

DANDRIDGE V. WILLIAMS REDUX: A LOOK BACK FROM THE TWENTY-FIRST CENTURY

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I. INTRODUCTION

This Article would be very short if it focused only on Constitutionalism and the poor with a capital “C”—meaning the Constitution as interpreted by the U.S. Supreme Court—especially since the advent of the Burger Court. The Court made clear a long time ago—in 1970, in *Dandridge v. Williams*—that it has little interest in questioning governmental decisions that injure the poor.¹ Subsequent decisions throughout the ensuing decade added emphasis to that point just in case people did not get it the first time.² Nothing in the Burger-Rehnquist-Roberts Constitution suggests any serious protection for the poor in the realm of economics, and the whiffs of such protection wafting through earlier decisions were blown away in *Dandridge*.³

Nonetheless, there are still many questions to discuss, especially if we include “constitutionalism” with a small “c”—ideas that arguably reflect constitutional values but are not encompassed in the Constitution as

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1. See *Dandridge v. Williams*, 397 U.S. 471, 487 (1970).

2. See, e.g., *Harris v. McRae*, 448 U.S. 297, 321–23 (1980); *Maher v. Roe*, 434 U.S. 462, 469 (1977); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 33–34 (1973); *Jefferson v. Hackney*, 406 U.S. 535, 545–46 (1972); *Lindsey v. Normet*, 405 U.S. 56, 64–65 (1972).

3. *Dandridge*, 397 U.S. at 487.

interpreted by the courts.⁴ I will begin by discussing the capital “C” part of the subject, reexamining *Dandridge* in today’s world—although more in the way of a thought experiment than a concrete strategy since the possibilities for successful litigation to reduce economic inequality are currently nil.⁵ Second, I will suggest that the more relevant conversation is about constitutionalism with a small “c,” in which other branches of government play a meaningful role.⁶ There has been significant change in a positive direction in this realm over the past five decades. Putting aside current politics, it is the much more practical approach and the one with more promise for achieving fundamental change over the longer run. Third, because substance and procedure are intertwined, or at least should be, I will also offer some reflections on “civil *Gideon*.”⁷ Substantive legal rights are of little value in court if lawyers are not available to assure they are asserted effectively.

II. THE CONSTITUTION WITH A CAPITAL “C”

I am going to make two points in this portion of the Article. First, whether or not *Dandridge* itself was wrong, another *Dandridge*, if litigated now, should be decided differently. Even using the methodology the Court used, the facts to support a case attacking our current cash assistance program for mothers and children are much stronger than they were in 1970.⁸ In addition, there is a way of framing the argument that was not available when the case was decided; intermediate scrutiny had not been invented when *Dandridge* came down.⁹ It is now possible to treat poverty the same way we treat gender. Given the facts about how poor people (especially very poor people) fare in our politics,¹⁰ the government, whether federal or state, should have the burden of putting forward an exceedingly persuasive justification, or at least a showing of substantial

4. See Peter Edelman, *Where is FDR When We Need Him?*, 93 GEO. L.J. 1681, 1682 (2005); see generally CASS R. SUNSTEIN, *THE SECOND BILL OF RIGHTS: FDR’S UNFINISHED REVOLUTION AND WHY WE NEED IT MORE THAN EVER* 61–64 (2004) (describing small “c” constitutionalism as “constitutive commitments” that cannot be changed without a “fundamental change in social understanding”).

5. See *infra* Part II.

6. See *infra* Part III.

7. See *infra* Part IV.

8. See *Dandridge*, 397 U.S. at 483–86.

9. See *infra* notes 46–54 and accompanying text.

10. Richard L. Hasen, *Clipping Coupons for Democracy: An Egalitarian/Public Choice Defense of Campaign Finance Vouchers*, 84 CALIF. L. REV. 1, 16 (1996) (arguing that the American political system disfavors the poor).

interest, to support decisions it makes about public benefit structures that relate to low-income people.

The other point is that poverty is an exemplar of how the essentially laissez-faire construct of our Constitution reinforces existing economic arrangements and power realities. At a minimum, changing this premise supports a more skeptical view of governmental decisions affecting the poor, and it also suggests the possibility of an affirmative obligation for government to see that people have a minimum income at some rudimentary level.

Before we pick up the thread of *Dandridge* in a twenty-first century framework, we need to put some current facts on the table about both poverty and public policy. I wrote an article twenty-five years ago about the constitutional implications of the plight of very low-income people.¹¹ The situation was bad then, but things have gotten even worse, especially since the year 2000—and not only because of the recession.

The facts most relevant to a reexamination of *Dandridge* are what sometimes are called “extreme poverty” or “deep poverty”¹²—meaning people with incomes below half the poverty line, or below approximately \$9,000 for a family of three or \$12,000 for a family of four in 2011.¹³ According to the U.S. Census numbers, about 20.5 million people had incomes below half the poverty line in 2010.¹⁴ The number was approximately 12.5 million in 2000,¹⁵ and it had risen to 14.5 million in 2007, even before the recession started.¹⁶ The percentage of people in deep poverty was 3.3% in 1976 and rose to 6.7% in 2010.¹⁷

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

12. See DANIEL T. LICHTER ET AL., POVERTY AND ECONOMIC POLARIZATION AMONG AMERICA’S MINORITY AND IMMIGRANT CHILDREN 24 (2005), available at http://www.npc.umich.edu/publications/workingpaper05/paper06/05-6_LichterQianCrowley.pdf.

