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SYMPOSIUM: THE NEEDS OF MEMBERS IN A LEGITIMATE DEMOCRATIC STATE

NAME: John A. Powell*

BIO:
* Williams Chair in Civil Rights and Civil Liberties, Moritz College of Law, Ohio State University; Executive Director, Kirwan Institute for the Study of Race and Ethnicity, Ohio State University. I would like to thank Stephen Menendian for his hard and thoughtful work on the article.

SUMMARY:
... Instead of trying to supplement this list, I will try to develop a larger context in which to think about how we should proceed in meeting the needs of members of our democratic state and the appropriate role of government. ... In more succinct terms, the primary need after membership is effective participation or civic freedom. ... If income is a proxy, what is it a proxy for? The task of defining need is hampered by the lingering burden of the more relevant policy question, the role of government in addressing need, rather than the theoretical difficulty of defining need. ... If we are to take seriously the idea of avoiding poverty, and poverty is not merely the lowness of income or similar economic measurement, then need here is for capacity, with a focus on the removal of capability deprivations. ... If we are serious about dealing with issues of deprivation and poverty, the capabilities approach grounded in membership is the only honest starting place for analysis. ... " "Civic freedom is the capacity of adult members of a community to participate in life and governance. ... The example of Japan undermines this assumption, demonstrating how the distinction may be irrelevant under the capabilities approach. ... Citizenship is certainly a precondition for the exercise of civic freedom, but membership is a critical component to citizenship. ...

TEXT:
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This symposium focuses on the needs of workers and whether the state is meeting those needs in the areas of bankruptcy, unemployment, and welfare. All of these areas are important in their own right, yet together they suggest a more comprehensive look at the welfare state and the role it does and should play in addressing the needs of its members. One could argue that other critical areas have been excluded, such as health care, education, and housing. In fact, it would be difficult to come up with a comprehensive list that would adequately define the needs of members. The reason for this will become clear in my article below. Instead of trying to supplement this list, I will try to develop a larger context in which to think about how we should proceed in meeting the needs of members of our democratic state and the appropriate role of government.

I will assert that it is membership itself that is the starting point for the appropriate bounds of inquiry, and that ways of thinking about membership itself must be called into question. I will also assert that discerning the needs, particularly social, that must be addressed by the state is a question arising from the membership process. In our democratic society, it is participation in a strong democratic process that defines those needs. In doing so, it is not only the needs for members that are delineated but also a description of what the role for a legitimate democratic state should be. I will further assert that the primary need is to be a member and that the primary need associated with this membership is the right and capacity [*970] to further define needs. In more succinct terms, the primary need after membership is effective participation or civic freedom.

There are two normative questions that must be addressed before substantively engaging the question of whether the United States, or any nation, is meeting the needs of its citizens. First, what should count as a need and how

does context help us both frame and answer this question? Second, what is the role of the government in meeting or addressing this identified need? The reader will not be surprised that there is no consensus or easy answer to either of these questions because the normative criteria chosen for determining what is meant by "need" provides the basis for evaluating whether needs are being met. As an alternative to engaging in a discourse without a resolution, I will try to set out a process for thinking about these two questions. It is important to note that we are concerned with the needs of members of any given state and with the legitimate role of the government in responding to those needs. The needs that one has outside of a particular state may be different from the needs in a particular state. I will also claim that different states may generate different needs. Even if a member of a particular state has a need, this in and of itself does not require a response from a state. Implicit in the question whether a state is meeting its members' needs are both the recognition of needs under that particular state and the recognition of some state obligation to meet those needs.

