
NOTES

LEGISLATORS' OBLIGATION TO SUPPORT A LIVING WAGE: A COMPARATIVE CONSTITUTIONAL VISION OF JUSTICE

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I grew up hearing over and over, to the point of tedium, that “hard work” was the secret of success No one ever said that you could work hard—harder even than you ever thought possible—and still find yourself sinking ever deeper into poverty and debt.¹

I. INTRODUCTION

Two dozen Harvard University students occupied university administrative offices in the Spring of 2001, insisting that one of the oldest and richest corporations in the western hemisphere heed its moral conscience. Specifically, students challenged the social irresponsibility of paying service workers meager poverty wages. The students comprising the cross-cultural and cross-classed sit-in demanded wages of \$10.25 an hour, plus benefits for janitors, maintenance, and food service workers. Students claimed victory after three weeks of protest ended in the

* Class of 2002, University of Southern California Law School; B.S., 1999, Northwestern University. Thanks to Professor Howard Gillman for his helpful assistance. My appreciation to Professor Mary Dudziak for her expert guidance and mentorship. Very special thanks to my family for their love and support. My warmest gratitude to Graham Smith for his immeasurable love and patience, his exemplary compassion, and especially, for always being on my side. Finally, I dedicate this Note to all of the working poor who toil each day in poverty and to the grassroots organizers who tirelessly strive to make the living wage a reality.

1. BARBARA EHRENREICH, NICKEL AND DIMED: ON (NOT) GETTING BY IN AMERICA 220 (2001).

establishment of a committee—including faculty, unionized employees, administrators, and students—to make recommendations on employment policies for low-paid waged workers.²

A local living wage ordinance passed in Baltimore in 1994 sparked the living wage movement demanding economic justice that now boasts national force,³ and which Harvard demonstrators have brought to international attention.⁴ Grassroots living wage activists challenge local governments, school boards, and universities to ensure that those who work full time for a company under government or university contract or with the aid of a government subsidy should earn at least enough money to meet federal poverty guidelines without reliance on public welfare.⁵ They refuse to allow solely traditional market considerations to dictate workers' income and means.⁶ These community organizers charge that local municipalities and endowed university employers should never facilitate substandard wages that preclude full-time workers from moving out of a cramped one-bedroom living space for a family of four.⁷ They demand that full-time waged workers should earn enough to provide basic necessities, including

2. See David Abel, *Key Issues in College Standoff*, BOSTON GLOBE, May 3, 2001, at A23; Steve Bailey, *Downtown; Revolution in the Air*, BOSTON GLOBE, April 25, 2001, at C1; Pamela Ferdinand, *Harvard Sit-in for 'Living Wage' Divides Campus: Many Back Raise for Workers; Some Question '60s-Era Tactics*, WASH. POST, May 5, 2001, at A03; Carey Goldberg, *Harvard Sit-in over Pay Ends with Deal to Re-examine Policies*, N.Y. TIMES, May 9, 2001, at A19; Bob Herbert, *In America; Disparities at Harvard*, N.Y. TIMES, April 30, 2001, at A19; Bob Herbert, *In America; Harvard's Heroes*, N.Y. TIMES, May 3, 2001, at A25; Tom Jehn, *Harvard, Do the Right Thing*, CHRISTIAN SCI. MONITOR, May 7, 2001, at 9; Benjamin McKean, *Harvard's Shame; Wages at Harvard University*, NATION, May 21, 2001, at 6; Elizabeth Mehren, *Student Sit-in Tests Harvard's Labor Policies, and Patience; Protest: Behind Two-Week Siege Is the Demand for a 'Living Wage' for Campus Service Workers*, L.A. TIMES, May 3, 2001, at A1.

3. ROBERT POLLIN & STEPHANIE LUCE, *THE LIVING WAGE: BUILDING A FAIR ECONOMY* 2 (1998). While the living wage movement most often touts Baltimore as the jumping off point for American mobilization around this issue, other nearly simultaneous efforts also contributed to the founding moment of this national struggle. In 1995, welfare reform critics and plant closing challengers united forces in Minnesota to target "corporate welfare" recipients, demanding the fulfillment of promises for good jobs. Meanwhile, advocates pushed for livable wages for unionized airport employees who ended up unemployed when minimum wage contractors won Los Angeles City contracts. Finally, the Association of Community Organizations for Reform Now (ACORN) supported requiring payment of a living wage from city contractors, government subsidy recipients, and beneficiaries of tax abatements in Boston after the city agreed to require subsidized businesses to employ workers from hiring halls in low-income city neighborhoods. David Moberg, *Martha Jernegon's New Shoes*, AM. PROSPECT, June 19, 2000.

4. See Ferdinand, *supra* note 2 (reporting that the Harvard students participating in the sit-in used laptops and cell phones in part to respond to international press queries from Italian National Radio).

5. See Peter J. Sammon, *The Living Wage Movement*, AMERICA, Aug. 26, 2000.

6. Moberg, *supra* note 3.

7. See Steven V. Brull, *What's So Bad About a Living Wage?*, BUS. WEEK, Sept. 4, 2000, at 68.

doctor's visits and household bills.⁸ Movements like the one in Baltimore have led to the successful implementation of sixty ordinances in cities, counties, and school districts nationwide, and more than seventy-five living wage campaigns are being fought presently across America in local government forums and on college campuses.⁹

Although the movement continues to gain broad-based momentum at the local level, waged workers do not enjoy a federal statutory right to a living wage. In fact, the Fair Labor Standards Act ("FLSA") sets the federal minimum wage at \$5.15 an hour,¹⁰ earnings well shy of what full-time workers need to supply the basic necessities of life. In addition, American constitutional jurisprudence currently affords no special or heightened protection based on economic status or depressed wages,¹¹ and

8. See *New Living Wage Ordinance Yields First Pay-Out: Home Health Care Workers Reap Windfall in Back-Pay and Higher Wages*, PR NEWSWIRE, Nov. 1, 1999.

9. ACORN Living Wage Resource Center, *The Living Wage Movement: Building Power in Our Workplaces and Neighborhoods*, at <http://www.livingwagecampaign.org/introcontent.htm> (last visited Oct. 20, 2001). For a more detailed review of living wage ordinances and similar economic justice measures in the United States from 1989–99, see POLLIN, *supra* note 3, at 212 app.II.

10. Fair Labor Standards Act, 29 U.S.C. § 206 (Supp. V 1999).

11. Until 1970, the Supreme Court provided limited sensitivity to wealth-based discrimination. In *Griffin v. Illinois*, the Court held that denial of free trial transcripts to indigent criminal defendants appealing their convictions resulted in equal protection and due process violations. 351 U.S. 12 (1956). The defendants alleged that they were denied full appellate review solely based on their financial inability to buy a transcript, and they challenged this poverty-based deprivation as a denial of due process and equal protection. See *id.* at 16. *Griffin* held that in order to preserve the integrity of an equality-based criminal justice system, the Constitution forbids invidious discrimination. *Id.* at 13–17. The opinion declared, "a State can no more discriminate on account of poverty than on account of religion, race, or color" in criminal trials or appeals. *Id.* at 17. The *Griffin* Court concluded that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has." *Id.* at 19.

Similarly, in *Douglas v. California*, the Court held that indigent defendants appealing criminal convictions enjoyed a right to free court-appointed counsel. 372 U.S. 353 (1963). In *Douglas*, a California court reviewed the trial record to determine the merits of the requested appeal, and consequently, whether the state should appoint counsel. Following *Griffin*, the Court found that granting or denying appellate review cannot be conducted in a way that discriminates based on poverty. *Id.* at 355–56. Otherwise, "[t]he indigent . . . has only the right to a meaningless ritual, where the rich man has a meaningful appeal." *Id.* at 358.

The Court also expressed sensitivity to socioeconomic status beyond criminal procedure when it invalidated poll tax requirements for voting. *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The opinion reasoned, "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth and property, like those of race, are traditionally disfavored." *Id.* at 668. The *Harper* Court emphasized, however, that the close connection between wealth-based discrimination and infringement on the right to vote aroused the Court's discomfort with economic means-based categorizations in this particular case. See *id.* at 670.

Five years later, the Court invalidated state laws denying welfare benefits to people who had not lived in the state or district for the one-year minimum requirement. *Shapiro v. Thompson*, 394 U.S. 618 (1969). The *Thompson* Court held that the residency requirement created two classes of inhabitants in

granting or denying public assistance, “upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life.” *Id.* at 627. This arbitrary division denied some inhabitants equal protection of the laws. *Id.* In addition, it amounted to an unconstitutional inhibition on the right to travel. *Id.* at 629. Finally, states could not attempt to deter migration of indigents into their states just because they only sought more generous welfare benefits. *Id.* at 631. Justice Brennan recognized the difficult parenting choices that poor parents face:

But we do not perceive why a mother who is seeking to make a new life for herself and her children should be regarded as less deserving [of benefits] because she considers, among other factors, the level of a State’s public assistance. Surely such a mother is no less deserving than a mother who moves to a particular State in order to take advantage of its better educational facilities.

Id. at 632.

Later, the Court recharacterized these cases as limited to criminal appeals, voting rights, or the right to travel—subjecting laws negatively affecting the poor to rational basis review. In *Dandridge v. Williams*, 397 U.S. 471 (1970), the Court sustained a state law that placed a ceiling on welfare benefits regardless of familial size, resulting in larger families receiving fewer funds per person than smaller families. Because the law dealt with “economics and social welfare,” the Court held that rational basis review provided the appropriate level of judicial scrutiny. *Id.* at 485–86. In employing the rational basis test, *Dandridge* held that the state did not have to provide equal benefits to all welfare-eligible individuals. Instead, it need only provide some level of assistance. *Id.* at 481.

In 1973, the Court reaffirmed that rational basis review applies to poverty-based claims. *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1 (1973). The plaintiffs claimed that the state property taxation scheme saddled poor districts with disproportionately high tax rates that yielded inadequate education funds, while wealthier school districts benefited from lower tax rates that generated generous funds. *Id.* at 11–13. The Court found that the disadvantaged class of poor people could not be identified in traditional equal protection terms, and the complaining class did not suffer absolute deprivation of education. *Id.* at 23. The Court wrote that the:

large, diverse, and amorphous class . . . ha[s] none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28. *But see* *M.L.B. v. S.L.J.*, 519 U.S. 102 (1996) (holding that a state may not deny a party appellate review of a parental termination action based on poverty).

Because this precedent forecloses a plausible judicial route toward substantial economic justice reforms, this Note looks beyond constitutional jurisprudence to explore solutions that a populist constitutional view provides. Even if the Supreme Court were likely to revisit the possibility of characterizing economic means as a suspect or quasi-suspect class, other problems would arise. Many academics suggest the Court is an improper venue for affording affirmative relief. *See, e.g.*, CASS SUNSTEIN, *THE PARTIAL CONSTITUTION* 147–48 (1993) (arguing that courts remain an improper venue for massive social change because judges lack the requisite expertise, the narrow scope of cases before courts often obscure the complexities of large-scale intervention, judicial implementation of affirmative rights would negatively affect other programs, and the American legal system is designed to provide compensatory justice instead of broad social reform).

Nonetheless, scholars have put forth a multitude of arguments advocating constitutional rights for the poor based on economic status. *See, e.g.*, Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 OHIO ST. L.J. 731 (1997) (arguing against President Clinton’s policy—a belief shared by many liberals—that the Constitution affords abortion rights but not rights to basic necessities); *infra* section IV. *See also* ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997) (refuting the theory that granting constitutional welfare rights is inherently inimical to our individualist political tradition and suggesting two possible sources for welfare rights, including natural law and “maternalism”). *But see* Ralph Winter, *Poverty, Economic Equality, and the Equal Protection Clause*, in 1972 THE SUPREME COURT REVIEW 41 (Philip B. Kurland ed., 1993) (suggesting

the text of the United States Constitution does not secure social or economic rights of any kind.¹² Despite legal academics' attempts to find the right to a living wage or other subsistence guarantees in the Constitution or to overcome the Supreme Court's failure to protect the poor, this "underclass" remains unable to enjoy and realize other revered, non-economic rights, including life, liberty and property, human dignity, or full civic and political participation in society—not to mention the pursuit of happiness. This Note explores the living wage movement—and the possibility that the Constitution requires living wage legislation—as one response to the distressing condition of the working poor. Specifically, a substantive vision of justice derived from the United States Constitution and other foundational American documents, scholars' response to Supreme Court jurisprudence addressing poverty, and global struggles for economic justice, inform and enrich legislators' obligation to consider the Constitution in enacting legislation. In short, lawmakers possess a duty to bear the Constitution in mind. Giving voice to this substantive theory of justice through living wage legislation presents one plausible, and arguably compulsory, method of adhering to this constitutional obligation. Even beyond the scope of this Note, this argument structure lends itself well to other areas in need of legislative action, including poverty problems other than the inadequate minimum wage and even broader concerns about civil rights and liberties.

Drawn from texts and principles constituting Americans as "a people," this substantive vision of justice coalesces with the grassroots demands for economic justice powering the living wage movement. Understanding how hunger for basic needs degrades human dignity motivates Part II, which gives a face to the working poor, reviews poverty statistics and thresholds as well as the current federal minimum wage, and highlights the need for a living wage to guarantee subsistence and improve the self-perception of the working poor. This section also reviews the most common characteristics of living wage legislation, advances many reasons why we *must* mobilize for a living wage, and responds to counterarguments launched by living wage challengers who fear economic disaster and failed businesses.

Though much discussion about constitutionalism in American legal discourse centers on the judiciary, legislators also take an oath to uphold

that advancing poverty rights through substantive equal protection contradicts the text and purpose of the Constitution and is improperly targeted at the courts instead of the elected branches of government).

12. See William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139 (1998) (arguing for the adoption of a constitutional amendment granting the right to work and the right to earn a living wage).

the Constitution, which includes a duty to enact constitutional law. The distressing situation of the working poor demonstrates one opportunity for lawmakers to engage in such a project. Thus, Part III argues that legislators must confront their obligation to respect the Constitution. While some instances of considering the Constitution might involve a negative constitutional argument—or avoiding legislation that will likely infringe constitutional rights—considering the Constitution might also mean affirmatively advocating and passing laws that carry out the underlying and fundamental principles enshrined in our founding documents. This section argues that in order to move toward enacting constitutional law in this sense, legislators should engage in political debates on legislation, framed by the values and ideas to which our ancestors committed us.

In order to take part in this political dialogue, legislators must argue living wage legislation establishes justice or promotes the general welfare. To participate in this endeavor, however, legislators need evidence that such a result rings true. Thus, Part IV begins to develop a substantive vision of justice, drawn from the arguments of American legal theorists. This vision borrows additional ideas from a comparative analysis in Part V. This section examines the Constitutions and case law of India and South Africa to supplement and advance this vision of justice. Ultimately, the vision drawn from these sources suggests that a truly just society—one based on the principles of equality, life, liberty, and the pursuit of happiness—requires dignified subsistence for all people at the very minimum. Part VI garners language, aspirational narratives, philosophies, and other concrete building blocks for assembling this coherent vision of substantive justice that guarantees human dignity for the working poor. Finally, this Note utilizes this carefully constructed vision of justice, with the empirical data amassed in Part II, to put forth one side of a principled, political debate that adheres to our founding values. This Note ultimately concludes that living wage legislation meets legislators' obligation to consider the Constitution because it carries out the project of the Declaration of Independence.

