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Kenneth L. Karst

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POVERTY AND RIGHTS: A PRE-MILLENNIAL TRIPTYCH

KENNETH L. KARST*

"Come the Millennium, . . . ." So began a common form for expressing a wish, when I was young. Often these words introduced an aspiration that was understood by speaker and listener alike to be utopian, a lovely but impossible dream. "Come the Millennium," we might have said, "all Americans will enjoy freedom from want."¹

All the authors in this symposium have come to bury poverty, not to praise it—and yet we are far from agreement as to poverty's causes and potential cures.² In this venue, I offer three short (and related) essays. First, I discuss the ways in which poverty can dilute the value of clearly established constitutional liberties. Illustrations are drawn from the rights protecting family relationships and the freedoms of reproductive choice. Second, I discuss the links between poverty and race in American politics and constitutional law. Central here are the unwillingness of the Supreme Court to take note of the interconnection of public and private actions in maintaining systemic severe inequalities and our persistent incapacity to muster the political will to respond directly to the poverty of our core cities. Third, with the Millennium not yet in sight, I offer two views of the law and politics of


¹ The term "freedom from want" was coined by Franklin Roosevelt in a 1941 address to Congress, and the words were also included in the Atlantic Charter. See THE COLUMBIA ENCYCLOPEDIA 706 (2d ed. 1956).

² I write this statement when I have seen nothing more than a list of authors.
economic inequality. As to law, I suggest that a modest extension of equal protection doctrine, suited to alleviating some forms of poverty, would lie well within the ability of our courts to manage. Then, as to politics, I consider whether some kinds of anti-poverty legislation may still lie within the realm of realistic possibility.

I. POVERTY AND THE DEVALUATION OF LIBERTIES: FAMILY RELATIONSHIPS AND REPRODUCTIVE FREEDOM

It is a cliché that legal rights are valuable mainly to those who can afford to take advantage of them. The "freedom of the seas" recognized by international law historically has benefited—indeed, was invented by—the nations that had large fleets, which is to say European colonial powers. In our own time, the "freedom of the press" is mainly invoked by the large enterprises that own and operate the media of mass communications. Given the capitalization required to exercise freedoms such as these, it would seem strained to say that poverty is denying some Americans the freedom of the seas recognized by international law or the freedom of the press guaranteed by the First Amendment. Some constitutional liberties, however, not only are highly individualized as a matter of theory but also offer a realistic expectation that they can be exercised by ordinary Americans who are not poor. Notable examples are the applications of the Fourteenth Amendment to protect choices to create or maintain family relationships and the freedom of reproductive choice. Here it is plain that, absent a legislative or judicial mandate for a subsidy, poverty may well impede—or even prevent—the translation of a theoretical liberty into a reality.

Hardly anyone denies that poverty obstructs the exercise of citizenship—that is, participation in the public life of the community as a respected, responsible member. Yet, not since the end of the Warren era has the Supreme Court shown any genera-


lized interest in interpreting the Constitution to obligate government to provide remedies for poverty. In the last three decades, however, while advocates of this millennial constitutional goal saw it receding from view, the Court has relied on the Fourteenth Amendment to mandate a number of legislative accommodations to facilitate poor people's choices about family relationships. A divorced father who was unable to keep up his child support payments had a constitutional right to remarry, despite a state law conditioning the remarriage on his making the past-due payments. The decision was explained on equal protection grounds but could just as easily have been rested on the freedom to marry which, the Court had recently held, was a (substantive) due process liberty. Sometimes the constitutional right in question is not just a "negative" freedom of an indigent from regulation but in practical effect, a right to a state subsidy. Thus, a person too poor to afford the filing fee nonetheless had a (procedural) due process right of access to a divorce court. An indigent man sued in a paternity action had a similar (procedural) due process right to a blood-grouping test subsidized by the state. And an indigent mother subject to a trial court's order terminating her parental rights was constitutionally entitled to a state-subsidized trial transcript when her right to appeal from the termination order was conditioned on her supplying a transcript.

In giving special constitutional protection to family relationships, the Court is following its own statements in the 1920s embracing a fundamental constitutional liberty "to marry, establish a home and bring up children." The modern decisions take a second step, holding that the making or termination of a marriage and the determination of a parent-child relationship are so fundamental as to justify an exemption for indigents from a barrier imposed by state law, and a third step, sometimes
imposing an affirmative state obligation to make up for an individual's poverty by assuring access to a fair judicial proceeding that will determine the indigent's marital or paternal status.\textsuperscript{12}

So far, so good. But if we change the setting only slightly, it becomes plain that poverty itself can be a severe burden on a parent's constitutional right to preserve the parent-child relationship. Now imagine a young single mother, living in poverty with her child, in a neighborhood where poverty is concentrated. If this description is enough to set you imagining the neighborhood and the mother's face, the chances are that your mind's eye envisions an inner-city street and a woman with a dark complexion.\textsuperscript{13} If her poverty is so severe that the child is poorly fed and clothed for a time—and especially if she is, indeed, black—she runs a risk that her parental rights will be terminated by the state for "neglect," and that the child will be placed with an adoptive family. The large majority of termination cases are founded on findings of neglect (as opposed to, say, physical abuse). These findings are correlated with poverty to a striking degree, and one justifiable worry is that racial stereotyping may play a role in characterizing poor young black single mothers as unfit.\textsuperscript{14}

We shall return to the interplay of race and poverty in the next essay; for now it will suffice to take note that even so fundamental a constitutional freedom as the right of a parent to bring up his or her child can be undermined when poverty is severe.

