Toward a Federal Constitutional Right to Employment

R. George Wright[*]

I. INTRODUCTION

This Article outlines an argument for a federal constitutional right to employment. Any such argument must be multi-faceted and complex. But the argument below avoids the distraction of building too much technical specificity and too many contestable policy choices into the proposed right itself. While it would be irresponsible to ignore the major concerns raised by such a purported constitutional right, it would be no less irresponsible to focus prematurely on policy details that could be reformulated, or entirely bypassed, in implementing such a right.

This concern over excessive detail can be clarified by a loose analogy to a hypothetical, newly proposed constitutional free speech right. Let us imagine that someone initially proposes adopting a free speech clause that in textual terms is similar to, if not identical to, our own historical First Amendment text.[1] The advocate of the proposed free speech right presents a case for such a novel right in similarly familiar terms,[2] and debate on recognizing a constitutional free speech right ensues.

An exceptionally perceptive critic who concedes the superficial appeal of such a right, but who is deeply troubled by what the critic predicts will become long-term costs of recognizing a right to freedom of speech, is particularly disquieted by the indeterminacies lurking within a brief textual constitutional free speech right. The critic astutely asks how the proposed right will be carried out in any number of important respects: What would a textual constitutional free speech right mean when apparently reasonable national security interests are involved? What

---

[*] Lawrence A. Jegen Professor of Law, Indiana University Robert H. McKinney School of Law. The author hereby thanks, and exculpates, Jennifer Drobac, Frank Emmert, Samantha Everett, Nick Georgakopoulos, Victoria Hedin, John Hill, Lindsay Llewellyn, Gerard Magliocca, Michael J. Perry, James Pope, and Fran Quigley.

1. *See* U.S. CONST. amend. I.

2. *See, e.g.*, JOHN STUART MILL, ON LIBERTY AND THE SUBJECTION OF WOMEN 1 (Alan Ryan ed., Penguin Classics 2007) (1869); THOMAS I. EMERSON, THE SYSTEM OF FREE EXPRESSION (1970).

should free speech mean in the context of labor organizing, workplace harassment, or in the wide variety of governmental employee speech contexts? What would the proposed constitutional speech right mean for individual or group defamation, particularly in an era of instantaneous mass global communications? Or, for various forms of allegedly pornographic or graphically violent materials, how far would a free speech right extend in a diverse global culture and an era of both relativism and absolutism in moral judgments?

But these uncertainties are only the beginning. What would be done about hostile or hate speech in any number of contexts? Where would electronic and other rapidly evolving forms of privacy invasion fit in? How about commercial advertising, or corporate speech, whether directed to electoral campaigns or not? Should restrictions on lying in politics, or on political campaign contributions, be encouraged or tolerated? What is the meaning, scope, and limiting principle of academic freedom? To what extent may speech and its consequences be licensed, charged for, taxed, or subsidized? What of speech by the government itself? What of the various kinds of public fora? What should be said about public school student speech, responsible or irresponsible, on or beyond school premises? To what extent should young children have free speech rights, as speakers, or as an audience? Which forms of dancing or computer games or clothing count as "speech"? What is the proper relation between a constitutional free speech right and any number of other actual or proposed constitutional rights, or a number of vital and less vital public interests?[3]

Would we not find such questions, at the outset, collectively daunting? In the absence of actual experience under a constitutional free speech right, we could hardly begin to answer any of the above questions with justified confidence. The mutual consistency of our answers would be doubtful. We could hardly begin to assess and compare the costs of alternative, more specific understandings of a free speech right. And we could, from the critic's perspective, hardly begin to determine whether some particular free speech regime would be worth the various direct and indirect, short- and long-term costs of a constitutional free speech right.

Adopting a constitutional right to freedom of speech would, thus, seem wildly speculative, if not simply irresponsible, in light of the doubtless substantial, yet unpredictable, costs. And yet, today, few of us would endorse entirely erasing the text of the constitutional free speech clause.

---

3. See, for example, GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW ch. 7 (7th ed. 2013) for background to the above issues.

At the very least, the loose analogy between a hypothetical newly proposed constitutional free speech right and a proposed federal constitutional right to employment is close enough to encourage us to resist initial despair over the latter. Any version of a constitutional right to employment, however conceived and implemented, will, like a free speech clause, have substantial and unpredictable costs of one sort or another. But abandoning the idea of a constitutional employment right on such a basis would be premature at best, and grossly misguided at worst.

To explain why, and to justify initial optimism regarding a constitutional employment right, we can draw on several well-established jurisprudential distinctions. Consider first that valid constitutional rights should not be limited to those rights that can be guaranteed to pass some specified cost–benefit test. The purpose of recognizing a right may in part be precisely to limit the sovereignty of a cost–benefit analysis. Costs and benefits in a broad sense will often be crucial in determining the scope and limits of a right,[4] but a perceived imbalance of costs over benefits in some respects need not preclude recognizing a right.[5] Thus, at some point, we might want to adopt a constitutional right even where applying the right in some contexts would fail a cost–benefit calculus.

But this distinction between rights and utility does not, by itself, gain much breathing room for a constitutional employment right. Far more is gained by taking proper advantage of a second familiar jurisprudential distinction. Often, we distinguish in the law between the general and the specific, the generic and the detailed, or a broad concept and one concrete realization of the broad concept's many possibilities. As H.L.A. Hart recognized, there would be less need to distinguish general laws from more specific conceptions if the world were simpler or our knowledge were greater.[6] Thus, Hart writes that "[i]f the world in which we lived were characterized only by a finite number of features, and these together with all the modes in which they could combine were known to us, then provision could be made in advance for every possibility."[7] But this is not our world. We should, therefore, not be surprised by our

4. *But see* JOHN FINNIS, FUNDAMENTALS OF ETHICS (1983) (the view that moral rights and duties should not be held hostage to what might be perceived as grossly disproportionate costs).

5. For further discussion, see RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 92–96, 191 (1978); RONALD DWORKIN, *Rights As Trumps*, *in* THEORIES OF RIGHTS 153–67 (Jeremy Waldron ed., 1984). *See also* Ronald Dworkin, *It Is Absurd to Calculate Human Rights According to a Cost–Benefit Analysis*, THE GUARDIAN (May 23, 2006), http://www.theguardian.com/commentisfree/2006/may/24/comment.politics.

6. *See* H.L.A. HART, THE CONCEPT OF LAW 125 (1961).

7. *Id.*

inability to easily translate even our most persuasive general legal principles into their best specific operational forms.[8]

This limitation on our ability to grasp in advance how general principles should best be implemented hardly impeaches the general principles themselves. Often, we must research, debate, and then modify, reject, or accept constitutional or other legal principles without supposing that the consequences of any particular form thereof can be traced in advance. This intellectual headway is appropriate for critics, as well as for proponents, of the general legal principle in question.

Nevertheless, much essential work must be undertaken, first at the broad, more indeterminate level referred to above by Professor Hart.[9] This work reflects a distinction between what John Rawls[10] and then, more elaborately, Ronald Dworkin[11] call a general "concept" and that concept's various, more specific possible "conceptions." Rawls explains that "it seems natural to think of the concept of justice as distinct from the various conceptions of justice and as being specified by the role which these different sets of principles, these different conceptions, have in common."[12]

While Rawls applies this concept versus conception distinction at the level of moral philosophy or broad jurisprudence, Dworkin emphasizes, as we do herein, the role of this distinction at the level of American constitutional rights.[13] Against accusations that a constitutional right to employment is vague or indeterminate, we can borrow Dworkin's observation, regarding the great clauses of the Constitution, that such clauses are "vague" only if they are assumed to be "botched or incomplete or schematic attempts to lay down particular conceptions."[14] Our approach varies, however, in an effort to address the crucial preliminary task of

---

8. *See* MICHAEL OAKESHOTT, RATIONALISM IN POLITICS AND OTHER ESSAYS 6 (expanded ed. 1991).

9. *See* HART, *supra* note 6, at 125.

10. *See* JOHN RAWLS, A THEORY OF JUSTICE 5–6 (1972).

11. *See, e.g.*, DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 5, at 135–36, 226; RONALD DWORKIN, LAW'S EMPIRE 70–71 (1986). *See also* Silas Wasserstrom, *The Empire's New Clothes*, 75 GEO. L.J. 199, 220 (1986) (further articulating the concept–conception distinction).

12. RAWLS, *supra* note 10, at 5 (citing HART, *supra* note 6, at 155–59).

13. DWORKIN, TAKING RIGHTS SERIOUSLY, *supra* note 5, at 226 ("The [Equal Protection] Clause makes the concept of equality a test of legislation, but it does not stipulate any particular conception of that concept.").

14. *Id.* at 136 (the familiar idea that legal principles can be more or less attractive depending upon the level of generality—broad and abstract, or specific and contextualized—at which they are formulated). For background discussion, see, for example, Frank H. Easterbrook, *Abstraction and Authority*, 59 U. CHI. L. REV. 349, 349–51 (1992); Adam M. Samaha, *Levels of Generality, Constitutional Comedy, and Legal Design*, 2013 U. ILL. L. REV. 1733, 1735–36 (2013); Girardeau A. Spann, *Constitutionalization*, 49 ST. LOUIS U. L.J. 709, 729–30 (2005).

assessing a constitutional right of employment while remaining as neutral as possible among the ultimately more and less costly, and otherwise better and worse, ways of implementing such a right.

Relevant as well is the practical recognition that it is often unwise to require even a congressional statute to provide much substantive direction as to how a statute is to be fleshed out and implemented in complex, evolving environments calling for technical judgment and multidisciplinary expertise. Thus, the idea that Congress, rather than expert administrative agencies, must choose among possible paths in clarifying, concretizing, and implementing a statute is today largely an anachronism.[15] This pragmatic realism carries even greater force at the broader, more general level of constitutional rights.