II. THE WORKING POOR AND THE NEED FOR A LIVING WAGE

A. WHO ARE THE WORKING POOR?

The working poor consist of people whose “full-time, year-round earnings are so meager that despite their best efforts they can’t afford

decent housing, diets, health care or child care.”¹³ They illustrate the inability that many wagedworkers face trying to support themselves and their families without outside assistance, and they painfully remind us that work and poverty continue to coexist in America.¹⁴ The problems facing the working poor remain somewhat removed from those confronted by their nonworking counterparts, as full-time minimum wage earners often make *too much* money to qualify for government assistance.¹⁵

The working poor include full-time working women like Juana Zatarin, a baggage screener at the Los Angeles International Airport (“LAX”),¹⁶ and Martha Jernegons, a middle-aged Chicagoan who works as a home healthcare aide for a private company under contract with the city.¹⁷ These women struggled to provide basic necessities for their families before living wage ordinances passed in both Los Angeles and Chicago improved their economic conditions. Though still living in a tiny, one-bedroom apartment abutting the roaring runways of LAX, forty-four-year-old Zatarin’s wage increase allowed her to take her three children on vacation for the first time in six years.¹⁸ Her current wage of \$8.97 an hour, almost a fifty percent raise, pushed Zatarin and her family above the federal poverty guideline for a family of four for the first time in many years.¹⁹ With an expected income of \$18,000 this year, Zatarin finally feels better equipped to supply some of her family’s needs.²⁰

Similarly, Jernegons made a mere \$5.60 an hour before her pay increase—earnings higher than the federal minimum wage of \$5.15 an hour—but far less than the funds needed to sustain her family of eight.²¹ Her forty percent wage increase to \$7.60 an hour still failed to lift Jernegons and her family to the federal poverty guidelines, and she and her dependents remained without health insurance.²² The living wage rate, however, helped her to begin paying off a \$600 medical debt that she has owed for several years.²³ Just as importantly to Jernegons, the pay raise has improved her self-esteem and allowed her to buy some of the things she

13. Katherine Newman, *The Problem of the “Working Poor” Is Being Ignored*, in POVERTY: OPPOSING VIEWPOINTS 49 (Bruno Leone et al. eds., 1999).

14. Quigley, *supra* note 12, at 166–70.

15. *See infra* notes 41–45 and accompanying text.

16. Brull, *supra* note 7.

17. Moberg, *supra* note 3.

18. Brull, *supra* note 7.

19. *Id.*

20. *Id.*

21. *See* Moberg, *supra* note 3.

22. *Id.*

23. *Id.*

wants and needs, like an inexpensive pair of shoes for herself and clothes for work.²⁴

B. THE REALITY OF THE WORKING POOR:
STATISTICS AND DEMOGRAPHICS

The United States Census Bureau reports that approximately thirty-two million people live in poverty,²⁵ with the working poor like Zatarin and Jernegons comprising approximately 7.2 million of the American impoverished.²⁶ More than half of the working poor include families, the fastest-growing segment of the poverty population.²⁷ Of these impoverished families, approximately seventy-five percent consist of at least one working family member, and almost forty-five percent of poor families in the United States have no less than one family member working full time.²⁸ Poverty also disproportionately affects children and people of color.²⁹ In fact, one in six children lives in poverty, and fifty percent of children younger than age six who live in a female-headed household are poor.³⁰ As compared to Caucasians, minority Americans face disproportionately high poverty rates, with African-Americans suffering

24. *Id.* See also EHRENREICH, *supra* note 1 (recounting the author's struggle to cover her subsistence expenses at minimum wage jobs in three different states, and making a poignant case for raising the minimum wage to a livable wage).

25. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, POVERTY IN THE UNITED STATES: 2000, 1-3 (discussing poverty statistics, compiled from the Census Bureau's Current Population Survey conducted in March 2001, categorized by age, race, ethnicity, nativity, family composition, work experience, and geography), available at <http://www.census.gov/hhes/www/poverty00.html> (last visited Dec. 18, 2001) [hereinafter POVERTY IN THE UNITED STATES].

26. Catholic Campaign for Human Development, *Poverty Quiz*, q.5, at <http://www.nccbuscc.org/cchd/povertyusa/quiz5f.htm>.

27. Catholic Campaign for Human Development, *The Face of Poverty in America*, at <http://www.nccbuscc.org/cchd/povertyusa/povfact2.htm> (last visited January 29, 2001) [hereinafter *Face of Poverty in America*].

28. U.S. CENSUS BUREAU, U.S. DEP'T OF COMMERCE, POVERTY AMONG WORKING FAMILIES: FINDINGS FROM EXPERIMENTAL POVERTY MEASURES, 4 t.2 (2000), available at <http://www.census.gov/hhes/poverty/povmeas/exppov/p23-203/tbl2.html> (last visited Jan. 10, 2002). See also Catholic Campaign for Human Development, *Poverty and the Working Poor*, at <http://www.nccbuscc.org/cchd/povertyusa/povfact3.htm> (last visited January 29, 2001) [hereinafter *Poverty and the Working Poor*].

29. POVERTY IN THE UNITED STATES, *supra* note 25, at 6; *Face of Poverty in America*, *supra* note 27.

30. *Face of Poverty in America*, *supra* note 27.

the highest poverty rates of any race, followed closely by Hispanics, then Asians and Pacific Islanders.³¹

Despite workforce participation, the current federal minimum wage of \$5.15 an hour³² leaves working poor families impoverished, according to official federal guidelines.³³ The continued erosion of the minimum wage remains the main reason that these wage earners find themselves unable to make ends meet.³⁴ For example, the 1968 federal minimum wage provided laborers with almost \$8.00 an hour in 2001 dollars.³⁵ Unfortunately, today's federal minimum wage falls short of such purchasing power by more than \$2.75, faltering at barely sixty-five percent of its value more than thirty years ago.³⁶

Full-time workers earning the federal minimum wage for fifty weeks of full-time work can anticipate bringing home \$10,712 in before-tax dollars this year.³⁷ This wage falls far short of the 2001 Department of Health and Human Services poverty guidelines for families of two or more.³⁸ Practically speaking, this means a single parent with one child

31. *Id.*; POVERTY IN THE UNITED STATES, *supra* note 25, at 6 (detailing the specific poverty rates by race, with African-Americans having a rate of 22.1%, Hispanics a rate of 21.2%, Asians and Pacific Islanders a rate of 10.8%, and Caucasian non-Hispanics a rate of 7.5%). The Current Population Survey, which provides the data source for poverty rates by race and ethnicity, is too small to generate dependable estimates for both American Indians and Alaska Natives. *Id.* Averages for the past three years, however, yield a poverty rate of 25.9% for the combined group, which is much higher than the rates for Caucasian non-Hispanics and Asians and Pacific Islanders, but statistically similar to the rates for African-Americans and Hispanics. *Id.* For more detailed poverty statistics and demographics, see Bureau of Labor Statistics & Bureau of the Census, *Current Population Survey*, at <http://www.bls.census.gov/cps/cpsmain.htm> (last visited Jan. 10, 2002).

32. Fair Labor Standards Act, 29 U.S.C. § 206 (Supp. V 1999).

33. See Office of the Assistant Secretary for Planning & Evaluation, U.S. Department of Health and Human Services, *The 2001 HHS Poverty Guidelines*, at <http://www.aspe.hhs.gov/poverty/01poverty.htm> (last visited Jan. 10, 2002) [hereinafter U.S. Department of Health and Human Services]; POLLIN, *supra* note 3, at 1; Press Release, White House, President Clinton: Raising Minimum Wage—An Overdue Pay Raise for America's Working Families (Jan. 8, 2001) [hereinafter White House], available at LEXIS, FDCH Federal Department and Agency Documents.

34. White House, *supra* note 33.

35. *Id.* (calculating the 1968 minimum wage as providing wageworkers with purchasing power equivalent to \$7.92 an hour today). See also Jack Z. Smith, *Show Us the Compassion by Raising the Minimum Wage*, FORT WORTH STAR-TELEGRAM, December 18, 2000, at 9 (computing the current federal minimum wage as 54% less than the purchasing power of the 1968 minimum wage, which would be \$7.91 in today's dollars).

36. White House, *supra* note 33; *Corrections and Clarifications*, FORT WORTH STAR-TELEGRAM, Dec. 19, 2000, at 2 (stating when adjusted for inflation, the minimum wage provides 35% less purchasing power than it did in 1968).

37. *Poverty and the Working Poor*, *supra* note 28.

38. See U.S. Department of Health and Human Services, *supra* note 33. In addition to the poor purchasing power of today's minimum wage, the thresholds used to measure poverty in the United States offer questionable markers of poverty. Mollie Orshansky published an analysis of American

working full time at a minimum wage job will fall short of the \$11,610 guideline, failing to earn enough to keep her family out of poverty.³⁹ The minimum wage proves even more inadequate for minimum wage workers as the size of their families increases. A family of three with one full-time, minimum-wage worker makes nearly \$4,000 less than the \$14,630 official guideline, while a family of four, also with one full-time wage earner, will take home almost \$7,000 less than they would need to meet the four-person

poverty in a Social Security Bulletin article in 1965. She based these measures on the economy food plan, which is the least expensive of four plans developed by the Department of Agriculture, that describes a nutritionally adequate diet designed for temporary emergency use. Based on a Department of Agriculture study that surveyed household food consumption in 1955, Orshansky deduced that families of three or more people spent about one-third of their after-tax income on food in 1955. Thus, she calculated the poverty thresholds for families of three or more persons by multiplying the economy food plan budget for the correct family size by a cost factor of three to determine poverty guidelines for 1963. The HHS guidelines used today still assume that the average, hypothetical poor family would spend one-third of its income on food, though critics allege that the breakdown of after-tax allocation of resources looks very different from Orshansky's model today. Interestingly, these original measures were intended to indicate income *inadequacy*, or how much a family could not live on. These numbers, however, are used today to measure income adequacy, or who is actually living in poverty. In addition, Orshansky made her calculations using after-tax income figures, though the resultant numbers were applied to Census Bureau data that incorporated before-tax money.

Around the same time that Orshansky developed her poverty guidelines, the Social Security Administration began to question how the thresholds would integrate increases in the general standard of living. The Poverty Level Review Committee created by the Bureau of the Budget decided to make adjustments only for price changes instead of for changes in the general standard of living in 1968. One year later, the Committee planned to index the thresholds by the Consumer Price Index rather than by the per capita cost of the economy food plan.

Since the late 1960s very few revisions have been made to Orshansky's measurement methodology. A study suggesting a new approach for developing an official poverty measure in the United States was published in 1995. Many critics argue that these former measurements fail to measure accurately the number of people in poverty, and thus, the poor end up shortchanged, as it seems fewer resources are needed for subsistence. For more information on the origin of poverty guidelines, see Gordon M. Fisher, *From Hunter to Orshansky: An Overview of (Unofficial) Poverty Lines in the United States from 1904 to 1965* (Aug. 1997), at <http://www.census.gov/hhes/poverty/povmeas/papers/hstorsp4.html>; Gordon M. Fisher, *The Development and History of U.S. Poverty Thresholds—A Brief Overview*, NEWSLETTER OF THE GOVERNMENT STATISTICS SECTION AND THE SOCIAL STATISTICS SECTION OF THE AMERICAN STATISTICAL ASSOCIATION 6–7 (1997), available at <http://www.aspe.hhs.gov/poverty/papers/HPTGSSIV.htm> (last visited Jan. 11, 2001). For a critical response to this methodology, see NATIONAL RESEARCH COUNCIL, MEASURING POVERTY: A NEW APPROACH 26–31 (Constance F. Citro & Robert T. Michael eds., 1995) (discussing social, economic, and public policy changes that question the accuracy of the current official poverty measure with respect to the guidelines and the definition of family resources). See also LAKE, SNELL, PERRY & ASSOCIATES, INC., JOBS FOR THE FUTURE: WELFARE REFORM OMNIBUS QUESTIONS, FILLED-IN QUESTIONNAIRE 2 (2000) (finding that twenty-three percent of those polled thought that a family of four needed at least \$25,000 a year to get by, thirty-seven percent guesstimated that such a family would need at least \$35,000, and thirty-two percent said a family of four needed at least \$45,000 a year to survive outside of poverty). As I agree with these critics, and also find these measures under-inclusive, I do not use poverty guidelines as synonymous with poverty.

39. See U.S. Department of Health and Human Services, *supra*, note 33.

guideline of \$17,650.⁴⁰ Although families falling below official federal poverty thresholds *sometimes* continue to meet eligibility requirements for the earned income tax credit,⁴¹ food stamps,⁴² Medicaid and Medicare,⁴³ or housing assistance,⁴⁴ the current minimum wage ultimately leaves full-time wage earners and their families both dependent and destitute.⁴⁵

C. UNITED STATES POVERTY LEGISLATION AND POLICY

Other political and economic changes nationally have exacerbated the culture of frustration and entitlement fueling the living wage movement, in addition to the declining vitality of the minimum wage.⁴⁶ Chief among these ranks the “welfare-to-work” legislation signed into law by President Clinton in 1996.⁴⁷ The Personal Responsibility and Work Opportunity Reconciliation Act of 1996⁴⁸ mandated that all welfare recipients find employment within two years of receiving benefits, relinquished welfare assistance to state control, and capped lifetime welfare benefits at five years.⁴⁹ As former welfare recipients abruptly descend upon the job

40. *See id.*

41. *See* I.R.C. § 32(a) (2000). *See generally* 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 (1994) (analyzing the efficacy of welfare reform that utilizes the earned income tax credit as a substantial factor and arguing that economic reform through such a credit has fewer deleterious effects on wage labor).

42. *See* National Resource Council, *supra* note 38, at 326–27 (illustrating that the Food Stamp Program is designed to supplement food resources for impoverished families, and so, is measured by the difference between thirty percent of the family’s countable income and the USDA Thrifty Food Plan for their family size). *See id.* at 215 (noting that food stamps pay benefits to people who have experienced an income reduction within the past month, but *only if* their countable assets—including all sources of income, earnings, and transfers—fall below a certain limit). *See id.* at 323 (explaining that the Food Stamp Program reduces coupon allowance in direct relation to countable income).

43. *See id.* at 228 (explaining that Medicare and Medicaid benefits depend on the “fungible value” approach, which compares a family’s income to the official federal poverty threshold and adds the value of the mean medical benefits for similarly situated families to their income to the degree that the family’s income surpasses this lower threshold). On balance, the “fungible value” approach reduces the poverty rate for most populations. *See id.*

44. *See id.* at 446–47 (explicating that the Section 8 program provides rent subsidies to low-income people, defined as people with incomes at or below eighty percent of the area median as determined by the Department of Housing and Urban Development, with a large portion of the subsidies going to households with incomes less than fifty percent of the area median income).

45. *See* POLLIN, *supra* note 3, at 2.

46. *See id.* at 3.

47. *Id.* at 7. *See generally* Kathleen A. Kost & Frank W. Munger, *Fooling All of the People Some of the Time: 1990s Welfare Reform and the Exploitation of American Values*, 4 VA. J. SOC. POL’Y & L. 3 (1996).

48. Pub. L. No. 104-193, 110 Stat. 2105 (codified as amended in 42 U.S.C.A. § 608 (1996)).

49. *Id.* at (b), (a)(7). *See also* *New Welfare Bill Clears Senate on Way to Clinton*, WASH. POST, Aug. 2, 1996, at 5A (discussing the practical implications of President Clinton’s welfare reform

market, this “welfare reform” increases competition among low-wage workers and results in displacement of workers already in the workforce by those seeking legislatively-mandated employment.⁵⁰ The onslaught of welfare recipients into the labor pool dulls wage pressure and decreases the bargaining power of already-employed workers to demand higher pay.⁵¹ Consequently, the law produces lower wages for all workers, as employers can forego the use of higher wages to lure reluctant workers into undesirable jobs in a tight job market.⁵²

In addition to the purchasing power decline of low-wage workers and the downward wage pressure resulting from welfare-to-work legislation, the last generation has witnessed an overall decline in pay for all wageworkers.⁵³ This complete deterioration in the actual value of wages paid to all workers has intensified the already existing concentration of wealth in a small segment of the population and the economic gap between the rich and the poor.⁵⁴ In fact, from 1973 to 1977 incomes of the richest five percent of Americans, which includes families with incomes exceeding \$123,656, benefited from an income increase of more than sixty percent.⁵⁵ Meanwhile, incomes for the poorest people declined when adjusted for inflation, making today’s living standards inferior to the conditions almost thirty years ago for most of the working poor.⁵⁶

D. WHAT IS THE LIVING WAGE?

The living wage stems from the basic premise that anyone who works for a living should earn enough money to raise a family outside of poverty.⁵⁷ Such legislation symbolizes that the working poor should be

legislation); CHRISTOPHER NIEDT, GREG RUITERS, DANA WISE & ERICA SCHOENBERGER, THE EFFECTS OF THE LIVING WAGE IN BALTIMORE 29 (1999), available at <http://www.lights.com/epi/virlib/WorkPapers/1999/effectsof.PDF> (reporting on the direct costs of the living wage to the city of Baltimore and the impact of the living wage on covered workers).

