules included rigid controls over aspects of their personal lives. From the late nineteenth century onward, an employer's work rules were treated as part of the labor contract, and immigrants who left agrarian lives in Europe to find work in American factories often found those rules to be harsh taskmasters. Slavery, of course, presented the most severe issues of discipline; if white masters called their black slaves lazy, perhaps they were imagining what their own behavior might be if the tables were turned and they were the slaves. After Emancipation, the few freedmen who managed to obtain land of their own became living examples of the relation between opportunity and effort. Those success stories were limited in number—not because the freedmen lacked a work ethic, but because they lacked access to land or to other avenues to independent earnings. The promise of freedom was betrayed.

The perception of work as discipline has often been associated with the need for taming raw nature, including the impulses of sexuality. Seen from this perspective, locking young women in their textile-mill dormitories was only common sense, as was the separation that enforced racial caste in the workplace in all public arenas of the Jim Crow South.

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84 See Epstein, supra note 53, at 93-94. Some of these walls of exclusion have begun to show cracks. For example, after a generation of hard work, women officers in the Air Force and the Navy have been allowed to serve as combat pilots, and a female Army captain was recently given command of a combat assault helicopter company. See Division to Get Female Commander, HAW. TRIB.-HERALD, July 17, 1996, at 3.


86 Cf. RODGERS, supra note 47, at 43-51.

87 See id. at 170-73.

88 Owners of large plantations who talked this way may also have been projecting on the slaves their own habits of idleness. On the work ethic of slaves and their masters, see EUGENE D. GENOVESE, ROLL, JORDAN, ROLL: THE WORLD THE SLAVES MADE 295-324, 388-98 (1974).


90 Cf. RODGERS, supra note 47, at 99 (detailing the historical viewpoint that work is the foundation of self-discipline).

us, the cities provided "the sharpest evidence of self-perpetuating tracks for winners and losers," and those on the upper track identified the poor as "the dangerous classes' of the cities and the contaminants of the towns." The fear of the out-of-control "other" was a powerful emotion in those earlier times, and it still is:

The image or stereotype of the "welfare recipient" is the [teenage] unmarried woman, more likely an addict, having children to get on and stay on welfare . . . . The subtext is the African-American "underclass" or the inhabitants of the Latino barrios. Race, ethnicity, and religion reinforce the moral condemnation of welfare. . . . Accordingly, welfare policy is deeply involved in preserving the moral order—the work ethic, and family, gender, race, and ethnic relations. In fact, most welfare mothers are in their twenties and thirties; welfare recipients are racially diverse (about as many whites as blacks, although the proportion of blacks is much higher); the average welfare family has only one or two children; half of all these children are pre-schoolers; and half of the adult recipients are on welfare for two years or less. Many who leave welfare do return to it after a few years when their jobs disappear. Although these women are the subjects of a good deal of moralizing that accuses them of preferring welfare over work, the moralizers rarely trouble themselves to find out what is going on in the lives of real people who are receiving welfare benefits. Overwhelmingly, welfare recipients prefer to be working for pay, and overwhelmingly they are working—usually "off the books" or ille-

93 Id. at 322-23.
94 Handler & Hasenfeld, supra note 7, at 3-4. I have substituted "teenage" for "young"; elsewhere, Handler and Hasenfeld make clear that this is the image they are discussing. The authors' characterization of the popular image of welfare recipients is supported by recent survey research. See Wilson, supra note 22, at 161-62.
95 See Joel F. Handler, The Poverty of Welfare Reform 46-48 (1995). Some 62% of adult recipients are on welfare for four years or less. At any given time, however, longer-term recipients constitute about 65% of the total. See id. at 48-49.
96 For a recent and representative short sermon that fits this pattern, see Gertrude Himmelfarb, Welfare as a Moral Problem, 19 Harv. J.L. & Pub. Pol'y 685 (1996). Himmelfarb's moralizing, for all her insistence on the virtues of throwing people off of welfare and into paid employment, is accompanied by no recognition—not any recognition at all—of the shortage of decent-paying jobs. Whose morality should we be examining here? See also Gertrude Himmelfarb, The De-Moralization of Society: From Victorian Virtues to Modern Values (1995) (discussing Victorian values and the concept of morality).
gally\(^98\)—in order to make ends meet.\(^99\) The term welfare has outlived its usefulness; a more descriptive term, and one less likely to reinforce group stereotypes, would be aid to the working poor.

"The problem of welfare," in today's political rhetoric, is a racially polarizing expression\(^100\) that serves to divert attention from one of the chief causes of poverty: a lack of jobs that pay a living wage.\(^101\) The prevailing image of the welfare mother offers political actors the opportunity to link the idea of work as discipline with primordial fears of the out-of-control "other."\(^102\) Once again, racial and sexual scapegoating is encoded in genteel-sounding appeals to the ideal values associated with work.\(^103\) The "moral order" reinforced by the politics of welfare is indistinguishable from the age-old status order of social groups.

For those who are employed, the workplace is one of our most important arenas for the public interaction of social groups and the public negotiation of group status. The long-lasting exclusion of black, Chinese, and Japanese workers from American labor unions represented not just the exclusion of individual applicants but the purposeful exclusion of racial groups; the most desirable industrial

\(^98\) See, e.g., Kathryn Edin & Christopher Jencks, Reforming Welfare, in RETHINKING SOCIAL POLICY: RACE, POVERTY, AND THE UPPERCLASS, supra note 6, at 204-35 (outlining an in-depth study of fifty welfare matters in the Chicago area). See also Handler & Hasenfeld, supra note 7, at 106-11 (summarizing the similar findings of a number of studies in other cities).

\(^99\) Finding and keeping any job can itself be quite a job if you are a single mother with no resources, no child care, and little education. See Lucie E. White, No Exit: Rethinking "Welfare Dependency" from a Different Ground, 81 Geo. L.J. 1961 passim (1993). The stories told in this Article should be required reading for our self-appointed instructors in Virtue 101.

Adult welfare recipients also spend a great deal of time in unpaid work outside the home to keep their families afloat. This includes time spent seeking to qualify for public medical care for their children, making repeated visits to welfare offices to jump through bureaucratic hoops, and calling on relatives for various kinds of aid. See CAROL B. STACK, ALL OUR KIN: STRATEGIES FOR SURVIVAL IN A BLACK COMMUNITY passim (1974) (exploring strategies and systems poor African-American families use to cope with poverty in their daily lives).


\(^101\) See Handler & Hasenfeld, supra note 7, passim.

\(^102\) I have previously discussed Vice President Dan Quayle's sortie into this territory in the 1992 presidential election. See KARST, supra note 35, at 137-46.

\(^103\) Anglo-American law has always treated relief for the poor as a means of controlling "deviance," distinguishing between the "deserving" poor, who need not work in order to receive support, and the "undeserving" poor, who must be forced to work. In America, the term "undeserving" has been, to a distressing degree, associated with persons of darker skin color. See, e.g., HANDLER, supra note 95, at 10-31. For recent discussions of this pattern in application to women of color, see Judith Olans Brown et al., The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor, 6 UCLA WOMEN'S L.J. 457, 486-95 (1996); LUCY A. WILLIAMS, RACE, RAT BITES AND UNFIT MOTHERS: HOW MEDIA DISCOURSE INFORMS WELFARE LEGISLATION DEBATE, 22 Fordham Urb. L.J. 1159, 1163-68 (1995).
jobs, union leaders repeatedly said, must be a white preserve.  

In our time, racial or sexual harassment on the job not only demeans individual employees, but it also reinforces the view that the members of a minority race in general, or women in general, are not worthy to be full participants in the workplace community.

The workplace is also an arena in which employers, private as well as public, can intensify intergroup conflict. Ronald Takaki has shown how plantation owners in Hawaii, by playing one ethnic group of workers against another, were able to minimize the likelihood that strikes would succeed.  

More generally, politicians have learned that appeals to racial and ethnic antagonisms are an effective “divide and conquer” technique, and that anxieties about employment are especially susceptible to this kind of manipulation. Once any political contest is sharply defined as a struggle between two groups for status domination, the minority loses, for status domination is always a zero-sum game. Jim Crow originated in just such a political use of racial scapegoating, and in the New Deal era, considerations of race produced the exclusion of agricultural work from both Social Security and the minimum wage.  

In our own time, television images are an effective way for political operatives to link racial antagonisms to insecurities about work. The technique has been central to the “social issues agenda” that played such an important role in the realignment of working class whites in presidential campaigns from 1968 through 1988.

Today, one work-related issue that serves a similar political purpose, particularly as to race relations but also as to the relations be-

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105 This group harm can be caused by “nondirected” racial or sexual slurs; for example, the posting of pinup pictures on the walls of the workplace without the targeting of any particular women. For the view that this kind of nondirected speech, in contrast with targeted slurs, is protected by the First Amendment, see Eugene Volokh, Comment, Freedom of Speech and Workplace Harassment, 39 UCLA L. REV. 1791, 1843-72 (1992).