Of course, it is impossible to meaningfully discuss a proposed constitutional right to employment without at least tentative, implicit assumptions of one sort or another. We will assume, therefore, that however one chooses to define or measure unemployment or the rate thereof, unemployment and its rates are not uncontrollable natural phenomena, independent of human decision making. As the economist Gregory Mankiw observes, "A nation's unemployment rate, rather than being immutable, is instead a function [intended, or unintended] of the choices a nation makes."[16] We might also assume, a bit more controversially, that in a dynamic economy, the optimal level of unemployment may be greater than zero.[17] And we shall assume that even if employment or other useful, valued work is considered a moral duty for some persons,[18] a constitutional right to employment should be treated as an option, rather than a legally enforceable duty to work.[19]

---

15. For laxity regarding the indeterminacy of statutory guidelines, see, for example, Whitman v. Am. Trucking Ass'ns, 531 U.S. 457 (2001); Zemel v. Rusk, 381 U.S. 1, 7–8 (1965); Yakus v. United States, 321 U.S. 414, 420–21 (1944) (WWII price control statute); NBC v. United States, 319 U.S. 190, 225–26 (1943) (upholding a statutory delegation of authority to regulate the assigning of frequencies "in the public interest"); Amalgamated Meat Cutters v. Connally, 337 F. Supp. 737 (D.D.C. 1971) (three judge panel decision on broad price control statute per the widely respected Leventhal, J). For discussion, see, for example, Eric A. Posner & Adrian Vermule, *Interring the Nondelegation Doctrine*, 69 U. CHI. L. REV. 1721 (2002).

16. N. GREGORY MANKIW, MACROECONOMICS 183 (7th ed. 2010). On the question of inflation in particular, see *infra* note 75 and accompanying text.

17. *See, e.g.*, Dale T. Mortensen, *Markets with Search Friction and the DMP Model*, 101 AM. ECON. REV. 1073 (2011) ("An acceptable . . . job . . . is one that offers an expected stream of future benefit that has a value in excess of the option to continue to search for an even better alternative.").

18. *Cf.* Lawrence C. Becker, *The Obligation to Work*, 91 ETHICS 35, 35 (1980) ("[W]ork *is* a social obligation, but . . . the work requirement should *not* be enforced by law, except in cases where it counts as reciprocity for a special benefit.") (emphasis in the original).

19. *See id.* Thus, a genuinely fulfilled right to employment does not at all imply full employment in the sense of universal and continuous active adult working-age engagement in the employ-

The serious arguments for and against a federal constitutional right to employment cannot, beyond some point, be entirely left as matters of mere assumption. But the idea of a constitutional right to employment—at the level of the broad concept—conversely cannot be undermined by arguments addressing merely one or more narrow, particularized, concrete conceptions of the proposed right. Developing a sense of the appeal, or lack of appeal, of such a right clearly involves exploring some of the questions raised by the proposed right at the broadest levels of discussion. While we cannot pretend to provide a comprehensive survey of the relevant considerations below, we can certainly provide enough of a sense of the major issues, problems, costs, and possibilities of a constitutional employment right to promote a richer discussion, and to provide some broad policy and jurisprudential guidance.

II. HARMS AND COSTS OF INVOLUNTARY LONG-TERM UNEMPLOYMENT

The case for a federal constitutional right to employment should not depend upon typical changes in unemployment or employment rates, however such rates may be defined and measured. A constitutional right is hardly the best instrument with which to address a temporary policy problem,[20] and constitutional rights should generally not address matters of limited moral consequence in the grand scheme of things.[21] But we do need some sense of the general magnitude, over time, of the harms that could be constitutionally addressed.

At any given time, the Bureau of Labor Statistics offers six different current measures of unemployment[22] and current data on a wide range of degrees of attachment to the workforce.[23] These data, given their

---

ment market, entrepreneurship, or other remunerative activity. Note that a right to vote need not be affirmatively exercised.

20. *Cf.* M'Culloch v. Maryland, 17 U.S. 316, 407 (1819) ("[W]e must never forget that it is a constitution we are expounding.") (emphasis omitted).

21. *But cf.* U.S. CONST. amend. III ("No Soldier shall, in time of peace be quartered in any house, without the consent of the Owner, nor in time of war, but in a manner to be prescribed by law."). Query whether, in a fairly conducted Constitutional Convention in our era, some sort of constitutional employment right might not outrank, say, the current Third Amendment. And bear in mind that personal long-term unemployment is generally not predictive of a real ability to donate large sums to the campaigns of elected officials.

22. *See* Gene Epstein, *The Real Jobless Rate*, BARRON'S (Dec. 7, 2013), http://online.barrons.com/news/articles/SB50001424053111903302604579234220737205480.

23. *See Labor Force Statistics from the Current Population Survey*, U.S. BUREAU OF LABOR STATISTICS, http://www.bls.gov/cps/lfcharacteristics.htm (last visited Feb. 18, 2014). Separate data is available on changes in the number of workers found to be disabled for purposes of Social Security Disability Insurance. *See Selected Data From Social Security's Disability Program*, U.S. SOCIAL SEC. ADMIN., http://www.ssa.gov/oact/STATS/dibStat.html (last visited Feb. 18, 2014).

variability,[24] are not in themselves of central concern for our purposes. Virtually all such indicators are alterable, directly or indirectly, intentionally or unintentionally, by various legally adopted government rules and policies.[25] At a crucial general level, however, we should take the broader and more stable evidence—especially the mainstream studies relating to the effects of involuntary long-term unemployment—with appropriate moral seriousness and constitutional attention.

While involuntary long-term unemployment disproportionately affects minorities,[26] the adverse impacts of such unemployment extend beyond any set of legally recognized minorities.[27] Thus, the well-established constitutional equal protection categories and tests are, for our purposes, of limited use.[28] Even more importantly, the familiar equal protection remedies do not begin to address our concerns. Rather, the

---

24. *See, e.g.*, Veronique de Rugy & Keith Hall, *Labor-Force Participation Rate Continues to Sink*, MERCATUS CTR., GEORGE MASON UNIV. (Dec. 17, 2013), http://mercatus.org/publication/labor-force-participation-rate-continues-sink; David Gilson et al., *Charts: The Worst Long-Term Unemployment Crisis Since the Depression*, MOTHER JONES (Dec. 23, 2013, 7:00 AM), http://www.motherjones.com/politics/2013/12/longterm-unemployment-recession-charts; Kenneth Rapoza, *Unemployment Rate Down As Americans Give Up On Work*, FORBES (Mar. 8, 2013, 3:09 PM), http://www.forbes.com/sites/kenrapoza/2013/03/08/unemployment-rate-down-as-americans-give-up-on-work/.

25. Perennially controversial policies involve the role of a minimum wage set at one level or another and exceptions thereto; a subminimum wage; gray and illegal labor transactions; disability benefit alternatives, and related phenomena. For the basic federal minimum wage statute, see 29 U.S.C. § 206 (2007). *See also Minimum Wage*, U.S. DEP'T OF LABOR, http://www.dol.gov/dol/topic/wages/minimumwage.htm (last visited Feb. 18, 2014). *See also* James Cross et al., *Gray Markets: A Legal Review and Public Policy Analysis*, 9 J. PUB. POL'Y & MKTG. 183 (1990).

26. *See*, *e.g.*, *Long-term Unemployment: Consequences and Solutions: Hearing Before the S. Joint Econ. Comm.*, 113th Cong. 4 (2013) (statement of Kevin A. Hassett, Dir. of Econ. Pol'y Studies, Am. Enter. Inst.), *available at* http://www.jec.senate.gov/republicans/public/?a=Files.Serve&File_id=6a85d765-d852-4a8e-8b73-5acb2dbf68c3 (financial hardships felt disproportionately by African Americans and Hispanics); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: THE WORLD OF THE NEW URBAN POOR (1996); WILLIAM JULIUS WILSON, WHEN WORK DISAPPEARS: NEW IMPLICATIONS FOR RACE AND URBAN POVERTY IN THE GLOBAL ECONOMY 2 (1998), *available at* http://eprints.lse.ac.uk/6509/1/When_Work_Disappears_New_Implications_for_Race_and_Urban_Poverty_in_the_Global_Economy.pdf ("[T]he consequences of high neighbourhood joblessness are more devastating than those of high neighbourhood poverty. A neighbourhood in which people are poor, but employed, is much different from a neighborhood in which people are poor and jobless."). More broadly, we should again not expect the long-term unemployed to be major political donors or otherwise politically influential.

27. *See, e.g.*, MIKE EVANGELIST & ANASTASIA CHRISTMAN, NAT'L EMP'T LAW PROJECT, SCARRING EFFECTS: DEMOGRAPHICS OF THE LONG-TERM UNEMPLOYED AND THE DANGER OF IGNORING THE JOBS DEFICIT 8 (2013), *available at* http://nelp.3cdn.net/4821589f87f6c502e1_nem6b0xjt.pdf ("[L]ong-term unemployment cuts across sex, education, race, and age.").

28. *See, e.g.*, ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES ch. 9 (4th ed. 2011). The familiar jurisprudence of privileges and immunities and of substantive due process would seem equally unavailing. *See*, *e.g.*, United Bldg. & Constr. Trades Council v. Camden, 465 U.S. 208 (1984).

primary point is to recognize a constitutional right aimed at preventing such harms, however equally or unequally distributed, from arising in the first place.