50. POLLIN, *supra* note 3, at 7; Louis Uchitelle, *Welfare Recipients Taking Jobs Often Held by Working Poor*, N.Y. TIMES, April 1, 1997, at A1.

51. Uchitelle, *supra* note 50.

52. *Id.*

53. POLLIN, *supra* note 3, at 4.

54. *Id.*; Sammon, *supra* note 5.

55. AFL-CIO, WORKING AMERICA: THE CURRENT ECONOMIC SITUATION, WE USED TO GROW TOGETHER, NOW WE’RE GROWING APART, at <http://www.aflcio.org/cse/mod5/situation3.htm> (last visited Jan. 29, 2001).

56. *Id.*

57. POLLIN, *supra* note 3, at 1; *Dane County’s Living Wage*, CAP. TIMES, March 23, 1999, at 8A; Bernardo Perez, *Those Who Work Should Not Face Lives of Poverty: A Living Wage Makes Economic Sense, It Can Benefit Taxpayers and Employers as Well as Employees*, L.A. TIMES, Dec. 12, 1999, at B11; AFL-CIO DEPARTMENT OF PUBLIC POLICY, LIVING WAGE LAWS: ANSWERS TO FREQUENTLY

paid wages high enough to lift their families above official poverty levels,⁵⁸ that limited public funds should never subsidize poverty wages,⁵⁹ and that wage labor entitles workers to earnings that facilitate a life of dignity.⁶⁰ The movement surrounding the living wage takes force from two sources: morality and economic fairness.⁶¹ The moral argument seems intuitive: citizen tax dollars should never facilitate the creation or continuance of poverty.⁶² Beyond principles of justice, however, the living wage demand has pragmatic force as well. Mainly, when businesses pay workers substandard wages, taxpayers encounter a forced subsidy to cover the needs that businesses fail to provide through wages, including healthcare, food stamps, tax credits, housing assistance, and other social costs of the wage gap and inequality.⁶³

The living wage movement has strategically identified local governments as the best soil to sow the seeds of economic justice, or at least the most appropriate place to lay the roots for future change.⁶⁴ Recent attempts to raise the federal minimum wage by one dollar from \$5.15 an hour to \$6.15 an hour have failed.⁶⁵ Thus, anticipating any raise in the minimum wage at the national level—let alone an increase to bring minimum wagedworkers to the poverty level—remains unrealistic at this time, so long as federal legislators' obligation to do so is ignored.⁶⁶

The grassroots living wage movement that is taking nationwide cities by storm assumes many forms. Most commonly, living wage ordinances "require at least some taxpayer-subsidized employers—mainly service contractors, but also businesses that receive government subsidies and tax breaks or lease public land—to pay substantially more than minimum

ASKED QUESTIONS 3 (Oct. 2000), at http://www.aflcio.org/articles/minimum_wage/living.pdf (last visited Jan. 29, 2001).

58. ACORN National Living Wage Resource Center, *The Living Wage Movement: Building Power in our Workplaces and Neighborhoods*, at <http://www.livingwagecampaign.org/introcontent.htm> (last visited Jan. 29, 2001).

59. Robert Ankeny, *Living-Wage Scope Narrows, But Some Still Worry*, CRAIN'S DETROIT BUS., May 17, 1999; *Dane County's Living Wage*, *supra* note 57; Perez, *supra* note 57.

60. Quigley, *supra* note 12, at 142.

61. Moberg, *supra* note 3.

62. *Id.*; Rick Haglund, *'Living Wage' Inspires Dirge at Island Retreat*, GRAND RAPIDS PRESS, June 9, 1999, at B5.

63. Moberg, *supra* note 3; Marcos Vargas, *Ventura County Perspective: Living Wage Ordinances Benefit All*, L.A. TIMES, Oct. 22, 2000, at B15.

64. POLLIN, *supra* note 3, at 2; Sammon, *supra* note 5.

65. *The Minimum Wage Debate Continues*, REP. ON HOURLY COMPENSATION, Aug. 2000, at 2; Smith, *supra* note 35.

66. Haglund, *supra* note 62.

wages.”⁶⁷ Many ordinances employ official poverty levels as a measure for fixing an indexed living wage, which means that several regulations require a wage of \$8.20 an hour or enough to bring a full-time living wage worker to the poverty level for a family of four.⁶⁸ Some ordinances provide for more than just increased wages by requiring or encouraging health insurance or facilitating a favorable environment for union organizing.⁶⁹ Others pay a different living wage based on medical benefits.⁷⁰ For example, a worker with employer-provided medical coverage might earn \$8 an hour, while a worker without benefits would earn \$10 an hour, allowing the wage earner to purchase health insurance individually on the open market.⁷¹

E. WHY OPT FOR A LIVING WAGE?

Clearly the minimum wage offers little relief for the working poor. As Juana Zatarin and Martha Jernegons illustrate, the most obvious benefits of the living wage remain the liberation of wage workers from official federal poverty levels and workers’ improved ability to support their families with markedly diminished or eliminated reliance on government aid.⁷² Interviews with Baltimore wage workers earning the living wage demonstrated that miserably shortsighted welfare qualifications bar the living wage from automatically translating into a living income.⁷³ Nonetheless, most noted the obvious and manifest role that increased wages played in stabilizing their families and other circumstances.⁷⁴

A less tangible, but equally important, advantage that living wage workers experience includes improved attitudes toward work and renewed self-confidence.⁷⁵ More than half of Baltimore workers earning the living wage expressed a feeling of pride in their jobs after earning

67. *Id.*

68. *Id.*

69. *Id.*

70. *See, e.g.,* Vargas, *supra* note 63; Ankeny, *supra* note 59; Perez, *supra* note 57; Warren’s *War on Taxpayers*, DETROIT NEWS, Sept. 21, 1999, at A8.

71. *See id.*

72. *See supra* notes 16–24 and accompanying text.

73. NIEDT ET AL., *supra* note 49, at 29.

74. *Id.* at 30 (quoting workers discussing decreased stress, feelings of equality in marital relationships with respect to contribution to household economic needs, the ability to donate food or money to neighborhood barbecues and bake sales, the financial capability to save money, increased non-work time facilitating community volunteerism and foster parenting, and providing their children with increased opportunities).

75. *See* Moberg, *supra* note 3 (quoting Jernegons, “I feel better about myself. Now I can go to Payless and buy a pair of shoes.”).

increased wages.⁷⁶ One worker shared, “I feel like I’m working for something now. I feel self-worth more,”⁷⁷ while others expressed hopefulness generated by the promise of future wage increases.⁷⁸ Still others mentioned gratification with statements like, “I take pride in what I do”⁷⁹ or “It gives me a feeling of wanting to be there; it gives a sense of responsibility.”⁸⁰ These sentiments exemplify the correlation between living wages and a means of dignity.

Despite the clear psychological gains, living wage critics contend that such dramatic market interference will generate the same economic ills that minimum wages produce, except to a more exaggerated extent.⁸¹ The main culprits include increased unemployment and employer costs,⁸² as well as reduction in job opportunities for low-skilled workers.⁸³ Local business owners insist that living wages function as “a disincentive to job growth and unneeded bureaucratic meddling in their private finances.”⁸⁴ Other opponents avow that living wages guarantee high costs and amount to “profound disrespect to local taxpayers—and contractors.”⁸⁵ In addition, critics claim that such legislation will hit small businesses particularly hard, compelling workforce downsizing, foregone expansion plans, and bankruptcy.⁸⁶ Minority business owners allege that living wage ordinances

76. NIEDT ET AL., *supra* note 49, at 27–28.

77. *Id.* at 27.

78. *Id.*

79. *Id.*

80. *Id.* at 28.

81. Atkinson explains the traditional economic critique of the minimum wage:

The standard textbook view is that the minimum wage laws “often hurt those they are designed to help . . . What good does it do a Negro youth to know that an employer must pay him \$1.60 [an] hour, if the fact that he must be paid that amount is what keeps him from getting a job?” . . . The higher wage that has to be paid causes employers either to replace low paid workers with more skilled workers or capital, or else to raise prices, in which case there will be substitution away from the product in question. The extent of the fall in employment depends on the ease with which the low paid workers can be replaced and on the elasticity of demand for the product.

A.B. ATKINSON, *THE ECONOMICS OF INEQUALITY* 153 (2d ed. 1983). For a more detailed overview of the alleged economic problems of the minimum wage, see *id.* at 153–55. Living wage critics extrapolate many arguments from those launched against the minimum wage.

82. *Montgomery County Living Wage Could Cost More Money and Jobs than Previously Thought: Employment Policies Institute University of Chicago Research Reflects High Cost of National Living Wage Movement*, PR NEWSWIRE, July 20, 1999.

83. Peter Waldman, *Living Wage Drive Fueled by Prosperity*, WALL ST. J., Jan. 2, 2000, at G6.

84. Ankeny, *supra* note 59. See also Haglund, *supra* note 62 (quoting a business leader referring to the living wage as a “diabolical instrument that’s got to be eliminated” and “the greatest deterrent to economic development of anything out there”).

85. *Warren’s War on Taxpayers*, *supra* note 70.

86. *Id.* See also Victoria Colliver, *Gauging the Living Wage Proposal Would Raise Minimum Pay Requirements for Companies that Do Business with the City*, S.F. EXAMINER, Apr. 4, 1999, at C1 (quoting a small business owner who stated that the living wage would put her out of business).

worsen the struggle to survive that many minority entrepreneurs already face.⁸⁷ Others fear the prohibitive administrative and enforcement costs of such ordinances.⁸⁸ Limited studies of prospective living wage ordinances conducted by conservative institutes profess that such wages will eliminate thousands of jobs and cost employers billions of dollars.⁸⁹

Other living wage critics believe that increasing substandard wages will harm the very group that living wage activists intend to help.⁹⁰ They allege, “there are some people who just don’t have the skills to be earning \$13 an hour—people who are illiterate, have substance abuse problems . . . that particular population of people needs to have low-paying jobs available or they won’t have any jobs at all.”⁹¹ The argument builds, “[w]hen low-skilled workers are forbidden employment wages the government outlaws, the politically disenfranchised are hurt most. The young, the least educated and minorities disproportionately become casualties to interest group pressure and pandering politicians. Rather than low wages, they get none at all.”⁹² These opponents claim that although the living wage will raise some workers’ incomes to the poverty level, they will concomitantly eliminate jobs for a larger subset of the working poor.⁹³

Notwithstanding these counterarguments, this broad-based, multi-racial movement is feeding off the growing countrywide recognition that the living wage actually *benefits* rather than harms local economies and the workers employed in them.⁹⁴ Some local leaders support living wages to alleviate the disparate wealth gap in their communities, save on public expenditures for government assistance, provide low-wage workers with more disposable income, and collect increased tax revenue.⁹⁵ The San Francisco Department of Public Health reported that living wages may diminish mortality rates, decrease unnecessary hospitalization of the poor, eliminate some costs associated with caring for the homeless, and save up

87. Colliver, *supra* note 86.

88. See Warrens War on Taxpayers, *supra* note 70.

89. See Montgomery County Living Wage Could Cost More Money and Jobs than Previously Thought, *supra* note 82.

90. Colliver, *supra* note 86.

91. *Id.*

92. Burnie Thompson, *Boosting Minimum Wage No Good Deed*, DAILY TROJAN (University of Southern California), Sept. 26, 2000.

93. Mark Wilson, *Increasing the Minimum Wage is Counterproductive in POVERTY: OPPOSING VIEWPOINTS* 135, 142 (Bruno Leone et al. eds., 1999).

94. See Vargas, *supra* note 63.

95. See Rosalinda DeJesus, *Hartford Living Wages Ordinance Discussed*, HARTFORD COURANT, May 18, 1999, at B1.

to 300 lives a year in the city.⁹⁶ Employers already paying living wages hail the low turnover and high quality work.⁹⁷ They also stress that citywide living wage laws will promote a healthier business climate by facilitating more responsible city contract competition—based on quality of service rather than shoddy pay.⁹⁸

Groundwork studies of living wage ordinances show that the pay increases create “a motivated, more productive and stable work force, which enhances a company’s ability to compete.”⁹⁹ This increase in productivity and morale also reduces absenteeism and turnover.¹⁰⁰ In addition, higher wages did not automatically translate into higher costs for city contracts following living wage legislation in Baltimore.¹⁰¹ In fact, increased costs affected business by less than two percent and have not eliminated jobs.¹⁰² The feared job relocation also has failed to materialize, as the nature of many city service jobs makes them difficult to relocate.¹⁰³ Even David Neumark, a longtime critic of the minimum wage, has recognized the overall positive impact of living wage laws.¹⁰⁴

An ongoing study of the Baltimore living wage reflects that it “has so far had a small but meaningful impact on the incomes and lives of affected workers.”¹⁰⁵ City costs stemming from increased wages have been inconsequential, and “the fears related to fiscal drag and a hypothesized erosion of competitiveness are evidently groundless . . . [T]he living wage

96. Sammon, *supra* note 5.

97. *Id.*

98. *Id.*

99. Perez, *supra* note 57.

100. Sammon, *supra* note 5 (noting Card & Krueger found that employers compensated for higher wages by improving management, cutting other costs, avoiding costs on turnover and recruitment expenses, and increasing returns on improved productivity based on a more motivated workforce).

101. Perez, *supra* note 57. *See also* Waldman, *supra* note 83 (regarding living wage laws in Los Angeles and New Orleans).

102. Waldman, *supra* note 83; Sammon, *supra* note 5.

103. Sammon, *supra* note 5. *See also* Moberg, *supra* note 3 (noting a city’s demand for services remains fixed for the most part, contractors often cannot leave the city, and employers leasing city space will often stay in their location).

104. Brull, *supra* note 7. Brull explains Neumark’s research, which contrasted a dozen cities with living wage laws with a group of cities without such ordinances. *Id.* Neumark found negligible job loss and substantial income gains among employees earning the lowest wages. *Id.* *See also* DAVID CARD & ALAN B. KRUEGER, MYTH AND MEASUREMENT: THE NEW ECONOMICS OF THE MINIMUM WAGE 389 (1995) (finding that minimum wage raises resulted in either no change or a positive shift in unemployment across many regions and job types); JEROLD WALTMAN, THE POLITICS OF THE MINIMUM WAGE 99 (2000) (noting that the beneficiaries of minimum wage increases include predominantly adults, not suburban teenagers earning spending money). *See id.* at 115 (establishing that little, if any, worker displacement results from such wage legislation).

105. NIEDT ET AL., *supra* note 49, at 32.

could be expanded into the private and nonprofit sectors without severely deleterious effects.”¹⁰⁶ Similarly, a study of living wages nationwide concluded “there is no reason why a municipal living wage ordinance should be seen as seriously burdensome for cities.”¹⁰⁷

III. LEGISLATORS’ OBLIGATION TO HEED THE CONSTITUTION

While empirical evidence suggests the prudence of moving toward a living wage, the constitutional case for mandating living wages presents a more difficult task. Judicial review of the constitutionality of legislation marks a fundamental characteristic of American constitutionalism. The officers of the legislative branch of the federal government, however, take an oath to uphold and support the Constitution.¹⁰⁸ This reality suggests a legislative duty to take the constitutionality of proposed legislation into account during the lawmaking process. Given this commitment, Paul Brest suggests that the conscientious legislator must ascertain how to meet this obligation—how to assess the constitutionality of proposed legislation.¹⁰⁹ Brest argues rational basis review upholding legislation that “furthers any reasonably conceivable legitimate objective to any extent”¹¹⁰ implies that courts presume a more rigorous legislative standard than minimum rationality to supplement the lawmaking process.¹¹¹

For example, in *San Antonio Independent School District v. Rodriguez*,¹¹² the Supreme Court applied rational basis review to uphold a statewide system that used property taxes to finance public education. The plaintiffs alleged that the scheme gave rise to disproportionately high tax rates in poor districts that bore inadequate funds for education, while wealthier districts enjoyed lower tax rates that yielded ample funds.¹¹³ The majority rejected strict judicial scrutiny based either on education as a

106. *Id.*

107. POLLIN, *supra* note 3, at 19. More specifically, Pollin and Luce write:

In short, municipal living wage policies are effective at delivering higher living standards for low-wage workers and their families; reducing government subsidy payments to these working families; and lowering turnover and absenteeism for firms with high concentrations of low-wage workers. At the same time . . . the costs of living wage programs can be readily diffused among firms, consumers, and municipal governments such that these costs need not be burdensome for any affected group.