13. POVERTY THRESHOLDS FOR 2011 BY SIZE OF FAMILY AND NUMBER OF RELATED CHILDREN UNDER 18 YEARS, U.S. CENSUS BUREAU (n.d.), available at <http://www.census.gov/hhes/www/poverty/data/threshld/index.html> (click on “2011” under “Poverty Thresholds by Size of Family and Number of Children”).

14. CARMEN DENAVAS-WALT ET AL., U.S. CENSUS BUREAU, INCOME, POVERTY, AND HEALTH INSURANCE COVERAGE IN THE UNITED STATES: 2010, at 19 (2011).

15. See *id.* at 34.

16. See *id.*

17. *Id.* at 19.

These are disturbing trends and disturbing numbers. Perhaps the most disturbing number of all is that as of 2010, 6 million people had no income other than food stamps.¹⁸ Food stamps provide an income of about one-third of the poverty line, so a family of three with no income other than food stamps had an income of about \$6,000.¹⁹ Two percent of our people—one in fifty—have no income other than food stamps.²⁰

There is much more to be said about poverty, and I will address the larger frame of issues and remedies in the next section of this Article. There is no way that we could or should want to constitutionalize in a judicially enforceable sense a right to a poverty-ending level of income. The elements of policy needed to achieve that in a way that is best for people and for the country are far too complicated for a court to handle. But, the idea that there should be a baseline of income that keeps people out of deep poverty is judicially manageable. I said that in my 1987 article.²¹ The underlying facts are even worse now. The statistics I cited then were deeply troubling, but they were mild compared to what has happened since.²²

I mentioned some poverty facts. Now some policy facts. They concern Temporary Assistance for Needy Families (TANF), which is the program that replaced Aid to Families with Dependent Children (AFDC), the program we called “welfare” from 1935 to 1996.²³

We do not have to get too deeply into the weeds discussing how TANF works. One basic fact is that welfare no longer effectively exists in much of the country. The core reason for that fact is that there is no legal right to TANF in federal law, and there is a five-year lifetime time limit for the use of federal money to assist any individual family.²⁴ Under AFDC, when a mother who was eligible for help under federal law walked into a

18. Jason DeParle & Robert M. Gebeloff, *Living on Nothing but Food Stamps*, N.Y. TIMES, Jan. 3, 2010, at A1, available at <http://www.nytimes.com/2010/01/03/us/03foodstamps.html?pagewanted=all>.

19. See *Supplemental Nutrition Assistance Program Participation and Costs*, USDA (May 31, 2012), <http://www.fns.usda.gov/pd/SNAPsummary.htm>.

20. See DeParle & Gebeloff, *supra* note 18.

21. Edelman, *supra* note 11, at 52.

22. Compare *id.* at 8–18 (examining the status of the poor in 1987), with DENAVAS-WALT ET AL., *supra* note 14, at 14–22 (providing contemporary data on poverty).

23. See Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 110 Stat. 2105 (1996).

24. See *id.* § 408.

state welfare office they had to help her.²⁵ The state could set the benefits at any level they wanted, but they had to help.²⁶ That is no longer true. In jargon terms, the program is now a “block grant” instead of an “entitlement.”²⁷

The consequence of this and associated state policies is that the welfare rolls shrank from more than 14 million people before TANF was enacted to 3.9 million before the recession started.²⁸ Wyoming is the “champion”—318 families (644 people) were receiving welfare in Wyoming in 2010, which amounts to approximately 4% of Wyoming’s poor families.²⁹ But Wyoming was not alone. Eighteen other states had fewer than 20% of their poor families with children on TANF in 2008.³⁰ The percentage of poor families with children receiving welfare dropped from 68% before TANF was enacted to 27% in 2010.³¹

The dramatic inadequacy of TANF leaped into even clearer focus in the recession. With the obvious need for help around the country, the total number of people on TANF nationally went up from 3.9 million to 4.4 million between 2007 and 2011.³² By contrast, the food stamp caseload skyrocketed from almost 17 million people in 2001 to nearly 46 million in 2011.³³ Why? Because there is a legal right to food stamps.³⁴

25. Pub. L. No. 87-543, 76 Stat. 172 (1962); Pub. L. No. 74-271, § 503, 49 Stat. 620 (1935).

26. Pub. L. No. 74-271, §§ 503–04.

27. See Pub. L. No. 104-193, 110 Stat. 2105, tit. I.

28. See *Indicators of Welfare Dependence*, U.S. DEP’T OF HEALTH & HUM. SERVICES app. at A-10 (2007), available at <http://aspe.hhs.gov/hsp/indicators07/apa.pdf>.

29. See CHILD WELFARE LEAGUE OF AM., WYOMING’S CHILDREN 2011, at 1 (2011); JIM KAMINSKI, TRENDS IN WELFARE CASELOADS 2 (n.d.), available at http://www.urban.org/uploadedpdf/TANF_caseload.pdf.

30. KAMINSKI, *supra* note 29 (noting that as of 2008, Alabama, Arkansas, Colorado, Florida, Georgia, Idaho, Illinois, Louisiana, Mississippi, Montana, Nevada, North Carolina, Oklahoma, South Carolina, Texas, Utah, West Virginia, and Wyoming have fewer than 20% of poor families on TANF).

31. DANILO TRISI & LADONNA PAVETTI, TANF WEAKENING AS A SAFETY NET FOR POOR FAMILIES (Mar. 13, 2012), available at <http://www.cbpp.org/files/3-13-12tanf.pdf>.