108 William Forbath notes the failure of black workers to share in the New Deal in his insightful analysis of the interplay of racial caste and economic class from Reconstruction to the present. See William E. Forbath, Race, Class, and Equal Citizenship, in MORAL PROBLEMS IN AMERICAN LIFE: NEW PERSPECTIVES ON CULTURAL HISTORY (Karen Halttunen & Lewis Perry eds., forthcoming 1997) (essays in honor of David Brion Davis).

tween women and men, is affirmative action. With so many American workers afraid they will fall out of the middle class, the climate is right for scapegoating. What has changed is the rhetoric. White American men have been reacclimatized at least to this extent: now most do not want to think of themselves as racist or sexist.\textsuperscript{110} The political appeal of the attack on affirmative action is enhanced because it is cast in the language of neutrality, while affirmative action is called "reverse discrimination."\textsuperscript{111}

The appeal is considerable. The Governor of California, hoping to revitalize a dying presidential campaign, led a successful assault in 1995 on affirmative action at the University of California.\textsuperscript{112} And next week the voters of California seem sure to adopt an initiative amendment to the state constitution that will forbid all state agencies from engaging in affirmative action, particularly in the area of employment.\textsuperscript{113} What should give the supporters of affirmative action pause,

\begin{itemize}
\item On white resentment, see DONALD R. KINDER & LYNN M. SANDERS, DIVIDED BY COLOR: RACIAL POLITICS AND DEMOCRATIC IDEALS passim (1996) (examining, along racial lines, the reasons behind Americans' opinions on various policies including affirmative action, school desegregation, and welfare reform, and concluding that whites' racial resentment 1) creates imagined racial threats, 2) fuels their belief that affirmative action threatens their collective interest, and 3) extends to issues as diverse as welfare, capital punishment, sexual harassment, gay rights, and immigration).
\item I have left the text as it was when this lecture was given. The voters did adopt the proposed amendment, by a 54%-46% vote. See State Propositions: A Snapshot of Voters, L.A. TIMES, Nov. 7, 1996, at A29.
\end{itemize}

Well before the California vote, a majority of the U.S. Supreme Court sharply limited state and federal governmental affirmative action programs in the areas of hiring and government contracting. Still, the Court has left the constitutional door open to affirmative action when governmental actors have a persuasive reason for concluding that their programs are needed to remedy the present effects of past racial discrimination or sex discrimination. On government employment, see Wygant v. Jackson Bd. of Educ., 476 U.S. 267, 270-74, 283-84 (1986) (invalidating a preferential collective bargaining agreement layoff provision for being too intrusive a solution after noting the Court's past insistence on both a showing of prior discrimination by the government unit involved and a narrowly tailored means of remedying the discrimination); id. at 284, 286, 294 (O'Connor, J., concurring) (stating that although the layoff provision is not narrowly tailored to effectuate its remedial purpose, nothing in the Court's opinion forecloses the possibility that the Court will find governmental interests sufficient to sustain affirmative action policies). On government contracting, see Richmond v. J.A. Croson Co., 488 U.S. 469, 477-78, 509-11 (1989) (holding unconstitutional the city of Richmond's plan requiring contractors for city projects to subcontract 30% of the dollar amount of the contract to businesses controlled primarily by minority owners, but acknowledging that the city could remedy past discrimination in the
and I include myself, is that in an opinion poll of likely voters taken shortly before the vote, substantial numbers of black (thirty-seven percent) and Latino (thirty-eight percent) Californians supported the ballot proposition.\footnote{114} The "Latino vote" in California typically includes a substantial element that is politically conservative.\footnote{115} No doubt some of the black supporters believe the existence of affirmative action programs will cause their own achievements to be discounted.\footnote{116} Others, however, may share in a larger attitude shift, the increasing despair of middle-class black Americans over the possibilities of full integration into our public life.\footnote{117}

Given the combination of white male resentment and black disillusionment, race-based affirmative action in government employment

granting of contracts if it identified the discrimination with sufficient particularity); Adarand Constructors, Inc. v. Pena, 115 S. Ct. 2097, 2110-12, 2117 (1995) (extending the strict scrutiny analysis of Croson to federal government contracts and reassuring governmental units that strict scrutiny is not fatal and that they may still act in response to past discrimination). Justice Scalia and Thomas would adopt the goal of the proposed California constitutional amendment as federal constitutional doctrine, completely forbidding affirmative action except as a remedy for highly particularized past discrimination by the governmental actor in question. See id. at 2118, 2119 (Scalia, J., concurring). Justice Ginsburg pointed out that a substantial majority of the Justices disagreed with this view. See id. at 2135 (Ginsburg, J., dissenting).


\footnote{115} In 1964 Latinos in California voted overwhelmingly for "Proposition 14," which amended the state constitution to forbid open housing legislation—a measure later held unconstitutional in Reitman v. Mulkey, 387 U.S. 369 (1967). In the Latino communities, voting is heavily weighted toward the middle class. In 1984, exit polls in California gave President Reagan up to 42% of Latino votes. See Peter Skerry, Mexican Americans: The Ambivalent Minority 253-54 (1993).


\footnote{117} See generally Derrick Bell, And We Are Not Saved: The Elusive Quest for Racial Justice (1987) (exploring the historical legal obstacles to racial equality in the United States); Derrick Bell, Faces At the Bottom of the Well: The Permanence of Racism (1992) (arguing that African-Americans will never gain full equality and that the goal of social equality is illusory for them).

On the greater levels of dissatisfaction among middle-class black Americans, see Hochschild, supra note 47, at 55-153. One explanation for this higher level of disillusionment is that middle class blacks have enough day-to-day contact with whites to see the effects of discrimination in their own lives. See id. at 73. Another reason, though, surely rests in justifiable resentment of the stereotyping that, in the minds of many white Americans, seems to attach fears (e.g., fears of crime) to all black people. A famous story illustrating this fear is Patricia Williams's account of a white clerk in an upscale store who would not open the door to Williams, a black woman professional. See Patricia J. Williams, The Alchemy of Race and Rights 44-51 (1991). Some white readers have been unimpressed by this story, but I know several middle-class black people who see it as similar to their own experiences.
CRISIS OF WORK

seems likely to decline.\textsuperscript{118} The sad reality is that this development will be largely irrelevant to black Americans at the lowest levels of the socioeconomic scale.\textsuperscript{119} These people were among the first to be hurt by the shortage of decent jobs,\textsuperscript{120} and they remain the hardest-hit of all.\textsuperscript{121} At the next highest level of employment, too, women and members of racial and ethnic minorities are disproportionately represented among temporary workers.\textsuperscript{122} In every crisis of work in America, the poor who have suffered most have been members of these groups. They have also felt the sting of group subordination in dimensions of their lives beyond employment. With the deterioration of many institutions that used to offer structure to society in the central cities, unemployment, especially among young black men, has become associated with all manner of social ills that, in the aggregate, translate into a sense of hopelessness.\textsuperscript{123} If "the American Dream" is a collective belief in the rewards of work,\textsuperscript{124} hopelessness is its exact antithesis.

This demoralization does not represent a rejection of the positive values associated with work; rather, it indicates how completely the values of work have been absorbed by those who have been marginalized. For people in despair, a common sequel is alienation. When members of a social group become conscious that they, as a group, are

\textsuperscript{118} See generally Daniel A. Farber, The Outmoded Debate Over Affirmative Action, 82 CAL. L. REV. 893 (1994) (contending that affirmative action will fade because of its practical and political limits).

Private employers, in contrast, will probably continue to adopt programs of affirmative action as "anticipatory remedies" to avoid lawsuits or administrative proceedings founded on charges of past discrimination. And because affirmative action programs for women have caused less resentment than race-based programs, they seem likely to survive even among governmental employers, unless they fall victim to omnibus anti-affirmative-action legislation similar to the impending amendment to the California Constitution.

\textsuperscript{119} This development is not entirely irrelevant for potential workers at the lowest wage levels, but the results are not encouraging for affirmative action advocates. See Jencks, supra note 6, at 49-58.

\textsuperscript{120} For an analysis of the factors that have contributed to unemployment among working-class black Americans, see William Julius Wilson's valuable but unfortunately titled book, The Declining Significance of Race: Blacks and Changing American Institutions (2d ed. 1980). For a more recent sorting of factors in the joblessness of urban black men living below the poverty line and an evaluation of possible remedies, see E. Douglass Williams & Richard H. Sander, The Prospects for "Putting America to Work" in the Inner City, 81 GEO. L.J. 2003 (1993).

\textsuperscript{121} See Jencks, supra note 6, at 49-58.

\textsuperscript{122} See Carré, supra note 15, at 50; Nollen, supra note 11, at 570. Of course these categories can overlap; a woman of Puerto Rican ancestry might bear all three descriptive labels.