Id. at 22.

108. U.S. CONST. art. VI, § 3.

109. See Paul Brest, *The Conscientious Legislator’s Guide to Constitutional Interpretation*, 27 STAN. L. REV. 585 (1975).

110. *Id.* at 595.

111. *Id.* at 598.

112. 411 U.S. 1 (1973).

113. See *id.* at 11–13.

fundamental right or poverty as a suspect classification.¹¹⁴ Justice Marshall dissented, promoting a sliding scale of judicial review that would select the appropriate level of scrutiny based on the importance of the asserted interest and the odiousness of the classification.¹¹⁵

Brest argues the majority holding could reflect *either* a substantive and definitive holding that the Equal Protection Clause demands no more than rational basis review in cases alleging the denial of education or invidious discrimination against the poor, *or* institutional incompetence to invalidate the financial scheme—a disinclination to second-guess the legislature’s best judgment—presuming legislators employed scrutiny more demanding than minimal rationality.¹¹⁶ In Brest’s view, “the equal protection clause neither compels nor forecloses Justice Marshall’s suggested interpretation.”¹¹⁷ Thus, Marshall’s criterion might guide legislative decisionmaking: “As the interests affected by legislation become more important and the classifications more invidious, the parochialism, self-interest, logrolling, and the like, that pervade the political process must yield to generally shared principles of fair treatment.”¹¹⁸ Provisions of the Constitution like the Equal Protection Clause recall the “government’s commitment to fairness and provide[] some counterweight to callousness and expediency.” In conclusion, Brest argues that the “very permissiveness of the rationality test may indicate that it is a standard of *judicial* review of a prior decision made on the basis of a more meaningful criterion.”¹¹⁹

Brest makes a strong case for the conscientious legislator’s obligation to consider the constitutionality of legislation. He also convincingly argues that deferential judicial review might presume stringent legislative scrutiny—buttressing the obligation conscientious legislators have to consider the Constitution. Brest, however, leaves some questions unanswered. His argument emphasizes that lawmakers should consider the constitutionality of proposed legislation that might infringe on constitutionally protected rights. More specifically, he ignores proposed legislation that the Constitution might substantiate because it affirmatively actualizes abstract constitutional principles such as equality or liberty.

A populist constitutional law perspective provides one framework that legislators might consider in transforming the Constitution into affirmative

114. *Id.* at 31.

115. Brest, *supra* note 109, at 598.

116. *See id.*

117. *Id.*

118. *Id.* at 599.

119. *Id.*

law. Richard Parker asserts that “democracy—its aspirations, its operations, its dangers—is what, most fundamentally our Constitution is *about*”¹²⁰ and that “[o]ur attitudes toward the political energy of ordinary people . . . shape our notions of what should be the mission of constitutional law.”¹²¹ This paradigm informs our designation of suitable sources for constitutional principles and the substantive content of constitutional law.¹²² Parker criticizes, however, the conflation of constitutional law over “ordinary law made by ordinary people.”¹²³ He suggests that “the animating *mission* of modern constitutional law is conventionally described as the correction of failures allegedly endemic to majority rule . . . to safeguard ‘The Individual’ or ‘minorities’ or even some governmental bodies . . . supposedly threatened by the force of ordinary political energy.”¹²⁴

The disinclination to make constitutional rights absolute and the sacredness with which we treat judicial review corroborate our Anti-Populist nature—our elevation of constitutional law over that derived from political energy.¹²⁵ Further, this inflated treatment of constitutional law has removed the development of constitutional law from ordinary citizens, placed unwarranted reliance on legal scholarship in the evolution of constitutional law, and made constitutional law inaccessible to everyday citizens.¹²⁶ Parker argues that “the elite attitudes nurturing . . . constitutional discourse are poisonous to our society and our polity.”¹²⁷ They destroy a sense of community and reinforce alienation of ordinary citizens from their own Constitution—making a mockery of our political form of government.¹²⁸

120. RICHARD D. PARKER, “HERE, THE PEOPLE RULE”: A CONSTITUTIONAL POPULIST MANIFESTO 4 (1994).

121. *Id.*

122. *See id.* at 5.

123. *Id.* at 66.

124. *Id.* at 69.

125. *See id.* at 70–71.

126. *See id.* at 73. Parker alludes to the historical social and economic elitism among lawmakers; his contemporary focus, however, emphasizes factors like education credentials and a feeling of disdain for the undereducated masses. *See id.* at 83–84.

127. *Id.* at 87.

128. *Id.* at 88. Parker goes on to argue that a reoriented constitutional law would “encourage the development of novel constitutional claims” and might ask whether officials “adequately opened the process to—and responded to—citizens other than professional ‘spokesmen’ and hand-picked ‘witnesses.’” *Id.* at 100–01. In addition, it would shift the focus in rights-based discussions from abstract discussion of the “right” in question to “how *effective* particular opportunities are for ordinary people.” *Id.* at 101. Finally, looking at the constitution from a populist perspective requires us to realize “that what is at the heart of constitutional argument is political controversy about democracy, about what it can be and what it should be . . . the terms of argument about it are not so different from

Parker builds on Brest's proposal that conscientious legislators possess a duty to consider the Constitution in lawmaking by placing legislators' obligation to consider the Constitution in a symbiotic relationship with populism. He lays a foundation for factoring politics into the constitutional law equation.

Mark Tushnet helps place the legislative duty that Brest addresses in a workable context with populist constitutional law. Tushnet reminds us that "the Constitution belongs to us collectively, as we act together in political dialogue with each other—whether we act in the streets, in the voting booths, or in legislatures as representatives of others."¹²⁹ He focuses on

the terms of ordinary political argument." *Id.* at 109. He concludes that "constitutions are not incompatible with the idea behind populism. They are *embedded* within it. For what is behind populism *is* the idea of political liberty: liberty to be shared equally among all." *Id.* at 114. Cass Sunstein asserts that relying on courts as the sole forum for pursuing social change weakens democracy. *See* Sunstein, *supra* note 11, at 145. He posits that "[t]he resort to politics tends to mobilize citizens on public matters, and the mobilization is good for individuals and society as a whole. It can inculcate political commitments, broader understandings, feelings of citizenship, and dedication to the community. An emphasis on the judiciary often compromises these values." *Id.*

129. MARK TUSHNET, *TAKING THE CONSTITUTION AWAY FROM THE COURTS* 181 (1999). Louis Fisher is considered a trailblazer on considering the Constitution outside of the courts. He posits a theory of coordinate construction, suggesting that "the President and members of Congress have both the authority and the competence to engage in constitutional interpretation . . . All three branches perform a valuable, broad, and ongoing function in helping to shape the meaning of the Constitution." LOUIS FISHER, *CONSTITUTIONAL DIALOGUES: INTERPRETATION AS POLITICAL PROCESS* 231–32 (1988). In addition to the oath that obligates officers of all three branches of our federal government to uphold the Constitution, Fisher points out that "[s]ome provisions of the Constitution are addressed explicitly to members of Congress and should not be evaded because of the availability of judicial review." *Id.* at 234. Beyond being a constitutional theory, Fisher argues that, "[g]iven the nature of our political system, [constitutional construction] is a necessity." *Id.* at 234. *See also* KEITH E. WHITTINGTON, *CONSTITUTIONAL CONSTRUCTION: DIVIDED POWERS AND CONSTITUTIONAL MEANING* (1999). In a mainly historical analysis that examines four different events in American history, which illustrates his constitutional construction thesis, Whittington argues the Constitution has a dual nature, including a legal element developed through judicial review and politics. *Id.* at 1. He suggests that "[t]he Constitution penetrates politics, shaping it from the inside and altering the outcomes." *Id.* Focusing primarily on the Constitution in a political sense in his book, Whittington asserts, that "the political Constitution operates within politics to empower and to bind political actors . . . Operating in this dimension, the Constitution is dependent on political actors, whether government officials or active citizens, both to formulate authoritative constitutional requirements and to enforce those settlements in the future." *Id.* at ix. Because of this fluid relationship between the Constitution and politics, the Constitution is constructed and reconstructed through political action. *See id.* In short, political actors face just as difficult a challenge as the judiciary in figuring out what the Constitution does and should mean. *See id.* at 2. This broad idea of constitutional construction comprises attempts to "resolve textual indeterminacies" and to "address constitutional subject matter." *Id.* at 9. *See also* STEPHEN M. GRIFFIN, *AMERICAN CONSTITUTIONALISM: FROM THEORY TO POLITICS* (1996) (arguing that American constitutionalism must encompass constitutional theory from both legal and political science perspectives because constitutionalism means performing government functions according to fundamental law); Howard Gillman, *From Fundamental Law to Constitutional Politics—and Back*, 23 *L. & Social Inquiry* 185 (1998) (reviewing Griffin's book). For a discussion of populist constitutional

what he calls the “thin Constitution,” or “its fundamental guarantees of equality . . . and liberty.”¹³⁰ He argues that “[t]he project [of] the Constitution . . . was the vindication of the Declaration’s principles: the principle that all people were created equal, the principle that all had inalienable rights.”¹³¹ Legislators should recognize their contribution to “populist constitutional law,” which “embodies a democratic commitment to carry out”¹³² the Declaration’s project—to establish justice and promote the general welfare.

Tushnet selects the Declaration of Independence and the Constitution’s Preamble as sources that determine the people’s vital interests.¹³³ More specifically, populist constitutional law “is a law committed to the principle of universal human rights justifiable by reason in the service of self-government.”¹³⁴ Thus, viewing the Constitution from a populist perspective, legislators will see the Constitution’s great relevance to many political issues.¹³⁵ While populist constitutionalism does not dictate the stance legislators must take on any issue—including economic justice—it creates a framework for principled political discussions and resolutions.¹³⁶ The principles of the Declaration dictate these parameters,¹³⁷ and political debate determines the details of what universal human rights require.¹³⁸

Tushnet persuasively extends Brest’s proposition that diligent legislators should give weight to the Constitution in the legislative process. He also fills in the gap Brest left by considering constitutional interpretation as a source of positive law rather than just a limiting principle where legislation might infringe fundamental rights. For Tushnet, the Declaration of Independence and the Preamble to the Constitution facilitate a more open and direct shaping of constitutional law by legislators and others.¹³⁹ He uses these sources to create a theoretical space in which legislators may engage in constitutional lawmaking and contribute to the

law exploring the competing ideas of “the people,” “their rights,” and “their powers” in the early republic, see DAVID P. CURRIE, *THE CONSTITUTION IN CONGRESS: THE FEDERALIST PERIOD, 1789–1801* (1997) and WAYNE. D. MOORE, *CONSTITUTIONAL RIGHTS AND POWERS OF THE PEOPLE* (1996).

130. TUSHNET, *supra* note 129, at 11.

131. *Id.*

132. *Id.* at 31–32.

133. *Id.* at 13.

134. *Id.* at 181.

135. *Id.* at 185.

136. *See id.*

137. *Id.*

138. *Id.* at 190.

139. *Id.* at 194.

development of constitutional law. In spite of this, Tushnet does not elaborate on what substantive sources of law legislators might use to enact constitutional law. Instead, he promotes a principled procedural framework.

Together, Brest and Tushnet illustrate that legislators have a clear duty to consider the Constitution in creating legislation. Brest encourages legislators to consider whether proposed legislation will infringe constitutional guarantees or fundamental rights. Tushnet promotes legislative involvement in populist constitutional law or a principled political debate that takes the principles of the Declaration of Independence seriously. These points help to uncover the project of this Note. Once we understand the legislative responsibility to consider the Constitution in lawmaking, Tushnet allows us to set living wage legislation in a political debate framed by the principles of the Declaration of Independence. Taking this argument structure seriously, this Note uses constitutional and comparative arguments to develop a substantive vision of justice to argue that living wage legislation is constitutional in the Tushnet sense. In other words, such laws establish justice, promote the general welfare, and facilitate the pursuit of happiness for the working poor. They reflect a commitment to the inalienable rights of humankind justifiable by reason—a substantive vision of justice—in the service of self-government.

IV. BEGINNING TO BUILD A SUBSTANTIVE VISION OF JUSTICE

American legal scholars continue to construct arguments in opposition to the Supreme Court's jurisprudential approach to poverty.¹⁴⁰ These arguments, however, help construct a substantive vision of justice that will inform the conscientious legislator's obligation to consider the Constitution in exercising her lawmaking duties. In particular, the substantive vision of justice to which they contribute aids an argument that living wage laws help actualize the foundational principles of the Declaration of Independence, helping to carry out the project of populist constitutional law. Thus, legislators should pay close attention to this vision and give voice to it through legislation.

140. See, e.g., JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 59 (1980) (arguing that the Court's exclusion of social or economic rights from the constitutionally protected category of fundamental rights is unsurprising, as judges tend to advance ideals commonly held by the upper-middle, professional class from which many lawyers and judges originate.) Thus, the values the Court protects seem the usual suspects for vital civic rights, "[b]ut watch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food or housing: those are important, sure, but they aren't *fundamental*." *Id.*

Black derives his vision of economic justice from the Declaration of Independence and the Preamble of the Constitution, as well as the Ninth Amendment. He argues for a “constitutional justice of livelihood,” or a decent material basis for life, from these sources.¹⁴¹ Specifically, Black challenges: “Can we, the inheritors of the Declaration, of the treasure of its words, dare to treat [‘the pursuit of happiness’] as semantically blank, as mere burnished orotundity without reference?”¹⁴² He answers that the right to such a pursuit coincides with “the right to be in a situation where that pursuit has some reasonable and continually refreshed chance of attaining its goal.”¹⁴³ Black posits that, “[t]he lack of [a decent material basis for life]—the thing we call ‘poverty’—is overwhelmingly, in the whole human world, the commonest, the grimmest, the stubbornest obstacle we know to the pursuit of happiness.”¹⁴⁴ Thus, Black marks a decent material basis for life as an essential possession in a just society. In moving toward this constitutional justice of livelihood, we must institute “a constitutionally based system of human rights that takes into account at last all the needs of humanity for life spiritual and physical”¹⁴⁵

Edelman alternatively argues for a survival or subsistence income.¹⁴⁶ He argues that this right emanates from two sources: morality and the Constitution.¹⁴⁷ Edelman develops his morality argument by defining “human rights as those conditions necessary for human self-realization.” His reasoning suggests since all humans possess identical physical needs in order to act, then, logically, all people must have a right to shelter, food, and clothing.¹⁴⁸ To support his constitutional contention, Edelman presents two claims. First, he puts forth a substantive due process argument that a survival income “is an obligation which has been implicit in our constitutional structure all along, or at least since the American polity has had enough resources to share its wealth more equitably.”¹⁴⁹ Second, he asserts an equal protection theory that such an obligation “has been acquired as a consequence of the government’s historic and continuing complicity in economic arrangements that foreseeably resulted in the

141. Charles L. Black, *Further Reflections on the Constitutional Justice of Livelihood: Rubin Lecture at the Columbia Law School, 20 March 1986*, 86 COLUM. L. REV. 1103, 1104–05 (1986).

142. *Id.* at 1105.

143. *Id.* at 1106.

144. *Id.*

145. *Id.* at 1117 (emphasis omitted).

146. Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 3 (1987).

147. *See id.* at 19–25.

