

THE RIGHT TO WORK AND EARN A LIVING WAGE: A PROPOSED CONSTITUTIONAL AMENDMENT

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I. INTRODUCTION

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty and the pursuit of Happiness. —That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. —*That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.*¹

There is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are:

- Equality of opportunity for youth and for others.
- Jobs for those who can work.
- Security for those who need it.
- The ending of special privilege for the few.
- The preservation of civil liberties for all.
- The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.²

Every person should have the right to work and to receive a living wage for their work. It is time for a constitutional change. As the nation exhibits its legislative unwillingness to support non-working adults by forcing them off government assistance programs,³ they will meet millions who are already seeking work. Mil-

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¹ THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).

² 87 CONG. REC. 46 (1941) (remarks by President Franklin Delano Roosevelt in his State of the Union Address).

³ See, e.g., Barbarda Vobeja, *After 60 Years, a Basic Shift in Philosophy*, WASH. POST, Aug. 1, 1996, at A1.

lions more who are working do not earn enough to lift themselves and their children out of poverty.

Justice, supported by the Declaration of Independence and the history of this nation, demands change when current economic and legal arrangements hurt individuals, families, and communities. This article proposes an amendment to the United States Constitution to provide every citizen with the right to an opportunity for employment at a living wage. If this nation is serious about putting everyone to work, then it must guarantee everyone an opportunity to work at a living wage. If the United States House of Representatives can pass a proposed constitutional amendment banning flag-burning,⁴ an amendment ensuring the right to a job at a decent wage is possible.

It is in the nation's best interest to give everyone who wants to work the chance to be gainfully employed. This interest is served by allowing people to contribute to their own well-being, as well as to their family's and their community's. Likewise, it is in the common interest that people who work full-time should not remain poor. Workers who are compensated enough to support themselves and their families do not need to rely on support from others. The opportunity to work should be the right of every person. Work and poverty should not coexist.

Some who oppose full employment argue that it is inflationary and bad for the nation. These people would accept millions of non-working adults as the price the nation must pay to maintain low inflation. But is this true? Is the family helped by heads of households not being able to work if they are trying to work? Is the neighborhood helped by people not working? Is the city, or the state? Clearly not. So, if involuntary unemployment is bad for the family, the neighborhood, the city, and the state, how can it possibly be good for the nation? Others suggest that government has no business interfering with economic life. I would imagine that those who advance this suggestion have not had their own economic life assisted by government action.

American political history supports efforts to give everyone the opportunity to work and to make sure that those who work earn enough to avoid poverty. Historically, all levels of government have provided opportunities for work when the private sector was unable. This century has seen several legislative efforts to create a right to employment which, while unsuccessful so far, have enjoyed

⁴ Kenneth J. Cooper, *House Approves Amendment on Flag Desecration*, WASH. POST, June 29, 1995, at A7.

broad public support. Public support of such efforts is not surprising since this nation values work and opportunity.

The United States continually seeks ways to improve the constitutional rights to personal liberty and political participation for its citizens. Many of these important rights become diluted for the unemployed and those who are employed but still unable to support themselves and their families. It is time to recognize the need for an opportunity for all persons to support themselves. It is time to create a constitutional right to work for a living wage. The purposes of this proposed amendment are simple: (1) to create an opportunity to work for the involuntarily unemployed, and (2) to create an opportunity to earn a decent and livable wage for the employed. The proposed amendment reflects and reinforces this nation's commitment to work and opportunity. While the amendment has significant implications for this country's laws and economic policies, few would dispute the values it enshrines with constitutional protection.

This article outlines how such a guarantee of employment might work. It does not point out exactly how such an amendment could be implemented because the possibilities are literally limitless. For example, it could be implemented through: (1) the provision of tax incentives to private employers and employees which would support work creation and retention policies; (2) modifications of existing labor laws such as raising and indexing minimum wages; (3) the establishment of a Works Progress Administration ("WPA")-type employment corps for those who are not employed by the private sector, which could help clean, teach, and police the nation's communities; and (4) many combinations, as yet, unthought. The cost of such an effort would be much less than the cost the nation is already paying for unemployment and poverty-level wages. Such an amendment is consistent with the historical development of this country, and could propel the nation forward in supporting its citizens as they search for decent work at a decent wage.

II. THE PROPOSED AMENDMENT

The proposed amendment would contain the provision: *Every person shall have the right to work and to receive a living wage for their work.*

The amendment embodies two principles: a right to work, and a right for workers to receive a living wage. What these rights mean exactly will be decided by Congress, the Executive Branch,

and the Judiciary.⁵ However, a brief sketch of what these rights are intended to mean is in order.

The right to work would be a right of opportunity. "Every person shall have the right to work" simply means that there must be an opportunity to work for those who seek it. The proposed amendment does not force anyone to work, nor are the voluntarily unemployed affected. This is not mere sloganeering, but a real right to the opportunity to work. As a part of the Constitution, there would be a legally enforceable right to the opportunity for employment, and the involuntarily unemployed would be entitled to enforce this right.

The employed would be entitled, under this amendment, "to receive a living wage for their work." A living wage means compensation sufficient for workers to meet the needs and demands of everyday life, lived in a manner consistent with human dignity.⁶ The precise amount of money due workers will vary over time with national standards and expectations, but it is intended to cover the commonly accepted living expenses. Since it is a living wage, and because it is expected that many workers will be supporting families, the needs of those dependent on the worker must also be considered. A living wage certainly does not mean the statutory minimum wage,⁷ which is far below the wages needed for most workers and their dependents to live in dignity. The right to a living wage would become legally enforceable, with all the benefits that entails.

At the present, there is neither a guarantee of work nor living wages. The two principles of work and living wages must fit together. Without the guarantee of a living wage, work loses some of its appeal; without the real opportunity to work, the promise of good wages is empty. The guarantees of work and living wages energize and complement each other. They must remain linked to create a strong constitutional bond for the people of this nation.

The Constitution enshrines the highest goals of the United States. This nation values working and earning enough to secure a

⁵ U.S. CONST. art. I, §§ 1-8; art. II, §§ 1-2; art. III, §§ 1-2.

⁶ See Karl E. Klare, *Labor Law as Ideology: Toward a New Historiography of Collective Bargaining Law*, 4 INDUS. REL. L.J. 450, 451 n.4 (1981) [hereinafter Klare, *Labor Law as Ideology*] ("[W]ork can and should provide dignity and meaning to life . . . it can and should be a mode of expression, development[,] and realization of the human self . . .").

⁷ The statutory minimum wage in the United States is currently \$5.15 per hour. Small Business Job Protection Act, 29 U.S.C. § 415(b)(2)(E) (1996).

dignified living.⁸ A constitutional amendment guaranteeing every person the right to work and to earn a living wage simply, yet forcefully, elevates accepted American principles to the status of constitutionally protected rights.

III. AMERICAN HISTORICAL PRECEDENT FOR THE RIGHT TO WORK AND EARN A LIVING WAGE

Three times during this century a guaranteed right to employment was seriously considered in the United States. First, in the early 1930s during the New Deal, President Franklin Delano Roosevelt led the fight for decent work at decent wages through exhortation and legislation.⁹ After World War II, a comprehensive legislative guarantee of employment was considered by Congress.¹⁰ Third, in the mid-1970s, Congress and the nation again wrestled with a way to ensure everyone had the opportunity to work.¹¹ While none of these efforts culminated in an enforceable right to work, each moved the country closer to that goal and provided insight for those considering a constitutional amendment.

Even before the New Deal, Americans supported the obligation of public authorities to help the able-bodied jobless become employed.¹² Furnishing work opportunities for the unemployed was considered a part of the duty of local officials in England as early as the sixteenth century.¹³ Publicly funded work was used as a

⁸ See, e.g., Keith B. Leffler, *Minimum Wages, Welfare, and Wealth Transfers to the Poor*, 21 J.L. & ECON. 345 (1978).

⁹ See *infra* pp. 108-15.

¹⁰ See *infra* pp. 115-19.

¹¹ See *infra* pp. 120-23.

¹² For a more detailed overview of the history of the right to work, see William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1793-1804 (1994) (posing a social and economic citizenship based on roots ranging from postbellum Republicans' discussions of "wage slavery," Gilded Age reformers, the Populist tradition, the Progressive era, and the New Deal). See also THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* 234 (1995).

¹³ WALTER I. TRATTNER, *FROM POOR LAW TO WELFARE STATE: A HISTORY OF SOCIAL WELFARE IN AMERICA* 8-9 (5th ed. 1994). See also Robert Teir, *Maintaining Safety and Civility in Public Spaces: A Constitutional Approach to Aggressive Begging*, 54 LA. L. REV. 285 (1994).

A statute enacted in 1530 . . . ordered that the disabled poor be licensed to beg within their own local area. Those begging outside the permitted area were to spend two days and nights in the stocks, and fed only bread and water. Moreover, anyone begging without a license was to be whipped and those "whole and mighty in body, able to labor" were to be "tied to the end of a cart naked, and be beaten with whips throughout the same town or other place till his body be bloody by reason of such whipping."

means of relief for the unemployed in the United States as early as 1857.¹⁴ In the nineteenth century, authorities in cities such as Baltimore, New York, Newark, and Philadelphia provided public jobs at a set minimum wage in response to widespread unemployment.¹⁵ These efforts continued into the twentieth century. Between 1914 and 1915, over fifty cities used public works such as laying water-mains, improving roads and parks, and repairing public buildings to help relieve unemployment.¹⁶

A. Franklin Delano Roosevelt and the New Deal

Government creation of public work programs cannot be understood without some knowledge of the Depression and its effect on unemployment. During the Depression, unemployment grew at a frightening rate. In the spring of 1929, there were 2.8 million unemployed men and women; by January 1930, there were over four million out of work; in September 1930, five million people were unemployed; eight million people were jobless by spring 1931; and unemployment peaked at thirteen to fifteen million people out of work in the spring of 1933.¹⁷

This sanguinary law was amended in 1535 to provide assistance to those who were truly needy, and to guide the others towards productive work. Under the amendment, sturdy beggars were made to work, and invalids were supported by alms collected by the churchwardens and two others of every parish. This was the first English law to legislate charitable sustenance of the poor.

After the accession to the throne of King Edward, the Henrician laws were replaced by more severe measures. The Edwardian statute provided that any loiterer or wanderer who would not work, or had run away from work, was to be branded with a "V" for vagabond. Furthermore, he was to be a slave for two years to whomever demanded him, was to be fed bread and water, and forced to do any task "how vile so ever it be as he shall be put unto by beating, chaining, or otherwise." Moreover, if the enslaved beggar ran away, he was to be branded with an "S" upon the cheek and made a slave for life. If he ran away again, he was to be hanged.

Id. at 295-96 (citations omitted).

¹⁴ See LEAH HANNAH FEDER, UNEMPLOYMENT RELIEF IN PERIODS OF DEPRESSION: A STUDY OF MEASURES ADOPTED IN CERTAIN AMERICAN CITIES, 1857 THROUGH 1922, at 31 (1936).

¹⁵ SKOCPOŁ, *supra* note 12, at 234.

¹⁶ FEDER, *supra* note 14, at 288.

¹⁷ JOSEPHINE CHAPIN BROWN, PUBLIC RELIEF: 1929-1939, at 64-65 (1940). These unofficial employment estimates were gathered by several organizations since no official government estimates exist. *Id.* at 64. See also BONNIE FOX SCHWARTZ, THE CIVIC WORKS ADMINISTRATION, 1933-1934 (1984).

More than 12.5 million Americans—ten percent of the population—were living on public aid. Four states alone, Pennsylvania, New York, Ohio, and Illinois, claimed a third of these persons, and an eighth re-

What did the unemployed want? Experiences of people involved in administering relief programs in the Depression confirmed that what the unemployed wanted was not a handout, but a job.¹⁸ But what did the unemployed receive? Not work, but relief, public assistance, and handouts. By 1933, relief from state and local governments was at unheard of levels: four million families (i.e., eighteen million people) were receiving some sort of public relief.¹⁹ "In some states [forty] percent of the population [was] on relief . . ."²⁰ Incredibly, one out of every six families in the United States depended on assistance.²¹ At the time of the New Deal, everyone wanted more jobs. This notion remains true today. The discussion to resolve the crisis centered on how to get jobs to those who wanted them.

President Herbert Hoover chose to rely on the private market alone for job creation. For example, in 1930, he created a President's Emergency Committee for Employment (the "Emergency Committee").²² The Emergency Committee and the rest of the administration consistently maintained the position that massive unemployment was not a problem for the federal government, but an economic problem, and a local problem to be addressed by local resources, primarily private agencies.²³ The Hoover Administration joined with business interests in opposing any significant fed-

sided in five cities with a million or more inhabitants. The count included over 5.25 million children under sixteen years of age. One seventh of all youngsters from six to thirteen years old depended on relief, an experience comparable to school in its impact upon a future generation. And almost .25 million infants were starting life out on the dole.

Id. at 3.

¹⁸ JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY: 1900-1994*, at 53 (1994). "At least seventy-five percent of the people who came to us," [the head of a New York relief agency] told Mayor Fiorello La Guardia, "wanted just one thing, and that was work; the last thing they wanted was a charity dole of any kind." *Id.*

¹⁹ BROWN, *supra* note 17, at 145.

