

HUMAN RIGHTS AND ECONOMIC POLICY DISCOURSE: TAKING ECONOMIC AND SOCIAL RIGHTS SERIOUSLY

by Philip Harvey*

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* Associate Professor of Law & Economics, Rutgers School of Law—Camden. J.D., Yale Law School; Ph.D., New School for Social Research; B.A., Yale College.

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I. INTRODUCTION

Critics of utilitarianism have emphasized the potential for conflict between utility-maximization as a normative social welfare goal and society's moral and legal obligations to protect certain fundamental rights.¹ Defenders of utilitarianism have responded to this criticism by arguing that although such conflicts are theoretically possible, they are sufficiently unlikely to occur in the real world and therefore do not call the moral adequacy of utilitarianism into question.²

Because of the methodological importance of utility-maximization in neo-classical economic theory and of rights-based claims in traditional legal theory, the question of whether significant conflicts exist between utility-maximization and the protection of human rights as policy norms is potentially important in assessing the proper role of economic analysis in legal scholarship.

1. See, e.g., Ronald Dworkin, *Taking Rights Seriously* (1977); Robert Nozick, *Anarchy, State and Utopia* (1974); John Rawls, *A Theory of Justice* (1971); Amartya Sen, *Collective Choice and Social Welfare* (1970).

2. See, e.g., R.M. Hare, *Ethical Theory and Utilitarianism*, in *Utilitarianism and Beyond* 23, 29–30 (Amartya Sen & Bernard Williams eds., 1982).

In a vigorous defense of the normative adequacy of utilitarianism in this context, Louis Kaplow and Steven Shavell have turned the standard rights-based critique of utilitarianism on its head.³ Whereas critics of utilitarianism argue that strict adherence to utilitarian principles could lead to abhorrent violations of human rights, Kaplow and Shavell argue that strict adherence to notions of fairness⁴ could lead to the pursuit of policies that reduce rather than enhance human welfare.⁵ Indeed, they suggest that strict adherence to rights-based policies “will sometimes entail favoring regimes under which every person is made worse off.”⁶ Kaplow and Shavell conclude from this that expert analysis of public policy options should be based exclusively on the principles and methodology of welfare economics,⁷

3. See Louis Kaplow & Steven Shavell, *Fairness Versus Welfare*, 114 Harv. L. Rev. 961, 961 (2001) [hereinafter Kaplow & Shavell, *Fairness Versus Welfare*] (arguing that the “assessment of legal policies should depend exclusively on their effects on individuals’ welfare”). See also Louis Kaplow & Steven Shavell, *The Conflict between Notions of Fairness and the Pareto Principle*, 1 Am. L. & Econ. Rev. 63, 64 (1999) (arguing that notions of fairness may “reduc[e] the well-being of every person in society”); Louis Kaplow & Steven Shavell, *Any Non-Welfarist Method of Policy Assessment Violates the Pareto Principle*, 109 J. Pol. Econ. 281 (2001) (arguing that any method of policy assessment that is not purely welfarist violates the pareto principle). For a critique of this work and a rejoinder by Kaplow and Shavell, see Howard F. Chang, *A Liberal Theory of Social Welfare: Fairness, Utility, and the Pareto Principle*, 110 Yale L.J. 173 (2000) [hereinafter Chang, *A Liberal Theory of Social Welfare*] (arguing that Kaplow and Shavell have assumed an unreasonable notion of fairness); Louis Kaplow & Steven Shavell, *Notions of Fairness Versus the Pareto Principle: On the Role of Logical Consistency*, 110 Yale L.J. 237 (2000) [hereinafter Kaplow & Shavell, *Notions of Fairness*] (arguing that Chang’s effort to show that certain notions of fairness can be altered so as to avoid conflicts with the pareto principle is unsuccessful); Howard F. Chang, *The Possibility of a Fair Paretian*, 110 Yale L.J. 251, 252 (2000) [hereinafter Chang, *The Possibility of a Fair Paretian*] (arguing that Kaplow and Shavell have not shown that “any non-welfarist method of policy assessment violates the pareto principle,” but they have only shown that some non-welfarist theories violate the pareto principle).

4. Kaplow and Shavell use the term ‘fairness’ as a stand-in for ‘justice,’ ‘rights,’ and other related notions. See Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 999.

5. Kaplow and Shavell use the terms ‘welfare,’ ‘well-being,’ and ‘utility’ as synonyms in their work. See *id.* at 985 n.42 (formally defining “social welfare” as a function of the “well being or utility” of individuals).

6. *Id.* at 1012.

with no independent evaluative weight accorded to notions of fairness, justice, or human rights.⁸

In this Article I use policy responses to the problem of unemployment as a lens for examining several issues raised by this debate. The first issue concerns the frequency of conflicts between utility-maximization and human rights protection in the real world. The second concerns the adequacy of Kaplow and Shavell's argument that the appropriate response to such conflicts is to embrace welfare economics as the only valid methodology for evaluating public policy choices. The third issue concerns the question of how the goals of utility-maximization and human rights protection should be balanced if Kaplow and Shavell's proposal to rely exclusively on welfare economics as a social choice methodology is rejected.

A. Is The Conflict Real Or Merely Hypothetical?

Most discussions of the potential conflict between utility-maximization and the protection of human rights focus on civil and political rights. Hypotheticals involving sadists and Nazis feature prominently in these discussions, the question being whether the satisfaction of 'objectionable' preferences could result in the adoption of public policies that violate the civil and political rights of victimized populations.⁹ Hypotheticals such as these have an air of unreality that tends to minimize the practical importance of the conflict they are designed to illustrate.

7. Kaplow and Shavell allow that it may be desirable for individuals to rely on notions of fairness in guiding their conduct on an everyday basis, even though it is not desirable for policy analysts to rely on such considerations in evaluating public policy choices. *See id.* at 1021–38.

8. *Id.* at 1011–17.

9. *See, e.g.,* Chang, *The Possibility of a Fair Paretian*, *supra* note 3, at 258 n.36 (criticizing the suggestion that one must “exclude all personal preferences that derive from moral or political views and asking whether the sadist’s pleasure of seeing . . . victims suffer” is a personal preference that ought to count); Hare, *supra* note 2, at 31 (stating that the tendency of opponents of utilitarianism to present such fantastic cases as the Nazi regime to show utilitarianism to be a sort of “moral monster” does not rightly show how ethical theory may work with utilitarianism).

If we focus instead on economic and social rights, the picture changes dramatically. Otherwise unobjectionable majoritarian preferences for low taxes, limited government, and price stability are highly likely to conflict with commitments to secure basic economic and social entitlements for all members of society.

Because readers of this Article may not be familiar with economic and social human rights claims, I begin my argument in Part II of the Article with a discussion of the right to work, the entitlement I use to explore the conflict between utility-maximization and human rights protection as economic policy goals. My discussion includes an examination of both the positive and normative foundations of right to work claims and an explanation of the nature and limits of the right as it is recognized in international human rights agreements. I also discuss the status of the right in United States law, including arguments recently advanced by William Forbath¹⁰ and Kenneth Karst¹¹ that would extend constitutional protection to the right.

I then turn to the question of how the goal of securing the right to work interacts with other economic policy goals. In Part III.A. I discuss the potential conflict between efforts to secure the right to work (which I maintain is routinely violated by policies that tolerate unemployment rates above the full employment level of about two percent) and the pursuit of price stability, limited government, and low taxes. I argue that the core issue dividing advocates of increased government efforts to achieve full employment and advocates of policies that aim instead to achieve the 'natural rate of unemployment' or the 'non-accelerating-inflation rate of unemployment' (NAIRU) properly can be characterized as a question of whether the right to work of those persons rendered jobless by the

10. William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 *Stan. L. Rev.* 1771 (1994) [hereinafter Forbath, *Why Is This Rights Talk Different*]; William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 *Mich. L. Rev.* 1 (1999) [hereinafter Forbath, *Caste, Class, and Equal Citizenship*]; William E. Forbath, *Civil Rights and Economic Citizenship: Notes on the Past and Future of the Civil Rights and Labor Movements*, 2 *U. Pa. J. Lab. & Emp. L.* 697 (2000) [hereinafter Forbath, *Civil Rights and Economic Citizenship*].

11. Kenneth L. Karst, *The Coming Crisis of Work in Constitutional Perspective*, 82 *Cornell L. Rev.* 523 (1997).

existing policy regime should trump the presumably utility-maximizing preferences of a majority of the population for policies which attach a higher priority to the achievement of price stability, lower taxes, and smaller government.

If my characterization of this policy debate is accurate, the conflict between utility-maximization and human rights protection cannot be treated as a purely hypothetical problem of interest to moral philosophers alone. The problem has very significant practical implications. The same type of conflict is likely to arise whenever rights-based claims are advanced on behalf of hitherto unsecured economic and social entitlements. Securing these entitlements is likely to require either increased government expenditures or increased governmental regulation of the economy, measures that generally run counter to the existing preferences of some portion of the population for lower taxes and limited government. Whether these preferences are based on self-interest (lower taxes) or ideologically-founded desires (for limited government), it is possible that a large enough portion of the population may find the proposed rights-securing policy sufficiently distasteful that a failure to fully protect the right at issue will be utility-maximizing.

B. Kaplow and Shavell's Proposal for Resolving Such Conflicts

What is the appropriate policy response to such conflicts? As noted above, Louis Kaplow and Steven Shavell have argued that public policy choices should be based exclusively on the principles of welfare economics, with no independent weight being given to the goal of securing fundamental rights. To the extent the protection of a right reasonably can be expected to enhance human welfare, they argue that welfare economics will assign an appropriate weight to the effect in deciding whether the right should be secured.

In Part III.B. of the Article I assess Kaplow and Shavell's argument. On the one hand, I note that their definition of human (and even non-human) welfare is broad enough to encompass the goals that most advocates of rights-based claims are pursuing. On the other hand, I find their argument that all policy choices should be based on the principles of neo-classical welfare economics to be unpersuasive. Part of the problem is that the kind of analysis they concede is necessary to fully account for the welfare effects of public

policy choices cannot be undertaken without making rights-based value judgments. This means an independent assessment of rights-based claims cannot be avoided even within the methodological framework they advocate. Even if this difficulty is ignored, however, I argue that Kaplow and Shavell presume too much for welfare economics. Welfare economics is based on the assumption that all the benefits and detriments attributable to different actions, events, or policies are commensurable with one another and that these 'welfare effects' are adequately measured by the preferences that individuals exhibit in the choices they make.¹²

I argue that both aspects of this assumption are problematic. First, the claim that all welfare effects are commensurable is implausible. We do not expect doctors to be able to reduce all indicators of individual health to a single metric. Health is multi-dimensional and its different elements require different measurements. What warrant is there for presuming that the far more complex question of what is best for humanity, or a community, or even one individual, is susceptible to uni-dimensional measurement?¹³

Second, even if all welfare effects are presumed commensurable, the assumption that 'revealed preferences' provide an adequate measure of those effects is troubling. Welfare economics does not really measure the welfare effects of public policies. It measures a third cousin of human welfare—the preferences that individuals exhibit in their behavior.¹⁴ Frequently, it is not even possible to

12. Welfare economics is the branch of economic theory that undertakes to assess the relative desirability of different economic policies. Kaplow and Shavell work within the dominant (neo-classical) branch of the discipline, which is grounded in utilitarian philosophy and views outcomes as desirable or undesirable based on whether they satisfy the 'revealed preferences' that individuals manifest in the choices they make. See Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 979–80 (equating the well-being that welfare economics evaluates with utility and utility with the preferences of individuals). For a general discussion of utilitarianism, see John Broome, *Modern Utilitarianism*, in 2 *The New Palgrave Dictionary of Economics and the Law* 651–56 (Peter Newman ed., 1998).

13. See Amartya Sen, *Development as Freedom* 54–86 (1999) (arguing that utilitarianism is unable to measure all data relevant to assessment of human well-being).

14. See *supra* note 12 and accompanying text.

measure revealed preferences, so imputed preferences serve as a stand-in. Ironically, the strongest support for the view that public policy should seek to accommodate the desires that individuals exhibit in their behavior may not be the presumption that their revealed preferences are welfare maximizing, but rather that individuals have the right to choose what they want for themselves without regard to whether their choices are welfare maximizing.

C. An Alternative Approach to Resolving the Conflict

If I am right about the methodological limitations of welfare economics, it cannot be deemed adequate to resolve conflicts between utility-maximization and human rights protection as policy objectives. How, then, should these conflicts be resolved? More particularly, how should the conflict between efforts to secure the right to work and the utility-maximizing preferences of the public for other economic policy objectives be resolved?

A view frequently expressed by human rights advocates is that valid rights should ‘trump’ other policy goals,¹⁵ but I argue that this prescription, if taken at face value, is inadequate. A genuine trump outweighs even the highest valued card in another suit, but rights-based claims are rarely treated that way. They are given added weight, but not a genuinely trumping value. For example, in American constitutional jurisprudence, even fundamental rights may be infringed; however, a ‘compelling state interest’ is required to justify such actions.¹⁶ What I argue is needed, therefore, is not a social choice methodology that treats rights as absolute trumps, but one that treats them with appropriate deference. The level of deference owed a particular right may vary with the importance of the ultimate interests it protects and with the nature of the countervailing interests that oppose it. Whether the balance between human rights protection and other policy goals is struck appro-

15. See, e.g., Dworkin, *supra* note 1, at 274–76 (summarizing the weaknesses in utilitarian arguments concerning individuals’ rights).

16. See, e.g., *Korematsu v. United States*, 323 U.S. 214, 216 (1944) (holding that “[p]ressing public necessity may sometimes justify” restrictions of civil rights that otherwise would be unconstitutional); *Griswold v. Connecticut*, 381 U.S. 479, 497 (1965) (holding that “fundamental personal liberties” may be abridged by the states “only upon showing a subordinating interest which is compelling”).

privately in particular instances may not be easy to determine. It certainly will not be demonstrable with the mathematical precision to which welfare economics aspires. The most we can expect is persuasive argument.

In Part III.C. of the Article, I explore the balancing methodology needed to resolve the conflict between the right to work and the public's opposing policy preferences. Using a pair of nineteenth-century lifeboat cases as a heuristic device, I discuss the importance of analyzing both the severity of the harms these opposing policy objectives seek to avoid and the manner in which those harms are distributed among individual members of society.

In Part IV of the Article I apply the methodological lessons of my analysis to the task of fashioning a policy response to the problem of unemployment that would take the right to work seriously while remaining sensitive to the public's utility-maximizing preferences. Economic analysis grounded in a concern for utility-maximization plays a crucial role in this analysis, but this role is balanced by an appreciation for the importance of rights-based concerns as well. It is my contention that good public policy must honor both of these normative objectives, which means that economists should learn to take human-rights claims seriously—particularly economic and social human rights claims—just as legal theorists have learned to take economic theory seriously.

II. THE RIGHT TO WORK

The right to work—generally conceived as an individual entitlement to a freely chosen job paying wages capable of supporting a dignified existence—was first accorded positive recognition as a human right in the French Constitution of 1793.¹⁷ Over the next century and a half, right to work claims had a checkered history, occasionally achieving prominence in the programmatic goals of revolutionary or reformist political, social, or religious movements,

17. Fr. Declaration [Constitution] of 1793 art. 21 (declaring that “[p]ublic relief is a sacred debt. Society owes maintenance to the unfortunate, either by procuring them work, or by providing the means of existence to those who are unable to labor.”).

but just as frequently being totally ignored.¹⁸ In the confluence of historical events that gave birth to the United Nations at the end of World War II, human rights claims—including right to work claims— attracted more concerted political attention from governments than they ever had before.¹⁹ The result was formal recognition of the right to work in a number of international human rights agreements that impose theoretically binding obligations on the United States government to at least strive to secure the right.²⁰ A review of these agreements is useful both to convey a sense of how the right is conceived and to underscore that right to work claims have enjoyed broad acceptance, even if practical support for measures designed to secure the right has been limited.

A. The United Nations Charter

The United Nations Charter, drafted in 1945, is an international treaty which imposes duties on Member States that are considered binding under international law.²¹ Articles 55 and 56 of the Charter contain the following pledge:

Article 55

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

18. See Richard Lewis Siegel, *Employment and Human Rights: The International Dimension* 23–71 (1994); Philip Harvey, *The History of Right to Work Claims* (Rutgers-Camden Series of Occasional Papers No. 1, 1998), <http://www.camlaw.rutgers.edu/faculty/occasional/1-harvey.html>.

19. Siegel, *supra* note 18, at 23–71.

20. International law is conventionally recognized as having three sources: “(a) international conventions, whether general or particular, establishing rules expressly recognized by the contesting states; (b) international custom, as evidence of a general practice accepted as law; (c) the general principles of law recognized by civilized nations.” Statute of the International Court of Justice, June 26, 1945, art. 38, 59 Stat. 1055, 1060, 33 U.N.T.S. 993. For an introductory discussion of the sources of international law, see Paul Sieghart, *The Lawful Rights of Mankind: An Introduction to the Legal Code of Human Rights* 47–58 (1985).

21. Sieghart, *supra* note 20, at 62–63.

- a. higher standards of living, full employment and conditions of economic and social progress and development;
- b. solutions of international economic, social, health, and related problems; and international cultural and educational co-operation; and
- c. universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.²²

All members of the United Nations, including the United States, have therefore acknowledged their obligation to promote both “full employment” and “human rights.”

Although the extent of the “joint and separate action” which Member States are obliged to undertake in pursuit of these goals has been the subject of considerable controversy among legal scholars,²³ the nature of the “full employment” goal that is the subject of this obligation is fairly clear. It describes a state of affairs in which adequately paid work is available to all job-seekers. This point needs to be emphasized since the term ‘full employment’ is now often used by economists to denote a level of unemployment thought necessary to keep inflation in check.²⁴ In the 1940s, however, when the United Nations Charter was drafted, the term was unquestionably understood to imply the elimination of all but the most temporary frictional and seasonal unemployment. This understanding of the term is illustrated by a 1945 book on the subject by William Beveridge, the principal architect of the British welfare state. He defined full employment in the following terms:

22. U.N. Charter arts. 55, 56.

23. See Louis Henkin, *The Age of Rights* 55–56 (1990).

24. See Philip Harvey, *Combating Joblessness: An Analysis of the Principal Strategies That Have Influenced the Development of American Employment and Social Welfare Law During the 20th Century*, 21 *Berkeley J. Emp. & Lab. L.* 677, 724–27 (2000).

It means having always more vacant jobs than unemployed men, not slightly fewer jobs. It means that the jobs are at fair wages, of such a kind, and so located that the unemployed men can reasonably be expected to take them; it means, by consequence, that the normal lag between losing one job and finding another will be very short.²⁵

A few years later, a task force of internationally prominent economists working under United Nations auspices and led by an American, John Maurice Clark,²⁶ defined full employment for purposes of Articles 55 and 56 as “a situation in which unemployment does not exceed the minimum allowances that must be made for the effects of frictional and seasonal factors.”²⁷ That the American Senate which ratified the United Nations Charter shared this understanding of the term is amply demonstrated by the political battle fought in the United States Congress during 1945 and 1946 over a proposed ‘full employment’ bill that would have required the federal government to take steps ensuring the availability of work for all job-seekers.²⁸ Opponents of the legislation not only succeeded in eliminating substantive provisions that would have secured the right to work; they made sure that all references to ‘full employment’ were eliminated as well. Senator Robert Taft (R-Ohio), a leader of the fight against the bill, underscored the importance of these changes when he commented in floor debate at the end of the battle, “I do not think

25. William Beveridge, *Full Employment in a Free Society* 18 (1945).

26. At the time, Clark was one of the most eminent of all American economists, a fact evidenced by his receipt in 1952 of the American Economics Association’s Walker Medal, awarded at intervals of at least five years to the most distinguished living American economist.

27. John Maurice Clark et al., *National and International Measures for Full Employment* 13 (1949). *See infra* note 140. *See also* Russell A. Nixon, *The Historical Development of the Conception and Implementation of Full Employment as Economic Policy, in* *Public Service Employment: An Analysis of Its History, Problems, and Prospects* 9, 9 (Alan Gartner et al. eds., 1973) (describing the variations of the term ‘full employment’ and its effects on policy).

28. *See* Stephen K. Bailey, *Congress Makes a Law: The Story Behind the Employment Act of 1946* (1950) (noting that the use of the term “full employment” by the drafters of the ‘Murray Bill’ caused significant political friction); Philip Harvey, *Securing the Right to Employment: Social Welfare Policy and the Unemployed in the United States* 106–12 (1989) (noting that the ‘Murray Bill’ would have mandated a sufficiently expansive macroeconomic policy to provide private sector jobs for all job seekers); *infra* Part II.E.

any Republican need fear voting for the bill because of any apprehension that there is a victory in the passage of the full employment bill, because there is no full employment bill anymore.²⁹

B. The Universal Declaration of Human Rights

The concept of human rights which members of the United Nations are pledged to promote pursuant to Articles 55 and 56 of the organization's Charter is not defined in the Charter. More importantly, the substantive content of the term was by no means as clearly settled at the time as the meaning of 'full employment.' This definitional gap was filled by the promulgation of the Universal Declaration of Human Rights by a forty-eight to zero vote of the General Assembly in 1948.³⁰ The Preamble of the Universal Declaration proclaims it to be

a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance³¹

Unlike the United Nations Charter, the Universal Declaration is not a treaty, and, at the time of its promulgation, it was not generally viewed as imposing legally enforceable obligations on individual governments.³² This is one reason it was embraced so warmly. Nevertheless, the Universal Declaration has gradually

29. *Quoted in Nixon, supra note 27, at 27.*

30. *Universal Declaration of Human Rights*, G.A. Res. 217A (III), U.N. GAOR, 3d Sess., Resolutions, Part I, U.N. Doc. A/810 (1948). Eight countries abstained from voting on the Universal Declaration: Byelorussia, Czechoslovakia, Poland, Saudi Arabia, South Africa, the Soviet Union, the Ukraine, and Yugoslavia. John P. Humphrey, *Human Rights and the United Nations: A Great Adventure* 71 (1984).

31. *Universal Declaration of Human Rights, supra note 30, pmbl.*

32. This view was not accepted, however, by all authorities. Opinion was divided on the question. See Nehemiah Robinson, *Universal Declaration of Human Rights: Its Origins, Significance and Interpretation* 33-53 (1950) (discussing the interpretation of the Declaration).

assumed legal weight over the years. First, it helped to clarify the nature of the human rights goals that members of the United Nations are independently obligated to promote under the terms of the Charter.³³ Second, by virtue of its widespread acceptance, the Universal Declaration has gradually assumed an independent status as a statement of customary international law.³⁴ Finally, to the extent that it does enumerate recognized human rights, it can be viewed as a statement of the obligations that governments bear whether or not they have acknowledged the obligation and whether or not such an obligation can be said to exist as a matter of customary international law.

The right to work is expressly recognized in Article 23 of the Universal Declaration, which proclaims:

1. Everyone has the right to work, to free choice of employment, to just and favorable conditions of work and to protection against unemployment.

...

3. Everyone who works has the right to just and favorable remuneration ensuring for himself and his family an existence worthy of human dignity, and supplemented, if necessary, by other means of social protection.³⁵

In reading this provision, it should be emphasized that the drafters of the document clearly understood “protection against unemployment” to mean protection against the occurrence of involuntary unemployment, and not just the provision of social welfare benefits to protect the victims of unemployment from its harmful consequences. They also clearly understood that the obligation to strive to achieve the right to work encompassed the obligation to

33. See Sieghart, *supra* note 20, at 65; Imre Szabo, *Historical Foundations of Human Rights and Subsequent Developments*, in 1 *The International Dimensions of Human Rights* 11, 23–24 (Karel Vasak ed., 1982).

34. See Humphrey, *supra* note 30, at 64–65, 73–76; Vratislav Pechota, *The Development of the Covenant on Civil and Political Rights*, in *The International Bill of Rights: The Covenant on Civil and Political Rights* 32, 38 (Louis Henkin ed., 1981); A.H. Robertson, *Human Rights in the World* 26–28 (1972); Sieghart, *supra* note 20, at 64.