Like marriage and parental relations, "procreation" had been identified by the Supreme Court as a fundamental personal liberty well before its modern recognition of broad rights of procreative choice. In 1942, the Court held invalid a state law selecting some, but not all, three-time felons for compulsory sterilization.\textsuperscript{15} But what of a right to choose not to procreate?

\textsuperscript{12} The Supreme Court further suggested in 1981, that in some cases brought by a state to terminate parental status, the state may have a constitutional obligation to employ counsel for the defendant parents. This right attaches only when the proceeding would be fundamentally unfair without the participation of defense counsel—presumably when important factual allegations are contested, or the case presents disputed and important points of law. Lassiter v. Dep't of Soc. Servs., 452 U.S. 18 (1981).


\textsuperscript{15} Skinner v. Oklahoma, 316 U.S. 535 (1942). Although a substantive due process ground was plainly available, the stated ground was equal protection; the Court said that, given the fundamental nature of the liberty in question, the law must survive strict judicial scrutiny of its selection among felons to be sterilized. No such justification was offered.
Connecticut was one of the states that forbade the use of contraceptive devices as a means of birth control. Even so, doctors had been prescribing methods of contraception, and drug stores had openly sold contraceptive devices—all without evoking any response from the police. Only when a birth control clinic opened its doors did the police bring a charge of violation of the state law.\(^\text{16}\) The resulting conviction was held unconstitutional in *Griswold v. Connecticut*.\(^\text{17}\)

It is notable that this decision, which opened the modern era for constitutional rights of reproductive choice, principally benefited women of limited means. The *Griswold* opinion, of course, said not a word about such women, but spoke generally in the language of privacy of the marital relationship. This form of constitutional privacy, said the Court, surely included power to make the intimate decision whether to practice contraception. But it was chiefly women who were less well-to-do who needed to rely on the clinic for assistance in exercising their choices about reproduction. Middle-class women not only had access to private physicians but could easily find advice about methods of contraception by traveling to another state—for example, New York—where such advice was entirely lawful. *Griswold* extended the right of reproductive choice to women of a less advantaged class—and I do mean economic class.

Within a decade, the Supreme Court decided *Roe v. Wade*,\(^\text{18}\) extending the right of reproductive choice to a woman's decision whether to terminate a pregnancy. Although this right remains under attack, especially by those who see abortion as murder, the right has, for the most part, survived legislative efforts to nullify it. After seeming to move toward overruling *Roe*, the Court in *Planned Parenthood v. Casey*\(^\text{19}\) reaffirmed *Roe's* "core meaning:" Up to the point of fetal viability, a woman has a constitutional liberty to end her pregnancy, and a law that imposes an "undue burden" on this right is unconstitutional. Yet, those who would celebrate

\(^{16}\) In *Poe v. Ullman*, 367 U.S. 497 (1961), the Supreme Court had held that a challenge to the same law was not justiciable, because of the persistent failure of the state to enforce it. That decision led directly to the founding of the clinic whose operators were prosecuted. The full story is told in FRED FRIENDLY, *THE CONSTITUTION: THAT DELICATE BALANCE* 189–208 (1984).

\(^{17}\) 381 U.S. 479 (1965).

\(^{18}\) 410 U.S. 113 (1973).

\(^{19}\) 505 U.S. 833 (1992). Here I refer to the plurality opinion of Justices O'Connor, Kennedy, and Souter, which has been taken, since 1992, as a statement of the governing law. Justice O'Connor is widely believed to be the author of the portions of this opinion applying the "undue burden" standard. That standard was first proposed in her dissent in *Akron v. Akron Ctr. for Reproductive Health*, 462 U.S. 416 (1983).
this reaffirmation of reproductive freedom should ask themselves whether poor women are able to exercise it. Does women’s poverty bear on the determination of an “undue burden” on the right of abortion choice? The only restriction on abortion held invalid in *Casey* was one requiring prior notice to a woman’s husband before she could obtain an abortion. Part of the justification for holding that this law unduly burdened a woman’s choice to have an abortion was that, for a significant number of women, the likely response to such a notification would be spousal abuse. The plurality opinion noted that many abused women have little option but to stay with their abusers, even when further abuse seems probable, “in large part because they have no other source of income.”

These women’s vulnerability to abuse was an important factor in the decision, for “[l]egislation is measured [for undue burden on abortion choice by] its impact on those whose conduct it affects.”

Remarkably, though, the same opinion upheld a law requiring a twenty-four hour waiting period between the doctor’s provision of information (said to be aimed at informing the woman’s choice about abortion) and the time the abortion was performed—and this in spite of lower court findings that having to make two visits to the doctor’s office would particularly burden women with the fewest financial resources, some of whom had to travel long distances to reach the doctor.

“On the record before us,” said the *Casey* plurality, this waiting period was not shown to be a substantial obstacle to such women’s liberty of abortion choice. Added cost, the plurality made clear, was not, by itself, enough to constitute an “undue burden,” but they went on to say that “at some point increased cost could become a substantial obstacle.”

