# To Promote the General Welfare: The Republican Imperative To Enhance Citizenship Welfare Rights

**Jon D. Michaels**

## I. INTRODUCTION

In the 1960s and 1970s, progressive lawyers and scholars aggressively campaigned to secure the recognition and protection of substantive welfare rights. Invoking welfare as a "new property" right,[1] they pressed the courts to declare affirmative guarantees to entitlements as varied as financial assistance, adequate housing, and education. But despite an early flirtation with recognizing a right to welfare, the Supreme Court ultimately and soundly dismissed the claim that the Constitution protects anything on the order of such a right.[2] The response of legal activists in the wake of this

1. *See* Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964) [hereinafter Reich, *The New Property*]. Professor Reich argued that a recognition of the significant degree to which government is involved in all facets of America's political economy should lead us to expand our understanding of what constitutes—and therefore what should be protected as—property. Private property affords the individual autonomous personal space. Reich suggested that those dependent on newer forms of property, such as government entitlements, should be afforded similar protection; without that protection, individuals' dependence on the government for their financial well-being would leave them at the mercy of the state. *Id.*; *see also* Goldberg v. Kelly, 397 U.S. 254, 263 (1970) (lending credence to Reich's argument with respect to the right to welfare throughout benefit-termination proceedings); PAUL BREST ET AL., PROCESSES OF CONSTITUTIONAL DECISIONMAKING 1400-06 (4th ed. 2000) (describing the new property approach to constitutional consideration of welfare rights); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1254-55 (1965) (characterizing the degree to which the modern political economy's property rights are tied up in government entitlements). Moreover, property-based arguments for other new rights, including privacy and procedural rights, *see infra* Parts II-III, gave advocates of substantive welfare rights hope that the expanding constellation of property protections would include guarantees to basic socioeconomic resources.

2. *See* Dandridge v. Williams, 397 U.S. 471 (1970) (refusing to recognize a constitutional right to welfare); *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (declining to recognize a constitutional right to equal education); Lindsey v. Normet, 405 U.S. 56 (1972) (declining to recognize the right to shelter as a constitutional right). With respect to the Court's brief flirtation with protecting welfare rights, I am referring to Justice Brennan's dicta in *Goldberg*, in which he lent his support to the new property theory. *See Goldberg*, 397 U.S. at 263.



Imaged with the Permission of Yale Law Journal

defeat has been muted at best.[3]

This Note revisits the jurisprudential and conceptual case for substantive welfare rights. Its objective is two-fold: to make sense of the failed attempts[4] to incorporate substantive welfare rights into our constitutional canon and to propose an alternative legal foundation for promoting those rights.

The history of the substantive welfare rights campaign, I argue, reveals a great flaw in strategy. To be sure, the Court proved willing to expand the traditional conception of property to cover new rights. Under its expanded view of property, the Court recognized privacy rights in the form of inviolable personal autonomy as well as procedural rights in the form of unobstructed access to the courts and polls. It is not, however, surprising that the Court refused to extend similar protection to substantive welfare rights. The line the Court drew was not arbitrary.[5] Privacy and procedural rights comport with the traditional Lockean protections of private property and negative liberties that are deeply embedded in our constitutional order. In contrast, substantive welfare rights are completely anathema to the Lockean tradition. The guarantee of welfare, after all, requires the government to take affirmative steps to redistribute private holdings. It is unimaginable that the Court would have, or would now, embrace an

3. *See* Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731, 745-46, 811-12 (1997) (describing how prominent liberals distanced themselves from the defense of affirmative welfare rights). But, for new thoughts and perspectives on substantive welfare rights, see William E. Forbath, *Constitutional Welfare Rights*, 69 FORDHAM L. REV. 1821 (2001); and Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993).

4. For discussions of poverty lawyers and their courtroom strategies, see MARTHA F. DAVIS, BRUTAL NEEDS 10-21 (1993); JACK KATZ, POOR PEOPLE'S LAWYERS IN TRANSITION 79-81 (1982); Forbath, *supra* note 3, at 1855-63; and Edward Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS 68, 68-83 (Norman Dorsen ed., 1971). Professor Loffredo broadly recounts the failure to incorporate welfare rights into our constitutional canon, offering explanations from conservative, moderate, and liberal schools of thought. Loffredo, *supra* note 3, at 1277.

5. *See, e.g.*, ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 90 (1997) (describing the Court's discipline in limiting its expansive equal protection jurisprudence to process rights involving criminal justice and voting). *But see* Graber, *supra* note 3. Graber does not concede there is a qualitative legal difference between rights of privacy and rights to substantive welfare. In his provocative article, he refers to the failure to incorporate substantive welfare rights while guaranteeing privacy rights as the "Clintonification" of American jurisprudence. Graber invokes Clinton iconographically, casting the constitutional disjunction between protected privacy rights and unprotected welfare rights in politically expedient terms: Privacy is privileged and championed by elites, who are willing to leave the nonvoting, nonmobilized poor to their own devices. *Id.* at 733-36. In suggesting that the major differences between privacy and welfare rights are political rather than legal, Graber typifies an unwillingness among scholars to recognize that welfare rights may, in fact, be quite different from privacy and procedural rights and may be better situated in an alternative legal framework.

Imaged with the Permission of Yale Law Journal

understanding of "new property" that required redistribution, for that would undermine the traditional protections of "old property."[6]

Substantive welfare rights must then be placed on a more secure theoretical foundation. I argue that such a foundation can be found in the values of civic republicanism that infuse our Constitution and that have only become more resonant as the country has grown more inclusive.[7] Civic participation and political engagement have always been critical concerns, even imperatives, of our republican community. The recent scholarship of the "republican revival" has certainly corroborated this reading of our history.[8] This revival has not yet influenced welfare theory. But it should. We must recognize that individuals lacking the basic socioeconomic resources necessary for effective political engagement cannot approach, let alone meet, our ideal of republican citizenship. Without some base level of education, health care, housing, and financial security, citizens cannot possibly be expected to vote, to deliberate, and to serve on juries as effectively as our system asks and expects. I argue therefore that we must view welfare rights through the lens of civic republicanism. Then we will see that welfare rights should be protected as citizenship rights.[9]

---

6. *See* JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM 223 (1990) (describing the incongruity of situating substantive welfare rights within a property framework).

7. *See infra* Part V. Several authors have referred to the synthesis in our constitutional order between liberal and republican values. *See* AKHIL REED AMAR, THE BILL OF RIGHTS 21-26, 32-33, 46-50, 59-61, 65-76, 81-116, 120-24, 163-80, 302 (1998) (arguing that the Bill of Rights consisted of republican-inspired protections, designed to help promote local democratic activity, which only fully became countermajoritarian liberal protections after Reconstruction); J.G.A. POCOCK, THE MACHIAVELLIAN MOMENT 506, 513, 523, 527-45 (1975) (emphasizing the republican values that infuse and inform our ostensibly liberal Constitution and constitutional culture); GORDON S. WOOD, THE CREATION OF THE AMERICAN REPUBLIC, 1776-1787, at 562, 593, 606-15 (1969) (highlighting the expansive republican values that were embraced during the Revolutionary period and their influence on the Founding); Daniel T. Rogers, *Republicanism: The Career of a Concept*, 79 J. AM. HIST. 11, 12-25 (1992) (describing the scholarly community's nascent recognition of America's "republican synthesis"). For recent efforts to revitalize welfare rights within the liberal tradition, see Graber, *supra* note 3, at 735-47, 752-70; and Loffredo, *supra* note 3, at 1293-303, 1313.

8. For a discussion on the recent revival of republican constitutional thought, see 1 BRUCE A. ACKERMAN, WE THE PEOPLE: FOUNDATIONS 24-33 (1991). *See also* Linda R. Kerber, *Making Republicanism Useful*, 97 YALE L.J. 1663 (1988); Frank Michelman, *Law's Republic*, 97 YALE L.J. 1493 (1988); Cass R. Sunstein, *Beyond the Republican Revival*, 97 YALE L.J. 1539 (1988).

9. Note that in limiting my constellation of substantive welfare rights to those directly connected with furthering the duties and obligations of citizenship, fewer absolute resources can be redistributed. The previous campaign to protect welfare rights envisioned those rights as neutral. The government should be agnostic with respect to beneficiaries' consumption patterns. For illustrations of the undifferentiated pursuit of substantive welfare rights, i.e., neutral rights, see JAMES T. PATTERSON, AMERICA'S STRUGGLE AGAINST POVERTY, 1990-1994, at 162-67 (1994); and MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT 286 (1996). *See also* King v. Smith, 392 U.S. 309 (1968) (rejecting the policy of midnight checks on families to see if there was a man in the home of a woman receiving welfare); Forbath, *supra* note 3, at 1851-54, 1871-72 (highlighting the welfare rights movement's goal to secure "a generous income untethered to work"). By tying welfare to civic participation, I leave myself exposed to criticism by liberals uncomfortable with the fact that assistance is granted, but only with strings attached. Yet, I

Imaged with the Permission of Yale Law Journal

This Note begins by investigating the circumstances under which property was expanded to cover new rights. Part II examines privacy rights jurisprudence. Part III extends this analysis to procedural rights. Then, in Part IV, I examine the unsuccessful campaign to protect substantive welfare rights as property rights. After describing the failure to incorporate welfare rights on the heels of the more successful battles to secure privacy and procedural rights, I reconceptualize and reconstruct a case for substantive welfare rights in Part V. I hope to locate a foundational justification for these rights within a republican-participatory context. Methodologically, through textual and structural interpretations of our evolving constitutional system, I attempt to erect a constitutional bridge that is synthesized from various participation-reinforcing amendments, sociopolitical movements aimed at promoting civic engagement, and aspirational ideals for community. This constitutional bridge will lead us to recognize the need to consider greater support for affirmative welfare rights as necessities of citizenship. In Part VI, I conclude by briefly considering the possibilities and difficulties associated with recognizing a legislative imperative to operationalize these citizenship welfare rights.

## II. PRIVACY AS PROPERTY

In this Part, I describe briefly how certain privacy rights have been incorporated into our constitutional canon, largely through conceiving those new rights as intimately linked to the sacrosanct rights of property. The progressive effort to protect bodily integrity, focused for our purposes on procreative rights and expressive intimate associations, stems from an older, more conservative effort to ensure the integrity of an individual's physical holdings. In building upon the traditions of property, privacy rights advocates were able to tap into libertarian strands of constitutional thought and, in the process, carve out a greater sphere of personal autonomy and inviolability.

---

contend that absent a political shift in the terrain, the most plausible and compelling way to articulate a legal (let alone moral) imperative to our nation's legislators and judges is to insist that those affirmative rights are necessary for effective civic and political participation. We can do that, as I intend to do, by grounding those citizenship rights in our constitutional system. Absent that connection, there simply is not legal—let alone popular—support for neutral welfare rights. *See, e.g.*, Peter Edelman, *The Worst Thing Bill Clinton Had Done*, ATLANTIC MONTHLY, Mar. 1997, at 43; Christopher Edley, Jr., Editorial, *Value Judgments*, N.Y. TIMES, Aug. 22, 1996, at A25; *Sign It*, NEW REPUBLIC, Aug. 12, 1996, at 7.

Imaged with the Permission of Yale Law Journal

A. *Why Employ a Privacy Analysis?*

I use both privacy and procedural rights as the substantive welfare rights movement's foil.[10] Privacy advocates successfully harnessed liberal property-based arguments to secure constitutional rights to procreative and personal freedoms. By liberal property-based arguments, I mean arguments that invoke those sets of traditions and values inherent in our constitutional system that privilege and protect individuals and their intimate possessions from encroachment or interference. Litigation attempting to secure a constitutional right to substantive welfare rights as property rights, however, proved less successful.[11]

In effect, privacy and procedural rights are jurisprudential analogues while privacy and substantive welfare rights are jurisprudential opposites. The protection of individual privacy is a process of safeguarding the right to noninterference. It involves the carving out of a negative space into which no one may encroach. The protection of procedural rights follows in a similar vein. The security of substantive welfare rights, on the other hand, requires community engagement and affirmative sacrifices. The community must not only *not* interfere, it must actively intervene.[12] The diametrically opposed obligations and impositions that these two sets of rights demand represent, in important ways, the differences between positive and negative rights in our political and constitutional orders.

A liberal framework of constitutional rights to property protects the private holdings that substantive welfare rights advocates seek, in essence, to redistribute. Thus, the justification for welfare rights that inescapably involve redistribution must emanate from alternative legal concepts and traditions, those we find to be more affirmative: the rights and duties of citizenry embedded in our constitutional system. In situating welfare rights within a democratic, participatory context rather than a property-focused, rights-based context, we can limit the starkness between acts and omissions

10. For our purposes, substantive rights as conceived during the litigation of the 1960s and 1970s include the previously undifferentiated second and third bundles of welfare rights. *See* SANDEL, *supra* note 9, at 286-87 (characterizing welfare rights advocates as insistent on a no-strings-attached right to welfare benefits).

11. *See infra* Part IV; *see also* PATTERSON, *supra* note 9, at 157-84 (describing the legislative gains welfare rights advocates secured); FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS 264-361 (1979) (describing the Welfare Rights Organization's activities); FRANCES FOX PIVEN & RICHARD A. CLOWARD, REGULATING THE POOR 196-97 (1993) [hereinafter PIVEN & CLOWARD, REGULATING THE POOR] (describing the confluence of socioeconomic events in the 1960s that led to the legislative welfare expansion).