I. Need for What?

In order to engage the question seriously, one has to start by examining what is meant by "need." The concern here is not just with need but with a certain type of need. This article will try to identify the process of identifying needs, recognizing the appropriate needs that one should expect the government to meet. Since we are interested in whether the government is addressing these needs, our attention gravitates toward a particular direction and away from other concerns. n1

[*971] One way to distinguish clearly between definitions of need is to compare answers to the question: "need for what?" The rephrased question reveals the chosen metric. One potential answer is the need for physical survival. Indeed, a minimum welfare state seems to be concerned with need in this limited way. n2 The most limited perspective of thinking about need in immediate relation to human survival is starvation: preventing people from experiencing abject starvation. This limited way of thinking about needs may answer one question but leave another unresolved. Certainly there is a need for food and other things for physical survival. So in this sense, there can be no question that these are needs. Yet, the need for survival does not tell us why the government should be concerned with these needs or how these and other needs are to be ordered or met.

There are others who believe that the role of a welfare state is more robust - to keep people from experiencing degradation or extreme poverty. The focus under this conception of need is to measure the disparity between what people have against some objective standard, and then transfer the difference. We may begin then with the assertion that the survival of the individual above abject poverty is a base line from which to define a category of needs. Although most may agree that there is a need in the area of physical survival, and if possible the avoidance of abject poverty, this does little to [*972] help us think about what other needs we should be concerned about, nor does it resolve serious doubts over the legitimate scope of government action in meeting those needs. n3 Even when one has a threadbare notion of the welfare state, one immediately treads into controversy over the role and legitimacy of the government in terms of addressing need.

Nozick and others would say that the role of the state is not to prevent people from experiencing abject poverty, but to prevent people from killing each other, and to protect private property and wealth. n4 Under this second approach to need, one might give to the poor for the purpose of maintaining stability and order, and to avoid revolt by the have-nots. Within this conception of need, welfare programs are instrumental to the survival of the state and the protection of property. n5 Although one might have a legitimate role for the government in addressing needs under this approach, the focus has shifted from the needs of the poor to the needs of the well-off. In answering "need for what?," need here is defined as stability and protection of wealth and the state itself, not for survival of the destitute individual. Within this approach we are invited to look at the needs of the propertied on the one hand and the needs of the state itself on the other. It is to the interest in the protection of property that we turn first.

This view of the state has been historically associated with Hobbes. n6 He asserts that people leave the state of nature and enter civil society for the protection of their property, thus defining the role of government. This Hobbesian view has been rightly criticized on a number of grounds. It is based on a flawed view that property exists before the state. [*973] This is clearly wrong. In a meaningful sense, the state is not designed to protect property. Instead, it is the state itself that calls various property regimes into being. n7 At a deeper level, the person that exists in a state of nature is so different from a citizen or a person in civil society that it makes little sense to argue about what the state owes the person entering the civil society. As a heuristic device, the Hobbesian position can be thought of as assertions about legitimacy. Why would an individual leave the state of nature and give up certain freedoms to enter into a civil society with a coercive state? Recognize that this question is anachronistic; it tries to project the modern individual with property into a pre-modern state of nature. In a pre-modern state not only did the individual as we think of her not exist but neither did our concept of freedom. n8 The foundational argument of Hobbes, and more recently Nozick, for a state whose main function is the protection of private property is so flawed that it has limited heuristic value and need not concern us further at this point. n9 Having examined the flaws in the formulation of need and correlative role of government as a means to protect property under this second approach, in which the interests of the well-off are primary, we now examine the other end sought by the state within the broader rubric of the need for stability.

Revolt does not just threaten the members of the state; at some level it threatens the state itself. A state, especially a democratic state, can maintain stability only if certain needs of its members are being met. n10 The assumption that the state has an interest in stability is not at issue. Nor do I take exception to the claim that the state has some obligation to the propertied. I only challenge the claim that there is no legitimate state role in meeting needs for the purpose of providing [*974] for the less-well off. Political philosopher Michael Walzer suggests that all states are by their nature welfare states, meaning that all states owe something to their members that they do not owe to nonmembers. n11 When a state fails to deliver, it loses legitimacy from its members who are necessary for the state to exist. In other words, all states must engage in some legitimating process. While stability is important, it should be based on legitimacy. This is especially true in a democracy. The state can avoid instability of revolt and revolution by remaining legitimate and open to change. This is clearly exemplified in the United States Declaration of Independence. n12 If one accepts the position that a state requires some degree of legitimacy to exist and that legitimacy is obtained in large part by addressing the needs of its members, the interrelationship between the states' needs and the needs of its members becomes clear.