The practical value of a constitutional right to employment seems clear based on mainstream social science evidence and moral theory. Given our focus on an individually exercisable constitutional right, the most relevant evidence is of unemployment's consequences to individual persons and their families. But it is impossible to separate those individual- or family-level consequences from the harmful consequences effected on broader communities and the nation.

When we turn to evidence of the harms of involuntary long-term unemployment, we inevitably face problems of precise measurement. But some of the basic harms, and their general magnitude, are clear enough for appreciable recognition, even in the basic economic textbooks. Well-respected mainstream economists William J. Baumol and Alan S. Blinder, for example, recognize that the social problem of long-term unemployment is not equally distributed across social and economic groups.[29] The importance of that distinctive fact is obvious. But they also recognize what is for our purposes an even more central concern:

> Even families that are well-protected by unemployment compensation suffer when joblessness strikes. Ours is a work-oriented society. A man's place has always been in the office or shop, and lately this has become true for women as well. A worker forced into idleness by a recession endures a psychological cost that is no less real for our inability to measure it. Martin Luther King, Jr., put it graphically: "In our society, it is murder, psychologically, to deprive a man of a job . . . . You are in substance saying to that man that he has no right to exist." High unemployment has been linked to psychological and physical disorders, divorces, suicides, and crime.[30]

Further dimensions and details of the general harms of involuntary long-term unemployment are easily added. One recent survey, for example, indicates that

> [b]eing out of work for six months or more is associated with lower well-being among the long-term unemployed, their families, and their communities. . . . The long-term unemployed also tend to earn less once they find new jobs. They tend to be in poorer health and

---

29. *See* WILLIAM J. BAUMOL & ALAN S. BLINDER, MACROECONOMICS: PRINCIPLES AND POLICY 111 (12th ed. 2011).

30. *Id.* (citation omitted). Literally, Baumol and Blinder may be arguing in the final quoted sentences, not precisely that one's own involuntary long-term unemployment can result in these consequences, but that the overall involuntary unemployment rate is related to such consequences.

> have children with worse academic performance than similar workers who avoided unemployment.[31] Communities with a higher share of long-term unemployed workers also tend to have higher rates of crime and violence.[32]

A bit more specifically, it has been reported that

> [b]eyond earnings losses, there is a host of health and social issues associated with unemployment and long-term unemployment in particular that affect families, but also have a larger cost to society. As a result of increased health problems, individuals who lose their jobs during a severe downturn can expect to live [one] to [one-and-a-half] years less. Health care costs may also rise with an increased risk of mental illness, domestic violence, and suicide. Family instability associated with job loss leads to higher divorce rates, while children of unemployed parents also perform worse in school and have lower future earnings as adults compared to children without unemployed parents.[33]

A number of the most significant effects of involuntary long-term unemployment are well documented[34] and their gravity, persistence,

---

31. Of course, studying the precise causal effects of involuntary long-term unemployment, as carefully distinguished from any other related independent variable, will not be realistic beyond a certain point. For general background, see William J. Sutherland et al., *Twenty Tips for Interpreting Scientific Claims*, 503 NATURE 335 (2013), *available at* http://www.nature.com/polopoly_fs/1.14183!/menu/main/topColumns/topLeftColumn/pdf/503335a.pdf; Jim Manzi, *What Social Science Does—and Doesn't—Know* (Summer 2010), http://www.city-journal.org/2010/20_3_social-science.html (discussing "causal density").

32. AUSTIN NICHOLS ET AL., URBAN INST., CONSEQUENCES OF LONG-TERM UNEMPLOYMENT 1 (July 2013), *available at* http://www.urban.org/uploadedpdf/412887-consequences-of-long-term-unemployment.pdf. For some complications of a high incidence of such unemployment, see W.G. RUNCIMAN, RELATIVE DEPRIVATION AND SOCIAL JUSTICE: A STUDY OF ATTITUDES TO SOCIAL INEQUALITY IN TWENTIETH CENTURY ENGLAND (1966).

33. EVANGELIST & CHRISTMAN, *supra* note 27, at 7–8. Again, sorting out the separate effects of unemployment and of poverty, however defined, is, beyond a certain point, not without technical problems. *See supra* notes 31–32 and accompanying text. But consider that "[o]nly 2.6 percent of full-time workers are poor, as defined by the Federal Poverty Level Standard, compared with 23.9 percent of adults who do not work. Even part-time work makes a significant difference; only 15 percent of part-time workers are poor." MICHAEL TANNER & CHARLES HUGHES, THE WORK VERSUS WELFARE TRADE-OFF: 2013, CATO INST. 2 (2013), *available at* http://object.cato.org/sites/cato.org/files/pubs/pdf/the_work_versus_welfare_trade-off_2013_wp.pdf. If even roughly accurate, these numbers would suggest a dramatic association between employment and the avoidance of poverty.

34. *See, e.g.*, RICH MORIN & RAKESH KOCHHAR, PEW RESEARCH CTR., THE IMPACT OF LONG-TERM UNEMPLOYMENT: LOST INCOME, LOST FRIENDS—AND LOSS OF SELF-RESPECT (2010), *available at* http://www.pewsocialtrends.org/files/2010/11/760-recession.pdf; Frances M. Mckee-Ryan et al., *Psychological and Physical Well-Being During Unemployment: A Meta-Analytic Study*, 90 J. APPLIED PSYCH. 53 (2005) (concluding, on the basis of 104 relevant empirical studies, that "[t]he unemployed had lower psychological and physical well-being than did their employed counter-

breadth, and distinctive constitutional relevance seem equally clear. In fact, much of the necessary crucial understanding of the roles and values of work and employment has long been available to legal and constitutional reformers, as the next Part will indicate.

III. HISTORICAL CONTRIBUTIONS TO OUR UNDERSTANDING OF THE VALUE OF WORK

Our collective attitude toward employment, and more broadly toward work in general, has long been ambivalent and complex. A sense of this ambivalence is clearly conveyed in Thomas More's description of Utopia:

> Agriculture is the one occupation at which everyone works, men and women alike, with no exceptions . . . . Besides farm work . . . each person is taught a trade of his own . . . . But no one has to exhaust himself with endless toil from early morning to late at night, as if he were a beast of burden. Such wretchedness . . . is the common lot of workmen in all countries, except Utopia.[35]

The universality of an enforceable work requirement[36] leaves open the question of the actual affirmative value of work. It has been argued, for example, that Thomas Jefferson believed that "learning to work well is the foundation of citizenship."[37] More basically, Immanuel Kant argued that "[m]an feels more contented after heavy work than when he has done no work; for by work he has set his powers in motion."[38] J.G. Fichte thereafter developed a fascinating social contract view, binding on both the state and the individual, legally recognizing the principle that

---

parts."). *See also, e.g.*, PEW ECON. POL'Y GRP., A YEAR OR MORE: THE HIGH COST OF LONG-TERM UNEMPLOYMENT (2010), *available at* http://www.issuelab.org/resource/year_or_more_the_high_cost_of_longterm_unemployment; ALAN B. KRUEGER & ANDREAS MUELLER, INST. FOR THE STUDY OF LABOR, THE LOT OF THE UNEMPLOYED: A TIME USE PERSPECTIVE (2008), *available at* http://ftp.iza.org/dp3490.pdf; Binyamin Appelbaum, *The Enduring Consequences of Unemployment*, N.Y. TIMES (Mar. 28, 2012), http://economix.blogs.nytimes.com/2012/03/28/the-enduring-consequences-of-unemployment/ ("People who lose jobs, even if they eventually find new ones, suffer lasting damage to their earnings potential, their health, and the prospects of their children. And the longer it takes to find a new job, the deeper the damage appears to be.") (noting as well the problem of the atrophy of various skills); Kevin Drum, *10 Reasons That Long-Term Unemployment Is a National Catastrophe*, MOTHER JONES (Dec. 23, 2013, 9:00 AM), http://www.motherjones.com/kevin-drum/2013/12/10-reasons-long-term-unemployment-national-catastrophe (focusing on personal, familial, and broader economic and societal costs, as gleaned from a variety of sources).

35. THOMAS MORE, UTOPIA 36–37 (Robert M. Adams rev. trans., 1992) (1516).

36. *See id.* at 36.

37. RICHARD SENNETT, THE CRAFTSMAN 290 (2008).

38. Norman E. Bowie, *A Kantian Theory of Meaningful Work*, 17 J. BUS. ETHICS 1083, 1084 (1998) (quoting student lecture notes of the early Kant).

"everyone must be able to live *off his labor*,"[39] with the relevant responsibility borne by both the individual and the state.[40]

What we might call the personal development theme is thereafter taken up, famously, by G.W.F. Hegel,[41] and then with varying emphases by Ralph Waldo Emerson[42] and Thomas Carlyle.[43] At the extreme, Carlyle maintained that "even in the meanest sorts of [l]abour, the whole soul of a man is composed into a kind of real harmony, the instant he sets himself to work."[44] Even more extravagantly, Carlyle argued that "in all true work, were it but true hand-labour, there is something of divineness. Labour, wide as the Earth, has its summit in Heaven."[45]

Thomas More's literal utopian themes with regard to work were later developed, in more detail, in the work of writers such as Edward Bellamy[46] and William Morris.[47] The latter in particular emphasizes the joy and fulfillment in the artistic crafting of objects,[48] and as one resident of his own utopia "burst out laughing . . . 'Excuse me neighbors, but I can't help it. Fancy people not liking to work!—It's too ridiculous.'"[49]

More recently, the economist John Maynard Keynes famously combined analytical realism with what once seemed like utopianism.[50]

---

39. J.G. FICHTE, FOUNDATIONS OF NATURAL RIGHT 186 (Frederick Neuhauser ed., Michael Baur trans., 2000) (1796) (emphasis in the original). *See also* Allen W. Wood, *Fichte's Philosophy of Right and Ethics*, *in* THE CAMBRIDGE COMPANION TO FICHTE (Günter Zöller ed.) (forthcoming) (manuscript at 22–23), *available at* http://web.stanford.edu/~allenw/papers/Fichte's.doc.