The Court has not yet given full consideration to the effects of women’s poverty on this “undue burden” issue. Within that subject, one extremely important question looms: Can a state constitutionally require an abortion to be performed in a hospital? It is no exaggeration to say that, for women of limited means, protecting any effective right of abortion choice requires access to birth control clinics. Middle-class women continue to have access to private doctors—and, if the need should arise,

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20. 505 U.S. at 892.
21. 505 U.S. at 894.
22. For example, a woman of reduced means may suffer hardship from having to take two days off from work rather than one and from doubled costs of transportation and childcare.
23. 505 U.S. at 887.
24. 505 U.S. at 901.
they can fly to New York or California to have abortions there. It is still the most vulnerable women—those who live in hardship, for example, or those who are young with no resources of their own and fearful of their fathers' wrath—who need the clinics if they are to exercise the right of reproductive choice. Only 7% of abortions are performed in hospitals; the other 93% are performed in clinics and other outpatient facilities, or in doctors' offices. Part of the reason for this great disparity is that the cost of hospital services far exceeds the cost of non-hospital services—in one study, by a factor of six. In 1983, the Court held unconstitutional a state law requiring second trimester abortions to be performed in hospitals on just this ground. But Justice O'Connor dissented from this holding, in an opinion that was dismissive of this concern of women of limited means. The requirement of a hospital, she said, was a "health regulation" and was not an "official interference" with the abortion decision. The latter point was asserted, not demonstrated. Even more startling is the opinion's curt tone, which just does not sound like the same Justice O'Connor who contributed to the Casey plurality.

Perhaps, in 1992, she was no longer quite the same Justice O'Connor she was in 1983. Her reluctance to overrule Roe v. Wade around that time seems significant. Roe's main influence in women's lives had been to extend to women of modest means a control over their maternity that their more affluent sisters already had. It is still true, for women of lesser means, that access to the clinics is crucial to their right of choice; disabling the clinics would throw away Roe's principal effect on real women's lives. Perhaps Justice O'Connor has reconsidered the meaning of "undue burden" in the years since Akron. In 1991 in Rust v. Sullivan, she not only refused to join in overruling Roe, but she also concluded that an administrative "gag order" forbidding abor-

25. See Stanley K. Henshaw, The Accessibility of Abortion Services in the United States, 23 FAMILY PLANNING PERSPECTIVES 246 (1991) (hospital average for first-trimester abortions: $1,757; non-hospital average: $288). Cost aside, a hospital abortion may not be available at all, either because the nearest hospital is far away or because the hospital has been acquired by a religious institution that will not permit abortions. From 1988 to 1992, the number of U.S. hospitals providing abortions decreased by 18%. Stanley K. Henshaw & J. Van Vort, Abortion Services in the United States, 1991 and 1992, 26 FAMILY PLANNING PERSPECTIVES 100 (1994).

26. See Akron, supra note 19.

27. 462 U.S. at 467 (O'Connor, J., dissenting).


tion counseling in federally-funded family-planning clinics had not been authorized by Congress. And she has consistently voted to uphold legislation and court orders offering protection for clinic patrons against the most intimidating forms of harassment by "pro-life" demonstrators. So, there are straws in the wind suggesting that Justice O'Connor may have a different view today of efforts to cancel Roe's main practical effect by putting the clinics out of business. Still, a reaffirmance of Akron's protection of the clinics is no sure thing.

Even in a clinic, exercising the constitutional right to choose to have an abortion typically costs money—enough money to price the procedure beyond the range of most women living in hardship. The Court has held that the Constitution is indifferent to those women's plight, offering freedom from direct governmental interference with the choice to have an abortion, but no claim of a right to governmental support of an abortion, even when government is supporting the (considerably greater) cost of childbirth. Because public aid is so great a proportion of poor women's resources, the refusal of public aid for abortion is quite likely to deprive a poor woman of any "choice" to undergo the procedure. About one-third of the states (including New

30. This gag order was later rescinded. On the special relevance to black women of access to clinics in order to get information about family planning, including information about abortion, see generally Dorothy E. Roberts, Rust v. Sullivan and the Control of Knowledge, 61 GEO. WASH. L. REV. 587 (1993).


32. A straw blowing in the opposite direction is the Court's refusal to review a Fourth Circuit decision upholding (by a 2-1 vote) South Carolina's hostile regulations of outpatient abortions in clinics and in doctors' offices. These astonishingly severe, nit-picking regulations were plainly designed to increase the difficulty of operating a clinic or performing abortions in a doctor's office and to increase the costs of abortion. After a six-day trial, the district court struck down the regulations as an undue burden on women's reproductive choice; in a ninety-four page opinion, the district court meticulously found facts demonstrating the pointless severity of one after another requirement set out in the regulations. The Fourth Circuit majority managed to reverse without questioning any of these findings. Greenville Women's Clinic v. Bryant, 222 F.3d 157 (4th Cir. 2000), cert. denied, 531 U.S. 1191 (2001). Anyone who reads the majority's bland and blinkered opinion should also get the facts of the case. They are to be found in the district court's opinion, 66 F. Supp.2d 691 (D.S.C. 1999), and in Judge Hamilton's trenchant dissent. Greenville Women's Clinic, 222 F.3d at 175 (Hamilton, J., dissenting).


York and California) offer poor women state funding for medically-necessary abortions. Elsewhere, some women in poverty are lucky enough to find private institutional support for the procedure, but others can dredge up the money for an abortion only by depriving themselves and their children of adequate nutrition. The result is that large numbers of them simply carry their unintended and unwanted pregnancies to term. Still others, desperate at the thought of a responsibility for parenthood utterly beyond their means to fulfill, seek to abort their pregnancies themselves; some of these—only a few, but one is too many—have died in the attempt or been maimed for life. These restrictions on the exercise of the constitutional right of procreative choice should trouble anyone who claims to believe in "equal justice for poor and rich, weak and powerful alike.”

II. POVERTY AND THE AGGRAVATION OF RACIAL INEQUALITY: FROM POLITICS TO LAW, AND BACK

Although a majority of all poor Americans are white, and majorities among black and Latino Americans are not poor, the subjects of poverty and race are inextricably connected in today's politics. According to a 1994 poll, more than half of all Americans believed, erroneously, that most people on welfare were black. And about two-thirds of those who held this belief also said—contrary to the evidence—that most people on welfare did not really need it, did not want to work, and had only their own lack of effort to blame for their condition. Politicians have seen these attitudes as defining a potential white constituency.