²⁰ BROWN, *supra* note 17, at 145-46.

²¹ BROWN, *supra* note 17, at 146.

During the spring unemployment had reached its peak. Approximately 15 million people were out of work. The fiscal condition of states, counties[,] and municipalities was becoming more and more serious. In many places the economic machinery had already collapsed. Essential public services were being suspended. Thousands of families were losing their homes and their farms. There was no such thing as security, whether that meant the assurance of a job, a home, a farm, shares of stock, deposits in banks, or a life insurance policy.

BROWN, *supra* note 17, at 145.

²² BROWN, *supra* note 17, at 68.

²³ BROWN, *supra* note 17, at 68.

eral effort to combat the unemployment of the Depression on many, now-familiar fears: interference with the cycles of normal business; an unbalanced budget; higher taxes; large bureaucracy; and state's rights.²⁴

Franklin Delano Roosevelt, on the other hand, upon accepting the nomination of the Democratic Party for President, made his position on the economics issue clear: "We must lay hold of the fact that economic laws are not made by nature. They are made by human beings."²⁵ Once in office, President Roosevelt's advisors began to consider ways the federal government could dramatically reduce unemployment, since the locally administered work relief programs which delivered public assistance were being overwhelmed by surging unemployment rates.²⁶

"[President] Roosevelt's understanding of New Deal constitutionalism embraced a right to decent, useful work."²⁷ President Roosevelt's New Deal went forward on two fronts: the creation of public programs providing jobs for the unemployed and the continual call for safeguarding the right to a job for all Americans.

While the most well-known of the New Deal public employment programs is the WPA, it was not the first effort of the Roosevelt Administration. The WPA actually arose out of the ashes of two programs enacted in 1933: the Civil Works Administration (the "CWA") and the Federal Emergency Relief Act ("FERA"). The CWA was created by President Roosevelt in November 1933 to provide jobs to the unemployed.²⁹ It employed four million people at good wages until it was terminated in March of 1934. Though it had problems with criticism from the business community, in addition to problems in its administration and its politics, it was very popular with the unemployed who expressed a clear preference for work rather than relief.³¹ The CWA, more than any other New Deal effort, came closest to providing the unemploy-

²⁴ BROWN, *supra* note 17, at 110-18.

²⁵ Franklin Delano Roosevelt, I Pledge You — I Pledge Myself to a New Deal for the American People, Address Before the Democratic National Convention (July 1932), in 1 THE PUBLIC PAPERS AND ADDRESSES OF FRANKLIN D. ROOSEVELT 657 (1957).

²⁶ PHILIP HARVEY, SECURING THE RIGHT TO EMPLOYMENT: SOCIAL WELFARE PROGRAMS AND THE UNEMPLOYED IN THE UNITED STATES 100-01 (1989).

²⁷ Forbath, *supra* note 12, at 1789.

²⁸ See SCHWARTZ, *supra* note 17, at 38. The WPA was created in 1935. It was at first known as the WPA even though its name actually changed to the Works Project Administration. It became an independent agency in 1939. SCHWARTZ, *supra* note 17, at 38.

²⁹ SCHWARTZ, *supra* note 17, at 38.

³⁰ SCHWARTZ, *supra* note 17, at 213.

³¹ HARVEY, *supra* note 26, at 103-05. The CWA encountered harsh criticism in

"real jobs for real wages."³²

After the 1934 elections, President Roosevelt, who always considered both FERA and CWA temporary, decided to "quit this business of relief" and dismantled the programs, shifting the government focus almost exclusively to public employment.³³ Anti-government forces are fond of quoting President Roosevelt's statement from his 1935 *State of the Union Address* that "[t]he Federal Government must and shall quit this business of relief."³⁴ However, they rarely go on to quote the rest of the speech in which he declared that government must provide unemployed people with jobs:

I am not willing that the vitality of our people be further sapped by the giving of cash, of market baskets, of a few hours of weekly work cutting grass, raking leaves, or picking up papers in the public parks. We must preserve not only the bodies of the unemployed from destitution but also their self-respect, their self-reliance, and courage and determination. . . . There are however an additional three and one-half million employable people who are on relief. . . . The Federal Government is the only governmental agency with sufficient power and credit to meet this situation. We have assumed this task and we shall not shrink from it in the future. It is a duty dictated by every intelligent consideration of national policy to ask you to make it possible for the United States to give employment to all of these three and one-half million employable people now on relief, pending their absorption in a rising tide of private employment.³⁵

As a result, a two-part strategy developed. First, the people who were unable to work were to seek assistance from the states.³⁶ Second, those who could work were to be assigned jobs through

South, where its nondiscriminatory hiring and wage policies interfered with the traditional race-based work patterns.

A du Pont vice president and family member wrote that, "Five negroes on my place in South Carolina refused work this spring, after I had taken care of them and given them house rent free and work for three years during bad times, saying they had easy jobs with the Government. . . ." A North Carolina landlord put it more bluntly: "You can't hire a nigger to do anything for you. . . . High wages is ruinin' 'em."

HARVEY, *supra* note 26, at 104.

³² HARVEY, *supra* note 26 at 99 (footnote omitted).

³³ SKOCPOL, *supra* note 12, at 170.

³⁴ 79 CONG. REC. 95 (1935) (remarks by President Roosevelt in his *State of the Union Address*).

³⁵ *Id.* at 95-96.

³⁶ MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 227 (1986).

the WPA.³⁷ Within a year, the WPA succeeded in employing more than three million people,³⁸ mainly those who were already on relief.³⁹ Despite its size, the WPA still reached only a fraction of the unemployed.⁴⁰ Wages earned by WPA workers were lower than private sector wages, but higher than the amount received on relief, although wages clearly were not as high as they had been in the CWA.⁴¹

While the WPA was criticized for its "make-work" philosophy, WPA workers did much to build and improve streets, storm sewers, grandstands, and landing fields.⁴² Other criticisms of the WPA included: its high cost; its infringement into private business and construction opportunities; and inherent uncorrectable flaws in any system of public employment.⁴³

As a result, public support for the work programs and the workers themselves began to erode.⁴⁴ While the WPA lasted until World War II, Congress cut its budget nearly in half in 1937, and again in 1939 when Congress ordered all WPA employees who had worked for the program more than eighteen months terminated.⁴⁵

³⁷ *Id.* at 227. The WPA was set up in 1935 with \$1.39 billion in funding, as part of the \$4.54 billion allocated for relief. PATTERSON, *supra* note 18, at 63. See KATZ, *supra* note 36, at 228-34.

³⁸ KATZ, *supra* note 36, at 228.

³⁹ PATTERSON, *supra* note 18, at 63-64 (the annual total of WPA jobs reached a high of 3.5 million people, approximately 30% of the 8 to 10.7 million unemployed).

⁴⁰ KATZ, *supra* note 36, at 229.

⁴¹ SCHWARTZ, *supra* note 17, at 254-56; see KATZ, *supra* note 36, at 229 (WPA wages, especially for semi-skilled workers, were often only 65 to 70% of workers' total needs; in the South, it was as low as 30 to 40% of workers' needs).

⁴² MARVIN OLASKY, *THE TRAGEDY OF AMERICAN COMPASSION 158-61* (1992). The WPA was known by its critics as "We Piddle Around" and "We Pay for All." *Id.* The author, a severe critic of most contemporary social assistance programs, looks comparatively fondly on the WPA, finding evidence that it was both "benefit and boondoggle" as he admires its attempts to "stress work and worthiness" over relief, and its conscious attempts to work within "American values toward work and dependency." *Id.* The WPA's "theater, arts, and writers' projects were bold ventures in government support of cultural activities." PATTERSON, *supra* note 18, at 63. See KATZ, *supra* note 36, at 230-34 (detailing the criticisms of the supporters and detractors of the work relief programs). The administrative problems of putting millions of people to work in a very short time with no prior programs to learn from was an incredible challenge. The goals of the programs were mixed, including immediately putting people to work, many of whom were unskilled, but also employing people for constructive public projects, which demanded planning and skilled workers. KATZ, *supra* note 36, at 230-31. Since all could not be helped, should the programs help those most desperate and least skilled, or those with skills who needed but a temporary job? KATZ, *supra* note 36, at 231-32. Wages had to be above relief levels but could not politically challenge private wage levels. KATZ, *supra* note 36, at 232-33.

⁴³ See PATTERSON, *supra* note 18, at 65-66.

⁴⁴ PATTERSON, *supra* note 18, at 45-55.

⁴⁵ KATZ, *supra* note 36, at 229; see PATTERSON, *supra* note 18, at 57.

A 1933 companion program, the CCC, put unemployed young people to work.⁴⁶ By 1939, 800,000 young Americans were working for the National Youth Administration (the "NYA") and the CCC, and another 2.3 million workers were employed through the WPA.⁴⁷ Eventually, the WPA folded into a new Federal Works Agency.⁴⁸ Congress terminated the CCC in 1942, and President Roosevelt called for the end of the WPA after the 1942 elections.⁴⁹

Though the public employment projects of the New Deal did not become permanent, they helped millions of people in one of the worst economic periods in American history. Subsequent efforts to guarantee employment through the legislature have never matched the success of the New Deal programs.⁵⁰ Likewise, the national government is popularly seen to be responsible for maintaining low rates of unemployment and, if necessary, becoming the employer of last resort.

In addition to the creation and administration of these programs, President Roosevelt and those who worked with the New Deal made significant contributions to the discussion over whether people should have a right to a job and a right to earn decent wages. For example, in 1934, President Roosevelt created the Committee on Economic Security ("CES") to develop a comprehensive workable social security program.⁵¹ CES quickly outlined a two-pronged social policy to combat the economic misfortunes:⁵² (1) income assistance for the needy who could not work; and (2) employment assurance for those who could.⁵³ The income assistance for the needy was formulated into programs. The economic assurance part of the equation was to provide work opportunities to make people self-supporting.⁵⁴ Unfortunately, only the income assistance programs were made operable.⁵⁵

Despite the novelty of the idea that the government become

⁴⁶ KATZ, *supra* note 36, at 224.

⁴⁷ SKOCPOL, *supra* note 12, at 169.

⁴⁸ SKOCPOL, *supra* note 12, at 172.

⁴⁹ SKOCPOL, *supra* note 12, at 175.

⁵⁰ SCHWARTZ, *supra* note 17, at 260-76 (providing a concise overview of legislative efforts to guarantee employment from the CWA to the Comprehensive Employment Training Act ("CETA")).

⁵¹ TRATTNER, *supra* note 13, at 289 (indicating that the committee consisted of four cabinet members and the head of FERA).

⁵² HARVEY, *supra* note 26, at 20 (labeling this a two-legged policy which ultimately lost one of its legs).

⁵³ HARVEY, *supra* note 26, at 20.

⁵⁴ HARVEY, *supra* note 26, at 20.

⁵⁵ HARVEY, *supra* note 26, at 20 ("Since then we have tried to walk on one leg only, to hobble along with half a social welfare system.").

the employer of last resort, a poll by *Fortune* magazine found overwhelming support for the principle that "government should see to it that every man who wants to work has a job."⁵⁶

President Roosevelt kept the idea of government guaranteed opportunity to work for fair wages on his agenda. In 1937, in an address to Congress, he said:

The time has arrived for us to take further action to extend the frontiers of social progress. . . . Our Nation so richly endowed with natural resources and with a capable and industrious population should be able to devise ways and means of insuring to all our able-bodied working men and women a fair day's pay for a fair day's work.⁵⁷

As World War II approached, President Roosevelt and his advisors recognized that the declining unemployment rate of the mid-1930s, which was a result of the war production effort, might rise again after the war. Accordingly, in November 1940, President Roosevelt instructed the National Resources Planning Board ("NRPB") to formulate detailed plans for economic and social policies for the postwar period.⁵⁸ The NRPB issued several reports including one with 640 pages and 400,000 words, entitled *Security, Work, and Relief Policies*.⁵⁹ In this report, the NRPB proposed a "New Bill of Rights," which included:

1. The right to work, usefully and creatively through the productive years.
2. The right to fair pay, adequate to command the necessities and amenities of life in exchange for work, ideas, thrift and other socially valuable service.
3. The right to adequate food, clothing, shelter and medical care.
4. The right to security, with freedom from fear of old age, want, dependency, sickness, unemployment and accident.
5. The right to live in a system of free enterprise, free from compulsory labor, irresponsible private power, arbitrary public authority and unregulated monopolies.
6. The right to come and go, to speak or to be silent, free from the spyings of secret political police.
7. The right to equality before the law, with equal access to justice in fact.

⁵⁶ *The Fortune Survey*, FORTUNE, July 1935, at 67.

⁵⁷ 81 CONG. REC. 4960 (1937) (statement of President Franklin Delano Roosevelt asking for the enactment of the Fair Labor Standards Act).

⁵⁸ STEPHEN KEMP BAILEY, CONGRESS MAKES A LAW, THE STORY BEHIND THE EMPLOYMENT ACT OF 1946, at 26 (1950).

⁵⁹ *Id.*; see SKOCPOL, *supra* note 12, at 173.