32. See *May 2011 Temporary Assistance for Needy Families (TANF)*, U.S. DEP’T OF HEALTH & HUM. SERVICES ADMIN. FOR CHILD. & FAMILIES, (Apr. 3, 2012), http://www.acf.hhs.gov/programs/ofa/data-reports/caseload/2011/monthly/2011_05_tan.htm.

33. *SNAP/Food Stamp Participation*, FOOD RES. & ACTION CENTER, <http://frac.org/reports-and-resources/snapfood-stamp-monthly-participation-data/> (last visited June 19, 2012).

There is a strong argument (more in theory than in reality, obviously) that TANF is unconstitutional as applied³⁵—far stronger than was the case with AFDC and much stronger than what could have been argued about TANF when it was enacted in 1996. Under AFDC a substantial majority of poor children were receiving benefits, inadequate as the benefits were.³⁶ There were large disparities among the states in the level of benefits they provided, but most poor children were getting cash help.³⁷

Now, the vast majority of poor children are not receiving cash assistance, and the disparities among states are not just in benefit levels, but also in providing help at all.³⁸ We do have a baseline income guarantee in the form of food stamps, but it is at the manifestly inadequate level of a one-third of the poverty line.³⁹ Food stamps and welfare combined get a family just over 40% of the poverty line in Mississippi,⁴⁰ and to somewhat over one-half the poverty line in most states,⁴¹ but that is true only if they receive both benefits. The vast majority of poor children live in families that do not receive TANF.⁴²

Even on a rational basis standard, this is totally arbitrary. Governments should certainly have leeway in constructing public benefit regimes, but this set of outcomes is palpably capricious. Whatever one might have thought about the constitutionality of TANF when it was enacted, the program as applied is outrageous. We do not even need the “rational basis with bite” test of *City of Cleburne v. Cleburne Living*

34. See 7 U.S.C. § 2013 (2006) (“[E]ligible households within the State shall be provided an opportunity to obtain a more nutritious diet through the issuance to them of an allotment . . .”).

35. See *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 83–84 (1988) (noting that “arbitrary and irrational discrimination violates the Equal Protection Clause under even our most deferential standard of review”).

36. CHILD RECIPIENTS OF WELFARE (AFDC/TANF), CHILD TRENDS DATA BANK (n.d.), available at http://www.childtrendsdatabank.org/sites/default/files/50_AFDC_TANF.pdf (noting that in 1996, during the final year of AFDC assistance, 61.5% of impoverished children were receiving assistance).

37. See *Dandridge v. Williams*, 397 U.S. 471, 472–76 (1970).

38. IFE FINCH & LIZ SCHOTT, CENTER ON BUDGET POL’Y PRIORITIES, TANF BENEFITS FELL FURTHER IN 2011 AND ARE WORTH MUCH LESS THAN IN 1996 IN MOST STATES 1 (2011), available at <http://www.cbpp.org/cms/?fa=view&id=3625>.

39. See *supra* note 19 and accompanying text.

40. See *id.* at 8 fig.5.

41. *Id.* at 19–20 app. 5.

42. See *id.* at 2.

*Center*⁴³ to conclude the statute as applied is unconstitutional.

This is about survival. It is about conditions of privation that should never exist in a country as wealthy as ours. Remember the Court's language in *Shapiro v. Thompson* in discussing AFDC—"the very means to subsist"⁴⁴—and the similar language in *Goldberg v. Kelly*—"meeting the basic demands of subsistence."⁴⁵ As troubling as AFDC was, TANF turns out to be much worse.

Nor need we be bound to a rational basis standard. Justice Marshall's dissent in *Dandridge* was sort of a precursor to intermediate scrutiny.⁴⁶ He articulated a standard of review based on "the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification."⁴⁷ Applying this sliding-scale formulation, he said that "the literally vital interest of a powerless minority—poor families without breadwinners—is far removed from the area of business regulation" and noted that the "Court has already recognized several times that when a benefit . . . is necessary to sustain life, stricter constitutional standards, both procedural and substantive, are applied to the deprivation of that benefit."⁴⁸ This made much more sense than the rational basis economic-regulation approach of Justice Stewart's majority opinion, but only Justice Brennan joined it.⁴⁹

The majority in *Dandridge* believed that it had only two choices as to the standard of review.⁵⁰ Evidently concerned about the constraining effect strict scrutiny would have on the ability of legislative bodies to create benefit structures, it chose to apply rational basis review⁵¹ even as it recognized that public welfare assistance "involves the most basic economic needs of impoverished human beings."⁵² Now, however, we have endorsed intermediate scrutiny as a constitutional standard of review.⁵³ It

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- 43. *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985).
 - 44. *Shapiro v. Thompson*, 394 U.S. 618, 627 (1969).
 - 45. *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).
 - 46. *Dandridge v. Williams*, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).
 - 47. *Id.* at 520–21.
 - 48. *Id.* at 520, 522 (footnote omitted).
 - 49. *See id.* at 508.
 - 50. *See id.* at 484–86.
 - 51. *See id.* at 484–50.
 - 52. *Id.* at 485.
 - 53. *See, e.g., United States v. Virginia*, 518 U.S. 515 (1996).

is a more flexible tool, and it can require governments to show that they have a “substantial interest” rather than a “compelling interest” to justify the way they treat vulnerable populations.⁵⁴

What would happen if the Court used intermediate scrutiny to examine TANF? It would find a disparity in receipt of benefits ranging from 4% of poor families in Wyoming,⁵⁵ as I said, up to 73% in California, with nineteen states reaching fewer than 20% of their poor families.⁵⁶ It would also find disparity in TANF benefits ranging from 11% of the poverty line in Mississippi,⁵⁷ to nearly 50% of the poverty line in Alaska,⁵⁸ with thirty states providing benefits below 30% of the poverty line and fifteen states offering benefits below 20% of the poverty line.⁵⁹

Is the United States achieving an objective in which it has a substantial interest? Does it have a substantial interest in maintaining a cash-assistance program for families with children that is characterized by these disparities? Does the nation have a substantial interest in maintaining a cash-assistance program that leaves 7 million children in deep poverty?⁶⁰ It is difficult to understand how the United States can stand up in court and represent that it has a substantial interest in maintaining a system that has such an outcome.