12. Frank Michelman's distinction between possession and distribution may be helpful. We usually think of our property rights as negative claims to keep government and our fellow citizens out—not as positive claims to a share. It is an "antiredistributive principle, opposed to governmental interventions into the extant regime of holdings for the sake of distributive ends." Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1319 (1987). This analysis is brought into further relief in subsequent Parts.

Imaged with the Permission of Yale Law Journal

that is central to the negative rights doctrine of classical liberalism standing in the way of affirmative welfare rights.[13] Thus, while privacy and welfare rights might seem mutually compatible, if we are to draw privacy rights from the strain of the Founding thought centering on property rights—and welfare rights from the inclusive republicanism embedded in our constitutional architecture—we can come to terms with the problems inherent in situating welfare squarely within the liberal tradition, a tradition opposed not only to government takings but also to government redistribution.

Once we place substantive welfare rights in this alternative constitutional context and establish the inexorable link that makes various welfare rights a necessary condition for full and active participation in public affairs, we can give practical meaning to our republican constitutional norms and rely on their authority to petition legislators to provide the basic resources necessary for meaningful civic engagement.

### B. *Understanding Privacy Through the Canon of Neoliberal Property Rights*

There is a nearly a priori connection between Anglo-American social contracts and the inviolate status of property.[14] Locke believed that individuals possessed "a natural right to their property before they entered civil society, and since they entered society to make their property more secure, they can never be understood to have given the magistrate carte blanche to 'dispose of it as he thinks good.'"[15] This view occupies a dominant position on the American constitutional horizon, often dominating in fact the redistributive (property-taking) perspective

13. *See* ISAIAH BERLIN, *Two Concepts of Liberty*, *in* FOUR ESSAYS ON LIBERTY 118, 121-22 (1969); David P. Currie, *Positive and Negative Constitutional Rights*, 53 U. CHI. L. REV. 864, 865-66 (1986); *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189, 195 (1989) ("The [Due Process] Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security. It forbids the State itself to deprive individuals of life, liberty, or property without 'due process of law,' but its language cannot fairly be extended to impose an affirmative obligation on the State to ensure that those interests do not come to harm through other means.").

14. *See* Michelman, *supra* note 12, at 1328 ("Property, with its long history of common-law elucidation and its naturalistic imagery . . . was [the] Atlantic legal culture's very model of a private sphere rightfully guarded against human encroachment[s] . . . ."); *see also* JOHN LOCKE, TWO TREATISES OF GOVERNMENT 119-21, 129-32 (W.S. Carpenter ed., Everyman 1990) (1690) (highlighting the centrality of property rights in a liberal state); ROBERT NOZICK, ANARCHY, STATE, AND UTOPIA 9-12, 150-64, 175-82 (1974) (affirming the centrality of Lockean liberalism in Anglo-American society). This connection, of course, has been challenged most notably by John Rawls. *See* JOHN RAWLS, A THEORY OF JUSTICE (5th ed. 1973) (using a social contractarian model to arrive at a liberal egalitarian posture conducive to redistributive efforts).

15. ROGERS M. SMITH, LIBERALISM AND AMERICAN CONSTITUTIONAL LAW 23 (1985) (quoting John Locke); *see also* LOCKE, *supra* note 13, at 119-21, 129-32 (articulating the preeminent liberal conception of property rights).

Imaged with the Permission of Yale Law Journal

underlying welfare rights. By recognizing the central place of property in the Lockean state and appreciating the liberal elements of our Founding compact,[16] we can easily draw a distinction between libertarian property rights and some types of rights linked to participatory government. To protect those citizenship rights, as discussed in Part V, we must develop a similarly intuitive understanding of civic engagement grounded in our Constitution's republican values.

The movement from property to privacy in its proto-modern form was motivated in part by Louis Brandeis and Samuel Warren.[17] Incidents of modernity compelled this pair to push the definitional boundaries of protected property beyond the physical and tangible to the more intimate and personal. Brandeis and Warren argued that while in earlier times the law gave remedy only for physical interference with life, liberty, and property, modernity demanded that our conception of property be extended beyond the material.[18] They spoke of the right not to be owned or possessed by others and thus conceptualized property in the form of personhood. They referred to this expanded notion of property, which includes "all possession, including all rights and privileges," as personality inviolate.[19]

16. In a Lockean world, "liberalism . . . limits the state to protecting individual rights which allow each person privately to pursue his own sense of happiness. . . . Human fulfillment thus seems to be regarded as ultimately an individual experience." SMITH, *supra* note 15, at 49. This liberal view of the state—and of humankind—can be contrasted with a thicker conception of an individual in society, specifically, as an Aristotelian political actor who is self-actualized only through participation in the polis. *Id.* at 47-48; *see also* Michelman, *supra* note 12, at 1327-29 (describing property rights as the "paradigm of the constitutionally protected private sphere").

17. Louis D. Brandeis & Samuel D. Warren, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890) (responding to the perceived invasion of privacy associated with the advent of newspaper photography and the concomitant rise in media celebrities). Tocqueville's characterizations of American life represented an even earlier recognition of the intuitive links between property and privacy. *See* ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 506-08 (J.P. Mayer ed. & George Lawrence trans., Anchor Books 1969) (1835).

18. Brandeis & Warren, *supra* note 17, at 195 ("The intense intellectual and emotional life, and the heightening of sensations which came with the advance of civilization, made it clear to men that only a part of the pain, pleasure, and profit of life lay in physical things. Thoughts, emotions, and sensations demanded legal recognition . . . .").

19. *Id.* at 211. Personality inviolate expresses a conception of a personal sphere. This sphere may not necessarily be territorially grounded. *See id.* at 214-15. In *Olmstead v. United States*, Brandeis offered the judicial articulation of this position, one that bridges traditional conceptions of property with modern matters of privacy:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect. They knew that only a part of the pain, pleasure and satisfactions of life are to be found in material things. They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations. They conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.

277 U.S. 438, 478 (1928) (Brandeis, J., dissenting).

Imaged with the Permission of Yale Law Journal

### C. *Ushering Privacy into Our Times*

By protecting procreative freedom, including the rights to contraceptives and abortions, the modern Court has recognized privacy as a fundamental right safeguarded by the Due Process Clause.[20] Monumental decisions protecting procreative freedom including the right to contraceptives and to abortions have brought privacy rights to the constitutional fore. The Justices' conception of privacy is essentially a modern application of a traditional theory of individual autonomy updated over time to meet the concerns and needs of a progressing society: Contraceptives and abortions are expressions of inviolate bodily territory.[21] The protection of intimate relations and bodily integrity is a significant jurisprudential step, but one that is, in fairness, a logical extension of traditional property protections.[22] The extension of privacy along these lines evokes a fundamental interest in pursuing one's own ends without government interference.[23]

In staking out a right to privacy, judges have relied on Justice Cardozo's famous description of due process in the *Palko*[24] and *Snyder*[25] cases, in which the concept of due process translated into a substantive guarantee.[26] This construction further justifies the incorporation of privacy rights: The right to order one's familial and intimate relationships must

---

20. *See* Planned Parenthood v. Casey, 505 U.S. 833 (1992) (reaffirming the Court's decision to protect abortion rights); Roe v. Wade, 410 U.S. 113 (1973) (recognizing abortion as a constitutionally protected privacy right); Eisenstadt v. Baird, 405 U.S. 438 (1972) (protecting the sexual privacy of consenting adults to use contraception); Griswold v. Connecticut, 381 U.S. 479 (1965) (recognizing a fundamental right among married couples to use contraceptives). *But see* Bowers v. Hardwick, 478 U.S. 186 (1986) (failing to protect the right to engage in homosexual sodomy).

21. *See* Helen Garfield, *Privacy, Abortion, and Judicial Review*, 61 WASH. L. REV. 293, 312 (1986) (claiming that *Griswold* and *Roe* both fit into a right-to-privacy, due process paradigm).

22. By permitting unmarried couples to use contraception, *Eisenstadt* carved out an even greater sphere of nonintrusion that permits not only greater autonomy of activity, but also greater autonomy in choosing those with whom to engage. 405 U.S. at 446.

23. *See id.* at 453 n.10 (quoting *Olmstead*, 277 U.S. at 478 (Brandeis, J., dissenting)); *see also* 1 ACKERMAN, *supra* note 8, at 159 ("[W]hen the Founders thought about personal freedom they used the language of property and contract; given the New Deal repudiation of this language, doesn't the language of privacy provide *us* with the most meaningful way of preserving these Founding affirmations of liberty in an activist welfare state?"). Notice that in making this move, judges have rejected an affirmative jurisprudential role for protecting economic rights.

24. Palko v. Connecticut, 302 U.S. 319 (1937). In *Palko*, Justice Cardozo refused to overturn a state law that allowed the state to appeal a legally erroneous acquittal in a criminal case. Cognizant that this appeal would be unavailable at the federal level because of the Fifth Amendment's Double Jeopardy Clause, Cardozo differentiated various rights in the Constitution, prioritizing some rights such as free speech over others including double jeopardy.

25. Snyder v. Massachusetts, 291 U.S. 97, 105 (1934) (limiting the Fourteenth Amendment due process protection to only those rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental").

26. *See* SMITH, *supra* note 15, at 71-72. For Justice Cardozo, some substantive guarantees were implicit in the notion of ordered liberty; without them, neither liberty nor justice would exist. *Palko*, 302 U.S. at 325.

Imaged with the Permission of Yale Law Journal

exist as a societal baseline. And, as I show in Part III and Part IV, this concept of ordered liberty embraces certain procedural rights, but not substantive welfarist resources. These procedural rights, like those affirming the right to privacy, center on negative protections from burdensome governmental interference.

## III. PROCEDURAL RIGHTS AS PROPERTY

Building upon Part II's exploration of privacy rights and their grounding in property notions, I now discuss the procedural rights jurisprudence to highlight the problems associated with looking to property rights to secure substantive welfare rights. This Part underscores the legal differences between procedural and substantive rights, situates procedural rights alongside privacy rights (under the constitutional umbrella of fundamental property-based rights), and compels the reconceptualization of substantive rights on alternative footing.

Constitutionally protected procedural rights involve freedom from undue government interference, in which a deprivation of personal liberty is at stake. These rights equip individuals with the tools necessary to live freely and, as such, include the right to counsel in criminal trials and the right of access to the courts when one's liberty interests are at stake. To some extent, procedural rights may be viewed as sliding into the realm of substantive welfare rights. Mandating the waiver of court fees and the appointment of defense attorneys do help the poor and do, inevitably, involve redistribution. But in truth, these procedural rights impinge on matters of economic justice only tangentially. Their focus instead is on negative liberties, ensuring individuals are not unduly deprived of their legal rights. They touch directly upon what Brandeis called personality inviolate.

### A. *Procedural Rights: Criminal Procedure and Privacy*

It is instructive to begin with those rights that sit at the intersection of criminal procedure and privacy, thus providing a bridge connecting these two Parts of the Note. The recognized right to bodily integrity with respect to police searches and seizures represents a milestone in liberal protection. Here, the fundamental interest in bodily privacy converges with the fundamental interest in liberty-violating searches that may lead to prosecution and incarceration. In *Rochin v. California*, the Court held that drug evidence forcefully obtained by violating the bodily integrity of the defendant must be held inadmissible under the Due Process Clause of the

Imaged with the Permission of Yale Law Journal

Fourteenth Amendment.[27] Justice Frankfurter argued that to struggle to open a suspect's mouth and forcibly extract his stomach's contents "shocks the conscience. . . . [T]his course of proceeding by agents of government to obtain evidence is bound to offend even hardened sensibilities."[28]

In *Mapp v. Ohio*,[29] the Court expanded the scope of protection against coercive seizure by grounding it in terms of the Fourth Amendment's protection against unreasonable searches as well as the Fifth Amendment's ban against compelled self-incrimination.[30] Finally, in *Miranda*, the criminally accused were held to be affirmatively entitled to protection against self-incrimination.[31] Under *Miranda*, arresting and prosecuting officers must explicitly inform those taken into custody of their right not to speak.[32] This step represented a procedural turning point. The constitutional right against self-incrimination had existed for almost two hundred years, yet in 1966 the Court decided the government had an affirmative obligation to remind the accused of this longstanding right.

### B. *Procedural Rights: Affirmative Access to Courts*

The rights limiting the aggressiveness of criminal searches are negative ones. Just as government cannot outlaw abortions, it cannot extract evidence in an overwhelmingly coercive manner. Nor can government deny access to the courts. Yet though our constitutional rights so far have been primarily negative to the extent they invoke protections against state action and encroachment,[33] opening up access to the courts requires the government to take affirmative, resource-distributing steps.[34] For example, in the pre-*Gideon*[35] era, the constitutional right to counsel was thought to prohibit the government from denying a defendant her right to counsel whom she herself retained.[36]

---

27. 342 U.S. 165 (1952).

28. *Id.* at 172.

29. 367 U.S. 643 (1961).

30. *Id.* at 646-47; *see also id.* at 661-62 (Black, J., concurring); *cf.* Griswold v. Connecticut, 381 U.S. 479, 484 (1965) (speaking to the merits of bridging amendments and claiming that a right may lie within the overlapping zone of coverage of several fundamental constitutional guarantees).