\textsuperscript{123} See Jencks, supra note 6, at 149-203; The Urban Underclass passim (Christopher Jencks & Paul E. Peterson eds., 1991); William Julius Wilson, The Truly Disadvantaged: The Inner City, The Underclass, and Public Policy passim (1987); Robert J. Sampson, Urban Black Violence: The Effect of Male Joblessness and Family Disruption, 93 AM. J. SOC. 348 (1987).

being denied equal access to decent work, they will see themselves standing outside the larger community. So, the world of work provides its own illustration that the American ideal of equality is linked not only to liberty but also to national union.

III

UNION: WORK AND THE CONSTITUTION OF A NATION

From the earliest days of American nationhood, a free citizen has been able to claim a right of geographical mobility. In a single section of the Constitution,125 the framers drew an explicit line between free labor and slave labor. The Fugitive Slave Clause contemplated that a slave who escaped to a free state would be forcibly returned to bondage. The Privileges and Immunities Clause, on the other hand, protected a free citizen's right to move from one state to another and to be afforded, among other privileges, the right to work in the new state on the same terms as local citizens.126 Formation of an economic union, after all, was the chief motivation for the Constitutional Convention and one of the easiest matters for the Convention to resolve.127 As we have seen, work and its rewards can also lead to social advancement. The two forms of mobility can complement each other: Citizen Giannini may move away in order to move up, while Citizen O'Malley's rise in fortunes may provide the independence that allows a move to a new state. Many things have changed in 200 years, but we still understand the relationships between freedom and these two forms of mobility. As interpreted by the modern Supreme Court, the Privileges and Immunities Clause retains its youthful vigor as a safeguard for the interstate mobility of workers,128 and those decisions are commendable.

125 U.S. Const. art. IV, § 2.
126 This Clause was adapted from the Articles of Confederation of 1781. It received the interpretation stated in the text as early as Corfield v. Coryell, 6 F. Cas. 546, 551-52 (C.C.E.D. Pa. 1823) (No. 9280).
128 See, e.g., Supreme Court of N.H. v. Piper, 470 U.S. 274 (1985) (nullifying a New Hampshire restriction limiting membership in the state bar to state residents after finding no substantial reason to discriminate against a non-resident attorney); United Bldg. & Constr. Trades Council v. Mayor of Camden, 465 U.S. 208 (1984) (holding that a municipal ordinance that discriminates against nonresidents of a city, rather than a state, falls within the Privileges and Immunities Clause, and remanding for determination of whether the city had a substantial reason to discriminate in its requirement that 40% of contractors, subcontractors, and their employees working on city projects be residents of the city); Hicklin v. Orbeck, 437 U.S. 518 (1978) (invalidating an Alaska statute requiring, in oil and gas leases and oil pipeline permits to which the state is a party, a contractual provision for preferential hiring of qualified Alaska residents over nonresidents).
This Clause is one arguable source of the constitutional right to travel, but other parts of the constitutional text have also been identified as sources of the same right. Surely, though, Justice Brennan is correct in saying that no particular textual source is required, for the right is implicit in our national union. Whether or not the right to travel should be limited to a right to migrate, interstate migration lies at the heart of the right. Typically, Americans migrate with the intention of taking employment in their destination states, and today a central object of the right to travel is freedom of access to work in an employment market that is national in scope.

From a broader constitutional perspective, both the Privileges and Immunities Clause and the right to travel promote not only economic integration but political integration. If the privilege of free and equal access to work—"the pursuit of a common calling"—is considered "fundamental" to the preservation of the American union, the reason is that work is vital to the independence of the individual both in the economic dimension and other dimensions of his or her life. Jonathan Varat has pointed out that this freedom of personal mobility—precisely because of its importance to a "range of personal life-defining liberties"—is of even greater concern to "political unification and personal liberty" than it is to national economic union. As this profound observation makes clear, the values of union and equal liberty come together in cementing the individual's sense of belonging. Work, and the employment market where work is negotiated, are fields of action in which both workers' freedom and workers' allegiance are played out.

The union of the American people is a constitutional value of the first importance. This interest in political union has been described as an interest of the people that "weighs against a policy" of government that is highly likely to precipitate caste divisions and thus disrupt


\[130\] See Kenneth L. Karst, Right to Travel, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 1593, 1593-94 (Leonard W. Levy et al. eds., 1986) (identifying the Commerce Clause and the Equal Protection Clause as additional sources of the constitutional right to travel).

\[131\] See Zobel, 457 U.S. at 67 (Brennan, J., concurring).


\[135\] In 1830, in one of his most famous speeches opposing slavery, Daniel Webster insisted on the same linkage: " Liberty and Union, now and forever, one and inseparable!" THE OXFORD DICTIONARY OF QUOTATIONS 725:6 (Angela Partington ed., rev. 4th ed. 1996) (quoting from the Second Speech in the Senate on Foote's Resolution).
the unity of the whole people. But the tasks of preserving the union and avoiding the subordination of caste typically will require the positive energies of government—for example, assuring sufficient funds for the education of all children, or creating jobs in a time of severe unemployment. In a community of equal citizens, responsibility goes beyond the obligations of law. Citizens have moral and political obligations to each other.

The national community, like any other community, carries with it a state of mind, a widely shared belief that "we are in this together." A sense of community needs continual nourishment, whether that community be a family, a neighborhood, or a nation. And, although the sense of obligation within a community may result in altruistic behavior, the nourishment cannot always run in one direction. No one maintains allegiance indefinitely without some sense that "there is something in it for me." True, the "something" can be intangible, but, usually, even the intangibles are reciprocal. Only a rare and saintly person goes on giving forever, with no hope of any payoff.

It is easy to see the relevance of these requisites of community allegiance to race relations in America. Recent calls for black separatism, for example, seem to express the growing pessimism among black Americans about the chances for group status equality. One area of American life in which the effects of racial caste are still to be found is the world of work. A genuine equality of access to stable jobs for black Americans would not only help to neutralize the racial hue that has been cast on a welfare system designed to stigmatize, but would also promote political unity by reducing the alienation that feeds on exclusion.

Historically, the workplace has been not only a field of ethnic conflict but also a source of social integration. Immigrants, from Asia and Latin America as well as Europe, have found work to be a place of learning, not only of job-related skills but of American English and


137 In San Antonio Indep. Sch. Dist. v. Rodriguez, Justice Powell's majority opinion strongly hinted that there would be a serious constitutional problem with a public school system that excluded children too poor to pay tuition. 411 U.S. 1, 25 n.60 (1973). See also Justice Brennan's comment in Plyler v. Doe, discussed supra text accompanying note 57.

138 Examples can be found in various work programs of the New Deal.

139 See generally Harold Cruse, PLURAL BUT EQUAL: A CRITICAL STUDY OF BLACKS AND MINORITIES AND AMERICA'S PLURAL SOCIETY (1987) (documenting the rise and the waning of the civil rights movement and advocating the establishment of an independent African-American political party as a means of promoting group political, cultural, and economic survival).

140 See supra text accompanying note 94.
other aspects of the American culture.\textsuperscript{141} True, the interaction of ethnic groups in the context of work has often been contentious and sometimes violent.\textsuperscript{142} But, by a group's third generation in America, high levels of social integration are the norm. The dominant factor in achieving both racial and ethnic integration has been economic advance, the entry of various outsider groups into the middle class.\textsuperscript{143} One index of integration is intergroup marriage; when the great majority of a group's members attain middle class status, marriage outside the group increases dramatically. Recent illustrations are the out-marriage patterns among American Jews and Japanese Americans.\textsuperscript{144} Access to work is an indispensable ingredient of a group's integration.\textsuperscript{145}

The world of work, then, offers vivid evidence of the connections between group status equality and national union—or, conversely, the links between inequality and disunion. In the field of work the crucial links in these two circles, benign and vicious, are inclusion or exclusion.\textsuperscript{146} Three decades ago, a distinguished national commission captured the economic and social separation of black and white Americans by calling the races “two societies”;\textsuperscript{147} a substantial racial differential in access to work was identified by the commission as both indicator and cause.\textsuperscript{148} Today it is more obvious than it was in 1968 that the “two societies” label oversimplifies, failing to account for the

\begin{itemize}
\item For a discussion of the adaptation of European immigrants to industrialization, see Rodgers, \textit{supra} note 47, at 170-73. The immigrant who arrived without friends or industrial skills “often went through the painful shock of unemployment followed by entrapment in a brutal round of temporary jobs.” \textit{Id.} at 172.
\item By integration I do not mean the erasure of cultural difference; I mean inclusion, by offering the choice to participate fully in all aspects of our public life. See Karst, \textit{supra} note 143.
\item \textit{Report of the Nat’l Advisory Comm’n on Civil Disorders} 1 (1968).
\item See \textit{id.} at 10-14.
\end{itemize}
many millions of Americans who identify themselves as neither black nor white. As a characterization of black/white relations, however, the concept of "two societies" retains considerable validity. A generation of advance for the one-third of black Americans who are now in the middle class is something to applaud, but the applause is muffled when we consider the nearly one-third of black Americans who live in poverty—or move in and out of poverty, as unemployment levels wax and wane. Until that number is drastically reduced, we must speak of a national community in the vocabulary of hope.