35. *Universal Declaration of Human Rights*, *supra* note 30, art. 23.

strive to achieve full employment recognized in Articles 55 and 56 of the United Nations Charter.³⁶

C. The International Covenant on Economic, Social and Cultural Rights

As noted above, the Universal Declaration was not originally perceived as imposing binding obligations on governments, and so two international treaties were subsequently drafted to afford individual countries the opportunity to assume such obligations with respect to the protection of specifically enumerated human rights. Although the drafting process was conflict-ridden and took almost two decades, the two treaties, the International Covenant on Civil and Political Rights³⁷ (ICCPR) and the International Covenant on Economic, Social and Cultural Rights³⁸ (ICESCR), were finally approved by a unanimous vote of the General Assembly in 1966 and opened for ratification by individual governments. Both Covenants came into force when they received the required minimum of thirty-five ratifications in 1976, and have now been ratified by over ninety countries.³⁹ Taken together, the two Covenants translate the principles proclaimed in the Universal Declaration into specific treaty obligations. The principal difference between the two Covenants—other than their subject-matter division between civil and political rights in the ICCPR and economic, social, and cultural rights in the ICESCR—lies in the strength of the obligations signatories assume

36. See Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting, and Intent* 157–68 (1999) (giving a detailed account of the drafting process and discussions leading to the inclusion of Article 23 in the Universal Declaration).

37. International Covenant on Civil and Political Rights, *opened for signature* Dec. 16, 1966, 999 U.N.T.S. 171 (entered into force Mar. 23, 1976), *reprinted in* 6 I.L.M. 368 (entered into force for the United States Sept. 8, 1992) [hereinafter ICCPR].

38. International Covenant on Economic, Social and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR].

39. For ratification status of the ICCPR and the ICESCR, see Office of the United Nations High Comm'r for Human Rights, *Status of Ratifications of the Principal International Human Rights Treaties*, <http://www.unhchr.ch/pdf/report.pdf> (as of Feb. 8, 2002).

under them. States Parties to the ICCPR incur an obligation to secure most of the rights enumerated in the agreement immediately. States Parties to the ICESCR generally commit themselves only to working *toward* the realization of the rights enumerated in the agreement.⁴⁰

President Carter signed both Covenants in 1977 and forwarded them to the Senate for ratification.⁴¹ The Senate ratified the ICCPR in 1992,⁴² but it has not ratified the ICESCR. This failure has important political implications,⁴³ and it means the United States is not subject to the monitoring and enforcement measures established under the ICESCR. However, to the extent the United Nations Charter and the Universal Declaration already bind the United States, our failure to ratify the ICESCR does not diminish our government's obligation to strive to achieve full employment and to provide protection for the right to work, since the right to work recognized under the ICESCR is essentially the same as that proclaimed in the Universal Declaration. Articles 6 and 7 of the ICESCR contain the pertinent language:

Article 6

1. The States Parties to the present Covenant recognize the right to work, which includes the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts, and will take appropriate steps to safeguard this right.

2. The steps to be taken by a State Party to the present Covenant to achieve the full realization of this right shall include technical and vocational guidance and training programmes, policies and techniques to achieve steady economic, social and cultural development and full and

40. See ICCPR, *supra* note 37, art. 1; ICESCR, *supra* note 38, art. 2; Philip Harvey, *Monitoring Mechanisms for International Agreements Respecting Economic and Social Human Rights*, 12 Yale. J. Int'l L. 396, 398-401 (1987).

41. See U.S. Const. art. II, § 2 (requiring that two-thirds of the Senate ratify any treaty made by the President).

42. The Senate ratified the agreement on April 2, 1992. 138 Cong. Rec. S4781-4 (1992). The United States deposited its instrument of ratification at the U.N. on June 8, 1992. 31 I.L.M. 645.

43. See Henkin, *supra* note 23, at 74-78.

productive employment under conditions safeguarding fundamental political and economic freedoms to the individual.

Article 7

The States Parties to the present Covenant recognize the right of everyone to the enjoyment of just and favorable conditions of work which ensure, in particular:

(a) Remuneration which provides all workers, as a minimum, with:

...

(ii) A decent living for themselves and their families in accordance with the provisions of the present covenant.⁴⁴

As noted above, the general obligation that governments assume under the ICESCR with respect to the realization of these rights is limited. For instance, Article 2 states:

1. Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures.⁴⁵

Thus, as with the United Nations Charter and the Universal Declaration of Human Rights, no obligation is incurred to secure the right to work immediately, but a State Party to the ICESCR does agree to take steps to secure the right over time.⁴⁶

44. ICESCR, *supra* note 38, arts. 6, 7.

45. *Id.* art. 2.

46. For a discussion of the enforceability of such 'promotional' obligations, see Harvey, *supra* note 40, at 396.

D. Defining the Right to Work

These documents do not exhaust the sources of recognition for the right to work in international human rights law,⁴⁷ but they are sufficient to illustrate how the right has been conceived in that context.

First, it involves more than freedom from forced labor and an opportunity to compete for available jobs. It is a right actually to be employed. An offer of income support in lieu of a job will not secure the right,⁴⁸ nor will assurances of non-discriminatory access to available jobs.⁴⁹ The ready availability of suitable opportunities for self-employment might count as contributing to the realization of the right. For example, access to land might secure the right to work for agricultural workers. But these opportunities would have to be as easy to exploit as job offers are to accept.

This view of the right was expressed very clearly by Eleanor Roosevelt, the United States representative on (as well as the elected chairperson of) the committee that drafted the Universal Declaration.

In the opinion of the United States delegation, the right to work, in this Declaration, meant the right of the individual to benefit from conditions under which those who were able and willing to work would have the possibility of doing useful work, including independent work, as well as the right to full employment.⁵⁰

47. For a collection of texts drawn from other international human rights documents recognizing the right to work, see Gert Westerveen, *The International Bill of Human Rights: Normative and Institutional Developments, 1948–1985*, at 92–99 (1986). For citations to national constitutions that expressly recognize the right to work, see Jean Mayer, *The Concept of the Right to Work in International Standards and the Legislation of ILO Member States*, 124 *Int'l Lab. Rev.* 225, 228–36 (1985).

48. Governments have a separate obligation, however, to provide support to persons who lose their jobs. See *Universal Declaration of Human Rights*, *supra* note 30, arts. 22, 25(1); ICESCR, *supra* note 38, arts. 9, 11(1).

49. Governments have a separate obligation, however, to ensure that all persons within their jurisdiction are afforded equal protection of their right to work. See *Universal Declaration of Human Rights*, *supra* note 30, art. 2; ICESCR, *supra* note 38, art. 2(2).

50. Summary of statement by Eleanor Roosevelt, *quoted in* Robinson, *supra* note 32, at 71 n.2. Early drafts of the Universal Declaration contained even

Second, the right to work does not include a right to retain a particular job. There is nothing in the U.N. Charter, the Universal Declaration, or the ICESCR implicating termination rights if adequate alternative employment opportunities are available to terminated employees. Realization of the right is therefore compatible with legal regimes that make it easy to fire individual workers as well as with those that make it difficult to fire them.⁵¹ Its touchstone is not tenure in a particular job but the availability of enough jobs to eliminate involuntary unemployment.

Third, the entitlement is viewed as including a right to be paid wages sufficient to support a dignified standard of living; the right has not been secured if employment is only made available on terms that leave full-time workers in a condition of poverty. This condition is made explicit in Paragraph 3 of Article 23 of the Universal Declaration and in Article 7(a)(ii) of the ICESCR.⁵² What constitutes an adequate standard of living will depend on local conditions and expectations, of course, but for the right to work to be fully realized, a minimum wage must be paid that reflects those conditions and expectations.

Fourth, the right can be asserted against governments, but the duty of governments to secure the right is perceived to be limited. They are not viewed as having an obligation to guarantee the right immediately, but only to adopt policies that will secure the right progressively over time.⁵³ Although this qualification helps to explain why utility-maximization has been deemed to justify limiting the right to work, it would be a mistake to conclude that it nullifies right to work claims entirely. The standard of performance that govern-

stronger language, expressly noting that “[t]he state has a duty to take such measures as may be within its power to ensure that all its citizens have an opportunity for useful work.” *Id.* See also Helle Kanger, Human Rights in the U.N. Declaration 133–34 (1984) (comparing stronger and weaker forms of the right to work).

51. Compare Richard Epstein, *In Defense of the Contract at Will*, 51 U. Chi. L. Rev. 947 (1984), with Gary Minda & Katie R. Raab, *Time for an Unjust Dismissal Statute in New York*, 54 Brooklyn L. Rev. 1137 (1988).

52. *Universal Declaration of Human Rights*, *supra* note 30, art. 23(3); ICESCR, *supra* note 38, art. 7(a)(ii).

53. Louis Henkin, *Introduction*, in *The International Bill of Rights: The Covenant on Civil and Political Rights*, *supra* note 34, at 1, 16.

ments are expected to meet in ensuring a particular human right has enormous practical importance, but that obligation speaks to the enforceability rather than the existence of the right.

Although extreme positivists take the position that a claim must be legally enforceable to be termed a right at all,⁵⁴ such a restrictive definition would force one to conclude that Nazi Germany did not violate the human rights of Jews and that apartheid in South Africa did not violate the human rights of black South Africans. In fact, it is not at all unusual for a right to be recognized without providing for its complete or immediate protection. The holding of the Supreme Court of the United States in *Brown v. Board of Education* is an illustration.⁵⁵ Even though the maintenance of segregated educational facilities was held to violate the constitutional rights of the plaintiff children in the case, the defendant school districts were not ordered to desegregate their schools at once. Instead, they were merely ordered to work towards that goal “with all deliberate speed.”⁵⁶

Rather than concluding that the plaintiffs in *Brown* had no right to the relief they sought, it would be more reasonable to conclude that the right they asserted was indeed vindicated, but the Court was not prepared to order government agencies to secure it immediately. A compromise order of this sort is actually quite likely when a court recognizes that major institutional changes are needed to secure a newly recognized right. It is no more incongruous to declare that the human rights of unemployed workers are being violated by the failure of governments to secure their right to work,

54. This view is exemplified by Bentham’s frequently cited attack on natural rights claims: “*Natural rights* is simple nonsense: natural and imprescriptible rights, rhetorical nonsense—nonsense upon stilts.” Jeremy Bentham, *Anarchical Fallacies; Being an Examination of the Declaration of Rights Issued During the French Revolution*, in 2 *The Works of Jeremy Bentham* 491, 501 (John Bowring ed., 1843). See also Stephen Holmes & Cass R. Sunstein, *The Cost of Rights* 16–20 (1999) (discussing two different approaches to rights—those rights as to which humans are morally entitled versus rights that are protected by a politically organized society).

55. The case was decided in two parts, *Brown v. Board of Education (Brown I)*, 347 U.S. 483 (1954) and *Brown v. Board of Education (Brown II)*, 349 U.S. 294 (1955).

56. *Brown II*, 349 U.S. at 301.

even though those governments are not deemed to have a duty to end the violation at once, but only over time.⁵⁷

E. Recognition of the Right to Work in U.S. Law

The United States has been a strong advocate on behalf of international efforts to secure human rights during the twentieth century, but this support has been qualified by a strong resistance to outside scrutiny of the United States government's own human rights record and commitments.⁵⁸ This latter tendency is displayed in the small number of international human rights agreements proposed for ratification by the executive branch of the United States government, by the even smaller number actually ratified by the legislative branch, and by the large number of reservations attached to those ratifications.⁵⁹ There is a strong tendency for Americans to view the United States Constitution as a complete, final, and superior statement of human rights. This attitude renders international human rights agreements profoundly suspect, even threatening, to many Americans, and severely limits the receptivity of the American public to human rights claims that go beyond those expressly recognized in their own Constitution.⁶⁰

Given this insular tradition, it is not surprising that international recognition of the right to work has been accorded both scant notice and minimal deference in United States public policy debates. Nevertheless, domestic advocacy of the right to work has occasionally been quite strong in the United States, and federal legislation stemming from this advocacy has succeeded in imposing, with one significant difference, essentially the same substantive obligations on the United States government that would flow from ratification of international human rights agreements recognizing the right to work. The difference is that ensuring access to work is

57. See Harvey, *supra* note 40, at 401–02.

58. See Henkin, *supra* note 23, at 64–80 (describing human rights and United States' foreign policy).

59. See generally Natalie Hevener Kaufman, Human Rights Treaties and the Senate: A History of Opposition (1990) (linking the United States' active role in proposing human rights treaties but refusing to ratify them in the 1950s with the current United States' opposition to international human rights agreements).

60. *Id.* at 150–72.

not recognized as a human right in this legislation, but merely a desirable policy goal competing for attention with other policy goals.⁶¹

Support for the right to work reached its apogee in the United States during the New Deal era, and this support culminated in an effort at the end of World War II to enact full employment legislation that would secure the right.⁶² In his 1944 State of the Union Message, President Franklin D. Roosevelt invoked the natural rights language of the United States Declaration of Independence to criticize the United States Constitution's failure to secure essential economic rights.⁶³ To correct this deficiency, he called on Congress to enact legislation giving effect to "a second Bill of Rights."⁶⁴ The first item in President Roosevelt's proposed economic bill of rights was "the right to a useful and remunerative job."⁶⁵ The second was "the right to earn enough to provide adequate food and clothing and recreation."⁶⁶

In response to the President's call, legislation designed to secure the right to work was introduced in Congress by progressive New Dealers, but it was strongly opposed by conservative Republicans and Southern Democrats.⁶⁷ The full employment guarantee included in the New Dealers' bill was defeated, but the watered-down remainder of their initiative, the Employment Act of 1946 (the 1946 Act), still proclaimed:

It is the continuing policy and responsibility of the Federal Government to use all practicable means consistent with its needs and obligations and other essential considerations of national policy . . . to coordinate and utilize all its plans, functions, and resources for the purpose of creating and maintaining . . . conditions under which there will be

61. See Harvey, *supra* note 28, at 106–12 (discussing efforts to secure legislative protection for the right to work in the United States).

62. See Forbath, *Caste, Class, and Equal Citizenship*, *supra* note 10, at 62–79 (describing growth in congressional support for the right to work during the New Deal era).

63. Franklin D. Roosevelt, Message to the Congress on the State of the Union (Jan. 11, 1944), in 13 Pub. Papers & Addresses 40 (1950).

64. *Id.* at 41.

65. *Id.*

66. *Id.*

67. See Bailey, *supra* note 28, at 177.

afforded useful employment opportunities . . . for those able, willing, and seeking to work, and to promote maximum employment, production, and purchasing power.⁶⁸

With this legislation, the promotion of “maximum employment” affording “useful employment for those able, willing, and seeking to work” became a statutorily mandated responsibility of the federal government. But there is no acknowledgment that this policy is needed to secure a human right, and the government’s obligation to pursue this goal was conditioned upon the simultaneous pursuit of other competing public policy goals.

A second effort to enact legislation securing the right to work met a similar fate in the 1970s. In its original form, this legislation would have created a judicially enforceable right to at least a minimum wage job.⁶⁹ As finally enacted, the Full Employment and Balanced Growth Act of 1978 (the 1978 Act) merely requires the federal government to try to achieve full employment without establishing any mandatory measures and, hence, without creating any enforceable obligations. The 1978 Act “declares and establishes as a national goal the fulfillment of the *right* to full opportunities for useful paid employment at fair rates of compensation of all individuals able, willing and seeking to work.”⁷⁰ The 1978 Act also established a loose time frame for achieving this goal. The unemployment rate was supposed to be reduced to four percent within five years (i.e., by 1983), and full employment was to be achieved “as soon as practicable” thereafter.⁷¹

It is noteworthy that, unlike the 1946 Act, the 1978 Act does refer to employment opportunities as a ‘right.’ But the government’s

68. Employment Act of 1946, Pub. L. No. 79–304, § 2, 60 Stat. 23, 23 (1946). For discussions of this legislative initiative and its significance, see Forbath, *Caste, Class, and Equal Citizenship*, *supra* note 10, at 82–91; Harvey, *supra* note 28, at 106–10. For a fuller account of the legislative history of the initiative, see Bailey, *supra* note 28.

69. For an account of the legislative history of this initiative, see Helen Ginsburg, *Full Employment and Public Policy: The United States and Sweden* 64–75 (1983).

70. Full Employment and Balanced Growth Act of 1978, Pub. L. No. 95–523, § 102, 92 Stat. 1887, 1890 (1978) (emphasis added).

71. *Id.* § 104(a)–(c).

obligation to secure this right is expressly qualified by linking it to a host of other policy goals, including a reduction in the rate of inflation, the achievement of a balanced federal budget, and the minimization of federal outlays as a share of GNP.⁷² Indeed, it was part of the strategy of opponents of the legislation to weaken it by including potentially inconsistent goals in the government's mandate.⁷³

In sum, the United States has imposed a statutory obligation on itself to secure the right to work that is substantially equivalent to the obligation that would follow from ratification of the International Covenant on Economic, Social and Cultural Rights. The only significant difference is that the statutes establishing this duty do not expressly recognize access to work as a human right.⁷⁴

We shall see that important consequences may flow from this distinction, but at this point I merely want to emphasize that the right to work claim has achieved some recognition in American law, despite the United States' strong resistance to accepting international human rights obligations beyond those already mandated by the nation's Constitution. Whether this recognition will grow with time is difficult to predict, but participants in employment policy debates in the United States should feel some obligation to address the legal mandates that do exist in this area under both international and domestic law.

F. The Legitimacy of Right to Work Claims

In assessing the legitimacy of the claim that access to work is a human right, it is important to evaluate both the nature of the political process that has led to its formal recognition as a positive right and the moral weight of the philosophical arguments that support it. I shall consider each of these questions in turn.

72. *Id.* § 102.

73. See Harvey L. Schantz & Richard H. Schmidt, *Politics and Policy: The Humphrey Hawkins Story, in* Employment and Labor Relations Policy 25, 32-34 (Charles Bulmer & John L. Carmichael eds., 1980).

74. As noted above, it also is true that in not ratifying the ICESCR, the United States exempts itself from the international monitoring measures established under the Covenant. See Harvey, *supra* note 40, at 396.

1. The Legitimacy of the Political Process Whereby Access to Work Has Been Recognized as a Human Right

Taken together, the Universal Declaration of Human Rights and the two International Covenants based upon it are commonly referred to as the International Bill of Rights. The immediate impetus for the adoption of such standards was provided by popular revulsion at the gross violations of human rights committed by fascist states, particularly Germany, before and during World War II.⁷⁵ This revulsion led to intense lobbying by non-governmental organizations (aided by the delegations of a handful of smaller countries) at the founding conference of the United Nations in San Francisco in the spring of 1945. As a result of this lobbying effort, relatively strong human rights language was added to the United Nations Charter at the conference and a general understanding was reached that the drafting of a universal 'bill of rights' would be among the organization's first tasks.⁷⁶

The United Nations Commission on Human Rights was subsequently established, and responsibility for drafting an international bill of rights was entrusted to it. Chaired until 1953 by Eleanor Roosevelt, the Commission's work fully reflected the disparate political tendencies that emerged in the postwar era.⁷⁷ No one group of nations dominated the drafting process. At first, the dominant split was between capitalist and communist states, but

75. See John P. Humphrey, *The Universal Declaration of Human Rights: Its History, Impact and Juridical Character*, in *Human Rights: Thirty Years After the Universal Declaration* 21, 21 (B.G. Ramcharan ed., 1979); Szabo, *supra* note 33, at 21. For discussions of the prior history of international human rights law and of the development of the international human rights movement, see Henkin, *supra* note 23, at 13–15; Hersch Lauterpacht, *International Law and Human Rights* 3–72 (1968); Robertson, *supra* note 34, at 15–22; Szabo, *supra* note 33, at 11–22.

76. Humphrey, *supra* note 30, at 12–13.

77. For discussions of the history of the Universal Declaration and the International Covenants, see John P. Humphrey, *The U.N. Charter and the Universal Declaration of Human Rights*, in *The International Protection of Human Rights* 39, 39 (Evan Luard ed., 1967); Humphrey, *supra* note 30, at 29–36; Peter Meyer, *The International Bill: A Brief History*, in *The International Bill of Human Rights* i, xxiii (Paul Williams ed., 1981); Szabo, *supra* note 33, at 23–33.

over time the 'north-south' division between the advanced capitalist states and the developing countries of Africa, Asia, and Latin America assumed increased importance. It is important to remember that the Universal Declaration and the International Covenants were drafted during the height of both the cold war and the de-colonization struggles of the postwar era. There were also important religious, regional, and ideological differences that existed within the major blocs and frequently cut across them. These were not easy times in which to search for a consensus concerning a list of universal entitlements.⁷⁸

78. The flavor of the disagreements that existed within the committee that drafted the Universal Declaration can be discerned from the following interchange described by John Humphrey, the Canadian who served as the Director of the United Nations Division of Human Rights from 1946 to 1966, and the person who prepared the first draft of the Universal Declaration for the drafting committee.

The inclusion in my text of a series of articles on economic and social rights, which Cassin [the French representative who prepared the second draft of the Declaration] had reproduced, was quickly challenged. R.H. Harry, speaking for Australia in the absence of Colonel Hodgson, said that it would be 'difficult to spell out in detail the different rights involved.' In his opinion, 'two or three articles in the final draft should be sufficient to cover the broad principles.' Geoffrey Wilson [England] agreed: 'two or three general principles should be stated. These principles would be worked out at a later stage by the United Nations and its specialized agencies.' Santa Cruz [Chile] disagreed: 'if the drafting committee did not introduce economic and social rights into the Declaration, it would not appear to the world to be acting realistically.' Mrs Roosevelt [U.S.] and Malik [Lebanon] took a middle ground. 'Some of the rights,' said Malik, 'would be true in a socialistic form of society; others would not. Since the Declaration had to be universal, only fundamental principles should be stated, such as the right to education, the right to participate in cultural life, the right to property, the fact that human labor is not merchandise and so on.' He then said something which showed how rigid his logic could be. Thinking probably that my article outlawing slavery and the slave trade was not sufficient, Cassin had added the principle that a person cannot 'either alienate his person nor place himself in a state of servitude to another.' This, said Malik, might be interpreted as 'a restriction on a man's personal freedom. If he wanted to be a slave it was his right.' Cassin's addition was not retained.

It would be a mistake, however, to view the drafting process as nothing more than a political competition. Governments certainly looked to their immediate interests, but the nature of the exercise required them to address much broader concerns. Each government spoke from its own history and the tradition of struggle against injustice reflected in that history. Together, they effectively catalogued the wrongs against which human rights claims have been asserted, and while each government sought legitimization for the claims with which it identified, the process required a mutual recognition of the legitimacy of other struggles as well.⁷⁹

As one would expect, the developed capitalist democracies provided strong support for the recognition of individual civil and political liberties, the communist states emphasized the importance of economic and social rights, and the emerging Third World bloc provided additional support for the recognition of economic and social rights while also pressing for the recognition of a new generation of collective entitlements—the rights of peoples to self-determination and to the disposal of their own natural resources.⁸⁰ Other interests pressed other agendas. Each claim had a history. The documents that emerged from this process were based on protracted deliberations,⁸¹ and they embodied a host of political compromises. But they also embodied something approaching an international consensus regarding a set of human rights claims that commanded universal respect. However uneven and inadequate the actual protection provided these rights may be, the political legitimacy of the Universal Declaration and the International Covenants cannot be easily

Humphrey, *supra* note 30, at 44–45.

79. For a detailed account of the drafting process and the mutual recognition of different perspectives that it accommodated, see generally Morsink, *supra* note 36.

80. For a discussion of the differing perspectives on human rights of these three groups of countries, see H. Gros Espiell, *The Evolving Concept of Human Rights: Western, Socialist and Third World Approaches*, in *Human Rights: Thirty Years After the Universal Declaration*, *supra* note 75, at 41, 41. For an extended discussion of the rights of peoples, as opposed to individuals, see James Crawford, *The Rights of Peoples* (1988).

81. For article by article discussions of the deliberations, see Kanger, *supra* note 50, at 78–163; Morsink, *supra* note 36; Robinson, *supra* note 32, at 33–79; Albert Verdoodt, *Naissance et Signification de la Declaration Universelle des Droits de L'Homme* (1950).

dismissed. Further, the legitimacy of both the 1946 Act and the 1978 Act is unassailable.

2. The Moral Legitimacy of Right To Work Claims

The rights proclaimed in international human rights agreements are not based on a unified theory of human rights. Given the highly political nature of the process that led to their adoption it could hardly be otherwise. As Louis Henkin has noted, “[I]nternational human rights are not the work of philosophers, but of politicians and citizens, and philosophers have only begun to try to build conceptual justifications for them.”⁸² Nevertheless, philosophical justifications for these rights do exist and their articulation has been an important part of the political process that has led to their formal recognition.