Before proceeding, it is important to note that there is an apparent tension here. As suggested above, the needs of persons are in part influenced by where they find themselves in civil society. If this is true, how could there be space for a critical examination of what the state and its institutional arrangements afford and how they meet the needs of its members? The apparent tension is resolved when one realizes that while the institutional and structural arrangements in society influence the needs of its members, they are not completely coterminous. First, there are a number of social locations in society; and second, there is always space for human wants and needs to extend beyond the current arrangements despite the influence of those arrangements. n13 What should be clear at this point is that the legitimacy of the state and the human need of its members, however defined or perceived, are often bound up.

[*975] I have already mentioned the need for survival as a need at the level of the person. Even this need is not always recognized as a social need that is valued in society. While the hungry person may recognize this as a need, it may not be a need that is recognized by the larger society. A way of reframing this is to think again about individual needs that require a social response in order for the state to maintain legitimacy. During most of the United States' early history, there was no recognition of eradicating individual hunger as a legitimate social need that required a social response. Partly, this lack of response occurred because of an assumption or dominant story that there was enough opportunity in the way of land and work that virtually all who wanted to could avoid hunger. n14

In light of the foregoing observations, a third approach to thinking about need is to frame it in terms of legitimacy, with a focus on human freedom. This turn away from thinking about physical necessities in the narrow sense is very useful and important. Economist Amartya Sen boldly points out in Development as Freedom that

African Americans in the United States are relatively poor compared to American whites, but much richer than people in the third world. However, African Americans have an absolutely lower chance of reaching mature ages than do people of many third world societies, such as China, or Sri Lanka, or parts of India. n15

In other words, he is suggesting that if you look at income, and if you correct for price variations across the world, African Americans have a lower life expectancy than people in China or Sri Lanka with not just equivalent income, but much lower income. Thus, Sen has defined poverty "as the deprivation of basic capabilities rather than merely as lowness of incomes, which is the standard criterion of identification of poverty." n16 What Sen is suggesting is that income is a proxy for something else. Moreover, there are many measures [*976] of need, among which income is merely one. "Growth ... of individual income can, of course, be important as means to expanding the freedoms enjoyed by members of the society But freedoms depend also on other determinants, such as social and economic arrangements (for example, facilities for education and health care) as well as political and civic rights." n17

If income is a proxy, what is it a proxy for? The task of defining need is hampered by the lingering burden of the more relevant policy question, the role of government in addressing need, rather than the theoretical difficulty of defining need. This fact explains the predominance of narrow definitions of need. Nonetheless, the commonality between all measures of need is that they are attempting to evaluate some standard of well-being, even if indirectly. n18 For this reason, the old paradigms focused on well-being as the end goal. In defining poverty as the deprivation of capabilities, Sen proposes that freedom is the most appropriate and directly relevant perspective to evaluate human need.

II. The Capabilities Approach

Sen builds upon the work of the Human Development Index (HDI), which comes out of the United Nations. n19 Human development, under this index, concerns creating an environment in which people can develop their

potential and lead productive, creative lives in accord with their needs and interests. The focus is on human choice: expanding the choices that people have to lead lives they value. Fundamental to enlarging choices is building human capabilities - the range of things that people can do or be in their lives. The most basic capabilities for human development are to lead long and healthy lives, to be knowledgeable, to have access to the resources needed for a decent standard of living, and to be able to participate in the life of the community. What is crucial [*977] for the elimination of unfreedom and poverty is not simply the mechanical balance of wealth and population, but the substantive opportunities that people have to earn income. Although a very thin index of human need, the HDI has a very robust concept of it. The index avoids detailing the content for what is necessary for people, but indicates that we are not just concerned with abject poverty but with expanding the range of individual choice.