8. The right to education, for work, for citizenship and for personal growth and happiness.
9. The right to rest, recreation and adventure, the opportunity to enjoy and take part in an advancing civilization.⁶⁰

The NRPB also called for the assurance of economic security as a right of every American citizen. Thus, the federal government should provide jobs when private economy cannot.⁶¹ The NRPB spelled out this strategy for full employment in detail:

To guarantee the right to a job, activities in the provision of physical facilities and service activities should be supplemented by:

- (1) Formal acceptance by the Federal Government of responsibility for insuring jobs at decent pay to all those able to work regardless of whether or not they can pass a means test.
- (2) The preparation of plans and programs, in addition to those recommended . . . for all kinds of socially useful work other than construction, arranged according to the variety of abilities and location of persons seeking employment.
- (3) Expansion of the functions of the [U.S.] Employment Service, strengthening its personnel to the end that it may operate as the key mechanism in referring unemployed workers to jobs, whether public or private.
- (4) Establishment of a permanent "Work Administration" under an appropriate Federal agency to administer the provision of jobs of socially desirable work for the otherwise unemployed.⁶²

The NRPB proposed the establishment of a national employment service to gather information, administer all work and training programs, and unemployment compensation.⁶³ While no specific action was taken on this report, its suggestions lay the groundwork for the 1945 Full Employment Bill. Meanwhile, President Roosevelt continued to proclaim the need to guarantee economic opportunity and security for all people. In his January 1941 *State of the Union Address*, President Roosevelt announced that these principles were necessary to support the very bedrock of the American system:

⁶⁰ *The 'New Bill of Rights,'* N.Y. TIMES, Mar. 11, 1943, at 12.

⁶¹ SKOCPOL, *supra* note 12, at 174 (indicating that the NRPB, like previous New Dealers, "regarded public works and public employment as the solutions to the unemployment problem").

⁶² HARVEY, *supra* note 26, at 106.

⁶³ SKOCPOL, *supra* note 12, at 173-75.

There is nothing mysterious about the foundations of a healthy and strong democracy. The basic things expected by our people of their political and economic systems are simple. They are:

- Equality of opportunity for youth and for others.
- Jobs for those who can work.
- Security for those who need it.
- The ending of special privilege for the few.
- The preservation of civil liberties for all.
- The enjoyment of the fruits of scientific progress in a wider and constantly rising standard of living.⁶⁴

He also pointed out the four freedoms he hoped would come about in the United States and world-wide: freedom of speech and expression; freedom of worship; freedom from want; and freedom from fear.⁶⁵

In his January 1944 *State of the Union Address*, President Roosevelt looked beyond the end of the World War II effort and enunciated the substance of the economic bill of rights:

It is our duty now to begin to lay the plans and determine the strategy for the winning of a lasting peace and the establishment of an American standard of living higher than ever before known. We cannot be content, no matter how high the general standard of living may be, if some fraction of our people—whether it be one-third or one-fifth or one-tenth—is ill-fed, ill-clothed, ill-housed, and insecure.

This Republic had its beginning, and grew to its present strength, under the protection of certain inalienable political rights—among them the right of free speech, free press, free worship, trial by jury, freedom from unreasonable searches and seizures. They were our rights to life and liberty.

As our Nation has grown in size and stature, however—as our industrial economy expanded—these political rights proved inadequate to assure us equality in the pursuit of happiness.

⁶⁴ 87 CONG. REC. 46 (1941).

⁶⁵ *Id.* at 46-47.

In the future days, which we seek to make secure, we look forward to a world founded upon four essential freedoms. The first is freedom of speech and expression everywhere in the world. The second is freedom of every person to worship God in his own way everywhere in the world. The third is freedom from want, which, translated in world terms, means economic understandings which will secure to every nation a healthy peacetime life for its inhabitants everywhere in the world. The fourth is freedom from fear—which, translated into world terms, means a world-wide reduction of armaments to such a point and in such a thorough fashion that no nation will be in a position to commit an act of physical aggression against any neighbor—anywhere in the world.

Id.

We have come to a clear realization of the fact that true individual freedom cannot exist without economic security and independence. "Necessitous men are not freemen." People who are hungry and out of a job are the stuff of which dictatorships are made.⁶⁶

President Roosevelt also proposed a "second Bill of Rights," where a new basis of security and prosperity could be established for all Americans.⁶⁷ This "second Bill of Rights" included: "[t]he right to a useful and remunerative job in the industries or shops or farms or mines of the Nation [and] the right to earn enough to provide adequate food and clothing and recreation. . . ."⁶⁸

During this period in American history, the federal government became the employer of last resort, and millions of people and their families survived massive unemployment. Economic independence, secured through the right to a decent job at decent pay, became more than just a slogan. It became part of the American dream.

B. *The Employment Act of 1946*

"Our American system owes no man a living but it does owe every man an opportunity to make a living. That is the proper interpretation of the 'right to work.'"⁶⁹

While the New Deal reforms made progress combating unemployment, as late as 1939, eight or nine million people remained

⁶⁶ 90 CONG. REC. 57 (1944) (remarks by President Roosevelt in his *State of the Union Address*).

⁶⁷ *Id.*

⁶⁸ *Id.* The complete "second Bill of Rights" proposed by President Roosevelt includes:

The right of every farmer to raise and sell his products at a return which will give him and his family a decent living;

The right of every business man, large and small, to trade in an atmosphere of freedom from unfair competition and domination by monopolies at home or abroad;

The right of every family to a decent home;

The right to adequate medical care and the opportunity to achieve and enjoy good health;

The right to adequate protection from the economic fears of old age, sickness, accident, and unemployment; [and]

The right to a good education.

Id.

⁶⁹ 91 CONG. REC. 381 (1945) (remarks of Senator James E. Murray (D-Mont.) introducing the proposed Full Employment Act of 1945).

jobless.⁷⁰ World War II solved the vast unemployment problem of the Depression.

With the nation concerned about joblessness rising again after World War II, full employment was the campaign cry of both Democrats and Republicans alike. During the 1944 National Convention, Republican presidential nominee Thomas E. Dewey strongly stated:

Government's first job in the peacetime years ahead will be to see that conditions exist which promote widespread job opportunities in private enterprise. . . . If at any time there are not sufficient jobs in private employment to go around, then Government [can and must create] job opportunities, because there must be jobs for all in this country of ours [I]f there is one thing we are all agreed upon, it is that in the coming peacetime years we in this country must have jobs and opportunity for all. That is everybody's business. Therefore it is the business of Government.⁷¹

By late 1944, a coalition of senators, interest groups, and various governmental agencies began drafting a full employment bill.⁷² The original draft of the bill (the "Murray Bill")⁷³ called for a specific right to full employment: "the Congress hereby declares that all Americans able to work and willing to work have the right to a useful and remunerative job in the industries, or shops, or offices, or farms, or mines of the nation."⁷⁴ After extensive discussions over what constituted full employment, how government economic analysis should be conducted, what political considerations were necessary for passage, and the role of Congress, a final draft emerged, with a little less than a full guarantee of a right to a job.

Section 2(b) of the Murray Bill stated:

All Americans able to work and seeking work have the right to useful, remunerative, regular, and full-time employment, and it is the policy of the United States to assure the existence at all times of sufficient employment opportunities to enable all

⁷⁰ BAILEY, *supra* note 58, at 8; see Helen Ginsburg, *Full Employment as a Policy Issue*, EMPLOYMENT AND LABOR RELATIONS POLICY 15 (Charles Bulmer & John L. Carmichael, Jr. eds., 1980) (stating that unemployment was out of control after the Depression. Beginning at 3% in 1929, it soared to 25% in 1933, and averaged 19% from 1933 to 1940. *Id.*

⁷¹ Gov. Dewey's Address in San Francisco Asking for Political Freedom With Security, *N.Y. TIMES*, Sept. 22, 1944, at 12-13.

⁷² BAILEY, *supra* note 58, at 39-59.

⁷³ Full Employment Act of 1945, S. 380, 79th Cong. § 2(b) (1945).

⁷⁴ S. 380, 79th Cong. (1945).

⁷⁵ BAILEY, *supra* note 58, at 45-59.

Americans who have finished their schooling and do not have full-time housekeeping responsibilities freely to exercise this right.⁷⁶

The Murray Bill called for the President to propose an annual National Production and Employment Budget which would estimate the number of jobs needed during the coming year, and to also propose a plan to raise the economy to full-employment levels.⁷⁷ While the Murray Bill did not specifically guarantee a job to everyone who wanted one, its goal, was to assure that there were enough jobs for everyone.⁷⁸

Support for the Murray Bill came from groups such as the American Federation of Labor, the Congress of Industrial Organization, the American Veterans Committee, the Young Women's Christian Association, the National Council of Jewish Women, the National Catholic Welfare Conference, the National Association for the Advancement of Colored People, the National Lawyers Guild, the Union for Democratic Action, and the National Farmers Union.⁷⁹

⁷⁶ S. 380, 79th Cong. § 2(b) (1945): see BAILEY, *supra* note 58, at 243 (discussing text of bill).

⁷⁷ See HARVEY, *supra* note 26, at 107-08 (explaining the Murray Bill as a reflection of the growing ascendancy of more conservative Keynesian economists over the liberal New Deal strategies contained in the NRPB plan (i.e., "Postwar Keynesianism promised full employment without the need to tamper with the microeconomic structure of the economy.")). See HARVEY, *supra* note 26, at 108.

⁷⁸ 91 CONG. REC. 380-81 (1945). Senator Murray further commented that the bill recognizes that these Americans:

are entitled to opportunities for "useful, remunerative, regular, and full-time employment." The right does not mean guaranteeing John Jones a given job carrying a set salary and a definite social standing. It is not the aim of this bill to provide specific jobs for specific individuals. However, I believe nobody will deny that our economic system of free enterprise must offer opportunities for jobs for all who are able and want to work. Our American system owes no man a living but it does owe every man an opportunity to make a living. That is the proper interpretation of the "right to work."

Id. at 381.

⁷⁹ BAILEY, *supra* note 58, at 86-87. Unfortunately, the support of organized labor was initially less than totally enthusiastic due to concentration on other issues such as minimum wage, unemployment compensation, and the continuation of the Fair Employment Practices Commission. BAILEY, *supra* note 58, at 82, 92-96; see HARVEY, *supra* note 26, at 108-09. Furthermore, the rest of these groups had little political ability to organize the grass roots support the bill needed for passage.

No nation-wide polls were taken on S.380, but an extremely interesting local poll was taken of the 2d Congressional district in Illinois during July, 1945, seven months after the bill had been introduced. The question was asked, "Have you heard of any bill before Congress that will plan for enough jobs for everyone after the war?" The response, in percent, was as follows:

There was also considerable opposition. A coalition of conservative Democrats and Republicans, who feared increasing power in the executive branch already dominated by President Roosevelt, opposed the bill. They "warned demagogically of a vast state bureaucracy that would compel everyone to work and determine what jobs they could have."⁸⁰ Some employers feared that a high-employment economy would "raise labor costs and make it difficult to find workers for menial jobs, such as seasonal farm work."⁸¹ Organizations including the National Association of Manufacturers, Chambers of Commerce, and the American Farm Bureau Federation shared these fears.⁸² Opponents of the Murray Bill argued, among other things, that full employment: (1) cannot be guaranteed in a free society; (2) would kill private initiative; and (3) would lead to runaway inflation.⁸³ Moreover, opponents argued that government spending undermined business confidence.⁸⁴ Opponents were helped by the postwar economic and political climate. The anticipated postwar depression had not occurred, and anti-labor opposition was energized by a wave of postwar strikes.⁸⁵

By the time the Employment Act of 1946 (the "Employment Act") was enacted,⁸⁶ the short, direct promise of full employment was gone. In its place was the following:

The Congress hereby declares that it is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy, with the assistance

No, have not heard

69

Have heard, but have no idea what it is

19

BAILEY, *supra* note 58, at 180-81 (footnotes omitted).

The pollsters then asked a follow up question, loosely based on the bill.

What would you think of a bill like this?

First, the President would find out each year how many jobs there are going to be for the coming year. Then, if there are not enough jobs for everyone, Congress would give financial help to private business so that it could provide more jobs. Then, if there were still too few jobs, the government would give contracts to private business to build public works to help make up the balance of jobs needed.

BAILEY, *supra* note 58, at 181 (footnote omitted).

The response was 83% for, 12% against, 5% doubtful. BAILEY, *supra* note 58, at 181.

⁸⁰ ALAN BRINKLEY, *THE END OF REFORM, NEW DEAL LIBERALISM IN RECESSION* (New York: Oxford University Press, 1995), at 262.

⁸¹ *Id.*

⁸² *Id.* See also BAILEY, *supra* note 58, at 129-49.

⁸³ BAILEY, *supra* note 58, at 130-31.

⁸⁴ BAILEY, *supra* note 58, at 130.

⁸⁵ Ginsburg, *supra* note 70, at 17.