35. One 1980 study (called "rigorous") found that eighteen to twenty-three percent of women on Medicaid who would prefer to have an abortion carry their pregnancies to term. Another 1980 study placed the rate at thirty-five percent. See Stanley K. Henshaw, Factors Hindering Access to Abortion Services, 27 Family Planning Perspectives 54 (1995).

36. A 1979 study by the (then named) Center for Disease Control explicitly linked four deaths to the unavailability of Medicaid funding. Alan Guttmacher Institute, Revisiting Public Funding of Abortion for Poor Women, at http://www.agi-usa.org/pubs/ib_funding00.html. In 1997, the Food and Drug Administration warned consumers that kits for self-abortion, marketed on the Internet, contained drugs not approved by the FDA, including one that can cause ectopic pregnancy, abnormal pregnancy, or permanent damage to reproductive organs. Health Notes, St. Louis Post-Dispatch, June 19, 1997, at A9.


38. Gilens, supra note 13, at 140 (quoting from a 1994 CBS/New York Times poll that produced all these results). Much of his book is devoted to refuting these myths and explaining their persistence.

39. Id. at 140.
waiting to be mobilized. Part of the appeal of a political attack on welfare has been that it is easily understood by the target constituency as a coded reference to race.\textsuperscript{40}

When a white observer identifies race with poverty, the identification can also lead to distortions in the other direction so that undifferentiated references to black Americans can call up fearsome images of "underclass" behavior:\textsuperscript{41} gangs, crime, drugs, riots. So, "[t]he ghetto hurts all Blacks, not just those entrapped in it."\textsuperscript{42} The classic story here features the black businessman, dressed in his business suit, who has trouble getting a taxi in the evening. Such fears for physical safety can translate into an asset for those who would turn white racial anxieties to political advantage—a tactic that began in the generations when Jim Crow held sway. The more serious harm of the race/poverty identification, however, is that it reinforces unconscious stereotypes of black inferiority. This distortion, too, has its political implications, for it can exacerbate anxieties about African Americans as potential competitors—say, for jobs or for college admissions. By a staggering illogic that finds its coherence in the realm of emotion, the politics of affirmative action is a cousin to the politics of welfare.

If many white citizens identify race with poverty, they do not make the connection out of whole cloth. The proportion of black Americans who are poor has been running for many years at about three or more times the rate of poverty among whites, with black unemployment persistently running around twice the rate for whites.\textsuperscript{43} While poor white Americans are scattered among center cities, suburbs, and rural areas, three out of five poor black Americans live in the center cities,\textsuperscript{44} and many of these neighborhoods are now areas of concentrated poverty.\textsuperscript{45} It

\textsuperscript{40} Elsewhere I have dealt with the anxiety-laden "social issues agenda" for race. \textsc{Kenneth L. Karst}, \textsc{Law's Promise, Law's Expression: Visions of Power in the Politics of Gender, Race, and Religion} 67–111, 137–46 (1993).

\textsuperscript{41} I use "underclass" not as a noun—no one is an underclass person—but as an adjective, used by "outside" observers to describe behavior that they see as deviant or threatening or both. On the distortions of "underclass" as a noun describing deviant persons, see Thomas Ross, \textsc{The Rhetoric of Poverty: Their Immorality, Our Helplessness}, 79 \textsc{Geo. L.J.} 1499, 1507–08 (1991), and sources cited.

\textsuperscript{42} \textsc{Douglas Glasgow}, \textsc{The Black Underclass: Poverty, Unemployment, and Entrapment of Ghetto Youth} x (1980).

\textsuperscript{43} See, \textit{e.g.}, \textsc{Andrew Hacker}, \textsc{Two Nations: Black and White, Separate, Hostile, Unequal} 100, 103 (1992).

\textsuperscript{44} \textit{Id.} at 100.

\textsuperscript{45} On the concentration of poverty, see \textsc{William Julius Wilson}, \textsc{When Work Disappears: The World of the New Urban Poor} 11–17 \textit{passim} (1996). In 1990, among all Americans living in neighborhoods of concentrated poverty
is these neighborhoods that produce the lion’s share of media images of “underclass” behavior.46 Life in such a neighborhood undoubtedly acculturates the residents in ways that are harmful. In taking account of this fact of our social life, I do not seek to revive the “culture of poverty” idea, floated in the 1970s, which suggested that something inherent in the culture of racial and ethnic minorities was transmitting poverty from one generation to the next.47 Nor do I accept the more recent version, with its claim to include a “scientific” explanation: that minority children inherit a genetic weakness that produces intergenerational welfare dependency.48 Rather I am suggesting that poverty itself is a powerful acculturating agent, and that one of its effects is to worsen racial inequality. To put the same point in terms of constitutional resonance, I am suggesting that living in a neighborhood of concentrated poverty strongly tends to undermine one’s chances to enjoy the Fourteenth Amendment right of equal citizenship.

To be an equal citizen, one must be treated by the organized community as a respected, responsible, and participating member.49 In America, one crucial arena for achieving respect is the world of work.50 Success in this arena requires that decent jobs

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(40% living at or below the poverty line), some 52% (over 4.1 million) were black, with the other 48% about evenly divided between white and Latino. INST. ON RACE & POVERTY, FINAL REPORT: EXAMINING THE RELATIONSHIP BETWEEN HOUSING, EDUCATION, AND PERSISTENT SEGREGATION 7 (2000), available at http://wwwl.umn.edu/irp/publications/final1.htm.