31. Miranda v. Arizona, 384 U.S. 436 (1966).

32. *Id.* at 455-58.

33. *See* Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 25 (1987).

34. *See* SMITH, *supra* note 15, at 84.

35. Gideon v. Wainwright, 372 U.S. 335 (1963) (reading the Sixth Amendment to guarantee the right to state-provided counsel for accused felons).

36. *See* Betts v. Brady, 316 U.S. 455, 471-72 (1942) (holding that a state's refusal to appoint counsel for an indigent defendant charged with a felony did not necessarily violate the Fourteenth Amendment's Due Process Clause).

Imaged with the Permission of Yale Law Journal

But more recently, the Warren Court placed affirmative obligations on government to facilitate access to the courts when fundamental interests of liberty were at stake. Although these rights seemingly move us toward affirmative welfare provision, poverty, in truth, remained incidental to the Court's reasoning. This affirmative jurisprudence focusing on liberty rights stopped well short of recognizing substantive welfare interests. Providing basic resources as part of a negative effort to prevent liberty deprivations is a bounded step. It did not extend any further; for example, it did not provide resources as a foundation for affirmative expressions of liberty.[37]

Yet within its bounded step, the Court nevertheless recognized that simply ensuring open access to the judicial system is insufficient. The Court, accordingly, has articulated a thicker notion of procedural justice, compelling states to provide transcripts to indigent defendants who appeal their convictions[38] as well as to provide counsel to indigents facing criminal charges.[39] In *Griffin v. Illinois*, the Court waived appellate fees for indigents, but its effort to protect procedural justice did not include any explicit redistributive objective.[40] Because the negative liberty interest at stake in *Griffin* was so salient, the Court insisted that government provide affirmative resources. Likewise, in *Douglas*, the Court recognized that "equality is not required . . . . But where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor."[41] Finally, in *Gideon*, the Court emphasized the fundamental liberty interest at stake (to remain free from incarceration), not the fact of poverty per se.[42]

37. By affirmative expressions of liberty, I mean notions of civic republicanism that consider participation in the democratic process and polity to be a necessary condition of being free. *See infra* Part IV.

38. Griffin v. Illinois, 351 U.S. 12 (1956). *Griffin* held that when a state grants appellate review it must do so in a way that does not discriminate against some convicted defendants on account of their poverty. Meaningful appellate review requires that the appellants have the resources to present an effective argument. "Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must . . . 'stand on an equality before the bar of justice.'" *Id.* at 17 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

39. Douglas v. California, 372 U.S. 353 (1963) (invalidating California's investigatory procedure for determining which indigents deserved appointed counsel); *Gideon*, 372 U.S. at 344.

40. 351 U.S. at 17. Justice Black signaled that no heightened scrutiny would be employed in reviewing legislation affecting the poor. *Id.* at 17-18; *see also* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (employing only a rational review standard for matters of economic regulation); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938) (declaring the Court's intent to use rational review for all legislation except when fundamental rights or discrete and insular minorities were involved).

41. 372 U.S. at 357.

42. In *Gideon*, Justice Black argued:

> [L]awyers in criminal courts are necessities, not luxuries. . . . [We, the Justices,] have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

Imaged with the Permission of Yale Law Journal

Yet we appreciate the subtle difference between opening court access and demanding affirmative welfare resources only with the benefit of hindsight. At the time, the Court's bounded limits were not in sight. As such, it made sense for welfare advocates to believe that their opportunity to secure affirmative resources was nearing.[43]

### C. *Procedural Rights: Ordering One's Familial Relations*

Within a short time span, the Court extended protected rights beyond the literal interest in freedom from incarceration and embraced a fundamental interest in ordering one's intimate family relations, specifically marital and parental ties that touch upon personhood in vitally important ways.[44] For instance, the Court held that states must waive divorce fees for indigent couples.[45] As there is no other way to dissolve this most intimate and fundamental social bond than through the state judicial machinery, a lack of resources for court fees unconstitutionally excludes indigents from the only forum effectively authorized to settle their disputes.[46]

Similarly, procedural justice demands an affirmative allocation of resources to help maintain parental rights pending the outcome of a termination hearing. In *M.L.B.*, the Court overturned the dismissal of an appeal by an indigent woman lacking the court fees to challenge a termination-of-parental-rights order.[47] The Court held that there is, in fact, a fundamental interest in retaining family ties. This interest was seen by the Court as equal in importance to the right to participate in political processes as voters as well as the right of access to effective criminal defense. "The interest of parents in their relationship with their children is sufficiently fundamental to come within the finite class of liberty interests."[48]

It is important to note that the Court did not lightly extend these affirmative protections into civil cases. But "[c]hoices about marriage, family life, and the upbringing of children are among associational rights [the] Court has ranked as 'of basic importance in society,' rights sheltered

372 U.S. at 344.

43. *See, e.g.*, *Douglas*, 372 U.S. at 356-58; *Griffin*, 351 U.S. at 18-20; *id.* at 34 (Harlan, J., dissenting) (suggesting that the state had simply failed "to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action" and thus the majority's endeavor was primarily a redistributive one, centering on securing substantive welfarist rights); *see also* BUSSIERE, *supra* note 5, at 87 (contending that the Court did employ a higher level of scrutiny in criminal procedure cases).

44. *But see* Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 31-32 (1981) (holding that the interest in maintaining parental relations was subject to a balancing consideration).

45. Boddie v. Connecticut, 401 U.S. 371 (1971).

46. *Id.* at 376-77 ("[The] resort to the judicial process by these plaintiffs is no more voluntary in a realistic sense than that of a defendant called upon to defend his interests in court.").

47. M.L.B. v. S.L.J., 519 U.S. 102 (1996).

48. *Id.* at 119 (citing Santosky v. Kramer, 455 U.S. 745, 774 (1982)).

Imaged with the Permission of Yale Law Journal

by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect."[49] Indeed, Justice Ginsburg's opinion explicitly differentiated the affirmative support secured in *M.L.B.* from other unsuccessful attempts to secure substantive welfare rights.[50] She contended that "M.L.B.'s complaint is of a different order. She is endeavoring to defend against the State's destruction of her family bonds . . . . Like a defendant resisting criminal conviction, she seeks to be spared from the State's devastatingly adverse action."[51]

### D. *Procedural Rights: Taking a Step Back*

These cases involving procedural rights—but having economic justice implications—intimated that the Court was incrementally ushering in a new era of affirmative rights protections. These cases did, after all, touch upon rights closely connected to substantive welfare rights. And in the arc of liberal democratic history, the protection of civil rights, including access to the courts, tends to precede the protection of political rights.[52] Therefore, might it not be fair to expect the courts to facilitate political participation in ways similar to their effort to facilitate access to the judicial process?

In the end, however, no new era of substantive welfare expansion was to be realized. The lesson that must be taken from this survey of proto-substantive rights was that the protected rights were confined to those impinging on fundamental interests rooted in the constitutional values and mores of negative liberty.[53] Thus the protected rights required affirmative government provisions, but they primarily involved promoting liberty and protecting, in essence, one's *property* in maintaining negative liberty. Indeed, the "Warren Court never pursued the implications of its economic equal protection holdings outside cases like these, where the equal

49. *Id.* at 116 (quoting *Boddie*, 401 U.S. at 376).

50. *See id.* at 125; *see also* DeShaney v. Winnebago County Dep't of Soc. Servs., 489 U.S. 189 (1989) (rejecting the argument that the state is liable for failing to provide affirmative protections to its citizens); Harris v. McRae, 448 U.S. 297 (1980) (upholding the federal denial of Medicaid funding for abortions); Maher v. Roe, 432 U.S. 464 (1977) (upholding a similar state legislative denial of funding). In the latter two cases, the Court held that while *Roe v. Wade* protects women from unduly burdensome interference with their freedom to decide whether to terminate their pregnancies, it implies no limitation on legislatures' choices to support those decisions.

51. *M.L.B.*, 519 U.S. at 125.

52. *See* Reva Siegel, *Why Equal Protection No Longer Protects: The Evolving Forms of Status-Enforcing State Action*, 49 STAN. L. REV. 1111, 1129-31 (1997); *see also* AMAR, *supra* note 7, at 216-18, 258-61 (discussing the distinction between civil and political constitutional rights).

53. *See* Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 29-30 (1969).

Imaged with the Permission of Yale Law Journal

protection issues were so entangled with other claims of fundamental rights as to prevent clear-cut social egalitarian rulings."[54]

Poverty per se did not galvanize judicial action in the cases discussed in this Part.[55] This assertion can be supported by looking at the Court's less sympathetic treatment of the poor in court-fee cases that do not involve a fundamental liberty interest. In *United States v. Kras*, the Court held that the government does not have to waive the fees of a poor appellant filing for bankruptcy.[56] Since bankruptcy was a purely economic matter, the litigant's limited access to the courts did not raise constitutional concerns.[57] Indeed, only liberty rights, defined to include privacy and property protection, have motivated the courts to demand affirmative governmental assistance. Thus a willingness to employ a redistributive remedy has been limited to those instances where such affirmative treatment is necessary to prevent the violation of those liberty rights.[58]

### E. *Segue into Substantive Rights?*

Two problematic cases that do not fit fully into procedural rights—nor in the substantive welfare category discussed below—involve promoting positive expressions of liberty by enhancing one's ability to act affirmatively in society. They do not involve the threat of a liberty deprivation at all. Thus, these two cases and the rights they protect, if viewed without the hindsight history affords, would be construed as proto-substantive welfare successes. But history has shown that the subsequent circumscription of these holdings relegates these rights to a hybrid category: something more than procedural but less than substantive.

In *Harper v. Virginia Board of Elections*, the Court supported voting rights by holding poll taxes unconstitutional.[59] While the Court would not

54. SMITH, *supra* note 15, at 161.

55. *See* Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 N.M. L. REV. 411, 438 (1998).

56. 409 U.S. 434 (1973).

57. The Court, reasserting that the waiver of fees in civil matters is the exception, not the rule, held:

> Kras' alleged interest in the elimination of his debt burden . . . does not rise to the same constitutional level [as *Boddie*]. If Kras is not discharged in bankruptcy, his position will not be materially altered in any constitutional sense. . . . We see no fundamental interest that . . . [attaches to] a discharge in bankruptcy.

*Id.* at 445 (citations omitted).

58. *See* BUSSIERE, *supra* note 5, at 90 ("For poor people the promise of the wealth-discrimination rulings lay in the justices' apparent willingness to rectify economic inequalities that impinge on fundamental rights or interests . . . . [But] the Court had not applied the strict scrutiny test outside the . . . domains of criminal justice and political procedures."); Michelman, *supra* note 53, at 25 (emphasizing that cases involving pecuniary discrimination in which the Court intervened were limited to those involving "the interests in voting and in access to the machinery of justice in criminal cases").

59. 383 U.S. 663 (1966).

Imaged with the Permission of Yale Law Journal

consider obstacles to voting as severe a liberty deprivation as was the absence of counsel in a criminal proceeding, it nevertheless took steps to eliminate financial impediments to the exercise of the franchise. "Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax."[60] Previously, the Court had upheld restrictions on the franchise, including a literacy requirement.[61] But in *Harper*, the Court distinguished wealth; unlike literacy, wealth has no rational relation to the vote.[62] Although wealth was singled out for its irrelevance, the Court applied only a rational basis test, thus reasserting its belief that poverty should not be afforded heightened judicial scrutiny.[63] The Court focused its attention on the right at stake, not the class of persons affected.[64] After all, neither the Court nor its petitioners made a further effort to seek the allocation of affirmative resources, such as bus fare to the polls.[65]

Second, though often placed in the category of procedural justice, *Goldberg v. Kelly*[66] made considered reference to notions of affirmative rights to welfare, citing Charles Reich's article on welfare as a new form of property.[67] The *Goldberg* Court recognized that economic resources were necessary to indigents preparing for hearings to contest the termination of their welfare benefits. Essentially, the Court held that welfare benefits should continue to be paid out to those preparing their termination appeal:

---

60. *Id.* at 666.

61. Lassiter v. Northampton County Bd. of Elections, 360 U.S. 45 (1959) (unanimously upholding North Carolina's literacy requirements).

62. *Harper*, 383 U.S. at 666. *But see* JOHN HART ELY, DEMOCRACY AND DISTRUST 120 (1980) (arguing that wealth discrimination in voting is not irrational, but does freeze the poor "out of the decision process for an insufficiently compelling reason"); Robert J. Steinfeld, *Property and Suffrage in the Early American Republic*, 41 STAN. L. REV. 335 (1989) (detailing a long history during which wealth, or the lack thereof, was closely linked to voting agency).

63. *See* Douglas v. California, 372 U.S. 353, 356-58 (1963); Griffin v. Illinois, 351 U.S. 12, 18-20 (1956); United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *cf.* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (denying the existence of a constitutional right to equality of education financing); Dandridge v. Williams 397 U.S. 471 (1970) (denying the existence of a constitutional right to welfare benefits). As I discuss below, the Court in *Rodriguez* and *Dandridge* refused to apply heightened scrutiny in matters involving poverty and impoverished individuals. For scholarly treatments of *Carolene Products*, see, for example, LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW §§ 8-7, 11-2, 11-4, at 582-83, 772-74, 778 (2d ed. 1988); Bruce A. Ackerman, *Beyond* Carolene Products, 98 HARV. L. REV. 713 (1985); Louis Lusky, *Footnote Redux: A* Carolene Products *Reminiscence*, 82 COLUM. L. REV. 1093 (1982); and Lewis F. Powell, Jr., Carolene Products *Revisited*, 82 COLUM. L. REV. 1087 (1982).