⁸⁶ Employment Act of 1946, Pub. L. No. 304 (1946).

and cooperation of industry, agriculture, labor, and State and local governments, to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining, in a manner calculated to foster and promote free competitive enterprise and the general welfare, conditions under which there will be afforded useful employment opportunities, including self-employment for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power.⁸⁷

While the Employment Act did create the President's Council of Economic Advisers,⁸⁸ it made minimal progress toward the right to a decent job at a decent day's pay. The Employment Act endorsed maximum rather than "full" employment, and backed off from the promise of institutionalized planning.⁸⁹ What survived was a commitment to the more vague goal of "maximum employment."⁹⁰ This effort for full employment has been aptly called "the last great battle for the New Deal."⁹¹ A battle that began with lofty hopes, dilution by its supporters, and ultimate compromise in order to gain passage, suggested "the outlines of the post war liberal world."⁹²

The Employment Act did not go as far as its supporters hoped, but was nonetheless a milestone in American economic and political history. It was the first explicit national commitment to the promotion of maximum employment.⁹³

⁸⁷ *Id.* at § 2.

⁸⁸ *Id.* at § 4.

⁸⁹ *Id.* at § 2.

⁹⁰ *Id.* See, e.g., Ginsburg, *supra* note 70, at 17; SKOCPOI, *supra* note 12, at 231. See also HARVEY, *supra* note 26, at 109-10 (noting the comment of Senator Robert Taft (R-Ohio), a leader of the opposition to the Murray Bill, that Republicans need not fear voting for the bill because the bill was no more).

⁹¹ BRINKLEY, *supra* note 80, at 264.

⁹² BRINKLEY, *supra* note 80, at 264 (calling the ultimate law an "evisceration" of the commitment to full employment contained in the first bill). *But see* Leon H. Keyserling, *The New Deal and Its Current Significance In Re National Economic and Social Policy*, 59 WASH. L. REV. 795, 824-30 (1984). Keyserling, who chaired the Council of Economic Advisers from 1949-1953, said there were serious efforts to follow the Employment Act of 1946 and design policies to achieve full employment until a new Administration appointed a new Council of Economic Advisers whose prime, and almost exclusive, focus was switched to fighting inflation. *Id.* at 795, 824-25, 829-30.

⁹³ The Employment Act of 1946 is generally looked upon as a milestone in the economic history of the United States. See, e.g., Harvey L. Schantz & Richard H. Schmidt, *Politics and Policy: The Humphrey-Hawkins Story*, in EMPLOYMENT AND LABOR-RELATIONS POLICY 25, 26 (Charles Bulmer & John L. Carmichael, Jr. eds., 1980).

C. Full Employment and Balanced Growth Act of 1978

Between 1946 and the mid-1970s, legislation to combat unemployment focused on job training and, to a lesser degree, public employment programs.⁹⁴ Interest in full employment was revived in the 1970s by a broad coalition of civil rights,⁹⁵ women's, religious, labor, and senior citizens' organizations who sought full employment to "replace the policy of maintaining unemployment at politically tolerable levels. . . ."⁹⁶ Unemployment, nationally, averaged 4.7% from 1962 to 1973, 5.2% in June 1974, 6.6% in November 1974, and 8.2% in January 1975, while unemployment among African-American youths reached 41.1% in 1974.⁹⁷

The Full Employment and Balanced Growth Act ("FEBGA")⁹⁸ was conceived, at least by some of its drafters, as a sequel to or an amendment of the Employment Act.⁹⁹ The bill proposing the Act (the "Humphrey-Hawkins Bill") was formally introduced in June

⁹⁴ There were a number of job-training and employment service programs on the federal level. These programs, like the 1962 Manpower Development Training Act ("MDTA"), the 1973 CETA, and the 1982 Job Training Partnership Act ("JTPA"), unfortunately, evidenced little substantial impact on employment. Rebecca M. Blank, *The Employment Strategy: Public Policies to Increase Work and Earnings*, in *CONFRONTING POVERTY* 168, 188-91 (Sheldon H. Danziger et al. eds., 1994).

The 1962 MDTA was designed to train and educate workers in order to gain private sector employment. From 1963 to 1968, MDTA reportedly enrolled nearly 700,000 persons in training; of these, about 450,000 people completed the training, and about 400,000 of those people secured employment within a year of training. Timothy A. Canova, *Monologue or Dialogue in Management Decisions: A Comparison of Mandatory Bargaining Duties in the United States and Sweden*, 12 *COMP. LAB. L.J.* 257, 263, 263 n.23 (1990-91).

CETA focused on the economically disadvantaged, the unemployed, and the underemployed. CETA provided job training, education, counseling, and public service jobs. CETA's impact on unemployment was slight but symbolic. "During its years of operation, CETA funding averaged between 0.3 and 0.41% of the [gross national product]; at its height, CETA served only about one-sixth of the six million officially jobless." *Id.* at 77.

Mere participation in CETA was not necessarily, of itself, a positive accomplishment. CETA participants thought little of the program and its impact on their lives. Mary K. Marvel, *The Social and Political Consequences of Manpower Training Programs: The Case of CETA*, in *EMPLOYMENT AND LABOR-RELATIONS POLICY* 41, 56-57 (Charles Bulmer & John L. Carmichael, Jr. eds., 1980).

⁹⁵ See, e.g., MARTIN LUTHER KING, JR., *WHERE DO WE GO FROM HERE: CAUSAS OF COMMUNITY?* 163 (1967). Dr. King asked for a "contemporary social and economic Bill of Rights" that included "full employment." *Id.* at 199-200.

⁹⁶ Ginsburg, *supra* note 70, at 21.

⁹⁷ Schantz & Schmidt, *supra* note 93, at 26.

⁹⁸ Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95-523, 92 Stat. 1887 (1978) (codified as amended at 15 U.S.C. §§ 3101-3152).

⁹⁹ Kenneth M. Casebeer, *Holder of the Pen: An Interview with Leon Keyserling on Drafting the Wagner Act*, 42 U. MIAMI L. REV. 285, 318 (1987). Keyserling is described as the "ghost writer" for many of the amendments to the Humphrey-Hawkins Act. *Id.* at 286.

1974 by Representative Augustus Hawkins (D-Cal.), who described the goal of full employment not as the number-driven goal of prior legislation, but as an enforceable right to work at fair pay. Representative Hawkins called it "an authentic full employment policy[,] reject[ing] the narrow, statistical idea of full employment measured in terms of some tolerable level of unemployment—the percentage game—and adopt[ing] the more human and socially meaningful concept of personal rights to an opportunity for useful employment at fair rates of compensation."¹⁰⁰

The Humphrey-Hawkins Bill was designed "to establish a national policy and nationwide machinery for guaranteeing to all adult Americans able and willing to work the availability of equal opportunities for useful and rewarding employment."¹⁰¹ Senator Hubert Humphrey (D-Minn.) noted that the goal of the Humphrey-Hawkins Bill was to reduce "unemployment to [three] percent of the adult labor force as promptly as possible, but within no more than [four] years after the date of enactment of this act."¹⁰² The key provision of the Humphrey-Hawkins Bill was Section 102, which amended section 2(b) of the Employment Act as follows: "[t]he Congress declares and establishes the right of all adult Americans able, willing, and seeking work to opportunities for useful paid employment at fair rates of compensation."¹⁰³ The federal government would, once again, become the employer of last resort.¹⁰⁴

Opponents of the Humphrey-Hawkins Bill stressed that full employment, or any reduction of unemployment to minimal levels, would have an inflationary impact on the economy.¹⁰⁵ Republicans publicly attacked the bill, saying it would cost thirty billion to sixty

¹⁰⁰ 120 CONG. REC. 21278 (1974). The Humphrey-Hawkins Bill was initially called the Equal Opportunity and Full Employment Bill. See statement of Rep. Augustus F. Hawkins describing the goal of the bill. *Id.* Senator Hubert Humphrey (D-Minn.) sponsored an identical bill in the Senate. 122 CONG. REC. 6610 (1976). The two versions became known as the Humphrey-Hawkins Bill.

¹⁰¹ 122 CONG. REC. 6610 (1976) (statement of Senator Hubert Humphrey).

¹⁰² *Id.* at 6611.

¹⁰³ *Id.* at 6616.

¹⁰⁴ Section 104 of the Humphrey-Hawkins Bill proposed to mandate "priority policies programs that comprise a full employment program." *Id.* Section 201 of the Humphrey-Hawkins Bill established "employment policies to create jobs in both the private and public sectors of the economy . . ." *Id.* at 6617. Section 206(d) of the Humphrey-Hawkins Bill guaranteed that "[i]nsofar as adult Americans able, willing, and seeking work are not provided with job opportunities [under other provisions of this Act], such opportunities shall be provided by the President through reservoirs of federally operated public employment projects and private nonprofit employment projects approved by the Secretary of Labor." *Id.* at 6619.

¹⁰⁵ See Schantz & Schmidt, *supra* note 93, at 27-28.

billion dollars annually.¹⁰⁶ Even Carter Administration economic experts testified that four percent unemployment would most likely be inflationary.¹⁰⁷ After extensive changes by its sponsors to meet the objections of Humphrey-Hawkins opponents, FEBGA passed the House on March 16, 1978 and the Senate on October 13, 1978.¹⁰⁸ Within five years of enactment, FEBGA aimed to reduce the unemployment rate of individuals over twenty years of age to three percent, and four percent for those sixteen years of age and older.¹⁰⁹ Unfortunately, these goals were not binding.¹¹⁰ Congress declared FEBGA's goal as "the fulfillment of the right to full opportunities for useful paid employment at fair rates of compensation of all individuals able, willing, and seeking to work."¹¹¹ FEBGA section 4(b)(1) stated that the unemployment rate was to be reduced to four percent within five years.¹¹² Section 4(c)(1) sought full employment and a balanced budget "as soon as practicable."¹¹³ FEBGA also aimed to reduce inflation and increase real income.¹¹⁴

FEBGA's purpose was "to require the President to initiate, as the President deems appropriate, with recommendations to the Congress where necessary, supplementary programs and policies to the extent that the President finds such action necessary to help achieve these goals."¹¹⁵

Thus, gone was the individual's right to employment, and gone was the government as employer of last resort. Like its predecessors, FEBGA bolstered lofty goals, but lacked real authority or systemic change to achieve its goals.¹¹⁶ As two sympathetic commentators noted, "[p]assage of [FEBGA] . . . has not resolved, ever

¹⁰⁶ Schantz & Schmidt, *supra* note 93, at 30.

¹⁰⁷ Schantz & Schmidt, *supra* note 93, at 29.

¹⁰⁸ The legislative history of Humphrey-Hawkins is summarized in Schantz & Schmidt, *supra* note 93, at 27-34.

¹⁰⁹ Full Employment and Balanced Growth Act of 1978, § 104. 15 U.S.C. § 1022(b)(1) (1994).

¹¹⁰ SKOCPOI, *supra* note 12, at 232.

¹¹¹ H.R. 15476, 94th Cong. § 102(b) (1978).

¹¹² *Id.* at § 4(b)(1).

¹¹³ *Id.* at § 4(c)(1).

¹¹⁴ *Id.* at § 2(c).

¹¹⁵ *Id.* at § 201.

¹¹⁶ In fact, almost immediately after FEBGA was passed by Congress, President James E. Carter announced a new anti-inflationary policy. He called for voluntary wage and price guidelines, cutbacks in federal hiring, and projected an increase in unemployment to 6.2%. See Schantz & Schmidt, *supra* note 93, at 36 (argument by Congressman Hawkins that FEBGA violated the intent of the Humphrey-Hawkins Act and would make it virtually impossible to reach the goals of the five year plan to reduce unemployment).

temporarily, differences over the direction of national economic policies. Although a major piece of goal-setting legislation has been placed on the statute books, the essential economic debate continues."¹¹⁷

FEBGA was the most recent legislative attempt to address the right to employment at decent wages.¹¹⁸ While its ultimate result was disappointing, its passage represents another step forward in the search for an enforceable right to work at a living wage.¹¹⁹

The search during this century for the right to work, for a living wage, and for full employment, is recognized as a vital part of the American political dynamic. The search will continue to clamor for action as long as Americans value work and opportunity.

Choosing to work for national employment assurance appears likely to remain a potentially popular political choice, although it remains to be seen if any political leadership will soon be forthcoming to devise both the policies and the suitably universalistic political alliances needed to work for this goal. Nevertheless, even if little happens soon, the goal of full employment assurance itself—so clearly articulated in 1935 by members of the [Committee on Economic Security]—seems unlikely to fade away. For employment assurance accords with longstanding American values, and it would address the distresses of many groups and regions in our presently unsettled national economy. Sooner or later, therefore, a politics of employment assurance—rather than one of welfare—will surely reappear on the American political scene.¹²⁰

IV. SUPPORT FOR A RIGHT TO WORK

Unless public policy ensures work for all, it is a cruel hoax to rely on the "discipline of the market" to inculcate the citizenly virtues of self-reliance and responsibility.¹²¹ Work can provide meaning and dignity to life.¹²² Some say "the history of the world is the

¹¹⁷ Schantz & Schmidt, *supra* note 93, at 36.

¹¹⁸ Ginsburg, *supra* note 70, at 21 (FEBGA "makes full employment a national policy and establishes the right of all Americans able willing and seeking to work opportunities for useful employment at fair wages.").

¹¹⁹ Ginsburg, *supra* note 70, at 21 (noting that for the first time, a process was established for formulating national economic policy openly and in a comprehensive, coordinated, and consistent manner).

¹²⁰ Skocpol, *supra* note 12, at 249.

¹²¹ Forbath, *supra* note 12, at 1789.