Race is by no means the only contributor to the group division that threatens national union in our increasingly "split society." This term refers to the division with which we began: A majority of Americans have access to employment at decent wages and, through that employment, access to family security benefits. A smaller but growing number of Americans lack decently remunerative pay and also lack the essentials of family security. This latter group is growing and seems likely to continue growing for years to come. Yet, for the most part, those who make the nation's employment policy are looking in other directions.

We confront a social Great Divide, one that endangers the union of citizens that is the foundation of our constitutional order. To those who say, "It can't happen here," I commend a 1935 novel by that very title. In the novel, of course, it did happen: a coup was organized by the elite after the election of a demagogue as President—a man who looked very much like Huey Long. An alternative response to widespread disorder might be a regime of "friendly fascism," all decked out in red, white, and blue. President Franklin Roosevelt came to understand that it could happen here. He saw the New Deal as a program that would preserve the blessings of economic freedom in the face of attack from radical quarters on the left and right.


150 See id. at 93-103; Holmes, supra note 25.

151 Bellin & Miller, supra note 32, at 173.

152 See id. at 173-81; Thurow, supra note 5, at 56-57. There is nothing "natural" about this projection and nothing inevitable either. Government has the power to shape these developments. The more somber question is whether comfortable Americans, a term that embraces all our policymakers, will have the will to do so. See id. at 189-90.

153 Sinclair Lewis, It Can't Happen Here (1935).

154 I have taken the term from Bertram Gross, Friendly Fascism: The New Face of Power in America (1980), but I have in mind something more akin to the Italian and German versions of fascism that emerged in the 1920s and 1930s.

Today's policymakers should ponder the relevance of Roosevelt's acumen to their own responsibilities.

IV
A CONSTITUTIONAL RIGHT OF ACCESS TO WORK?

Although it is instructive to look at work and unemployment from the constitutional perspectives of liberty, equality, and national union, I do not suggest that American courts are capable of enforcing a constitutional right to stable and adequately compensated work. William Forbath, after illuminating the moral force and sophistication of the nineteenth century advocates who claimed such a right, has powerfully argued for recognition of the right in our own time. He makes clear, however, that he does not place responsibility for vindicating this right on the courts. Rather, he looks to Congress and to the state legislatures. I agree that American lawmakers can and should contribute to a national effort to head off the impending crisis of work. Any effective contribution will include a conscious effort to expand the social definitions of work. To understand the difficulty of accomplishing even that task, we need to examine why it is that the courts are incapable of enforcing a generalized constitutional right to decent work.

In the late nineteenth and early twentieth centuries, the judiciary could have promoted a more generous view of the freedom to work simply by upholding laws designed to expand workers' range of free choice. When advocates asserted a right to decent work, they mainly asked the courts for removal of the judicial veto, not the recognition

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156 See Forbath, Rights Talk, supra note 67, at 1790-92. See also Forbath, Free Labor, supra note 67, at 800-14. For an analogous argument, deriving a right to labor protest not only from the First Amendment but from the Thirteenth Amendment and from "republican free labor" ideals, see James Gray Pope, Labor and the Constitution: From Abolition to Deindustrialization, 65 Tex. L. Rev. 1071, 1096-112 (1987).


Judith Shklar, who argues for philosophical recognition of a right to work, adds:

It may not be a constitutional right or one that the courts should enforce, but it should be a presumption guiding our policies. Instead of being regarded as just one interest among others, it ought to enjoy the primacy that a right may claim in any conflict of political priorities.

Shklar, supra note 48, at 99 (footnote omitted).

158 See infra Part V.
of an enforceable right of guaranteed employment.\textsuperscript{159} If enforcement of such a right would have been difficult a century ago, the crisis of work in our time will confront any would-be judicial Solon with insurmountable obstacles. The problems lie not only in the application of remedies but in the definition of substantive claims.

Judicial remedies, even sweeping remedies, are readily conceived when the courts have a clear idea of what constitutes wrongdoing, and who is doing the wrong. Jim Crow was an all-pervading social system, but the basic wrong of racial subordination through race-based exclusion was easy to see for anyone who was looking.\textsuperscript{160} The wrong—the constitutional wrong—was committed not only by officers of government but by nongovernmental actors who controlled access to elements of "the public life of the community,"\textsuperscript{161} and especially the public world of work.\textsuperscript{162} When the wrong consists of exclusion, one obvious remedy is to order an end to the exclusion. In furtherance of this end, a positive command to desegregate the workplace is appropriate.\textsuperscript{163} Affirmative remedies for employment discrimination were developed early in the Supreme Court's interpretations of Title VII of the Civil Rights Act of 1964 and have become a standard part of the judiciary's remedial repertoire.\textsuperscript{164}

So, when I speak of insuperable obstacles to judicial enforcement of a constitutional right to decent work, I am not talking about the "state action" limitation that was made by judges and could be unmade by them. Nor am I assuming some inherent limitation on courts' capacities to develop affirmative remedies.\textsuperscript{165} Both of those presumed obstacles are quite surmountable. Rather, the chief difficulties lie in the superabundance of causes for the harm of joblessness in today's economy. This diffusion of responsibility seriously compli-

\textsuperscript{159} See Forbath, \textit{Free Labor}, supra note 67, at 775-800, 805-06.
\textsuperscript{160} Even after all these years, the best exposition of this point remains Charles L. Black, Jr.'s powerful essay, \textit{The Lawfulness of the Segregation Decisions}, 69 \textit{Yale L.J.} 421 (1960).
\textsuperscript{162} See Karst, \textit{ supra} note 65, at 5-11.
\textsuperscript{164} An analogy outside the world of work may be helpful here. If Congress had not enacted the Voting Rights Act of 1965, there would be nothing amiss in a "judicial activism" that developed affirmative remedies for violation of the Fifteenth Amendment.
cates not only the identification of particular defendants and the crafting of judicial remedies, but also the definition of the wrong.

Consider, for example, the multifaceted question of temporary and part-time work. A great many workers who occupy these jobs surely would prefer steady, full-time work, not only for job security and better incomes, but also for the health care and pension benefits that are so vital to family security. What is the wrong here? Who is the wrongdoer? What remedial action should a court command? To the extent that underemployment is aggravated by low wages in a global labor market, most of that factor lies beyond any American judge’s writ. But, even if we could put aside the effects of the “new world order” on American jobs, and even if we could particularize responsibility for underemployment in some cases, the dimensions of a right to decent work would remain elusive. Unlike the constitutional litigation that invalidated the Jim Crow laws (or even statute-based litigation against private employers who practice racial discrimination), litigation to enforce a right to decent work does not offer the prospect of standardized lawsuits, against standardized defendants, with demands for standardized forms of relief. True, if a company should persist in using temporary or part-time help to avoid the costs of health and pension benefits, it would be easy to specify a standard remedy: a court could order the company to stop. But, even in so simple a case, the attempt to define the contours of the right would lead the courts deep into a question that turns the “liberty of contract” issue of the early twentieth century upside down: How much market freedom must give way to the freedom of access to work? Or, to put it more starkly, in which particulars is capitalism unconstitutional? This thicket of political economy makes the “political thicket” of legislative reapportionment look like a stroll in the park.

Here I draw heavily on the work of Joel Handler, see Handler, supra note 95, at 42-44; Handler & Hasenfeld, supra note 7, and on Gillian Lester’s research on the subject, as yet unpublished.

Estimates vary as to the proportion of temporary or contingent workers who would prefer permanent work, but a majority appear to do so. See Developments in the Law: Employment Discrimination, supra note 10, at 1651 n.24. On the other hand, some surveys indicate that a majority of part-time workers say they are holding those jobs voluntarily. It is hard to estimate the degree of actual choice being exercised here, given the parlous state of child care, the costs of transportation, and widespread awareness of the shortage of full-time jobs. See Handler, supra note 95, at 43.

Speaking of reapportionment, Justice Felix Frankfurter said, “Courts ought not to enter this political thicket.” Colegrove v. Green, 328 U.S. 549, 556 (1946) (plurality opinion).

Plainly, a court that declined to find a “comparable worth” requirement in Title VII’s general prohibition of sex discrimination is not about to enter the thicket of fair distribution of work. See County of Washington v. Gunther, 452 U.S. 161, 183-84 (1981) (Rehnquist, J., dissenting). In any case, the comments in the text are not so much predictive as they are normative.
The prospect of a prolonged scarcity of decent jobs makes the definition of a constitutional freedom to work even more difficult. For example, one response to the job shortage may be part-time work itself, or, to use a more positive term, job sharing. Such a program would seek to lower the number of hours worked by individual workers in order to employ more of them—but if that were the end of the matter, there would be no solution at all. We can imagine the advertising slogan of the company that systematically hires temporary and part-time workers and consistently refuses to provide them with health or pension benefits: "Do people care about joblessness? People do." A further sharing of jobs that simply spreads around the effects of underemployment will only intensify the crisis of work. To lower hours while assuring the expanded work force of health care and pension benefits does not seem beyond human ingenuity. But imposing that remedy on private employers as an implication of a right to decent work would involve judges in constitutionalizing one specific, yet incomplete, solution from among myriad possible responses to the harms of underemployment. Alternative proposals have included a variety of combinations of governmental provision, tax subsidy, or mandated health care or retirement benefits. If ever there were a place for heeding Lon Fuller's advice to leave "polycentric" problems to legislative solutions, this is it.