148. *Id.* at 22.

149. *Id.* at 5.

current misdistribution.”¹⁵⁰ Thus, for Edelman, justice in a contemporary society includes “a societal obligation to assure survival . . . at a more generous level than a bed in a homeless shelter and meals at a soup kitchen.”¹⁵¹ In short, his substantive vision of justice requires subsistence.

Finally, Michelman advocates a constitutionally required “minimum protection against economic hazard” for those who suffer deprivation of “basic wants.”¹⁵² Using the Equal Protection Clause, he shifts his focus from equality to minimum welfare or deprivation in an “individualistic, competitive, and market-oriented” society.¹⁵³ Michelman’s vision of social justice relies upon a theory of “just wants.”¹⁵⁴ More specifically, minimum protection “would mean that persons are entitled to have certain wants satisfied—certain existing needs filled”¹⁵⁵ While Michelman promotes “a right to have a *specific, existing want* provided for” rather than increased income, his ideas inform a more expansive view of justice. He posits that “justice requires *more* than a fair opportunity to realize an income which can cover [just wants] or insure against them—requires . . . absolute assurance that they will be met . . . free of any remote contingencies pertaining to effort, thrift or foresight.”¹⁵⁶

Together, Black, Edelman, and Michelman contend that justice in a contemporary constitutional democracy requires income sufficient to provide the common physical needs of humanity, subsistence, or the provision of just wants.¹⁵⁷ Each of these theorists presents a strong case to argue against poverty in general, supporting a comprehensive vision of

150. *Id.*

151. *Id.* at 3.

152. Frank I. Michelman, *The Supreme Court 1968 Term: Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 Harv. L. Rev. 7, 13 (1969).

153. *Id.* at 9.

154. *Id.* at 13.

155. *Id.*

156. *Id.* at 14.

157. For other creative arguments in support of social and economic rights, see Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065 (1977) (arguing that *National League of Cities v. Usery*, which invalidated the 1974 amendments to the Fair Labor Standards Act that extended the minimum wage and maximum hour provisions to government employees on federalism grounds, can be read as limiting federal encroachment on state budgets in order to protect certain individual rights to basic government services in areas such as public health, sanitation, and fire and police protection); KENNETH L. KARST, *Citizenship, Race, and Marginality*, in BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION 125 (1989) (suggesting that our responsibility as equal citizens requires us to fight poverty and the consequences of economic injustice); and Mark Tushnet, *Civil Rights and Social Rights: The Future of the Reconstruction Amendments*, 25 LOY. L.A. L. REV. 1207 (1992) (recommending that we reorient our conceptualization of social and economic rights as not distinct from, but inextricably linked with, civil rights).

economic justice. Each of their assertions has even more force, however, when applied to the working poor specifically. Opponents to the above arguments might allege that the government owes no affirmative duty to provide positive rights and challenge that doing so will undermine individual responsibility and incentives to work. These objections lose force, however, in the debate surrounding substandard wages that create conditions of persistent poverty for the working poor. Guaranteeing a subsistence income for the working poor or actualizing a just wants theory would neither amount to government handouts, nor create work disincentives. Instead, such arguments buttress living wage activists' claims that work should never advance destitution in a just society.

V. A COMPARATIVE ANALYSIS: INFORMING A SUBSTANTIVE VISION OF JUSTICE

In spite of the convincing moral and constitutional arguments in support of fighting poverty, the American working poor continue to suffer at the mercy of substandard minimum wages. This debate does not end, however, within the confines of American borders. Constitutional democracies abroad continue to struggle with the constitutional requirement of living wages and other social and economic rights.

The discourse about these struggles—found in international judicial opinions and constitutional texts—provides refreshing and fruitful contributions to our domestic fight for economic justice and informs the substantive vision of justice derived from American legal theory and documents.¹⁵⁸ For example, the treatment of social welfare rights and living wage guarantees in the international context dares us to question our conception of justice and suggests how we might improve this definition to realize universal human rights at home.

158. The United States Supreme Court has been reluctant to examine foreign constitutional principles despite the value of doing so. Vijayashri Sripati, *Toward Fifty Years of Constitutionalism and Fundamental Rights in India: Looking Back to See Ahead (1950–2000)*, 14 AM. U. INT'L. L. REV. 413, 418 (1998); Rebecca Lefler, Note, *A Comparison of Comparison: Use of Foreign Case Law As Persuasive Authority by the United States Supreme Court, the Supreme Court of Canada, and the High Court of Australia* 11 S. CAL. INTERDISC. L.J., (forthcoming 2002) (arguing the American courts have resisted employing foreign comparative law, resulting in stilted legal interpretation, reasoning, and thought in the United States). For more information on comparativism, see PETER DE CRUZ, *COMPARATIVE LAW IN A CHANGING WORLD* (2d. ed. 2000) (defining comparative law, elaborating on its contemporary significance, and illustrating various techniques of and uses for comparative law); GEORGE E. GLOS, *COMPARATIVE LAW* (1979) (providing an informational review of the civil, criminal, and administrative legal structures in various countries); BERNHARD GROSSFELD, *THE STRENGTH AND WEAKNESS OF COMPARATIVE LAW* (Tony Weir, trans. 1990) (demonstrating the contributions of comparative law in Germany as well as its failures).

While informative, no comparative project will uncover universal truths about justice, nor will it confirm or refute methods to approach questions as troublesome as living wage legislation or what economic justice in a contemporary civil society requires.¹⁵⁹ Rather, a worthwhile comparative analysis calls on us to realize the political, economic, historical, and linguistic circumstances affecting legal development in each country examined.¹⁶⁰ To avoid projecting an essentialist, American view onto other countries' methodologies in this process, this Note attempts to gain some distance from ingrained ideas about American constitutionalism and justice as well as accompanying assumptions, bigotry, and ignorance.¹⁶¹ Simultaneously, the importance of cultural and contextual differences among American, Indian, and South African law underscores the inevitable impact of subjectivity.¹⁶² Ultimately, all ideas about the living wage, poverty, and economic justice emanate from cultural constructions and a particular positionality.¹⁶³ Nevertheless, this comparative exercise helps inform a substantive understanding of justice derived from American legal scholars, which might guide conscientious legislators in how to consider the Constitution.

Before beginning this comparative enterprise, however, this Note must respond to anticipated objections. Contenders will argue that American legislators need only consider conceptions of justice taken from American texts and theories. They will challenge that notwithstanding coherent visions of justice or reasonable arguments about what human dignity requires, the American people constituted themselves as a particular people, subject to the aspirations and commitments outlined in the Declaration of Independence and U.S. Constitution. Thus, neither the text of the Indian Constitution, nor the holdings of the South African Constitutional Court bear on the way in which American legislators respect the United States Constitution. Further, looking comparatively displaces reliance on our own constitutional authorities and amounts to an illegitimate project.

Two responses counter these objections. Considering international understandings of justice might help us to think about issues that we would not have contemplated had we constricted our scope to American texts and

159. See MARY ANN GLENDON, MICHAEL W. GORDON, & PAOLO G. CAROZZA, *COMPARATIVE LEGAL TRADITIONS IN A NUTSHELL* 4 (2d ed. 1999).

160. See Gunter Frankenburg, *Critical Comparisons: Re-Thinking Comparative Law*, 26 HARV. INT'L. L.J. 411, 412 (1985).

161. See *id.* at 414.

162. See *id.*

163. See GLENDON, *supra* note 159, at 6–7.

theories. Looking internationally helps discern what substantive vision of justice will best help domestic legislators to realize universal human rights and dignity. Moreover, the constitutional text, judicial opinions, and legislation in the United States have dealt less extensively with the plight of the working poor and other poverty-stricken peoples than have India and South Africa. Therefore, it makes sense to examine how other countries have attempted to address the same issues and inform a substantive vision of justice by drawing upon their experiences. In fact, deciding to ignore potentially instructive models might leave this analysis artificially undeveloped and would exclude American contributions to the global dialogue about poverty-based rights.

Looking internationally has pragmatic force as well. First, the living wage movement will continue to take on an international force as the Internet and “exploitable” labor eliminate economic isolationism, expand our market economy into an integrated network, and dictate a worldwide dignified wage. Thus, an internationally informed vision of justice makes sense because legislation emanating from it will have an impact beyond domestic waged workers. Second, a successful grassroots effort to create widespread public acceptance of the living wage will require education and a strong appeal to passionately held values, such as human dignity and individual self worth. While one recent survey indicated that forty-two percent of American adults cite “lack of living-wage jobs” as the “most serious problem facing communities today,”¹⁶⁴ the general political consensus seems to belie such widespread concern. Activists might find helpful language, theory, and doctrinal support in the constitutional language and judicial reasoning of India and South Africa to build a public consensus in support of a living wage. Third, a comparative approach might garner empirical data to help create workable legislation that can negotiate efficiency, economic, and other practical objections.

A. INDIA

When India drafted its Constitution more than fifty years ago, the country was concurrently emerging from British colonial rule¹⁶⁵ and attempting to transform itself into a constitutional democracy committed to

164. *USA Today Snapshots: Community Concerns: Adults Say These Are the Most Serious Problems Facing Communities Today*, U.S.A. TODAY, March 6, 2001, at 8D.

165. Sripati, *supra* note 158, at 415.

social welfare.¹⁶⁶ The worldwide concern with human rights following the Holocaust¹⁶⁷ and newly realized Indian independence both contributed to a constitutional text exceptionally committed to democracy, equality, and justice.¹⁶⁸ The preamble of the Constitution, which declares India a “sovereign socialist secular democratic republic,”¹⁶⁹ reinforces this justice-oriented obligation and departure from caste organization.¹⁷⁰

India provides an interesting contribution to our quest to build a substantive vision of justice. The drafters of the Indian Constitution directly borrowed Part IV, Directive Principles of State Policy, from the Constitution of Ireland.¹⁷¹ Part IV of the Constitution of India directly addresses issues of state accountability for socioeconomic objectives.¹⁷² Article 43 demands, “[t]he state shall endeavor to secure, by suitable legislation or economic *organisation* or in any other way, to all workers agricultural, industrial or otherwise, work, a living wage, conditions of

166. *Id.* at 467. For background on India, see MARC GALANTER, *LAW AND SOCIETY IN MODERN INDIA* (1989). See also Jamie Cassels, *Bitter Knowledge, Vibrant Action: Reflections of Law and Society in India*, 1991 WIS. L. REV. 109 (reviewing Galanter’s book).

167. Sripati, *supra* note 158, at 415.

168. *Id.* at 420–21.

169. INDIA CONST. pmb. (amended 1976).

170. The preamble reads:

We, the people of India, having solemnly resolved to constitute India into a sovereign socialist secular democratic republic and to secure all its citizens: justice, social, economic and political; liberty of thought, expression, belief, faith and worship; equality of status and of opportunity; and to promote among them all fraternity assuring the dignity of the individual and the [unity and integrity of the Nation].

Id.

171. GERARD HOGAN & GERRY WHYTE, *THE IRISH CONSTITUTION* 1118 (J.M. Kelly 3d ed. 1994); M.P. JAIN, *INDIAN CONSTITUTIONAL LAW* 2 (3d ed. 1978). Ireland transitioned to a constitutional democracy in 1937. FRANCIS X. BEYTAGH, *CONSTITUTIONALISM IN CONTEMPORARY IRELAND: AN AMERICAN PERSPECTIVE* 4 (1997). The Indian Constitution adopted language and ideas from the Constitution of Ireland. For example, Article 45 of the Irish Constitution mandates that the government shall “strive to promote the welfare of the whole people by securing and protecting . . . a social order in which justice and charity shall inform all the institutions of national life.” Art. 45 (1), Constitution of Ireland, 1937. Specifically, the government must ensure that Irish citizens “. . . (all of whom, men and women equally, have the right to an adequate means of livelihood) may through their occupations find the means of making reasonable provision for their domestic needs.” *Id.* at Art. 45 (2)(i). Further, the legislature should promote a distribution of material resources in society “as best to *subserve* the common good” and guard against a free economic market that would “result in the concentration of the ownership or control of essential commodities in a few individuals to the common detriment.” *Id.* at Art. 45(2)(ii)–(iii). In addition, the legislature shall endeavor to create “economic security” for as many families as possible. *Id.* at Art. 45(2)(v). Finally, Article 45 instructs the state to protect the “economic interests of the weaker sections of the community,” to assist the “widow, the orphan, and the aged” as needed, and to protect the health of all laborers, ensuring that “citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age, or strength.” *Id.* at Art. 45(4)(i)–(ii).

172. Sripati, *supra* note 158, at 467.

work ensuring a decent standard of life and full enjoyment of leisure and social and cultural opportunities”¹⁷³ Other sections of Part IV also tackle corollary economic justice principles.

For example, Article 38 imposes an affirmative duty on the state “to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.”¹⁷⁴ In addition, the Constitution mandates that the government “strive to minimize the inequalities in income.”¹⁷⁵ Finally, Article 39 commands the government to secure “the ownership and control of the material resources of the community are so distributed as best to *subserve* the common good . . . [and] that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.”¹⁷⁶

While these sections clearly outline India’s dedication to advancing a social welfare state, these economic justice provisions remain excluded from judicial review.¹⁷⁷ The writers of the Indian Constitution created these affirmative obligations on the state as non-justiciable guarantees based on the practical reality that the government confronts limited resources.¹⁷⁸

Lack of judicial review, however, should not deem the socioeconomic rights in the Indian Constitution any less essential to the organization, governance, or vision of justice in India than judicially enforceable fundamental rights.¹⁷⁹ Though not directly enforceable in a court of law as unfulfilled demands on the government, these socioeconomic rights remain

173. INDIA CONST., pt. IV, art. 43.

174. *Id.* at pt. IV, art. 38.

175. *Id.*

176. *Id.* at pt. IV, art. 39(b)–(c).

177. *Id.* at pt. IV, art. 37 (“The provisions contained in this Part shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws.”). The Supreme Court of India refers to and interprets the Directive Principles, which require a living wage, as fundamental to the constitutional analysis of the legislation in question. *See Sripati, supra* note 158, at 425; notes 184–98 and accompanying text (discussing India living wage cases). These cases suggest that these Directive Principles serve both as a guide to legislators in enacting national laws and to the courts in interpreting the constitutionality of those laws.

178. M.P. JAIN, *supra* note 171, at 595.

179. Sripati, *supra* note 158, at 425. *See also Olga Tellis v. Bombay Municipal Corporation*, A.I.R. 1986 S.C. 180, 190 (noting that “[s]ocial commitment is the quintessence of our Constitution which defines the conditions under which liberty has to be enjoyed and justice has to be administered. Therefore, Directive Principles, which are fundamental to the governance of the country, must serve as a beacon light to the interpretation of the constitutional provisions”).

binding directives on the state through legislation and policy, and the Supreme Court of India has used the directive principles as sources of social philosophy in statutory interpretation.¹⁸⁰ The Supreme Court also has read the rights outlined in this “Social Document”¹⁸¹ as integrated and harmonious with the fundamental rights provisions of the Constitution.¹⁸² In addition to the willingness of the judiciary to use the directive principles as an interpretative guide toward justice, amendments to the Indian Constitution have granted primacy to the socioeconomic directive principles over the fundamental rights to equality before the law and free speech.¹⁸³

In 1961, the Indian Supreme Court addressed the issue of the living wage in detail for the first time. In *Standard Vacuum Refining Co. of India v. Its Workmen*,¹⁸⁴ the Court declared that “the doctrine of a welfare State is based on notions of progressive social philosophy which have rendered the old doctrine of laissez faire obsolete.”¹⁸⁵ In reviewing a wage disagreement under the Industrial Disputes Act of 1947, the opinion recounts that while economic concepts of supply and demand governed nineteenth century labor relationships in India, contemporary wage structures require considerations of “right and wrong, propriety and impropriety, fairness and unfairness” according to the social conscience of the community.¹⁸⁶ Thus, over time, India will become more attuned to its welfare policy, the economy will progress, and employee wages clearly will require considerations beyond arithmetical calculations.¹⁸⁷

In *Standard Vacuum*, the Court considered an Industrial Truce Resolution passed by the government, business, and labor in 1947 and approved by the federal government in the same year.¹⁸⁸ The resolution indicated that “increase in production was not possible unless there was just

180. *Mumbai Kamgar Sabha v. Abdulbhai*, A.I.R. 1976 S.C. 1455, 1465. *See also infra* notes 184–98 and accompanying text.