46. Gilens, supra note 13, at 132, remarks:
For most Americans, the most powerful images of poverty are undoubtedly the black urban ghettos. These concentrations of poverty represent the worst failures of our economic, educational, and social welfare systems. Yet they also represent a minuscule portion of all the American poor. Only 6% of all poor Americans are blacks living in ghettos.

For a review of recent evidence that the work ethic is very much alive among recipients of public assistance, see Joel F. Handler & Yeheskel Hasenfeld, The Poor People: Work, Poverty, and Welfare 44–53 (1997).


48. Richard J. Herrnstein & Charles Murray, The Bell Curve: Intelligence and Class in American Life 403 passim (1994). Wholly apart from the genetic inheritance silliness, the idea that public assistance is intergenerational has no factual basis. See Handler & Hasenfeld, supra note 46 at 46–47.


50. See Judith Shklar, American Citizenship: The Quest for Inclusion 63–101 (1991); Forbath, Caste, Class, supra note 4; Kenneth L. Karst, The Coming
be available and that workers be ambitious. Both of these ingredients are undermined in today’s urban neighborhoods of concentrated poverty. The low-skilled industrial jobs that once were a first step on the economic ladder have either disappeared altogether or moved beyond effective reach (to the far suburbs, to Thailand). The jobs that remain for low-skilled workers are generally so poorly paid that they will not support a family; further, they offer no security of employment, no health insurance, and no pension benefits.\(^{51}\) Lacking an economic basis for hope for the future, young adults have little incentive to marry. For a young man, illicit activities seem to promise ready cash. For a young woman confronting an unplanned pregnancy, motherhood may be the only respected social role in view.\(^{52}\)

Americans have historically looked to education as a path to economic and social advancement. But the schools in areas of concentrated poverty are poor in resources, and at every level they are inadequate to cope with the failings of children’s prior education. Besides, with no decent jobs in sight for the children, teachers and counselors face an uphill struggle as they try to persuade students even to stay in school, let alone strive for admission to college. If “underclass” behavior is a significant feature of such a neighborhood, the primary determinant is not a defect in black culture, but a vicious cycle: the absence of decent employment opportunity is demoralizing to individual ambition, and tends to deflect both young men and young women into risky behavior that digs them—and their community—deeper into poverty. In turn, the community’s widespread demoralization deters potential employers from locating there. When a low-skilled adult manages to escape this cycle, it is impressive. When a school child escapes, it is miraculous.

A market economy is, among other things, a system for measuring values—not just the values of goods, but the values of personal services—and, given the role of work in establishing identities, the values of persons. The market teaches lessons about individuals, lessons about who counts and who does not. On this scale, from the early 1970s to the early 1990s the employ-

\(^{51}\) See generally Wilson, supra note 45.

ment market consistently taught the low-skilled poor that they did not count—and their absorption of that lesson was a major factor in their demoralization. An upturn in the 1990s brought a measure of improvement for this group. Today, however, we face not only a declining economy but also a global labor market that portends drastically declining prospects for low-skilled American workers. If history is to be our guide, we can predict that African Americans in this group, having been the last hired in the 1990s upturn, will be the first fired as the economy declines. With the concentration of poverty in their urban neighborhoods intensified, we can expect that young African Americans will be further acculturated to “underclass” behavior. And then, in the world outside the ghetto, we can expect a heightened deployment of the politics of racial fear.

In its currently prevailing interpretations, American constitutional law has little to say about any of these conditions—and this even though the conditions, in the aggregate, deny the substance of equal citizenship to millions of Americans. In a number of cases, the Supreme Court has been confronted with legislation that has produced racially disparate effects, and on that basis has been challenged as unconstitutional racial discrimination. In these cases, the Court typically has rejected the challenge for want of proof of a governmental purpose to disadvantage anyone on the basis of race. In Washington v. Davis, the leading case in this group, the Court’s opinion makes clear the reason why the majority has adopted this limiting principle:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far-reaching and would raise serious questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white. . . . [W]e think it is clear that the opportunity of fair employment is a substantial right under the Equal Protection Clause. In our view, extension of the rule beyond those areas where it is already applicable by reason of statute should await legislative prescription.

53. See William Julius Wilson, The New Economy and Racial Inequality, 54 Bull. Am. Acad. of Arts and Sciences, no. 4, 41, 45-46 (Summer 2001), at http://www.amacad.org/blvlvm4/blvlvm4_41.htm. In the 1960s Bayard Rustin, a prominent black labor leader, said, “We cannot have fair employment until we have full employment.” Forbath, Caste, Class, supra note 4, at 87.


55. 426 U.S. at 248.
Or, a cynic might say: The inequalities resulting from historic and continuing connections between race and poverty are so deep and so wide-ranging that the courts simply have to ignore them, lest judges overextend themselves in the cause of racial justice.

One such case, antedating Washington v. Davis, had focused on assistance to people in need. In the 1960s Texas operated two big welfare programs: assistance to the elderly, and assistance to children in poor families (AFDC). To limit the aggregate of welfare spending as required by the state constitution, the legislature appropriated lump sums for each category, leaving to administrators the final calculation of benefits. Those officials ordered that AFDC benefits (paid to families 87% of whom were black or Latino) be cut to 50% of need, while maintaining funding at 100% of need for aid to the aged (paid to beneficiaries 60% of whom were white). In Jefferson v. Hackney, the Supreme Court, shrugging off these racial percentages as a "naked statistical argument," found no racial discrimination. If you believe race had nothing to do with the state's behavior, I would like to sell you the Brooklyn Bridge. When AFDC was first adopted, its beneficiaries were mostly white widows. As the numbers of beneficiaries gradually shifted toward single mothers who were dark-skinned, all over the nation AFDC benefits declined. Yet, because the Texas legislation was formally race-neutral, the Supreme Court could look at a governmental action that was saturated with racial meaning and see only poverty.