The thrust of Sen's work is that human capabilities should be the centerpiece of public policy attempts to address inequality. A focus on development and capacity is more inclusive in terms of support. If we are to take seriously the idea of avoiding poverty, and poverty is not merely the lowness of income or similar economic measurement, then need here is for capacity, with a focus on the removal of capability deprivations.

If income is not a proxy for capacity, how might we measure and actualize capacity? What Sen is pointing to is a critical factor that needs to be examined: institutional structures and arrangements. n20 There is a cluster of institutional arrangements that mediate the achievement of capacity outcomes, and these institutional arrangements vary from society to society. The focus on wealth or well-being, an end state, ignores the ways in which well-being is actualized and the complex ways in which structures and arrangements may inhibit this actualization. Sen, like Unger and Rawls, recognizes that there is no natural or neutral way for institutions and structures to be arranged. n21 The shift in focus from income to capabilities reframes the issue in a way that better informs how to address the problem of need.

In some societies, income is really a proxy for a job, a type of job which would provide critically important health care. Health care in the United States is distributed on the basis of income. A group of Chinese peasants is more likely to have access to health care than an African American or poor American. The institutions in China are geared, or one might say normalized, in relationship to poor Chinese peasants. n22 They serve and anticipate the lack of income. In the United [*978] States, health care is normalized and designed to serve people in a certain type of job. If you do not have that type of job, you are disassociated from the institution that delivers capacity. The income you make may not make up for the lack of capacity from those institutional arrangements.

What I am suggesting is that when you look at any particular program, you need to step back and ask what are we trying to achieve. If you are trying to achieve a certain capacity, then you cannot know whether unemployment insurance, bankruptcy, or welfare will meet it or not; you have to look at the institutional arrangements at the cluster. In fact, trying to assist the needy through one narrow program may be wasteful of resources designed to meet capability deprivation. The contrast between India and Sub-Sahara Africa is illustrative. India has higher incidence of under-nutrition than Sub-Sahara Africa, although it has lower infant mortality, higher female literacy rates, and a much higher median age at death. n23 Although a greater number of Indian citizens may be malnourished relative to persons in Sub-Sahara Africa, n24 Indian citizens may likely have much greater capabilities. Redistributing income without taking account of the prevailing institutional arrangements is inefficient and ineffectual. It will fail to solve underlying problems of need, and addresses only piecemeal the larger problem. n25

Many different scholars approach this idea in many different directions, and yet it is interesting how they all come out in this way. In the The American Dilemma, a book about the history of African Americans in the United States, Myrdal argues that the thing that is distinct about the Negro is not the poverty, but it is the cumulative economic poverty, the cumulative deprivation. n26 What distinguishes the Negro from poor whites is not only lack of income, but also his/her being defied in terms of education, voting rights, and segregation, [*979] and the list goes on. What happens in terms of depressing the "capacity of the Negro," is not any one of those things, but the cluster of things creating a vicious cycle. n27 Myrdal warns against thinking about a silver bullet - thinking that one individual will break the cycle held together by a cluster. Freeing people from one structural constraint, say segregation, will not produce a just outcome if there is a cluster of arrangements oppressing them.

What Sen is also asserting is that needs and poverty are relational, and that this relational differential is also meditated through the arrangements of institutions and structures. Sen's criticism of Rawls and utilitarianism n28 reveals how poverty and need are relative to how human beings are differentially situated. In regard to utilitarianism, the concept of utility cannot escape the problem of being unable to measure interpersonal discrepancies, because utility is often a function of how content one is with one's position, regardless of the extent of one's opportunities. In that way, an extremely poor person in a first world country might have a much lower utility than an even poorer person in a third world country despite having higher real income. For example, African American men still have a shorter life expectancy than men from third world countries with far less annual income. In the same sense, a Rawlsian primary good index n29 cannot be taken separately from the needs one must actually require, including the Smithian right to dignity. n30 Extremely poor people may not be able to be functioning individuals if they are ashamed of their status. The full injury of slavery in American history cannot be

understood without realizing that democracy is among the highest values in American society. In context of a democratic society, citizenship becomes a need of the highest order. It is important to recognize the relative valuation in any given context of any given institution. So what do we mean by welfare and need? If we are thinking about it in robust terms, then the cluster of capabilities may have to be expanded or altered in different contexts with varying institutional arrangements. We also have to be clear [*980] about the outcomes, preferring wholistic approaches to piecemeal solutions.