181. *Sripati*, *supra* note 158, at 425.

182. *V. Parthasarathi v. Tamil Nadu*, A.I.R. 1974 Mad. 76, 83–84; *Sripati*, *supra* note 158, at 448 (discussing a 1992 Supreme Court case, *Jain v. State of Karnataka*, A.I.R. 1992 S.C. 1858, in which the Court held that the socioeconomic right to education provided for in Article 41 was vital to the fundamental right to a life of dignity, meaning that private schools charging inflated tuition to exclude the poor did so in violation of the Constitution).

183. M.P. JAIN, *supra* note 171, at 570–71, 597. *See also* INDIA CONST. pt. III, art. 31(C).

184. A.I.R. 1961 S.C. 895.

185. *Id.* at 899.

186. *Id.*

187. *Id.*

188. *Id.* at 900–01. *See also* *All India Reserve Bank Employees' Ass'n v. Reserve Bank India*, A.I.R. 1966 S.C. 305, 316 (1965).

remuneration to capital (fair return), just remuneration to labour (fair wages) and fair prices for the consumer.”¹⁸⁹ The government set up a committee upon approving the resolution to explore the division of the Indian industrial wage structure into three categories: the basic minimum wage, the fair wage, and the living wage.¹⁹⁰ While indefinable and elastic, the Court noted that the minimum wage parallels the poverty level, the fair wage meets subsistence, and the living wage amounts to comfort or a life of decency.¹⁹¹ The Court refused, however, to define the living wage “in terms of rupees, annas and pies” because the wage depends upon development and change in the national economy.¹⁹² The opinion focused instead on defining what a living wage means in terms of socioeconomic justice rather than strictly mathematical terms.

The Indian Supreme Court elaborated on the meaning of the living wage five years later in *All India Reserve Bank Employees’ Association v. Bank of India*.¹⁹³ In this case, employees of a government-owned and controlled bank sued their government employer, alleging inadequate wages.¹⁹⁴ The *All India Reserve Bank* Court recognized the wage delineations considered in *Standard Vacuum*. The Court reconfirmed this wage structure and defined the living wage as one at which “every male earner should be able to provide for his family not only the essentials but a fair measure of frugal comfort and an ability to provide for old age or evil days.”¹⁹⁵

All India Reserve Bank reaffirmed that the minimum wage measures the absolute wage floor, “the lowest wage in the scale below which the efficiency of the worker was likely to be impaired” and “allowing living at

189. *All India Reserve Bank Employees’ Ass’n*, A.I.R. 1966 S.C. at 316.

190. *Id.*

191. *Standard Vacuum Ref. Co. of India*, A.I.R. 1961 S.C. at 900. More specifically, the Court looks at the conclusions of the Report of the Committee on Fair Wages resulting from the Industrial Truce Resolution. The report suggests that a living wage

[R]epresents a slightly higher level than that of subsistence, providing not only for the material needs of food, shelter and body covering, but also for certain comforts such as clothing sufficient for bodily comfort and to maintain the wearer’s instinct of self-respect and decency, some insurance against the more important misfortunes—death, disability and fire—good education for the children, some amusement and some expenditure for self development.

Id. In addition, the Report adopted the general views of the Royal Commission on the basic wage for the Commonwealth of Australia that “the minimum wage must provide not merely for the bare sustenance of life but for the preservation of the efficiency of the worker. For this purpose the minimum wage must also provide for some measure of education, medical requirements and amenities.” *Id.* at 901.

192. *Id.* at 901.

193. A.I.R. 1966 S.C. 305 (1965).

194. *Id.* at 308.

195. *Id.* at 316.

a standard considered socially, medically and ethically to be the acceptable minimum.”¹⁹⁶ Finally, the Court implicitly reaffirmed an earlier holding that “[n]o industry has a right to exist unless it is able to pay its workman at least a bare minimum wage,” supporting the idea that “the employment of labour on starvation wages cannot be encouraged or favoured in a modern democratic welfare state.”¹⁹⁷

Despite these affirmations, the Supreme Court recognized the tension between the constitutional goal of realizing justice through the living wage and its economic reality in *All India Reserve Bank*. In discussing Article 43’s living wage provision, the Court wrote: “It may thus be taken that our political aim is ‘living wage’ though in actual practice living wage has been an ideal which has eluded our efforts . . . Our general wage structure has at best reached the lower levels of fair wage”¹⁹⁸ The Court recognized that the Constitution instructs the government to fulfill specific socioeconomic policy directives through legislation or other means. At the same time, the Court realized that the well-intentioned economic justice philosophy laid out in the Constitution remained disconnected from the actual wages Indian industrial workers earn. Despite this admission, the holding maintained a steadfast commitment to the living wage ideal. The Court suggested that it anticipated the realization of living wages in the future, hinting that employers may not deny the living wage when the economy can sustain it.

In addition to the specific constitutional right to a living wage, the Indian Supreme Court has used other constitutional provisions to guarantee socioeconomic rights, further informing a substantive vision of justice. Part III of the Indian Constitution delineates justiciable fundamental rights.¹⁹⁹ In *Ghandi v. Union of India*,²⁰⁰ the Supreme Court explored the meaning of the fundamental right protecting life and personal liberty. Article 21 demands that “[n]o person shall be deprived of his life or

196. *Id.*

197. *Crown Aluminum Works v. Their Workmen*, A.I.R. 1958 S.C. 30, 34. *See also Standard Vacuum Ref. Co. of India*, A.I.R. 1961 S.C. at 899 (reiterating that employers who cannot pay the minimum basic wage have no right to engage in their industry and that the purchasing of labor at substandard wages that one might find in underdeveloped countries based simply on economic principles of supply and demand has no place in a social welfare state like India where each worker is entitled to a wage of dignity).

198. *All India Reserve Bank Employees’ Ass’n*, A.I.R. 1966 S.C. at 317.

199. Examples include the right to equality, the right to freedom, the right against exploitation, the right to freedom of religion, cultural and education rights, the right to property, and the right to constitutional remedies.

200. A.I.R. 1978 S.C. 597.

personal liberty except according to procedure established by law.”²⁰¹ Until *Ghandi*, the Court failed to use an expansive perspective in interpreting this fundamental right.²⁰² Here, however, the Court finally widened the scope and content of personal liberty protected under the Constitution.²⁰³

First, *Ghandi* noted that the fundamental rights embodied in Part III of the Constitution express respect for the individual and his or her self-development.²⁰⁴ With this liberal view of the fundamental rights provisions, the Court set out to consider the meaning of “personal liberty” and “procedure prescribed by law.”²⁰⁵ The Court held that no deprivation of life or personal liberty may be extracted with an “arbitrary, unfair or unreasonable . . . oppressive or unjust” procedure.²⁰⁶ In short, the Court must find the procedure at least reasonable.²⁰⁷

Following *Ghandi*, the Court utilized the constitutional right to life and personal liberty to protect socioeconomic rights. In the same year, the Court reiterated the crucial importance of fair procedure in the deprivation of life or liberty in *Hoskot v. Maharashtra*.²⁰⁸ Specifically, the Court held that procedures must be “fair, not foolish, carefully designed to effectuate, not to subvert, the substantive right itself. Thus understood, ‘procedure’ must rule out anything arbitrary, freakish or bizarre Procedural safeguards are the indispensable essence of liberty.”²⁰⁹ The majority concluded that fair procedure comprises “natural justice” and requires an indigent prisoner’s right to free legal services.²¹⁰

The Court’s commitment to economic justice exceeds free legal representation for indigent criminal defendants. The Supreme Court next broadened the scope of life beyond mere bodily protection in *Francis Coralie Mullin v. Union Territory of Delhi*.²¹¹ The Court wrote:

[T]he right to life includes the right to live with human dignity and all that goes along with it, namely, the bare necessities of life such as adequate nutrition, clothing and shelter over the head and facilities for

201. INDIA CONST., pt. III, art. 21.

202. Sripati, *supra* note 158, at 444–42.

203. *Id.* at 442.

204. *Ghandi*, A.I.R. 1978 S.C. at 620.

205. *Id.* at 619.

206. *Id.* at 622.

207. *Id.*

208. A.I.R. 1978 S.C. 1548.

209. *Id.* at 1553.

210. *Id.* at 1554.

211. A.I.R. 1981 S.C. 746.

reading, writing and expressing oneself in diverse forms, freely moving about and mixing and commingling with fellow human beings.²¹²

While the Court recognized that the magnitude and extent of such rights depended upon the economic viability of sustaining them, it also held that an affirmative act infringing the right to human dignity violates the constitutional protection of the right to life.²¹³

In addition to dignity, the Indian Supreme Court held that the right to life includes the right to livelihood in *Olga Tellis v. Bombay Municipal Corporation*.²¹⁴ In this case, the plaintiffs included pavement and slum dwellers.²¹⁵ These destitute people, forced to flock to Bombay in search of work, alleged that the municipal eviction of pavement dwellers and the destruction of slums deprived them of their right to life.²¹⁶ They asserted that the constitutionally guaranteed right to life included the right to livelihood.²¹⁷ The evictions from their homes, which precluded them from continuing to live near their places of work, amounted to a deprivation of life.²¹⁸ The Court upheld the plaintiffs' contentions, writing that "no person can live without the means of living . . . the means of livelihood."²¹⁹ Without protecting the right to livelihood as part of the right to life, the Court feared that continued, systematic deprivations of the right to livelihood would result in the wholesale denial of the right to life for pavement and slum dwellers.²²⁰

The Indian Constitution also guarantees the right against exploitation, specifically guarding against traffic in human beings and forced labor.²²¹ Using this provision, *People's Union for Democratic Rights v. Union of India* held that paying substandard wages, or those less than the minimum wage, amounts to forced labor.²²² The Court reasoned that labor by force results from physical force or violence, legal provisions, or "hunger and poverty, want and destitution."²²³ The majority deduced that:

212. *Id.* at 753.

213. *Id.*

214. A.I.R. 1986 S.C. 180, 195–96.

215. *Id.* at 183.

216. *Id.* at 193.

217. *Id.*

218. *Id.*

219. *Id.*

220. *Id.* at 193–94.

221. INDIA CONST. art. 23, which reads: "Traffic in human beings . . . and other similar forms of forced labour are prohibited and any contravention of this provision shall be an offence punishable in accordance with law."

222. A.I.R. 1982 S.C. 1473, 1490.

223. *Id.* at 1490.

[w]here a person is suffering from hunger or starvation . . . where utter grinding poverty has broken his back and reduced him to a state of helplessness and despair . . . he would have no choice but to accept any work that comes his way, even if the remuneration offered . . . is less than the minimum wage.”²²⁴

The Court recognized the duty incumbent upon it to “advance the socio-economic objective of the Constitution” and to recognize the survival pressures inherent in a capitalist economy.²²⁵ Thus, “force” must be interpreted to include compulsion to accept less in pay than the amount to which one is constitutionally entitled.²²⁶

The Supreme Court of India has constructed a multi-textured vision of socioeconomic justice through its holdings on the living wage and other constitutional provisions. In addition to case law and its willingness to use the non-justiciable Directive Principles as an interpretative tool, the Court has employed other creative methodologies to build upon its conception of justice. In the 1970s, the Indian judiciary led a silent movement called the Social Action Litigation or Public Interest Litigation Movement, which produced innovative procedural advancements.²²⁷ First, the Indian courts enlarged the concept of *locus standi*, relaxing previous requirements of personal harm.²²⁸ In brief, where an individual or group suffers a constitutional violation or deprivation of a legal right, and the individual or group is “by reason of poverty, helplessness, or disability or socially or economically disadvantaged position unable to approach the Court for relief” any public citizen may bring an action in court.²²⁹ Second, the Indian judiciary established the concept of epistolary jurisdiction, allowing the Court to forego formal jurisdictional rules when freedom is at stake.²³⁰ Thus, the judiciary of India employs procedural innovations to continue to develop and fulfill its vision of justice.

224. *Id.*

225. *Id.*

226. *Id.*

227. Sripati, *supra* note 158, at 453. See also Carl Baar, *Social Action Litigation in India: The Operation and Limits of the World's Most Active Judiciary*, in *COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY* 78 (Donald W. Jackson & C. Neal Tate eds., 1992); Jeremy Cooper, *Poverty and Constitutional Justice: The Indian Experience*, 44 *MERCER L. REV.* 611 (1993) (discussing the Indian Supreme Court's willingness to grant relief where doing so will advance the goal of social justice, including in the Social Action Litigation movement).

228. Sripati, *supra* note 158, at 454.

229. *Id.*

230. *Id.* at 455. The Supreme Court of India heard *Olga Tellis* on such a theory. *Id.* at 456 n.253.

In *People's Union for Democratic Rights*, the Court elaborated on the importance of public interest litigation.²³¹ The Court acknowledged that the rule of law should not be “prostituted by the vested interests for protecting and upholding the status quo Large numbers . . . are today living a sub-human existence in conditions of abject poverty, utter grinding poverty has broken their back and sapped their moral *fibres*.”²³² The Court recognized its own duty to help “restructure the social and economic order so that [the poor] may be able to *realise* . . . economic, social and cultural rights.”²³³ The Court hailed the executive and legislative branches as appropriate provinces for addressing socioeconomic issues but declared itself a partner in this collaborative effort.²³⁴ Finally, the Court rejected claims that public interest litigation sacrifices judicial economy, noting that cases asserting the rights of the vulnerable are essential to social and economic justice—values integral to India’s social welfare democracy.²³⁵

B. SOUTH AFRICA

The Constitution of South Africa provides different insight because it does not textually provide for the right to a living wage. Alternatively, the New Constitution secures a number of judicially enforceable social welfare rights, which help inform a substantive vision of justice.²³⁶ South Africa transitioned from a parliamentary democracy to a constitutional democracy in 1994.²³⁷ The debate concerning the inclusion of social welfare rights in South Africa’s New Constitution began with the end of apartheid, the creation of an Interim Constitution, and the first free, democratic elections ever held in South Africa.²³⁸ Thus, South Africa illustrates the possibilities for economic justice through contemporary constitutionalism, especially in the wake of healing from a divisive political history.

South Africa’s Interim Constitution provided for the creation of a Constitutional Assembly charged with drafting the New Constitution,

231. *People's Union for Democratic Rights*, A.I.R. 1982 S.C. at 1476–79.

232. *Id.* at 1477 (emphasis added).

233. *Id.* (emphasis added).

234. *Id.*

235. *Id.* at 1478.

236. See Shadrack B. O. Gutto, *Beyond Justiciability: Challenges of Implementing/Enforcing Socio-Economic Rights in South Africa*, 4 BUFF. HUM. RTS. L. REV. 79, 89 (1998).

237. Jeremy Sarkin, *The Effect of Constitutional Borrowings on the Drafting of South Africa's Bill of Rights and Interpretation of Human Rights Provisions*, 1 U. PA. J. CONST. L. 176, 178 (1998).