Early advocates of the right to work were strongly influenced by the social contract strain of natural rights theory. The writings of the French utopian theorist Charles Fourier exemplify this tradition.⁸³ Fourier argued that in the state of nature everyone had seven natural rights. Four of these—the right to hunt, to fish, to gather food, and to pasture animals—were rights to derive a subsistence from nature’s bounty through work carried on in free association with others. It was society’s obligation, he maintained, to provide its members equivalent opportunities.

To equal nature’s bounty you must give us at least what it gives to the savages and the wild animals, a job which pleases them and to which they have become accustomed

82. Henkin, *supra* note 23, at 6.

83. Fourier’s conception of the right was an expansive one. He viewed it as more than a right of access to adequately remunerative employment. Presaging the findings of modern research concerning the role of work in promoting the psychological and social well-being of individuals, Fourier believed the entitlement included a right to enjoyable work in a succession of occupations carried on in the company of friends. See Jonathan Beecher & Richard Bienvu, *The Utopian Vision of Charles Fourier: Selected Texts on Work, Love, and Passionate Attraction* 1–75 (1971).

during the course of their lives, a job with creatures whose society suits them.⁸⁴

Fourier was well aware of the differences between his discussion of natural rights and that of earlier natural rights theorists. His recognition of the right to work was associated with express denunciations of what he perceived to be the inadequacies of classical liberalism. He refused to debate the “renewed reveries of the Greeks, these Rights of Man that have become so ridiculous.”⁸⁵ He believed that such debates merely diverted attention from the real source of civilization’s failure.

Our social compacts are utterly unable to provide the poor man with a decent level of subsistence consistent with his education. They cannot guarantee him the first of the natural rights, the RIGHT TO WORK!⁸⁶

...

Politics . . . vaunts the rights of man but fails to guarantee the right and the only useful one, which is the right to work.⁸⁷

The first task of politics, he maintained, was “to find a new social order that insures the poorest members of the working class sufficient well-being to make them constantly and passionately prefer their work to idleness and brigandage to which they now aspire.”⁸⁸

Although Fourier’s philosophical discussion of the right to work was the most extensive among early advocates of the right, he was not the first to suggest that access to work is a natural right that society has a duty to secure. That claim was advanced during the French Revolution by a number of people representing various tendencies on the left and culminated in its recognition in the revised

84. Charles Fourier, *Oeuvres Completes de Charles Fourier* 625 (1968) (author’s translation).

85. *Quoted in Beecher & Bienvenu, supra* note 83, at 30.

86. *Id.* at 137.

87. *Id.* at 159.

88. *Id.* at 30.

Declaration of the Rights of Man included in the French Constitution of 1793.⁸⁹

The pre-revolutionary origin of the idea that society has an obligation to provide work to those who need it is unclear. It may lie in much older claims that all persons have a natural or God-given right to a share of the earth in order that they may secure their own existence—the right to existence being the most fundamental of all natural entitlements. In agrarian societies this claim has been the common currency of radical reformers for centuries, perhaps millennia. It was the rallying cry of Winstanley and the diggers in seventeenth century England,⁹⁰ of supporters of the so-called ‘agrarian law’ (a redistribution of the property of the rich among the poor) in eighteenth century France,⁹¹ and of ‘land reform’ advocates in the Third World today.⁹²

89. The Declaration states, “Public relief is a sacred debt. Society owes maintenance to the unfortunate, either by procuring them work, or by providing the means of existence to those who are unable to labor.” Fr. Declaration [Constitution] of 1793 art. 2. For an account of the role of right to work claims in the French revolution, see R.B. Rose, *Gracchus Babeuf: The First Revolutionary Communist* 330–45 (1978). A similar provision recognizing the right to work was included in Frederick the Great’s contemporaneously promulgated Prussian Civil Code. See Siegel, *supra* note 18, at 31.

90. Christopher Hill, *Reformation to Industrial Revolution* 129–30, 148, 153, 176, 261 (1967).

91. Rose, *supra* note 89, at 85, 137.

92. The continuing salience of the claim is illustrated by the following lead-in to a 1990 *New York Times* article on Central America:

The futility of efforts to attack the basic causes of Central America’s endemic poverty preoccupied President Vinicio Cerezo one day three years ago as he sat in a hotel room with friends. Some topics, he complained, were so explosive they could not even be mentioned. Asked for an example, he paused. Then he replied, “agrarian reform.” In that instant, the chandelier fell from the ceiling with a crash.

That anecdote was told last week by a friend of the Guatemalan President to illustrate the roadblocks that confront the latest effort to end the poverty that has brought Central America a decade of civil war.

Lindsey Gruson, *Can Central America Win a War on Poverty?*, *N.Y. Times*, June 24, 1990, at D3.

In urban societies, the idea that everyone is entitled to enough land to be self-supporting is easily transmuted into the claim that everyone is entitled to enough work to be self-supporting. This obviously is what happened in urban France during the Revolution, since early proponents of the right to work such as Noel “Gracchus” Babeuf were ardent supporters of the ‘agrarian law’ as well.⁹³ If peasants received land in satisfaction of their natural rights, what should their urban compatriots, the *sans culottes*, receive? A guarantee of work paying wages capable of supporting a reasonable subsistence seemed the natural equivalent.⁹⁴

Although the adaptation of natural rights theory to support right to work claims originated with left-wing radicals, the tradition has also attracted the support of groups with decidedly different agendas. The Catholic Church, for one, has offered significant support to right to work claims grounded not in social contract theory, but in the church’s conception of the purposes that God intends individual human beings to pursue.⁹⁵ Pope Leo XIII’s 1891 encyclical, *Rerum Novarum* (The Condition of Labor) reflected this perspective:

The Preservation of life is the bounden duty of each and all, and to fail therein is a crime. It follows that each one has a right to procure what is required in order to live; and the poor can procure it in no other way than by work and wages.⁹⁶

This view was explained by the Catholic writer Heinrich Pesch in the following terms:

Men have . . . as men in themselves, natural tasks and goals and, consequently, natural rights: the right to exist, the right to work, to acquire property, to activate their personal capabilities, the right to found a family, etc.⁹⁷

93. Rose, *supra* note 89, at 85, 137.

94. *Id.*

95. Siegel, *supra* note 18, at 45–48.

96. Pope Leo XIII, *Rerum Novarum* (The Condition of Labor), *quoted in* Siegel, *supra* note 18, at 46.

97. 1 Heinrich Pesch, *Lehrbuch der Nationaleconomie* 440 (rev. ed. 1920–26), *quoted in* Siegel, *supra* note 18, at 47.

Offering his support to the right to work in a World War II radio address, Pope Pius XII insisted on the natural rights origin of the entitlement in order to emphasize his rejection of the view that the right is a creation of society, a view he associated with Marxist-Leninist and Fascist thinking.⁹⁸ Support for the Catholic Church's natural rights view of the right to work can also be found in Pope John XXIII's *Pacem in Terris* (Peace on Earth) and Pope John Paul II's *Laborem Exercens* (Performing Work).⁹⁹

Secular support for the claim that access to work is a natural right now tends to be grounded in theories of human nature rather than social contract theory. In his inaugural address as President of the American Political Science Association in 1963, Carl Friedrich argued that the right to work "is rooted in the belief that it is part of man's nature to work and that therefore any situation which deprives him of fulfilling this natural propensity ought to be corrected."¹⁰⁰ According to this view, the right to work, along with other economic and social entitlements are 'freedoms of creation.'

They are rights which provide man with the freedom from fear and the freedom from want; that is to say, they liberate him from restrictions and inhibitions which hinder his full development as a human being. While radically different from the older [civil and political] freedoms, they are nonetheless rightfully claimed for all men *qua* men.¹⁰¹

Jack Donnelly has similarly argued that human rights are natural entitlements that

serve to protect or realize essential human attributes, potentials, or holdings. What one is entitled to simply as a person is a function of a theory of human nature, a philosophical anthropology, which presents an account of what it is to be a human being or moral person.¹⁰²

98. Siegel, *supra* note 18, at 47–48.

99. *Id.* at 78–79.

100. Carl J. Friedrich, *Rights, Liberties, Freedoms: A Reappraisal*, 57 *Am. Pol. Sci. Rev.* 841, 846 (1963).

101. *Id.* at 843.

102. Jack Donnelly, *Human Rights as Natural Rights*, 4 *Hum. Rts. Q.* 391, 398 (1982).

Many different theories of human nature are possible, in Donnelly's view, and right to work claims find support in many of them, including those of people like Marx who rejected natural rights theory.¹⁰³

Although philosophical support for right to work claims has been expressed most frequently in natural rights terms, the right has been and can be justified on other philosophical grounds as well. For example, James Nickel has argued that right to work claims can be grounded on a Rawlsian theory of social justice as well as more traditional natural rights theories.¹⁰⁴ The justification for a universal right to employment would lie, on this view, in the fact that because of class interests and various group prejudices any nonuniversal distribution of employment opportunities would be unfair to the disadvantaged classes and minorities. Hence the only fair distribution available is one that guarantees each person a job.¹⁰⁵

Richard Siegel has similarly argued that right to work claims can be supported by theories of distributional justice grounded on claims that all persons have a right to 'subsistence,' that all nations have a right to 'development,' or that all governments have a duty to secure certain 'basic needs.'¹⁰⁶

Eschewing "natural law philosophy" and "other extra-evidential referential sources," Marc Tool has argued that "[t]he concept of a human right to employment requires the making of a value judgment: it affirms that people *ought* to have access to contin-

103. Donnelly commented:

Probably the best known such theory is the familiar humanist reading of Marx, especially the *Manuscripts*. If humans, by nature, are creative laboring beings, and if meaningful productive work is required to realize their potential (in a way analogous to the need for an unfettered intellect and conscience), then a natural right to work clearly follows.

Id. at 399.

104. James W. Nickel, *Is There a Human Right to Employment?*, 10 *Phil. F.* 149, 161 (1978-79).

105. *Id.*

106. Siegel, *supra* note 18, at 86-88.

uing and remunerated employment.”¹⁰⁷ Tool grounds his advocacy of the right to work on the values of “rightness, participation and community” reflected in the “democratic ethos” that “historically affirms the fundamental human right to be and to belong.”¹⁰⁸

It is obvious that specialization of labour, in all but the most underdeveloped countries, has proceeded to the point where receipt of a continuous money income provides the primary access to the material means of life and experience. All adult individuals, as a condition of their own psychological, physical, and cultural continuity, need to have regular access to an adequate flow of money income that provides the ‘tickets to participation’ in most aspects of economic and social life.¹⁰⁹

William Forbath and Kenneth Karst have recently developed a theory of constitutional entitlement to the right to work that is similarly grounded on the right of inclusion. In their view, the equal citizenship rights which the United States Constitution promises to all Americans should be interpreted to mandate protection for the right to work.¹¹⁰

Forbath argues that equal citizenship norms embedded in the Constitution can and should be interpreted to require the federal government to guarantee “decent work and livelihoods, social provision, and a measure of economic independence and democracy” for all members of society.¹¹¹ He grounds his argument on the same considerations that led liberal scholars in the late 1960s and 1970s to

107. Marc R. Tool, *Employment as a Human Right 6* (paper presented before the Association for Evolutionary Economics, San Francisco, Jan. 1996, and before the European Association for Evolutionary Political Economy, Antwerp, Nov. 1996) (on file with author).

108. *Id.*

109. *Id.*

110. See Forbath, *Why Is This Rights Talk Different*, *supra* note 10, at 1771–1805; Forbath, *Caste, Class, and Equal Citizenship*, *supra* note 10, at 83; Forbath, *Civil Rights and Economic Citizenship*, *supra* note 10, at 697–718; Karst, *supra* note 11, at 523–71. Other commentators have argued for a constitutional amendment expressly recognizing the right to work. 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).

111. Forbath, *Caste, Class, and Equal Citizenship*, *supra* note 10, at 83.

argue that the United States Constitution should be interpreted to guarantee a right to welfare for the poor and broad-based affirmative action to achieve substantive equality for blacks and other disadvantaged minority groups.¹¹² Forbath believes the social citizenship tradition of liberal, non-court-centered constitutional advocacy can and should be revived in order to realize a more expansive conception of national citizenship.¹¹³

Kenneth Karst's contribution to this discussion has focused on the consequences of our failure to secure the right to work. Developing the linkage between access to work and the quality of citizenship one is able to achieve, Karst asks, "What happens to individuals and families when the formal freedom to work becomes hollow because stable work with a decent wage, decent health and retirement benefits, and access to decent child care just isn't available?"¹¹⁴ He notes the obvious, that the family's income suffers, but also stresses less tangible effects:

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

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

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

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

If stable, adequately paid work elicits the esteem of others, its absence means shame.¹¹⁵

Karst also emphasizes the negative social effects of our failure to secure the right to work, particularly on our ability to build a national community, a goal which he characterizes as "a consti-

112. For citations to this literature, see Forbath, *Why Is This Rights Talk Different*, *supra* note 10, at 1771 n.1.

113. Forbath, *Caste, Class, and Equal Citizenship*, *supra* note 10, at 15–16.

114. Karst, *supra* note 11, at 534.

115. *Id.*

tutional value of the first importance."¹¹⁶ Because unemployment is statistically associated with membership in disadvantaged population groups, negative stereotypes concerning those groups and jobless individuals feed on one another in ways that intensify intergroup conflicts, thereby aggravating the divisiveness that economic inequality produces.¹¹⁷

The world of work . . . offers vivid evidence of the connections between group status equality and national union—or, conversely, the links between inequality and disunion. In the field of work the crucial links in these two circles, benign and vicious, are inclusion or exclusion.¹¹⁸

All of the theories of entitlement we have considered emphasize the material, social, and psychological harms that unemployment causes its victims. The existence of these harms suggests that recognition of the right to work also might be justified in utilitarian terms. Many of these negative utilities have already been mentioned, but a brief recapitulation of the list, with citations to the relevant empirical literature, will be useful.

First, unemployment is a primary cause of both absolute and relative poverty.¹¹⁹ This poverty is harmful because it involves real material deprivation, but it may hurt even more when it is experienced in the midst of plenty.¹²⁰ For this reason, poverty caused by joblessness during periods of general economic prosperity may be especially damaging to the persons who suffer it. This effect is likely to be even more pronounced in a society like the United States where both social status and self-esteem depend heavily on the kind of work one does and how it is rewarded. In fact, being involuntarily unem-

116. *Id.* at 549.

117. *Id.* at 538–53.

118. *Id.* at 551.

119. See Catherine Hakim, *The Social Consequences of High Unemployment*, 2 J. Soc. Pol'y 433 (1982); Isabel V. Sawhill, *Poverty in the U.S.: Why Is It So Persistent?*, 26 J. Econ. Literature 1073 (1988).

120. Sen, *supra* note 13, at 71, 89–90.

ployed is a deeply corrosive experience, even when it is not associated with significant material deprivation.¹²¹

In addition to its role in causing poverty, unemployment is associated with a wide range of adverse psychological and physical health effects ranging from a loss of self-esteem to increased mortality from a surprisingly wide variety of illnesses.¹²² The stress associated with being unemployed seems literally to attack our bodies as well as our psyches. Stress is also associated with increased rates of suicide and attempted suicide.¹²³

121. See, e.g., Sheila Allen & Alan Waton, *The Effects of Unemployment: Experience and Response*, in *The Experience of Unemployment 1* (Kate Purcell et al. eds., 1986); Katharine Hooper Briar, *Social Work and the Unemployed 1–23* (1988); Stephen Fineman, *Back to Employment: Wounds and Wisdoms*, in *Unemployed People: Social and Psychological Perspectives* 268 (David Fryer & Philip Ullah eds., 1987); David Fryer & Stephen McKenna, *The Laying Off of Hands—Unemployment and the Experience of Time*, in *Unemployment: Personal and Social Consequences* 47 (Stephen Fineman ed., 1987); John T. Haworth & Stephen T. Evans, *Meaningful Activity and Unemployment*, in *Unemployed People: Social and Psychological Perspectives*, *supra*, at 241; Marie Jahoda, *Employment and Unemployment: A Social-Psychological Analysis* (1982); Peter Kelvin & Joanna E. Jarrett, *Unemployment: Its Social Psychological Effects* (1985); Gordon E. O'Brien, *Psychology of Work and Unemployment* (1986); Andrew Baum et al., *Unemployment Stress: Loss of Control, Reactance and Learned Helplessness*, 22 *Soc. Sci. & Med.* 509 (1986); Richard M. Cohn, *The Effect of Employment Status Change on Self-Attitudes*, 41 *Soc. Psychol.* 81 (1978); Liliana Winkelman et al., *Why Are the Unemployed So Unhappy? Evidence from Panel Data*, 65 *Economical* 1 (1998); G.J. Meyer, *Dancing with Headhunters: Scenes From the Downsized Life*, *Harpers*, July 1995, at 37.

122. See, e.g., Brenden Burchell, *The Effects of Labour Market Position, Job Insecurity, and Unemployment on Psychological Health*, in *Social Change and the Experience of Unemployment* 188, 188–212 (Duncan Gallie et al. eds., 1994); Terry F. Buss et al., *Mass Unemployment: Plant Closings and Community Mental Health* 27–42 (1983); Peter Warr, *Work, Unemployment and Mental Health* 194–209 (1987); Harvey M. Brenner & Anne Mooney, *Unemployment and Health in the Context of Economic Change*, 17 *Soc. Sci. & Med.* 1125 (1983); Susan Gore, *The Effect of Social Support in Moderating Health Consequences of Unemployment*, 19 *J. Health & Soc. Behav.* 157 (1978); Hakim, *supra* note 119, at 433; Ramsay Liem & Paula Rayman, *Health and Social Costs of Unemployment: Research and Policy Considerations*, 37 *Amer. Psychologist* 1116 (1982).

123. See, e.g., Stephen Platt, *Recent Trends in Parasuicide ('Attempted Suicide') and Unemployment Among Men in Edinburgh*, in *The Experience of Unemployment*, *supra* note 121, at 150, 150–67; Stephen Platt, *Unemployment and Suicidal Behavior: A Review of the Literature*, 19 *Soc. Sci. & Med.* 93 (1984).

Finally, unemployment causes enormous social harm. It is disruptive of a wide range of relationships—including relationships with spouses, children, and close friends, in addition to more casual acquaintances.¹²⁴ As such, unemployment is an enemy of stable family formation and a destroyer of existing families. Not surprisingly, it also causes increased criminal activity and other anti-social behavior.¹²⁵

The portion of the population that does not suffer unemployment directly—and even in the deepest recessions they comprise the vast majority of workers at any moment in time—also suffers negative utilities due to the unemployment of others. The economic costs that society bears as a result of the problem include the foregone goods and services that jobless individuals would have produced if they had been employed (including the foregone taxes they would have paid), the cost of charitable gifts and transfer payments made to jobless individuals as a result of their joblessness by both individuals and governments, and a plethora of indirect costs

124. See Patricia Allat & Susan Yeandle, *Youth Unemployment and the Family: Voices of Disordered Times* (1992); Briar, *supra* note 121, at 32 fig. 3, 40–42; Susan Hutson & Richard Jenkins, *Taking the Strain: Families, Unemployment and the Transition to Adulthood* (1989); Lorna McKee & Colin Bell, *His Unemployment, Her Problem: The Domestic and Marital Consequences of Male Unemployment*, in *The Experience of Unemployment*, *supra* note 121, at 134–49; Warr, *supra* note 122, at 206–07; David Binns & Gerald Mars, *Family, Community and Unemployment: A Study in Change*, 32 *Soc. Rev.* 662 (1984); Hakim, *supra* note 119, at 453–59; Jeffrey H. Larson, *The Effect of Husband's Unemployment on Marital and Family Relations in Blue-collar Families*, 33 *Fam. Rel.* 503 (1984); Liem & Rayman, *supra* note 122, at 1116.

125. See Chester L. Britt, *Crime and Unemployment Among Youths in the United States, 1958–1990: A Time Series Analysis*, 53 *Amer. J. Econ. & Soc.* 99 (1994); Theodore G. Chiricos & William D. Bales, *Unemployment and Punishment: An Empirical Assessment*, 29 *Criminology* 701, 701–24 (1991); Hakim, *supra* note 119, at 450–53; Chris Hale & Dima Sabbagh, *Testing the Relationship Between Unemployment and Crime: A Methodological Comment and Empirical Analysis Using Time Series Data from England and Wales*, 28 *J. Res. Crime & Delinquency* 400, 400–17 (1991); M. Dwayne Smith et al., *Crime and Unemployment: Effects Across Age and Race Categories*, 35 *Soc. Persp.* 551, 551–72 (1992).

borne by society as a result of the health and social problems caused or aggravated by the problem.¹²⁶

This list could easily be extended.¹²⁷ A utilitarian justification of the right to work would have to be based on more than an iteration of these harms, of course. The beneficial effects on aggregate utility, flowing from competing policies that fail to protect the right, also would have to be assessed. Those effects will be considered in the next section of this Article, as will the question of whether welfare economics, the methodology upon which utilitarians principally rely to make such policy assessments, is capable of striking the requisite balance.

III. THE RIGHT TO WORK AND ECONOMIC POLICY DISCOURSE

A. Explaining the Low Salience of Right to Work Claims

Philosophical arguments supporting the right to work and the recognition it has been accorded in both international and U.S. domestic law are consistent with the visceral importance the American public appears to attach to issues of job security. Nothing is more common in American political debate than for proposed government action to be justified by its supporters with claims that it will create jobs, and/or condemned by its opponents with claims that it will destroy jobs. And nothing is more certain in American political life than the seismic influence exerted on public policy agendas by recessions and other economic events involving large-scale job loss.

Based on this evidence one might reasonably suppose that right to work claims would command considerable deference in American public policy discourse, but this is decidedly not the case. One might also suppose that the economic content of right to work claims would have enticed economists to devote a fair amount of attention to exploring how the right might be secured, but this, too, is decidedly not the case.

126. See Philip Harvey, *Paying for Full Employment: A Hard-Nosed Look at Finances*, Soc. Pol'y, Spring 1995, at 21.

127. See Amartya Sen, *Inequality, Unemployment and Contemporary Europe*, 136 Int'l Lab. Rev. 155, 155–72 (1997).

A closer examination of the public's interest in job security suggests a reason for the low salience of right to work claims in both ordinary public policy discourse and in the work of professional economists, and this reason is grounded in the public's presumably utility-maximizing preference for other economic policy goals, a preference that most economists share.¹²⁸

The response of both the public and professional economists to the problem of unemployment varies dramatically over the course of the business cycle. The utility-diminishing effects of unemployment during recessions are clear. Unemployment reduces national income, and those losses are translated, on the micro-economic level, into diminished disposable income for individuals, business firms, and renters alike. Unemployed workers and distressed businesses obviously suffer, but even employed workers and more stable businesses endure income losses, reduced income growth, and added tax burdens. So important and intensely felt are these losses, that during recessions, the goal of putting people back to work tends to dominate all others on the public's political agenda. Based on a similar assessment of the negative effects of recessions, economists have devoted substantial resources during the twentieth century to the task of figuring out what causes recessions and how they can be avoided or shortened.¹²⁹

During such periods the public's overwhelming desire to reduce joblessness is consistent with efforts to secure the right to work, and right to work claims may attract public notice and support. To the extent the right to work has gained formal recognition in the law, it is attributable to public support generated during periods of

128. In other work I have argued that both public and expert views on this question are distorted by misperceptions and confusion concerning the causes of joblessness and the feasibility of achieving full employment. See Harvey, *supra* note 24, at 677–758; Harvey, *supra* note 28, at 21–50, 66–78; Harvey, *supra* note 126, at 21–30. It could be argued that if these misperceptions were corrected, both public and expert preferences would favor protecting the right to work, thereby eliminating the apparent contradiction between utility-maximization and human rights protection in the formulation of employment policy. I shall discuss this possibility below. See *infra* Part IV.C.

129. The best known work in this field, Keynes' *General Theory*, was arguably the most influential book published by an economist during the entire century. For a brief account of the 'Keynesian Revolution' in economic doctrine, see Mark Blaug, *Economic Theory in Retrospect* 640–45 (5th ed. 1996).

exceptionally high unemployment. Even then, however, right to work claims may not figure prominently in public policy debates, because they are not needed to justify or motivate a vigorous policy response to the problem of unemployment.