So, if a state should adopt legislation explicitly providing better housing, or education, or employment opportunity for white citizens than for their black co-citizens, that would violate the equal protection clause. But the Constitution, as now interpreted, offers virtually no relief against a state's "racially selective sympathy and indifference." If a city's schools remain racially separate because they serve racially separate neighborhoods—so the reasoning goes—the problem lies not with the school board, but with the inability of many blacks to live in white middle class

57. During the same period, increasingly generous Social Security benefits (including Medicare) virtually eliminated poverty among the elderly in America. In the 1990s, those two federal programs for the elderly regularly cost about twenty times the cost (to the federal government and the states combined) of welfare (AFDC). For the 1993 figures, see Handler & Hasenfeld, supra note 46, at 8.
neighborhoods. If low-income apartment housing is not available in such a neighborhood, it is not the responsibility of local zoning officials, who are merely seeking to protect neighborhood tranquility and property values by insisting on single-family housing. The problem is the inability of poor people to meet the prices set by "the housing market" for homes in the white, middle class areas. What those people need are good jobs. And, if they do not qualify for those jobs, it is not the responsibility of an employer—even the government as an employer. After all, good jobs, especially in the modern economy, require more education than used to be required for jobs of similar desirability. On this view, what is needed for racial equality in "the employment market" is equal educational opportunity. But—is anyone surprised?—neighborhoods that are economically poor are, with rare exceptions, served by schools that are qualitatively poor. Given the correlation of family wealth with race, a school's quality is apt to vary greatly according to the racial composition of its student body. In this circle of irresponsibility, we confront a systematic governmental neglect that cannot be called benign. Any advocate for the disadvantaged who imagined that the War-

59. For a recent decision reaffirming that racial separation of public schools raises no constitutional claim unless it is the result of deliberate governmental discrimination, see Freeman v. Pitts, 503 U.S. 467 (1992).
60. In Warth v. Seldin, 422 U.S. 490 (1975), the Supreme Court held that the plaintiffs, urban blacks of low income, lacked standing to challenge a suburb's refusal to rezone land for low-income housing. The Court remarked that the plaintiffs' inability to reside in the suburb was the likely "consequence of the economics of the area housing market, rather than [the suburban officials'] illegal acts." 422 U.S. at 506.
61. In James v. Valtierra, 402 U.S. 137 (1971), the Court had dealt with a law requiring that any low rent housing project be subjected to a local referendum. Despite the common understanding among voters that "low rent housing" means housing for minorities, the Court upheld this requirement.
63. For illustrations, see Brenna B. Mahoney, Note, Children at Risk: The Inequality of Urban Education, 9 N.Y.L. SCH. J. HUM. RTS. 161 (1991). Christopher Jencks recently encapsulated this connection:

What are the effects of growing residential segregation by income? First, it leads to increasing disparities in school quality—not only because the tax base for local support is more unequal, but also, even more important, because the strongest single determinant of where able teachers choose to work is the socioeconomic mix of the students they will be teaching.

ren Court was ushering in a constitutional Millennium turned out to be mistaken.

Here, where the Supreme Court turns a blind eye to the public's role in perpetuating racial inequality, we see the same collection of constitutional doctrines that produced the Court's refusal to recognize a poor woman's right to public support for an abortion. Three doctrines combine to deny relief: the judge-made "state action" limitation on the Fourteenth Amendment, the judge-made requirement of a showing of "purposeful" discrimination, and judge-made (and tunnel-visioned) definitions of the "causation" of harm. Together, these restrictive judicial inventions have created a doctrinal Bermuda Triangle from which a substantial number of Americans—those who are poor, or members of historically disadvantaged racial or ethnic minorities, or both—cannot escape. What is missing here is recognition—any recognition at all—of the ways in which public and private decisions reinforce each other in maintaining a structure of advantage that excludes people from equal citizenship. For the present, then, advocates for the poor are remitted to political remedies. Whatever one may think of the Court's normative statement in Washington v. Davis, it has become self-validating as a description. Any public responses to the systematic inequalities associated with poverty—including the dilution of liberties and the exacerbation of racial inequality—must "await legislative prescription." Given that one glaring systematic inequality is the distribution of political advantage, perhaps that is the end of the matter. Perhaps the "forgotten man" is destined to remain forgotten.

III. WHAT TO DO UNTIL THE MILLENNIUM COMES

Then again, perhaps not. This symposium, attracting the participation of writers across a broad political spectrum, attests to a widely shared concern for attuning public policy to the

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68. On some of the disastrous effects of the interaction of these doctrines, see Kenneth L. Karst, Citizenship, Race, and Marginality, 30 WM. & MARY L. REV. 1 (1988).

69. 426 U.S. at 248.

70. The "forgotten man" is, collectively, the poor, both men and women, in the language of politics in the 1930s.
needs of Americans who are living in hardship. For all our differences, we share the long-standing view that prizes work, and we recognize the connections between work and respected membership in our national community. What is less clear is that this agreement, at this level of abstraction, can serve as a foundation for any sort of governmental action to combat poverty. In this brief concluding essay, I offer two observations, both modest in scope. I begin by suggesting a limiting principle that might help a new majority of the Supreme Court to entertain the notion that some laws excluding the poor from important benefits—contrary to several of the Court’s decisions of the past generation—do, indeed, confront government with serious constitutional problems. Finally, I assess the political prospects for governmental action aimed at reducing poverty, and particularly legislation in support of the working poor.