Can an analogous constitutional duty be enforced against agencies of government? The model, arguably, would be those school desegregation cases in which school boards were ordered to bring into court their own plans for desegregating. By analogy, a right to access to work might be enforced by commanding government officials to offer plans for the relief of the harms of unemployment and underemployment. The advantage here would be that the initial choices among the wide range of possible actions would emerge from a political (administrative and legislative) process, with the courts limited to a veto power. Some years ago I suggested something similar as a way of prodding political action to alleviate the worst effects of marginaliz-

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169 I refer here to the environmentalist hymns in recent advertising by an oil company that for twenty years dumped pollutants into the ocean off Catalina Island. Do people indulge in hypocrisy? People do.

170 See infra text accompanying note 189.


172 See, e.g., Green v. County Sch. Bd., 391 U.S. 430, 439 (1968) (holding that district courts have an obligation to assess the effectiveness of a school district's proposed desegregation plan and to retain jurisdiction until it is clear that segregation has completely disappeared); Board of Pub. Instruction v. Braxton, 402 F.2d 900, 901-02, 906-07 (5th Cir. 1968) (rejecting a school district's challenge to a court-compelled provision of a desegregation plan and remanding to the district court to reconsider the school board's entire plan pursuant to the requirements set forth in Green).
ing poverty on black Americans in our central cities. Even this proposal, I conceded, would press the courts toward the outer limits of their capacities.\textsuperscript{173} What is different about the crisis of work we now face is not only the greater diffusion of harms and the greater difficulty in particularizing causes of joblessness,\textsuperscript{174} but the heightened influence of a factor—the global labor market—that a defendant public agency will find hard to govern. Considerations like these should not be taken by legislators as a counsel of despair,\textsuperscript{175} but for judges they are a counsel of modesty.

The idea of a right to work at a living wage, backstopped by the health and pension benefits needed for family security, unquestionably resounds with our constitutional values of liberty, equal citizenship, and national union. But if the courts are not going to enforce the right—and, certainly, they are not\textsuperscript{176}—then they should not declare it to be a constitutional right. Even the “Constitution of aspiration,” to the extent that it encompasses more than pleas for the courts to recognize new rights and enforce them, is a set of political claims resonating against various constitutional guarantees that are enforced—a political “penumbra,” if you will.\textsuperscript{177} True, judges do try to mobilize citizen respect for constitutional values by articulating those values in opinions, but the hallmark of a judicially recognized constitutional right is that it will be enforced—that if the right be denied, a court will supply a remedy. This is what lawyers and lay observers usually have in mind when they talk of constitutional rights.\textsuperscript{178}


\textsuperscript{174} See Bellin & Miller, supra note 32, at 174-77; Williams & Sander, supra note 120, at 2013-42.

\textsuperscript{175} See infra note 177 and accompanying text.

\textsuperscript{176} A decade ago, Charles Black made an eloquent appeal for recognition of a constitutional right to the basic necessities of livelihood. He mainly envisioned a duty of the President and Congress to act effectively to keep Americans out of poverty. He did not expect much help from judges: “The courts probably cannot do very much herein—certainly not enough—though perhaps we will know more about this later, through trial.” Charles L. Black, Jr., Further Reflections on the Constitutional Justice of Livelihood, 86 COLUM. L. REV. 1103, 1107 (1986).


\textsuperscript{178} Lawrence Sager thoughtfully explored these boundary regions in his article, Fair Measure: The Legal Status of Underenforced Constitutional Norms, 91 HARV. L. REV. 1212 (1978).
something to be left to political negotiation; that sort of abdication, after all, was the most grievous error in "all deliberate speed."\textsuperscript{179}

The Fourteenth Amendment's guarantees of liberty and equal citizenship, however, do have their own legislative-power "penumbras," with a clear textual basis in Congress's power to enforce the amendment "by appropriate legislation."\textsuperscript{180} This power has been interpreted generously by the Supreme Court in the field of voting rights legislation,\textsuperscript{181} and a similar generosity ought to extend to congressional laws to promote a right to remunerative work. Access to work, we have seen, is an individual liberty of major importance, and equal access to work has a comparable importance for individuals' enjoyment of equal citizenship, which typically turns on the status of groups. Surely Congress can promote this liberty and this equality, not only in the name of the commerce and spending powers,\textsuperscript{182} but also in exercising its Fourteenth Amendment power. In the next Part we examine some legislative proposals along these lines.\textsuperscript{183}

It is entirely appropriate to refer to such legislation as the enforcement of a constitutional right. But the claim of a constitutional status for a right of access to work ought to be left to Congress, to the President, to other political actors, and to commentators on the Constitution. In 1941 Franklin Roosevelt and Winston Churchill met on

Some constitutional norms, he said, are underenforced by the judiciary for reasons related not to the substance of the norms but to perceived limitations of judicial capacity or of the courts' legitimate role in the governmental system. See id. at 1219-20. He concluded that "the unenforced margins of underenforced norms should have the full status of positive law which we generally accord to the norms of our Constitution." Id. at 1221. Thus public officials should understand that they are duty-bound by the norms, even though no court will hold them to that duty. For a "second pass" at the topic of underenforced norms, see Sager, supra note 178, at 419-35.

William Forbath's call for recognition of a constitutional right to decent work seems to fit this model. See Forbath, Free Labor, supra note 67; Forbath, Rights Talk, supra note 67. The constitutional duty in question would fall on the President and Congress to validate the promise of equal citizenship by assuring citizens the wherewithal to participate effectively in the national community.

\textsuperscript{179} See Kenneth L. Karst, Equality and Community: Lessons from the Civil Rights Era, 56 NOTRE DAME LAW. 183, 208-11 (1980) (criticizing the "all deliberate speed" formula for failing "both the test of principle and the test of expediency").

\textsuperscript{180} U.S. CONST., amend. XIV, § 5.

\textsuperscript{181} See, e.g., City of Rome v. United States, 446 U.S. 156, 179 (1980) (holding that "principles of federalism that might otherwise be an obstacle to congressional authority are necessarily overridden by the power to enforce the Civil War Amendments by 'appropriate legislation'"). This power is one of the main illustrations of Lawrence Sager's thesis. See Sager, supra note 178. The breadth of the "remedial" legislative power recognized in the Rome decision would seem to obviate the need for Congress to tap into the full potentialities in Katzenbach v. Morgan, 384 U.S. 641 (1966). See Sager, supra note 178, at 1228-42.

\textsuperscript{182} The Commerce Clause is ample authorization for such an exercise of congressional power, even after United States v. López, 115 S. Ct. 1624 (1995) (striking down the Gun-Free School Jones Act for exceeding Commerce Clause authority).

\textsuperscript{183} As the next Part suggests, state governments can make their own contributions to relieving the harms of underemployment. Here, however, I focus on Congress.
the high seas to issue the Atlantic Charter, setting out common aspirations of the American and British people. The Charter included the "Four Freedoms" that Roosevelt had recently articulated, identifying the "freedom from want" as an essential of the democratic faith. The Charter was not enforceable as law, but its rhetoric of rights is a solid political precedent for the freedom to work.

The political value in applying such a rhetoric of rights to the right to decent work is plain enough: "People mobilize around rights, not human capital policy." But it is also true that people—at least American people, in our time—expect judges to enforce the rights they declare. Constitutional rights talk from the courts, when it is not backed up by judicial enforcement, may be seen as all talk and no rights. The moral philosopher Judith Shklar said that the right to work should be respected as "a presumption guiding our policies," enjoying "the primacy that a right may claim in any conflict of political priorities."  

V  
INTERDEPENDENCE: LAW AND THE EXPANSION OF THE SOCIAL MEANINGS OF WORK

The political morality of a right to work can be translated into citizens' lives only if government officials and private employers confront an issue that has previously seemed too difficult and too painful to contemplate seriously: the fair distribution of work. In this final discussion I do not offer proposals of my own to respond to the crisis of work. Rather, I take up various proposals made by others and examine them in the light of the social meanings of work, particularly as those meanings are affected by the constitutional values of liberty, equality, and national union.

In any initiative to head off a crisis of work, government is likely to make some distinctive contributions. Still, given that the liberty-oriented meanings of work closely link self-realization with individual achievement, I assume that any governmental responses would be made within the broad outlines of a system in which economic decisions are generally left to market solutions. There is no contradiction here. Our free market system already includes public interventions in the employment market, from wage-and-hour laws and antidiscrimina-
tion laws to the Federal Reserve's adjustment of interest rates to keep unemployment at a level that will avoid inflationary pressures. It is consistent with this system, in principle and in practice, for government to seek to broaden the base of citizenship by broadening the base of work.