What should the remedy be? Although with distinctly mixed emotions, I would settle for a judicial remedy that revives the entitlement to cash assistance, which was a feature of AFDC⁶¹ and requires a benefit level that at a minimum, when combined with food stamps, raises all families with children to an income that brings them out of deep poverty. Seven million children would escape deep poverty if every family in such straits were to participate.⁶² This is an astonishing figure, and it illustrates the gash we have made in a safety net that was already demonstrably inadequate.

There is another method to look at the way we want our Constitution

54. See, e.g., *Craig v. Boren*, 429 U.S. 190 (1976).

55. KAMINSKI, *supra* note 29; see also *supra* notes 28–31 and accompanying text.

56. *Id.*

57. FINCH & SCHOTT, *supra* note 38, at 13 app. 2.

58. *Id.*

59. See *id.* at 13–14 app. 2.

60. DENAVAS-WALT ET AL., *supra* note 14, at 19 tbl.6.

61. See *supra* notes 24–27 and accompanying text.

62. See DENAVAS-WALT ET AL., *supra* note 14, at 19 tbl.1.

to work. I wouldn't necessarily be looking for a court-ordered remedy any different from what I have set out, but the premise would be different. The premise of the analysis thus far has been one of equal protection⁶³—the idea that the federal government and many states have acted and produced a result that discriminates horribly among powerless people, especially children.⁶⁴ The other approach, of course, is to think of our Constitution as a document that builds a more inclusive society and entails affirmative obligations to do various things that fulfill the social contract—in this case to provide a baseline income at some survival level.

The current structure of our Constitution contains some affirmative obligations—to protect speakers in public forums who are threatened with violent retaliation,⁶⁵ for example. Adding an obligation to see that people do not suffer awful privation would be a rather modest departure in the direction of a different Constitution.

Chief Justice Hughes spoke in terms of obligation—at least in moral terms—in 1937 in *West Coast Hotel Co. v. Parrish*,⁶⁶ ending the era of a judicially enforced laissez-faire social structure. He said,

The exploitation of a class of workers who are in an unequal position with respect to bargaining power and are thus relatively defenceless against the denial of a living wage is not only detrimental to their health and well being but casts a direct burden for their support upon the community.⁶⁷

Instead of saying that the worker's plight is simply the result of the functioning of the market, Chief Justice Hughes says government has the power to rectify the dysfunction of the market and implies, one can infer, a "burden," or an obligation to act, on the part of the "community," which includes the government.⁶⁸

The current Court has become the protector and enhancer of the powerful. In case after case, cutting across many parts of the Constitution and many areas of law, the Court has generally favored big business and the economically powerful. The Court has steadily eroded and sometimes gouged holes in economic regulations heretofore regarded as matters for

63. See *supra* notes 43–62 and accompanying text.

64. See KAMINSKI, *supra* note 29.

65. See, e.g., *Collin v. Smith*, 578 F.2d 1197 (7th Cir. 1978).

66. *W. Coast Hotel Co. v. Parrish*, 300 U.S. 379 (1937).

67. *Id.* at 399.

68. See *id.*

deference to legislative bodies and administrative agencies. Its activism and lack of restraint, carried out for the benefit of the powerful and to the detriment of everyone else, are now routine. Sometimes the Court interprets the Constitution, or a statute, to strike down or eviscerate governmental actions that protect the less well-off and sometimes it upholds government action that is injurious to those surviving on the margins.

Simply interpreting the Constitution in ways that protect ordinary people would be an enormous step in and of itself. That, of course, can occur without changing the generally accepted view that the Court responds only to government's actions and not to its inaction. A combination of greater deference for public policy that helps the less powerful and greater skepticism about legislation that is injurious to such people would make an important difference in American society.

But, we can also argue that the social contract—as embodied in the structure of governance in the Constitution—contemplates an obligation to act toward building a just society. A society that people agree to join has a list of obligatory tasks—not necessarily enforceable in court—with regard to the pursuit of physical security, peace, and justice. We need to invigorate a public discussion about the parameters of our obligation to build a just society and to determine who has the responsibility for carrying out those obligations. How much is appropriate for judicial action; how much should be carried out by other branches and levels of government; and how much should be left to civil society is a trilogy of difficult and vitally important issues.

I believe that ameliorating poverty in this wealthy country is at the top of the list of public and community duties and obligations. A Constitution that is as interested in substantive justice as it is in procedural regularity should be seen as expecting the courts to play a role in seeing that action is taken. This matter is not only one of equality—it is even more fundamentally one of justice.

III. THE CONSTITUTION WITH A SMALL “C”

The current Court is not going to reexamine *Dandridge* regardless of the stunning growth in the number of people in deep poverty, and the equally stunning and related increase in the disparity among the states in their delivery of cash-assistance programs to single mothers and their children. But, even if the Court were ready to be more responsive regarding extreme poverty, it would be difficult to conceptualize a judicial

role in effectuating the long and complex list of public policies that must be part of a serious effort to reduce American poverty.