¹²² Klare, *Labor Law as Ideology*, *supra* note 6, at 451 n.4.

history of work."¹²³ The opportunity to work is precious and once lost, even for a day, it can never be reclaimed.¹²⁴ Work is essential to a person's self-definition. The community also defines a person's value by their employment or lack of employment.¹²⁵

Currently, there is only the right to look for work, and to engage in enormously unequal bargaining over the terms of work.¹²⁶ Refusal to work because a job is too dangerous or too low-paying is considered un-American and even immoral.¹²⁷ Economic justice is

¹²³ David L. Gregory, *Catholic Labor Theory and the Transformation of Work*, 45 WASH. & LEE L. REV. 119, 119-20 (1988).

The history of the world is the history of work. It is a history first eloquently told in the Torah, as the Jews moved from the toil of slavery in Egypt to the dignity of meaningful work as free people in a free land. In the New Testament Jesus continued to dignify work. Unfortunately, for much of humanity the world of work historically has been debased and denied in alienation. This is the tragedy of labor; tragic because alienation is unfair, undeserved, and remarkably intractable.

Id.

¹²⁴ Otto Nathan, *Favorable Economic Implications of the Fair Labor Standards Act*, 5 LAW & CONTEMP. PROBS. 416, 417 (1939) ("Human labor is the most perishable commodity that exists; if it cannot be sold instantly, it will be lost forever.")

¹²⁵ PETER KELVIN AND JOANNA E. JARRETT, *UNEMPLOYMENT: ITS SOCIAL PSYCHOLOGICAL EFFECTS I* (1985). The authors point out that unemployment, among other deleterious effects, tends to ostracize those without work who feel stigmatized and who then withdraw from social activities. *Id.* at 53.

Unemployment brings a loosening and disintegration of a number of previously crucial fixed points in the individual's social environment. The most obvious of these are the loss of an active occupational role, and the fading of many job-related friendships; less tangibly, but none the less disturbingly, there is a general sense of loss of status; and beyond this, the individual may come to doubt whether he can still truly claim to belong to work-related organizations such as a particular trade union or professional association, which may once have been an important reference group.

Id. at 55. See also KATHRYN MARIE DUDLEY, *THE END OF THE LINE: LOST JOBS, NEW LIVES IN POSTINDUSTRIAL AMERICA* (1994) (describing the impact on the individual and community of the 1988 closing of the Chrysler plant in Kenosha, Wisconsin which cost the area 6,000 jobs).

¹²⁶ Howard Lesnick, *The Consciousness of Work and the Values of American Labor*, 32 BUFF. L. REV. 833, 845 (1983); *Coppage v. Kansas*, 236 U.S. 1, 11 (1915). The Supreme Court stated that "in all respects employer and employee have equal right" in that they are both free to enter or not enter into an employment contract. The Supreme Court would distinguish the coercion inherent in such an unequal relationship as public or private. "This approach makes critical a distinction between private and public power: public pressure on choice is coercion, private pressure is freedom." Lesnick, *supra*, at 845.

¹²⁷ Lesnick, *supra* note 126, at 850 ("The moral obligation to be employable implies that one unable to get the job he or she wants will take any job he or she can get. That is to say, one's willingness to take a job that is available is itself a moral act.")

The prevailing consciousness rests on a world-view that denies that work can be made to be life-affirming. The "Curse of Adam" is a metaphorical expression of this notion. It was not by being set to work that

built on opportunity, and the opportunity for every person to work must be included.¹²⁸ A right to an opportunity to work for a living wage would economically and socially enfranchise all citizens.¹²⁹

A. Popular Opinion

Popular opinion has continuously supported the right of every person to work, even if government has to provide a job for every person who wants to work. In 1935, *Fortune* magazine surveyed the American people and asked the following question: "Do you believe that the government should see to it that every man who wants to work has a job?"¹³⁰ The survey reported 76.8% answered "yes."¹³¹ The survey concluded that "public opinion overwhelmingly favors assumption by the government of a function that was never seriously contemplated prior to the New Deal. . . . [T]he country has definitely accepted the theory of state responsibility for an opportunity to earn a living."¹³²

Several surveys indicated that public support for the proposition that "[t]he government in Washington ought to see to it that everybody who wants to work can find a job," grew from fifty-six

Adam was cursed: "Cursed be the ground," Genesis says, "for your sake; in sorrow you shall eat of it; thorns and thistles shall it bring forth all your life." In other words, humankind will be cursed by scarcity and low productivity. Work will be just barely able to sustain life. That is the way it is, that is the way it is supposed to be; the only issue is how we deal with that reality.

Lesnick, *supra* note 126, at 851 (footnotes omitted).

¹²⁸ Keyserling, *supra* note 92, at 806.

The enlargement of economic justice has always been and still is one of the great purposes of the American society. Perfect justice is unattainable, and cannot even be defined. But rank injustice is easy to define and easy to observe, and it is all around us. Failing to give sufficient attention to economic justice is not only a social and moral error, it is an economic error as well. There is no way to avoid massive idleness of workers and other production resources so long as scores of millions of Americans are not brought up to much higher standards of living.

Keyserling, *supra* note 92, at 806. See Gregory, *supra* note 123, at 119.

¹²⁹ See, e.g., Lesnick, *supra* note 126, at 856.

Seeing the utility of work as not wholly external to the worker, and its meaning as more than a means toward self-sufficiency, would tend to legitimate the issue of work restructuring—the desire to make the workplace consonant with the values of a democratic social order and a fully enfranchised citizenry, and to make work consonant with the values of the individual worker.

Lesnick, *supra* note 126, at 856.

¹³⁰ FORTUNE, *supra* note 56, at 67.

¹³¹ FORTUNE, *supra* note 56, at 67.

¹³² FORTUNE, *supra* note 56, at 67.

percent in 1956 to seventy percent in 1976.¹³³ Later, the polls indicated overwhelming public support for a guarantee of work at a living wage.¹³⁴

In November 1987, a New York Times/CNN poll found seventy-one percent of the American public supported the proposition that "the Federal Government should see to it 'that everyone who wants a job has a job.'"¹³⁵ Public support for the opportunity to work is not surprising; Americans are committed to the ideals of work and opportunity.¹³⁶

B. Problems Finding Work

Unemployment is bad for those thrown out of work, who lose income and the nonpecuniary benefits of work. It is bad for society in general, because of the loss in production. It saps people's confidence in the economic system when, as often happens during a depression, idling plants and unemployed workers coexist.¹³⁷

Encouragement and support of work are currently being undercut by two forces: lack of opportunity to work due to unemployment or underemployment, and declining wages for those who do work. This section will focus only on unemployment.

There are millions of people who are unemployed, many ap-

¹³³ Robert Y. Shapiro et al., *Report: Employment and Social Welfare*, 51 PUB. OPINION Q. 268, 274 (1987) (supporting the proposition that the government should find employment for those who could not gradually rose from 1956 to 1976: 56% in 1956; 57% in 1958; 58% in 1960; 70% in 1976).

¹³⁴ In June 1968, the pollsters asked: "As you may know, there is talk about giving every family an income of at least \$3,200 a year, which would be the amount for a family of four if the family earns less than this, the government would make up the difference. Would you favor or oppose such a plan?" 3 DR. GEORGE H. GALLUP, *THE GALLUP POLL: PUBLIC OPINION 1935-1971*, at 2133. This was rejected by 58% and accepted by 36% in June 1968. *Id.* at 2133. In January 1969, 62% said no and 33% said yes. *Id.* at 2177. The second question was: "Another proposal is to guarantee enough work so that each family that has an employable wage earner would be guaranteed enough work each week to give him a wage of about \$60 a week or \$3,200 a year. Would you favor or oppose such a plan?" *Id.* at 2133. This was supported by a ratio of 78% to 18% in June 1968, and by 79% to 16% in January 1969. *Id.* at 2133, 2177.

¹³⁵ E.J. Dionne, Jr., *Poll Finds Reagan Support Down But Democrats Still Lacking* *FIN. N.Y. TIMES*, Dec. 1, 1987, at A1.

¹³⁶ JUDITH N. SHKLAR, *AMERICAN CITIZENSHIP: THE QUEST FOR INCLUSION* 92-93 (1991) ("Both the dignity of work and the public obligation to work are almost universally preached. Seventy-five percent of the American public think that there is something wrong with not wanting to work. A good citizen is an earner, because independence is the indelibly necessary quality of genuine, democratic citizenship.")

¹³⁷ Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *DEMOCRACY AND THE WELFARE STATE* 53 (Amy Gutmann ed., 1988).

parently permanently.¹³⁸ For example, since the mid-1970s, over ten percent of African-American adults have been unemployed, about twice the rate of whites.¹³⁹ In the mid-1990s, the overall unemployment rate leveled off at 5.6%.¹⁴⁰

Unemployment has been a consistent problem in the United States. This nation has achieved an annual unemployment rate of two percent or less in only seven years of the past hundred.¹⁴¹ In contrast, Sweden's median unemployment rate between 1959 to 1986 was close to two percent, West Germany's median unemployment rate was 1.5%, and Japan's median unemployment rate was 1.6%.¹⁴² Despite this data, conventional wisdom continues to cling to the notion that there is plenty of work, if only the unemployed would get out and hustle to find it.¹⁴³ However, the facts are:

Lack of jobs has been endemic in peacetime during the past fifty years of American history. . . . [W]e need to face the fact that our economy and our institutions will not provide jobs for everyone who wants to work. They have never done so, and as currently structured, they never will. When it comes to unemployment, we are consistently the industrial economy with the worst record.¹⁴⁴

The widespread negative impact of unemployment on society exceeds the damage done to the unemployed individuals. For ex-

¹³⁸ Gregory, *supra* note 123, at 124 ("When the underemployed and those not statistically recognized are added, such as the disheartened who have abandoned the search for work, and the homeless, perhaps one-eighth of the work force is directly affected adversely by unemployment.")

¹³⁹ Blank, *supra* note 94, at 170.

¹⁴⁰ Stuart Silverstein, *Huge Layoffs May Now Be in Decline, but Worries Linger*, L.A. TIMES, Jan. 3, 1996, at A1.

¹⁴¹ HARVEY, *supra* note 26, at 14.

¹⁴² HARVEY, *supra* note 26, at 13, tbl. 1.1.

¹⁴³ KATZ, *supra* note 36, at 6 ("The availability of work for every able[-]bodied person who really wants a job is one of the enduring myths of American history.")

¹⁴⁴ LESTER C. THUROW, *THE ZERO-SUM SOCIETY: DISTRIBUTION AND THE POSSIBILITIES FOR ECONOMIC CHANGE* 203 (1980).

Controlling inflation without idle capacity is essential since we now start from a position where there simply aren't enough jobs, good or bad, to go around. The problem is not just peculiar to this period of stagflation. . . . Review the evidence: a depression from 1929 to 1940, a war from 1941 to 1945, a recession in 1949, a war from 1950 to 1953, recessions in 1954, 1957-58, and 1960-61, a war from 1965 to 1973, a recession in 1969-70, a severe recession in 1974-75, and another recession probable in 1980. This is hardly an enviable economic performance. While monetary and fiscal policies could be used to stimulate the economy to the degree that it would provide good jobs for everyone able and willing to work, macroeconomic policies will not be used for this purpose.

ample, joblessness creates costs to implement unemployment programs; goods and services are lost, which could have been produced by the non-working; and the unemployed individual and family suffer a social cost.¹⁴⁵ Twenty years ago, it was estimated that every one percent rise in the jobless rate led to a sixteen billion dollar increase in the federal deficit.¹⁴⁶

Some suggest the economy could respond to globalization and growth in information technology by an increase in the number of people permanently without access to jobs.¹⁴⁷ Since this nation values work and opportunity, it is again time to consider creating a legally enforceable right to the opportunity to work. Valuing work and even demanding work is not enough. The opportunity to work must be provided. Otherwise, the commitments to work and opportunity ring hollow.

We consistently preach that work is the only "ethical" way to receive income. We cast aspersions on the "welfare" society. Therefore we have a moral responsibility to guarantee full employment. Not to do so is like locking the church doors and then saying people are not virtuous if they do not go to church.¹⁴⁸

V. SUPPORT FOR A RIGHT TO A LIVING WAGE

"Our Nation so richly endowed with natural resources and with a capable and industrious population[,] should be able to devise ways and means of insuring [sic] to all our able-bodied working men and women a fair day's pay for a fair day's work."¹⁴⁹

A full-time worker should not be left in poverty. A living wage should ensure that work pays off, otherwise some of the incentive to work is lost.¹⁵⁰ Yet, the term "working poor" exists.¹⁵¹ Over six

¹⁴⁵ HARVEY, *supra* note 26, at 51-53 (suggesting the costs for the income maintenance programs for the unemployed are \$1,000 per household per year; another \$1,600 per household annually in lost production; and an incalculable amount for the suffering resulting from lack of work).

¹⁴⁶ Ginsburg, *supra* note 70, at 20 (citing ALBERT H. CANTRIL & SUSAN DAVIS CANTRIL, U.S. DEP'T OF LABOR, UNEMPLOYMENT, GOVERNMENT AND THE AMERICAN PEOPLE 20 (1978)).

¹⁴⁷ HERBERT J. GANS, THE WAR AGAINST THE POOR: THE UNDERCLASS AND ANTI-POVERTY POLICY 133 (1995).

¹⁴⁸ THUROW, *supra* note 144, at 203-04.