When I speak of government, I refer both to the United States and to the states. A single program might involve both levels of government. For example, Congress might condition block grants to the states on the adoption of state or local plans to attack underemployment or to relieve underemployment's most serious harms. Such a program could combine the national government's superior funding capacity with the benefits of local experimentation.

Recent proposals for legislation responding to the crisis of work have been notable for their wide variety. Government might seek to shorten the work week by direct regulation, as Senator Hugo Black proposed in the 1930s, but most recent suggestions for legislation have emphasized incentives that are less coercive. Government might offer tax subsidies to private employers who adopt work-sharing policies that pay a living wage even for reduced hours and make health and pension benefits available to all their workers. Government might achieve similar results by serving as an employer of last resort, but in my view, other ways of broadening the base of citizenship generally would be preferable. For example, health and pension benefits, so vital to family security but now inaccessible to the large number of citizens who are underemployed, might be altogether split off from employment, with government either subsidizing the benefits or providing them directly. Government might subsidize day care for young children, perhaps administered by public and private school systems.

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188 On the latter policy, see supra text accompanying notes 2-4.
189 See Rifkin, supra note 29, at 28. For Rifkin's own elaboration of a similar project, see id. at 221-35.
190 See, e.g., PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE POLICY AND THE UNEMPLOYED IN THE UNITED STATES 11-20 passim (1989); Williams & Sander, supra note 120, at 2047-52. Public funds in the United States have always been used to create jobs, not just in the New Deal era but in depressed cities of the Northeast in the 1850s, and in a continuous stream of party patronage dispensed at levels high and low. The idea of spending public money to create jobs has been continuously supported in surveys of American attitudes in this century. On the spending programs and the surveys, see Theda Skocpol, Brother, Can You Spare a Job? Work and Welfare in the United States, in THE NATURE OF WORK, supra note 32, at 192, 188-201. The practice continues today, in government spending on agriculture, on highways, on the space program, and on defense. Let us not forget how Senator Henry "Scoop" Jackson of Washington earned the title, "the Senator from Boeing." See Peter Schrag, Restoration: Congress, Term Limits and the Recovery of Deliberative Democracy, THE NATION, Oct. 19, 1992, at 445.
Any of these alternative proposals—subsidy, government provision, or government employment—would carry significant costs, and the political obstacles here are huge. Congressional Democrats may attribute their 1994 rout to the failure of the Administration’s proposal for health care reform. One explanation for that fiasco is that the proposed system was an overcomplicated administrative nightmare. But another explanation seems at least as valid: Middle class Americans remembered, with some prompting from the insurance companies, that, however much they believed in good health care for the poor, they did not want to pay for it. The voting public is largely middle class, the very people who would carry the greatest part of the burden of any of the employment programs I have mentioned. A work-sharing policy that costs money can be sold to voters only if they understand how important work is to individual and group status. But, as we saw when we looked at work in America from an equality-oriented perspective, this voter support is no sure thing. It is entirely possible that middle class voters, when they focus on the symbolic values of work, will be reluctant to share those symbols of inclusion with people who are poor, or dark-skinned, or both. As any parent will attest, it is not easy to teach people to accommodate grasping and sharing.

Assume, for the moment, that this formidable political hurdle can be surmounted. The question remains: Can legislation help us to expand the social meanings of work to reflect not only the values of liberty but also the values of equality and union—to reflect not only our pursuit of independence but also our interdependence? My answer is a qualified Yes. To the extent that the law’s inducement succeeds in promoting work-sharing, it can also help to redefine the meanings of industry and dependability. Similarly, law can help to

192 For one refutation of this position, see John B. Judis, Abandoned Surgery: Business and the Failure of Health Care Reform, AM. PROSPECT, Spring 1995, at 65-66 (blaming the loss of support from prominent business groups as the cause of the demise of the Health Care Reform proposal).

193 See, e.g., James F. Blumstein, Health Care Reform and Competing Visions of Medical Care: Antitrust and State Provider Cooperation Legislation, 79 CORNELL L. REV. 1459, 1500 (1994) (discussing the prospect of lower quality services for the 85% of the population currently insured and the spreading of health care dollars over more beneficiaries as a “hidden in-kind transfer program”).

194 Even a steeply graded income tax at the very highest levels never seems to produce significant revenue—although many Americans might think that an after-tax income of half a million dollars a year would be plenty to live on, even for a movie star or a basketball player. Perhaps the largest American companies could survive in the competition of the new world order even if they were not allowed full tax deductions for paying their chief executive officers at the 1995 rate of 185 times the average pay of their employees. See Sarah Anderson & John Cavanagh, CEOs Win, Workers Lose: How Wall Street Rewards Job Destroyers, 1996 INST. FOR POL’Y STUD. THIRD ANN. ANALYSIS OF EXECUTIVE COMPENSATION 1. The corresponding ratios in Japan, France, and Germany are 25, 30, and 35. See id.

195 See supra Part II.
attach the standard meanings of compensable labor to work activities that, traditionally, have not been so labeled. In doing so, law can also help to deepen our understanding of earnings and of independence itself. One who is hostile to these redefinitions may call them lawyers’ rationalizations; one who is more receptive may see them as the shaping of traditional legal forms to fit the actualities of people’s lives.

One proposal is that government should find ways to compensate work that has not traditionally been seen as paid employment. Examples might include the maintenance of a family home (including one’s own home or that of a relative), care of children (including one’s own children as well as other children), or some forms of community service now typically performed by volunteers, such as working with a neighborhood food bank, serving a local youth group, or reading to persons who are blind. I am not referring here to “make-work” jobs, but to work, previously unrecognized as such because it has not been validated by a wage.

The very mention of “make-work” jobs should be a warning signal, cautioning that a scheme in which government is the employer is truly a last resort. A wage serves best to validate work and the worker when the employment represents an employer’s choice. To preserve the liberty-oriented values of work as validation, any government contribution to the wage ideally should leave an employer free to choose among applicants for the job. This stricture has obvious application to the community-service alternatives I have mentioned, but it applies equally well to any strategy that employs government subsidies to private employers.

In conversation, my colleague Richard Sander has suggested to me a more generalized job-promoting scheme that easily meets this standard of market validation for work. Congress might authorize a wage subsidy for all private employers in a given region, perhaps in the form of a credit against payroll taxes. The amount of the subsidy could be calibrated to rise and fall with changes in unemployment in the region and phased out when the regional labor market became tight enough to generate wage inflation. This kind of subsidy would leave the selection of workers entirely to the employer, with resulting gains not only in efficiency but in workers’ sense that they are contributing members of society.

Jeremy Rifkin argues for this approach as a way to add vitality to the “third sector,” the independent or volunteer sector that lies between government and the private market. See Rifkin, supra note 29, at 239-74.

The announcement of a five percent national rate of unemployment may conceal regional differences that are substantial. A sliding-scale regional wage subsidy would have one advantage over the interest-rate adjustments now administered by the Federal Reserve: it would not regulate the entire national economy as a lump, but would be more finely attuned to local needs for stimulus and restraint of growth.
Any system to compensate work that has been traditionally uncompensated would require some imputation of value to activities for which there is no standard market price. Consider again the people who service California's freeway rest-area parks. What is the proper valuation for their work? There is, let us assume, no established market for the labor of people with mental impairments. Should these workers' services be valued at the cost of hiring a commercial cleaning/gardening service? It is not impossible to fix some imputed market value, but the market doesn't impute; it buys and sells. Imputing here is an evaluative exercise that assumes a conclusion. What I value most in the state's employment of these people is not that the parks are clean and pleasant, but that the workers are afforded the dignity of work. This is not a market calculation; rather, it is an evaluation that gives weight to the inclusion of a group of Californians in our community.

Pursuing the same theme, consider a legal principle familiar to any adult Californian: the ownership of community property. (This is not a play on words; the subject is linked to the people who clean the parks by more than the word "community.") Although one spouse's employment income may be considerably greater than the other's, California law treats each spouse as the owner of half of the total earnings of husband and wife—or, to use language familiar to California lawyers, half the earnings of the marital community. It used to be true, in community property states, that the husband managed the community's property, but now that right of control is divided evenly, and the United States Constitution stands in the way of any legislative effort to revive the husband-management system.

Suppose a male entertainer lives in California with his wife, and that he has a huge income as a performer. His wife produces no income from her own labor, but she shares equally in the community's earnings and in any property bought with those earnings. In what sense does her ownership represent the application of free-market principles? Do we think about this question in the vocabulary of imputed earnings, estimating the value of the wife's services in the home, or estimating the earnings her own labor would bring on the market if she were employed for pay? Lawyers, of course, are experts at what economists call imputing. Economists impute; lawyers deem. In California, I am glad to report, the courts would not waste their time on evaluating this wife's contribution. She is entitled to a

198 See CAL. FAM. CODE § 760 (West 1994).
one-half share because the marriage is deemed to be a community. And that is that.