The Court could do more, of course. Many, myself included, believe we would be in a somewhat better place regarding the education of low-income children if one Justice had switched his vote in *San Antonio Independent School District v. Rodriguez*.⁶⁹ Low-income African-American children would be better off if *Milliken v. Bradley*⁷⁰ and a number of subsequent desegregation cases had been decided the other way. A different result in *James v. Valtierra*⁷¹ and *Lindsey v. Normet*⁷² would have also made some degree of difference in the availability of housing to low-income people. An opposite decision in *Jefferson v. Hackney*⁷³ would have had an impact on the calculation of welfare benefits for mothers and children. Similarly, *Maher v. Roe*⁷⁴ and *Harris v. McRae*⁷⁵ would have extended public funding for abortions to more low-income women if the cases had been decided the other way. Further, the number of criminal cases that, if decided differently, would have changed the lives of low-income people, especially low-income people of color, is almost literally countless.⁷⁶ All of these cases would have necessitated additional public policy beyond what the courts would have decided in order to

69. *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973). In a 5–4 decision the Court held that the poor are not considered a suspect class and that a school financing system that favors the affluent does not violate the Fourteenth Amendment. *Id.* at 18, 29.

70. *Milliken v. Bradley*, 418 U.S. 717, 752–53 (1974) (holding that desegregation remedies only applied to districts in which actual evidence of segregation exists).

71. *James v. Valtierra*, 402 U.S. 137, 142–43 (1971) (holding that a California procedure for mandatory referendums not limited to proposals involving low-cost public housing does not violate the Equal Protection Clause).

72. *Lindsey v. Normet*, 405 U.S. 56, 64–65, 68, 74 (1972) (holding that due process is not denied when rental payments are not suspended while the alleged wrongdoing of a landlord is investigated and noting that absent a constitutional mandate, the assurance of adequate housing and the definition of the landlord–tenant relationship is a legislative function).

73. *Jefferson v. Hackney*, 406 U.S. 535, 545–51 (1972) (holding that a Texas statutory scheme to allocate its fixed pool of welfare money among persons with acknowledged need does not violate the Equal Protection Clause of the Constitution).

74. *Maher v. Roe*, 432 U.S. 464, 469 (1977).

75. *Harris v. McRae*, 448 U.S. 297, 311 (1980).

76. See generally Joel Gross, Note, *The Effects of Net-Widening on Minority and Indigent Drug Offenders: A Critique of Drug Courts*, 10 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 161 (2010) (detailing the negative effects of drug courts on low-income people and minorities).

achieve the full measure of justice in the particular area involved, but all would have been constructive and not entailed a role for the courts beyond their competence.

All of that said, a comprehensive strategy for wiping out American poverty would have to be far more robust. I am not the first, but I call it fulfilling the constitution with a small “c” because the values of promoting economic, racial, and social justice and equality are, or should be, constitutional values.⁷⁷

There is a new, or renewed, call from some eminent constitutional scholars for promoting the values of the constitution outside the courts.⁷⁸ For some, it is a matter of making the best of a bad situation, their point being that the courts have become so unresponsive that we have to turn to the legislatures.⁷⁹ Others argue that the active liberal Court from 1937 until 1969 was an aberration⁸⁰ and that active Courts are far more dangerous than beneficial.⁸¹ Such scholars thus argue for legislative democracy as the least dangerous neutral governing principle. And, some argue that making more of the constitution with a small “c” was the intent of the framers.⁸²

At least as to poverty, these latter-day arguments for less reliance on the courts are beside the point. The courts have always been of limited value when it comes to poverty. Ed Sparer and others had a dream in the 1960s that the Court could be convinced to declare a right to a guaranteed income that would end poverty in this country.⁸³ Had they succeeded, it would have been of value—although not of as much value as they thought. As things were, the golden age of possibility for a major judicial

77. See SUNSTEIN, *supra* note 4.

78. See generally James E. Fleming, *Judicial Review Without Judicial Supremacy: Taking the Constitution Seriously Outside the Courts*, 73 FORDHAM L. REV. 1377 (2005).

79. See generally Larry D. Kramer, *Popular Constitutionalism, Circa 2004*, 92 CALIF. L. REV. 959 (2004).

80. *Id.* at 964–68 (discussing scholarly disagreement with the Post-New Deal Court).

81. See generally Keenan D. Kmiec, *The Origin and Current Meaning of “Judicial Activism,”* 92 CALIF. L. REV. 1441, 1471–74 (2004).

82. See Jack M. Balkin, *Framework Originalism and the Living Constitution*, 103 NW. U. L. REV. 549, 559–62 (2009).

83. See Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (discussing how people are entitled to have certain needs satisfied by the government).

intervention came and went very quickly—from *Goldberg*⁸⁴ and *Shapiro*⁸⁵ to *Dandridge*⁸⁶ in about a microsecond.

But, what Sparer and the others hoped for, while important, was only a piece of what was needed. What we need to do to end poverty is much more complicated, and a reliance on income in the form of transfer payments as the central principle was mistaken. Work—and not just jobs, but jobs that supplement wages by providing benefits to produce a living income—is at the heart of an antipoverty strategy, along with education for the next generation. A strong safety net is vital, too, but jobs are at the heart of the matter.