The situation is different at the top of the business cycle. As unemployment rates come down, most people regain the job security they previously had lost, and the public becomes steadily less concerned about expanding employment opportunities and progressively more concerned about other perceived threats to their interests. The threat of inflation is especially important in this regard, since it is perceived to be aggravated by falling unemployment rates.¹³⁰ The related tendency for wage levels to rise as labor markets tighten has a similar effect on employer attitudes towards unemployment. As unemployment rates fall, employers become progressively less concerned about their customers' unemployment and progressively more concerned about their own ability to find qualified workers at wage levels they are accustomed to paying. Since all the measures available for restraining these inflationary pressures while pushing unemployment rates still lower involve increased government spending and/or an expanded role for government in managing the economy, the public's preferences for lower taxes and limited government—both of which are especially strong in the United States—also contribute to changing attitudes towards unemployment at the top of the business cycle.

As economic conditions improve, a conflict emerges between the presumably utility-maximizing policy preferences of a majority of the voting public and the goal of securing the right to work for persons still suffering involuntary unemployment.¹³¹ Unemployment

130. Harvey, *supra* note 24, at 726–30.

131. It is possible, of course, that the harm caused to a minority of a population when a government fails to secure the right to work may be sufficiently intense to outweigh the majority's preference for policies that pursue other economic policy goals, thereby vindicating the utilitarian calculus. Indeed, I would like to believe this is the case. Still, public preferences for limited government, for freedom from taxation, and for the perceived benefits of living in a society that is substantially free of welfare state institutions also can be quite intense, and there is no reason to assume that the positive utilities derived from satisfying these preferences are less weighty in the aggregate than those that would flow from securing the right to work. Moreover, given the difficulty—some would say impossibility—of making the interpersonal comparisons necessary to

tends to be viewed as a problem, at such times, only to the extent it is suffered disproportionately by members of disadvantaged population groups. In other words, concern about the *distribution* of unemployment replaces concern about the *level* of unemployment in the mind of the public.¹³²

Economists tend to agree with this shift in concern. While disagreements exist within the profession on these issues, most economists take positions that reinforce the public's inclination to believe that (1) falling unemployment rates at the top of the business cycle are more a threat than a blessing; and (2) the disproportionate unemployment burden still borne by disadvantaged population groups at such times can and should be attacked exclusively with measures designed to equalize employment opportunities rather than by trying to reduce aggregate levels of joblessness any further.¹³³

Not surprisingly, right to work claims attract little attention during such periods. Instead, rights-based claims relating to the problem of unemployment tend to focus exclusively on barriers to equal employment opportunity.¹³⁴ The enemy is no longer perceived to be a lack of jobs in the aggregate, but employment discrimination, unequal educational and training opportunities, shortages of child care and other employment-supporting services, and disparities in job availability between rich and poor communities.

Still, the sway of broad right to work claims may be reflected in the fact that express repudiations of the right to work are just as rare as express endorsements.¹³⁵ Even determined opponents of active

determine whether majoritarian preferences are truly utility-maximizing, there is no empirical way to resolve this question. For this reason it probably is best to refer to majoritarian preferences as *presumably* or *presumptively* utility-maximizing, and my references to such preferences always should be understood to include this qualification.

132. Harvey, *supra* note 24, at 686–701.

133. *Id.* at 686–701, 724–30, 738–50.

134. *Id.* at 694–701, 738–50.

135. The only extended discussion expressly rejecting the right of which I am aware is Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *Democracy and the Welfare State* 53, 53–78 (Amy Gutmann ed., 1988). For a response to Elster's argument, see Philip Harvey, *Employment as a Human Right*, in *Sociology and the Public Agenda* 351, 351–74 (William J. Wilson ed., 1993).

policies designed to secure the right to work are unlikely to deny that society has an obligation to provide able-bodied persons the opportunity to support themselves. They are more likely to argue that the market already guarantees those opportunities.¹³⁶ The tendency to assume that market conditions adequately secure the right to work is likely to be especially strong at the top of the business cycle, since that is when the assumption is needed to rationalize a cessation in efforts to bring unemployment rates down further. It is at such times that jobless individuals are most likely to be perceived as responsible for their own condition.¹³⁷

The sway of right to work claims also may help explain the tendency for neo-classical economists to equate ‘full employment’ with the so-called ‘natural rate of unemployment’ or the ‘non-accelerating-inflation rate of unemployment’ (NAIRU) rather than with the existence of enough jobs to provide work for all job-seekers (measurable by comparing job vacancy rates to unemployment rates).¹³⁸ If a plausible argument can be made that existing policies actually do secure the right to work—because ‘full employment’ has been achieved—then proposals to reduce unemployment rates further can be opposed on the basis of ordinary utilitarian considerations without risking a guilty conscience.

In other works I have analyzed in some detail both the causes of joblessness and the facts of job availability over the course of the business cycle in the United States.¹³⁹ The conclusion I draw, in so far as it relates to this issue, is that unemployment rates would have to fall to the two percent range before it reasonably could be argued that labor market conditions alone provided work for all job-seekers in the United States (independent of any inquiry into the adequacy of those employment opportunities to support a dignified existence).¹⁴⁰ If

136. See, e.g., Lawrence Mead, *The New Politics of Poverty* 85–109 (1992) (arguing that the problem of joblessness in the United States is not attributable to a shortage of jobs).

137. Harvey, *supra* note 24, at 730–38.

138. *Id.* at 705 n.95.

139. See, e.g., *id.* at 677–758.

140. *Id.* at 702–09. I define full employment formally as a labor market condition in which the number of full-time equivalent job vacancies equals or exceeds the number of full-time equivalent job-seekers, and in which there is no

this analysis is correct, the assumption that the right to work is adequately secured at the top of the business cycle is faulty. The problem is more serious during recessions, but even at the top of the business cycle, unemployment rates rarely fall low enough to secure the right to work. Indeed, in an effort to prevent inflation, federal monetary authorities actively pursue policies designed to prevent unemployment rates from falling low enough to secure the right to work. Thus, it could be said that the federal government actively pursues policies designed to *prevent* the right to work from being secured.¹⁴¹

The conflict between the utility-maximizing preferences of a majority of the population and human rights protection—exemplified by the fate of right to work claims in the United States—likely extends to other economic and social rights as well. All that is required is the existence of a positive right vested in a minority of the population which a majority of the population believes would be too costly to secure.¹⁴² In addition to the right to work, the Universal Declaration of Human Rights declares a variety of other social

unemployment attributable either to structural impediments to employment (e.g., a mismatch between available jobs and the skills of job-seekers) or to non-optimal job search behavior on the part of job-seekers. I estimate that unemployment rates would have to fall to the two percent range to satisfy this condition based on survey evidence concerning the number of job vacancies in the United States economy over the course of the business cycle (in the one percent to three percent range), and historical evidence concerning the minimum level to which unemployment rates have fallen in the United States and other countries. *See id.* A similar conclusion—that two percent unemployment constitutes a reasonable goal for achieving full employment—was reached by an international task force of eminent economists working under United Nations auspices in the aftermath of World War II. Led by an American, John Maurice Clark, this task force undertook to define full employment for purposes of Articles 55 and 56 of the United Nations Charter. *See Clark et al., supra* note 27, at 14.

141. For example, the Federal Reserve Board began raising short-term interest rates to slow down the United States economy in mid-1999 when unemployment rates averaged 4.2–4.3 percent. As the Board explained, this action was taken because it feared that tightening labor markets would eventually unleash inflationary pressures, even though “[c]ore inflation measures generally remained low” at the time. *See Monetary Policy Report to the Congress*, Fed. Reserve Bull. (Fed. Reserve Bd., Washington, D.C.), Mar. 2000, at 161.

142. For a discussion of the distinction between positive and negative rights, see, for example, Stephen Holmes & Cass R. Sunstein, *The Cost of Rights: Why Liberty Depends on Taxes* 199–203 (1999).

welfare benefits to be fundamental entitlements that society has a duty to try to secure for all its members. These include “the right to education,”¹⁴³ “the right to a standard of living adequate for . . . health and well-being . . . including food, clothing, housing and medical care and necessary social services,”¹⁴⁴ and “the right to security in the event of unemployment, sickness, disability, widowhood, old age or other lack of livelihood in circumstances beyond [individual] control.”¹⁴⁵

Most discussions of the conflict between utility-maximization and the protection of human rights focus on violations of so-called negative rights—the protection of which requires society to abstain from interfering with individual prerogatives. The examples discussed in the social choice literature typically involve ‘objectionable preferences’ in which people derive satisfaction from interfering with the autonomy or dignity of other persons: Nazis deriving pleasure from persecuting Jews or sadists deriving pleasure from causing pain.¹⁴⁶ Since these preferences are unlikely to be very widely felt, it is plausible to question whether conflicts of this type are likely to arise often enough in democratic societies to call the moral adequacy of utilitarianism into practical question.¹⁴⁷ It is also possible to suggest resolutions of the conflict based on a devaluation of the objectionable preferences.¹⁴⁸

143. *Universal Declaration of Human Rights*, *supra* note 30, art. 26.

144. *Id.* art. 25.

145. *Id.*

146. *See, e.g.*, Hare, *supra* note 2, at 30 (discussing a hypothetical situation involving a society of Nazis who derive intense pleasure from persecuting Jews); Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 1339–50 (analyzing objectionable preferences within the framework of welfare economics); Sen, *supra* note 1, at 79–88 (noting that if social choice theory took into account the causation of preferences, rather than just preferences alone, it would shed doubt on the validity of utilitarianism).

147. *See, e.g.*, Hare, *supra* note 2, at 30–31 (dismissing the importance of hypothetical examples of persecution as a challenge to utilitarianism on the grounds that persecutory preferences are rarely intense enough to arguably command utilitarian deference).

148. *See, e.g.*, Chang, *A Liberal Theory of Social Welfare*, *supra* note 3, at 178 (arguing that a liberal theory of social welfare would not permit the satisfaction of objectionable preferences).

Conflicts involving a reluctant majority's disinclination to secure positive rights—rights whose protection requires society to provide certain benefits—are likely more common, and they need not involve objectionable preferences. In practice, conflicts of this type pose a more serious challenge to the moral adequacy of utilitarianism than examples of inherently injurious but implausibly intense (or implausibly widespread) preferences.

While controversies involving social welfare entitlements provide the clearest examples of this type of conflict, they are not the only source. Civil and political rights can also give rise to positive entitlements which are either costly to secure or which only expanded government regulation could secure. Examples include the right of prison inmates to humane living conditions or the right of minority populations to state guarantees of equal-employment or equal-housing opportunity. If enough people feel strongly enough about low taxes or the benefits of laissez-faire, their disinclination to secure positive rights such as these may be utility-maximizing. How should conflicts of this sort be resolved?

B. Welfare Economics

Louis Kaplow and Steven Shavell argue that alleged conflicts between utility-maximization and human rights protection are largely an artifact of unjustifiably narrow definitions of the utility-maximization standard.¹⁴⁹ Describing their preferred normative goal as the maximization of human welfare,¹⁵⁰ they argue that a long list of factors that welfare economists have been accused of ignoring can and should be included in the welfare maximizing calculus. These factors include the welfare effects of changes (or a lack of change) in the distribution of income;¹⁵¹ the fact that existing preferences may be based on imperfect information or mistaken assessments of available information;¹⁵² the fact that people may attach positive value to (i.e., have a taste for) fairness and other normative goals involving self-

149. See Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 961.

150. See *supra* note 5.

151. Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 989–95.

152. *Id.* at 1330–34.

sacrifice;¹⁵³ the fact that preferences are themselves shaped by social institutions, including the law;¹⁵⁴ and the fact that human welfare may increase in the long run if policies are pursued for the purpose of changing preferences rather than for the purpose of merely satisfying existing preferences.¹⁵⁵ Kaplow and Shavell also allow that the welfare of future generations, and even of non-human beings, may be considered relevant in assessing the aggregate welfare effects of particular policies,¹⁵⁶ and they believe that welfare economics can and should account for variations in the intensity of the welfare effects that different individuals experience in assessing the aggregate welfare effects of particular public policies.¹⁵⁷

Based on this very broad conception of the utility-maximization standard, Kaplow and Shavell argue that “the assessment of legal policies should depend exclusively on their effects on individuals’ welfare,” and that “no independent weight should be accorded to conceptions of fairness” except insofar as they concern the distribution of income.¹⁵⁸ Accordingly, they propose that expert assessments of public policy be based exclusively on the principles of welfare economics.¹⁵⁹ Although they do not address the question of how majoritarian preferences that are not utility-maximizing should be viewed, the implication of their argument is that public policy should be utility-maximizing whether or not it reflects majoritarian preferences.

Kaplow and Shavell’s very broad definition of the utility-maximization standard allows them to argue that rights-based claims are superfluous in public policy analysis. Welfare economics, in their view, already takes into consideration everything that rights-

153. *Id.* at 1350–55.

154. *Id.* at 980 n.35, 1334–38.

155. *Id.* at 1338.

156. *Id.* at 987 n.46.

157. *Id.* at 985 n.42.

158. *Id.* at 966.

159. *Id.* at 968. Kaplow and Shavell allow that it may be desirable for individuals to rely on notions of fairness in guiding their conduct on an everyday basis, even though it is not desirable for policy analysts to rely on such considerations in evaluating public policy choices. *Id.* at 1021–38.

based claims legitimately seek to achieve. The only time a rights-based analysis could possibly result in a different ranking of policy choices, according to Kaplow and Shavell, would be in instances where the rights-based choice would reduce people's well-being.¹⁶⁰ To argue that rights should prevail against utility-maximization as a social choice criterion in this context necessarily would imply that human welfare should be sacrificed to the rights-based principles being espoused.

On closer examination, however, Kaplow and Shavell's dismissal of rights-based policy analysis is not as complete as it appears. As noted above, they expressly exempt "concern about equity in the distribution of income" from their critique of fairness and rights-based claims,¹⁶¹ and when the basis for that exemption is examined, we shall see that their objection to other such claims loses force.

Kaplow and Shavell's own description of the methodology of welfare economics makes it clear that policy assessments based on the methodology necessarily rely on normative judgments about whose welfare interests to count and how to weigh the competing welfare interests of different individuals against one another. Since, as I shall show, these are precisely the questions that fairness and rights-based claims address, rather than excluding such claims from consideration, Kaplow and Shavell's description of welfare economics appears to guarantee their relevance.

Thus, even if we accept the equation of human welfare with a broad definition of utility-maximization, and also accept Kaplow and Shavell's position that the only goal of public policy should be to maximize human welfare, it does not follow that fairness and rights-based claims would lose their salience. Does it mean, at least, that those claims should be reformulated and presented using the language and analytic framework of welfare economics? In other words, having defined utility-maximization broadly enough to encompass the policy preferences articulated by most advocates of fairness and rights-based claims, do Kaplow and Shavell provide a convincing argument that those claims would be better expressed

160. *Id.* at 1017.

161. *Id.* at 966.

using the terminology and analytic methods associated with conventional (i.e., neo-classical) welfare economics? This is the real question posed by their argument—whether we should accept neo-classical welfare economics as our sole and exclusive methodology for deciding what public policies are most likely to enhance the well-being of human beings (and non-human beings as well if their interests are recognized).

To answer this question we must examine the strengths and limitations of welfare economics as a methodology for assessing the welfare effects of public policies. Without questioning the many contributions the methodology has made to our understanding of these effects, I shall argue that its virtues are circumscribed by significant conceptual and measurement difficulties. These difficulties suggest that neo-classical welfare economics may be well-suited for assessing only certain kinds of welfare effects—specifically those involving variations in money income or prices—while other welfare effects are better-analyzed using the balancing tests associated with traditional legal analysis, including the differential weighting methodologies commonly employed in the assessment of fairness and rights-based claims.

1. The Role of Fairness and Rights-Based Claims in Welfare Economics

Before any assessment of the welfare effects of a particular policy can be assessed, important issues have to be settled for which rights-based analysis remains relevant within Kaplow and Shavell's analytic framework. These issues concern the principles that regulate the aggregation of individually experienced welfare effects.

First, it is necessary to decide whose welfare is to be counted in the aggregation exercise. As Kaplow and Shavell note, welfare economists have to determine “whose utilities are to be aggregated—whether it includes all individuals in a nation, or in the world, or in some other group; whether it includes only the present generation or also future ones; and whether it includes only humans or, for example, all sentient beings.”¹⁶² This issue cannot be resolved by reference to the welfare effects of the decision, since it is impossible,

162. Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 987 n.46.

even in principle, to ascertain those welfare effects until we know whose welfare is to be counted in measuring those effects. In contrast, rights-based analysis directly addresses the question of whose interests are entitled to consideration in judging the merits of a public policy.

Second, once it has been determined whose welfare is to be counted, it is necessary to determine what normative principles will guide the aggregation of individual welfare effects to determine the aggregate welfare effect of the policy being evaluated. As Kaplow and Shavell note, the principle adopted could embrace the normal utilitarian presumption that all individual utility effects should be given equal weight (an increase in pleasure of a certain absolute magnitude being counted the same whether it is experienced by the richest person in society or by the poorest). It could be radically egalitarian (individual levels of welfare being counted only to the extent that they do not exceed the absolute level of welfare experienced by the least well-off member of society), or it could reflect an intermediate position such as the one espoused by Rawls (increases in welfare for the better-off being counted only if they are accompanied by increases in the welfare of the least well-off members of society).¹⁶³ It is also possible that the aggregation principle could assign weights based on other factors, giving “more [weight to the welfare of] Joe because he is tall and less to Jill because her preferences are objectionable.”¹⁶⁴ A white supremacist, for example, might argue that the welfare of whites should count more than that of non-whites while an equal-opportunity advocate might argue that the welfare of persons who are burdened by disadvantages attributable to present or past racist practices should count more than that of persons who are not similarly burdened. Whereas welfare economics contains no mechanism for choosing among these competing distributional rules, the choice can and arguably should be based, at least in part, on ‘fairness’ and rights-based considerations.

Although Kaplow and Shavell do not argue in favor of any particular set of aggregation principles, they note that the “spirit” of their argument would “narrow the range of plausible distributive

163. See *id.* at 988; Kaplow & Shavell, *Notions of Fairness*, *supra* note 3, at 237 n.2.

164. Kaplow & Shavell, *Notions of Fairness*, *supra* note 3, at 237 n.2.

principles substantially.”¹⁶⁵ For example, they would dismiss as inconsistent with their position any aggregation principle that required particular rights to be honored “regardless of [their] consequences.”¹⁶⁶ They also argue that “favoritism” should not be shown “toward particular individuals or groups.”¹⁶⁷

This latter qualification is hard to understand, since Kaplow and Shavell appear to view aggregation procedures that favor some groups—e.g., the poor—as consistent with their approach.¹⁶⁸ Perhaps their point is that it would be inconsistent with their argument to rely on aggregation procedures which did not at least purport to measure aggregate welfare. This would mean that the welfare of a particular group could be given additional weight if the procedure was intended to measure aggregate welfare but not if it was intended to achieve other goals.

If this interpretation of their position is correct, the limitation Kaplow and Shavell would place on permissible aggregation procedures is not very confining. J.K. Simmons, the actor who portrays the neo-Nazi Vern Schillinger in the Home Box Office television series *OZ* has commented that the secret to his believable portrayal of the character is his assumption that Schillinger views himself as a good rather than an evil person.¹⁶⁹ Although coming from the fictional world of entertainment, this comment illustrates that it may be difficult to find any ideologically motivated advocate of a normative system—no matter how vicious—who does not believe their goals are in the best interest of humanity in general.

Moreover, even a nominal requirement that acceptable aggregation procedures be justified on the basis of their welfare effects may not be possible to apply to decisions about whose welfare to count. The question of whether the welfare of future generations or of non-human beings should be counted in measuring the aggregate welfare effects of a policy cannot be answered—even in principle—

165. *Id.*

166. Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 987 n.45.

167. *Id.*

168. *Id.* at 987–88.

169. Interview by Terry Gross with J.K. Simmons (National Public Radio broadcast, July 30, 1998 and Aug. 30, 2000), <http://www.npr.org>.

with arguments about what end state would truly maximize aggregate welfare. We must first decide whose welfare we are interested in maximizing.

So far, I do not believe I have said anything about the role of rights-based claims in Kaplow and Shavell's social choice model that they do not concede, at least implicitly.

We note that there is some potential for confusion about our statement that social welfare depends only on well-being because of the very fact that one needs a method of aggregating information about individuals' well-being in order to make an overall assessment. In this sense, the evaluations under welfare economics do not depend purely on the data (facts) about individuals' well-being.¹⁷⁰

Having conceded this much, however, Kaplow and Shavell draw a line in the sand. They deem it significant that the only information they would aggregate in evaluating the merits of competing public policies is information concerning the individual welfare effects of the policy.

Our contrast with notions of fairness . . . concerns the data themselves. Under a notion of fairness, some information other than that about each individuals' [sic] well-being is given weight in a judgment about policy choice; that is, it is possible for two policies to result in identical levels of well-being for each individual yet for the judgment to differ. Under welfare economics, by contrast, the only information about a policy that is relevant is information about how it affects each individual's well-being.¹⁷¹

It is important to be clear about the extent of this claim. It is equivalent to pointing out that once all of the functions in a mathematical formula are specified, the only factors affecting the formula's output are the variables plugged into it. Consider, for example, the following aggregation principles that might be used to estimate the total welfare effects of a proposed public policy.

170. Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 988 n.50.

171. *Id.*

	Aggregation Procedure #1	Aggregation Procedure #2
Category of Persons	Weight	Weight
Wealthy	1	1
Poor	1	2
Future Generations	0	1

Using 'Aggregation Procedure #1,' the welfare effects of a policy on wealthy and poor persons would be accorded equal weight, while the welfare effects of the policy on future generations would not be counted at all. Using 'Aggregation Procedure #2' the welfare effects of a policy on future generations and on living wealthy persons would be accorded equal weight, while the policy's welfare effects on living poor persons would be accorded extra weight.

The difference between these two aggregation procedures can be expressed mathematically as follows. Let 'AW' equal the aggregate welfare effect of a public policy. Let 'a,' 'b,' and 'c' represent the average welfare effect of a public policy on wealthy individuals, poor individuals, and members of future generations respectively. Finally, let 'n_w,' 'n_p,' and 'n_f' equal the number of persons falling into each of those three categories respectively. Then our choice between the two aggregation procedures summarized in the above chart would be expressed as a choice between the following two aggregation functions.

Aggregation Procedure #1

$$AW = an_w + bn_p$$

Aggregation Procedure #2

$$AW = an_w + 2bn_p + cn_f$$

As explained above, Kaplow and Shavell implicitly concede that fairness and rights-based claims may—indeed must—play a role in deciding which function should be used to measure the aggregate welfare effects of a public policy. Suppose Jack's well-being would increase by four and Jill's would decrease by three as a result of a particular public policy. To aggregate these individual welfare effects we first must decide whether the welfare of both Jack and Jill matters. Maybe Jack is a chimpanzee and Jill is a human being, or

Jack is ten years old and Jill is a fetus, or Jack is alive today and Jill is an unconceived member of a future generation. After deciding whether the welfare of both Jack and Jill matters, we also must decide whether changes in their well-being should be accorded the same or different weights for evaluative purposes. Suppose Jack is as rich as Croesus and Jill is as poor as a church mouse. Our utilitarian muse tells us this should not matter, but our Rawlsian muse tells us it should. Our answer to these questions determines whether we should use Aggregation Procedure #1 or Aggregation Procedure #2 to measure the aggregate welfare effects of the policy we are evaluating. Kaplow and Shavell's point is that once this decision has been made, the only *remaining* pieces of information affecting our policy assessment are the values of 'a,' 'b,' and possibly 'c' in the equation we choose to use.

This social-choice model involves a strictly demarcated, two-stage analytic process. During 'Stage One' of the analytic process, a set of aggregation principles must be selected, which will determine whose welfare we should count and how much weight we will attach to the welfare effects experienced by different individuals. This task is equivalent to the selection of Aggregation Procedure #1 or Aggregation Procedure #2 in our hypothetical example. Once this task is completed, the analysis enters a second stage. During 'Stage Two' we must determine the individual welfare effects of the public policies being assessed on those individuals whose welfare we have decided to count—that is, the values of 'a,' 'b,' and 'c' (if the welfare of future generations is deemed to matter).

Kaplow and Shavell argue that policy assessments based on this methodology attach no independent evaluative weight to considerations of fairness, because

[u]nder a notion of fairness, some information other than that about each individuals' [sic] well-being is given weight in a judgment about policy choice; that is, it is possible for two policies to result in identical levels of well-being for each individual yet for the judgment to differ, [while] [u]nder welfare economics, by contrast, the only information about a policy that is relevant is information about how it affects each individual's well-being.¹⁷²

172. Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 988 n.50.