64. *Harper*, 383 U.S. at 667 (asserting that the right of suffrage is fundamental in a free and democratic society, and that the exercise of the franchise preserves other basic civil and political rights).

65. With their *Harper* decision, the Justices "more likely saw themselves completing the dismantling of Jim Crow, than identifying the first 'islands of [economic] haven' on a constitutional map of basic needs and just wants." Forbath, *supra* note 3, at 1871 (quoting Michelman, *supra* note 53, at 33).

66. 397 U.S. 254 (1970).

67. Reich, *The New Property*, *supra* note 1, at 733.

Imaged with the Permission of Yale Law Journal

> [T]ermination of aid pending resolution of a controversy over eligibility may deprive an *eligible* recipient of the very means by which to live while he waits. Since he lacks independent resources, his situation becomes immediately desperate. His need to concentrate upon finding the means for daily subsistence, in turn, adversely affects his ability to seek redress from the welfare bureaucracy.[68]

In one swoop, the Court extended resources beyond those directly connected with access to a legal process and elevated the importance of welfare procedural hearings to the same protected echelon as voting and criminal trials.[69] This affirmative right is qualitatively different from those granting the in-kind equivalent of the cost of court transcripts or the poll tax. Justice Brennan's dicta are even more revealing in terms of the possibilities of recognizing a general basket of minimal resources necessary to participate fully in society:

> Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. . . . Public assistance [is] a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity" [and] pre-termination evidentiary hearings are indispensable to that end.[70]

This holding was not to be built upon, and the dicta were quickly repudiated.[71] Despite the allusions to a Reichean sense of welfare as property, in less procedurally driven welfare cases the Court declined to extend a constitutional right to basic resources. Ultimately, there must be some highly significant procedural justification for the courts to order the government to grant any affirmative rights.

## IV. SUBSTANTIVE WELFARE RIGHTS AS PROPERTY RIGHTS

In this Part, I discuss the Court's unwillingness to protect substantive welfare rights. The unsuccessful litigation involving substantive welfare rights[72] tested the limits of the procedural rights described in Part III.

---

68. *Goldberg*, 397 U.S. at 264.

69. Edelman, *supra* note 33, at 36-37 ("'[AFDC was] the means to obtain essential food, clothing, housing, and medical care . . . the very means by which to live.'" (quoting *Goldberg*, 397 U.S. at 264)); *see also* JERRY L. MASHAW, DUE PROCESS IN THE ADMINISTRATIVE STATE 106-13, 164, 264-71 (1985) (putting the utility of substantive resources in a procedural context).

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

71. *See infra* Part IV.

72. For an examination of welfare advocacy, see DAVIS, *supra* note 4, at 65-91; and Sparer, *supra* note 4, at 65-93.

Imaged with the Permission of Yale Law Journal

Ultimately the failure to secure substantive welfare rights is a testament to the inability to expand on *Goldberg*'s holding.[73] Essentially, the Court refused to consider the denial of affirmative resources to be a sufficient liberty or property deprivation to warrant judicial intervention.[74] At stake in the privacy and procedure cases were fundamental property rights. This designation was not extended to affirmative welfare provisions.

In confirming this assertion, I attempt to compel a reconceptualization of substantive welfare rights that moves us away from the historical Anglo-American privileging of property and toward thicker notions of citizenship embedded in our original framing and consistent with our evolving constitutional project in democracy.[75]

### A. *Neutral Welfare Rights and the Failed Property Paradigm*

These cases begin and end with *Dandridge v. Williams*.[76] In *Dandridge*, the Court upheld Maryland state legislation designed to impose a family cap on welfare benefits. In effect, after a certain cut-off, the birth of additional children into families already on welfare would not lead to increases in the families' benefit packages. In deciding *Dandridge*, the Court refused to extend Justice Brennan's *Goldberg* dicta to protect welfare benefits in circumstances in which those benefits were disconnected from a liberty-threatening procedural matter. Without a fundamental property or liberty interest hanging in the balance, the Court decided to treat the welfare benefits as it would any other statutory economic regulation.[77]

*Dandridge* held: "In the area of economics and social welfare, . . . if the classification has some 'reasonable basis,' it does not offend the Constitution simply because . . . 'it results in some inequality.'"[78] The Court conceded that though welfare programs try to alleviate poverty, they

---

73. *See* Forbath, *supra* note 3, at 1856.

74. *See* BUSSIERE, *supra* note 5, at 90 ("The Justices' ability to muster support for its [sic] wealth-discrimination opinions was due mainly to the Court's articulation of a shared belief in American political culture regarding the impropriety of inequality in the criminal justice and democratic processes.").

75. *See* Forbath, *supra* note 3, at 1867-68 (describing the need to reorient welfare advocacy away from a basic need jurisprudence and toward a more dynamic, distributive justice one).

76. 397 U.S. 471 (1970).

77. *See id.* at 484. The *Dandridge* Court reasoned:

> [H]ere we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights, and claimed to violate the Fourteenth Amendment only because the regulation results in some disparity in grants of welfare payments to the largest AFDC families. For this Court to approve the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought."

*Id.* (quoting Williamson v. Lee Optical, Inc., 348 U.S. 483, 488 (1955)).

78. *Id.* at 485 (quoting Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78 (1911)).

Imaged with the Permission of Yale Law Journal

must be scrutinized as any other economic regulation would be—no differently from, say, a congressional regulation on the automotive industry.[79] Thus at the end of the day, a day not far from the triumph of *Goldberg*, the Court held the right to welfare to be well outside the ambit of constitutional protection.[80]

### B. *Post*-Dandridge *Retrenchment*

*Dandridge* effectively wiped out any substantive value *Goldberg* contained. It held that welfare, divorced from a critical procedural hearing, was not a protected right.[81] The landslide continued with the Court subsequently holding that the right to basic shelter similarly did not rise to the level of constitutional canonization.[82] In that housing battle, welfare advocates grounded their arguments, again, in property-like language to no avail. In dissent, Justice Douglas contended, "Modern man's place of retreat for quiet and solace is the home . . . . [I]t is his sanctuary. Being uprooted and put into the street is a traumatic experience."[83]

Moreover, in *San Antonio Independent School District v. Rodriguez*,[84] the Court refused to protect the right to equal education. But though the Court rejected Rodriguez's argument, the case offers a glimmer of optimism for reconceptualizing affirmative rights in some thicker conception of republican participatory democracy rather than liberal

---

79. The Court opined:

> [T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. The Constitution may impose certain procedural safeguards upon systems of welfare administration. But the Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.

*Id.* at 487 (citations omitted); *see* Graber, *supra* note 3, at 776 (describing the Court's refusal to involve itself in socioeconomic policymaking); *see also* Williamson v. Lee Optical, Inc., 348 U.S. 483 (1955) (employing only a rational review standard for matters of economic regulation); United States v. Carolene Prods. Co., 304 U.S. 144 (1938) (declining to use heightened judicial scrutiny in reviewing economic policy); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 399 (1937) ("Even if the wisdom of the [economic] policy be regarded as debatable and its effects uncertain, still the legislature is entitled to its judgment.").

In dissent, Justice Marshall took exception to the relevance of the longstanding *Williamson* holding: "This case, involving literally vital interests of a powerless minority—poor families without breadwinners—is far removed from the area of business regulation." *Dandridge*, 397 U.S. at 520.

80. For scholarly support of the *Dandridge* Court's position, see Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; and Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41.

81. *Dandridge*, 397 U.S. at 485-87.

82. Lindsey v. Normet, 405 U.S. 56 (1972) (rejecting the claim that the need for shelter rose to the level of a fundamental interest that would demand heightened scrutiny).

83. *Id.* at 82 (Douglas, J., dissenting); *see also id.* at 74 (majority opinion).

84. 411 U.S. 1 (1973).

Imaged with the Permission of Yale Law Journal

property rights. Condoning the differences in school funding between relatively poor and affluent school districts in San Antonio, the Court held that to warrant judicial intervention, there must have been an absolute deprivation of a constitutionally fundamental interest harming a definable category of poor people.[85] The Court acknowledged that San Antonio provided a "quantum" of education,[86] which the majority considered sufficient. Moreover, the group systematically harmed by the asymmetric funding was not homogeneously poor.[87] Yet the Court did intimate it would be alarmed if a modicum of education were not guaranteed.[88] And it further intimated that poor people were not systematically discriminated against; some of San Antonio's poorest resided in better-funded districts, and some of San Antonio's middle class resided in the city's worst-funded districts. Given a different fact pattern, in which a more serious educational deprivation harmed only the very poor, the Court might decide a school-funding case differently.

The *Rodriguez* Court contemplated protecting education as a possible fundamental right[89] before ultimately asserting that its "social importance is not the critical determinant for [triggering] strict scrutiny."[90] The Court remained unsympathetic to Rodriguez's claim that unlike other social services, such as housing and welfare, education is (more) closely and directly connected to the effective exercise of fundamental rights including voting and political expression. Accordingly, it reiterated the classic distinction between acts and omissions:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's rights to speak and to vote. Yet we have never presumed . . . to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice. That these may be desirable goals . . . is not to be

85. *See id.* at 17.

86. *Id.* at 36.

87. *Id.* at 23; *see also* SMITH, *supra* note 15, at 162 (concluding that the Court determined that "the law worked no absolute deprivation, since the poor did receive some education . . . and it did not necessarily work chiefly against the poor, since many of them resided in property-rich districts").

88. Indeed, the Court rejected the reasoning of *Griffin* and *Douglas* as inapposite because there was no absolute deprivation. *See Rodriguez*, 411 U.S. at 24.

89. The *Rodriguez* Court wrote:

> "[Education] is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity . . . must be made available to all on equal terms."

*Id.* at 30 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

90. *Id.* at 32.

Imaged with the Permission of Yale Law Journal

> doubted . . . . But they are not values to be implemented by judicial intrusion into otherwise legitimate state activities.[91]

In refusing to confer fundamental status on these affirmative resources we colloquially consider to be fundamental, the Court continued its overemphatic protection of what Professor Charles Black referred to as "elite" rights, such as privacy, which are inescapably conditioned on one's possession of baseline socioeconomic resources.[92] Indeed, Justice Marshall's dissent in *Rodriguez* recognized education as necessary for the practical exercise of political and expressive freedoms and thus deserving of consideration as a fundamental right.[93] For our purposes, Justice Marshall's dissent represents the judicial high-water mark for the case of citizenship-related substantive republican welfare rights:[94]

> As the nexus between the specific constitutional guarantee and the nonconstitutional interest draws closer, the nonconstitutional interest becomes more fundamental and the degree of judicial scrutiny applied . . . must be adjusted accordingly. . . . The exercise of the state franchise is closely tied to basic civil and political rights inherent in the First Amendment. . . . Only if we closely protect the related interests from state discrimination do we ultimately ensure the integrity of the constitutional guarantee itself. This is the real lesson that must be taken from our previous decisions involving interests deemed to be fundamental.[95]

Justice Marshall went further than seeking just a modicum of education;[96] he sought equal education:

---

91. *Id.* at 36; *see also id.* at 37 ("How . . . is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process.").

92. The Court's protection of rights to be free from denials of liberty—not the more affirmative right to life, liberty, and happiness—led Charles Black to remark that "[l]iberty is very often made into a mocking simulacrum by poverty." Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103, 1105 (1986).

93. *Rodriguez*, 411 U.S. at 102-03 (Marshall, J., dissenting). Professor Ackerman argues, "Public education has become a fundamental part of the process by which we pass our democratic values to the next generation. If we do not provide the young with a solid education in democratic citizenship, our larger project in self-government will not endure." Bruce Ackerman, *Ackerman, J., Concurring*, *in* WHAT *BROWN V. BOARD OF EDUCATION* SHOULD HAVE SAID 100, 111 (Jack M. Balkin ed., 2001). Ackerman considers *West Virginia State Board of Education v. Barnette*, 319 U.S. 624 (1943), to be as much about the fundamentality of education as about free speech. Ackerman, *supra*, at 112.

94. *See* SMITH, *supra* note 15, at 163; *see also infra* Part V (supporting a constitutional imperative to protect certain welfare rights as rights owed to citizens).

95. *Rodriguez*, 411 U.S. at 102-03 (Marshall, J., dissenting).

96. *See id.* at 87.

Imaged with the Permission of Yale Law Journal

> [T]his Court has never suggested that because some "adequate" level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable. The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities[,] . . . mandat[ing] nothing less than that all persons similarly circumstanced shall be treated alike.[97]

Justice Marshall focused explicitly on inequality, not inadequacy, and thus may have taken his (and our) eye off the ball. Marshall indicated that education should be an equal protection concern rather than one of due process.[98] And it is here that I believe the progressive movement has found jurisprudential and political trouble: Although equal protection arguments make sense with respect to an immutable trait such as race, the suspect nature of poverty is more fleeting. American jurisprudence has focused on poverty only insofar as it impinges on one's negative freedoms. Whereas race as a category is a priori problematic—for reasons of social, institutional, and historical bigotry—poverty does not have to be treated as a particularly congenital problem. Once poor children are effectively schooled and nurtured, they possess the skills and should have access to the resources to contribute effectively in the polis. To insist on an affirmative right to full economic equality is to hold out for too much, for access to the political process may hinge on sufficient education, housing, and health care, but does not hinge on completely leveling all playing fields. To hold out for equality is to hold on to the wrong constitutional theory.[99] To hold out for equality is to alienate the political branches that ultimately must, if reform is to occur, embrace our alternative theory. This impulse is hardly fatal. I discuss it only so far as to suggest that the aspirations of my project are more modest.