The idea that the work of an individual can, in some legal sense, belong to a community is not a modern invention. In early modern England and during the colonial era in America, the work of many a worker was treated by statute or village bylaw as a common resource of the village or town.\(^{201}\) "[O]ne who was a member of the community owed his or her labor to other community members first and was not free to depart from the town unless that labor was not needed."\(^{202}\) Today, of course, it is often the employer who decides that it would be profitable to leave town. In fact, this sort of market-driven decision is one marginal contributor to the crisis of work.\(^{203}\) In the perspective of community responsibility, it is possible to see an analogy to the old English restrictions on laborers in modern laws and litigation aimed at protecting communities against some of the devastating harms caused by factory closures.\(^{204}\) Joseph Singer has argued persuasively for a revised legal evaluation of the plant owner's interests, recognizing the community's role in establishing and maintaining the property relation.\(^{205}\) No one should expect an early revision of the law of property to reflect the reciprocity of legal duty that Singer envisions. But the absence of a legal obligation does not release the owner from a moral

\(^{201}\) See Robert J. Steinfeld, The Invention of Free Labor: The Employment Relation in English and American Law and Culture, 1350-1870, at 60-66 (1991). Assuming that such a law could be enacted today, it would be unconstitutional as involuntary servitude, or a denial of the right to travel, or perhaps even as a denial of liberty without (substantive) due process.

\(^{202}\) Id. at 61.


\(^{204}\) Some state laws have required companies that close plants to continue health care plans for laid-off workers for a short time or to offer limited severance pay. See Bureau of Nat'l Affairs, Plant Closings: The Complete Resource Guide 35-41 (1988) (summarizing the state laws). On the other hand, litigation to keep the companies from closing the plants has been unsuccessful. See, e.g., Local 1330, United Steel Workers v. United States Steel Corp., 631 F.2d 1264 (6th Cir. 1980) (denying several theories plaintiffs used in seeking to keep two large steel mills open); Amalgamated Local 813, Allied Indus. Workers v. Diebold, Inc., 605 F. Supp. 32 (N.D. Ohio 1984) (refusing to grant a preliminary injunction that would enjoin the defendant corporation from implementing procedures to close one plant and consolidate its production in another plant).

obligation to others in the community who have nourished the plant for a generation or more.

The owner's moral obligation can be expressed as a claim founded on the interdependence of members of a community. Extrapolating from this claim in the perspectives of liberty, equality, and union, it is reasonable to say that the freedoms of work and earning carry with them at least a moral responsibility to the community that fosters and respects those freedoms. This obligation is not lessened by describing earnings, and the fruits of earnings, as property. Property is delegated sovereignty, and it carries at least some of the sovereign's moral responsibility for fair governance.\textsuperscript{206}

A closer historical analogy to community property was the claim, in the early days of the American women's movement, that a wife should have a property right in her own household labor and thus should be entitled to joint rights in marital property—even in a common law state, by legislation, if not by judicial interpretation. The claim, which never found a receptive legislature, was a radical challenge to the legal doctrine that gave a husband a right to his wife's marital services. A few years ago, Reva Siegel analyzed the joint property claim in its historical context and as a contribution to feminist legal theory. Her analysis illuminates not only its immediate subject, but also larger questions about the relation of law—in particular, law's concerns about liberty, equality, and union—to the social meanings of work.\textsuperscript{207} If we pay close attention to this claim made by women a century and a half ago, we can learn about the potential uses of law in defining work and earnings, two crucial features of any serious legislative response to the impending crisis of work.

The joint property claim was not so much an individualist or libertarian claim as an appeal to the idea of equality of status within the marital union; women's work at home was said to be embedded in the family's property.\textsuperscript{208} In the years just before the Civil War, the idea that work in the home deserved a legal status as work was by no means obvious to American men—and all the judges at that time were men.\textsuperscript{209} Today, housework at home is understood to be work, but in no sense is it the equivalent of paid work. The lack of pay makes


\textsuperscript{207} See Siegel, supra note 70, \textit{passim}.

\textsuperscript{208} See id. at 1078.

\textsuperscript{209} From approximately 1860 on, even the statutes that purported to allow wives to keep their earnings tended to be interpreted by (male) judges to extend only to work outside the home (excluding, for example, clothes washing or taking in boarders). Even as to outside work, judges often gave husbands control over earnings intended to be used for maintaining the household. See Reva B. Siegel, \textit{The Modernization of Marital Status Law: Adjudicating Wives' Rights to Earnings}, 1860-1930, 82 \textit{Geo. L.J.} 2127, 2154-57 (1994).
home work ineligible for credit as employment under the Social Security system. However, when women work for pay, even doing housework in other people's homes, the work not only qualifies as Social Security employment but also enhances the social meanings attached to the work.\textsuperscript{210} When married women work for pay outside the home, for example, they gain in power—both liberty and equal status—withing the household.\textsuperscript{211} In these contexts, the critical ingredient is pay, not work. In a time when it often takes two cash incomes to maintain a family's middle class status, these differential views of paid and unpaid housework presumably are being reinforced.

Now, let us think about paying people to care for their own pre-school children (or, perhaps, for elderly relatives or persons with disabilities).\textsuperscript{212} It is hard to imagine any work more important to America's future or more demanding of sensitive, creative effort, than the care of very young children. No European would give a second thought to the fairness of a child-care allowance.\textsuperscript{213} Here in America, of course, we do value child care, elder care, and care for persons with disabilities; we even pay for it.\textsuperscript{214} As in the case of other work in the home, the irony is that huge amounts are being paid for the child care that allows single parents—or, where the parents live together, both parents—to work outside the home. Again, it is the pay, not the work, that counts.

Imagine a group of three single mothers who are unrelated. Some days, Helen cares for Mary's children for pay; other days, Mary cares for Alice's children for pay; and still other days, Alice cares for Helen's children for pay. All three of these women's work for pay will count as work.\textsuperscript{215} While each is taking care of her own child, however, that care does not count as work. It does not even qualify as Social

\textsuperscript{210} This view was propagated by feminists who put aside the joint property proposals in favor of opening careers for women outside the home and insisting on equal pay for equal work. \textit{See} Siegel, \textit{supra} note 70, at 1191-98.

\textsuperscript{211} \textit{See} Ruth Laub Coser, \textit{Power Lost and Status Gained: A Step in the Direction of Sex Equality}, in \textit{The Nature of Work}, \textit{supra} note 32, at 71. The gains and losses identified in Coser's title are the husband's.

\textsuperscript{212} The public school system becomes a surrogate parent once a child is five years old.

\textsuperscript{213} For a survey of European family allowances, subsidy or direct provision of child care, parental leave allowances, and the like, see Handler, \textit{supra} note 24, at app. B. On child benefits, child care, and the relation of these allowances to the labor supply (particularly women) in five countries, see generally \textit{Welfare and Work Incentives: A North European Perspective} (A.B. Atkinson & Gunnar Viby Mogensen eds., 1993).

\textsuperscript{214} On the costs of child care, see Gormley, \textit{supra} note 14, at 24-25, 69. In 1990, mean spending on child care for families with annual incomes of $15,000 or less ran to 29\% of family income. \textit{See id.} at 25 tbls.2-4.

\textsuperscript{215} If the arrangement is seen as a sham—for example, to inflate earnings for purposes of getting higher allowances under the Earned Income Tax Credit—then for those purposes, the child care would not count as work.
Security employment.\textsuperscript{216} In fact, if the mothers are receiving welfare benefits, some Members of Congress will call them welfare dependents when they stay home to care for their children.\textsuperscript{217} The contrast between these two pictures is not merely silly; the pictures depict an inequality that, in the aggregate, is a massive social wrong. Today, however, politics is moving to deny welfare assistance to the mother who is performing the vital work of child care, without making any serious effort to provide a job outside the home at a wage that will support her family—and calling this noisome package "welfare reform."\textsuperscript{218}

Here we have yet another example of the influence of the worker's group identity—that is, the status of the group—on the value assigned to work. We have seen how the abstraction "welfare" carries racially charged meanings emphasizing laziness and dependency, relics of a past era's rationalizations for slavery.\textsuperscript{219} Our national experience with group status inequality offers an important political lesson for policymakers: Any program to pay parents for the work of caring for pre-school children should be a universal program, not one tied to a calculation of need, and thus subject to political manipulation as a racial issue.\textsuperscript{220} Whatever problems may inhere in the Social Security

\textsuperscript{216} Even if home work, including care of one's own children, should not be recognized as work and given wages, it ought to receive credit as "covered employment" for Social Security purposes. Nancy Staudt, showing how the tax laws encourage middle class women to stay home to care for children, has proposed adding home work to the income tax and Social Security tax base, with a household income credit to offset the tax for lowest-income home workers. See Staudt, supra note 200, at 1620-31. Alternatively, Congress might authorize Social Security employment credit for home work without taxing it.