For this claim to be true, of course, the same aggregation principles must be used to evaluate all public policies, since the use of different aggregation principles to evaluate different policies would mean that under welfare economics it *would* be possible for “two policies to result in identical levels of well-being for each individual yet for the judgment to differ.”¹⁷³ Moreover, even if this condition is satisfied—i.e., a single set of aggregation principles is selected to evaluate all public policies—Kaplow and Shavell’s claim that welfare economics attaches no independent evaluative weight to fairness is equivalent to claiming that the number of times a car will go around a test track depends entirely on the amount of gas put in its fuel tank. While that may be true if we hold the design of the car constant, it would be just as true to say that the number of times a car will go around a test track depends entirely on its design—holding the amount of fuel constant. Kaplow and Shavell’s claim could be turned on its head in a similar fashion. Policy assessments depend entirely on normative judgments concerning the aggregation of individual welfare effects—given the extent of those effects. A more complete description of the variables affecting a car’s performance would identify both the vehicle’s design and the amount of fuel used in the test run, and a more complete description of the variables affecting policy assessments under Kaplow and Shavell’s social choice model would identify factors that play a role in both Stage One and Stage Two of the analysis, without denigrating or discounting the importance of either stage.

This is not a minor point, since fairness and rights-based concerns are more likely to focus on issues raised in Stage One of the analytic process Kaplow and Shavell describe than in Stage Two. Concepts of ‘fairness’ and ‘rights’ are relational in character. As rights theorists routinely point out, to say that an individual has a right necessarily implies that some other person or group has a related obligation. In the case of negative rights, the obligation may be a duty not to interfere. In the case of positive rights, the obligation may be a duty to do or provide certain things. Fairness assessments involve similar claims of entitlement and obligation. Thus, while it may be possible to define and measure the benefits an individual derives from a fairness or rights-based entitlement without weighing those benefits against the opposing interests and desires of other

173. *Id.*

persons, it is precisely this balancing exercise that comprises the analytic focus of fairness and rights advocacy. In other words, the issues that fairness and rights-based assessments raise are precisely those which Kaplow and Shavell would limit to Stage One of a welfare economic assessment—the determination of whose interests are entitled to weight in assessing a public policy and how the conflicting interests and desires of different individuals should be balanced against one another.

Moreover, since both stages of the analytic process Kaplow and Shavell describe must be completed for welfare economists to offer policy assessments, the full range of issues relevant to both stages necessarily are placed in issue whenever such an assessment is offered. That being the case, it is not clear who is more out of sync with the spirit of welfare economics—fairness advocates who refuse to concede that the only ‘data’ relevant to public policy analysis is information about the welfare of individuals, or economists who refuse to acknowledge the role of fairness and rights-based normative judgments in the aggregation principles they employ.

2. The Adequacy of Welfare Economics to Assess Welfare Effects

The prescriptive power of neo-classical welfare economics is based on its construction of a single metric for measuring the relative welfare effects of different experiences or states of being. The advantages of having such a metric are obvious. It allows straightforward comparisons of the welfare-producing qualities of experiences that otherwise appear incomparable. But the difficulties involved in constructing this metric are formidable, and one may legitimately question if it is useful to assess the range of experiences in this way.

As noted above, Kaplow and Shavell concede that individual welfare effects cannot be aggregated without making normative judgments about whose welfare to count and how to weigh the welfare interests of differently situated individuals. In contrast, they appear to view the measurement of individual welfare as a positivist inquiry—one that raises only questions of fact.¹⁷⁴ Their position on

174. Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 986–88.

this point is puzzling. If anything, the steps required to define and measure individual welfare using a single yardstick appear more value-laden than those required to aggregate those effects once their measurement has been completed.

Individual welfare has many components and just as many potentially measurable dimensions. You can be poor but healthy, crippled but blessed with a supportive family, drenched with success but still limited by a 'glass ceiling,' smart but unloved, ignorant but self-satisfied, rich but dissatisfied. All of these disparate states of being can be characterized as contributing to or detracting from a person's well-being, but that does not mean they all can be measured using the same yardstick.

The term 'welfare' encompasses an unbounded set of experiences and feelings with no common metric. To measure the overall welfare effects of a policy on a single individual, we need a set of aggregation principles, just as much as we do to measure the overall welfare effects of a policy on an entire community. Deciding whether an income of \$50,000 per year combined with a predisposition to depression produces greater 'welfare' for Joe than an income of \$40,000 per year combined with no predisposition to depression poses the same theoretical challenge as the task of deciding whether the overall well-being of a community is better measured by giving the same or different weight to the welfare effects of a public policy on Joe (who is comfortably 'middle class') and Jill (whom you may recall is as poor as a church mouse).

In response to this 'incommensurability' problem, Kaplow and Shavell simply assert that "finding a common denominator" for the measurement of seemingly incommensurable factors "is a prerequisite to coherent policy assessment."¹⁷⁵ This is not much of an argument. Surely coherence does not require that all reasons or factors cited in support of a proposition be reducible to a single measurable substance which can be weighed against a similarly measurable quantity of the same substance distilled from all the reasons and factors cited in opposition to the proposition. Moreover, even if it were true that coherent policy assessment required this kind of expression, it does not mean it is achievable. If coherence is

175. *Id.* at 1368.

equated with mathematical certainty, we may have to settle for something less than coherence.

In any event, it is important to understand that *any* purported ‘common denominator’ for measuring the individual welfare effects of a public policy is the product of a set of normative assumptions that are just as value-laden as those required to aggregate individual welfare effects for the purpose of measuring a community’s overall level of well-being.

Amartya Sen’s Annapurna parable illustrates this point.¹⁷⁶ Annapurna wants to hire someone to clear her garden. There are three applicants for the job. Dinu is the poorest and would experience the greatest increase in income from receiving the job. Bishanno is the least happy and would experience the greatest increase in happiness from receiving the job. And Rogini is the most constrained by disadvantage (a chronic disease) and would experience the greatest improvement in the quality of her life from receiving the job (because she then could afford medical treatment for the disease). Sen asks whom Annapurna should hire, assuming, implicitly, that her goal is the maximization of human welfare.

What is the ‘common denominator’ measuring the welfare effect of Annapurna’s policy choice on each of these individuals? Is it relative increase in income, relative increase in happiness, or relative increase in opportunity? All three factors affect individual welfare, but in order to compare those effects we first have to make a series of normative judgments. What factors should we count as welfare-enhancing? How should we measure those factors? And what relative importance should we accord to each factor in measuring the overall well-being of an individual? These choices are no less normative than those involved in selecting a set of principles for the purpose of aggregating the individual welfare effects of a policy. Sen summarizes this point as follows.

Euclid is supposed to have told Ptolemy: “There is no ‘royal road’ to geometry.” It is not clear that there is any royal road to evaluation of economic or social policies either. A variety of considerations that call for attention are involved, and evaluations have to be done with sensitivity to these

176. Sen, *supra* note 13, at 54–55.

concerns. Much of the debate on the alternative approaches to evaluation relates to the priorities in deciding on what should be at the core of our normative concern.¹⁷⁷

Neo-classical economists have tried to overcome this measurement problem by equating welfare with utility.¹⁷⁸ At first blush, this does not seem to help very much, since 'utility' is no more susceptible to direct measurement than 'welfare.' The hedonistic overtones of the utility concept facilitate a further assumption, however, that brings us closer to something measurable. This second step is the equation of utility with individual preferences.¹⁷⁹ Based on this assumption, the relative welfare effects of being as poor as Dinu, as unhappy as Bishanno, or as disadvantaged as Rogini depend on the relative strength of an individual's desire to avoid Dinu's, Bishanno's, or Rogini's fate. But how are these preferences to be measured? Welfare economists could rely on survey data in which individuals report their preferences directly, but they have instead chosen to rely on a third assumption. This third step is the equation of individual preferences with the choices individuals make—especially in their market behavior.

What neo-classical welfare economics actually measures, therefore, is not the individual welfare effects of public policies, but a third-generation proxy for those effects—the 'revealed preferences' that individuals disclose through the choices they make. Stated differently, neo-classical welfare economics relies on the following string of presumptions in its attempt to construct a 'common denominator' for measuring individual well-being.

welfare <=> utility <=> preferences <=> choices

I shall point out presently that there are problems with this string of presumptions, but even if the linkages were infallible, they do not provide any means of comparing the welfare effects of a policy on different individuals. What the measurement of revealed preferences allows is nothing more than an ordinal ranking of each individual's preferences.¹⁸⁰ With enough observations, the relative

177. *Id.* at 85.

178. Kaplow & Shavell, *Fairness Versus Welfare*, *supra* note 3, at 979.

179. *Id.* at 980.

180. *Id.* at 979 n.33.

strength of these preferences could be mapped on an absolute scale, but even if we knew the preferences of every individual in complete detail, we would not be able to calibrate these individual scales against one another. In other words, we could not tell whether any individual experienced greater or lesser well-being than any other individual. To achieve that goal we need to make interpersonal comparisons of individual utilities (or preferences),¹⁸¹ a problem that neo-classical welfare economics has not solved. All that Kaplow and Shavell claim is that “there do exist coherent approaches to the task.”¹⁸² All such approaches, however, require assumptions and normative judgments beyond those described above.

There are other problems with the string of presumptions on which the neo-classical measure of welfare is founded. As Kaplow and Shavell readily acknowledge, an individual’s revealed preferences may not be welfare-maximizing because they are based on imperfect information,¹⁸³ have been affected by cognitive limitations,¹⁸⁴ or have been shaped by public policies which, if changed, would result in a new set of preferences that would generate greater utility.¹⁸⁵ Where an individual’s existing preferences are not welfare maximizing, for these reasons or any others, Kaplow and Shavell argue that public policy should be directed to the maximization of the ‘actual’ welfare of individuals, rather than their revealed preferences (or some other value such as fairness).¹⁸⁶

But if we cannot rely on an individual’s revealed preferences to guide us, how are we supposed to know when those preferences are not welfare-maximizing, and how are we supposed to know what the individual’s ‘actual’ welfare interests are? The reason neo-classical welfare economics uses revealed preferences as a proxy for individual welfare is because it has no way of assessing individual welfare more directly. In this instance, however, assessments of the ‘actual’ welfare interests of individuals would have to be based on other data. If such

181. *Id.* at 985 n.42.

182. *Id.*

183. *Id.* at 1330–34.

184. *Id.* at 1378–81.

185. *Id.* at 1334–38.

186. *Id.* at 1330 n.897.

data is available, why should we not rely on it to assess the welfare effects of a policy directly rather than merely as a stand-in for revealed preferences when we lack confidence in the reliability of that measure? The obvious answer is that alternative measures of welfare do not allow us to construct a 'common denominator' for assessing *all* welfare effects.

It may be, however, that the attraction of using revealed preferences as a proxy for individual welfare is more than instrumental. Kaplow and Shavell argue that well-being alone should matter, and they allow for the possibility that, under certain circumstances, individual preferences should be ignored in order to maximize individual welfare. But their deference to individual preferences is also very strong. "Well-being is not restricted to hedonistic and materialist enjoyment," they argue, "or to any other named class of pleasures and pains,"¹⁸⁷ but it does appear to be restricted to what individuals want for themselves: "The only limit on what is included in well-being is to be found in the minds of individuals themselves, not in the minds of analysts."¹⁸⁸ The rhetoric is stirring—very close in tone and content to condemnations of 'pointy-headed government bureaucrats who think they know what's better for us than we know ourselves'—but it leaves unanswered the question of why we should assume that the well-being of individuals will be maximized if they get what they want. My point is not to argue in favor of paternalism, but merely to point out that the equation of welfare with the satisfaction of revealed preferences may be grounded as much in anti-paternalistic normative preferences as it is in positivist judgments about the measurement of individual well-being.

Similar questions arise with respect to the welfare economist's equation of well-being with 'utility.' As I have emphasized, well-being has many dimensions. Some of these dimensions involve objective circumstances (whether or not an individual is afflicted with a serious disease), and some involve subjective attitudes (whether or

187. *Id.* at 980.

188. *Id.* See also *id.* at 1338–55 (noting that preferences can be shaped by public policies, but expressing the view that it is legitimate to justify a policy on the grounds that it actually will change what individuals want rather than on the grounds that they *should* want what the policy aims to achieve).

not an individual is depressed about having a serious disease). The equation of welfare with utility causes the objective dimensions of individual well-being to recede into the background compared to the subjective dimensions. Arguably, objective circumstances no longer matter except as causes of psychological states. The relevant psychological states need not be hedonistic. All that is required is that they produce desires and hence preferences.

Sen's Annapurna parable speaks to this issue. Dinu (who is debilitated by a chronic disease) is described as bearing her affliction cheerfully. If welfare is measured entirely by subjective states rather than objective circumstances, it should not matter whether Dinu's contentment is based on the actual material conditions of her life or her perception of those circumstances. That being the case, policies that teach the oppressed to accept their fate may be deemed more welfare-enhancing than policies that encourage them to resist their fate. As Sen notes:

The utility calculus can be deeply unfair to those who are persistently deprived: for example, the usual underdogs in stratified societies, perennially oppressed minorities in intolerant communities, traditionally precarious sharecroppers living in a world of uncertainty, routinely overworked sweatshop employees in exploitative economic arrangements, hopelessly subdued housewives in severely sexist cultures. The deprived people tend to come to terms with their deprivation because of the sheer necessity of survival, and they may, as a result, lack the courage to demand any radical change, and may even adjust their desires and expectations to what they unambitiously see as feasible. The mental metric of pleasure or desire is just too malleable to be a firm guide to deprivation and disadvantage.¹⁸⁹

Neo-classical welfare economics has been a source of many insights, and it would be foolish to declare those insights irrelevant or useless for assessing the individual welfare effects of public policies; however, it would be equally foolish to disregard the inherent limitations of the methodology. Where the individual welfare effects of a policy mainly consist of changes in income, neo-classical welfare economics may constitute an entirely adequate

189. Sen, *supra* note 13, at 62–63.

methodology for measuring those effects, but when other dimensions of well-being are implicated, welfare economics is likely to be less useful. Other means of evaluating individual well-being may be needed which do not attempt to reduce all benefits and harms to a single common denominator. These methods may produce evaluations that look more like medical records than preference rankings, but they need not be, for that reason, either less rigorous or less 'scientific.' Indeed, welfare economic analyses would form an important part of the relevant data set—including analyses that attempted to push the envelope of welfare economic measurement. The only difference would be that other sources of data would *not* be excluded from the assessment enterprise as Kaplow and Shavell seem to propose.

C. Balancing Rights-Based Claims and Utility-Maximization as Public Policy Goals

If welfare economics is not equal to the task, how should we resolve the conflict between the duty of governments to secure the right to work and the presumably utility-maximizing preferences of the public for price stability, low taxes, and limited government? In answering this question, I think it is useful to reflect on two well-known nineteenth century lifeboat cases in which conflicts between utility-maximization and the protection of countervailing rights were addressed in judicial decisions. Both cases involved situations in which utterly innocent individuals were killed under circumstances that were presumed to have saved more lives than were sacrificed.

*U.S. v. Holmes.*¹⁹⁰ In the early spring of 1841, an American ship hit an iceberg while crossing the Atlantic Ocean. As the ship sank, forty-one passengers and crew members crowded onto a leaky lifeboat. The boat was badly overloaded, its gunwales only five inches above the water line. Nevertheless, the passengers and crew managed to keep the boat afloat for the next twenty-four hours. The crew rowed and the passengers bailed water. Then, in the middle of their second night in the lifeboat, the wind rose and waves began to splash into the boat. Certain that the boat would founder unless its load was lightened, the officer in charge ordered the crew members to throw overboard all the adult male passengers who were not

190. 26 F. Cas. 360 (C.C.E.D. Pa. 1842) (No. 15,383).

accompanied by their wives. Fourteen men were thrown overboard, followed by two women who apparently asked to be thrown overboard with their brother. Thus lightened, the lifeboat survived the night, and the next morning the boat's remaining occupants were rescued by a passing ship.

When the rescue ship reached port, most of the surviving crew disappeared, but one, a man named Holmes, was arrested and charged with manslaughter. The judge who presided at Holmes's trial instructed the jury that individuals facing certain death, as were the occupants of the lifeboat, could rightfully sacrifice some of their number to save the rest, but that this act of self-preservation was conditioned on satisfying two requirements. First, crew members had to be sacrificed before passengers, because of the contractual duty the crew owed to the passengers. Second, the selection of specific individuals to be sacrificed had to be done by lot. If these requirements were met, the homicides would be justified, even if the victims had not agreed to the procedure, and even if the victims resisted their fate and had to be killed by force. Following these instructions, Holmes was convicted of manslaughter and sentenced to six months imprisonment.¹⁹¹

Although this case does not concern unemployment, it illustrates how one judge resolved a conflict between utility-maximization and countervailing rights-based claims. In his instructions to the jury, the judge in the *Holmes* case articulated a rule of law according to which the killing of innocent persons could be justified if it resulted in fewer lives being lost than if no one were killed. The judge's holding that the killing of innocent persons could be justified in the circumstances of this case reflects the view that utilitarian considerations sometimes should outweigh otherwise valid rights-based claims—in this instance, the right to life itself, if only for a few more minutes or hours (with a remote chance of long-term survival).

At the same time, however, the court held that the crew had no right to sacrifice the lives of passengers ahead of their own, and no right to sacrifice anyone's life unless that person was selected by lot. This was true, even though the crew's use of a different procedure to decide whom to throw overboard produced the same net benefit in

191. *Id.*

terms of the number of lives saved as would the procedure approved by the court. This holding illustrates the justification of public policies on the basis of rights-based concerns, irrespective of whether the policy is utility-maximizing.¹⁹²

*The Queen v. Dudley and Stephens.*¹⁹³ The rule of law adopted by the *Holmes* court compromised utilitarian and rights-based considerations. In an analogous nineteenth century English case, *The Queen v. Dudley and Stephens*, the court adopted a rule that was more deferential to the rights of potential victims. In that case two sailors stranded in a lifeboat were prosecuted for killing and eating a third. They offered a defense based on the necessity of their action to save their own lives. The court held that this defense was unavailable to the sailors, even though “if the men had not fed upon the body of the boy they would probably not have survived to be . . . rescued,” and “the boy, being in a much weaker condition, was likely to have died before them.”¹⁹⁴ Moreover, the *Dudley and Stephens* court expressly noted its disagreement with the *Holmes* court’s holding that the homicide would have been justified if the victim had been chosen by lot. Instead of a right to preserve their lives, the court reasoned that both morality and the law imposed a duty on Dudley and Stephens to accept their own deaths. Their innocent victim’s right not to be killed against his will trumped their scheme to maximize the survival rate of the group as a whole.

My purpose in describing these cases is not to argue the merits of the holdings of either court. I cite them merely to illustrate the special weight that rights-based claims generally are presumed to possess when they conflict with utilitarian considerations.¹⁹⁵ This ‘trumping’ effect may be absolute, as it was deemed to be by the *Dudley and Stephens* court. But the *Holmes* case illustrates that

192. The *Holmes* case did not make clear why the officer in charge of the lifeboat felt justified in sacrificing passengers ahead of crew members, but he may have been motivated by a reasonable belief that there would be a better chance of saving the greatest number of lives if experienced seamen remained in the boat to handle the oars during the upcoming storm. If so, the judge’s rights-based analysis of who should have been sacrificed clearly would have conflicted with a utilitarian assessment of how expected aggregate utility could be maximized.

193. 14 L.R. 273 (Q.B.D. 1884).

194. *Id.* at 275.

195. See Dworkin, *supra* note 1, at 232–38.

rights-based claims can be accorded special deference without treating them as absolute trumps. This is consistent with the view that both utility-maximization and the protection of fundamental rights are legitimate public policy goals. According to this view, policies that infringe on fundamental rights may be justified, but they require stronger utilitarian justification to be deemed acceptable than policies which do not infringe on such rights. In other words, while a utilitarian cost-benefit analysis may justify non-infringing public policies whenever the balance is even slightly positive, that is not enough to justify a policy that does infringe on basic rights. Similarly, a legitimate rights-based claim that does not require a sacrifice of aggregate utility (or conflict with some other legitimate public policy goal) may be owed absolute deference, but where a conflict exists with utility-maximizing objectives, some compromise of the right may be necessary.

Perhaps the clearest illustration of this compromise or balancing principle is the distinction drawn in constitutional jurisprudence between the standard of review applied by courts in deciding whether legislative enactments comply with the Equal Protection Clause of the Fourteenth Amendment. Laws that do not infringe on certain constitutionally protected rights will pass muster if there is a mere rational basis for their enactment, whereas laws that do infringe on such rights require more compelling justification, with the level of justification varying depending on the right at issue.¹⁹⁶ Human rights claims have bite precisely because they declare that certain actions may be improper, even if those actions are supported by a majority of the population, indeed, even if the actions in question would increase the total utility of the population as a whole. But it is not necessary to take the position that rights-based claims should always trump conflicting utility-maximizing purposes.¹⁹⁷ It should be possible to honor multiple goals in public policy decision-making.

The attraction of utility-maximization as a single-purpose public choice criterion is especially strong for scholars. The advantage of basing public policy choices on utility-maximization alone is

196. See, e.g., *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 439–42 (1985) (explaining different levels of equal protection review).

197. See Donnelly, *supra* note 102, at 402.

that it allows—at least in principle—for policy choices to be made scientifically. If the utility-generating effects of competing policies could be measured, then policy choices could be made simply by comparing measurements (and persons expert in such measurement would become the true arbiters of public choice).

But is the promise of scientific decision-making a sufficient reason to adopt a single-purpose decision rule? I think not. Just as human welfare is multi-dimensional, so are the purposes that human communities pursue. Some of these purposes may have a common denominator, but there is no reason to believe they all do. The desire for a uni-dimensional decision rule, as exemplified by Kaplow and Shavell's argument, has little to commend it other than its scientific aspirations. Were it not for that promise, it is doubtful that anyone would think it a good idea to try to reduce all the benefits and detriments of a particular policy to a single metric.

Decision-making in the face of conflicting goals is not easy, but traditional legal reasoning shows that competing goals can be rationally analyzed and balanced. The balancing tests that courts have devised to accomplish this task are far from perfect and are never free of controversy, but they may provide a better model than welfare economics for evaluating public policy choices that involve conflicts between utility-maximization and the protection of human rights.

The *Holmes* case, in which a balancing of these competing goals is attempted, suggests some rules for the exercise. First, it is necessary to assess the strength of both the utility-maximizing purpose and the rights-based claims with which that purpose conflicts. In the *Holmes* case, the utility-maximizing purpose of saving lives was deemed to be very strong, while the right to life of the innocent individuals whose deaths were required to achieve that purpose was dramatically diminished by the fact that they faced certain death within a very short span of time if their right to life was not violated.

A second rule suggested by the *Holmes* case for balancing rights-based claims against utility-maximizing purposes is that the distribution of harms necessary to compromise these two goals must be considered, as well as the magnitude of the harms. The *Holmes* judge accepted that at least some occupants of the lifeboat at issue in the case were destined to drown. Given the inevitability of that harm,

it was not possible for the group as a whole to maximize its utility without sacrificing some members of the group, thereby violating their right not to be killed.

In deciding how these harms should have been distributed, however, the *Holmes* judge enforced two rights-based entitlements. The first was a private entitlement created by contractual relations between the crew members, the shipping company, and the passengers. The judge held that passengers had a right to precedence over crew members in deciding who should be sacrificed because of the crew's contractually-assumed duty to care for the passengers.¹⁹⁸ The other right enforced by the *Holmes* judge was a public entitlement grounded in human rights principles.¹⁹⁹ Among those with equal claim to be spared, the judge held that those to be sacrificed had to be chosen by lot, thereby honoring the principle that all persons are naturally endowed with an equal right to life. Thus, rights-based claims may be honored in deciding how the benefits and harms of a utility-maximizing course of action are distributed, even when such claims are deemed insufficient to bar the utility-maximizing action.

These two balancing principles—one focusing on the relative strength of conflicting utility-maximizing and rights-based interests and the other focusing on the way in which harms to these interests are distributed among individuals—are helpful in assessing the conflict between right to work claims and the public's preference for other economic policy goals.

In assessing the strength of the utility-maximizing and the rights-based interests that conflict in this area of public policy, it is important to remember that we are not seeking a common denominator capable of measuring all benefits and harms using a single metric. Instead, our goal should be to measure the interests at issue in whatever ways we can best appreciate their respective importance and the tradeoffs that exist between them.