Low-wage work has become endemic.⁸⁷ Large numbers of people work and are still poor; about three-fifths of the income of people in poverty comes from work.⁸⁸ The poverty line—about \$23,000 for a family of four—is unrealistically low.⁸⁹ Extensive research shows that twice the poverty line is the income people need to stay current in paying their bills and have the financial ability to see a physician or a dentist without thinking twice.⁹⁰

The shocker here is that the number of people with incomes below twice the poverty line is 103 million—one-third of the entire population.⁹¹ Why? The economy has certainly grown, but all of the fruits of the growth

84. *Goldberg v. Kelly*, 397 U.S. 254, 270 (1970) (holding that before welfare benefits are terminated, one must be provided with a procedural hearing).

85. *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969) (holding that there is a fundamental right to travel in the United States pursuant to the Fourteenth Amendment and thus holding that a waiting period that requires nonresidents to wait a certain length of time before receiving benefits is unconstitutional).

86. *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (finding that a state cap on welfare that was not based on the family's size of need is constitutional).

87. See U.S. DEP'T OF LABOR BUREAU OF LABOR STATISTICS, CHARACTERISTICS OF MINIMUM WAGE WORKERS: 2011 (2012), available at <http://www.bls.gov/cps/minwage2011.pdf>.

88. See LAWRENCE MISHEL ET AL., THE STATE OF WORKING AMERICA 2008/2009, at 329 tbl. 6.11 (2011).

89. 2012 *Annual Federal Poverty Guidelines*, FAMILIES USA, <http://www.familiesusa.org/resources/tools-for-advocates/guides/federal-poverty-guidelines.html> (last visited June 20, 2012).

90. See, e.g., BOUSHEY ET AL., HARDSHIPS IN AMERICA: THE REAL STORY OF WORKING FAMILIES 20–21 (2001), available at <http://cows.org/pdf/x-hardships-01.pdf>.

91. DENAVAS-WALT ET AL., *supra* note 14, at 19 tbl.6.

have gone to people at the very top.⁹² Half the jobs in the country pay around \$35,000 a year⁹³ and one-quarter of the jobs pay less than the poverty line for a family of four.⁹⁴ Wages for median jobs have become stagnant, having grown less than 7% since 1973 by one measure, or less than one-fifth of 1% annually.⁹⁵

A decent income from work and related sources seems to me to be a constitutional value with a small “c,” or one could call it a human right. Needless to say, the measures necessary to achieve that right are complex. Changing the minimum wage, creating a stronger protection of union organization, supplementing wages, and providing work supports such as health care, help with housing, child care, and support for going to college are a few of the needed policies, all of which have income effects. Good jobs, work supports, and a strong safety net are all part of ending poverty, and every one of the measures involved demands legislation. There is no way the courts have the competence to go beyond a baseline level of guarantee on these matters, or even yet, reach the baseline. The same goes for education reform beyond baseline levels of school finance adequacy. Restructuring education and the long list of associated policies needed from birth to adulthood are also matters for public policy. And, cutting across all of it are factors of race and gender—both outright discrimination and the structural racism and sexism that infiltrate institutions and systems throughout society.⁹⁶

The list of public policies that bear upon the situation of low-income people is extremely long. Determining which public policies can entail constitutional values, or can be properly denominated as human rights, is debatable, but the basic point is we need to take the Constitution into Congress and the state legislatures and pursue its values in a small “c” way.

One more thing. We hear over and over from the political right that nothing works; as Ronald Reagan said, “we fought a war against poverty ‘and poverty won.’”⁹⁷ After all, some say, the poverty percentage in 1973

92. MISHEL ET AL., *supra* note 88, at 144.

93. *See id.* at 19 tbl.1.

94. *Id.* at 140 tbl.3.8.

95. *See id.* at 134 tbl.3.5.

96. *See, e.g.,* Ian F. Haney López, *Institutional Racism: Judicial Conduct and a New Theory of Racial Discrimination*, 109 Yale L.J. 1717, 1723–25 (2000).

97. Jason DeParle, *THE NATION*; *Debris of Past Failures Impedes Poverty Policy*, N.Y. TIMES, Nov. 7, 1993, <http://www.nytimes.com/1993/11/07/weekinreview/the-nation-debris-of-past-failures-impedes-poverty-policy.html?pagewanted=all&src=pm>.

was 11.1% and by 2000 was still 11.3%,⁹⁸ so public policy must have failed to make a difference. There are two points here. One, we did a lot that has worked very well. And two, problematic trends in wage levels, family composition, and income and wealth distribution kept us running in place even as we were enacting and effectuating important public-policy initiatives.⁹⁹

There would potentially be about 40 million more people in poverty in 2012 if we had not done what we have done.¹⁰⁰ Half of them, primarily elderly and some disabled, are beneficiaries of social security.¹⁰¹ The other half are, variously, recipients of food stamps, the Earned Income Tax Credit, the Child Tax Credit, Supplemental Security Income (SSI), housing vouchers, public housing, and an array of other programs.¹⁰² Medicare and Medicaid are not counted as income for these purposes, but have clearly made a significant monetary impact. We have been pursuing the constitution with a small “c” and we are making a difference.

The barriers to progress have been substantial, to say the least. Wages for the entire lower-half of the labor force have been relatively stagnant for four decades.¹⁰³ The increased number of single mothers, combined with the flood of low-wage jobs, makes it extremely difficult for a woman trying to raise children by herself to earn enough to get out of poverty—more than one-half of mothers with children under six now live in poverty.¹⁰⁴ There has been economic growth over the decades, but it has

98. JOSEPH DALAKER, U.S. CENSUS BUREAU, POVERTY IN THE UNITED STATES: 2000, at 1 (2001), *available at* <http://www.census.gov/prod/2001pubs/p60-214.pdf>.