Formulation of an answer to the second question posed at the outset, the role and legitimacy of the government to meet needs, circumscribes the range of discussion in regards to the first question based upon the assumption that the more expansive the answer to the prior question, the more expansive and costly the role of government. This is not necessarily the case. The capabilities approach focuses on outcomes - and when it allocates resources, it does so in a way that may be more efficient than piecemeal programs, and more likely to require less expenditure in the future. Moreover, the capabilities approach is oriented toward the issue of need in such a way as to empower people to meet their own needs. The result is that fewer resources will be required to address the needs of those already in poverty. This point will become clear as we examine the capabilities approach in more detail. If we are serious about dealing with issues of deprivation and poverty, the capabilities approach grounded in membership is the only honest starting place for analysis.

III. Human Capability as Freedom

What is unique about the capabilities approach is the centrality of freedom. It would be a mistake to say that what Sen is proposing is merely a shift in focus designed to recognize the role of institutions or a more cost effective method of poverty avoidance. For Sen, capabilities are both a means and an end.

One of Sen's major points is that a famine is not the consequence of lack of food. "A person may be forced into starvation even when there is plenty of food around if he loses his ability to buy food in the market, through a loss of income (for example, due to unemployment or the collapse of the market for goods that he produces and sells to earn a living)." n31 In this way, famine is not caused by the quantum of food, but the lack of economic power and substantive freedom of individuals and families to buy food. In the same way, simply siphoning funds from tax coffers to the needy does not solve the underlying problem of dependence because of inadequate opportunities and freedom.

[*981] Another observation will bring the issue of famine into focus. Wherever you have robust civic engagement, no matter how little food, you do not have famine. n32 A famine is a consequence of the lack of democracy: lack of capacity of civic engagement by marginalized people. It is on this point that John Rawls comes together with Sen in an interesting way.

When Rawls talks about his first principles that may not be derogated from, n33 what is he talking about? In one sense he is talking about individual freedom: freedom of conscience and religion. But in another sense, and a more important sense for us, he is talking about the capacity to be civically involved - to be involved in the democratic process. One can wonder: Why is it so important to partake in the democratic process when people are starving to death? Rawls in a sense makes the same point: those things will only happen where people are denied effective participation. n34 Those evils are distributed where there is ineffective participation in civic life. n35 This is why, for Sen, development is freedom, particularly civic freedom. n36 Without the space of democracy, people cannot affect economic crises such as famine, and they cannot expand their opportunities for affecting civic discourse. "When people without political liberty or civil rights do not lack adequate economic security, ... they are deprived of [the] important freedoms in leading their lives and denied the opportunity to take part in crucial decisions regarding public affairs." n37 The "constitutive" role of freedom presented here is the primary end of development. It is a general capability of individuals to lead the kind of lives they value. To grasp the full scope of what effectively participating in public life imports, [*982] we need to be clear in what we mean by "freedom," a contested and confounding word.

In Freedom in the Making of Western Culture, Orlando Patterson traces the origins and development of freedom. n38 Several of the things we see in terms of the Athenian and Greek early conceptions of both freedom and democracy are interesting. First, freedom is a derivative of slavery. It is not natural or historical. There was a political context that called it into being to generate it, but perhaps more importantly than its generation was how freedom came to be so highly valued. People came to value freedom, to construct it as a powerful shared vision of life, as a result of their experience of and response to slavery and serfdom.