¹⁴⁹ 81 CONG. REC. 4960 (1937) (statement by President Franklin Delano Roosevelt in his message asking for the enactment of the Fair Labor Standards Act).

¹⁵⁰ Karl E. Klare, *Toward New Strategies for Low-Wage Workers*, 4 B.U. PUB. INT. L.J. 245, 251-56 (1995). There is substantial evidence that adequately paying jobs would decrease reliance on public assistance. Rather than the current proposals to "push" people on public assistance into low wage jobs (where most are already working and

and one-half million workers in the labor force lived in families whose income fell below the poverty level.¹⁵² For about 3.4 million full-time wage and salary workers, the earnings were not enough to bring their families' incomes above the poverty level.¹⁵³

The average employee's hourly earnings declined over the past twenty years. Such a decline had not occurred in America since the Depression.¹⁵⁴ Also, less-skilled male workers experienced the sharpest decline in inflation-adjusted wages in the last twenty years.¹⁵⁵ In the 1990's, young men with high school degrees or less can expect to earn less than their fathers earned twenty years ago.¹⁵⁶ While women without high school degrees have not seen the same decline, they earn fifty-eight percent of the salaries of their counterparts.¹⁵⁷

The present minimum wage structure clearly does not provide a living wage.¹⁵⁸ By 1989, the value of the minimum wage had eroded significantly, falling over thirty percent from a 1979 real value (in 1992 dollars) of \$5.50.¹⁵⁹ Contrary to conventional wisdom, minimum wage jobs are held neither exclusively nor over-

not making it thus also living, in many cases illegally, on public assistance as well), living wages would "pull" recipients into the labor market. *Id.* at 254.

¹⁵¹ The working poor are defined as "persons who devoted more than half of the year to working or looking for work and who lived in families with incomes below the official poverty level." Bruce W. Klein & Philip L. Rones, *A Profile of the Working Poor*, 112 MONTHLY LAB. REV. 3, 6 Ex.1 (Oct. 1989) quoted in Jennifer M. Gardner & Diane E. Herz, *Working and Poor in 1990*, 115 MONTHLY LAB. REV. 20 (Dec. 1992). They identified three major labor market problems that help create the numbers of working poor: unemployment, involuntary part-time work, and low earnings. *Id.* at 3-5.

¹⁵² Jennifer M. Gardner & Diane E. Herz, *Working and Poor in 1990*, 115 MONTHLY LAB. REV. 20, 20 (Dec. 1992).

¹⁵³ *Id.* at 23.

¹⁵⁴ Paul Weiler & Guy Mundlak, *New Directions For the Law of the Workplace*, 102 YALE L.J. 1907, 1909 (1993).

¹⁵⁵ Blank, *supra* note 94, at 172-73. ("There is widespread agreement within the research community that inflation-adjusted wages have fallen among less-skilled male workers. Employed white men between the ages of eighteen and sixty five who had less than twelve years of education earned 15.8[%] less per week in 1989 than in 1979.")

¹⁵⁶ Blank, *supra* note 94, at 172-73.

This wage decline is not the result of the shift of low-skill jobs from the manufacturing sector to the service sector. Real wages have declined for both manufacturing jobs and service sector jobs, so that even less-skilled workers who find jobs in manufacturing industries in the 1990s face reduced wage opportunities.

Blank, *supra* note 94, at 173.

¹⁵⁷ Blank, *supra* note 94, at 173.

¹⁵⁸ See William P. Quigley, "A Fair Day's Pay for a Fair Day's Work": Time to Raise and Index the Minimum Wage, 27 ST. MARY'S L.J. 513 (1996).

¹⁵⁹ Jared Bernstein & Lawrence Mishel, *The Growth of the Low-Wage Labor Market: Who, What and Why*, 3 KAN. J.L. & PUB. POL'Y 12, 23 (1994).

whelmingly by teenagers. In fact, over seventy percent of minimum wage workers are adults, many the sole wage earners of their families.¹⁶⁰ For example, millions of workers are still exempt from minimum wage protection under the Fair Labor Standards Act ("FLSA"). Of those people, it is estimated that more than one million earned less than the minimum wage in the last decade.¹⁶¹ Despite this, some still argue that minimum wage levels affect the poverty status of relatively few workers, and even fewer families.¹⁶²

The history of the FLSA supports the position that the ideal of the minimum wage *was* to be a living wage.¹⁶³ The Conference Committee Report indicated minimum wage protections were needed because of "labor conditions detrimental to the maintenance of the minimum standards of living necessary for health, efficiency and general well-being"¹⁶⁴ Contemporary commentators recognized FLSA's aim to protect the living conditions of the lowest-wage workers.¹⁶⁵

¹⁶⁰ See 1 REPORT OF THE MINIMUM WAGE STUDY COMMISSION 8-12 (May 1981) (profiling minimum wage workers in the 1980s). The report found them to be in all segments of the population, but disproportionately concentrated among those groups who are traditionally poor: 18% of all working women earned minimum wages or less versus 8% of all working men; 44% of those 16 to 19 earned minimum wages or less as did 38% of those over 65; while whites accounted for over three-quarters of those who earn minimum wages, 18% of all Black workers earned minimum wages or less while 11% of white workers did; surprisingly, 70% of all minimum wage workers were adults 20 or older and over 50% were 25 or older. *Id.*

¹⁶¹ See Earl F. Mellor & Steven E. Haugen, *Hourly Paid Workers: Who They Are and What They Earn*, 109 MONTHLY LAB. REV. 20, 23 (Feb. 1986) (stating that in 1984, 1.8 million people estimated to be employed in industries such as outside sales work, low-volume retail trade and service firms, and seasonal amusement establishments earned less than the minimum wage).

¹⁶² See, e.g., Gardner & Herz, *supra* note 152, at 20; LAWRENCE M. MEAD, *The New Politics of Poverty: The Nonworking Poor in America* 70 (1992) (acknowledging that 45% of minimum wage workers without other workers in the family were poor, making the "rhetoric of minimum wage" an increasingly irrelevant problem since only 710,000 people fit that category). See also Ralph E. Smith & Bruce Vavrichek, *The Minimum Wage: Its Relation To Incomes and Poverty*, 110 MONTHLY LAB. REV. 27, 27-29 (June 1987) (arguing that about five million workers were paid at or below the minimum wage in 1985 and concluding that after teenagers, two-earner families, part-time workers, and the self-employed are deducted from the working poor that only 1.1 million of minimum wage workers were poor); Timothy J. Eifler, Comment, *The Earned Income Tax Credit as a Tax Expenditure: An Alternative to Traditional Welfare Reform*, 28 U. RICH. L. REV. 701, 737 (1994) (arguing that over 98% of workers who would benefit from minimum wage increases would not be poor, leaving "only 1.8% of full-time, year-round workers in occupations covered by the minimum wage [who] were poor").

¹⁶³ Quigley, *supra* note 158, at 529.

¹⁶⁴ H.R. REP. NO. 2738, at 28 (1938).

¹⁶⁵ See, e.g., Nathan, *supra* note 124, at 416.

The most favorable implication of the Fair Labor Standards Act is

There is disagreement concerning whether or not government should intervene to sustain adequate pay levels for low-wage workers. Some suggest that minimum wages reduce overall employment,¹⁶⁶ particularly for less-skilled workers,¹⁶⁷ and drive jobs away to other countries.¹⁶⁸

The value of the minimum wage continues to erode. The Congressional Research Service estimated that the minimum wage would had to have risen to \$6.75 an hour in 1996 to equal the purchasing power it had in 1978.¹⁶⁹ When compared with years past, the minimum wage is relatively low.¹⁷⁰ When adjusted for inflation it is even lower — lower than in the 1950s, 1960s, or 1970s.¹⁷¹ In order to set the minimum wage at the poverty threshold for a family of three, the minimum hourly wage needed to be raised to \$5.92 for 1994.¹⁷² Indexing it to a family of four would demand a minimum hourly wage of \$7.12.¹⁷³ To become a living wage, the minimum wage should be elevated to 1960-1970 levels, at least to coincide with the poverty threshold for a family of three,

the federal statutory recognition of the fact that the living conditions of those in the lowest income group should not be determined solely by the anonymous forces of the market mechanism. The Fair Labor Standards Act is a denial of the thesis that a competitive market without any regulatory interference will result in the greatest good for the greatest number of people. It postulates the necessity of considering human labor no longer as a "commodity" which is subject only to the iron laws of the market mechanism.

Nathan, *supra* note 124, at 416.

¹⁶⁶ Lefler, *supra* note 8, at 345 n.2 ("The real tragedy of minimum wage laws is that they are supported by well-meaning groups who want to reduce poverty. But the people who are hurt most by higher minimums are the most poverty stricken.")

¹⁶⁷ Minimum wage laws tend to cut off the bottom rungs of the economic ladder. The plain truth is there should be no minimum wage law, period, in this great land of free enterprise. Minimum wage laws keep people in poverty . . . by keeping workers from ever getting that foot on the bottom rung of the economic ladder.

Lefler, *supra* note 8, at 345 n.2. 135 CONG. REC. S5475 (daily ed. May 17, 1989) (statement of Senator Phil Gramm (R-Tex.) opposing the FLSA amendments).

¹⁶⁸ See Daryl Marc Shapiro, Comment, *Will an Increased Minimum Wage Help the Homeless?*, 45 U. MIAMI L. REV. 651, 698 (1991).

¹⁶⁹ 139 CONG. REC. S2779 (daily ed. Mar. 11, 1993) (statement of Senator Paul Wellstone (D-Minn.)).

¹⁷⁰ Blank, *supra* note 94, at 194.

¹⁷¹ Blank, *supra* note 94, at 194. See Smith & Vavrichck, *supra* note 162, at 26; Shapiro, *supra* note 133, at 659 (graph 3).

¹⁷² See 59 Fed. Reg. 32,614-27 (1994) (calculating the poverty threshold for a family of three in 1994 as \$12,320). A minimum wage of \$5.92 per hour was computed by dividing the poverty threshold for a family of three by forty hours per week, fifty-two weeks per year.

¹⁷³ In 1994, the poverty threshold for a family of four was \$14,800. *Id.*

and indexed to prevent erosion from inflation.¹⁷⁴ The politics of indexing minimum wages in order to allow them to keep up with inflation are what most observers would expect: unions favor indexing and business opposes it. Congressional action fluctuates accordingly.¹⁷⁵

While progress on a living wage has been slow, the need remains critical. "The fact that 1.7 million prime-aged workers worked full-time, year-round in 1992, yet remained poor, begins to suggest the serious nature of the problem."¹⁷⁶ It is time to recognize the need for a living wage. It is also time to respond to the opponents of a living wage.

VI. WHY A CONSTITUTIONAL AMENDMENT?

A constitutional amendment is the most binding and direct way to ensure that all people have a right to work and earn a living wage. While it may be argued that the Constitution already contains support for the right to work and to earn a living wage, no court has yet said so. Scholars have argued, albeit unsuccessfully, that the Due Process Clause of the Fourteenth Amendment should establish a liberty interest in the right to work for a living wage.¹⁷⁷

¹⁷⁴ WALLACE E. HENDRICKS & LAWRENCE M. KAHN, *WAGE INDEXATION IN THE UNITED STATES: COLA OR UNCOLA* 15, 28, 65 (1985). Since World War I, federal agencies including the National War Labor Board and the Shipbuilding Labor Adjustment Board, and state minimum wage boards have relied on cost-of-living as one criterion for wage adjustments. *Id.* Indexing has also been used in many union contracts since 1910. *Id.* Since 1919, the United States Department of Labor Bureau of Labor Statistics has been publishing its cost-of-living index. The most commonly used inflation index, the cost-of-living allowance ("COLA"), triggers raises in union contracts, Social Security payments, and home mortgages in response to increases in the consumer price index ("CPI"). *Id.* See Edi Karni, *On Optimal Wage Indexation*, 91 J. OF POL. ECON. 282 (Feb.-Dec. 1983).

¹⁷⁵ 123 CONG. REC. 32,696 (1977) (indicating that Congress ordered indexing and its effects on the minimum wage analyzed as part of the 1977 amendments to the FLSA). See also REPORT OF THE MINIMUM WAGE STUDY COMMISSION, *supra* note 160, ch. 4 (containing the commission's findings and conclusions about indexing). Despite these findings and recommendations, indexing of minimum wages has not yet come into existence.

¹⁷⁶ Bernstein & Mishel, *supra* note 159, at 13.

¹⁷⁷ U.S. CONST. amend. XIV; Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Governmental Services*, 90 HARV. L. REV. 1065, 1065-66 (1977) ("I am convinced that, despite its difficulties, a doctrine will ultimately emerge that recognizes under the fifth and fourteenth amendments constitutional rights to decent levels of affirmative governmental protection in meeting the basic human needs of physical survival and security, health and housing, employment[,] and education.").