40. *See* FICHTE, *supra* note 39.

41. *See* G.W.F. HEGEL, THE PHENOMENOLOGY OF SPIRIT 111 (J.B. Ballie trans., Dover Publ'ns 2d rev. ed. 2003) (1807) ("Precisely in labour where there seemed to be merely some outsider's mind and ideas involved, the bondsman [servant] becomes aware, through his re-discovery of himself by himself, of having and being a 'mind of his own.'").

42. *See* RALPH WALDO EMERSON, SELF-RELIANCE 26 (1841) ("It is only as a man puts off all foreign support, and stands alone, that I seem to be strong and to prevail."). *But see* ALASDAIR MACINTYRE, DEPENDENT RATIONAL ANIMALS ch. 10 (2001).

43. *See* THOMAS CARLYLE, PAST AND PRESENT (reprint ed., 2009) (1843).

44. *Id.* at 202. We do not suggest that even the meanest sort of work should suffice for constitutional rights purposes, or that work is either itself somehow divine or divinely imposed.

45. *Id.* at 208. For a contrasting, less positive view, see CHARLES DICKENS, HARD TIMES 66 (Grahame Smith ed., reprint ed. 1998) (1854). *See also* FRIEDRICH ENGELS, THE CONDITION OF THE WORKING CLASS IN ENGLAND (David McLellan ed., Oxford Univ. Press reissue ed. 2009) (1845).

46. *See* EDWARD BELLAMY, LOOKING BACKWARD: FROM 2000 TO 1887 ch. 7 (1888), *available at* http://www.gutenberg.org/files/624/624-h/624-h.htm (utopian work system in general combining elements of military organization, revisable incentives, broad training, and voluntary choice).

47. *See* WILLIAM MORRIS, NEWS FROM NOWHERE chs. 6, 15 (1890), *available at* http://www.gutenberg.org/files/3261.

48. *See id.* at ch. 15.

49. *Id.* at 41.

50. *See* John Maynard Keynes, *Economic Possibilities for Our Grandchildren*, *in* ESSAYS IN PERSUASION 358 (W. W. Norton & Co., 1963) (1930). Compare another well-known work published the same year: SIGMUND FREUD, CIVILIZATION AND ITS DISCONTENTS (James Strachey trans., 1962) (1930).

Keynes imagined technological advances, with accompanying productivity increases, as leading not merely to changing demand for particular kinds of workers or work skills, but to a reduced overall demand for labor.[51] But for Keynes, fascinatingly, the resulting unemployment would be a temporary maladjustment, reflecting the solution to the historic problem of economic scarcity, at least in the sense of unfulfilled genuinely basic needs.[52] The new circumstances for liberated former workers would require a remarkable historic adjustment of cultural habits and priorities.[53] The former worker's focus would now be on "how to use his freedom from pressing economic cares, how to occupy the leisure, which science and compound interest will have won for him, to live wisely and agreeably and well."[54]

As the nature of work has evolved, so has the distinctive Marxist critique, which includes Engels's response to the depredations of nineteenth century Manchester[55] and Marx's own famous prediction that

> in communist society, where nobody has one exclusive sphere of activity but each can become accomplished in any branch he wishes, society regulates the general production and thus makes it possible for me to do one thing today and another tomorrow, to hunt in the morning, fish in the afternoon, rear cattle in the evening, criticize after dinner, just as I have a mind, without ever becoming a hunter, fisherman, herdsman, or critic.[56]

---

51. *See* Keynes, *supra* note 50, at 364.

52. *See id.* Note that Keynes is referring, in the historical context of 1930, to the eventual conquest of basic need, which might fall well short today of what we think of as all scarce and desired goods, including continuing advances in communications and medical technology.

53. *See id.* at 366.

54. *Id.* at 367. For Keynes, an undiminished fascination with acquiring a kaleidoscopic stream of luxury services and trinkets seems not to be an especially worthy alternative. In the meantime, though, public policy turned to an attack on traditional economic ills, including involuntary worker idleness. *See* SIR WILLIAM BEVERIDGE, SOCIAL INSURANCE AND ALLIED SERVICES 6 (1942), *available at* http://news.bbc.co.uk/2/shared/bsp/hi/pdfs/19_07_05_beveridge.pdf ("[W]ant is one only of five giants on the road of reconstruction and in some ways the easiest to attack. The others are Disease, Ignorance, Squalor, *and Idleness*.") (emphasis added).

55. *See* ENGELS, *supra* note 45.

56. Karl Marx, *The German Ideology*, *in* THE MARX-ENGELS READER 110, 124 (Robert C. Tucker ed., 1972) (1846). For a confluence of Marx and Freud, see HERBERT MARCUSE, EROS AND CIVILIZATION: A PHILOSOPHICAL INQUIRY (2d ed. 1961). For developments in Marxist and related approaches to alienated labor, see ROBERT BLAUNER, ALIENATION AND FREEDOM: THE FACTORY WORKER AND HIS INDUSTRY (1964); BERTELL OLLMAN, ALIENATION: MARX'S CONCEPTION OF MAN IN CAPITALIST SOCIETY (2d ed. 1977); RICHARD SCHACHT, ALIENATION (1970). For related critiques of the value of work, as work is currently experienced by many on a global scale, see ANDRE GORZ, RE-CLAIMING WORK: BEYOND THE WAGE-BASED SOCIETY (1999); ANDRE GORZ, PATHS TO PARADISE: ON THE LIBERATION FROM WORK (1985). *See also* Sean Sayers, *Why Work? Marx and Human Nature*, 69 SCI. & SOC'Y 606 (2005).

Distinctively religious outlooks have also historically informed our cultural understandings of, and attitudes toward, work. We can briefly refer here to merely a few of the more widely cited discussions by modern contributors. Central among these discussions has been Max Weber's analysis of Puritanism and the roles of work.[57] Weber describes an important element of the Puritan perspective in these terms: "Irregular work, which the ordinary labourer is often forced to accept, is often unavoidable, but always an unwelcome state of transition. A man without a calling thus lacks the systematic, methodical character which is . . . demanded by worldly asceticism."[58]

At about the same time as Weber's investigations, the encyclical Rerum Novarum[59] expressed the developing Catholic doctrine on labor and labor rights themes: the cultivation of virtues in which the public has an interest, and the development of the person, require the skillful exercise of one's capacities for labor.[60] On the hundredth anniversary of Rerum Novarum, the encyclical Centesimus Annus[61] held that "[w]ork belongs to the vocation of every person,"[62] and that state and society are responsible "for protecting the worker from the nightmare of unemployment."[63]

Based in part on this brief historical survey, we may conclude that a range of the most serious and insightful perspectives converge on the profound importance of work—for the individual, for families, for communities, and for the broader society—not merely as a collectively focused general social policy, but as a matter of basic right for each individual person as well. The above discussions constitute much of the groundwork for what is argued for herein under general economic cir-

---

57. *See* MAX WEBER, THE PROTESTANT ETHIC AND THE SPIRIT OF CAPITALISM 159–61 (Talcott Parsons trans., Scribner 1958) (1905).

58. *Id.* at 161.

59. Pope Leo XIII, *Rerum Novarum: Encyclical of Pope Leo XIII on Capital and Labor*, THE VATICAN (May 15, 1891), http://www.vatican.va/holy_father/leo_xiii/encyclicals/documents/hf_l-xiii_enc_15051891_rerum-novarum_en.html.

60. *See id.* § 34.

61. Pope John Paul II, *Centesimus Annus*, THE VATICAN (May 1, 1991), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_01051991_centesimus-annus_en.html.

62. *Id.* § 6.

63. *Id.* § 15. See also, with regard to necessary training opportunities and quality of work issues, *id.* § 33. For an anticipation of many of the themes of Centesimus Annus, sometimes cast in dramatic terms, see the prior encyclical of Pope John Paul II, *Laborem Exercens*, THE VATICAN (Sept. 14 1981), http://www.vatican.va/holy_father/john_paul_ii/encyclicals/documents/hf_jp-ii_enc_14091981_laborem-exercens_en.html. *See also* Pope Francis, *General Audience*, THE VATICAN (May 1, 2013), http://w2.vatican.va/content/francesco/en/audiences/2013/documents/papa-francesco_20130501_udienza-generale.html.

cumstances as an individually enforceable constitutional right to employment, however that right might be qualified and defined.

IV. DOES THE MINIMAL UNITED STATES CASE LAW PROVIDE MUCH ADDITIONAL INSIGHT?

The United States courts have certainly not approached endorsing anything like an implied, general federal constitutional right to employment. This is not a matter of judicial insensitivity to the harms of unemployment,[64] especially at massive Depression-era levels.[65] Consider, for example, Justice Cardozo's opinion for the Court constitutionally upholding the federal unemployment compensation system against a state challenge:

> During the years 1929 to 1936, when the country was passing through a cyclical depression, the number of unemployed mounted to unprecedented heights. . . . Disaster to the breadwinner meant disaster to dependents. Accordingly the roll of the unemployed, itself formidable enough, was only a partial roll of the destitute or needy.[66]

Nor have the courts invariably assumed that unemployment compensation or, presumably, welfare benefits, are the functional equivalent of gainful employment in all important respects.[67]

Sympathy for a broad right to employment, encompassing more than just the results of stimulus packages, money supply expansion, and training programs, has long, if only very occasionally, been manifested at the highest levels of American politics. In his 1944 State of the Union Address, for example, President Roosevelt included within a proposed

---

64. *See supra* Parts II, III. Note, by contrast, that while the Court has also declined to recognize, for example, an implied federal constitutional right to an education despite the severe harms of a complete denial of an education, educational opportunity is typically protected by state constitutional law, and few persons are legally denied any educational opportunity. *See* Honig v. Doe, 484 U.S. 305 (1988); Plyler v. Doe, 457 U.S. 202 (1982); San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973).