99. *See generally* MISHEL ET AL., *supra* note 88 (documenting stagnant wage levels, unequal wealth distribution, and increasing job scarcity).

100. *See* Paul N. Van de Water & Arloc Sherman, *Social Security Keeps 20 Million Out of Poverty: A State-By-State Analysis*, CENTER ON BUDGET & POL’Y PRIORITIES tbl.1 (Aug. 11, 2010), <http://www.cbpp.org/cms/index.cfm?fa=view&id=3260>.

101. *See id.*

102. *See* Arloc Sherman, *Poverty and Financial Distress Would Have Been Substantially Worse in 2010 Without Government Action, New Census Data Show*, CENTER ON BUDGET & POL’Y PRIORITIES (Nov. 7, 2011), <http://www.cbpp.org/cms/?fa=view&id=3610>.

103. LAWRENCE MISHEL, ECON. POLICY INST., THE WEDGES BETWEEN PRODUCTIVITY AND MEDIAN COMPENSATION GROWTH (2012), *available at* <http://www.epi.org/publication/ib330-productivity-vs-compensation/>.

104. *Current Population Survey, 2011 Annual Social and Economic Supplement, Families With Related Children Under 6 by Number of Working Family Members and Family Structure: 2010*, U.S. CENSUS BUREAU, <http://www.census.gov>

mostly been stuck at the top.¹⁰⁵

IV. CIVIL *GIDEON*—ACCESS TO JUSTICE FOR THE POOR

If you ask almost any trial judge who hears civil cases in a big city what is the most vexing problem in the daily work of the court, he or she will say it is trying to do justice for pro se litigants.¹⁰⁶ Prosecutors and public defenders that become trial judges in urban courts, who are used to both sides having counsel, express shock at what they encounter on the civil side.¹⁰⁷ In high-volume courts such as landlord-tenant and debt collection dockets in small claims court, counsel represents fewer than 5% of defendants.¹⁰⁸ Nationally, surveys show that legal services meet the needs of just one in five people who need help.¹⁰⁹ Substantive rights are worth little if litigants do not have counsel.

Whatever slim hope there was for a Supreme Court decision broadening the scope of constitutionally guaranteed attorney representation in civil matters was dashed in *Turner v. Rogers*,¹¹⁰ which the Court decided in 2011. The petitioner was a man who had been repeatedly sentenced to jail on civil contempt charges for failure to pay child support.¹¹¹ The defendant had not been assigned a lawyer and had not had the benefit of various alternative procedures that Justice Breyer laid out in his majority opinion, and he did not have clear notice that his ability to pay would be the critical question in his civil contempt proceeding.¹¹² One might have thought that since he faced a sentence of up to one year in prison, the Court would rule that he should be given a lawyer automatically. Instead, the Court held that he should not have been accorded counsel under the particular circumstances of the case, but nonetheless vacated the conviction because of the failure to make clear to

/hhes/www/cpstables/032011/pov/new08_100_01.htm (last updated Sept. 13, 2011).

105. MISHEL ET AL., *supra* note 88, at 134 tbl.3.5.

106. See Russell Engler, *And Justice for All—Including the Unrepresented Poor: Revisiting the Roles of the Judges, Mediators, and Clerks*, 67 FORDHAM L. REV. 1987, 1987 (1999).

107. See *id.*

108. D.C. ACCESS TO JUSTICE COMM'N, JUSTICE FOR ALL? AN EXAMINATION OF THE CIVIL LEGAL NEEDS OF THE DISTRICT OF COLUMBIA'S LOW-INCOME COMMUNITY 83 (n.d.), available at <http://www.dccaccesstojustice.org/files/CivilLegalNeedsReport.pdf>.

109. *Id.*

110. *Turner v. Rogers*, 131 S. Ct. 2507 (2011).

111. *Id.* at 2513.

112. *Id.* at 2513–14, 2520.

him the importance of his ability to pay.¹¹³ In other words, the battle was won but the war was lost.

Legal services attorneys were enraged and disappointed. Experts called on organizations of judges and access-to-justice advocates to push for implementation of the alternative procedural safeguards that the Court set out, but the general reaction of lawyers who represent indigent civil defendants was not at all positive.¹¹⁴

My point is not so much to criticize the Court, although I think the decision reflects an obliviousness as to what actually happens not just in urban trial courts, but also in courts in conservative states where low income people, especially people of color, are not regarded with great respect. However, given the decision and the track record in getting courts to declare *Gideon*-type rights, my suggestion is that we need to pursue civil *Gideon* incrementally and legislatively, and in some jurisdictions, not talk in terms of civil *Gideon*.¹¹⁵ Perhaps states here and there will declare a right to counsel on the civil side judicially—Maryland came close¹¹⁶—but the main avenues to progress are step by step and outside the courts.

I am chair of the District of Columbia Access to Justice Commission. Appointed by the Chief Judge of our state court of appeals, our commission is one of about thirty around the country.¹¹⁷ We have been in business for seven years and have some relevant experience.¹¹⁸

The first strategy to pursue this kind of social justice is simply allocating money. One of the main reasons why courts, including the Supreme Court, and legislatures as well, have been reluctant to extend

113. *Id.* at 2520.