The fact that there is a need for a constitutional amendment to create a right to work and a right to work for a living wage would come as no surprise to Leo Charland of Muskegon Heights, Michigan. Charland worked for Norge in its Muskegon

Some have looked, with no success, for a constitutional right to a subsistence or minimum income.¹⁷⁸ Still others have looked, also unsuccessfully, for economic rights, like the right to a job, under the heading of fundamental values.¹⁷⁹

Thus, a constitutional amendment is in order.¹⁸⁰ Article V of

Heights plant for 30 years. In 1961, when he was 55, Norge decided to move out of Michigan to Fort Smith, Arkansas. Charland's job was gone and all he received was an offer of \$1,500 in termination pay. Norge's contract with the plant's union did not give the employees any rights to their jobs when the company moved to Arkansas. Charland could apply for a job as a new employee in Arkansas, but Norge had already indicated a preference for hiring local employees. Charland sued both Norge and his union asserting he had a property right to his job under the U.S. Constitution. Charland fought hard and even became ill while his case went through the courts. His wife was allowed to argue on his behalf in the district court and the court of appeals. While the appellate court sympathized with his predicament and his arguments, they concluded that "[w]hatever the future may bring, neither by statute nor by court decision has appellant's claimed property right been recognized to date in this country." *Charland v. Norge Div., Borg-Warner Corp.*, 407 F.2d 1062, 1065 (6th Cir. 1969), *cert. denied*, 395 U.S. 927.

¹⁷⁸ See, e.g., KENNETH L. KARST, *BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION* (1989) (indicating that chronic unemployment and poverty is tantamount to a denial of equal citizenship); LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 573 (1978); Frank I. Michelman, *The Supreme Court, 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986) (discussing the Declaration of Independence, the Preamble to the Constitution and the Ninth Amendment); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987) (discussing substantive due process and equal protection); and Kenneth L. Karst, *The Supreme Court, 1976 Term, Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1 (1977). *But see* RALPH K. WINTER, JR., *SUP. CT. REV.* 41 (1972).

¹⁷⁹ See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 58-59 (1980).

Experience suggests that in fact there will be a systematic bias in judicial choice of fundamental values, unsurprisingly in favor of the values of the upper-middle, professional class from which most lawyers and judges, and for that matter most moral philosophers, are drawn. People understandably think what is important to them is what is important, and people like us are no exception. Thus the list of values the court and the commentators have tended to enshrine as fundamental is a list with which readers of this book will have little trouble identifying: expression, association, education, academic freedom, the privacy of the home, personal autonomy, even the right not be locked in a stereotypically female sex role and supported by one's husband. But watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: these are important, sure, but they aren't *fundamental*.

Id. (footnotes omitted).

¹⁸⁰ Questions about the process of amending the Constitution under Article V are the subject of many inquiries and are beyond the scope of this article. See generally Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V*, 94 COLUM. L. REV. 457 (1994); Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V*, 55 U. CHI. L. REV. 1043 (1988); David Dow, *When Words*

the United States Constitution provides:

The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress¹⁸¹

Amending the Constitution is an arduous, time-consuming, and politically challenging task.¹⁸² Waiting for the Supreme Court to recognize a constitutional right to work will be fruitless. While there is international support for these basic human rights,¹⁸³ progress in the United States Supreme Court in the near future appears unlikely.¹⁸⁴

Absent a constitutional amendment providing a right to employment at a living wage, what can we realistically expect? Most people thinking about reversing trends in unemployment, under-

Mean What We Believe They Say: The Case of Article V, 76 IOWA L. REV. 1 (1990); and Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment*, 103 YALE L.J. 677 (1993).

¹⁸¹ U.S. CONST. art. V.

¹⁸² See generally Dow, *supra* note 180, at 41 (discussing the effort in the 1960s to overturn the one-man one-vote decisions of the Supreme Court and that after *Baker v. Carr*, 369 U.S. 186 (1962) and *Reynolds v. Simms*, 377 U.S. 533 (1964), thirty-two states, only two fewer than necessary under Article V, petitioned Congress to call a convention for the purpose of overruling the decisions); Judith L. Elder, *Article V, Justiciability, and the Equal Rights Amendment*, 31 OKLA. L. REV. 63 (1978); Ruth Bader Ginsburg, *Observations: Ratification of the Equal Rights Amendment: A Question of Time*, 57 TEX. L. REV. 919 (1979).

¹⁸³ See generally POPE JOHN PAUL II, *ON HUMAN WORK* (1981).

¹⁸⁴ Historically, constitutional and human rights have focused on civil and political rights, and not on economic and social rights, which have been the focus of socialist and developing countries.

What is at stake here is the different perceptions of human rights that seem to prevail in the North and the South. Westerners tend to afford special prominence to civil and political rights—at the expense of economic, social and cultural rights and of the right to development. Civil and political rights are the ones that were initially identified by Western political philosophers. They were the rights that were known when the United States was established and which found their way into the American Bill of Rights. Economic, social, and cultural rights, on the other hand, traditionally received special emphasis in socialist countries and—to add to Western skepticism—are often referred to as “red rights.”

Johan D. van der Vyver, *Kathleen E. Mahoney's & Paul Mahoney's Human Rights in the Twenty-First Century: A Global Challenge*, 8 EMORY INT'L L. REV. 787 (1993) (book review).

employment, and employment at declining wages, propose several strategies: improve education for children so present trends can be reversed; eliminate social programs for those who do not work; increase minimum wages and/or income support for those who work; train unemployed adults; offer incentives for private employers to hire the unemployed; enhance enforcement of civil rights laws in the area of housing and hiring; and increase public employment.¹⁸⁵ While these strategies have some merit, they are all, to some extent, already in place and, unfortunately, they have failed to make significant progress in combating the lack of work at decent wages.

What then is the prospect for a full-employment economy if these efforts have already been tried with only modest success? With a constitutional right to work at a living wage, the nation would have to seriously re-examine these past efforts. The nation would also be forced to evaluate whether some of these efforts need to be terminated, intensified, expanded, or blended in order to meet the shared national goal. Thus, if the right to work and to earn a living wage is worth the struggle, now is the time to start the process of amending the Constitution. There is no option but to give the right to an opportunity to work for a living wage constitutional protection.

VII. HOW WOULD/COULD A CONSTITUTIONAL AMENDMENT WORK?

How would a constitutional right to a job at a living wage be implemented? Would it demand that Congress create new corporations? Would judges mandamus the national economy? Would the President nationalize industries that lay off workers?

Fortunately, others have given consideration to similar rights. Professor Charles Black makes some observations about these issues in the context of his argument for a constitutional justice of livelihood:

I rather guess that my self-chosen task, for the rest of my years as a constitutionalist, is going to be arguing, in all weathers, the case for the proposition that a constitutional justice of livelihood should be recognized, and should be felt by the President and Congress as laying upon them serious constitutional duty. In the early phases of this work, I find I am most often asked the question, "How much?" or "Where will you draw the line?" I

¹⁸⁵ See Black, *supra* note 94, at 200-04; GANS, *supra* note 147, at 135-47; WILLIAM JULIUS WILSON, THE TRULY DISADVANTAGED 157 (1987).

think it well to try to suggest, at the beginning, that the establishment of a duty is one thing, while the specification of prudent quantities and means is another—though it must be remembered as well that the decently eligible range of means and measures is one thing when you are under no duty at all to act, and quite another when you are under a serious duty to act effectively.¹⁸⁶

The first step to a constitutional amendment is the establishment of the right itself. How would such a right be protected or implemented? The implementation of a right to work at a living wage would operate the same as with all other constitutional obligations: with considerable care, deference, and judgment.¹⁸⁷

As with all other constitutional obligations, where the initial steps are the responsibility of the legislative bodies, Congress is expected to craft appropriate implementation laws.¹⁸⁸ The executive branch, in turn, would be called upon to carry out these laws. The judiciary would fulfill its traditional role of evaluating the legisla-

¹⁸⁶ See Black, *supra* note 178, at 1113.

¹⁸⁷ See Kenneth L. Karst, *Citizenship, Race, and Marginality*, 30 W.M. & MARY L. REV. 1 (1988) [hereinafter Karst, *Citizenship*] (addressing how all branches of the government might address a judicially-developed right to equal citizenship for the poor).

I do not claim that courts can abolish poverty by judicial decree, and I am not nominating King Canute for the Supreme Court. Beyond any judicial declaration will lie the crucial questions of remedy. Just as the remedies for segregated schools originated with desegregation plans filed by school boards, remedies that address the harms of ghetto unemployment and welfare dependency should find their initial definition in the proposals of elected officials.

Id. at 43.

The author recognizes the difficulty of these questions, but acknowledges that it is the burden and genius of government to address these and similar questions:

There is challenge in questions like these, but the challenge is no greater than those presented by other constitutional issues that have a more familiar ring. What kinds of police behavior amount to unreasonable searches and seizures? How much government regulation of the use of property is allowable before the regulation amounts to a "taking"? Constitutional questions normally turn on matters of degree; the challenge in all these questions is the challenge of judgment. No one thinks the courts alone are capable of solving the problem of marginalizing poverty. Yet they do have a role in keeping pressure on government to fulfill the responsibility we all share for affording every citizen the resources necessary to be a participating member of our society.

Id. at 45.

¹⁸⁸ *Id.* at 43 (arguing for a constitutional understanding of citizenship that would address various aspects of poverty and speaking to the question of judicial remedy in a manner that would also likely apply to a constitutional amendment such as the one advocated here: "Any such remedies will be partial. . . . So, no one should expect miracles from the judges who seek to protect equal citizenship against the worst ravages of material want. Modest beginnings hold the most promise.").

tion in purpose and practice, and ensuring its constitutionality.¹⁸⁹ While judicial interpretation and enforcement of a constitutional right to work for a living wage would be unprecedented in their particulars, the process engaged in by the judiciary would remain the same as for other constitutional rights. Legal scholars point out that enforcing social rights requires the same degree of judicial action as enforcing civil rights.¹⁹⁰

There are many practical questions about implementing legis-

¹⁸⁹ See Abram Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976) (arguing that in an increasingly regulated society, the involvement of the court in public law litigation is both workable and inevitable). The role of the court is not so unusual, in fact there is quite a bit of precedent for this type of involvement. "In enacting fundamental social and economic legislation, Congress is often unwilling or unable to do more than express a kind of general policy objective or orientation. Whether this be legislative abdication or not, the result is to leave a wide measure of discretion to the judicial delegate." *Id.* at 1314.

¹⁹⁰ See, e.g., Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207, 1210 (1992) (noting that many of the problems of interpreting and enforcing economic or social rights are the same as those involved in interpreting and enforcing the civil rights of the reconstruction era).

It has been contended that social rights are different. They often seem to require social provision; governments cannot simply stand aside, but must take positive steps to assure that rights to shelter, food[,] and work are honored. Yet, although courts are well positioned to protect civil rights, they are ill-suited to enforce social rights; courts cannot devise effective methods of ensuring that shelter, food[,] or jobs are available to citizens.

Id. at 1211 (citation omitted).

I believe the foregoing claims are wrong. First, civil rights are not in fact absolute in any interesting sense; that social rights cannot be absolute, therefore, does not distinguish them from civil rights. Second, enforcing both civil and social rights requires the same degree of judicial action, whether the action be a lot or a little.

Id. at 1211-12 (citation omitted).

Finally, consider the objection that "government in the large" may perhaps determine the distribution of food, jobs[,] and housing by structuring markets, but courts should not. Courts may be appropriate institutions to define civil rights, but they are inappropriate institutions to define social rights. Yet the distinction between civil and social rights is thinner than its proponents claim. Civil rights include the right to own property, to act freely subject to ordinary liability rules[,] and to enter into contracts. The manner in which those rights are defined determines how the interests protected by social rights are distributed.

For example, if a society defines the right to dispose of property to include a factory owner's power to shut down the plant whenever he or she wants, jobs may be more at risk than if the property right is defined so as to permit a shutdown only if certain conditions are met. There is nothing in the nature of the concept of property, or other civil rights, that forecloses the second definition of property. Yet, of course, the two definitions have quite different implications for the protection that society accords work. If we want to assure a certain distribution of jobs,

lation, but there are also innumerable combinations of ways to bring this about.¹⁹¹ The government would likely, again, become the employer of last resort. However, if other creative ways of ensuring an opportunity to work for a living wage arose, Congress would no doubt attempt to implement them. The United States has not yet perfected any other well-established constitutional rights, therefore full realization of this right will undoubtedly take time.

As least one economist says it can be done by creating "a socialized sector of the economy designed to give work opportunities to everyone who wants them but cannot find them elsewhere."¹⁹² Such a major restructuring would fundamentally alter the role of labor and economy. Under this view, "real economic competition would almost certainly increase."¹⁹³ The essential characteristics of a viable guarantee of employment include: decent, non-minimal wages; opportunity for promotion; availability of employment to those able and willing to work despite age, race, gender or education. While some of the jobs may be temporary, the guarantee of employment is permanent.¹⁹⁴

A New Deal-like Employment Assurance Policy ("EAP") for making a right to employment workable has been espoused by some.¹⁹⁵ The EAP would distinguish between those who are unable or not expected to work, and those who need public assistance because they have no work. The unemployed would be recipients of income assistance programs.¹⁹⁶ Those who could work would not receive income assistance, but would be entitled, by law, to a public sector job paying market wages.¹⁹⁷ Unskilled workers would

shelter[,] and food, we can reach that goal by a careful definition of property rights.

Id. at 1217 (citations omitted).