65. For a brief survey, including the Roosevelt-era Civilian Conservation Corps (CCC) and Works Progress Administration (WPA) job-program responses, see, for example, ERIC RAUCHWAY, THE GREAT DEPRESSION AND THE NEW DEAL 46, 64–68 (2008).

66. Charles C. Steward Mach. Co. v. Davis, 301 U.S. 548, 586 (1937).

67. *See, e.g.*, Consumer Action Network v. Tielman, 49 A.3d 1208, 1217 (D.C. 2012). *See also* Richard T. DeGeorge, *The Right to Work: Law and Ideology*, 19 VAL. U. L. REV. 15, 20 (1984) ("[A]lthough welfare does indeed preserve life, it does not allow the able-to-work who receive it to take an active, productive part in their society with the concomitant respect and self-respect that goes with having such a position in work or employment.").

"second Bill of Rights"[68] a "right to a useful[69] and remunerative job in the industries or shops or farms or mines of the Nation."[70]

At the statutory level, the value of "full" employment was legally recognized in the Humphrey–Hawkins Act in 1978.[71] Actual enforcement of the goals of the Humphrey–Hawkins Act is a matter of an impressive public record.[72] But Humphrey–Hawkins itself at least offers official congressional recognition of some important realities: "Unemployment exposes many families to social, psychological, and physiological costs, including disruption of family life, loss of individual dignity and self-respect, and the aggravation of physical and psychological illnesses, alcoholism and drug abuse, crime, and social conflicts."[73] Humphrey–Hawkins also recognizes the unemployment-related dimensions of various increased government costs and expenditures, lost income tax revenue, erosion and loss of work skills, and in contrast, the reduced opportunities for various sorts of invidious employment discrimination in tight labor markets.[74]

The most relevant judicial opinions also occasionally convey a sense of the individual and the collective costs of unemployment. Consider, for example, a dissenting opinion of Justice Marshall in an involuntary retirement case of a federal worker.[75] Justice Marshall observed that "[a] person's interest in continued Government employment, although not 'fundamental' as the law now stands, certainly ranks among the most important of his personal concerns that Government action

---

68. *See* RAUCHWAY, *supra* note 65, at 127.

69. Without here resolving the empirical question, it seems entirely possible that some of the benefits associated with work (*see supra* Parts II, III) may be reduced or absent in the case of what is perceived as "make-work," or work that is widely perceived as pointless or grossly inefficient. Alternately, digging and then filling in, repeatedly, socially pointless holes in the ground might count as perceived make-work. Pursuing a socially useful construction project by hiring thousands of otherwise unemployed persons to move earth with ordinary tablespoons could well seem grossly inefficient and not conducive to some or all of the benefits of meaningful employment.

70. RAUCHWAY, *supra* note 65, at 127. *See also* JACK DONNELLY, UNIVERSAL HUMAN RIGHTS IN THEORY AND PRACTICE 241 (3d ed. 2013) (citing President Roosevelt, as of 1938, to similar effect).

71. *See* Full Employment and Balanced Growth Act of 1978 (Humphrey–Hawkins), Pub. L. No. 95-523, 92 Stat. 1887 (codified as amended at 15 U.S.C. § 3101 (2013)).

72. *See, e.g.*, DeGeorge, *supra* note 68, at 30–31. For current unemployment and related figures of various sorts, see the latest available data from the websites referred to *supra* note 23.

73. 15 U.S.C. § 3101(a)(5).

74. *See id.* § 3101(a) & (b). Humphrey–Hawkins may remain unimplemented due to a fear of a sustained tradeoff between employment rates and inflation rates. But see the complications noted in Kevin D. Hoover, *Phillips Curve* (2d ed. 2008), *available at* http://www.econlib.org/library/Enc/PhillipsCurve.html. Note also the range of approaches to reducing unemployment with substantially different effects on inflation.

75. Vance v. Bradley, 440 U.S. 93, 112 (1979) (Marshall, J., dissenting).

would be likely to affect."[76] What Justice Marshall says of older workers in particular[77] is largely applicable, and often in even greater measure, to workers further from traditional retirement ages:

> The lack of work is not only economically damaging, but emotionally and physically draining. Deprived of his status in the community and of the opportunity for meaningful activity, fearful of becoming dependent on others for his support, and lonely in his new-found isolation, the involuntarily retired person is susceptible to physical and emotional ailments as a direct consequence of his enforced idleness.[78]

There are also a number of related cases addressing the government interests required to justify legal limitations on a worker's entry into particular trades. It has occasionally been suggested, for example, that some legal certification or licensing requirements amount to unduly restrictive barriers to occupational entry by potential competitors.[79] But even if the courts were uniformly suspicious of legal obstacles to gainful employment in various trades,[80] reduced legal barriers to entering such trades

---

76. *Id.* at 113 (Marshall, J., dissenting). Think also in terms of the outcome of a genuinely, fairly, and democratically conducted contemporary Constitutional Convention.

77. *See id.* (Marshall, J., dissenting).

78. *Id.* (Marshall, J., dissenting) (quoting Mass. Bd. of Retirement v. Murgia, 427 U.S. 307, 323 (1976) (Marshall, J., dissenting)). For further brief references to, respectively, dignity and self-respect in the context of labor, see Emo v. Milbank Mut. Life Ins., 183 N.W.2d 508, 516 (N.D. 1971); Garney v. Dep't of Labor, 41 P.2d 400, 403 (Wash. 1935) (en banc) (Tolman, J., concurring in result).

79. *See, e.g.*, MILTON FRIEDMAN, CAPITALISM AND FREEDOM ch. 9 (40th anniv. ed. 2002) (1962).

80. For a sampling of the less than uniform constitutional case law in this general context, see, for example, Massachusetts v. Murgia, 427 U.S. 307, 313 (1976) (per curiam) ("[A] standard less than strict scrutiny 'has consistently been applied to state legislation restricting the availability of employment opportunities.'") (quoting the welfare benefits statutory cap case of Dandridge v. Williams, 397 U.S. 471, 485 (1970)). *See also* Lindsey v. Normet, 405 U.S. 56, 73 (1972) (denying a federal constitutional right to, murkily, housing "of any particular quality"); St. Joseph Abbey v. Castille, 712 F.3d 215, 222–23 (5th Cir. 2013) ("[N]either precedent nor broader principles suggest that mere economic protection of a particular industry is a legitimate governmental purpose, but . . . may well be supported by a post hoc perceived rationale . . . without which it is aptly described as a naked transfer of wealth.") (citing Merrifield v. Lockyer, 547 F.3d 978, 991 n.15 (9th Cir. 2008)); Powers v. Harris, 379 F.3d 1208, 1211 (10th Cir. 2004) ("Hornbook constitutional law provides that if Oklahoma wants to limit the sale of caskets to licensed funeral directors, the Equal Protection Clause does not forbid it."); Craigmiles v. Giles, 312 F.3d 220, 224–29 (6th Cir. 2002) (The court referred to the relevant statutory amendment as "nothing more than an attempt to prevent economic competition." The court points out that "nothing in the [state statute] prevents casket retailers from becoming licensed funeral directors. However, dedicating two years and thousands of dollars to the education and training required for licensure is undoubtedly a significant barrier to entering the Tennessee casket market. . . . [Therefore,] we invalidate . . . the General Assembly's naked attempt to raise a fortress protecting the monopoly rents that funeral directors extract from consumers.").

would hardly guarantee anything close to universal, realistic employment opportunities.[81]

If we broaden the focus, the phenomenon of the legally incentivized destruction of employment opportunities looms much larger. The problem is not the intentional judicial, statutory, or regulatory destruction of jobs, but the destruction of jobs as an unintended and indirect consequence of a wide range of otherwise worthy regulatory enactments aimed at a range of evils.[82] While the adverse employment effects of any single legal regulation may be modest, the unintended and even unrecognized cumulative effect of many such regulations is to raise involuntary unemployment levels significantly.[83] These cumulative effects, if not somehow abated, dramatically raise the significance of recognizing a meaningful constitutional right to employment.

---

81. For an interesting such judicial victory against a statutorily-enforced barrier to occupational entry, see Clayton v. Steinagel, 885 F. Supp. 2d 1212 (D. Utah 2012) (African hair braiding as not constitutionally subsumable within the requirements of the state's cosmetology and barbering licensing scheme). For additional discussion of instances in which occupational licensing or certification requirements may adversely affect employment mobility, often at the expense of the poor and minorities, see Morris M. Kleiner, *Occupational Licensing*, 14 J. Econ. Perspectives 189 (2000); DICK CARPENTER, II ET AL., LICENSE TO WORK (2013), *available at* https://www.ij.org/images/pdf_folder/economic_liberty/occupational_licensing/licensetowork.pdf; DANE STANGLER, PROGRESSIVE POLICY INSTITUTE OCCUPATIONAL LICENSING: HOW A NEW GUILD MENTALITY THWARTS INNOVATION (2012), *available at* http://progressivepolicy.org/wp-content/uploads/2012/04/03.2012-Stangler_Occupational-Licensing_How-A-New-Guild-Mentality-Thwarts-Innovation1.pdf; Timothy Taylor, *Occupational Licensing and Low-Income Jobs*, CONVERSABLE ECONOMIST (May 11, 2012), http://conversableeconomist.blogspot.com/2012/05/occupational-licensing-and-low-income.html; Theresa Boyd, *The Artificial Barriers of Occupational Licensing*, AM. LEGISLATOR (Oct. 25, 2013), http://www.americanlegislator.org/artificial-barriers-occupational-licensing/.