Unemployment imposes significant material and social harms on society, but it is a distinguishing characteristic of the phenomenon that this burden is not evenly distributed among workers. In

198. U.S. v. *Holmes*, 26 F. Cas. 360, 366–67 (C.C.E.D. Pa. 1842) (No. 15,383).

199. *Id.* at 367.

assessing the importance of the harms that unemployment causes to rights-based interests, attention accordingly must be focused on those persons who directly bear the burden—unemployed workers and their dependents.²⁰⁰

As previously noted, society's failure to secure the right to work has severely negative effects on these individuals. They suffer a broad range of economic, psychological, social, and medical harms²⁰¹ that directly attack the interests protected by the right to work.²⁰² As Amartya Sen has noted:

[T]he penalties of unemployment can be enormously more serious than income distribution statistics may suggest. . . . The separate problems are, of course, interrelated, but each is significant in its own way, and they have to be distinguished from one another. Their negative effects are cumulative, and they act individually and jointly to undermine and subvert personal and social life.²⁰³

The number of individuals who suffer these harms varies, of course, as unemployment rates rise and fall, and the amount of harm that particular individuals suffer also varies. The harm depends on the frequency and duration of the unemployment spells they suffer and on the extent and quality of the material and social resources that are available to them when they are unemployed. Families can and do provide substantial support to unemployed individuals, mitigating the harm they suffer. Governments also mitigate the harm in the form of income maintenance benefits and various social programs. The aggregate harm joblessness causes to rights-based interests accordingly must be assessed after taking these additional factors into consideration.

The magnitude of the harm to utility-maximizing interests that would flow from policies designed to secure the right to work is much less certain. The harms the public seems to fear—increased

200. The balance between rights-based and utility-maximizing interests might look different if the burdens of unemployment were distributed more equally across the population. I consider this possibility in the context of my examination of policies designed to produce this effect. *See infra* Part IV.A.

201. *See supra* notes 119–25 and accompanying text.

202. *See supra* Part II.F.

203. Sen, *supra* note 127, at 160.

inflation, higher taxes, and larger government—could vary greatly depending on the type of policies pursued to secure the right to work and the economic environment in which they were pursued. Also, the magnitude of these harmful effects depends substantially on public preferences, that is, on the public's 'taste' for price stability, reduced levels of taxation, and limited government. Some people view increased taxation and government spending as benefits to be sought, rather than harms to be avoided, and the weight of public opinion on this question fluctuates. Finally, it is important to remember that these harms generally attack only utilitarian as opposed to rights-based interests, so they do not give rise to the heightened concerns that harms to human rights interests deserve.

The contingent nature of these harms means that judgments as to whether efforts to secure the right to work would do enough damage to the public's utilitarian interests to justify a rejection of right to work claims is best undertaken in conjunction with the analysis of specific policy proposals, a task I undertake in Part IV of this Article. However, given the severity of the harms caused by unemployment, it probably is safe to conclude that society's utilitarian interest in maintaining unemployment rates above the full employment level would have to be very strong to outweigh the rights-based interests of those persons who suffer unemployment as a result of that policy choice—unless, of course, the negative effects of unemployment were greatly reduced by mitigating factors such as those identified above.

If we assume for the sake of argument that the public's preference for reduced inflation, lower taxes, and limited government over policies that would secure the right to work is justified, is the distribution of unemployment that results from that preference fair? Most people view workers who lose their jobs during recessions as innocent victims of economic circumstances; further, most people also probably agree that the disproportionate unemployment burden that disadvantaged population groups bear is unfair. I shall argue, however, that the unfairness runs deeper than this—and that very few workers who suffer unemployment deserve their fate.

Members of disadvantaged population groups experience significantly more unemployment than other workers in the United States. The unemployment rate for African-Americans is consistently

about twice the rate that white workers experience;²⁰⁴ the unemployment rate for teenagers is about four times the rate for workers twenty-five years of age and older;²⁰⁵ and the unemployment rate for persons with less than a high school diploma is more than four times the rate for persons with a college degree.²⁰⁶ When these characteristics are combined, the unemployment rates for these population groups soar. The unemployment rate for black youths age sixteen to twenty-four years with less than a high school diploma was 36.7% in September 2001, while the unemployment rate for white college graduates was 2.0%.²⁰⁷ If other factors indicative of disadvantage were added to the mix—such as family composition, child-care responsibilities, neighborhood of residence, and prior employment experience—the differences would be even greater. Moreover, the fact that disadvantaged individuals suffer more unemployment tends to be self-perpetuating, because unemployment creates conditions that aggravate labor market disadvantages.

This distribution is problematic. Even if we assume that the existing policy regime is justified by utilitarian considerations, fairness considerations arguably dictate that the sacrifices required to maximize aggregate utility be distributed equally across the benefited population or, if an equal sharing of the burden is impossible, that those individuals called upon to shoulder the burden be randomly selected. The disproportionate unemployment burden borne by disadvantaged population groups offends these principles.

As for other workers, it is fairly obvious that cyclically unemployed workers also do not deserve their fate. Their lack of work is attributable to the economy's failures rather than their own, and the risk of being laid-off to which they have succumbed is not shared equally by workers in all occupations and sectors of the economy. For these reasons, the suffering they endure offends the same equal-sharing or equal-exposure principles that condemn the disproportionate unemployment burden borne by disadvantaged population groups.

204. Harvey, *supra* note 24, at 741 fig. 7.

205. Handbook of U.S. Labor Statistics 92 tbl. 1-25 (Eva E. Jacobs ed., 3d ed. 1999).

206. Harvey, *supra* note 24, at 743 fig. 8.

207. 48 Employment and Earnings 25 tbls. 1-16, 26, & A-17.

Persons who say they want to work but remain jobless in periods of relative prosperity tend to be viewed with much less sympathy by the public, but this unfavorable opinion is partly attributable to misperceptions concerning job availability.²⁰⁸ Few people seem to realize that even in periods of general prosperity, there generally are not enough jobs available to provide work for everyone who wants it.²⁰⁹ The existence of involuntary unemployment is as certain in such circumstances as it is during recessions. The only difference is the nature and size of the population that tends to suffer unemployment. During recessions the unemployed include large numbers of regularly employed individuals whose desire for work is unquestioned by the public. During non-recessionary periods, jobless individuals are less likely to have been regularly employed and more likely to have histories of labor market failure.

This profile makes it easy for the public to blame jobless individuals for their own unemployment. Since members of disadvantaged population groups are over-represented among the unemployed, these unfavorable judgments are reinforced by racist attitudes and other historical prejudices against the groups in question.²¹⁰ The unemployed are seen as lazy, shiftless, or predisposed to prefer criminal activity over honest labor. These negative views flourish despite the fact that unemployment during periods of relative prosperity is just as much a product of a shortage of jobs as it is during recessions.²¹¹ If enough jobs become available to provide work for all who seek it, virtually all unemployed workers find work, and unemployment rates fall to genuinely frictional levels (below two percent).²¹²

The fact that there are not enough jobs in the economy to provide work for all job-seekers makes it inevitable that a certain

208. See Harvey, *supra* note 24, at 730–38.

209. See *id.* at 700–07.

210. See Joel Handler & Yeheskel Hasenfeld, *We The Poor People: Work, Poverty, and Welfare* 4, 27 (1999) (discussing the typical welfare recipient and also the historically racist and sexist attitudes that led to or kept certain groups in poverty); Philip Harvey, *Joblessness and the Law Before the New Deal*, 6 *Geo. J. on Poverty L. & Pol'y* 1, 1–41 (1999).

211. See Harvey, *supra* note 24, at 701–50.

212. See *id.* at 707 n.112.

number of people will suffer the harms that flow from being unemployed, even in periods of relative prosperity. Variations in individual behavior may help determine who those individuals will be, but that does not mean their joblessness is self-inflicted. Everyone who runs a race and loses may be deemed responsible, in some sense, for their loss. Each racer, viewed individually, might have been able to win if he or she had trained harder or competed more fiercely. But even if every person in a race has trained as hard and races as fiercely as it is humanly possible to train and race, there still will be only one winner. Everyone else must lose, because there are not enough winning positions to go around. The rules of the race create losers, not differences in relative training, effort, or talent. If winning were defined as crossing the finish line, then everyone could win.

So it is with the labor market. Even if every member of the labor force did everything possible to find work, a certain number still would suffer involuntary unemployment, because there almost never are enough jobs to go around. Unemployment is not self-inflicted in these circumstances. If there were enough jobs to go around, differences in qualifications and job search activities would help determine who got the best jobs, but these differences would not create any unemployment.

As noted above, there are mitigating factors that can reduce the severity of the harms that unemployed workers and their dependents suffer. Some of these factors work mainly by equalizing the burdens of joblessness.²¹³ These include enforcement of anti-discrimination legislation, the redirection of private or public investment to economically depressed communities, the provision of increased educational and training opportunities for disadvantaged population groups, and the provision of social services such as child care that make it easier for unemployed workers to seek and find employment. To the extent these measures are effective, they tend to reduce inequities in the distribution of the unemployment burden among individuals and population groups.

The distribution of the costs of policies designed to secure the right to work raises fewer fairness concerns. There are two reasons for this. First, the burdens likely to flow from efforts to secure the right to work—increased inflation, higher taxes, and bigger

213. See *id.* at 738–50.

government—may impinge on the utilitarian interests of those who bear them, but they do not violate their human rights. There is no right to price stability or lower taxes recognized in either international or domestic human rights law, and while some governmental actions may violate rights, the growth of government per se does not violate any recognized human right. This does not mean that fairness concerns are unimportant in deciding how the costs of securing the right to work should be distributed. The distribution of tax burdens always raises fairness issues, as does the distribution of the costs of inflation. But these fairness concerns are not heightened by an additional overlay of human rights considerations.

The second reason that policies to secure the right to work raise fewer fairness concerns is that they tend to be distributed more evenly than the burdens of joblessness. This not only lessens the likelihood that particular groups will bear an unfair share of the costs of securing the right to work; it also means that democratic political processes are more likely to ensure that these costs are distributed in a manner that is reasonably fair. Democratic political processes are inherently less responsive to the concerns of minority groups than to those that affect a majority of the population.²¹⁴ And because of the material deprivation, social stigmatization, and psychological demoralization that unemployed workers experience, the unemployed tend to be a particularly weak and voiceless interest group, except during recessions.

Several conclusions flow from this comparison of the intensity and distribution of the harms to rights-based and utilitarian interests derived from public policy decisions concerning the right to work. First, both the severity and unequal distribution of the harms from society's failure to secure the right to work suggest that the right should be accorded substantial deference. Conflicting utilitarian

214. This is one reason for the heightened equal protection scrutiny accorded statutes that burden individuals based on their race or national origin. *See City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985) (justifying heightened scrutiny of laws that discriminate on the basis of race, alienage, or national origin, in part because they are “unlikely to be soon rectified by legislative means”); *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152 n.4 (1938) (allowing for the possibility that “prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities”).

interests would have to be very strong for utility-maximization to trump government obligations to secure the right to work. Second, the severity of the harm to utilitarian interests that would flow from policies to secure the right to work cannot be assessed without an analysis of specific policy proposals, but the distribution of harms associated with those policies is unlikely to raise fairness issues other than those associated with the general allocation of tax burdens. Third, if policies designed to protect the right to work are rejected, for whatever reason, the severity of the conflict between the public's presumably utility-maximizing preferences and society's human rights obligations in this area can be reduced by policies that either ameliorate the negative effects of joblessness on individuals or equalize the unemployment burden among individuals and population groups. Depending on the success of these alternative measures, the moral force of right to work claims might be reduced enough to justify society's failure to secure the right to work. Of course, these measures may also be costly and/or involve increased governmental regulation of the economy, so they, too, may conflict with utility-maximizing public preferences. In the final section of this Article, I will consider several policy options for responding to the problem of unemployment that are grounded in insights drawn from these conclusions.

IV. POLICY IMPLICATIONS

Our analysis thus far suggests that policy responses to the problem of joblessness could aim either to eliminate involuntary unemployment or reduce its harmful effects to such a degree that utility-maximizing preferences for other policy goals could be considered to outweigh the residual rights-based interests of unemployed workers. There are three general ways in which these goals might be pursued.

First, public policy could be directed at achieving genuine full employment—i.e., the achievement of conditions in which the number of available jobs equals or exceeds the number of job-seekers (and in which structural barriers that prevented job-seekers from being hired for available jobs are also eliminated).

Second, public policy could be directed at reducing the harms associated with being unemployed by providing transfer benefits and

other compensatory social services to involuntarily unemployed individuals and their dependents.

Third, public policy could be directed at equalizing the unemployment burden that different individuals and population groups bear. With an average unemployment rate of five percent, for example, an equal sharing of the burden of joblessness would imply that each member of the labor force would be out of work five percent of the time—approximately two and a half weeks per year or about five weeks every other year. This could be viewed as equivalent to unpaid vacation time, in anticipation of which workers reasonably might be expected to take individual precautions. Alternatively, the policy goal might be to ensure that any individual who was experiencing financial or other difficulties as a result of involuntary unemployment could be assured of finding work quickly through reasonably diligent job search measures. In effect, this policy would move needy job-seekers to the front of hiring queues, thereby forcing job-seekers who can more easily bear the burdens of joblessness to endure more of it.

Let us consider each of these strategies, beginning with the last.

A. **Can the Burden of Joblessness Be Redistributed to Reduce Its Harmful Effects?**

To either equalize the burdens of joblessness or move needy job-seekers to the front of hiring queues would require some combination of the following: (1) the elimination of significant structural barriers to the hiring of less advantaged job-seekers; (2) modifications in the way employers make hiring decisions; and/or (3) improvements in the intensity and quality of job search activities by disadvantaged job-seekers. Advocates of structuralist explanations of joblessness could be expected to argue that the first two changes are the key ones. Advocates of behavioralist explanations of joblessness could be expected to argue that the last change is the key one.²¹⁵

215. I use the term 'structuralist' to refer to explanations of joblessness that attribute the problem to factors that reduce the access of certain groups of job-seekers to available employment opportunities. These 'structural' factors include employment discrimination against certain population groups, education and skills deficits that prevent certain workers from qualifying for available jobs, and

In either case, the nature of these changes makes them difficult to achieve. Efforts to reduce either structural or behavioral barriers to the employment of disadvantaged persons must overcome significant institutional and personal inertia. Aggregate unemployment rates can go up and down with dizzying speed compared to the institutional and personal changes required to make structuralist and behavioralist interventions work. Changes in aggregate labor market conditions exert a quick, certain, and dramatic effect on levels of joblessness and public assistance reciprocity within disadvantaged population groups.²¹⁶ Reducing joblessness through structural and behavioral interventions requires a different kind of change—a qualitative change in the way institutions function and in the way individuals behave rather than a mere quantitative change in the level of economic activity. Under conditions of less than full employment, these difficulties increase.

First, labor markets tend to reward success with more success and punish failure with more failure. Under conditions of full employment, this tends to sort workers among jobs, but under conditions of less than full employment, it creates special disadvantages for jobless individuals who are seeking work, even in the absence of structural or behavioral impediments to their employment. Analysts who acknowledge the existence of an aggregate job

mismatches between the location of available jobs and the residences of unemployed individuals. I use the term 'behavioralist' to refer to explanations of joblessness that attribute the problem to the behavior of jobless individuals themselves—principally their failure to seek work with adequate determination or their unwillingness to accept work on the terms dictated by market conditions. I argue elsewhere that structuralist and behavioralist factors provide a good explanation of the distribution of joblessness among population groups but that the aggregate level of joblessness is largely determined by the size of the gap between the number of jobs employers are willing to fill compared to the number of persons seeking paid employment. I refer to this last explanation of joblessness as the 'job shortage' view. See Harvey, *supra* note 24, at 684–99.

216. See Richard B. Freeman, *Employment and Earnings of Disadvantaged Young Men In a Labor Shortage Economy*, in *The Urban Underclass* 103, 103–21 (Christopher Jencks & Paul Peterson eds., 1991) (arguing that employment of black youths is sensitive to the circumstances of local labor markets); Paul Osterman, *Gains from Growth? The Impact of Full Employment on Poverty in Boston*, in *id.* at 122–34 (arguing that a strong economy reduces poverty); Council of Econ. Advisers, *Technical Report: Explaining the Decline in Welfare Receipt, 1993–1996* (1997), http://www.whitehouse.gov/WH/EOP/CEA/Welfare/Technical_Report.html (on file with author).

shortage sometimes describe unemployed workers as ‘queuing’ for jobs,²¹⁷ but it is a hiring queue that functions differently from most other waiting lines. The distinguishing characteristic of most queues is that people move from the back to the front of the line as they wait. Special rules may allow certain people to join the line someplace other than at its end, but arrival time generally determines position, with those who join the line first occupying a position closer to the front of the line than those who join the line later. Among the unemployed, however, the hiring queue probably moves in the opposite direction. Among two otherwise identical candidates for employment, the one who joined the unemployment queue more recently is likely to be perceived by employers as a more desirable candidate for employment. In fact, job-applicants who are still working in their old jobs are probably the most attractive to employers. They are the ones at the front of the queue, and available data suggests there are approximately as many of them as there are unemployed job-seekers.²¹⁸ This does not mean that jobless individuals cannot find work, but it makes it harder for them.²¹⁹ Nor does this mean that efforts to help jobless individuals find work will fail when an aggregate job shortage exists, but such efforts are working against a natural tendency for markets to discriminate against such persons. The larger the economy’s aggregate job shortage, the longer the hiring queue will be, and the farther back in line unemployed job-seekers, especially disadvantaged job-seekers, will find themselves.

Second, efforts to help disadvantaged job-seekers to find work may increase unemployment among workers who are only marginally better situated and who probably have very similar personal characteristics to the assisted population. The increased economic

217. See, e.g., Harry J. Holzer, What Employers Want: Job Prospects for Less-Educated Workers 29 (1996); Mead, *supra* note 136, at 86.

218. See Joseph R. Meisenheimer II & Randy E. Ilg, *Looking for a “Better” Job: Job-Search Activity of the Employed*, Monthly Lab. Rev., Sept. 2000, at 3.

219. The likelihood a job-seeker will have received a job offer necessarily increases with the length of time the individual has been unemployed. This is because the number of job applications increases with time, however, not because the job-seeker’s ‘turn’ has arrived. Even if your chances of winning a lottery declined each time you played (as an unemployed worker’s chances of being hired as a result of any particular job application probably decline over time), it still would be true that the likelihood of your buying a winning ticket at some point in your life would increase the longer you played.

stress and associated problems likely to be experienced by these workers would diminish the net benefit of helping disadvantaged job-seekers to find work. A redistribution of the burdens of joblessness among only the lowest strata of the labor force is unlikely to significantly reduce the harms caused by joblessness.²²⁰ It may even aggravate the harmful effects of unemployment by visiting them on a larger number of people over time. Like the tendency for hiring-queues to move backwards, the severity of this problem is linked to the size of the economy's job gap, because that is what determines how intense the competition for available jobs among employed and unemployed workers is likely to be.²²¹

Third, efforts to increase the employment of disadvantaged individuals may also elicit nullifying counter-responses from more privileged workers. These counter-responses may take benign forms, such as increased investment in education, but they also can take less benign forms, such as growing resentment directed at disadvantaged groups and increased opposition to access-broadening initiatives. Opposition by white workers to the use of hiring preferences to increase the employment of non-white job-seekers illustrates this kind of reaction—a reaction that is likely to be more intense when jobs are perceived to be scarce and competition for them is greater. Actions of this type—whether benign or invidious—are likely to frustrate efforts to increase the job security of less advantaged workers.

220. Increased cycling on and off public assistance rolls may be one result of such a policy. This kind of cycling was common in the Aid to Families with Dependant Children (AFDC) program, even before recent reforms were enacted in an effort to increase participant job search activity. See Roberta Spalter-Roth et al., *Welfare That Works: The Working Lives of AFDC Recipients* (Inst. for Women's Policy Research, Washington, D.C.), Feb. 1995, at 1, 19 (finding that in two-year period studied, fifty percent of AFDC recipients combined work and benefit receipt in some way and another twenty-three percent unsuccessfully sought work).

221. Job growth in the United States following the enactment of welfare-reform legislation in 1996 appears to have been strong enough to absorb the large number of single mothers who entered the labor force as a result of the legislation without causing the labor-market prospects of other workers to deteriorate. See Robert I. Lerman & Caroline Ratcliffe, *Are Single Mothers Finding Jobs Without Displacing Other Workers*, *Monthly Lab. Rev.*, Jul. 2001, at 3, 3–12.

Fourth, to the extent the distribution of joblessness is a product of discriminatory hiring practices, the existence of a significant job gap makes it harder to alter employer practices. Surplus labor supply provides both a cover for discriminatory practices and an economic cushion that allows employers to indulge their biases. Proving discriminatory treatment is very difficult when large numbers of workers apply for a small number of jobs and are evaluated according to multiple, incommensurable objective and subjective hiring criteria. This may be one reason for the prevalence of discriminatory firing cases over discriminatory hiring cases in employment discrimination litigation.²²² The existence of labor surpluses also permits employers greater latitude in deciding where to locate their businesses, avoiding minority populations if they want, without fear of not being able to recruit adequate numbers of workers.²²³ As the economy's job gap shrinks, the economic pressure on employers not to discriminate increases, and the deterrent effect of anti-discrimination law probably becomes more effective.

For all of these reasons, it may be unrealistic to expect dramatic results from either structuralist or behavioralist attempts to reduce the relative amount of joblessness experienced by disadvantaged population groups in a job-short economy. The history of efforts to reduce poverty and its attendant ills by means of behavioralist and structuralist strategies certainly provides no cause for optimism that the goal is achievable without closing the economy's job gap. Behavioralist policies dominated efforts to combat jobless-

222. In the first few years after Title VII was enacted, more discriminatory hiring claims were filed under the act than discriminatory firing claims, and in the early 1970s, the number of hiring and firing claims brought were approximately equal. Since the mid-1970s, however, the number of discriminatory firing cases has grown dramatically, while the number of discriminatory hiring cases has remained constant or declined. See John J. Donohue III & Peter Siegelman, *The Changing Nature of Employment Discrimination Litigation*, 43 Stan. L. Rev. 983 (1991). The initial growth in discriminatory hiring cases brought in the 1960s and early 1970s may have reflected the relative ease of litigating cases involving obvious instances or patterns of discriminatory hiring. Once blatant practices were eliminated, however, the problems of proof in hiring discrimination cases involving large numbers of applicants for a small number of available jobs loomed larger. In firing cases, in contrast, the relevant comparison group for judging whether discriminatory treatment has occurred is much smaller, making proof of unlawful discrimination much easier.

223. Holzer, *supra* note 217, at 131.

ness in the United States prior to the 1930s without ever solving the problem.²²⁴ The failure of these policies was a principal reason for their repudiation during the New Deal era.²²⁵ The recent resurgence in support for behavioralist policies for combating joblessness, reflected most clearly in federal welfare reform legislation enacted in 1996, ignores this earlier record of failure.²²⁶ Structuralist policies also have produced disappointing results. It is disheartening, for example, that unemployment rates for blacks continue at roughly twice the rate for whites more than thirty years after the enactment of the Civil Rights Act of 1964. Expressing faith in the adequacy of the structuralist strategy, the legislative history accompanying the Act asserted that

[a] nation need not and should not be converted into a welfare state to reduce poverty, lessen crime, cut down unemployment, or overcome shortages of skilled occupational categories. All that is needed is the institution of proper training programs and the elimination of discrimination in employment practices.²²⁷

That optimism now seems naïve.

I am not arguing that these policies are totally ineffective. There is good evidence that anti-discrimination legislation has

224. Harvey, *supra* note 210, at 38–40.

225. Harvey, *supra* note 24, at 687–88.

226. Studies of the labor-market experiences of persons induced to leave welfare as a result of behavioralist policies embodied in the new legislation show that they are continuing to experience disproportionate levels of joblessness. One such study found that only sixty-one percent of persons who left AFDC/TANF rolls in 1996 and 1997 were employed at the time they were surveyed. Fourteen percent were not working but had an employed spouse or partner. Twenty-five percent were not working and either had no spouse/partner or had a spouse/partner who also was not employed. Pamela Loprest, *Families Who Left Welfare: Who Are They and How Are They Doing* 1, 8, 14 (Urban Inst. Discussion Paper No. 99–02, 1999). Given these facts, it is not surprising that the poorest cohorts of single-mother families have grown still poorer as a result of welfare reforms designed to force public assistance recipients to rely more on paid employment for their support. Wendell Primus et al., *The Initial Impacts of Welfare Reform on the Incomes of Single-Mother Families* (Ctr. on Budget & Policy Priorities, Washington, D.C.), Aug. 1999, at 1, 17–19.