### C. *Substantive Rights: Taking a Step Back*

*Dandridge* was the deathblow to the welfare-as-property movement, and *Rodriguez* seemed to provide similar closure to the legal strategy of claiming certain resources as necessary to enjoying fundamental rights. Yet,

---

97. *Id.* at 89 (internal quotation marks omitted).

98. Marshall seems to be holding out for neutral, unconditional welfare rights instead of more modestly linking education to participation in public affairs. *See id.* at 90.

99. Marshall himself conceded the constitutional limitations of wealth-based classifications:

> It is true that *Griffin* and *Douglas* also involved discrimination against indigents, that is, wealth discrimination. But . . . the Court has never deemed wealth discrimination alone to be sufficient to require strict judicial scrutiny . . . . Thus, I believe *Griffin* and *Douglas* can only be understood as premised on a recognition of the fundamental importance of the criminal appellate process.

*Id.* at 102 n.61.

Imaged with the Permission of Yale Law Journal

as I explore below, these cases do leave opportunities open to stake a claim for stronger welfare rights as citizenship rights. Justice Powell's concession, in *Rodriguez*, that a quantum of education may be constitutionally protected left the door open, and a new rhetoric and understanding of participatory republicanism may provide an impetus to cross that threshold.

## V. CARVING OUT CITIZENSHIP RIGHTS FROM REPUBLICAN TRADITIONS

In modern welfare jurisprudence, the courts have relied overwhelmingly on a liberal, property-centered reading of the Constitution. This reading privileges negative rights and helps open doors to facilitate procedural justice. But it has failed to convince the Court to make any leap of faith, however logical that leap seems to be, to support those foundational rights necessary for individuals to engage in participatory democracy. Yet to deny the possibility of a constitutional imperative to promote these foundational rights is to deny the existence of robust republican values in our political and constitutional order. With regard to substantive welfare rights, there has not been sufficient consideration of either our republican traditions or the inclusive democratic progress the country has made in expanding the franchise, promoting political participation, and enhancing economic justice.

Our republic's moral legitimacy is steeped in its democratic inclusiveness, which has come a long way since 1787.[100] While jurisprudential understanding of political participation has evolved over the last two hundred years,[101] our recognition of the similar need to modernize our understanding of the interplay of economics and political participation has lagged considerably. We take for granted the necessary relationship between economic comfort and political participation at the time of the Founding and thus fail to consider that not all of our participants today, in the broadly expanded polity, have the foundational resources, say, to summer in Philadelphia and deliberate effectively on nation-building and constitution-writing. While foundational economic resources were not an issue in 1787 because those included in the process were exclusively white men of wealth and learning, today the disconnect between those broadly eligible to participate and those who can do so effectively should be a

100. Thurgood Marshall, *Racial Justice and the Constitution: A View from the Bench, in* AFRICAN AMERICANS AND THE LIVING CONSTITUTION 314 (John Hope Franklin & Genna Rae McNeil eds., 1995).

101. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663, 670 (1966) (rejecting the legality of state poll taxes); Reynolds v. Sims, 377 U.S. 533, 568 (1964) (adopting the one person, one vote standard); Baker v. Carr, 369 U.S. 186, 204 (1962) (holding that matters pertaining to the fairness of redistricting are justiciable).

Imaged with the Permission of Yale Law Journal

source of concern and a call to reconsider some of the assumptions about what baseline resources are necessary for individuals to be participating citizens.

This Part ultimately seeks to develop an affirmative theory of citizenship welfare rights premised on the assertion that republican values built into our constitutional order should permit us to go beyond the bounded holdings of *Griffin* and *Goldberg*, provided of course we frame the constitutional rights in terms of only those actually necessary for the fulfillment of the democratic project rather than the broad satisfaction of property wants.

### A. *Republican Values: Some Initial Caveats*

Although there is a rich and diverse literature on republican values,[102] this Note has been describing them simply but roughly as those social and political traditions intimately connected to a conception of community in which individual and group participation in civic life is not only prized but expected. Society must be a polity, and that polity must be one in which the demonstrative endeavor of "citizenship . . . appears as a primary, indeed constitutive, interest of the person."[103] Thus republican values command and authorize civic participation. These values, I suggest, inhere in our constitutional system.

Any more elaborate and nuanced description would distract us from the present inquiry. Accordingly, it makes sense to embrace the terminology unproblematically in order to move forward with the present effort to operationalize its underlying constitutional values and apply them to a substantive welfare rights paradigm. Nevertheless, any exuberance associated with the promulgation of a constitutional regime built, at least in part, on a foundation of civic, participatory imperatives must be tempered with a sober recognition of the analytical weaknesses that accompany this endeavor. A republican paradigm is admittedly elusive. But this weakness should not prove to be too troublesome. In truth, republican values are elusive not because we do not understand them (nor because they are lacking in textual, structural, or historical groundings), but because we have never employed them within the context of affirmative resource allocation

---

102. *See supra* notes 7-8.

103. Michelman, *supra* note 8, at 1503 (1988). Michelman further posits:

> Only in public life can we jointly, as a community, exercise the human capacity to "think what we are doing," and take charge of the history in which we are all constantly engaged . . . . [T]he distinctive promise of political freedom remains the possibility of genuine collective action, an entire community consciously and jointly shaping its policy, its way of life.

*Id.* at 1504 (quoting Hanna Fenichel Pitkin, *Justice: On Relating Private and Public*, 9 POL. THEORY 327, 344 (1981) (citation omitted)) (alteration in original).

Imaged with the Permission of Yale Law Journal

in the modern welfare state. Because we have envisioned and constructed the welfare state increasingly through the lens of liberalism, both on the right and the left,[104] republican norms have laid dormant and remain unexplored at a time they are most needed.

### B. *Abandoning the Property Regime*

To establish a stronger foundational basis for substantive welfare resources, we first need to move outside of the liberal property paradigm. The poverty lawyers of the previous generation wanted to "reconstitute the constitutional meaning of property by tying it to the (related) values they want[ed] to promote, such as political participation, privacy, and autonomy."[105] This focus on property reflected a faith in the possibility of using the tradition itself to effect radical change. Indeed, one concern with deviating from the property strategy was that if the right to welfare were to be contextualized outside of property—say, if it were grounded in human rights—then the movement to promote redistributive welfare would compete directly with traditional liberal protections of property, and the whole legal, philosophical, and rhetorical arsenal of the American property paradigm would work to undermine welfare rights.[106]

Yet litigating substantive welfare rights like one would litigate privacy or procedural rights was unnatural and forced. The problems associated with trying to frame welfare rights within a property paradigm can best be illustrated by contrasting the foundations of the Lockean liberal state, where property finds its traditional home, with a Rawlsian welfare state, where substantive resource redistribution would find a more suitable home. Professor Michelman, a major proponent of incorporating welfare rights, has relied on Rawlsian ideas of social contract to underscore support for a redistributive state.[107] Rawls insists we all place ourselves behind a veil of ignorance in order to derive his "maximin" social function.[108] This

104. The major political philosophical works on modern redistribution and justice take a decidedly rights-based approach. *See, e.g.*, RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978); NOZICK, *supra* note 14; RAWLS, *supra* note 14. Professor Graber in fact refers specifically to Dworkin's explicit effort to reject any constitutional theory in support of welfare rights. Graber, *supra* note 3, at 735-36.

105. NEDELSKY, *supra* note 6, at 223.

106. *See* BUSSIERE, *supra* note 5, at 151; *see also* NEDELSKY, *supra* note 6, at 223. Framed in this way, it becomes more apparent that in the zero-sum game for wealth distribution, any redistributive endeavor would require some form of illiberal taking. Indeed, it has been noted that the Court possesses a "particular view of the nature of property rights in our society, under which property rights are defined by the right to pre-existing ownership of property rather than by the right to distribution of property in an equitable fashion." Zietlow, *supra* note 55, at 414.

107. *See* Michelman, *supra* note 53, at 14-15.

108. *See* RAWLS, *supra* note 14, at 152-57. Rawls's maximin principle, simply, seeks to guarantee the biggest share possible of the community's resources to the least-well-off. Thus only those policies that benefit the worst-off, however helpful to the better-off classes, are just.

Imaged with the Permission of Yale Law Journal

arrangement is, of course, in stark contrast with the more intuitive Lockean social contract, which emerges naturally from decisions made by a people actually embedded in their community.[109] Rawls's narrative, since it requires us to go behind a veil of ignorance and divorce ourselves from our actual existence, is self-consciously counterintuitive. Accordingly, the need to construct an alternative ratifying convention—going behind the veil—suggests the difficulties inherent in positing that welfare rights stem from the natural rights of property. Rather, if a redistributive model is to find any constitutional resonance, it must find a home elsewhere.[110]

Plainly put, the idea of conferring affirmative rights is completely inconsistent with our liberal tradition. The redistributive aspects of new property do not sit well with old property. Yet liberalism, as intimated above, is only one strain of our cultural and constitutional ethos. While the welfare-rights-as-property movement failed, there is merit in looking to the civic-participatory republican laws, traditions, and spirit that also spring forth from our constitutional system.[111]

Despite the abundance of scholarship and debate on republican values, civic republicanism has not generally informed our welfare rights jurisprudence.[112] In what follows, I suggest that our current readings of the

---

109. For criticism of modern liberal egalitarians for ignoring the importance of actual social practices and connections, see MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 52-55 (1982); and CHARLES TAYLOR, PHILOSOPHY AND THE HUMAN SCIENCES 205 (1985).

110. The move to tag welfare rights with property was, in fairness, not just a tactical move to link progressive elements of privacy with poverty. Rather, a justification for welfare entitlements as property was grounded in the belief that welfare resources need not come with government strings attached—and certainly need not be linked to civic participation. In the 1960s, welfare payments were conditioned on highly intrusive and morally dictatorial strings, centering upon, for instance, compliance with midnight visits to evaluate the domestic living arrangements of those receiving public assistance. *See* SANDEL, *supra* note 9, at 286 (describing the discretionary power of welfare agents to conduct midnight raids as a double violation of individual liberty—infringing on privacy and legislating morality); *see also* King v. Smith, 392 U.S. 309 (1968) (holding midnight raids to be unconstitutional).

In seeking to secure a constitutional right for welfare, especially when legislative entitlements, including Johnson's War on Poverty and Nixon's proposed Family Assistance Plan, were expanding, advocates were making a bold case that entitlements should not come with moral strings attached. Thus, a constitutional canonization of welfare rights would make it difficult for Congress not only to cut funding, but also to add burdensome eligibility requirements. *See* SANDEL, *supra* note 9, at 286. This reading was consistent with the liberal neutrality of the time: The poor should get their checks and be left alone to do what they want with them. *See* PIVEN & CLOWARD, REGULATING THE POOR, *supra* note 11, at 374-98. Thus any effort to link welfare to affirmative obligations of citizenship would be as anathema to this agenda as efforts to issue welfare in the hope of improving the moral fiber of the citizenry.

111. *See, e.g.*, STANLEY ELKINS & ERIC MCKITRICK, THE AGE OF FEDERALISM 3-11 (1993); WOOD, *supra* note 7, at 593, 606-15. Such an approach, it might be said, was attempted in *Rodriguez*, especially in Justice Marshall's dissent linking educational opportunities to civic responsibilities. Yet I believe the majority's rhetoric and the legal theories in support of welfare rights were so grounded in a liberal property foundation that any ancillary efforts to tie republican values into the argument seemed to be an afterthought rather than a fully developed constitutional argument.

112. In one notable free speech case, the Court intimated a respect for public rights construed with respect to republican values. Professor Loffredo highlights a particular First Amendment

Imaged with the Permission of Yale Law Journal

Constitution do little service, let alone justice, to notions of republican values vis-à-vis welfare. In addition to the Founding, key constitutional moments have done a considerable amount of work in reviving the classical republican traditions that characterized the American revolutionary movement.[113] These traditions, somewhat circumscribed by the hesitantly democratic Founders in Philadelphia, have nevertheless been expanded by their progeny in ways that deserve closer examination.[114]

### C. *Our Republican Constitutional Values*

It is my contention that there is a civic republican constitutional imperative that authorizes the protection of substantive welfare rights. We currently do not give enough thought to what basic socioeconomic resources are required for citizens to participate effectively in the polis. Though not an a priori truth of liberal democratic governance, we have come to settle on an understanding of citizenship that fails to appreciate the synthetic connections between political engagement and economic security. Our failure to recognize the intuitive connections between social welfare and civic participation is largely a function of the fact that those who were permitted to take part in governmental and political affairs in the eighteenth century were men of land, wealth, and education. Participation in public affairs was essentially limited to those for whom economic security was never a concern. Yet, even though participatory rights have expanded over time to include all adult members of our population, economic security's

---

decision as contemplating a more protective role the Court may play vis-à-vis the poor. In *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 668 (1990), the Court contended that economic inequality tends to undermine legitimate democratic governance. "*Austin*'s acknowledgement of the structural role that money plays in American politics would seem to open many areas of constitutional doctrine to serious question." Loffredo, *supra* note 3, at 1286. Loffredo, however, uses the paradigm of this speech case to return to an internal critique of poverty jurisprudence, in which he seeks heightened judicial scrutiny for the poor. *See id.* at 1287-88 n.41.