82. *See, e.g.*, *Over-Regulated America*, THE ECONOMIST (Feb. 18, 2012), http://www.economist.com/node/21547789 ("The problem is not the rules that are self-evidently absurd. It is the ones that sound reasonable on their own but impose a huge burden collectively."). For some brief discussions seeking to account for such outcomes via public choice theory, see, for example, Fred S. McChesney, *Rent Extraction and Rent Creation in the Economic Theory of Regulation*, 16 J. Legal Stud. 101 (1987); VERONIQUE DE RUGY, MERCATUS CTR., GEORGE MASON UNIV., WHY GOVERNMENT INSTITUTIONS FAIL TO DELIVER ON THEIR PROMISES: THE PUBLIC CHOICE EXPLANATION (2013), *available at* http://mercatus.org/publication/why-government-institutions-fail-deliver-their-promises-public-choice-explanation; JAMES M. BUCHANAN, PUBLIC CHOICE: POLITICS WITHOUT ROMANCE (2003), *available at* http://www.montana.edu/econ/hfretwell/332/buchananpublicchoice.pdf; William F. Shugart, *Public Choice*, LIBRARY OF ECON. & LIBERTY, http://www.econlib.org/library/Enc/PublicChoice.html (last visited March 1, 2014).

83. *Over-Regulated America*, *supra* note 83 (Consider that "[a] study for the Small Business Administration . . . found that regulations in general add [as of the date of the study] $10,585 in costs per employee. It's a wonder the jobless rate isn't even higher than it is."). Of course, to the extent that a constitutional right to employment is met, in part, through government employment or government "matching" programs, we should expect one degree or another of similar sorts of costly inefficiencies, and of public choice-related costs in general.

V. A RIGHT TO EMPLOYMENT IN HUMAN RIGHTS AND LEGAL PHILOSOPHICAL PERSPECTIVE

Employment rights of one sort or another are widely recognized in a number of international treaties and conventions.[84] For example, there has been recognized "the right of everyone to the opportunity to gain his living by work which he freely chooses or accepts . . . ."[85] Whether the "right to work"[86] expressed therein really amounts to a universal human right[87] is of interest, but not directly relevant to our narrower concern for federal constitutional rights in the United States. Additionally, whether the International Covenant's contemplated means of enforcing this right are adequate, even for advanced economies, is also subject to some doubt.[88] At that point in the Covenant, no reference is made to the substantial employment problems of women in general, or of mothers more specifically.[89]

The logic of recognizing a human right to employment overlaps meaningfully with the logic of recognizing employment as a federal constitutional right. As to the former, one leading human rights theorist has suggested[90] that among the grounds for a human right to employment are "considerations of personal survival[91] and well-being, independence and

---

84. *See, e.g.*, DeGeorge, *supra* note 68, at 15–16 (discussing the Article 23 of the Universal Declaration of Human Rights). For a convenient general compilation, see IAN BROWNLIE & GUY S. GOODWIN-GILL, BASIC DOCUMENTS ON HUMAN RIGHTS (6th ed. 2010) (see especially Part IV on labor rights).

85. International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1996, art. 6(1), 993 U.N.T.S. 3 (entered into force Jan. 3, 1976) [hereinafter ICESCR], *available at* http://www.ohchr.org/Documents/ProfessionalInterest/cescr.pdf.

86. *Id.* Of course, a right to employment, however specified, will be distinct from a right to subsistence by means of working or not. *See, e.g.*, HENRY SHUE, BASIC RIGHTS 55 (2d ed. 1996).

87. *See, e.g.*, CARL WELLMAN, THE MORAL DIMENSIONS OF HUMAN RIGHTS 58 (2011) ("[T]his is a universally applicable right only if work need not consist of paid employment, for there are many forms of unpaid work and some simple agricultural or hunting societies that do not have the economic institutions of employers and employed workers.").

88. *See* ICESCR, *supra* note 86, at art. 6.2, which might be interpreted as requiring, for example, something like Keynsian economic growth stimuli, if necessary, rather than government as employer of last resort or other more directly targeted, universalist steps.

89. *See, e.g.*, MARTHA NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 38 (2011) ("Many women in the United States are forced to forego employment opportunities in order to care for children or elderly relations."); Guy Mundlak, *The Right to Work: Linking Human Rights and Employment Policy*, 146 INT'L LABOUR REV. 189, 196 (2007) (noting the problems of substantively unpaid work, including "care work within the household (typically almost exclusively provided by women), community work (done by volunteers) and artistic expression.").

90. *See* James W. Nickel, *Is There a Human Right to Employment?*, 10 PHILOSOPHICAL FORUM 149 (1978).

91. Of course, programs of minimum income or subsistence-level welfare could accommodate bare survival interests, whatever their effects, in cultural context, on self-respect, dignity, self-esteem, meaningfulness, or a sense of contribution. *See id.* at 154.

self-respect, and self-development."[92] At the human rights level, and at the constitutional level as well, one could argue that gainful employment, as opposed to some particular desired job, should not be reserved for the winners and denied to good-faith losers in some sort of competitive struggle.[93] Instead, the theory would run: "work, like security and food, is too important to human well-being to be available only to some—even if a non-universal[94] distribution were made through a fair competition or a lottery."[95] At both the human rights and the constitutional levels, a right to employment is not only typically crucial for practical reasons,[96] but is also likely to be of special practical concern to persons and groups exercising relatively limited electoral or other political influence.[97]

A slightly distinct, but complementary, approach is taken by John Rawls, whose primary focus is neither on human rights nor on American constitutional law. At the level of moral, political, and legal philosophy, Rawls famously argues that "perhaps the most important primary good is that of self-respect."[98] Self-respect encompasses both "a person's sense of his own value"[99] and "a confidence in one's ability, so far as it is within one's power, to fulfill one's intentions."[100] Crucially, "[a] person tends

92. *Id.* at 157.

93. *See id.* at 160.

94. We again need not include those persons, of various categories, who, for one legitimate and sufficient reason or another, do not currently seek gainful employment.

95. Nickel, *supra* note 91, at 160. Of course, as we have seen, our Constitution as currently conceived does not enshrine all of the rights or interests typically deemed to be of the most practically fundamental importance. *See supra* notes 21, 81 and accompanying text. But it is unclear how constitutionally leaving the most basic interests to mere chance and contingency, while embracing the Third Amendment, for example, comports with the basic logic and fairness required by the broad social contract tradition. *See, e.g.*, JOHN LOCKE, TWO TREATISES OF GOVERNMENT 265 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690); JEAN-JACQUES ROUSSEAU, THE SOCIAL CONTRACT AND OTHER LATER POLITICAL WRITINGS 39 (Victor Gourevitch ed., Cambridge Univ. Press 1997) (1762); J.G. FICHTE, FOUNDATIONS OF NATURAL RIGHT pt. II (Michael Baur trans., 2000) (1976); and even JOHN RAWLS, A THEORY OF JUSTICE ch. 3 (1917). For a version of social contract theory that might, on some readings, fall short of any general employment right, see DAVID GAUTHIER, MORALS BY AGREEMENT 16, 95, 107 (1986) (discussed in James S. Fishkin, *Bargaining, Justice, and Justification*, *in* THE NEW SOCIAL CONTRACT: ESSAYS ON GAUTHIER 46, 50–51 (Ellen Frankel Paul et al. eds., 1988)).

96. *See supra* Parts II, III.

97. *See* Nickel, *supra* note 91, at 161; JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

98. RAWLS, *supra* note 96, § 67, at 440. Or, more precisely, the social (and legal) bases of self-respect. Rawls appears to take self-esteem as a synonym for self-respect, but see JEAN M. TWENGE & W. KEITH CAMPBELL, THE NARCISSISM EPIDEMIC: LIVING IN THE AGE OF ENTITLEMENT (2010) (sharply distinguishing the two concepts).

99. RAWLS, *supra* note 96, § 67, at 440.

100. *Id.*

to be more confident of his value when his abilities are both fully realized and organized in ways of suitable complexity and refinement."[101]

Rawls here links the crucial primary good of the social bases of self-respect with appropriate opportunity for realizing one's capacities. For many persons, especially in an economically advanced society, meaningful employment is an irreplaceable element of both self-respect and self-realization. Rawls himself begins to develop this connection more explicitly in his later work,[102] where he emphasizes "free choice of occupation against a background of diverse opportunities."[103] The idea of a universal and genuinely free choice of occupations, if interpreted too strongly, is unrealizable in practice. But our thesis herein requires no such stringent interpretation. An appropriately situated person who faces sustained unemployment, despite exerting reasonable good faith efforts to avoid such unemployment, plainly lacks even the minimal rudiments of a "free choice of occupation."[104] In particular, Rawls's concern for government as an employer of last resort[105] stems partly from rights-oriented considerations, such as the social bases of self-respect and freedom, but also from broad regime-oriented considerations, such as healthy citizenship and regime stability.[106]

Rawls is far from alone among contemporary theorists in noting the importance of the social bases of self-respect and the risk to basic self-respect posed by prolonged involuntary unemployment. Thus, the philosopher Elizabeth Telfer vividly writes that "[t]he emotional aspect of loss of self-respect is not merely absence of pride or of pleasure in one's achievements, but disgust, contempt or despair. Self-respect then seems to be a man's belief that he attains at least some minimum standard . . . ."[107] The distinguished social scientist Robert Coles contributes

---

101. *Id.* For an important discussion of the broader idea of respect for persons, see Stephen L. Darwall, *Two Kinds of Respect*, 88 ETHICS 36 (1977).