A Limited Judicial Role. Surely the Supreme Court will never adopt an open-ended constitutional principle of affirmative governmental responsibility for ending poverty. What might be expected, however, is a modest extension of existing law. The Court might adopt a principle that identifies a violation of the equal protection clause when the government itself has defined a basic necessity, but has adopted a selective response to that need, rejecting coverage for one group without offering substantial justification for that exclusion. Plyler v. Doe could be cited as an example of this principle. In that decision the Court held invalid a Texas law that specified an entitlement of children to free public education, but denied the entitlement to the children of undocumented foreign workers. The Court, in theory, applied a permissive “rational basis” standard of review, but all observers (Justices included) now agree that, in fact, the Court insisted on substantial justification for the state’s discrimination, and found

71. At least, this concern is widely shared among the chattering classes.

72. In referring to legislation, I do not mean to ignore possibilities for community self-help through grassroots movements. Of course, any program aimed at economic development of a poor urban neighborhood will need outside financing. Here, government grants are not the whole story; private businesses and private philanthropy both have important roles to play. For a sensitive exploration of these themes by one who draws on his own experience as a participant-observer, see John O. Calmore, Racialized Space and the Culture of Segregation: “Hewing a Stone of Hope from a Mountain of Despair,” 143 U. Pa. L. Rev. 1233 (1995).

73. I made a similar suggestion in 1988, in a widely uncited discussion. See Karst, supra note 68, at 44–45.


75. 457 U.S. at 230.
the law wanting. The heart of the principle I am suggesting is this insistence on a truly important justification for a withholding of benefits from persons who are poor.

If the Court were to apply a similarly demanding standard of justification, surely it would have to reach a different result in a case replicating Jefferson v. Hackney, when the Court—without requiring any serious justification by the state—upheld Texas's determination to cut welfare (AFDC) benefits to 50% of need, while leaving aid to the elderly funded at 100% of need. If the suggested principle were adopted, the Court would also have to revisit such issues as (1) the limitation of a large family's monthly welfare grant to a maximum of $250, even though the state's own identification of "need" per person would require a benefit of $296; (2) the denial of the costs of medical care for abortion while paying the greater costs of medical care for childbirth, or (3) dramatic differences in governmental spending per pupil on public schools in districts that are property-rich and property-poor. I do not say that the Court would be compelled to reach opposite results in all three cases, but only that the suggested principle, using the government's own standard of basic need as a benchmark for equal protection analysis, would require substantial justification of the exclusion in question. In each of those cases, the Court expressly noted that it was performing the most permissive sort of review of the discrimination before it. My own view, I concede, is that substantial justification was lacking in all the cases, and that proper applications of the suggested principle would lead to results opposed to the ones the Court reached in years past.

Political Prospects for Anti-Poverty Legislation. A legislative advocate who seeks to better conditions for Americans living in urban neighborhoods of concentrated poverty faces three formidable

78. Id. at 551; see also supra text relating to note 57.
79. The Court upheld such a law in Dandridge v. Williams, supra note 5, in the absence of any showing by the state of economies of family scale, or any other serious justification for reducing the family's benefit below the level of "need" per person, as established by state law. The figures in the text are drawn from this case.
82. See, e.g., 411 U.S. at 40–44.
obstacles. First, the poor mostly do not vote. If they are to be mobilized as a constituency, they must be given hope that government will respond to their needs—and little in their experience encourages any such hope. Second, political power has shifted decisively from the cities, with their substantial populations of racial and ethnic minorities, to the suburbs, which are largely white. Third, legislation that directly and openly confronts conditions of concentrated poverty in the core cities cannot pass without running the gauntlet of the politics of race.

This is not to say that any and all anti-poverty policies are politically doomed. Indeed, the most obvious and most effective anti-poverty policy would be a strong and continuing effort to achieve full employment, with special attention to the low-wage labor market. As Bayard Rustin said four decades ago, a full employment policy would be especially beneficial for poor black families. The flip side of historically high unemployment rates for black Americans (double the levels for white Americans), is that the 1990’s economic upturn produced a dramatic decrease in black unemployment. One political advantage of a jobs policy is that it would not be explicitly targeted to black workers. But, given the globalization of the market for low-skilled employment, creating such jobs will be no easy matter, even if the U.S. economy is able to escape a prolonged recession.

Let no one think a jobs program could be carried through on the cheap. For a job to be an effective substitute for public assistance, it must be a stable, adequately paid job—that is, one that is paid a living wage and that carries health and pension benefits. Since the 1996 federal legislation aimed at “ending welfare as we know it,” significant numbers of people have moved from welfare into some form of work, aided by the boom times of the 1990s. This development, standing alone, should not be news. For years, most welfare beneficiaries have been supple-


84. “Suburbs cast 36% of the vote in the presidential election of 1968, 48% in 1988, and a majority of the vote in the 1992 election.” Wilson, supra note 45, at 186.