Whereas Loffredo and I both argue for greater recognition of how economic inequalities spill over into politics and civic life in general, I aim to reconceptualize poverty jurisprudence broadly and generally within an affirmative, participatory framework while Loffredo sees the *Austin* decision as an effort to turn back the clock and rethink the earlier welfare cases within the context of equal protection. *See id.* For further connections between free speech and economic and participatory inequality, see *Buckley v. Valeo*, 424 U.S. 1 (1976), which recognized the power money plays in the realm of politics. *See also* ROBERT C. POST, CONSTITUTIONAL DOMAINS 268-89 (1995) (discussing the "collectivist" theory); Owen M. Fiss, *Free Speech and Social Structure*, 71 IOWA L. REV. 1405, 1408-11, 1425 (1986) (discussing the occasional need to restrict speech in order to preserve public discourse); J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609 (1982) (criticizing the Supreme Court's approach to campaign finance legislation).

113. *See, e.g.*, GORDON S. WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1991).

114. By republican values, I mean, of course, those affirmative values, rights, and duties that are consistent with active participation in public affairs and the democratic process.

Imaged with the Permission of Yale Law Journal

relation to citizenship continues to be taken for granted or is altogether disregarded. Today, every adult American has the right to vote and to hold office irrespective of economic status. But those rights may be meaningless if their bearer lacks the basic resources to make informed political choices.[115]

Thus, while we have expanded the political role of ordinary Americans, we have continued to rely on the Federalists' assumptions that ignore economic realities when considering the scope of political rights.[116] In doing so, we have opened up the lanes of the political track to potential participants, but have not recognized that these new runners may lack the knowledge and training, as well as the health and nutrition, not to mention the pair of spikes, necessary to run a real race.

Given the evolutionary and revolutionary changes made to our Constitution over the decades and centuries since 1787, we need to appreciate the problems of continuing to embrace the Philadelphia Convention's indifference toward the link between economic resources and political participation. Over time we have increasingly appreciated and protected political rights.[117] This inclusive, expansionary movement has emerged out of the recognition that the spirit of the Constitution, our democratic practices, and our collective aspirations demand full participation. Participation is a necessary condition in our effort to perfect our democratic project. Yet the myopia in failing to recognize the necessary connections between participation and economic security remains undertheorized.

In the Sections that follow, I will conceptualize welfare as a republican right necessary to undergird our commitment to democratic engagement. First, we need license to support this claim. Thus, in Section V.D, I describe my interpretive methodology and apply it in locating the strong republican values that infuse the Constitution. Then, in Sections V.E and V.F, I take a step back and explore the historical circumstances that explain why citizenship welfare rights have remained dormant for so long—and why they need, today, to be revitalized. In Sections V.G and V.H, I synthesize the constitutional and historical arguments and arrive at a clear statement regarding welfare rights as citizenship rights.

115. *See* Steinfeld, *supra* note 62, at 337-38, 342. Steinfeld describes the widely shared nineteenth-century conviction that paupers ought to be disenfranchised because they lacked a political will of their own. Essentially, it was commonly recognized that economic autonomy was a necessary precursor to the proper exercise of the franchise.

116. *See* NEDELSKY, *supra* note 6, at 221, 226.

117. *See* ALEXANDER KEYSSAR, THE RIGHT TO VOTE 4, 33-42, 172-73, 256-57 (2000).

Imaged with the Permission of Yale Law Journal

### D. *Constitutional Authorization for Substantive Citizenship Rights*

I employ an interpretive methodology that looks to the overall structure of the Constitution as informing our reading of the document. Reading, for instance, older parts of the text in light of newer elements is vitally important in understanding the Constitution as it exists in our times and as it relates to our present purposes. Most prominently, Professor Akhil Amar encourages constitutional scholars to recognize how the structure and purpose of the Constitution add meaning to the text itself.[118] Indeed, because amendments usually do not simply rewrite old clauses, a reader "must always scour later amendments to see if they explicitly or implicitly modify the clause at hand."[119] Thus there seems to be interpretive virtue in, first, a kind of "Shepardizing" of the Constitution, an appreciation that new additions to the document may change our understanding of extant clauses. And, second, there is also interpretive virtue in reading a series of amendments framed and ratified within a given period of time as expressing some purpose.

An example of Amar's theory is illustrative of the first point:

> [T]he Fourteenth Amendment itself must be read in light of the later Nineteenth Amendment. If we simply parsed the Fourteenth in isolation, the status of women's equal civil rights might be unsure. On one hand, the Amendment's opening section affirms the rights of all "citizens" and "persons" and says nothing in particular about "race" as distinct from "sex." . . . Regardless of this original ambiguity, after the Nineteenth Amendment becomes part of the document, we have strong documentarian warrant to construe the Fourteenth Amendment in favor of women's rights. Once the Constitution vests women with full and equal political rights, shouldn't entitlement to the full and equal enjoyment of lesser civil rights follow a fortiori? Discriminations that might once have seemed legitimate . . . bec[a]me illegitimate when *the Constitution itself*, in a later amendment, affirm[ed] a very different and more robust vision of women as full and equal members of the political People who govern America.[120]

118. Akhil Reed Amar, *The Supreme Court, 1999 Term—Foreword: The Document and the Doctrine*, 114 HARV. L. REV. 26, 29 (2000) (stating that later (post-Founding) "generations of Americans have added amendments one by one, but no amendment stands alone as a discrete legal regime. Each amendment aims to fit with, and be read as part of, the larger document").

119. *Id.* at 29-30.

120. *Id.* at 51-52; *see* Reva B. Siegel, *She, the People: The Nineteenth Amendment, Sex Equality, Federalism, and the Family*, 115 HARV. L. REV. 948 (2002); *see also* Adkins v. Children's Hosp., 261 U.S. 525 (1923) (reinterpreting the Due Process Clause in light of the newly ratified Nineteenth Amendment).

Imaged with the Permission of Yale Law Journal

With this interpretive license, we can glean from the document a republican imperative to promote citizenship rights. Historically, constitutional canonization of economic rights, when it has occurred, has been intimately linked to the canonization of participatory rights, notably expansions in the polity. We have evidence of a redistributive revolution, or at least reformation, beginning with the Income Tax Amendment,[121] which intimated the government's commitment to empowering the poor with some resources.[122] The Sixteenth Amendment, along with the direct election of senators[123] and the conferral of women's right to vote,[124] were the fruits of a progressive period in the generations following Reconstruction. If we appreciate these expressive constitutional efforts as somewhat related, it is hard to lose sight of the confluence of economic redistribution and political empowerment as a galvanizing moment or series of moments. We see this economic and political convergence with the constitutional abolition of the poll tax[125] and the passage of the Voting Rights Act of 1965,[126] which, though not a constitutional amendment, stands out as a monumental legislative enactment.[127] These links, however loose, suggest the implicit connection between political and economic rights—the abolition of the poll tax most explicitly serving to marry these two interests directly. Essentially, I make the structuralist claim that there are strong bonds linking our republican democratic advances with our egalitarian socioeconomic ones. For support, I look both to pronounced trends in our historical development and to precise deliberative moments in time.

With this interpretive framework in mind, does it not make sense to read the democracy-enhancing and welfare-enhancing amendments discussed in this Section as part of a larger conversation not only with each other, but with, notably, the Fourteenth Amendment? Do not these rights, each read as adding meaning to a larger constitutional narrative, suggest that Americans have been thinking jointly about economic justice and participatory democracy? Considered as a whole, these rights tell us a story about a nation's commitment to promoting democracy and to empowering its citizenry. If we treat these amendments as related, we might begin to see the benefits of articulating an affirmative theory of due process citizenship

121. U.S. CONST. amend. XVI.

122. *See* AMAR, *supra* note 7, at 300 ("The Sixteenth Amendment was . . . profoundly redistributive, authorizing a 'progressive' income tax that would take more proportionately from the rich than the poor.").

123. U.S. CONST. amend. XVII.

124. *Id.* amend. XIX.

125. *Id.* amend. XXIV.

126. Voting Rights Act of 1965, Pub. L. No. 89-110, 79 Stat. 437 (codified as amended at 42 U.S.C. §§ 1971, 1973 to 1973bb-1 (1994)).

127. The passage of certain landmark legislation, such as the Voting Rights Act of 1965, accelerated the progressive movement's commitment to egalitarian values "far beyond the point where the courts could have taken it by themselves." 1 ACKERMAN, *supra* note 8, at 110.

Imaged with the Permission of Yale Law Journal

rights, bolstering the position of not only the racially disempowered, but also the economically and politically disenfranchised.

### E. *The Early Marginalization of Republican Values*

In this Section, I argue that the Philadelphia document did not fully embrace the democratic, inclusive values that have subsequently emerged from our modern constitutional system, which has changed through amendment, practice, and judicial interpretation. With the articulation of democratic rights extending beyond the initial level of political participation envisioned at the Founding, the links between politics and economics have become more complicated than they were at the time of our nation's infancy. Accordingly, democratic values must be interpreted in light of the fact that the resources necessary to participate effectively were taken for granted, rather than denied, by the wealthy, educated men who convened in Philadelphia. It is helpful to explore how our constitutional system has changed along the path of democratization and to appreciate the degree to which these changes should imply concomitant changes to our implicit norms and understandings of economic security.

While over the past two hundred years we have become both more liberal (by protecting more rights) and more republican (by promoting greater political participation), we currently privilege our liberal commitments over our republican ones in at least one important way. During the nineteenth century, the franchise was widely extended, a victory for participation.[128] But it was participation divorced from another fundamental tenet of the republican vision: community voice in important aspects of governance.[129] Thus, to this extent, the republican ethos was a hollow one.[130] Since then, participatory expectations have increased considerably, but we must appreciate the existence of an even wider gap that now stands between the formal possession of a political right and its effective exercise. Among the Founders, though the franchise was restricted, it is safe to say those who possessed political rights also possessed the private means to avail themselves of those rights. Today, in contrast, though the franchise is universal, many lack the basic economic resources to use the vote (and other political rights) effectively. Indeed, we need to look at this modern gap to appreciate that though our constitutional

128. *See id.* at 26-27, 52, 173, 182-83.

129. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977); WILLIAM NOVAK, THE PEOPLE'S WELFARE (1996). *But see* LOUIS HARTZ, THE LIBERAL TRADITION IN AMERICA (1955) (emphasizing the hegemony of liberalism).

130. This description is not solely based on hindsight and revisionism. Contemporaries were cognizant of the Philadelphia regime's failure to provide public space for civic and political discourse. *See* HANNAH ARENDT, ON REVOLUTION 238 (1963); Sunstein, *supra* note 8, at 1552.

Imaged with the Permission of Yale Law Journal

system today hints at a balance between Lockean liberalism and Rousseauean republicanism, that balance has yet to be struck.[131] While the Founders' Constitution contained the normative vision as well as the procedural and structural arrangements that remain with us today, it fell short in prescribing true democratic values.[132] If we admit there is a gap, we will be able to confront the problems of basic want and de facto disenfranchisement from an entirely different and potentially more fruitful perspective.

### F. *Moving Beyond the Philadelphia Document*

The Philadelphia document did not mention slavery directly, yet it countenanced and even protected it.[133] It also reflected the Federalists' belief in government by one's betters.[134] The first families of Virginia and the brahmins of Boston would ponder, deliberate, vote, legislate, and lobby; this propertied class would govern.

We have long dismissed—or at least downplayed—the elitist application of the Madisonian vision and have in turn revised and amended the Constitution to conform more easily with our evolved sentiments of more inclusive democracy. On the bicentennial of the Philadelphia document's drafting, Justice Thurgood Marshall expressed his belief about how far we have come:

---

131. As Ackerman explains:

> Deemphasizing Locke, [Pocock] placed the Founding against a different intellectual background—one that ultimately gained its inspiration from the classical Greek polis. Within this classical republican tradition, the fundamental challenge of human life is not to lose oneself in the Lockean pursuit of life, liberty, and property but to join with fellow citizens in the ongoing project of political self-government.

1 ACKERMAN, *supra* note 8, at 28.

132. *Cf.* CHARLES A. BEARD, AN ECONOMIC INTERPRETATION OF THE CONSTITUTION OF THE UNITED STATES 14-18 (1913) (suggesting that the Founders designed the constitutional system with the intent to preserve their own economic interests). My argument is not, however, Beardian. Simply put, I am attempting to revitalize the somewhat dormant participatory values embedded in our constitutional order. *See, e.g.*, POCOCK, *supra* note 7, at 527-45; Linda R. Kerber, *supra* note 8, at 1664.

133. The original text contains a number of references to slaveholding. *See* U.S. CONST. art. I, § 2, cl. 3 (counting slaves—"other Persons"—as three-fifths of a person for purposes of legislative apportionment); *id.* art. I, § 9, cl. 1 (placing a twenty-year moratorium on banning slave importation); *id.* art. IV, § 2, cl. 3 (guaranteeing sustained ownership of slaves who flee across state lines).