238. See Randal S. Jeffrey, *Social and Economic Rights in the South African Constitution: Legal Consequences and Practical Considerations*, 27 COLUM. J.L. & SOC. PROBS. 1, 2 (1993).

which came into effect in February of 1997.²³⁹ Never before had South Africans enjoyed justiciable rights of any kind, and various political factions agreed to the inclusion of a constitutionally entrenched Bill of Rights in the Interim Constitution.²⁴⁰ The leading political parties disagreed, however, about how the New Constitution should treat socioeconomic rights—they each held different views about what justice required.²⁴¹ The African National Congress (“ANC”) which enjoyed the strongest support among the South African population during this transitional period, demanded the New Constitution incorporate justiciable social and economic rights to provide an assured remedy to the deprivations suffered under apartheid.²⁴² The ANC first embodied its vision for a new government in a document called *African Claims in South Africa* in 1943,²⁴³ followed by the *Freedom Charter* in 1955, which contains the basic policies of the organization.²⁴⁴ The document still reflects the core aims of the political party.²⁴⁵

The Freedom Charter demands basic civil and political rights, including a government respecting self-governance and equality of all people regardless of race, color, or sex.²⁴⁶ In addition, the Charter demands social and economic freedoms, including that “the people shall share in the country’s wealth”²⁴⁷ as well as the right to work, equal pay, a national minimum wage, paid annual vacation, and maternity leave;²⁴⁸ the right to learning and culture;²⁴⁹ and the right to housing, comfort, security, and medical care.²⁵⁰ The ANC used this document to compile a Working Draft Bill of Rights to assist the Constitutional Assembly in writing the new South African Constitution.²⁵¹ The document demanded justiciable constitutional rights to education, healthcare, housing, employment, and basic nutrition among others.²⁵² Proponents urged that while inclusion of

239. Sarkin, *supra* note 237, at 177.

240. *See id.* at 176.

241. Jeffrey, *supra* note 238, at 4–5.

242. *Id.* at 8.

243. Lourens M. du Plessis, *A Background to Drafting the Chapter on Fundamental Rights, in BIRTH OF A CONSTITUTION* 89, 91 (Bertus de Villiers ed., 1994).

244. Jeffrey, *supra* note 238, at 9.

245. *Id.*

246. *The Freedom Charter* (June 26, 1955) in *THE SOUL OF A NATION: CONSTITUTION-MAKING IN SOUTH AFRICA* 415 (Hassen Ebrahim ed., 1998).

247. *Id.* at 416.

248. *Id.* at 417.

249. *Id.* at 418.

250. *Id.*

251. *See* Jeffrey, *supra* note 238, at 10.

252. *Id.*

such rights would recognize subsistence as crucial to social existence, excluding them would respect only a “truncated humanity,” omitting those “for whom autonomy means little without the necessities of life” from civil and political participation.²⁵³

The Constitutional Assembly ultimately included a wide variety of social and economic rights in the New Constitution, although not all of the rights suggested by the ANC and others.²⁵⁴ Specifically, the Constitution provides for freedom of trade, occupation, and profession;²⁵⁵ the right to fair labor practices;²⁵⁶ the right to housing;²⁵⁷ rights to healthcare, food, and social security;²⁵⁸ and the right to education.²⁵⁹ In some cases, the Constitution expressly indicates what these rights entail. For example, the right to housing obviously guarantees access to adequate housing, but the Constitution also proscribes eviction or demolition of one’s home in the absence of a court order issued “after considering all the relevant circumstances.”²⁶⁰ Similarly, the right to health care specifically includes reproductive health care²⁶¹ and mandates that, “[n]o one may be refused emergency medical treatment.”²⁶² Finally, the right to social security provides social assistance when individuals cannot support themselves and their dependents.²⁶³

Many of these rights impose affirmative duties on the state to guarantee such rights. For example, the rights to housing, health care, food, water, and social security contain an edict that, “[t]he state must take reasonable legislative and other measures, within its available resources, to achieve the progressive *realisation* of each of these rights.”²⁶⁴ In addition, the Constitution creates a Human Rights Commission charged with

253. Craig Scott & Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in a New South African Constitution*, 141 U. PA. L. REV. 1, 29 (1992).

254. S. AFR. CONST. §§ 22–28, 29–31. See also Makau wa Mutua, *Hope and Despair for a New South Africa: The Limits of Rights Discourse*, 10 HARV. HUM. RTS. J. 63 (1997) (arguing that the use of human rights—and rights discourse generally—as the main organizing principle for creating a new post-apartheid state is wrongheaded because the new constitutional rights have constitutionalized the social and economic status quo).

255. S. AFR. CONST. § 22.

256. *Id.* at § 23.

257. *Id.* at § 26.

258. *Id.* at § 27.

259. *Id.* at § 29.

260. *Id.* at § 26 (1), (3).

261. *Id.* at § 27(1)(a).

262. *Id.* at § 27(3).

263. *Id.* at § 27(1)(c).

264. *Id.* at §§ 26(2), 27(2) (emphasis added).

advancing and monitoring respect for and protection of human rights.²⁶⁵ The Commission must investigate and report on the status of human rights observation and remedy violations.²⁶⁶ Divisions of the state responsible for realizing these social and economic rights must report to the Commission annually with steps that they have taken toward actualizing the constitutional rights to housing, health care, food, water, social security, education and the environment—including the problems they have encountered.²⁶⁷

The Interim Constitution created a Constitutional Court to hear human rights and constitutional claims, as many South Africans feared existing courts that had upheld apartheid lacked the legitimacy and credibility to interpret the New Constitution adequately.²⁶⁸ In its short existence the Constitutional Court has heard only one case dealing with social welfare rights in South Africa. *Soobramoney v. Minister of Health* marks the only Supreme Court case directly construing a social welfare right enumerated in the Constitution to date.²⁶⁹ The diabetic appellant, Mr. Soobramoney, suffered from heart complications and chronic kidney failure, which required regular kidney dialysis to prolong his life.²⁷⁰ Unfortunately, the renal treatment unit at the state hospital had limited machines, many of them in greatly deteriorated condition.²⁷¹ To allocate these scarce resources, the hospital limited the use of its renal treatment facilities to patients with recoverable conditions²⁷² or to those who had chronic renal failure but were eligible for a kidney transplant.²⁷³ As the hospital excluded those with cardiovascular disease from the kidney transplant pool, the appellant's condition precluded him from treatment in the hospital's unit.

Mr. Soobramoney alleged two arguments.²⁷⁴ First, he claimed that the Constitution guarantees “[n]o one may be refused emergency medical treatment”; second, the Constitution also ensures “[e]veryone . . . the right to life.”²⁷⁵ The Court reiterated its compassion for the impoverished people

265. *Id.* at § 184 (1).

266. *Id.* at § 184(2)(a)–(b).

267. *Id.* at § 184(3).

268. Sarkin, *supra* note 237, at 190–91.

269. *Soobramoney v. Minister of Health, Kwazulu-Natal*, 1998 (1) SALR 765 (CC).

270. *Id.* at 769.

271. *Id.*

272. *Id.*

273. *Id.* at 770.

274. *Id.*

275. *Id.* at 770. *See also* S. AFR. CONST. §§ 27(3), 11.

of South Africa, remarking, that “[m]illions . . . are living in deplorable conditions and in great poverty These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order.”²⁷⁶ The opinion notes the hollowness of any promise to eliminate poverty so long as these conditions persist,²⁷⁷ and the Court proceeds to catalogue the constitutional commitment to redress the wrongs of apartheid, specifically through social welfare provisions.²⁷⁸ In the end, the Court’s rhetoric concludes the overwhelming demand for the state’s limited resources bars fulfillment of such rights.²⁷⁹

Soobramoney held dialysis treatment to prolong the life of one suffering from a chronic condition falls outside the ordinary meaning of emergency medical treatment. The opinion also rejected the appellant’s contention that the right to emergency medical treatment—interpreted in light of the right to life—requires the state to provide free life-saving treatment to all people who cannot afford it.²⁸⁰ The holding reasoned such an understanding would frustrate the obligation to provide health care services to “everyone” under section 27 and also would prioritize the treatment of terminal illnesses over preventative health care or non-fatal illnesses.²⁸¹ The Court decided to defer to the good faith, rational judgment of the provincial government and medical experts charged with prioritizing limited resources.²⁸²

Even in coming to this conclusion, Justice Chaskalson lamented over the disconcerting situation, observing that “[t]he hard and unpalatable fact is that if the appellant were a wealthy man he would be able to procure such treatment from private sources”²⁸³ Despite this troubling reality, the *Soobramoney* Court noted that many other indigents require access to health care or other subsistence needs, all of which comprise components of the right to life.²⁸⁴

Despite the limited amount of socioeconomic rights jurisprudence, the Court has repeatedly highlighted the vulnerability and discrimination the

276. 1998 (1) SALR 765, 771.

277. *Id.*

278. *Id.*

279. *Id.*

280. *Id.* at 773–74.

281. *Id.*

282. *Id.* at 776.

283. *Id.*

284. *Id.* at 777.

poor or otherwise socially disadvantaged members of society face and has begun to generate a particular vision of justice. In the first case argued before the Constitutional Court, the tribunal held that capital punishment violated the constitutional right to human dignity.²⁸⁵ In reaching this conclusion, Justice Chaskalson considered the arbitrary imposition of the death penalty, especially noting the variable impact of race and poverty.²⁸⁶ The opinion recognized that most defendants facing the death penalty rely on state-provided defense, resulting in a situation “which will continue to place poor accused at a significant disadvantage in defending themselves in capital cases.”²⁸⁷ While the opinion identified numerous other factors that influence the capricious imposition and performance of the death penalty, the Court clearly expressed concern about the disproportionate disadvantage faced by capital defendants—usually with limited or nonexistent financial resources.²⁸⁸

In another criminal case, the Court again articulated its concern about the inequitable impact poverty plays in the criminal justice system. In *Coetzee v. South Africa*, the Court held that imprisonment of a debtor for inability to pay a fine violates the Constitution.²⁸⁹ Specifically, the statute in question did not distinguish between those unable to pay their debts and those financially able but unwilling to do so.²⁹⁰ The Court held that the administration of the statute violated the Constitution because the infringement was not “justifiable in an open and democratic society based on freedom and equality.”²⁹¹ As the system was used to collect small debts, most of those affected by the law were “poor and either illiterate or uninformed about the law or both . . . they do not enjoy legal representation.”²⁹² Because the scheme targeted impoverished people who could not pay their debts but who failed to prove this inability at a hearing, the Court found the debt collection system overbroad and unreasonable.²⁹³

The South African Constitutional Court has not limited its socioeconomic sensitivity to criminal cases, however. In *Mohlomi v. Minister of Defense*, the Court dealt with a six-month statute of limitations for litigation against the state, which required notice to the defendant at

285. *S v. Makwanyane and Another*, 1995 (3) SALR 391 (CC).

286. *Id.* at 419.

287. *Id.* at 420.

288. *Id.* at 420–21.

289. *Coetzee v. South Africa*, 1995 (4) SALR 631 (CC).

290. *Id.* at 641.

291. *Id.* at 642.

292. *Id.* at 641.

293. *Id.* at 643.

least one month prior to the commencement of the civil action.²⁹⁴ The plaintiff, alleging that a soldier shot him intentionally, sought legal assistance from a university legal clinic providing free legal services to the poor.²⁹⁵ A clinic volunteer incorrectly thought the claim involved a police officer rather than a soldier—causing the defendant to receive notice twenty-eight days before the lawsuit began, rather than the thirty-one statutorily required calendar days.²⁹⁶

Mohlomi held that the statute of limitations and the strict adherence to its requirements, regardless of the severity of the outcome for plaintiffs seeking redress, violated the interim Constitution.²⁹⁷ In doing so, the Court took judicial notice of the contemporary social and economic context in South Africa, describing the nation as,

[A] land where poverty and illiteracy abound and differences of culture and language are pronounced, where such conditions isolate the people whom they handicap from the mainstream of the law, where most persons who have been injured are either unaware of or poorly informed about their legal rights and what they should do in order to enforce those, and where access to the professional advice and assistance that they need so sorely is often difficult for financial . . . reasons.²⁹⁸

Thus, the statute of limitations and its accompanying enforcement served to deny affected plaintiffs “an adequate and fair opportunity to seek judicial redress”²⁹⁹

The Court similarly observed the importance of socioeconomic status against the backdrop of the social and economic reality of the nation in *Fraser v. Children’s Court*.³⁰⁰ In *Fraser*, the biological father of a child born to an unmarried couple challenged the mother’s decision to put the child up for adoption.³⁰¹ *Fraser* held the statute unconstitutional since it always discounted the father’s consent for the adoption of an “illegitimate” child, and thus, discriminated based on gender and marital status.³⁰² The opinion directly addressed the legislature, counseling that it should respect

294. *Mohlomi v. Minister of Defense*, 1997 (1) SALR 124 (CC).

295. *Id.* at 126–27.

296. *Id.* at 127–28.

297. *Id.* at 136.

298. *Id.* at 131.

299. *Id.*

300. 1997 (2) SALR 261 (CC).

301. *Id.* at 266.

302. *Id.* at 271–77.

paternal consent in the adoption of illegitimate children when amending the legislation.³⁰³

The bench voiced concerns about expanding the rights of biological fathers to the detriment of mothers.³⁰⁴ The Court wrote “parliament should be acutely sensitive to the deep disadvantage experienced by the single mothers in our society The socio-economic and historical factors which give rise to gender inequality in South Africa are not always the same as those in many of the ‘first-world’ countries”³⁰⁵ In short, *Fraser* recognized the tension between biological fathers’ rights to exercise parenting control and the social and economic hardships single mothers face. The holding intimates that while the legislature should revise the legislation to protect paternal rights in the decision to put an illegitimate child up for adoption, the economic difficulties that a woman forced to raise a child alone will face should inform those amendments.

VI. CRITICAL ANALYSIS: COMPILING A SUBSTANTIVE VISION OF JUSTICE

Black, Edelman, and Michelman provide the foundation upon which to build a substantive vision of justice. Though relying on different sources, each requires a minimum amount of money or fulfillment to ensure a dignified existence. Black’s constitutional justice of livelihood mandates a decent material basis for life, one that considers all human needs—both physical and spiritual.³⁰⁶ Edelman argues for a subsistence income, providing all of the conditions necessary for human self-realization and assuring more liberal provisions than eking out a miserable, meager existence.³⁰⁷ Rather than suggesting a certain amount of income, Michelman makes a case for minimum protection of each individual against economic hazard, which requires satisfaction of just wants or basic needs. He contends that this protection requires an income that will absolutely meet these needs without additional prerequisites.³⁰⁸

Thus, these theorists help to uncover the first necessary component of a substantive vision of justice. All human beings possess entitlement to enough income to meet their physical and spiritual needs—at a minimum. These provisions must assure a self-respecting lifestyle—a guarantee of

303. *Id.* at 282.

304. *See id.*

305. *Id.*

306. *See supra* notes 141–45 and accompanying text.

307. *See supra* notes 146–51 and accompanying text.

308. *See supra* notes 152–56 and accompanying text.

more than abject poverty. This subsistence income must secure a lifestyle that facilitates human self-realization—conditions fostering intellectual and cultural development, building community, living with pride. Finally, this income must provide enough to make certain that the basic needs of life—one’s just wants—will be satisfied without additional requirements and without state intervention or support. The income that a substantive vision of justice requires ought to secure self-sufficiency.

This Note’s comparative journey complements this preliminary vision of justice. Although India declares itself a social welfare state, its constitutional text and Supreme Court opinions still enhance a substantive vision of justice for our American constitutional democracy and do not differ a great deal from the foundational vision already derived from American legal scholars. In fact, the preamble of the Indian Constitution commits the nation to social, economic, and political justice as well as to ensuring the dignity of each individual.³⁰⁹ The living wage language also parallels the dignified income envisioned by Black, Edelman, and Michelman, as it must ensure a decent standard of life in addition to full enjoyment of leisure and of social and cultural opportunities.³¹⁰ The Constitution goes beyond this vision, however, by requiring the state to minimize inequality of income and to distribute resources fairly.³¹¹ Thus, the Constitution of India explicitly compels the state to do what Black, Edelman, and Michelman only suggest: to ensure more equitable incomes, diminish the wage gap, and guard against the concentration of wealth in an isolated, elite group.

Indian case law questions traditional ideas about what inputs fashion an efficient economy. The Supreme Court rejects *laissez faire* economics as the only—or even the correct—framework in which to figure a just wage structure.³¹² Specifically, the Court has suggested that right and wrong, propriety and impropriety, fairness and unfairness, as well as the social conscience of the community should all have voice in the Indian wage structure.³¹³ Efficiency in the Indian economy yields fair return to capitalists, fair wages to wagers, and fair prices for consumers.³¹⁴ The Indian living wage means that every wagger should make enough income to provide his or her family’s essential needs, a prudent amount of

309. *See supra* notes 169–70 and accompanying text.