102. *See* JOHN RAWLS, POLITICAL LIBERALISM (expanded ed. 2005).

103. *Id.* at 181 (again citing "the social bases of self-respect").

104. *Id.* This is again not to pre-judge what general terms, conditions, nature, and circumstances of employment, for persons with particular backgrounds, should be ruled in or out as adequate for purposes of our proposed constitutional right to employment.

105. *See id.* at lix. *See also* JOHN RAWLS, THE LAW OF PEOPLES 50 (1999) (government as employer of last resort as linked not only to self-respect, but to meaningful citizenship and to regime stability).

106. *See* RAWLS, *supra* note 106. For useful discussion, see Jeffrey Moriarty, *Rawls, Self-Respect, and the Opportunity for Meaningful Work*, 35 SOCIAL THEORY & PRAC. 441 (2009). More broadly, see Richard Penny, *Incentives, Inequality, and Self-Respect*, 19 RES PUBLICA 335 (2013); James R. Zink, *Reconsidering the Role of Self-Respect in Rawls's A Theory of Justice*, 73 J. POL. 331 (2011).

107. Elizabeth Telfer, *Self-Respect*, 18 PHIL. Q. 114, 114 (1968). *See also* Nickel, *supra* note 91, at 162 ("In regard to the right to a job a society that avoidably fails to ensure that productive

both anecdotal, interview-based evidence and philosophical insight in recognizing some of the very real costs of working,[108] while at the same time linking work not only to self-respect,[109] but to one's basic identity,[110] or to one's elemental sense of self.[111]

Human rights theory, philosophy, and social science[112] thus provide much of the basic logic underlying a proposed constitutional right to employment. But it remains to consider below some of the arguments at a more concrete and contextualized level, without mistakenly exploring details that need not be resolved at a broad constitutional level. Let us briefly consider some of the most typical concerns, in the form of conceptual boundary issues, arguable costs, possible broad forms of implementation, and the proper limits on the scope of a constitutional right to employment.

VI. THINKING MORE CONCRETELY ABOUT A RIGHT TO EMPLOYMENT WITHOUT PREMATURELY OVER-SPECIFYING THE CONSTITUTIONAL-LEVEL RIGHT

As in the case of a constitutional right to freedom of speech,[113] a textual, federal constitutional right to employment would inevitably raise far more questions than it would answer. Helpfully, basic elements of some general possibilities for fleshing out the right can already be borrowed from the literature. Again, we do not herein endorse any particular scheme for implementing such a right. However, such matters have already been the subject of serious reflection, in one context or another.

Consider, for example, the broad conception of the employment right offered by the philosopher James W. Nickel.[114] Professor Nickel suggests generally:

> Large-scale works programs . . . that combine work experience and job training can be created. Tax and other incentives[115] to hire more people can be given to industries. Economic policies designed to

activity and the rewards thereof are available to its members subjects them to a number of indignities.").

108. *See* Robert Coles, *Work and Self-Respect*, 105 DAEDALUS 29, 32–33 (1976).

109. *See id.* at 34–35, 38.

110. *See id.* at 37.

111. *See id.*

112. *See supra* Parts II, III.

113. *See supra* notes 1–3.

114. *See* JAMES W. NICKEL, MAKING SENSE OF HUMAN RIGHTS 156–58 (1987). For a contrasting overall view, see Jon Elster, *Is There (or Should There Be) a Right to Work?*, *in* DEMOCRACY AND THE WELFARE STATE ch. 3 (Amy Gutmann ed., Princeton Univ. Press 1998).

115. Or, perhaps at least as importantly, reducing government-imposed disincentives, of various sorts, to hiring and job creation.

> run the economy at a faster rate[116] can be adopted. The most ambitious solution is for government[117] to become the employer of last resort, guaranteeing a job to every person who is able to work,[118] wants a job, and has been unable to find one.[119]

Many variations on these themes, with varying degrees of attention to policy waste, inefficiencies, and other costs, are possible.[120] As with most other individual constitutional rights, a right to employment is unavoidably subject to justifiable limitation, waiver, or forfeiture.[121] For an employment right to be universal and utterly absolute, it would have to trump not only every conceivably conflicting public interest, but every other occasionally conflicting federal constitutional right as well, including the conflicting constitutional employment rights of different individuals.[122]

Without claiming that any particular resolution of employment right issues is uniquely appropriate, we can suggest that a right to employment can be forfeited by certain actions, such as repeatedly declining to report

---

116. Or, more specifically, to tighten labor markets, again through various possible legal mechanisms.

117. Our primary, but not exclusive, concern is at the federal level.

118. The "ability" to work, what counts as a wish to find work, and what should count as minimally sufficient employment are not mere natural facts, or even discoverable independent social facts, but are instead contestable social constructs reflecting our economic circumstances, priorities, cultural beliefs, and power relationships.

119. NICKEL, *supra* note 115, at 156.

120. *See, e.g.*, MIKE EVANGELIST & ANASTASIA CHRISTMAN, NAT'L EMP'T LAW PROJECT, GETTING OUR PRIORITIES STRAIGHT: THREE ACTIONS CONGRESS CAN TAKE TO CREATE JOBS AND BUILD FUTURE PROSPERITY (2013), *available at* http://www.nelp.org/page/-/Job_Creation/Report-Job-Creation-Getting-Our-Priorities-Straight.pdf; William Darity, Jr., *Federal Law Requires Job Creation*, N.Y. TIMES (Dec. 4, 2013), http://www.nytimes.com/roomfordebate/2013/12/04/making-low-wages-liveable/federal-law-requires-job-creation (advocating "a National Investment Employment Corps similar to the [FDR-era] Works Progress Administration and the Civilian Conservation Corps . . . ."); L. Randall Wray, *The Job Guarantee: A Government Plan For Full Employment*, THE NATION (June 27, 2011), http://www.thenation.com/article/161249/job-guarantee-government-plan-full-employment ("An 'employer of last resort' program would restore the government's lost commitment to full employment . . . .") (presenting additional recommended program details); William P. Quigley, *The Right to Work and Earn a Living Wage: A Proposed Constitutional Amendment*, 2 N.Y. CITY L. REV. 139, 141 (1998) (emphasizing the broad range of programmatic options); DeGeorge, *supra* note 68, at 34–35.

121. Note, merely for example, the various limitations on the free speech rights of public employees discussed throughout *Garcetti v. Ceballos*, 547 U.S. 410 (2006); on free exercise rights in *Employment Div. v. Smith*, 494 U.S. 872 (1990); on the rights of new state residents to vote in *Dunn v. Blumstein*, 405 U.S. 330 (1972); and on free press rights in the prisoner interview case of *Pell v. Procunier*, 417 U.S. 817 (1974).

122. See the authorities cited *supra* note 120. Note that the possibility of genuine conflict between free speech and equal protection does not show that either or both rights cannot be genuine constitutional rights. *See* R. George Wright, *Dignity and Conflicts of Constitutional Values: The Case of Free Speech and Equal Protection*, 43 SAN DIEGO L. REV. 527 (2006).

for work without an attempt at notice or excuse. At some sub-constitutional level, further similar limitations on the right plainly must be set.[123]

On the other end of the spectrum, not everything that could be technically classified as employment should be considered employment for constitutional purposes. For the sake of clarity, consider an extreme case: a constitutional right to employment typically, under familiar economic circumstances, could not be genuinely fulfilled by relentlessly degrading, trivially compensated, dangerous, unhealthful, mindless, and utterly meaningless work. At some point, the meaningfulness of a particular form of work can reasonably be contested, and scarcity, among other factors, obviously precludes a limitless supply of personally tailored dream jobs.[124]

Implementation of a constitutional right to employment must avoid extremes at both ends of the spectrum. Workers and the public can tell, at least in extreme cases, when a job is without market or any other public value,[125] or without sufficient meaningfulness[126] to advance the basic

---

123. *See, e.g.*, Wray, *supra* note 121; Richard A. Epstein, *Curing the Unemployment Blues*, HOOVER INST. (Nov. 29, 2011), http://www.hoover.org/research/curing-unemployment-blues-0 (noting the disincentives to hiring caused by rules purportedly making it "next to impossible to fire workers"). *See also* Elster, *supra* note 115, at 74 (on the problem of "shirking"). For much broader discussion of the right's boundary conditions, see DeGeorge, *supra* note 68, at 16.

124. *See* Megan McArdle, *Why Uncle Sam Can't Guarantee College Grads a Job*, BLOOMBERGVIEW (Jan. 24, 2014), http://www.bloombergview.com/articles/2014-01-24/why-uncle-sam-can-t-guarantee-college-grads-a-job ("I do think that we should provide bare-bones employment-of-last-resort to people who are struggling but just can't find a job. But the government cannot make every English major's employment dreams come true."); Elster, *supra* note 115, at 62 ("Not all good things in life can be provided as a matter of right.").

125. The "make-work" problem, in which jobs are artificially constructed or conserved at the cost of enormous losses in productivity, efficiency, and social wealth is discussed in BRYAN CAPLAN, THE MYTH OF THE RATIONAL VOTER 40–43 (rev. ed. 2008) (citing the French economist Frederic Bastiat); MATTHEW B. CRAWFORD, SHOP CLASS AS SOULCRAFT: AN INQUIRY INTO THE VALUE OF WORK 5 (2009) (noting "the appeal of tangible work that is straightforwardly useful."). *See also* Elster, *supra* note 115, at 75 (on self-defeating policy attempts to enhance self-esteem, if not dignity), and at 66 (many, if not most, contemporary jobs are not especially self-fulfilling or self-realizing, if not actually alienating).