The first group enslaved in large numbers, and therefore the first group to value individual freedom was women. n39 As women initially valued freedom, men did not care about it. As they developed a concept of freedom, first they developed sovereign, then civic, and finally individual. "[Sovereignal freedom] is the power to act as one pleases, regardless of the wishes of others, as distinct from personal freedom, which is the capacity to do as one pleases, insofar as one can." n40 "Civic freedom is the capacity of adult members of a community to participate in life and governance." n41 It implies a political community of sorts. Civic participation and organized politics first emerged together in Athens. n42 Personal or individual freedom is the "sense that one ... is not being

coerced or restrained by another ... and ... that one can do as one pleases within the limits of other person's desire to do the same." n43

Sen is acutely aware of the subtle distinctions in what is meant by freedom. Sen emphasizes the interrelationship between personal freedom and civic freedom as integral components of a larger whole. n44 In this sense, Sen views freedom as instrumental: each of his enumerated freedoms helps to advance the general capability of a person. Participation in civic life in any meaningful sense is conditioned on a number [*983] of instrumental, personal freedoms. The broader base of individual freedoms, which are constituted by both political liberties and the removal of unfreedoms, expands civic freedom, which serves to open up for broader discussion the possibilities of social and economic development.

"Development consists of the removal of various types of unfreedoms that leave people with little choice and little opportunity of exercising their reasoned agency." n45 This refers to both positive and negative rights. The dominant paradigm often views positive rights as going beyond what society is required to provide. Such a dichotomy is vulnerable to attack on several levels. One of the prevailing assumptions is that the procedural background is just. If this were true, then a capabilities approach would not be necessary, because people would be able to take control of their own lives. Another assumption is that negative rights are less costly and more natural. An approach focused on human capabilities realizes that this is false. As a technical matter, all forms of freedom, positive or negative, are costly because they require enforcement. A fair and carefully rendered judiciary is in the same cost range as a universal program of health insurance. As a conceptual matter, the distinction is irrelevant. A lack of regard for both positive and negative rights results in a deprivation of freedom. Few would argue that elections should be called off because they are too expensive.

Development can be seen, it is argued here, as a process of expanding the real freedoms that people enjoy... . Development requires the removal of major sources of unfreedom: poverty as well as tyranny, poor economic opportunities as well as systematic social deprivation, neglect of public facilities as well as intolerance or overactivity of repressive states. n46

In focusing on the positive or negative rights dichotomy, many often miss the critical role that social opportunities play in permitting development. Social opportunities become institutional necessities if people are going to exercise not only personal freedoms, but also political or civic freedoms. The classic example of enhancing economic growth through social opportunity is Japan. n47 During the mid-nineteenth century, [*984] Japan had a higher rate of literacy than Europe, when industrialization had not yet arrived in Japan but had gone on for several decades in Europe. n48 The early emphasis on literacy and health care provided the human resource capital which enabled massive economic expansion. One of the assumptions underlying the positive and negative rights dichotomy is the idea that there can be a clear line dividing worthwhile policy goals and the sort of expenditure that only richer countries may afford. The example of Japan undermines this assumption, demonstrating how the distinction may be irrelevant under the capabilities approach.

The bottom line is that freedom, for Sen, is instrumental as well as an end. n49 Freedom is the end of development in that it consists in individual agency. A part of this is participation in civic life enabling individuals to lead the lives they have reason to value. Freedom is also a means of development in that it makes possible meaningful civic participation. The directional influence runs two ways. Political freedom expands meaningful civic freedom, which serves to open up for broader discussion the possibilities of social and economic development.

Sovereign freedom, in effect, is the freedom to lord over someone else. There was a huge debate over the freedom of white property owners to own slaves that was expressed in terms of advancing freedom: we need freedom to lord over others. The second kind of freedom was civic engagement or civic freedom. Within the sphere of aristocrats that lorded over the rest of society, there is equality, mutuality, respect, etc.; but in relationship to someone outside the club, there is the right to lord over them. n50 Those who are not part of whichever club we are talking about have no right to regulate their lives. Under this view, not only is there nothing wrong with this, there is something right with it.