¹⁹¹ See, e.g., Richard J. Arneson, *Is Work Special? Justice and the Distribution of Employment*, 84 AM. POL. SCI. REV. 1127, 1144-45 (1990). The work provided should reflect the following principles: no make-work; stable employment, not temporary stop-gap; opportunities for promotion; low skill requirements; careful monitoring of equality; respectful supervision; on the job training; choices of entry level jobs; and wages and benefits that do not pull people out of decent private employment. *Id.* See Elster, *supra* note 137, at 53; HARVEY, *supra* note 26, at 115. See also WILSON, *supra* note 183, at 157 (proposing a full employment policy as a solution to present poverty and a substitution for traditional public assistance).

¹⁹² THUROW, *supra* note 144, at 206.

¹⁹³ THUROW, *supra* note 144, at 204.

¹⁹⁴ THUROW, *supra* note 144, at 200-07.

¹⁹⁵ See generally HARVEY, *supra* note 26.

¹⁹⁶ HARVEY, *supra* note 26, at 22.

¹⁹⁷ HARVEY, *supra* note 26, at 30 (explaining that since the minimum wage has deteriorated so much in recent decades, paying the minimum wage is not part of the

be offered special training with a job guarantee utilizing their skills upon completion of the training.¹⁹⁸ The entire process could be funded by an increase in Social Security taxes.¹⁹⁹ An increase of twelve percent would provide suitable funding and a feasible framework for the proposed EAP.²⁰⁰

Will such an amendment cause problems? Absolutely. Progress is problematic.²⁰¹ Traditional thought analyzes the implications of a right to a job by merely superimposing the right to work on the current situation and focuses on all the difficulties it can create.²⁰² Some have already concluded that a right to work, without a corresponding guarantee of a living wage, would create more harm than good. Particularly, this would disrupt current employer/employee, citizen/government, and business/government relationships.²⁰³

However, fair analysis must start with an acknowledgment that the current system does not work for millions of people. The analysis must then review the possible implications of a constitutional right to work in a society that would be directing a portion of its energy into creating employment rather than merely decrying the current victimization of millions. These rights, like the minimum wage, environmental protection, and the Federal Deposit Insur-

solution; rather, there should be a guarantee that at least poverty threshold wages would be paid).

¹⁹⁸ HARVEY, *supra* note 26, at 36.

¹⁹⁹ HARVEY, *supra* note 26, at 43-44 (explaining that this increase not only includes the cost of the EAP jobs program, but also is offset by the savings from eliminating income support programs for the currently unemployed).

²⁰⁰ HARVEY, *supra* note 26, at 50.

²⁰¹ There will be cries of "pain" of economic sorts. Creating such rights will make a "mess" of current economic relationships. These are familiar objections, heard in response to all efforts to improve society. See James Gaffney, *She Who Laughs Last: The Gender-Inclusive Language Debate*, AMERICA, Aug. 26-Sept. 2, 1995, at 8, 12 ("The moral aberrations of culture have never been corrected without pain and mess.").

²⁰² BAILEY, *supra* note 58, at 6 (quoting President Warren G. Harding, "There has been vast unemployment before and there will be again. There will be depression and inflation just as surely as the tides ebb and flow. I would have little enthusiasm for any proposed remedy which seeks either palliation or tonic from the Public Treasury." (citation omitted)).

²⁰³ See Elster, *supra* note 137, at 72-74. For those already employed in private industry, the effect would differ depending on whether the worker was a good or bad employee. The effect would create a workplace environment where the under-motivated and less-industrious would ease off, confident in their right to a government job, while good workers could demand better compensation as a condition of staying active. Further, whenever public workers received a raise, private workers would have to be better compensated as well. A right to work could not function in a capitalist economy because the end result of all these dynamics would be a constant enlargement of public employment and a constant diminishing of private employment concluding in the state employing all labor. Elster, *supra* note 137, at 72-73.

ance Corporation, would interfere with unfettered supply and demand. Would capitalism be able to adapt? Absolutely.

Human beings have created the current system, which works very well for some and not so well for others, and humans can modify it.²⁰⁴ The operation and inequity of the present system is a natural consequence of what has been created by America's choices.²⁰⁵ Legal realists argue that "the market itself, and therefore everything that flow[s] from market transactions, [is] structured by government."²⁰⁶ No one may argue that present governmental and legal actions do not already have impact on the creation, retention, elimination, and compensation of jobs. This proposed amendment would refocus the direction of those laws and policies toward creating jobs. Government policy already shapes employment in issues such as location, participation, and even the expansion and contraction of the total number of jobs.²⁰⁷

²⁰⁴ Indeed, as legal realists taught us long ago, the hand of government is present in any market. The law, by protecting some claims to property rights but not others, and by enforcing some contracts but not others, determines whether a market will exist. Since the New Deal era, the constitutional power of government to make those determinations has gone virtually unchallenged. It is at least half a century too late for anyone to say that law and government merely provide a neutral playing field on which "market forces" contend. Government in America has always influenced significantly the distribution of goods, and politics typically has been the province of the "haves."

Karst, *Citizenship*, *supra* note 187, at 22 (citation omitted).

²⁰⁵ Material and cultural poverty in American life is not like cancer or heart disease; still less is it like the winds and the tides. It is a result of our institutions, economic, social and—I am sorry to say—legal. There would be enough money in our society to provide for everyone's needs if we did not choose to spend it on other things. There would be enough to do in our society to keep everyone productively occupied if we did not choose to get it done in other ways. Poverty and unemployment are human artifacts as surely as highways and bridges—as surely as deforestation and acid rain. . . . [T]he same institutions that support our own prosperity are the ones that impoverish the poor among us. Whatever good there is in our laws and institutions—and there is a great deal—has a price, and the poor in our society are the ones who pay it.

Thomas L. Shaffer & Robert E. Rodes, Jr., *A Christian Theology for Roman Catholic Law Schools*, 14 U. DAYTON L. REV. 5, 15 (1988) (citation omitted).

²⁰⁶ Tushnet, *supra* note 190, at 1210 (citation omitted).

²⁰⁷ Edelman, *supra* note 178, at 45-46 (noting that specific governmental policies and decisions in issues ranging from urban renewal and highway construction to farm policy and public education directly influence where people work and the physical access people have to different kinds of jobs).

[G]overnment shapes the total number and quality of jobs available in the economy and the take-home pay of those who have work. Fiscal, monetary, and trade policies all affect the total number of jobs and the tax bites on those who do work. When the Federal Reserve decides on a

Many who claim that government has no business interfering in the marketplace in reality mean that they are satisfied with the present level of government interference. Those who benefit from government interference do not want to change its position in the marketplace to benefit others.²⁰⁸ Some suggest that politics and law are the subject of a public sphere of influence.²⁰⁹ It is further suggested that this influence is distinct from economics and business, which are in a private sphere.²¹⁰ This is little more than a

policy of high-interest rates to fight inflation, and there is no concomitant Congressional response to aid the people who lose their jobs as a consequence, the new recruits to the ranks of the poor are there because of government policy.

Edelman, *supra* note 178, at 46.

²⁰⁸ See, e.g., Morris R. Cohen, *Property and Sovereignty*, 13 CORNELL L.Q. 8 (1927) (concerning the need to subject the profit motive to the higher demands of wisdom and justice, by first recognizing the role that economic power already plays in political decision-making, and by recognizing the need for government action to temper economic interests).

Utterly unreal is all talk of men being robbed of their power of initiative because the state undertakes some service, e.g. to build a bridge across a river. Men are not deprived of opportunities for real self reliance by having their streets lighted at night, by filling up holes in the pavements, by removing other dangers to life and limb and by providing opportunities for education to all. The conditions of modern life are complex and distracting enough so that if we can ease the strain by simplifying some things through state action we are all gainers by it. Certain things have to be done in a community and the question whether they should be left to private enterprise dominated by the profit motive or to the government dominated by political considerations, is not a question of man versus the state, but simply a question of which organization and motive can best do the work. Both private and government enterprise are initiated and carried through by individual human beings.

Id. at 27.

²⁰⁹ See, e.g., Karl E. Klare, *The Public/Private Distinction in Labor Law*, 130 U. PA. L. REV. 1358, 1417 (1982).

²¹⁰ The essence of the public/private distinction is the conviction that it is possible to conceive of social and economic life apart from government and law, indeed that it is impossible or dangerous to conceive of it any other way. The core ideological function served by the public/private distinction is to deny that practices comprising the private sphere of life—the worlds of business, education and culture, the community, and the family—are inextricably linked to and at least partially constituted by politics and law. Denying the role of politics—the processes by which communities organize and institutionalize their self-directive capacities—in constituting the forms and structure of social life is a way of impeding access to an understanding of the role of human agency in constructing the world. The primary effect of the public/private distinction is thus to inhibit the perception that the institutions in which we live are the product of human design and can therefore be changed.

Id. (citations omitted).

wish to avoid changing the status quo and the interdependent relationship between public and private, law and economics, and politics and business.

Such criticisms have been leveled at every effort to make the economic system more human. It is not enough to say a proposal interferes with the market. The questions, rather, are whether interference is within the public interest and will it work? In order to consider how such an amendment might work, it is necessary to think about economics, justice, and law in new ways.²¹¹

Undoubtedly, some critics will say an effort to guarantee everyone the right to a job will reduce the number of jobs available. Historically, labor has been unpersuaded by the arguments of business leaders that other efforts, like increased minimum wage protections for low-wage workers, would hurt the cause of workers.²¹²

Ultimately, the effect of an amendment guaranteeing everyone a right to a job and a living wage will depend on how Congress chooses to legislate the implementation of these rights, and how the judiciary chooses to evaluate these rights and their implementation. Current legal and economic arrangements leave millions unemployed and millions more working, yet still poor. A constitutional amendment guaranteeing the right to an opportunity to work and to receive a living wage is worth undertaking the tedious and uncertain process of legislative, executive, and judicial implementation. Millions would certainly agree.

VIII. CONCLUSION

"If we continue to frame political debate about jobs, health care, and other aspects of equal citizenship only in terms of 'the budget' and 'sound policy,' it seems safe to expect the status quo will go largely undisturbed."²¹³ During the Depression, when unemployment nationwide was not as high as it is in today's inner cities, there was an effort to change the status quo and make government and economics more responsive to the needs of citizens. It was an effort of optimism and confidence that together, the citizens, the business community, and the government could change the present calamities and improve the daily lives of millions of

²¹¹ "The mission of all critical social thought is to free us from the illusion of the necessity of existing social arrangements." Klare, *supra* note 6, at 482.

²¹² See van der Vyver, *supra* note 184, at 326 (observing that in 1939, when labor rejected the concerns of business that minimum wage protection was not in workers' economic interests, "however horrible a situation might be brought about by interference with economic laws, the workers could hardly be any the worse off").

²¹³ Forbath, *supra* note 12, at 1805.

people who were suffering.²¹⁴ Similar efforts were launched in the mid-1940s and again in the mid-1970s.

Business interests will undoubtedly continue their historical opposition to the right to a job at a living wage. Those who would most benefit, the unemployed and low-wage workers, will remain relatively weak politically. However, there is still reason to hope for change, so long as America values work and opportunity. Contemporary America recognizes a duty to work, and recognizing the right to an opportunity to work for a living wage is not far removed.

The right to a job at a living wage has remained a popular concept to the general public for decades.²¹⁵ There is reason to believe that the spirit of the New Deal, which combined economic self-interest of the nation with the moral demands of full citizenship, will again call for the right to a job at a living wage.²¹⁶ Until then, "part of a theorist's job is to imagine the furthest possibilities lying fallow in the present and the past and the Constitution of a future that brings them to light."²¹⁷ This proposed constitutional

²¹⁴ In the darkest days of our worst domestic calamity, the greatest words of [President Roosevelt] were not that "the only thing we have to fear is fear itself." His greatest words were "[w]e are stricken by no plague of locusts." Even more so today, there is no plague of locusts. There is only the self-inflicted plague of underestimating our own capabilities to reduce social ills. While today's leadership has made a laudable attempt to win business confidence, this is not enough. Our leadership must also regain its confidence in itself, in the American economy, and in the about 113 million people in our civilian labor force.

Keyserling, *supra* note 92, at 800 (citations omitted).

²¹⁵ See, e.g., MICKEY KAUS, *THE END OF EQUALITY* 137 (1992).

A WPA-type jobs program would, quite literally, set the underclass and anyone else who needed a job to work rebuilding the public sphere rather than destroying it—planting trees, if you will, rather than lurking behind them. . . . With a neo-WPA maintaining highways, schools, playgrounds, and subways, with libraries open every evening and city streets cleaned twice a day, we would have a common life more people would find worth reclaiming.

Id.

²¹⁶ See, e.g., SHKLAR, *supra* note 136, at 63 ("Modern citizenship is not confined to political activities and concerns. Important as governing, voting, military service, and taxpaying are, they are not nearly as significant as the endeavors that constitute what Hegel called "civil society.") (citation omitted).

The right to earn should not be based on personal responses, such as loss of self-respect among the unemployed, but on loss of public respect, the reduction of standing and demotion to second-class citizenship, to which the public ethos, overtly and traditionally, condemns them. It is not a right to self-respect, but a right not to be deprived of one's standing as a citizen, that is at stake here.

SHKLAR, *supra* note 136, at 100-01.

²¹⁷ Forbath, *supra* note 12, at 1805.

amendment will finally guarantee the right to an opportunity for employment at a living wage.