126. *See supra* Parts II, III. *See also* RUSSELL MUIRHEAD, JUST WORK 170–71 (2004) ("Societies in every age need certain things done that are not fulfilling to do."); William A. Kahn & Steven Fellows, *Employee Engagement and Meaningful Work*, *in* PURPOSE AND MEANING IN THE WORKPLACE ch. 5, at 109–15 (Bryan J. Dik, Zinta S. Byrne & Michael F. Steger eds., 2013) (discussing the work-engagement dimensions of attentiveness, connectedness, integration, and absorption, along with workplace identity, appropriate level of challenge of work, clarity of workplace roles, meaningfulness of rewards, workplace relationships, competence of supervision, and a sense that one's voice is taken into account); Richard J. Arneson, *Meaningful Work and Market Socialism*, 97 ETHICS 517 (1987); Beate Roesler, *Meaningful Work: Arguments from Autonomy*, 20 J. POL. PHIL. 71, 71 (2012) (recognizing the disputability of what should count as meaningful work, at least in some instances); Adina Schwartz, *Meaningful Work*, 92 ETHICS 634, 635 (1982) (emphasizing

values of employment.[127] But we can also commonly tell when a publicly funded job is more attractive, overall, than any market-supported job for which the claimant might be a viable candidate, and thus is likely distortive of employment market signals and incentives.[128]

Finally, a word is needed about an especially important dimension of the complex question of who is to be eligible for a constitutional right to employment. Of course, problems of inclusion and exclusion are inevitable here, similar to the constitutional right to vote.[129] But in our context, the potential eligibility, immediately or after a waiting period, of various classes of non-citizens is of special interest. Some individual constitutional rights have traditionally been restricted to citizens.[130] Other important individual constitutional rights have been afforded not merely to citizens, but to various classes of non-citizen persons within the geographic jurisdiction.[131] The benefits and costs, moral and fiscal, of extending constitutional employment rights to various categories of non-citizens may vary with circumstance, and plainly involve complex moral and empirical questions.[132] As with any number of other matters, there will be time enough for any necessary tentative and experimental, or fixed and permanent, line-drawing after the idea of a federal constitutional right to employment has been endorsed in principle.

---

autonomy and personal development); David Wiggins, *Work, Its Moral Meaning or Import*, 89 PHIL. 477 (2014); Alan Wolfe, *The Moral Meaning of Work*, 26 J. SOCIO-ECONOMICS 559 (1997) (noting that, ironically, the home can be the locus of bitter conflict, while the workplace may be the locus of friendship, self-understanding, and meeting challenges).

127. Unfortunately, there seems to be no economic law that only degrading, dangerous, or meaningless jobs are automated out of existence or otherwise effectively abolished; reasonably meaningful and fulfilling jobs, as in, for example, the travel agency business or professional journalism can be "abolished" as well.

128. *See* McArdle, *supra* note 125.

129. In the voting rights context, consider durational residency requirements, citizenship limitations, age requirements, and the effects of non-violent felony convictions, let alone a number of other historic limitations on the franchise.

130. *See, e.g.*, the case law under the Privileges and Immunities Clause, as in *Saenz v. Roe*, 526 U.S. 489 (1999); *Union Building & Constr. Trades Council v. Camden*, 465 U.S. 208 (1984); and *Supreme Court of New Hampshire v. Piper*, 470 U.S. 274 (1985).

131. See, in the alienage context, *Plyler v. Doe*, 457 U.S. 202 (1982); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Yick Wo v. Hopkins*, 118 U.S. 351 (1886).

132. The literature on alien employment effects is quite substantial. For merely one brief and easily accessible treatment, see George Borjas, *Immigration and the American Worker: A Review of the Academic Literature*, CTR. FOR IMMIGRATION STUDIES (Apr. 2013), http://cis.org/immigration-and-the-american-worker-review-academic-literature.

VII. CONCLUSION: A CONSTITUTIONAL RIGHT TO EMPLOYMENT IN A TWENTY-FIRST CENTURY ECONOMY

Constitutional rights should reflect underlying interests of breadth and robustness. Even the non-consensual quartering of troops in one's home during peacetime[133] offends privacy and autonomy interests we have valued for centuries. And work, if not employment, has long implicated recognizable basic interests.[134] But what if Lord Keynes's fascinating prediction[135] of what we might call the partial withering away of work, at least to fulfill basic human needs, is eventually fulfilled? Is a supposed right to employment the sort of right that is appropriate for constitutional enshrinement? Or is it more like a supposed constitutional right precisely to a horse and carriage?

For the foreseeable future—the future in which law is to be guided by the established, if evolving, Constitution—it is difficult to imagine employment and its affirmative values evaporating into anachronism. A proposed constitutional right need not be of nearly universal personal interest, to rich and poor alike, if it qualifies for constitutional status in other respects.[136] Thus, the existence over a lifetime of a substantial number of persons with no interest in employment, let alone a right thereto, does not dispose of the case for such a right. By analogy, some sort of constitutional right to interstate travel would inhere in our system even if many persons took no interest in actively exercising such a right.

What, though, about the possibility—the hope or the fear—that at some point, employment will be generally obsolete or unduly costly, with self-repairing, self-replicating, self-enhancing robots doing most of the work?[137] This long-term prospect often evokes ambivalence, or at

133. *See* U.S. CONST. amend. III.

134. *See supra* Part II.

135. *See supra* notes 50–53 and accompanying text.

136. The Third Amendment need not be of much interest, or value, to those without homes suitable for occupation. And as a matter of fact, even the substantive due process and equal protection rights described in, say, *Griswold* and *Eisenstadt* need not be of universal interest, at any point over a lifetime. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Eisenstadt v. Baird, 405 U.S. 438 (1972). Similarly, the Second Amendment right to bear arms discussed in, for example, *District of Columbia v. Heller,* 554 U.S. 570 (2008) and *McDonald v. Chicago*, 561 U.S. 3025 (2010), however controversial, is of less than universal interest.

137. For a focused, but still unavoidably speculative, popular discussion, see, for example, Catherine Hollander, *Are Robots About to Take Our Jobs?*, NAT'L JOURNAL (Mar. 11, 2014), http://www.nationaljournal.com/magazine/are-robots-about-to-take-our-jobs-20140311 (noting the thus-far limited hard data supporting such scenarios); Ross Douthat, *Leaving Work Behind*, N.Y. TIMES (Feb. 8, 2014), http://www.nytimes.com/2014/02/09/opinion/sunday/douthat-leaving-work-behind.html (noting current political divisions over whether a presumed decline of work itself should be resisted, or at least regretted). *See also* the authorities cited *supra* note 24.

least uneasiness. Consider the reaction of a leading human rights theorist, James Griffin:

> On my account, there is no right to work. There is certainly a right to the resources needed to live as an agent, but those resources do not have to come through work. If in an advanced technological society there were not enough work for everyone, and those without it were adequately provided for, then, on the face of it, no one's human rights would be violated.[138]

To similar effect, James Nickel declares:

> I do not wish to preclude the possibility of future societies in which most work is done by automated machines and in which income is independent of work. If this sort of society emerges, and attitudes about what constitutes a meaningful existence change so that people's self-respect ceases to depend on remunerative employment, the case for a right to employment may lose its force.[139]

We can assume that in a society in which, for whatever reason, most persons never engage in paid work, any broad social stigma attached to such a condition would gradually fade. But as Professor Griffin recognizes, the important value of work cannot be reduced to merely avoiding stigma: "Work is valuable to us, it is true, in more than one way."[140] Griffin elaborates: "[T]he value of work is far more complex than this means–end story makes out. Most people want the dignity of earning their own keep. They want to contribute something to their society. Their enjoyment of life depends upon their having something absorbing, demanding, and useful to do."[141]

How many generations will be required before work can be severed from the values—including respect, dignity, self-realization, and self-respect—with which it is today often associated is a matter for speculation. We suggest only that when and if[142] such a condition eventually arises in the United States, life in general will assuredly have changed sufficiently to justify more than one revision, of whatever sort, to the

---

138. JAMES GRIFFIN, ON HUMAN RIGHTS 207 (2008). For discussion of subsistence or welfare rights and their foundations, independent of ability or willingness to work, see Philippe Van Parijs, *Why Surfers Should Be Fed: The Liberal Case For an Unconditional Basic Income*, 20 PHIL. & PUB. AFF. 101 (1991); Richard J. Arneson, *Should Surfers Be Fed?*, 6 THE GOOD SOC'Y 38 (1996).

139. NICKEL, *supra* note 115, at 158.

140. GRIFFIN, *supra* note 139, at 207.

141. *Id.* at 208. *See also, e.g.*, *supra* notes 30–33 and accompanying text.

142. When one adds up the healthcare and social security costs of retiring generations, along with the unfunded costs of public pensions, the need for either continuing taxable labor, or for increases in general technological productivity, seems clear.

current Constitution. Were a right to employment recognized over the near-term future, its useful life would be sufficient to avoid the collective embarrassment of its prompt obsolescence.[143]

On our view, then, persons should generally be free to decline to engage in paid labor, all else equal. As history unfolds, perhaps the percentage of persons so choosing, for an entire lifetime, may increase. But over the foreseeable future, the percentage of persons who do not freely make such a lifestyle choice will be substantial. Their numbers will remain of constitutional scale and significance, and the importance of employment in the lives of such persons will similarly remain of a kind and degree worthy of constitutional recognition.

143. *See supra* text accompanying note 142.