227. 1964 U.S.C.C.A.N. 2515.

improved the economic position of blacks in the United States,²²⁸ and behavioralist welfare reform policies certainly have succeeded in inducing many welfare recipients to find jobs.²²⁹ But the benefits traceable to structuralist and behavioralist interventions such as these have not come close to equalizing the burdens of joblessness nor provided a reliable means of moving needy workers into jobs. Joblessness is still very unequally distributed, and it still causes substantial harm to its victims.

As explained above, however, there is good reason to believe that both structuralist and behavioralist policies might be more effective if pursued in the context of full employment. The problem may not be with structuralist and behavioralist policies, but in the assumption that they can work against the countervailing forces that a significant shortage of jobs set in motion. In fact, the faith expressed in structuralist and behavioralist policies by their proponents may be predicated on the assumption that job availability is not a significant constraint. We see this in public debate over welfare reform. Behavioralists tend to assume that low-wage jobs are plentiful, and that public assistance recipients can and should be expected to find and accept them.²³⁰ Structuralists tend *not* to contest the claim that low-wage jobs may be available in adequate numbers, but they argue that these jobs do not provide adequate levels of support and that public assistance recipients accordingly should be provided with additional education and job training so they can qualify for better jobs. The implication of the structuralist position, of course, is that adequate numbers of 'better' jobs would be found to exist if public assistance recipients could qualify for them. What is not clear is whether these favorable presumptions concerning job availability are based on the assumption that the demand for labor is sufficient to provide employment for all job-seekers or merely that labor turnover rates are high enough that diligent job-seekers need not wait too long for a turn at being employed, even though there

228. See John J. Donohue III & James Heckman, *Continuous Versus Episodic Change: The Impact of Civil Rights Policy on the Economic Status of Blacks*, 29 J. Econ. Literature 1603, 1603–43 (1991).

229. See Council of Econ. Advisers, *supra* note 216.

230. See, e.g., Mead, *supra* note 136, at 85–109 (arguing that labor trends and the experience of immigrants suggest that jobs are available and that the nonworking poor simply choose not to take available jobs).

may not be enough work to provide employment for all job-seekers at the same time.²³¹

Whatever may be the limitations of structuralist and behavioralist policies in reducing the negative effects of joblessness, it is abundantly clear that changes in aggregate demand have a quick and powerful effect on the problem. This is true even with respect to population groups that are the target of concerted behavioralist and/or structuralist policy interventions. Declining general rates of unemployment were found to have had a far more powerful effect on Aid to Families with Dependent Children (AFDC) caseloads than changes in program requirements in the late 1980s and early 1990s,²³² and the problems welfare-recipients have faced finding work since welfare-reform legislation was enacted in the mid-1990s have been similarly eased by increases in job availability.²³³ Structuralist and behavioralist measures may be important in combating the negative effects of joblessness, but given the importance of job availability in determining the success of structuralist and behavioralist interventions, it seems unwise to look exclusively to such measures to reduce the conflict between society's obligation to secure the right to work and the public's preference for policies that pursue other goals.

B. Can Transfer Benefits Substitute for Jobs?

Since it is unrealistic to expect structuralist and behavioralist policies to redistribute the burdens of joblessness to the extent necessary to render the problem innocuous, offering public or private transfer benefits to jobless workers would appear to be the only way of dramatically reducing the personal and social costs of joblessness without achieving full employment.

The policy of using transfer benefits to reduce the negative effects of joblessness has been pursued in the United States, although

231. See Harvey, *supra* note 24, at 700–07, 728–36.

232. See Council of Econ. Advisers, *supra* note 216.

233. Robert I. Lerman & Caroline Ratcliffe, *Are Single Mothers Finding Jobs Without Displacing Other Workers*, *Monthly Lab. Rev.*, July 2001, at 3, 3–12.

not to the same extent as in Europe.²³⁴ Criticism of such programs focuses on their negative effect on the work incentives of recipients.²³⁵ However, to the extent that the quantity of joblessness is determined by the level of aggregate demand rather than by the job search behavior of unemployed workers, the behavioral effects of transfer benefit programs mainly affect the distribution of joblessness rather than its aggregate level.²³⁶ Recipients of such benefits may be likely to experience more joblessness than persons who do not receive such benefits, but the total amount of joblessness in the economy may not be affected.

This is a bad thing, of course, only if we think that the recipients of such benefits should be working. The New Deal's funding of Old Age Assistance benefits for the elderly poor undoubtedly reduced the work effort of the recipient population, but that was not perceived to be a problem, because one of the goals of the program was to reduce the number of people competing for scarce jobs. When the Aid to Dependent Children (ADC) program—predecessor to AFDC and the Temporary Assistance for Needy Families (TANF) program—was established in the same legislation, the likely effect of the program on recipient work effort was not a cause for concern, because one intent of the program (like Old Age Assistance) was to facilitate the withdrawal of recipients from the labor force.²³⁷

The New Dealers preferred to provide income assistance to persons who were expected to work in the form of a job—in work relief programs like the Civilian Conservation Corps (CCC) or the Works Progress Administration (WPA). The only exception to this rule was Unemployment Insurance (UI), but UI benefits were made

234. Org. of Econ. Cooperation and Dev., *OECD Jobs Study: Evidence and Explanations*, ch. 8 (1994).

235. *See, e.g., id.* (using statistical analysis to argue that unemployment benefits increase unemployment rates due to disincentives).

236. *Cf.* Alan B. Krueger & Jorn-Steffen Pischke, *Observations and Conjectures on the U.S. Employment Miracle* 1, 7 (Nat'l Bureau of Econ. Research, Working Paper No. 6146, 1997).

237. *See* Comm. on Econ. Sec., Report 7–10 (1935), *reprinted in* Nat'l Conference on Soc. Welfare, *The Report of the Committee on Economic Security of 1935 and Other Basic Documents relating to the Development of the Social Security Act 56* (1985) (stating that the purpose of the ADC program was to release the mothers of “fatherless children” from “the wage-earning role”).

available for only a short period of time (twenty weeks in the original legislation), were limited to workers with an established work history who were laid off from their jobs, and were structured to resemble an earned benefit rather than means-tested public assistance. This type of benefit might be considered a reasonable way to reduce individual economic stress associated with frictional unemployment, even in an economy operating at full employment. It was not designed to offer gratuitous transfer benefits as a substitute for a job.

When covered workers exhausted their UI benefits, New Deal social welfare planners assumed that continued public aid should be provided in the form of work relief, in contrast to the general practice in Europe of offering reduced, means-tested direct relief benefits to unemployed workers who have exhausted their unemployment insurance benefits.²³⁸ The latter practice is still the predominant one in Europe, but increasingly the Swedish strategy of offering continued aid only in exchange for work or as a stipend for participation in an intensive training program is being followed.²³⁹ In countries that offer long-term gratuitous income assistance to jobless workers, average unemployment spells are much longer than in countries like the United States (which offers little or no long-term assistance to jobless workers) or Sweden (which offers long-term assistance only in conjunction with work or training).²⁴⁰ This means that in the typical European country today, fewer individuals experience joblessness at a given rate of unemployment than in the United States, but those who do experience it endure longer spells (while receiving income supplements that are very generous by American standards).

The problem with the American strategy of denying or severely limiting income assistance benefits for able-bodied individuals is that it has the undesirable consequence of visiting intense harm on job-seekers who do not manage to find employment quickly, but there also are problems with the European strategy of providing long-term income assistance benefits to jobless individuals. First, even if the strategy secures recipients from material deprivation, it

238. See *id.* at 11; Org. of Econ. Cooperation and Dev., *supra* note 234, at 172–73.

239. Richard Layard, *Sweden's Road Back to Full Employment*, 18 *Econ. & Indus. Democracy* 99, 101–04 (1997).

240. *Id.*

does not protect them from all the non-pecuniary harms of joblessness which, as noted above, can be substantial. Second, by fostering long-term joblessness, it makes it more difficult for recipients to reenter the active labor force when economic conditions improve. As their spell of unemployment lengthens, the long-term unemployed are likely to become progressively less attractive to potential employers. Third, as the long-term unemployed become steadily less competitive in the struggle for available jobs, their presence in the labor market may lose its anti-inflationary effect. If inflationary tendencies associated with low rates of unemployment are a function of the relative bargaining power of employers and employees at different levels of unemployment, the presence in the labor market of job-seekers who lack credibility as alternative candidates for employment are not going to affect the relevant balance of power.²⁴¹

The Swedish strategy of providing extended income assistance to jobless workers in conjunction with intensive job-training is a structuralist strategy that has worked well in Sweden because it is exceptionally well-organized and because, until about ten years ago, unemployment rates were successfully kept at or close to the full-employment level.²⁴² Our earlier discussion of the challenges faced by structuralist efforts to redistribute joblessness under conditions of less than full employment suggests that the Swedish strategy might not be equally successful here. The Swedish practice of providing long-term income assistance in the form of reasonably attractive work relief is really a job creation strategy that reduces the effective unemployment rate. This strategy will be discussed in the next subsection of the Article, which focuses on the goal of achieving full employment. The use of transfer benefits to encourage certain categories of workers to withdraw from the labor force will also be discussed in that context.

241. Stephen Nickell, *Unemployment and Labor Market Rigidities: Europe versus North America*, 11 J. Econ. Persp. 55, 57 (1997).

242. *Id.*

C. Is Full Employment Achievable?

All of the goals of both structuralist and behavioralist strategies for reducing the harmful effects of joblessness would be easier to achieve if there were more jobs than job-seekers in the economy. It also would ease the fiscal burden of providing income assistance benefits to jobless individuals while making it easier to design programs addressing the needs of persons suffering significant personal impediments to employment. Efforts to achieve full employment, however, have been constrained by the fear that full employment policies would be inflationary.²⁴³ Let us consider several of these policy options with an eye both to the public's preference for price stability and the deference that is owed the right to work.

1. Macroeconomic Policy

Macroeconomic policy obviously has a role to play in combating joblessness, but the potential inflationary effects of expansionary fiscal and monetary policies limit their ability to close the economy's job gap completely. Before full employment is achieved, wage and price increases, caused by tightening factor and product markets, are likely to cause inflation rates to accelerate to levels that result in either a spontaneous contraction of economic activity or a change in policy to focus on price control rather than employment expansion.

It may be possible, however, to reduce the level of unemployment at which inflationary pressures become troublesome. The kind of policies that I have referred to as structuralist or behavioralist are viewed in Europe as a means of combating inflation as well as a means of reducing unemployment within disadvantaged population groups. Europeans refer to these measures as 'active' labor market policies to distinguish them from pure income support programs which they describe as 'passive' measures. Active labor market policies can relieve inflationary pressures by increasing the effective supply of labor that competes for available jobs at any level of unemployment, thereby dampening upward pressure on wage

243. See Harvey, *supra* note 24, at 724–30.

rates.²⁴⁴ If inflationary pressures are reduced by this method, macroeconomic policy can be used more aggressively to reduce unemployment rates. It is not clear that policies such as these are capable of allowing an economy to operate at the full employment level while keeping inflation in check, but they could allow a closer approach to that goal.

Given the deference that right to work claims arguably deserve, it also should be emphasized that the limits which inflationary pressures impose on macroeconomic policy are, to some degree, self-imposed by society. Inflation does not necessarily prevent further economic expansion. Rising prices may cause spontaneous changes in economic behavior that will tend to stall or reverse the economic growth process,²⁴⁵ but if the public were more tolerant of inflation, it might be possible for unemployment rates to be driven or permitted to fall lower.

However, there is another problem with relying exclusively on macroeconomic policy to combat joblessness. The effects of macroeconomic stimulation, especially monetary stimulation, tend to ripple very broadly through the economy. Because of its diffuse effects, such stimulation need not decrease differences in unemployment rates in different sectors of the labor market. It may even increase the differences. This means that job gaps in some regions or for some types of labor might not be closed even if aggregate (i.e., average) unemployment rates were driven below the full-employment level. It may be that structuralist labor-market policies could even out these differences, but not very quickly. For this reason, macroeconomic policy alone is unlikely to secure the right to work. Even if aggregate unemployment rates could be driven below the full-employment level, other policies would be needed.

244. Richard Layard et al., *Unemployment: Macroeconomic Performance and the Labour Market* 473 (1991).

245. This could be the case, for example, if reductions in unemployment below a certain point caused ever-accelerating inflation as opposed to a finite increase in average rates of inflation. See Timothy J. Bartik, *Jobs for the Poor: Can Labor Demand Policies Help?* 152–54 (2001).

2. Policies Aimed at Reducing the Number of People Seeking Work

Joblessness attributable to a shortage of jobs can be reduced not only by increasing the number of available jobs, but also by reducing the number of people who are seeking jobs. When this policy is pursued by providing transfer benefits to persons who are expected to work, the strategy conflicts with the goal of encouraging such persons to maintain their self-sufficiency, but transfer benefits may also be used to encourage certain people to withdraw from the labor force, either permanently or temporarily. As noted earlier, this consideration was one of the factors underlying the dramatic increase in public funding for old-age pension benefits that occurred during the New Deal period as well as the restructuring of public assistance benefits for single parents with dependent children.

Early retirement schemes provide one means of achieving similar goals today. A number of European countries have experimented with programs that subsidize early retirement benefits for firms that replace the retiring workers with younger workers.²⁴⁶ Some of these programs have been found effective in reducing unemployment, at least marginally, and their cost is partly offset by reduced unemployment benefit payments to the newly employed workers.

Other groups, of course, could be targeted for the receipt of subsidies. For example, it might be considered a desirable public policy goal to make it possible for parents to spend more time with their children when the children are young. A program modeled on European early retirement programs might be created which provided government funding for family care leaves to certain categories of workers in exchange for commitments from their employers to hire a certain number of unemployed workers to replace the absent workers.

If unemployment rates were above an inflation-inducing level, such policies might be pursued on a temporary basis to open up job opportunities for persons whom society wanted to encourage to work, without fear that the policies would cause inflation. Subsidized

246. Richard B. Freeman, *Work-Sharing to Full Employment: Serious Option or Populist Fallacy?*, in *Generating Jobs: How to Increase Demand for Less-Skilled Workers* 195, 208–09 (Richard B. Freeman & Peter Gottschalk eds., 1998).

educational opportunities (or 'sabbatical' leave programs) could be funded for the same purpose. Educational programs designed with structural unemployment in mind invariably target disadvantaged workers. The goal of such programs is to qualify such persons for available jobs. If the problem to be addressed is a shortage of jobs, however, educational subsidies targeting workers who are neither unemployed nor likely to become unemployed could prove just as effective. The goal of such programs would be to make currently occupied jobs available to other workers while raising the overall skill level of the labor force (and possibly rejuvenating regularly employed workers through a break in their employment). All of these policies would help to secure the right to work.

If the economy were already operating with unemployment rates at or below an inflation-inducing level, the possible inflationary effects of such a strategy also would have to be considered. The question to be addressed is whether a reduction in unemployment rates achieved by encouraging certain persons to withdraw from the labor force would carry the same potential inflationary effects as a similar reduction in unemployment rates caused by additional economic growth. Although many economists answer this question in the affirmative,²⁴⁷ others argue that it depends on the design of the program and the economic environment in which it is implemented.²⁴⁸

We have noted that inflationary side-effects do not necessarily justify rejection of policies to secure the right to work, but we have also emphasized that policy makers should try to minimize conflicts between utilitarian and rights-based policy objectives. This means that efforts to secure the right to work should try to minimize inflationary and other undesirable side-effects.

Expanding job availability by encouraging certain categories of workers to withdraw from the labor market is least likely to be inflationary when there is a pool of unemployed workers available with the requisite qualifications to fill the shoes of those who vacate their jobs. Even if aggregate unemployment rates are low enough to

247. See Layard et al., *supra* note 244, at 502–07.

248. See, e.g., Freeman, *supra* note 246, at 195 (comparing the degrees of success of work-sharing in economic environments with governmental employers and non-governmental employers, and in the various programs in the United States, Canada, and European Union nations).

cause inflation worries, this condition may be satisfied for certain segments of the labor force.²⁴⁹ Certain communities or regions may have above-average unemployment, and certain occupational groups may have untapped reserves of labor. This is especially likely to be true of economically depressed communities and of low-skilled workers, since unemployment rates tend to be higher in such communities and for such workers.

While the kind of targeting that would minimize the inflationary effects of encouraging labor-market withdrawal would not accommodate all of the other social welfare goals that such programs might serve, one area in which substantial overlap does exist involves the provision of job training. Job training is probably the most popular means used by governments to actively combat joblessness in non-recessionary periods.²⁵⁰ During such periods joblessness tends to be viewed as a behavioral or structural problem rather than as a consequence of continuing job shortages.²⁵¹ Job training finds special favor in this context because it tends to be supported by both behavioralist and structuralist policy advocates. Behavioralists view it as a means to increase job search efforts on the part of jobless individuals.²⁵² Structuralists view it as a means of reducing the skills deficits that prevent certain categories of job-seekers from qualifying for available jobs. Since job training is viewed from both perspectives as a way of moving jobless individuals into available jobs, agreement also exists that job training should target jobless individuals.

If our goal is to secure the right to work, and we accordingly want to increase job availability even at the top of the business cycle, it no longer matters whether educational assistance or job training is offered to employed or unemployed workers, provided participation in

249. Bartik, *supra* note 245, at 151, 154–57.

250. Harvey, *supra* note 24, at 686–89.

251. *Id.*

252. Job training can have this effect for several reasons. First, the training process itself may have positive motivational effects on the trainee. Second, as an individual's skill level increases, the number of jobs for which he or she qualifies tends to increase, making the job search easier (and therefore more appealing) even if motivation is held constant. Third, as an individual's skill level increases, the average quality of employment opportunities available to the individual also increases, thereby increasing incentives to engage in job search activities.

the educational or training programs are conditioned on the trainees' withdrawal from the labor force during the training period.²⁵³ There are good reasons, however, why it would make sense to target such educational and training opportunities on *employed* rather than *unemployed* workers.

First, a training program for previously employed low-wage workers would be more likely to succeed in its training objectives. Job training programs for persons with limited prior employment experience have a less than stellar track record in increasing the post-training earnings of program participants.²⁵⁴ There is good reason to believe that educational and training programs targeting low-wage workers who already have mastered the skills necessary to find and keep low-wage jobs (and who now want to move up the occupational ladder) would meet with better success. Such workers would be better prepared to master the curriculum of the program, could be trained for higher-level occupations in which demand conditions are likely to be more favorable for job-seekers, and their prior employment experience would make them more attractive to employers upon their graduation from the program.

Second, an enhanced success rate would mean that job vacancies created in the low-wage labor market by the enrollment of previously employed workers in training programs would likely persist after their participation in the programs ended. Because of their more limited success, training programs that target unemployed low-wage workers are less likely to reduce unemployment rates in low-wage labor markets over time. They may reduce competition for low-wage jobs while program participants are in training, but when participants complete their training they are more likely to rejoin the low-wage labor force, thereby tending to drive the unemployment rate for such workers back up.

Third, by creating job vacancies in the low-wage labor market, training programs that target employed low-wage workers would produce immediate benefits for unemployed low-wage workers

253. This implies, of course, that participants must be provided generous enough subsidies to allow them to attend the program full-time.

254. Bartik, *supra* note 245, at 98–101; John P. Martin, *What Works Among Active Labour Market Policies: Evidence From OECD Countries' Experiences*, OECD Economic Studies No. 30, 2000/1, at 80, 89–93.

as well. In effect, subsidized training positions would do double duty—creating an additional job vacancy in the low-wage labor market for every job-training slot. Moreover, by making access to ‘training scholarships’ a reward for good labor-market performance, training programs that target employed low-wage workers would enhance the value of low wage work, making it a more reliable stepping stone to higher-level occupations and diminishing the likelihood that low-wage workers will remain trapped in low-wage careers.²⁵⁵

Finally, the institutional changes required to implement this policy option are small compared to some other policy options. An extensive educational and training infrastructure already exists in the United States and other developed economies. All that would be required is the creation of appropriate subsidies to enable employed low-wage workers to withdraw from the labor force for the purpose of attending educational and training programs. Because of the need to subsidize the living expenses of participants, these programs would be expensive, but the *net* cost of such interventions can be quite low after taking into account the savings they would generate.²⁵⁶

3. Shortening Normal Working Hours

Efforts to shorten normal working hours have a long history as a proposed response to job shortages.²⁵⁷ The overtime provisions of the Fair Labor Standards Act (FLSA) effectuate this policy in American law.²⁵⁸ The statute does not attempt to regulate hours directly, but creates financial incentives for employers not to employ their covered workers more than forty hours per week.

255. William J. Carrington & Bruce C. Fallick, *Do Some Workers Have Minimum Wage Careers?*, *Monthly Lab. Rev.*, May 2001, at 17, 17–21.

256. See *infra* notes 295–97 and accompanying text.

257. See Benjamin Kline Hunnicutt, *Work Without End: Abandoning Shorter Hours for the Right to Work* (1988) (discussing historical context and backdrop for trends in the U.S. to shorten working hours and suggesting answers to why such shorter work-day trends have ended).

258. Fair Labor Standards Act of 1938, 29 U.S.C. § 201 (1938) (requiring employers to pay covered workers no less than a statutorily fixed minimum wage and to pay a premium for hours worked in excess of a statutorily fixed number per week).

The effectiveness of these incentives has eroded over the years for two reasons. First, the overtime premium that employers are required to pay for work in excess of forty hours per week does not apply to fringe benefits. In 1938, when the FLSA was enacted, these non-wage benefits accounted for less than five percent of average employee compensation, but by 1998, they accounted for twenty-seven percent.²⁵⁹ That means the fifty percent premium the FLSA requires employers to pay for overtime hours amounted in practice to a surcharge of about forty-eight percent in the 1930s, but only about thirty-six percent today.

Second, certain categories of employees excluded from coverage under the FLSA have grown in importance in the labor force over time. The overtime provisions of the Act do not apply to “executive, administrative and professional” employees²⁶⁰—a group whose relative importance in the labor force has grown substantially since the 1930s.

Ample means exist for increasing the incentives under the FLSA for shortening normal working hours. The most obvious steps would be to increase the overtime premium that employers are required to pay and to narrow the exclusions from coverage currently allowed under the Act.

As a response to joblessness, however, this strategy raises the same concerns as do policies designed to shrink the labor force. By reducing unemployment rates below an inflation-inducing level, reducing normal working hours might trigger inflationary pressures.²⁶¹ Unfortunately, this would probably be a bigger problem with hours reduction schemes than with labor force reduction schemes, because an hours reduction strategy would be harder to target on sectors of the economy where unemployment rates were above average. In fact, if overheated sectors of the economy were more likely to require overtime work, they would be more affected by the

259. Author’s calculations. See Bureau of the Census, U.S. Dep’t of Commerce, Series D 722 and 175, Series D 905, Historical Statistics of the United States: Colonial Times to 1970, Part 1, at 164 (1975); Handbook of U.S. Labor Statistics, *supra* note 205, at 280 tbl. 6-6.

260. 29 U.S.C. § 213(a)(1) (1938).

261. Freeman, *supra* note 246, at 201; Layard et al., *supra* note 244, at 502–08.

strategy, possibly causing labor markets to tighten and prices to rise more rapidly in those sectors as aggregate unemployment rates fell. Given this difficulty, hours reduction policies may not offer much help in plotting a strategy to secure the right to work except as a means of encouraging job-sharing during recessions when inflationary pressures are low.

4. Direct Job Creation

Macroeconomic stimulation of the economy creates jobs indirectly. It is possible, of course, for governments to do the same thing directly. This can be achieved through public works (or public services) contracting with private firms, the establishment of special employment programs like the New Deal-era WPA, or by expanding regular public sector hiring.

Although using direct job creation to secure the right to work would not be problem-free, there are significant advantages to the strategy compared to the other measures we have considered. One such advantage is that the policy probably would be less inflationary than other means of achieving full employment, especially if combined with structuralist and behavioralist policies to increase labor-market efficiency.²⁶² The reasons for this are varied.