85. See supra text accompanying note 53.

86. Wilson, supra note 45, at 45.

87. On the non-economic values of work, see sources cited supra note 52.
menting their benefits by working,88 leaving welfare when work provides an adequate income, and returning to welfare only when they are unable to make a go of things in the labor market alone.89 The question, for those who left welfare in the wake of the 1996 Act is whether those people are working their way out of poverty. Up to now, the record has been spotty, with welfare officials having no idea what has happened to about half of the welfare-leavers. Of the leavers who were tracked, more than half found work, but not at wages sufficient to lift them out of poverty. From about one-third to about one-half of them have suffered various kinds of hardship, most notably, reducing food intake for lack of money, and inability to pay rent or utility bills.90 The recent successes in reducing welfare rolls plainly should not be confused with the larger goal of relieving poverty. To achieve that goal, there will be no substitute for the creation of many, many new jobs at wages that will support families. The latter objective would seem to require further raising of the national minimum wage, which stands today at a level, adjusted for inflation, 24% lower than its level in 1979.91

Concurrently with an ongoing effort to maintain high levels of employment, both Congress and the state legislatures can, within the limits of political realism, seek to aid the working poor.92 Recent survey research has shown strong public agreement, across divisions of race and class, in support of programs to help the working poor continue to work, and to make work

88. Sometimes welfare beneficiaries are working “off the books” in order to avoid a possible termination of welfare benefits.
89. HANDLER & HASENFELD, supra note 46, at 46-53.
92. For a thorough examination of such programs and a persuasive argument for their adoption, see HANDLER & HASENFELD, supra note 46, at 97-145, 213-25 passim. On the political attraction of “universal” aid programs, as distinguished from programs “targeted” at the urban poor, see Theda Skocpol, Targeting Within Universalism: Politically Viable Policies to Combat Poverty Within the United States, in The Urban Underclass, supra note 52, at 411. Although some aspects of Skocpol’s position have been contested, there is general agreement that aid to the working poor can have broad appeal.
pay. The Earned Income Tax Credit (EITC), allowing tax refunds for poor families, deserves not only continued re-enactment, but expansion of coverage and a relaxation of its "phaseout" provision.\textsuperscript{93} Work-facilitating programs—notably job training, childcare, and subsidized transportation to the workplace—are widely supported, even at the cost of increased taxation. Or, at least, these are the views being communicated to those who are doing opinion polls.\textsuperscript{94} It is by no means clear that these attitudes are translatable into active grass-roots support of such programs. Nor is it clear that the attitudes would survive actual, as opposed to hypothetical, increases in taxes (indeed, one wonders whether the polled citizens have any idea how expensive decent child care is).\textsuperscript{95} But the survey research does

\textsuperscript{93} One thorough study of the political history and economic analyses of the EITC concludes:

The overwhelming majority of economic evidence suggests that the EITC constitutes a uniquely effective and viable anti-poverty program . . . . [A]s reported by the [Council of Economic Advisors], the EITC lifted 4.9 million persons out of poverty in 1997, including 2.2 million children under the age of 18, more than any other government program.


EITC began, not as a liberal benefits program, but as a work-incentive alternative to welfare (AFDC); its expansion in the 1990s probably helped to lay AFDC to rest. See Edward J. McCaffery, \textit{The Burdens of Benefits}, 44 Vill. L. Rev. 445, 482 (1999). EITC (codified in 26 U.S.C. § 32) has always included a "phaseout" ingredient, in which the credit is reduced by a substantial percentage once the earned income reaches a certain level. As AFDC died, and an expanded EITC came to be perceived by some as a "liberal" handout, threatening noises were heard in Congress. During the 2000 election campaign, however, Governor George W. Bush made clear his support for continuation of EITC, and in 2001, as President, he signed a tax cut bill that expanded some benefits under EITC by increasing the income levels at which a married couple's "phaseout" begins. The object was to soften the "marriage penalty" that, in effect, penalized a single mother for marrying. Richard W. Stevenson, \textit{Congress Passes Tax Cut}, Milwaukee Journal-Sentinel, May 27, 2001, at 1A. For a skeptical view of the EITC's contributions to the working poor, see McCaffery, \textit{supra}, at 484–91. For other evaluations of EITC, see Ann L. Alstott, \textit{The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform}, 108 Harv. L. Rev. 533 (1995); Handler & Hasenfeld, \textit{supra} note 46, at 106–11; Deepak Bhargava, \textit{A Silver Lining in Cloudy Washington, D.C.} (Nat'l Campaign for Jobs and Income Support, 2001), available at http://www.nationalcampaign.org/victory/asp (last visited Nov. 12, 2001).

\textsuperscript{94} See Gilens, \textit{supra} note 13, at 187–89, 192–203.

\textsuperscript{95} According to one recent study, in all but one state the average cost of child care in a child care center is greater than the annual tuition cost at a public college. Kathleen Schulman \textit{et al.}, \textit{The High Cost of Child Care Puts Quality Care Out of Reach for Many Families} (Children's Def. Fund, 2000). In a social-accounting perspective, however, the total cost of decent
suggest that, if a group of legislators—white legislators, we might hope—can be persuaded to take the initiative for such programs, they will be safe from the most virulent form of voter resentment, the race-based resentment that has infected the welfare issue for a generation.

For the present, the prospects do not seem bright for the change of heart among the Justices that would permit the modest expansion I have suggested for the reach of the equal protection clause. Nor, in the near future, should we expect adoption of the legislative programs I have mentioned—with the exception of the expanded (but ever vulnerable) Earned Income Tax Credit.96 But it seems reasonable to continue to offer suggestions, especially suggestions so modest as these, even though today's judicial and political environments may be unreceptive.97 Times change. In 1940, who would have predicted Brown v. Board of Education98 or the Civil Rights Act of 1964?99

96. If we should confront a prolonged economic downturn, another possible exception might be something resembling a full employment policy.

97. Here I follow William Julius Wilson, supra note 45, at 208, who noted that his suggested policy framework was "not constrained by an awareness of the current political climate in the United States."