134. *See* THE FEDERALIST NO. 10, at 82 (James Madison) (Clinton Rossiter ed., 1961) (advocating a republican system that "refine[s] and enlarge[s] the public views by passing them through the medium of a chosen body of citizens, whose wisdom may best discern the true interest of their country and whose patriotism and love of justice will be least likely to sacrifice it to temporary or partial considerations").

Imaged with the Permission of Yale Law Journal

> When contemporary Americans cite "The Constitution," they invoke a concept that is vastly different from what the Framers barely began to construct two centuries ago.
>
> . . . .
>
> While the Union survived the civil war, the Constitution did not. In its place arose a new, more promising basis for justice and equality, the Fourteenth Amendment, ensuring protection of the life, liberty, and property of all persons against deprivations without due process, and guaranteeing equal protection of the laws.[135]

As over time we have read the Constitution more broadly within the framework of political rights,[136] we now must contemplate more seriously the need to undergird those political rights with a semblance of economic security.

Simply put, in the Philadelphia document, Madison's plan—republican or otherwise—does not reflect or speak to the political reality of today. "[T]he government [the Founders] devised was defective from the start, requiring several amendments, a civil war, and momentous social transformation to attain the system of constitutional government, and its respect for the individual freedoms and human rights, we hold as fundamental today."[137]

Our society has transformed and transcended the Philadelphia pact by expanding political rights and taking (more) seriously our democratic project. It was and has been easy to discern the systematic political disenfranchisement of America and Americans.[138] But, over the years, there

---

135. Marshall, *supra* note 100, at 315, 317. Ackerman echoes Marshall's concern, contemplating the "bicentennial myth" and positing an American false consciousness. *See* 1 ACKERMAN, *supra* note 8, at 34-35. "[B]oth Reconstruction Republicans and New Deal Democrats appear as the equals of the Founding Federalists in creating new higher lawmaking processes and substantive solutions in the name of We the People of the United States." *Id.* at 58; *see also* Sunstein, *supra* note 8, at 1569 ("American republicanism must be understood not only in terms of the framing period, . . . but also in terms of the Civil War Amendments and the New Deal.").

136. *See, e.g.*, Harper v. Va. Bd. of Elections, 383 U.S. 663 (1966) (holding that a state poll tax violated the Equal Protection Clause since wealth bears no relation to voting qualifications); Reynolds v. Sims, 377 U.S. 533 (1964) (invalidating a state proposal to deviate from a one person, one vote districting scheme).

137. Marshall, *supra* note 100, at 315. Professor Amar concurs. He challenges the notion that even after the ratification of the Bill of Rights, "we all lived happily ever after." He thinks those who fixate on the Founding generation possess a vision of our country that "ignores all the ways in which the Reconstruction generation—not their Founding fathers or grandfathers—took a crumbling and somewhat obscure edifice, placed it on new, high ground, and remade it so that it truly would stand as a temple of liberty and justice for all." AMAR, *supra* note 7, at 288.

138. *See* TOCQUEVILLE, *supra* note 17, at 506-08; *see also* Steinfeld, *supra* note 62, at 339-42 (describing efforts in American history to expand and limit the franchise).

Imaged with the Permission of Yale Law Journal

has been a concerted effort to enhance political and participatory rights through legislation, amendments, and judicial interpretations that accompany the reconstructed democratic vision.

Yet what we were unable to do, possibly because of its subtle unstated influence on the original text, was to recognize a symmetrical link between elite "republican" democracy and elite political economy. It was no secret that the effort to exclude the propertyless, to exclude women, and to exclude blacks left only wealthy, educated white men to govern.[139] Taking for granted that these individuals enjoyed the private means to devote resources to policy considerations, to prudent voting, to political discourse, to campaigning, and to lobbying, there was thus no explicit concern that Founding citizens would face any substantive obstacles limiting civic participation. There would be no concern that these members of the bar, of mercantile houses, and of the gentry would lack the human capital tools, the social capital connections, and the vigor of healthy existence necessary to participate.

Illustratively, despite the apparent weakening of the inexorable links between property ownership and political agency, paupers remained systematically disenfranchised throughout the nineteenth century. Their dependent status made them unworthy to participate in self-government. Community leaders feared that the poor, utterly lacking in socioeconomic resources, could not deliberate prudently. But instead of empowering these individuals, legislatures left paupers disenfranchised.[140] My argument, in truth, accepts the premises of those exclusionary community leaders but simply takes exception with the way they resolved the dissonance between political and economic resources.[141]

In the course of our nation's expansion of participatory rights, many lawyers have been satisfied with the extant protections afforded and see none of this dissonance. They essentially reject the premise that without resources, one cannot effectively contribute. They encourage us to look at free speech and access to the polls and to recognize that the doors are wide open: A woman today, of any background, can campaign, lobby, and vote. But while these liberty safeguards are in place, I believe they constitute merely a supervening layer of empowerment, one that overlays a

139. As liberals are quick to point out, a communitarian-republican paradigm does not promise universal participatory rights.

140. *See* Steinfeld, *supra* note 62, at 353, 361-66; *see also* KEYSSAR, *supra* note 117, at 130-35 (citing numerous state laws from the 1800s imposing economic conditions on the right to vote); Michelman, *supra* note 12, at 1329 (suggesting that a person without material security was one whose vote could be appropriated by those on whom he is dependent).

141. *See* Steinfeld, *supra* note 62, at 350-53 (describing leaders as choosing to disenfranchise the poor rather than economically empower them).

Imaged with the Permission of Yale Law Journal

foundation that assumes basic material needs are satisfied.[142] Michelman asks, "Are not these [basic material] interests the universal, rock-bottom prerequisites of effective participation in democratic representation . . . ? How can there be those sophisticated [procedural] rights to a formally unbiased majoritarian system, but no rights to the indispensable means of effective participation in that system?" [143]

Thus the democratization and republicanization of our government, through direct election of senators[144] and through the enfranchisement of blacks,[145] women,[146] and those over eighteen years of age,[147] has been mapped onto a constitution of negative rights that was meant to describe a government by the haves.[148] Professor Nedlesky's comment that an "average" American at the time of the Founding would have been disenfranchised even if he had the vote sounds equally applicable in describing a poorly educated, impoverished voter today:

> It would be difficult for the propertyless to get elected. It would be difficult for them to communicate across the distances of the federal republic and thus difficult to coordinate their plans. . . . It would be difficult for them to persuade their representatives to implement plans that shifted the rules and expectations of entitlement in their favor . . . .[149]

Indeed, although our country has transformed itself and prioritized political rights when in the past it had privileged only civil rights, we have not recognized the reforms required on the economic side of participatory empowerment.[150] We have, in fairness, been adept at detecting the most

142. John Hart Ely resists this reasoning. His theory of reinforcing representative democracy suggests that once given the franchise, individuals face no effective obstacles to the channels of democracy. He opposes the constitutional protection of unenumerated constitutional welfare rights because he believes welfare benefits should be determined through majoritarian deliberations. ELY, *supra* note 62, at 167. "[U]nblocking stoppages in the democratic process is what judicial review ought preeminently to be about . . . ." *Id.* at 117.

143. Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH U. L.Q. 659, 677. In response to Cardozo's statement in *Palko* that free speech "is the matrix, the indispensable condition, of nearly every other form of freedom," Professor Black asked "whether the rights to freedom from gnawing hunger and from preventable sickness may not form the 'matrix, the indispensable condition, of nearly every other form' of freedom." Black, *supra* note 92, at 1110 (quoting Palko v. Connecticut, 302 U.S. 319, 326 (1937) (Cardozo, J.)).

144. U.S. CONST. amend. XVII.

145. *Id.* amend. XV.

146. *Id.* amend. XIX.

147. *Id.* amend. XXVI.

148. This mapping is somewhat awkward because while the franchise has been extended, the ability to exercise political rights may remain limited given the poor's socioeconomic constraints.

149. NEDELSKY, *supra* note 6, at 146-47.

150. Professor Michelman asks:

> [W]e have inherited a Constitution both republican and democratic—a Constitution that springs, in part, from republican antecedents marked by a crucial regard for the material independence of participant-citizens, and a Constitution that democratically rules out

Imaged with the Permission of Yale Law Journal

obvious demands on the government for participatory involvement, largely centered on the vote and judicial proceedings. Yet we have ignored the need for basic resources undergirding participation, which the Founders did not necessarily take for granted so much as they assumed would never present a problem as long as blacks, women, and the poor lacked a voice and a vote in public affairs. As long as we continue to reject the premise that those without independent resources cannot effectively participate in self-government, we are bound to condone inequality and subordination at the polls, in the town-hall meetings, and on the hustings.

Accordingly, we need to posit a theory that gives meaning to this open-door policy of political inclusiveness. As Professor Michelman suggests:

> Republican constitutionalism . . . involves a kind of normative tinkering. It involves the ongoing revision of the normative histories that make political communities sources of contestable value and self-direction for their members. This tinkering entails not only the recognition but also the kind of re-cognition—reconception—of those histories that will always be needed to extend political community to persons in our midst who have as yet no stakes in "our" past because they had no access to it.[151]

It is this task that is before legislators and jurists today.

### G. *Acknowledging Republican Values in Our Democratic Project*

Employing a set of interpretive tools to understand the constitutional and historical evolution (if not revolution) of the imperative for civic participation, I have argued that republican values lie at the core of our democratic project. As Justice Marshall articulated in the bicentennial year of the Constitution, the document we look to today no longer reflects fully the words or the sentiments of the Founding generation. Over time, the Jacksonian Revolution expanded the franchise, allowing those white men who did not hold property to vote. Then, with Reconstruction, the expansion of the franchise and the recognition of civil and political liberties ushered in a new era of American democracy built not just on negative rights, but on a proud appreciation for the equal moral worth of all individuals.[152]

---

> the republican exclusionary strategy of restricting participation to the prepolitically (relatively) wealthy. Are we, then, forced to the conclusion that *this* Constitution incorporates the republican *inclusionary* strategy . . . ?

Michelman, *supra* note 12, at 1330-31.

151. Michelman, *supra* note 8, at 1495.

152. *See* Steinfeld, *supra* note 62, at 336. While the nineteenth-century movement to discredit those who believed one needed economic security in order to possess political rights represented a leap forward in terms of our inclusive democratic enterprise, the underlying motivations behind

Imaged with the Permission of Yale Law Journal

This movement toward democratization speaks to a thicker conception of participatory government that is intrinsically meritorious. Participation cannot be simply a defensive, negative right. In a purely liberal state not concerned with participation and democratic process,[153] explicit constitutional safeguards could ensure the freedmen's needs were protected from state infringements. A paternalistic structure of protections written into our Constitution would satisfy the classical liberals, who measure the value of participation primarily as a protective means, safeguarding individuals from the tyranny of the government.[154] Insofar as those interests are represented, participation per se does not matter; negative property rights could be the touchstone of minority rights. But the amended Constitution insists on more than that. It insists on the right to political participation.

Likewise, participatory expansion is not simply about Madisonian pluralism designed to promote and maintain political stability through interest-group competition.[155] Rather, the expansion was, in actuality, about conferring moral inclusion on Americans. It was about a place at the table, and above all, about adding voices to the policymaking process.[156] Subsequent generations have bestowed those affirmative political rights on women, on the poor, and on all those old enough to serve in war. One of our most recent political amendments, the Twenty-Sixth Amendment, comports well with the republican case in favor of political rights expansion, because it sought to remedy the incongruity that had existed between the obligations of military service and the limitations on participation in domestic politics.[157]

---

that reasoning were never revisited in terms of appreciating the actual significance of basic economic resources to all members of our polity. *But see* SMITH, *supra* note 15, at 163 (describing Marshall's *Rodriguez* dissent as an instance in which this equation was revisited).

153. *See* AMY GUTMANN, LIBERAL EQUALITY 175 (1980).

154. *Id.*

155. *See* Michelman, *supra* note 8, at 1502-15 (describing republican models of participatory governance); *see also* AMAR, *supra* note 7, at 9 ("The Federalists . . . [claimed] that a large and modestly heterogeneous society could actually produce a more stable republic . . . .").

156. *See* Steinfeld, *supra* note 62, at 350-53, 364-66. Tocqueville's Americans, while liberal in outlook and individualistic in spirit, nevertheless took solace in the fact that they saw themselves as political equals. *See* TOCQUEVILLE, *supra* note 17, at 503.

157. Wars abroad, in fact, have served for generations as wake-up calls for recognition of rights at home. *See* PHILIP A. KLINKNER WITH ROGERS M. SMITH, THE UNSTEADY MARCH 136, 202, 317 (1999). We are all familiar with the old cliché that it was hard to keep (white) boys down on the farm once they had seen Paris. But how were we to keep the (black) boys down, in a more literal sense of the word, once they had been treated as equals on the battlefield and had fought for other people's—Americans' and foreigners'—freedom and democracy? The connection between service and participatory membership is an important one, and the conferral of rights suggests the degree to which democratic expansion comes when the polity believes would-be members have demonstrated distinguished, commendable service to the commonwealth. Professor Ackerman has argued:

> Negroes had *earned* their claim to citizenship by sacrificing for the Union during the darkest hours of the Civil War . . . . [Reconstruction was] a legal token of a more

Imaged with the Permission of Yale Law Journal

Building on this analysis, we should draw connections between those efforts designed to promote political empowerment and those designed to enhance socioeconomic well-being. There is a logic to having political rights enshrined in the Constitution and having economic rights lag behind in a temporal sense and, moreover, be set by the legislature. Such logic undergirds the argument that political rights give people the power and the opportunity to create whatever public policy ends they want.[158] There is a sense that once everyone is brought to the town meeting and given a vote, prudent policy will follow—and justice is ensured since everyone is present at the table.