First, in contrast to standard Keynesian measures for increasing employment, direct job creation could be fiscally neutral. Research suggests that reductions in transfer payments to jobless individuals and increased income tax receipts from their earnings would pay the great bulk of all program costs for an expansive direct job creation program—one that offered work at market wages to all jobless individuals.²⁶³ Indirect savings attributable to such a program would likely pay for any remaining program deficit, but it is also possible to ensure fiscal neutrality by charging fees for some portions of the program's output. Since these fees would have to cover only a small fraction of total production costs, they could be set with the program budget rather than market conditions in mind.²⁶⁴

262. See Bartik, *supra* note 245, at 149–61.

263. Harvey, *supra* note 28, at 21–50.

264. *Id.*; Harvey, *supra* note 126, at 29–30; Philip Harvey, *Direct Job Creation, in* Commitment To Full Employment: The Economics and Social Policy

Second, direct job creation programs can be targeted with great specificity at labor markets and population groups with higher than average rates of unemployment, thereby reducing the program's inflationary impact on sectors of the economy that are already operating at full capacity. This would not eliminate all inflationary pressures likely to emanate from a policy that reduced aggregate levels of unemployment, but it would diminish them.

Third, an expansive policy of direct job creation would likely increase the effectiveness of structuralist and behavioralist policies,²⁶⁵ thereby enhancing the anti-inflationary effects of such policies.²⁶⁶

Fourth, carefully structured direct job creation programs may even function as anti-inflation measures in their own right by creating 'buffer stocks' of labor whose 'release' into regular labor markets could help dampen wage inflation.²⁶⁷

For all of these reasons, direct job creation initiatives may be the most effective means of reducing joblessness when inflationary pressures are a source of concern. This was a key reason the then-Chairman of the Federal Reserve Board threw his support behind the expansion of the Comprehensive Employment and Training Act (CETA) as a response to the recession of 1973–75.²⁶⁸

This does not mean that using direct job creation to achieve full employment would be an inflation-free strategy. At the very least, the policy would likely trigger a temporary wage-price spiral due to the enhanced relative bargaining power that reduced unemployment would give to low-wage workers.²⁶⁹ Until the strategy is tried we will not know how serious this or other inflationary

of William S. Vickrey 35, 35–41 (Aaron W. Warner et al. eds., 2000) [hereinafter Harvey, *Direct Job Creation*].

265. See *supra* Part IV.A.

266. See *supra* notes 215 & 224–33 and accompanying text.

267. See Randall Wray, *Understanding Modern Money: The Key To Full Employment and Price Stability* (1998) (arguing that a situation of zero unemployment could be created if the government were to act as an employer of last resort at an announced wage).

268. Gary Mucciaroni, *The Political Failure of Employment Policy 1945–1982*, at 86–87 (1990).

269. Harvey, *supra* note 28, at 75–78.

tendencies associated with the strategy are likely to be, nor how effective efforts to limit these inflationary effects may be. The important point to keep in mind is that there is no reason to believe that the policy would necessarily produce unmanageable levels of inflation.

Other than its inflationary tendencies, the most significant perceived shortcoming of direct job creation is its so-called 'displacement' effect: the possibility that deliberately created jobs will displace other employment opportunities in the economy rather than add to the total number of available jobs.²⁷⁰ Early macroeconomic assessments of CETA, for example, suggested that almost all of the positions created by the program eventually were used by local governments to replace regular employees rather than to augment local public sector employment.²⁷¹ This type of displacement is commonly referred to as 'fiscal substitution' or 'public worker substitution.'²⁷² A better term might be 'direct displacement' since it is accomplished by the direct replacement of an agency's regular workforce with a workforce funded through the job creation initiative.

A second type of displacement potentially attributable to job creation programs works less directly. It arises because the program may have labor-market or product-market effects that cause other employers to lay off workers or reduce their hiring. This type of

270. For general discussions of the displacement problem, see Bartik, *supra* note 245, at 189–93; David T. Ellwood & Elisabeth D. Welty, *Public Service Employment and Mandatory Work: A Policy Whose Time Has Come and Gone and Come Again?*, in *Finding Jobs* 299, 302–12 (David E. Card & Rebecca M. Blank eds., 2000); Peter Gottschalk, *The Impact of Changes in Public Employment on Low-Wage Labor Markets*, in *Generating Jobs: How to Increase Demand for Less-Skilled Workers* 72, 84–86 (Richard B. Freeman & Peter Gottschalk eds., 1998); Harvey, *supra* note 28, at 79–84; Lars Calmfors, *Active Labour Market Policy and Unemployment—A Framework for the Analysis of Crucial Design Features*, OECD Economic Studies No. 22, 1994, at 7, 17–19.

271. George E. Johnson & James D. Tomola, *The Fiscal Substitution Effects of Alternative Approaches to Public Service Employment Policy*, 12 *J. Hum. Resources* 3, 3–26 (1977).

272. See, e.g., Ellwood & Welty, *supra* note 270, at 302 (arguing that public service employment programs may be ineffective if regular employees are laid off when public service employees are hired).

displacement is frequently referred to as ‘private crowd-out,’²⁷³ but a more encompassing term might be ‘indirect displacement.’

It is well recognized that the direct displacement effects of job creation programs depend on their design. In its first incarnation, CETA provided unintended but very strong incentives to local governments to use program funds as a form of general revenue sharing. This resulted in high levels of direct displacement which led to a restructuring of the program, in part to correct this very problem.²⁷⁴ Although the evaluation literature is limited, the best estimates available are that the program’s direct displacement effects declined from about seventy percent before the restructuring to between ten and thirty-five percent after the restructuring.²⁷⁵

Nor do these latter levels of displacement establish the minimums achievable in such programs. Arguably, the design feature that contributed most to CETA’s direct displacement problems was the practice of having the federal government pay for CETA positions while vesting administrative control of the program in state and local governments.²⁷⁶ Direct displacement was hard to control in CETA, both before and after it was restructured, because the federal government did not control the non-CETA hiring decisions of the entities that received CETA funding to create jobs. If the federal government had administered the program directly, as was the case with New Deal employment programs, the problem would have been much easier to control.²⁷⁷ Other possibilities also exist for limiting the direct displacement effects of job creation programs,²⁷⁸ and there is no reason to believe it is insoluble. All that is required is careful design.

273. See, e.g., *id.* at 303 (presenting an illustration of a ‘private crowd-out’ in a simple supply and demand framework).

274. *Id.* at 320–32.

275. *Id.* at 322 tbl. 8.3.

276. Harvey, *supra* note 28, at 79–84.

277. *Id.* State and local governments still could try to use the program to replace locally-funded jobs by influencing project selection—what program participants were hired to do—but it would be much easier administratively to limit the ability of state and local governments to exploit these opportunities than if they exercised outright control over the job assignment process, as they did under CETA both before and after it was restructured.

278. See *id.* at 85; Bartik, *supra* note 245, at 191–93.

The indirect displacement effects of government job creation initiatives fall under three headings.²⁷⁹ The first type is attributable to the reallocation of public and private expenditures caused by the funding of the job creation effort. The second type is attributable to the effect of wage increases on the aggregate demand for labor. The third type is attributable to the competitive effects of increased public-sector production on the demand for similar goods and services produced by private employers. Let us consider each of these types of displacement in turn.

If a job creation program is financed by reductions in other categories of public expenditures, the jobs that are lost because of those reductions will reduce the effectiveness of the job creation program even if no direct displacement (as described above) occurs.²⁸⁰ The flip side of this observation, however, is that even if the direct displacement effect of a jobs program is one hundred percent, it will not eliminate the job creation effect of the program. To the extent local funds freed up by direct displacement effects are spent in other ways—whether by the local government, not-for-profit entities, private businesses, or individual taxpayers—additional spending will tend to create other jobs.²⁸¹ For this reason, federally funded direct job creation programs tend to reallocate societal resources and jobs to the communities they target even if the direct *and* indirect displacement effects of the program are very high. Indeed, this redistributive effect may justify such programs even if their net job creation effect on a society-wide basis is zero. First, it tends to equalize unemployment burdens across communities and population groups, a policy goal that we have argued is desirable but which is hard to achieve by other means.²⁸² Second, it tends to equalize tax burdens and government services among communities.²⁸³ The

279. Gottschalk, *supra* note 270, at 84–85.

280. *Id.* at 84.

281. Ellwood & Welty, *supra* note 270, at 309–10. These jobs may not all be in the community targeted by the jobs program, however, since the local resources freed up by direct displacement effects could be spent elsewhere or primarily effect employment elsewhere.

282. *See supra* Part IV.A.

283. *See* Harvey, *supra* note 28, at 79–84.

strategy would be more desirable, of course, if it succeeded in reducing aggregate levels of joblessness as well.

We have noted that the direct displacement effects of job creation programs depend on the programs' design. The indirect displacement effects of job creation programs depend on how they are financed. If they could be financed without decreasing any other job creating expenditures, there would be no indirect displacement effect of the type we are discussing. One way of achieving this goal is to rely on the federal government's ability to create money to fund the job creation effort. Such a procedure would be dismissed by most economists as fatally inflationary, but some post-Keynesian economists argue that it need not be.²⁸⁴

If this type of funding mechanism were rejected and resources were reallocated to the job creation effort from other purposes, the amount of indirect displacement that would result would depend on the relative employment intensity of the spending that is displaced compared to the job creation program. If a million dollars that would have been spent to pay the salaries of twenty new school teachers were used instead to fund fifty slots in a job creation program, the indirect job displacement effects of the program would be greater than if the million dollars otherwise would have been spent to pay the salaries of two brain surgeons. The displacement effects would be minimal if the funds reallocated to support the program otherwise would have been used to pay income transfer benefits to the persons targeted by the program—unemployed workers and their dependents. In fact, there is good reason to believe that even a very generous direct job creation program could be entirely funded from this and other sources, and would not displace any job sustaining expenditures.²⁸⁵ If true, indirect displacement effects attributable to the reallocation of public and private resources to pay for direct job creation programs should be negligible when considered, as they should be, in aggregate terms.

The second type of indirect displacement that job creation programs can cause is attributable to the possibly depressing effect of

284. See Wray, *supra* note 267, at 74–85.

285. See Harvey, *supra* note 28, at 21–50; Harvey, *supra* note 126, at 28–29; Harvey, *Direct Job Creation*, *supra* note 264, at 35–41.

wage increases on the aggregate demand for labor.²⁸⁶ Concern about this type of displacement is premised on the assumption that reducing unemployment will cause average wage rates to rise and that rising wage rates will cause the aggregate demand for labor to fall.²⁸⁷

It is not clear how much upward pressure job creation programs put on wage levels, especially since concerted efforts to prevent wage increases often accompany such programs in order to control their inflationary tendency. Countries that have succeeded in maintaining unemployment rates at or near the full-employment level for sustained periods of time generally have developed methods of keeping wage inflation in check. The primary concern animating these measures, however, has been fear of inflation. The claim that rising wages will reduce the *aggregate* demand for labor is much harder to justify.²⁸⁸ Even those who assume that such a relationship exists concede that the responsiveness of *aggregate* labor demand to wage changes is very slight; this means the amount of displacement one could expect from this effect is quite small.²⁸⁹ Concern about this type of displacement hardly constitutes grounds for doubting the ability of job creation programs to raise employment levels.

The third type of indirect displacement that job creation initiatives might cause concerns the effect of job creation programs on private producers of similar goods and services. Whether the output of job creation programs is distributed for free or sold, it will compete with similar goods and services produced by private employers. The predictable result will be a loss of business by competing private employers and a decline in their employment needs.

This type of displacement undoubtedly occurs and can cause significant political conflict relating to the operations of job creation programs.²⁹⁰ Still, there is no reason to believe it would diminish the net job creation effect of such programs. If, for example, a job creation

286. See Ellwood & Welty, *supra* note 270, at 303–06, 336–41; Gottschalk, *supra* note 270, at 85.

287. Ellwood & Welty, *supra* note 270, at 303–06.

288. See Harvey, *supra* note 24, at 709–23.

289. *Id.* at 716–17.

290. See Harvey, *supra* note 28, at 91–93.

program undertook to provide free child-care services to working families, commercial child-care providers would likely suffer a loss of business and lay off employees. However, expenditures by child-care consumers on other goods and services (made possible by their reduced expenditures on child care) would support an approximately equal amount of job creation in other industries. Accordingly, it may be important for political reasons to minimize competition between the activities of job creation programs and other producers of similar goods and services.²⁹¹ Such a step, however, is not necessary in order to prevent job displacement at the aggregate level.

When all the displacement effects we have identified are considered together, they provide surprisingly little reason to doubt the overall job creating effects of direct job creation initiatives. This does not mean that these displacement effects need not be considered in designing such programs. It may be important to limit or entirely avoid certain categories of displacement; however, the fear that direct job creation cannot succeed in reducing aggregate levels of unemployment appears unfounded. Concern about the displacement effects of direct job creation programs that featured so prominently in the evaluative literature is attributable to the fact that researchers generally have asked what effect such programs have had on the employment of discreet groups of workers (e.g., local public-sector employees or participants in particular job creation programs), rather than on aggregate levels of employment and unemployment.²⁹² By looking at only part of the displacement picture, it is possible to find significant displacement effects. Our focus on the overall displacement effect of job creation programs has permitted us to conclude that such effects are less of a problem than is commonly assumed.

291. *See id.* at 93–96.

292. Examples include studies that estimate the number of jobs directly displaced by CETA without estimating the number of jobs created by increased spending related to that displacement, and studies that try to measure the private ‘crowd-out’ effects of a job creation program by estimating how much regular employment participants in the program passed up by virtue of their participation without estimating how much additional employment non-participants enjoyed because those employment opportunities were passed up. For an excellent but uncritical survey of the relevant literature, see Ellwood & Welty, *supra* note 270, at 313–35.

Having concluded that direct job creation appears capable of reducing aggregate levels of joblessness without unleashing unmanageable inflationary effects, we need to consider whether the strategy is attractive on other grounds. We have assumed that the public's preference for policies that maintain unemployment above the level necessary to secure the right to work is based on fear of inflation, fear of higher taxes, and a preference for limited government. Those are the concerns we are trying to accommodate in assessing various strategies for securing the right to work.

Of the strategies we have considered, direct job creation appears to be the one that best accommodates our conflicting goals. As noted above, there is reason to believe the right to work could be secured by means of direct job creation without significantly increasing financial burdens on taxpayers, and although the strategy would generate some inflation, those effects appear both manageable and less severe than the inflationary effects likely to flow from other methods of achieving full employment. The one concern that would not be substantially accommodated by such a strategy is the public's preference for limited government. Securing the right to work by means of direct job creation programs would create a new government function that would be both fiscally and administratively significant, but this function could be only partially established in order to limit its reach by offering employment guarantees only to certain categories of persons whose unemployment is particularly harmful.

A limited experiment named The New Hope Project tested the strategy in Milwaukee, Wisconsin from 1994 to 1998. During the project's life, minimum wage jobs supplemented by significant wage subsidies and a generous benefit package were offered in conjunction with a variety of other labor-market services to all adults with family incomes below 150 percent of the poverty line in two Milwaukee neighborhoods. Because of the small size of the program and the city's favorable labor-market conditions at the time, the number of people actually provided jobs under the program was quite small, averaging only about 100 at any point in time. Research evaluations of the project have been quite favorable.²⁹³ This example is cited to

293. See Susan Poglinco et al., *An Early Look at Community Service Jobs in the New Hope Demonstration 1* (Manpower Demonstration Research Corp.

illustrate that it is possible to use the job creation mechanism to secure the right to work on a very limited scale. However, very large programs also are possible.²⁹⁴ It is not an all or nothing policy.

The advantages of using direct job creation to secure the right to work are quite strong. Even the existence of full employment would not guarantee that all job-seekers would be able to find work. Structural barriers to employment still could leave some willing workers without jobs.²⁹⁵ Direct job creation is the only mechanism that provides a potentially justiciable means of securing the right. Nevertheless, legitimate concerns can be raised about the quality of employment opportunities that direct job creation programs would offer jobless workers, and whether they would adequately respond to the various needs that access to work ideally fulfills.²⁹⁶

The strategy also has other advantages. First, it attacks poverty and other social problems not only by reducing joblessness, but also by increasing the provision of public goods and services. For example, a direct job creation program that focused on the rehabilitation of abandoned and substandard housing in poor communities would reduce poverty not only by increasing employment, but also by increasing the quantity and quality of low-cost housing. A program that provided recreational activities for children would have a similarly dual effect on poverty, as would a program that provided home-care assistance to the elderly poor.

Working Paper, 1998) (presenting the generally positive results of the implementation of wage-paying 'community service jobs' program), available at <http://www.mrdc.org>; Johannes Bos et al., *New Hope for People with Low Incomes: Two-Year Results of a Program to Reduce Poverty and Reform Welfare 1* (Manpower Demonstration Research Corp., 1999) (presenting further results of the program, and how the lives of the participants were changed through the first two years since the program's implementation), available at <http://www.mrdc.org>.

294. See, e.g., Harvey, *supra* note 28, *passim* (arguing that a practical program to secure the right to employment is both feasible and desirable in the United States).

295. See Philip Harvey, *Liberal Strategies for Combating Joblessness in the Twentieth Century*, 33 J. Econ. Issues 497, 500 (1999).

296. See Jon Elster, *Is There (or Should There Be) a Right to Work?*, in *Democracy and the Welfare State* 53, 53 (Amy Gutmann ed., 1988); Philip Harvey, *Employment as a Human Right*, in *Sociology and the Public Agenda* 351, 351 (William J. Wilson ed., 1993).

Second, as these examples illustrate, direct job creation programs actually increase national wealth. The policy accordingly represents a wealth-enhancing response to joblessness, a strategy that would permit the economy to expand output above the level where inflationary tendencies normally are thought to create a barrier to further economic growth. This additional wealth could be devoted to the expansion of poverty-reducing goods and services, as suggested above, but it also could be devoted to other public purposes, such as the improvement and beautification of public spaces. In either case, society in general would benefit.

Third, a large-scale direct job creation program could serve as a powerful automatic stabilizer, flattening the business cycle. Unemployment Insurance (UI) functions in a similar fashion, but its coverage limitations and limited wage replacement policy diminish its counter-cyclical effects. A job program that automatically expanded as unemployment rates rose could have a stronger impact, and, in any case, would enhance the counter-cyclical effects of UI.

Finally, as mentioned above, an expansive policy of direct job creation would be likely to increase the effectiveness of structuralist and behavioralist policies for combating joblessness. The goal of equalizing employment opportunities is an inherently important goal, and at very low levels of unemployment, structural and behavioral problems are likely to function as a barrier to the achievement of full employment even if their effect at higher levels of unemployment is purely distributional.²⁹⁷

V. CONCLUSION

The right to work—defined as an individual entitlement to a freely chosen job paying wages capable of supporting a dignified existence—has been proclaimed in a number of international human rights agreements promulgated since World War II. The philosophical underpinnings of the right are both varied and strong, and the positive recognition it has been accorded in international law also seems to accord with the practical importance the public attaches to job security. Nevertheless, right to work claims rarely play a

297. See Harvey, *supra* note 24, at 738–50.

significant role in either expert or ordinary public policy discussions of the problem of unemployment.

In this Article I have argued that the low salience of right to work claims in public policy discourse is at least partially attributable to shifting public attitudes towards unemployment over the course of the business cycle. When significant numbers of regularly employed workers lose their jobs—as happens during recessions—fear of unemployment spreads throughout the population and tends to dominate all other concerns in public policy debate. In this context the public's majoritarian preference for public policies that reduce aggregate levels of unemployment is fully consistent with efforts to protect the right to work. The situation changes, however, as unemployment rates fall and unemployment is increasingly concentrated among disadvantaged population groups whose labor-market problems do not threaten a majority of the population. In this economic environment, majoritarian political priorities tend to shift. Fear of inflation replaces fear of unemployment as a dominant concern in economic policy debate, and policies designed to reduce aggregate levels of unemployment tend to be replaced by those designed to maintain aggregate levels of unemployment at whatever level is deemed necessary to restrain inflationary pressures.

Affirmation of an individual right to work is an uncomfortable principle for either economists or the public to embrace if the real goal of public policy is the maintenance of unemployment at a high enough level to keep inflation in check. At the same time, it is not easy to deny the right to work outright. The harms suffered by the unemployed are too great to countenance an express denial of the right. The result is a certain evasiveness in public policy discussions concerning the ultimate goal of employment policy and a tendency for public policy debate to be limited to supply-side measures when unemployment rates are perceived to be close to the inflation-triggering level. Efforts to reduce unemployment are universally applauded, but securing the right to work is rarely mentioned as a policy goal. The concept of 'full employment' is either avoided in policy discussions or used ambiguously, and the role played by aggregate job shortages in causing unemployment at the top of the business cycle is tacitly ignored. Instead of focusing on ways to reduce aggregate levels of unemployment still further, in order to achieve full employment and secure the right to work, economic policy discussions at the top of the business cycle instead focus on

supply-side measures designed to reduce unemployment rates for disadvantaged population groups without necessarily reducing aggregate levels of unemployment. The implicit assumption of these policy discussions is that there would be nothing wrong with four percent unemployment if that level of joblessness were suffered equally by all population groups. In short, the goal of securing the right to work is ignored or tacitly rejected, while efforts are undertaken to reduce the special burden that decision imposes on disadvantaged population groups.

I argue that this conflict between majoritarian public preferences for policies that use unemployment to combat inflation and government obligations to strive to secure the right to work constitutes a real-world example of a widely recognized theoretical problem in social choice theory. That problem arises from the possibility that utility-maximization and human rights protection may conflict with one another as public policy goals. If such conflicts do exist—as I argue they do in this area of public policy—how should they be resolved?

I reject Louis Kaplow and Steven Shavell's recently elaborated argument that such conflicts should be decided in favor of utility-maximization alone, not because their conception of utility-maximization is unattractive, but because their philosophical reach exceeds their methodological grasp. On the other hand, I also reject the view that legitimate rights-based claims should be treated as absolute 'trumps' outweighing all utilitarian considerations. Instead, I argue that the importance of protecting human rights and of maximizing collective utility should be balanced against one another—not in the abstract but in the course of assessing specific policy choices—with the degree of deference accorded to each goal depending on the severity and distribution of harm the values underlying each goal are likely to suffer if one is sacrificed to the other.

Applying these principles to assess the relative deference owed to right to work claims compared to public preferences for inflation control and other utilitarian policy goals, I conclude that the right to work is entitled to far more deference than it normally receives. On the other hand, my analysis also underscores the fact that a variety of strategies are available to accommodate the right to work to serve the public's conflicting policy preferences.

Of the available policy options, I conclude that the use of direct job creation by government to achieve the functional equivalent of full employment is the most attractive. Other policies may succeed in reducing the social costs of unemployment and/or reducing the level of unemployment at which inflationary pressures become problematic, but none of these policy alternatives appear as certain of success and as free of undesirable side-effects as direct job creation. Nevertheless, many of these alternative policies—particularly structuralist measures designed to raise skill levels and equalize employment opportunities—are likely to enhance the effectiveness of direct job creation in securing the right to work, and they are desirable for other reasons as well. This is not to say that direct job creation constitutes a problem-free strategy for securing the right to work. The appropriate question to ask, however, is whether a better means exists to balance the competing interests and claims that collide in this vital area of public policy. We do not have the choice of living in a policy nirvana where human rights claims and conflicting public preferences can all be perfectly satisfied. I have argued that right to work claims are owed deference, but that public policies reflecting that deference also should strive to accommodate the public's opposing utilitarian preferences for price stability, lower taxes, and limited government. As a practical matter, this accommodation may be politically necessary to achieve greater protection for the right to work, but it also reflects the legitimacy of utility-maximization as a public policy goal. The attractiveness of direct job creation rests not only on the fact that it promises strong protection for the right to work, but also because it does so while remaining sensitive to the concerns that have caused the public to prefer policies that do not secure the right.

Whether or not my specific policy conclusions are accepted is less important, however, than the fate of my broader argument that right to work claims deserve a place in economic policy debates. Such claims are important precisely because they are likely to conflict with public preferences. In political democracies, majoritarian interests tend to be self-enforcing, but minority interests often need the special protection that rights-based claims provide. I argue that unemployed workers constitute just such a minority in need of special protection, particularly in periods of relative prosperity when their interests are likely to conflict with the policy preferences of a majority of the population.

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Finally, the lessons derived from this study of the right to work may help to explain the low profile in public policy discourse of other economic and social human rights claims. Economic and social human rights are costly to secure, and once the rights at issue are secured for most members of a society, conflicts may arise between the rights of excluded populations and majoritarian preferences for lower taxes and more limited government. In other words, conflicts between utility-maximization and human rights protection are more than a theoretical possibility in this realm of public choice; they may be the general rule.