\textsuperscript{217} There is a double bind here. When these mothers do go out to work, they may face social disapproval for neglecting their children—but that is another story. See Joel F. Handler & Yeheskel Hasenfeld, The Moral Construction of Poverty 22-26 (1991).

"Staying home" is a misleading description of women who receive welfare payments. Because welfare payments usually are insufficient to support a family, most recipients do have marginal work and, in addition, perform a great deal of unpaid work to make ends meet. See supra notes 97-99 and accompanying text.


\textsuperscript{220} Bayard Rustin organized the March on Washington in 1963. No doubt he had in mind the dangers to black Americans of a heightened sense of racial competition in the field of work when he remarked, around that time, "We cannot have fair employment until we have full employment." See Forbath, supra note 108.
When the retirement benefits of Social Security were established, a major purpose of the law was egalitarian: to take older workers out of the work force so that the available jobs would be shared with younger workers. Ironically, one factor contributing to today's shortage of decent jobs is itself the result of an egalitarian development: the entry of large numbers of married women into the labor market. A few decades ago, most married women stayed home to do the work of home maintenance and child care. They were compensated for this work only in theory and indirectly, through a "family wage" paid to their husbands and controlled by their husbands. These women were explicitly called "dependents," even though their work was essential to their husbands' capacity to work and earn. The nineteenth century claim that a married woman should have joint rights to marital property was founded on just this moral base. It was the man who was "dependent" on his wife, said the women who articulated this claim, and they were correct. Today's proposals to broaden the definition of work to include home-based work, including child care, recognize that a great many people who work for pay outside the home have the liberty to do so only because someone else is working inside; they are dependent for their capacity to work on those home services.

If government were to find ways to assure a wage for home work and the care of pre-school children, many men and women would still prefer work outside the home—for all the positive liberty-oriented social meanings attached to work in that public world. But some women, and some men, would prefer work in the home, even at a

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Race was, however, very much in the minds of the legislators who enacted the Social Security Act in 1935. To garner Southern support for the bill, the congressional leadership excluded from coverage both farm and domestic workers—occupations with high proportions of poor black citizens. See McElvaine, supra note 155, at 257. Dorothy Roberts justifiably argues that universal programs of social support are no substitute for a political movement to effect more sweeping changes that will make good on the promise to black Americans of equal citizenship. See Dorothy E. Roberts, Welfare and the Problem of Black Citizenship, 105 Yale L.J. 1563 (1996) (book review). In my view, these two strategies do not pose an either/or choice. The more ambitious movement is still searching for leadership; in the meantime, universal programs have a potential here and now to better the conditions of life among the black working poor.


223 From 1940 to 1980, white women's participation in the labor market rose from 25.6% to 49.4%. The corresponding increase for black women was from 39.4% to 53.3%. See Wilson, supra note 123, at 76.

224 See Siegel, supra note 70, at 1101-02.
reduction in pay, if their families had enough to live on. A recurrent theme in the literature of work, more often sounded by women than by men, is that, in many a family, both partners are working outside the home only because it takes two incomes to maintain the family's middle class status. If there are a significant number of such people—and the literature suggests that there are, especially among married women who work outside the home but still carry the lion's share of housework—the offer of pay for the work of home and child care would remove some people from the market for labor outside the home. To put the analogy to the Social Security retirement system into a caricature, one might foresee an improvement in poor people's access to decent jobs if fewer middle class Americans were competing for those jobs. If a substantial number of men should take advantage of a home-wage program, so much the better for both the symbolism and the substance of sex equality. If the tax system were reformed to minimize its strong bias against second earners—most commonly wives who work outside the home—and if employment discrimination law were interpreted to "end the economic marginalization of caregivers," then married couples might be encouraged to opt for more even divisions of work both within and outside the family unit.

Just to state these various possible responses to the shortage of full-time work is to recognize that every alternative involves a trade-off. What should replace the old "family wage" system in a time when part-time work is common? Should employment policy center on individual workers or on families? Should middle class Americans be encouraged to give up home work for jobs outside the home, even though they may displace other candidates from among the working poor? Should health care and pension benefits be decoupled from employment, even though one result may be to diminish the sense that those benefits, as indicia of social citizenship, are "earned" and

226 See, e.g., Arlie Hochschild & Anne Machung, The Second Shift: Working Parents and the Revolution at Home (1989); Rhona Mahony, Kidding Ourselves: Breadwinning, Babies, and Bargaining Power (1995). As these and many other studies of the two-earner family make clear, the "revolution" has not relieved women who go out to work from the main responsibility for house work and child care. For a powerful summary of the recent evidence, with thorough coverage of the relevant sources, see Staudt, supra note 200, at 1579-85.
227 Joan C. Williams, Restructuring Work and Family Entitlements Around Family Values, 19 Harv. J.L. & Pub. Pol'y 753, 756 (1996). Williams is referring to the structuring of paid work around an "ideal worker who takes no time off for child-bearing, has no daytime child rearing responsibilities, and is available 'full-time' and for overtime at short notice." Id. at 753. In our society this ideal worker, of course, is modeled on a behavioral norm that describes most men and most unmarried women who do not have children.
therefore deserved? In answering questions such as these, the makers of policy, both public and private, confront challenge aplenty. The one unacceptable alternative, however, is the current policy of drift toward deeper and deeper social division.

As we seek to respond to the impending crisis of work, one rewarding by-product may be that Americans will come to see our interdependence more clearly by seeing it in the world of work. Judith Shklar called “earning” an essential of full citizenship, and contrasted the independence that accompanies earning with the dependence of welfare beneficiaries who are “treated with that mixture of parentalism and contempt that has always been reserved for the dependent classes.”229 In common speech, though, earning has at least two meanings. Usually we think of “earning” as being paid for work; this is the meaning Shklar had in mind. But we can also say of someone, as the nineteenth century joint property advocates said of a wife, that she is “earning her keep,”230 and when we say this, we are implying that she should not be treated as a dependent. Interdependence, too, is a negation of dependence.231

It remains true, nonetheless, that a price in money is our society’s most visible sign of value, and that our most important token of earning one’s keep is a money wage. Law has expressive power and educative power. Not the least important function of a law that assured wages for home and child care—not a handout, but earnings paid to those who earn their keep in this way—would be its reminder that the work of home and child care, like the work of school teachers, is valuable to us all.

Even if I have overstated the case that the shortage of decent work threatens the American constitutional order, a poverty rate of fourteen percent—twenty percent among our children232—is a disgraceful inequality in a nation so blessed with abundance as the United States in our time. The persistence of poverty for so many Americans shows how artificial it is to publish an official unemployment rate around five or six percent. Calling such a rate “natural” compounds the disgrace by evading responsibility for a condition that government deliberately maintains. I concede that concerns about inflation may require an interest-rate policy that will produce some level

229 SHKLAR, supra note 48, at 96-98.
230 Siegel, supra note 70, at 1112.
231 See MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW 267-311 (1990) (family relations); Singer, supra note 205, at 652-99 (employment relations).
232 See supra note 25.
of unemployment. I concede, too, that such a policy will, to some
degree, undermine any proposal—either the ones we have considered
or others yet to come—for government to assure paid work for all who
want it. But, for the unemployed, the stakes are economic survival. If
the crucial regulating body declares that we are near “full employ-
ment” (meaning the “natural” level of unemployment), what are peo-
ple to do when they are thrown off welfare and told to “Get a job”?

If the United States continues its policy of maintaining a perma-
nent pool of unemployed and underemployed citizens, Congress, the
President and the state legislatures have the corresponding duty—the
moral duty and the political duty—to assure those citizens who are
involuntarily unemployed or underemployed that their families will
be secure. More specifically, government has the duty to assure that
every family has enough resources to live on and has good medical
care and decent retirement benefits. Even if no crisis of work were
impending, our constitutional commitments to liberty, to equality,
and to national union would demand a serious national effort to pro-
mote the fair distribution of work and its associated benefits.

It may be, as one cynical view has it, that the constitutional order
will not be threatened by an economically split society, so long as ra-
cial and ethnic antagonisms can be counted on to divide the down-
and-out from each other. A cynic might also say that if the constitu-
tional order has survived a period in which about one out of six or
seven Americans is living in poverty, then there is no short-term dan-
ger to the majority in letting that proportion rise to one out of four or
five. I am not suggesting that anyone should hope for still higher
levels of misery to insure a political upheaval. What we should be hop-
ing for—and demanding from our elected representatives—is vigoro-
ous action to strengthen the material and moral foundations of equal
citizenship. The larger constitutional lesson from the world of work is
that America’s historic concerns for liberty and for equality need not
be seen as competing. Both contribute to the interdependence of citi-
zens that is the foundation for the national union. A sharp improve-
ment in access to decent work is needed right now to serve the ends of
justice; ultimately it will be needed to preserve the constitutional or-
der on which all our liberties depend.

233 See supra note 2.