114. See Richard Zorza, *Turner v. Rogers: The Implications for Access to Justice Strategies 9–14* (n.d.) (unpublished manuscript), available at http://www.nlada.org/Training/Train_Civil/Equal_Justice/2012_Materials/102_2012_Carr_Handout1.

115. See generally *Gideon v. Wainwright*, 372 U.S. 335, 339–40 (1963) (finding the right to counsel for indigent criminal defendants is present in the Sixth Amendment).

116. See *Rutherford v. Rutherford*, 464 A.2d 228, 237 (Md. 1983) (“[U]nder the due process requirements of the federal and state constitutions, an indigent defendant in a civil contempt proceeding cannot be sentenced to actual incarceration unless counsel has been appointed to represent him or he has waived the right to counsel.” (footnote omitted)).

117. See *Current Commissioners*, D.C. ACCESS TO JUST. COMMISSION (2011), <http://www.dcaccesstojustice.org/commissioners>.

118. See *About the Commission*, D.C. ACCESS TO JUST. COMMISSION (2011), <http://www.dcaccesstojustice.org/about-commission>.

Gideon to the civil side is because of the costs entailed.¹¹⁹ Many states have a right to counsel in child welfare cases,¹²⁰ and a few states have extended the right in other limited circumstances—the most interesting recent example being the California fund enacted at the end of the Schwarzenegger administration to support demonstrations of the right to counsel in various circumstances.¹²¹

Pursuing increased funding for legal services has been effective in the District of Columbia. In 2006, we were able to convince the Mayor and the City Council to appropriate public funding for our legal aid system, which enabled us to increase the number of full-time legal services lawyers by about 25%.¹²² We have been able to keep that funding fairly steady despite the budget cuts that were forced on the city because of the recession.

The private sector is another important source of funding. This past year we partnered with a few of the most supportive law firms in our city to create a public relations campaign, “Raising the Bar in D.C.”¹²³ Twenty-three firms pledged to give at platinum, gold, or silver levels that we had created.¹²⁴ Donations by those firms totaled \$3 million in 2011, up \$500,000 from the year before.¹²⁵ Those numbers may not seem large to a reader from California or New York, but remember that we are a city of 600,000 people.¹²⁶

A second area for effort, distinctly less satisfactory than full representation, is limited scope representation. In the District of Columbia, we have been able to stretch the inadequate supply of full-time

119. See, e.g., *Turner v. Rogers*, 131 S. Ct. 2507, 2519–20 (2011) (noting that the state bears the cost of providing counsel to indigent defendants).

120. See, e.g., *In re K.L.*, 91 S.W.3d 1, 13 (Tex. App. 2002) (granting a statutory right to counsel for indigent parents in termination of parental rights proceedings).

121. See Carol J. Williams, *California Gives the Poor a New Legal Right*, L.A. TIMES (Oct. 17, 2009), <http://articles.latimes.com/2009/oct/17/local/me-civil-gideon17>.

122. *D.C. Counsel Appropriates \$3.2 Million for Legal Services*, DC BAR, http://www.dcaccessjustice.org/files/DC_Bar_Fnd_art.pdf (last visited June 20, 2012).

123. Mathew Huisman, *Firms Donate More Than \$3 Million for ‘Raising the Bar in D.C.’ Event*, THE BLT: THE BLOG OF LEGAL TIMES (Mar. 23, 2012, 11:47 AM), <http://legaltimes.typepad.com/blt/2012/03/firms-donate-more-than-3-million-for-raising-the-bar-in-dc-event.html>.

124. *Id.*

125. See *id.*

126. DC—DISTRICT OF COLUMBIA, U.S. CENSUS BUREAU, <http://2010.census.gov/2010census/popmap/ipmtext.php?fl=11> (last visited June 20, 2012) (scroll down to select the District of Columbia).

legal aid lawyers that practice in our landlord–tenant court by creating an “Attorney for the Day” program, which provides representation for tenant-defendants on specific tasks such as particular hearings or settlement negotiations.¹²⁷ This kind of initiative is far from ideal, but in a world in which legal representation for the poor in civil courts is in short supply, limited scope representation is being undertaken in many parts of the country.

Ideally the courts at the state level, if not nationally, should declare a constitutional right to civil representation—at least in subject areas in which trying to navigate the courts without a lawyer is most difficult and where the consequences of not having a lawyer are most dire. Lacking that, we need to pursue the matter by legislation, including appropriations, and by initiatives in the courts.

All of this is part of the constitution with a small “c” and, in my judgment, an appropriate subject for a conversation about constitutionalism and the poor. Rights—whether constitutional, statutory, or common law—mean little if we cannot increase the availability of legal services to litigants who struggle to navigate their way through proceedings and procedures that to them are simply incomprehensible.

V. CONCLUSION

I do not think much about the Constitution in my day-to-day work on various issues about poverty. The subject comes up mainly when I talk briefly in class about ancient history—the cases that made the Constitution irrelevant to poor people in any positive sense. It would be excellent to once again come to a time when the courts are responsive to litigation that would contribute to reducing poverty. More promising, though, is to take up advocacy based on the constitution with a small “c” and on international human rights norms, which more people are invoking currently. But, these ideas are means, not ends. The real point is that what we are talking about is the pursuit of public policy, which means we are talking about politics. One ingredient in this endeavor is to find a vocabulary and a message that appeal to voters and to public officials. What will work? Bring on the focus groups.

127. *Court-Based Legal Services Project*, D.C. ACCESS TO JUST. COMMISSION (2011), <http://www.dcaccesstojustice.org/legal-services-project>.