While there is no logical fallacy in that line of reasoning, there are both intuitive and empirical reasons for challenging its accuracy. By simply possessing the right to vote, one is not automatically transformed into an empowered member of the polity. First, there is no qualitative consideration of the effectiveness of that participation. Second, there is no guarantee that certain individuals will be treated with dignity and respect when they lack the socioeconomic capital almost universally enjoyed by political elites and even the civically engaged middle class. Based on these assertions, I argue that avenues to participation are not sufficiently open to ensure one arrives, by virtue of her right to vote, at her deliberative destination. With that in mind and with the arguments I have already asserted, I conclude by identifying the right to minimal resource protection as one necessary for political and civic participation.

### H. *Resources for Citizenship*

It is helpful to look to scholars who challenge the conventional belief that a basic right to participate is sufficient. Amy Gutmann argues:

> By opening up opportunities for free and equal participation in political life . . . , an egalitarian society gives credence to the ideal of equal moral persons. . . . Only by allowing and encouraging equal opportunities for all citizens to participate in a variety of spheres that affect their lives will citizens see themselves and be seen as possessing equal dignity. . . . [Yet to] deny *effective* equal

---

> profound act of mutual recognition occurring among the American people themselves. . . . [T]he citizenship clauses do not speak of rights at all, but make the national government the guarantor of the *privileges* of citizenship.

Ackerman, *supra* note 93, at 104; *see also id.* at 110 (discussing the reciprocal relationship between the rights and duties of citizenship in the context of military service).

158. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); *see also* ELY, *supra* note 62, at 87-101, 181 (describing his vision of reinforcing representative democracy).

Imaged with the Permission of Yale Law Journal

> participatory rights or *fair* equality of participatory opportunities is to deny the equal dignity of individual citizens.[159]

Professor Zietlow concurs:

> The relegation of the economic rights of the poor to the political process creates a "Catch 22" for the poor, because the ability of poor people to affect the political process is limited by their lack of economic resources. A substantive approach to equal justice is needed to facilitate the equal participation of the poor in the political process. In order to achieve equality of participation, the poor must have the substantive means to enable them to participate. Therefore, a procedural approach to equal justice alone cannot succeed even on its own terms.[160]

Indeed, even Chief Justice Stone appreciated that enfranchised discrete and insular minorities would still be susceptible to attack in the legislative realm.[161] Despite the Court's refusal to treat the poor as a discrete and insular minority for purposes of heightened judicial review, there has been no corollary consideration of the poor's insularity in purely participatory terms—other than the procedural context in which the Court was supportive of affirmative rights to protect negative, fundamental interests. Indeed, just because the poor are not systematically discriminated against in ways that would trigger strict scrutiny, it does not follow that the poor actually possess the means to participate effectively. Traditionally, there must be some intent to discriminate by outsiders in order to trigger suspect classifications.[162] Yet my argument is that even though the Court does not recognize the poor as suspect in this fashion, there may still be affirmative obstacles in their path that demand the Court's—and Congress's—attention. Academics recognize:

> In order for formal participatory rights to become meaningful and effective rights, both a minimum absolute level and a relative equality of primary-good distribution must be guaranteed to all citizens. . . . Recent studies of participation clearly indicate a wide "participation gap" between citizens of low and high socioeconomic status . . . . As the absolute level of education, and of socioeconomic status in general, increases across the population, so too does the absolute level of participation of low-status groups . . . .

159. GUTMANN, *supra* note 153, at 181.

160. Zietlow, *supra* note 55, at 411-12; *see also* Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 59 (1977) (discussing equal citizenship and equal access to goods and services generally).

161. *See Carolene Prods.*, 304 U.S. at 152.

162. *See* Washington v. Davis, 426 U.S. 229 (1976).

Imaged with the Permission of Yale Law Journal

. . . .

> In order for effective equality of participatory opportunities . . . to be achieved, welfare rights must be established for all citizens and economic resources redistributed.[163]

With this in mind, I suggest a recognition of the need to satisfy the very basic elements of societal living in the polis. This suggestion is grounded, of course, in the structural reformations of the Constitution. As Justice Douglas reasoned in *Griswold*, and as Amar and Siegel suggest in terms of affirming expansive women's rights by thinking about how the Nineteenth Amendment affects our reading of the Fourteenth Amendment,[164] I would look to all those amendments that empower different sets of groups along political and economic lines as the foundation for such an enterprise.

For certain, the rights protected cannot just be those directly connected with voting, which have already been protected by *Harper* and by the Poll Tax Amendment.[165] Gutmann contends that "equal voting rights establish only the most minimal participatory sphere . . . . [W]e cannot expect voting rights to be intelligently exercised without effective participatory opportunities in more immediate spheres of communal life."[166] We need a more comprehensive, substantive foundation from which effective citizenship and participation can flourish.

## VI. CONCLUSION

This Note has suggested a rhetorical strategy and jurisprudential framework in which to reconsider welfare rights. It surely does not attempt to resolve all the problems, but merely offers a new paradigm for consideration. But, assuming our country begins to appreciate the legal imperative to secure affirmative resources as a prerequisite for meaningful citizenship, it seems incumbent upon the legislative branch to take the lead. As intimated above, a legislative awakening to the merits of civic republicanism would confer great legitimacy and legality on the effort to enhance affirmative welfare rights as they are connected to citizenship.[167]

---

163. GUTMANN, *supra* note 153, at 189, 196.

164. *See* Amar, *supra* note 118, at 28-30; Siegel, *supra* note 120.

165. U.S. CONST. amend. XXIV.

166. GUTMANN, *supra* note 153, at 188.

167. Although the recognition of a constitutional right is often the judiciary's domain, the instant right or set of rights may pose particular difficulties for Article III courts. The disinclination to make policy, to abandon precedent, and to expand the traditional bounds of justiciability complicate a judicial response.

First, there has been a long tradition of courts' refraining from making affirmative policy. Any effort to operationalize a right to effective citizenship may be beyond the bench's scope and expertise. But beyond that prudential concern, even when the Court has recognized rights as

Imaged with the Permission of Yale Law Journal

These rights could, perhaps, take the form of an array of vouchers tagged to the essential socioeconomic resources necessary to undergird participation as it is broadly understood.[168] To have citizenship welfare rights affirmed by the people's representatives would give a particularly democratic gloss to the identified constitutional imperative.

We can look, for starters, in the direction of other congressional imperatives surrounding important rhetorical phrases of the Constitution, specifically the phrases to "promote the general Welfare,"[169] and to "provide for the . . . general Welfare,"[170] as well as the Declaration of Independence's "Life, Liberty and the Pursuit of Happiness."[171] Professor Charles Black proffers analogous examples, including the constitutional

---

fundamental, it has been hesitant to impose affirmative obligations on legislatures and force them to help rights-bearers take advantage of their rights. For example, in two cases involving abortion funding, the Court reaffirmed the right of a woman to have an abortion, but expressly refused to compel states to finance abortions as part of government health-care programs. *See* Harris v. McRae, 448 U.S. 297, 318 (1980); Maher v. Roe, 432 U.S. 464, 469 (1977). Dissenting in *Maher*, Justice Brennan argued that the failure to provide funds for abortion should be considered comparable to a failure to waive court fees, thus making *Maher* difficult to square with *Griffin* and *Boddie*. *Maher*, 432 U.S. at 483, 488 (Brennan, J., dissenting). More generally, the Court has had a chance to discuss the Constitution's affirmative obligations in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189 (1989). The *DeShaney* Court refused to hold the state government affirmatively responsible for neglecting the needs of an abused child—even after that abuse had been brought to its officers' attention. Chief Justice Rehnquist reasoned:

> [N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors. The Clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimal levels of safety and security . . . . [I]ts language cannot fairly be extended to impose an affirmative obligation on the State. . . .
>
> . . . .
>
> . . . Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual.

*Id.* at 195-96.

Second, to reverse the patterns of precedent would be very difficult. Even assuming that there is a considerable republican interest in citizenship welfare, the Court would still have to confront its liberal decisions regarding the limitations inherent in a doctrine of negative rights. Prudentially, the Court may want to avoid those sets of pitfalls. *See, e.g.*, Planned Parenthood v. Casey, 505 U.S. 833, 854-69 (1994) (reaffirming the power of stare decisis).

Third, it might be difficult to grant standing for an injured party. While there may be an abstract constitutional right to effective participation, an injury in fact may be hard to demonstrate. It may be difficult to quantify effective participation and it would certainly be difficult to determine what remedy at law a court could offer. Given these obstacles, a court may never reach these erstwhile meritorious claims. For a general discussion of complications arising out of Article III courts, see, for example, FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE § 2.26, at 134-37 (5th ed. 2001), which describes how a plaintiff may meet the requirements to bring suit.

168. It is well beyond the scope of this Note to contemplate what these rights might look like in practice. But very briefly, we might consider health care, food, shelter, and education as basic necessities for democratic participation. Access to these resources would have to be conditioned, of course, on some demonstration of a concerted effort to participate in civic or political affairs.

169. U.S. CONST. pmbl.

170. *Id.* art. I, § 8.

171. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

Imaged with the Permission of Yale Law Journal

assertion that Congress shall provide for the national defense.[172] This vague mandate is taken quite seriously by our government even though there is no further explicit obligation to build and maintain a sizable army. The same implied mandate is true, for Professor Black, with the census.[173] In the Census Clause, there is an implication of carrying out a constitutional mandate—and carrying it out well. Black considers these imperatives to be duties held in trust, not text. Both the census and the national defense examples establish "that the systematic frame of constitutional rights and duties can comfortably contain, and quite evidently does contain, a duty not expressly declared as such, but of vast scope and highest essentiality, a duty derived from the grant of power held in trust."[174] Contemplated in light of the constitutional authorization to promote the common welfare and in light of the civic and economic welfare-enhancing amendments, a case for affirmative citizenship rights demands consideration comparable to the national defense and census-taking mandates.

Professor Black founds his assertion for welfare rights on textual phrases asserting rights to the pursuit of happiness as well as on congressional imperatives to promote the general welfare:

> [T]he possession of a decent material basis for life is an indispensable condition, to almost all people and at almost all times, to this "pursuit" [of happiness]. The lack of this basis—the thing we call "poverty"—is . . . the commonest, the grimmest, the stubbornest obstacle we know to the pursuit of happiness. I have suggested that poverty may be the leading cause of death; it is pretty certain that it is the leading cause, at least amongst material causes, of despair in life.[175]

Black's assertiveness regarding congressional imperatives must be balanced, of course, against our recognition that frequent and competitive elections for seats in Congress may give new meaning to Justice Jackson's oft-quoted remark that the Constitution should not be a "suicide pact."[176] Simply put, today's political consensus supports only very attenuated welfare benefits. Thus even with legal prodding, it is doubtful that Congress

172. *See* Black, *supra* note 92, at 1113-14; *see also* U.S. CONST. pmbl.; *id.* art. I, § 8, cl. 1.

173. U.S. CONST. art. I, § 1, cl. 3.

174. Black, *supra* note 92, at 1114.

175. *Id.* at 1106.

176. Terminiello v. Chicago, 337 U.S. 1, 37 (1949) (Jackson, J., dissenting) (arguing that an absolutist protection of free speech rights may threaten, in the long run, our democratic way of life); *see also* Kennedy v. Mendoza-Martinez, 372 U.S. 144, 160 (1963) (using the phrase "suicide pact" to describe a decision to protect a particular right even though that protection would undermine the broader purpose and ideals of the American constitutional system).

Imaged with the Permission of Yale Law Journal

will act authoritatively any time soon to bolster affirmative welfare rights.[177]

Pragmatic difficulties notwithstanding, there are from a conceptual standpoint real jurisprudential, normative, and empirical justifications for looking to classical republicanism as a constitutional value that is alive and vibrant. It is here that we must recognize that the power to participate meaningfully in the political system may not be taken for granted. Once we have arrived at this recognition, we must begin to contemplate effective strategies to secure the legal, political, and financial capital necessary to remedy this oversight.

177. In 1996, Congress overhauled the American welfare system. Promising to end welfare as we know it, President Clinton signed a widely supported bill that ended Americans' entitlement to welfare. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of 42 U.S.C.). Spurred on by a desire to cut the budget, promote work, and curb dependency, the welfare reform advocates have captured the public agenda and have not weakened their grip. *See, e.g.*, Mickey Kaus, Editorial, *Who's the Real Beltway Candidate*, N.Y. TIMES, Jan. 14, 2000, at A25 (declaring the righteousness of the 1996 welfare reform bill); Martin Peretz, *War on Words*, NEW REPUBLIC, Sept. 6, 1999, at 46 (calling Bill Bradley's vote against the 1996 welfare reform proposal "wildly out of step with public opinion"). For additional background information on this wave of welfare reform, see Dan Morgan, *A Revolution Derailed*, WASH. POST, Oct. 20, 1996, at C1; and Editorial, *Where Welfare Stands*, N.Y. TIMES, May 18, 1997, at D16.

Imaged with the Permission of Yale Law Journal