310. *See supra* notes 141, 146, 152, 169, and 173 and accompanying text.

311. *See supra* note 174 and accompanying text.

312. *See supra* note 185 and accompanying text.

313. *See supra* note 186 and accompanying text.

314. *See supra* note 189 and accompanying text.

life's comfort, and some security for retirement or disability.³¹⁵ Realizing the current inability of the Indian economy to sustain a living wage, the Court still foreclosed the existence of businesses unable to employ workers at the barest minimum wage and expressed its refusal to tolerate poverty wages.³¹⁶ Hence, the Indian judiciary collapses ideas of economic efficiency and justice, challenging a new perspective from which to view economically efficient markets and refusing to make market forces the predominant dictator of workers' wages. A substantive vision of justice must also require, then, a creative, non-traditional approach to wage calculations and economic efficiency—one that gives credence to fairness, decency, ethics, morals, and the community's social conscience.

India also enhances a vision of justice already firmly held in the United States: proscriptions on involuntary servitude. The Indian Constitution also prohibits labor by force.³¹⁷ The Supreme Court of India, however, conceptualizes labor by force to include labor compelled by hunger and want. The Court mandates that no one should accept poverty wages by force of destitution, helplessness, and desperation.³¹⁸ Accordingly, India contributes to a broader reading of the Thirteenth Amendment of the United States Constitution, suggesting that a just society prohibits slavery, or forced labor of the abjectly poor at inhuman wages.

Finally, the Public Interest Litigation Movement in India³¹⁹ contributes to a substantive vision of justice. Though it focuses on the judiciary, the movement recognizes that promoting and establishing justice for the underrepresented and impoverished people accomplishes more than realizing the human rights of those groups. In addition, it reaffirms the nation's commitment to justice for all people and recommitments the Indian people to realizing social, economic, and political justice—a foundational precept of the Constitution of India. Consequently, protecting the vulnerable realizes a particular vision of justice and functions as a symbol of the nation's continued oath to adhere to the Constitution and protect the basic human needs of all Indians.

South Africa further informs the developing substantive vision of justice. Rather than defining a dignified income, the constitutional text affords all South Africans a right to shelter, healthcare, food, social

315. See *supra* note 195 and accompanying text.

316. See *supra* note 197 and accompanying text.

317. INDIA CONST. art. 23.

318. See *supra* notes 222–24 and accompanying text.

319. See *supra* note 227–35 and accompanying text.

security, and education.³²⁰ While at first glance, this Constitution seems to share a wholly different vision of justice, it actually adheres quite closely to the just wants argument pressed by Michelman.³²¹ Whether arguing for a certain amount of income that will secure a dignified existence or asserting that justice requires the individual components that comprise a dignified existence—which a subsistence income could purchase—both arguments support a similar vision: justice demands the fulfillment of each individual's physical and spiritual requirements.

Similar to India, South African case law struggles with meeting these needs and the reality of limited resources. Inability to satisfy all of the socioeconomic requirements specified in the Constitution, however, does not render the aspirational qualities of either the Constitution of South Africa or India moot to informing a substantive vision of justice in America. In fact, with a stronger economy, the United States might not encounter similar problems matching economic and social needs of the American impoverished. In addition, its ability to satisfy these rights might make the substantive vision of justice developed here even more compelling for conscientious legislators.

For example, the South African Constitutional Court attempts to adhere to the Constitution's commitment to address poverty and the deplorable conditions it imposes, recognizing that the vow to eliminate such circumstances rings hollow so long as many continue to suffer in poverty.³²² Similarly, in *Soobramoney*, the Court reluctantly denies the plaintiff access to kidney dialysis in order to use state resources to provide the greatest amount of care for the greatest number of people, by using limited funds for preventative health care and non-fatal diseases.³²³ Thus, South Africa challenges us to adopt an ambitious vision of justice to which we must continuously and tirelessly strive. As applied to the United States, some components of this substantive vision of justice might remain unmet, threatening to make a mockery of any serious commitment to address poverty and dignified wages. On the other hand, greater resources in the United States arguably could leave fewer needs unmet, substantiating efforts to actualize a substantive vision of justice. In addition, South Africa suggests that enacting any vision of economic justice will require difficult funding choices. This difficulty, however, further dares us to promote justice for the greatest number of people.

320. See *supra* notes 257–59 and accompanying text.

321. See *supra* notes 152–56 and accompanying text.

322. See *supra* note 277 and accompanying text.

323. See *supra* notes 280–81 and accompanying text.

Despite its admitted failures in implementing all of the goals of its New Constitution, the South African Constitutional Court's jurisprudence reflects an enduring sensitivity to poverty, social disadvantage, and economic vulnerability.³²⁴ Its case law reflects an intense commitment to discerning what justice requires in a constitutional democracy in light of the contemporary social and economic context the nation faces.³²⁵ In attempting to fulfill constitutional demands on the state, the Court takes note of poverty, illiteracy, the quality of free legal services, and the hardships a single mother faces.³²⁶ This sensitivity suggests a substantive vision of justice should adhere to its broad and abstract ideals while simultaneously recognizing societal ills in need of repair. Once this vision of justice promotes the passage of living wage legislation, for example, it should be rearticulated and molded to confront poverty problems beyond the working poor.

In sum, then, a substantive vision of justice comprises seven components. First, this vision requires wages or income high enough to sustain a dignified lifestyle. Second, it necessitates an innovative approach to the structuring of wage scales and an open view of economic efficiency and market functioning. Third, justice requires a conceptualization of involuntary servitude as including situations where abject poverty compels workers to engage in labor at subhuman wages. Fourth, a substantive vision of justice does not view protecting the politically powerless as a waste of legislative resources or an inappropriate use of government assets. Instead, it views empowering the vulnerable as a reaffirmation of our commitment to the Constitution and integral to the security of all human rights. Fifth, justice includes ambitious and currently unreachable goals, instilling in us an assiduous effort to provide for the needs of all Americans. Sixth, a substantive vision of justice inevitably entails trying choices between vulnerable groups or basic human needs. This conundrum forces a vision that promotes a utilitarian ideal: fulfilling the basic needs of the greatest number of Americans. Finally, this substantive vision of justice contains two integral components: a faithfulness to principles of dignity and fairness coupled with a pragmatic flexibility to confront the economic and social injustices of the day.

324. See *supra* notes 283–304 and accompanying text.

325. See *supra* notes 283–304 and accompanying text.

326. See *supra* notes 283–304 and accompanying text.

VII. A ONE-SIDED PRINCIPLED DEBATE

Armed with this substantive vision of justice, conscientious legislators may use it to advance living wage legislation that the Constitution arguably requires. Recalling Tushnet's argument, legislators should use constitutional interpretation to inform the creation of legislation rather than as only a restraint, guarding against the violation of constitutional rights. He suggests that legislators should use the principle values of the Declaration of Independence and the Constitution's Preamble to conduct a political debate that will facilitate constitutional lawmaking.

Using the substantive vision of justice developed above and the experience of municipalities and locales with living wage legislation, this Note engages in one side of a principled, political debate in support of living wage legislation. The mobilization for a living wage outlined above suggests that living wage laws establish justice, promote the general welfare, and facilitate the pursuit of happiness for the working poor. Such laws are rooted in reason and justice, and facilitate the inalienable rights of humanity to a dignified existence.

First, living wage legislation establishes justice, as exemplified by the substantive vision of justice fleshed out above.³²⁷ The whole edict behind a living wage suggests that full-time waged workers should earn enough to provide for their families without reliance on government assistance.³²⁸ Living wages demand that wage labor and destitution should never coexist. In a just society, full-time workers should never find themselves unable to make ends meet or falling below official federal poverty measures.

A living wage also requires an out-of-the-box approach to the economies of pay scales and wages. Strict adherence to traditional components of economic efficiency and market elasticity discounts the reality of poverty. Justice disqualifies substandard wages and impoverished full-time workers as legitimate outcomes of the free market. Justice requires a new kind of economics that considers the actual expenses needed to provide oneself and one's family with a dignified existence. It demands that employers cannot pay wages less than this living wage.

The living wage movement recognizes that employment of waged workers on poverty wages sacrifices laborers' humanity and amounts to a version of slave labor. A just society will never tolerate workers' acceptance of substandard wages because destitution leaves them no other

327. See discussion *supra* Parts V, VI.

328. See discussion *supra* Part II.D.

choice. A constitutional democracy with serious commitments to justice will force those employers that only provide substandard wages out of business because it will never abide involuntary servitude.

Living wage legislation acknowledges the premier importance of protecting the working poor from economic exploitation, degrading wages, and the allegedly objective wage scale dictated by free-functioning economic markets when they reach efficiency. In fact, living wage laws realize that failure to protect the vulnerable brands us an unjust society—questioning the import of other human rights. By failing to ratify federal living wage legislation that safeguards the dignity of the working poor, our society weakens its supposed commitment to the Constitution, to the Declaration of Independence, to a coherent vision of justice in a constitutional democracy.

If the American economy or some employers could not sustain a living wage for all low-paid employees at this time, justice would still require a commitment to a universal living wage for all waged workers. Such a lofty aspiration would continuously dangle the achievement of economic justice before us, encouraging us to strive toward an ideal, similar to anti-discrimination legislation. In addition, the attainment of living wages by some members of the workforce would remind lower-paid workers of their entitlements in a just society to a dignified existence—to a living wage. The fight would continue.

Living wage legislation might require compromise: a decision to give government subsidies to employers allegedly unable to pay a living wage might translate into fewer welfare benefits for the unemployed. A living wage—as any other government-mandated program or law—potentially requires troubling choices. Living wage laws, however, might promote a utilitarian notion of justice. Living wages would not only lift the working poor from poverty measures, but they also would reduce the number of people dependent on government assistance and create a larger tax base from which to collect revenue.³²⁹ Finally, living wage legislation reflects allegiance to the dignity of humanity as well as social, economic, and political justice, while simultaneously tackling a problem of principle magnitude today: the lack of living wages for the working poor, which relegates more than seven million American waged workers to lives of destitution.

329. See *supra* note 95 and accompanying text.

As briefly mentioned above,³³⁰ this substantive vision applies to any argument advocating poverty relief. This vision has particular bite, however, when considering the situation of the working poor. If justice requires that each person shall enjoy a decent standard of living, which recognizes rather than degrades the inherent value of each human being, for example, then the Constitution requires a living wage for all waged workers. While this vision of justice puts forth compelling claims rationalizing why no person should suffer in poverty—irrespective of one’s productivity, effort, or contribution to society—the bleak situation facing the working poor enhances this assertion. It adds moral, popular, and political support to this argument when one acknowledges the full-time toil and constructive involvement that the working poor play in the education of our children, the functioning of our infrastructure, the safety of our transportation systems, and the efficiency of the healthcare industry. A just society cannot condone these contributions through poverty wages.

Second, living wage legislation promotes the general welfare. In addition to justice-oriented arguments in support of the living wage, a “rising tides lifts all boats” analogy also applies. First, workers earning a living wage experienced great psychological gains, including improved self-confidence, self-esteem, and pride.³³¹ In addition to these gains, governments with living wage experience tout the economic incentives of adopting such legislation.³³² Living wages have helped to narrow disproportionately wide wealth gaps in many communities, lowered tax monies used for public welfare, allocated more disposable income that waged workers can use to oil the economy, and increased tax revenues.³³³

The ability to purchase health insurance and take advantage of preventative healthcare also decreased unnecessary hospital care of the working poor on the government dole.³³⁴ Employers also applauded the lower turnover and higher quality work among their employees once they earned a living wage.³³⁵ Business owners also suggest that broad-based living wages promote a healthier business climate, basing competition on the quality of service or product rather than deplorable wages.³³⁶

330. See discussion *supra* Part VI.

331. See *supra* notes 75–80 and accompanying text.

332. See *supra* note 94 and accompanying text.

333. See *supra* note 95 and accompanying text.

334. See *supra* note 96 and accompanying text.

335. See *supra* notes 99–100 and accompanying text.

336. See *supra* note 98 and accompanying text.

Studies of implemented living wages corroborate increased workforce motivation, productivity, and stability; decreased absenteeism and turnover; and overall company competitiveness.³³⁷ Feared increased costs and business relocation never occurred and probably would not manifest under federal living wage legislation, as all employers nationwide would have to adjust business practices to cover increased wage costs.³³⁸ Thus, experience with living wages suggests that they will improve the psychological health of wageworkers in addition to strengthening economies, improving business competitiveness, aiding increased tax revenue, and saving public expenditures. In short, living wage laws promote the general welfare.

Finally, living wages facilitate the pursuit of happiness for the working poor. As Black argues,³³⁹ poverty may be the foremost obstruction to the pursuit of happiness for the working poor. For how can the working poor pursue their dreams, their self-development, cultural enrichment, rest, or leisure if poverty forces them to work two or three jobs or if the worry of providing for their families destroys any chance of real relaxation? Poverty wages often prevent the working poor from supplying nutritious food for their families without the help of food stamps. And how can those who work full time for a living pursue true happiness if their insufficient wages leave them either dependent on government assistance or foregoing basic needs? Disturbing as it may be, poverty wages devastate altogether the hopes, the dreams, the pursuit of happiness for the working poor. Living wages would provide enough basic comfort and security to ease the stress of daily provisions and to free some time and space for one's wants rather than solely one's needs. Living wages would give the working poor a chance at the pursuit of happiness.

CONCLUSION

Brest and Tushnet helped us to consider the obligation that all legislators have to take the Constitution into account in lawmaking. Specifically, Tushnet argues for a principled, political debate among legislators—an active participation in populist constitutional law. This debate should consider the ways in which legislation furthers the project of the Declaration of Independence and the Preamble to the Constitution. Rather than contemplating the Constitution only as a restriction upon

337. See *supra* notes 99–100 and accompanying text.

338. See *supra* notes 102–04 and accompanying text.

339. See *supra* notes 141–45 and accompanying text.

legislation that might infringe on fundamental rights, Tushnet illustrates how laws can “be constitutional” when they function to further the project of the Declaration.

To demonstrate Tushnet’s version of constitutionalism, this Note developed a substantive vision of justice that might inform one side of a principled political debate in support of living wage legislation. This vision, collected from American legal theorists, comparative jurisprudence, and constitutional texts confronting economic injustice requires that all human beings hold enough income or resources to live a self-respecting existence. It also exemplifies that protecting the vulnerable guards all human rights and that true justice requires an ambition to relieve all basic needs imposed by destitution.

Finally, this substantive vision of justice supports a one-sided, principled argument that living wage laws establish justice, promote the general welfare, and facilitate the pursuit of happiness for the working poor. Thus, once legislators recognize their obligation to consider the Constitution, they should give voice to the substantive vision of justice developed here, recognizing the duty incumbent upon them to promote economic justice, to support living wages.

The limited scope of this Note precluded consideration of related issues, projects, and theses. Realizing that living wages require much more research, debate, and mobilization than one Note could ever tackle, this Note dealt exclusively with the hardships the working poor face. The substantive vision of justice developed above, however, might also influence conscientious legislators to consider the Constitution in other poverty-based programs. For example, it might inform changes to the “welfare to work” program or complement revisions to the earned income tax credit. In addition, this Note did not generate specific recommendations to legislators as to how they might actually implement a substantive vision of justice. Such a task awaits another paper or perhaps the attention of a conscientious legislator.

Finally, this Note does not assume that legislators will suddenly realize their duty to consider the Constitution, give voice to a substantive vision of justice, and instantly win the popular support of the nation’s citizenry to do so. The direct action component of the living wage movement, however, makes successful accomplishment of this realization and its implementation possible. The sit-in at Harvard taught us that realizing a living wage relies on building coalitions across class, race, gender, and age. In addition, activists must build bridges from their

pragmatic vision of economic justice to the substantive vision of justice that the Constitution requires. They must direct their campaigns at conscientious legislators, helping them realize their duty to consider the Constitution in lawmaking and to understand how sponsoring and promoting the enactment of federal living wage legislation creates constitutional law.