There are two powerful assumptions at play. The first assumption suggests that "they" are in some fundamental sense not deserving. That becomes a powerful justification for denying membership not easily overcome by empirical [*985] data. It is either because God has not chosen them, or they are stigmatized. n51 Even if the poor are otherwise good people and it would be efficient to help them, we should not. It is not enough to show that these people are not so bad. We are not supposed to be helping them, so we make up elaborate stories that this is how things are supposed to be.

In modern times, we do not follow the justification of a higher authority, but we remain driven by the story of "otherness," of "not being chosen," hypnotized in a way that justifies the current arrangements. Like Myrdal, Glenn Loury claims that stigmatized inequality may be best understood as an outgrowth of a series of vicious

circles of cumulative causation. n52 This is a recursive process. Because they are stigmatized, we are justified in affording them less membership, dignity, etc. Because they have less, we are justified in stigmatizing them. Loury describes the categorizing process that all humans rationally undergo. We differentiate in order to make sense of our world, and then we draw inferences based upon those distinctions to help us make future decisions. Race, while socially constructed, is not the target of his attack. It is not the objective biological elements of race that matter, it is the social, subjective perceptions associated with a race. Moreover, while the inferences might be rational when analyzing the data or the logic of them, the assumptions which underlie them may not be rational. It is difficult to get at these assumptions; thus they are often taken as given. Indeed, it may be impossible to even make inferences at all without making assumptions first - assumptions that there is rarely reason to question. So the stereotypes passed down, learned, and associated with race may create a feedback loop by which they are perpetuated. If society assumes that institutional arrangements are just, then the further assumption is that the outcomes are also just, and the explanation for why people are in poverty is that it is their own fault. "The illusions of false necessity arise because we surrender to the social world, and then begin to mistake present society for possible humanity, giving in to the ideas and attitudes that make the established order seem natural, necessary, or authoritative." n53 [*986] The assumptions that underpin the conclusions which lead to "otherness" are not dislodged because the incentives are not structured in such a way as to make us question them. Evidence contrary to the assumption is either dismissed or ignored. For example, if wealth is a function of hard work, does that mean that Bill Gates works more than all thirty-five million African Americans combined, because he has more wealth than all combined? n54

The other assumption posited for prohibiting the state from helping proceeds from the first. If "they" are deserving of their position, an assumption which justifies the denial of full membership, then they also must be treated harshly because they are not to be trusted. This second assumption reinforces the first. If we are too liberal with bankruptcy laws, or unemployment insurance, then "these people," who are not members of the club, will rip us off. We have to crack the whip and make them suffer or they will not show up at work - or if they do show up, they will not work to their full potential. Part of this assumption comes from empirical and descriptive patterns; the welfare queen fits this composite: this woman who is black is taking advantage of us - how stupid of us to support welfare when she is driving around in a pink Cadillac. It generates hostility for these people and suggests a bipolar: we have to lord over them. The bases for these arguments or what might be called our membership myths about non-members are that these unfortunate people are not only outsiders but also undeserving. This argument is not available to us in a modern democracy.

IV. A Reconeption of the Citizen

John Rawls' rich conception of civic freedom points to a solution to the problem of otherness. Within his work, Rawls persistently espouses a deep view of civic freedom that goes far beyond casting a vote once every four years. If, for Sen, meaningful civic freedom is dependent upon the removal of unfreedoms and the granting of greater personal freedom, Rawls suggests that it is also dependent upon a notion of political [*987] equality. "Since ancient Greece, both in philosophy and in law, the concept of a person has been that of someone who can take part in, or play a role in, social life, and hence who can exercise and respect its various rights and duties." n55 This normative construction of personhood has been predominant in Western history for over two millennia, yet sadly, for most of that time, personhood was bestowed to limited segments of the populace. The rise of the nation-state created a new political space for personhood (and membership) rooted in citizenship. The effect of this was to limit personhood to citizens. When citizenship was granted universally, based upon liberal notions of the enlightenment, personhood became a presumption bestowed to all citizens at birth, and revoked when they failed to live up to that measure. Only a presumption of equality among citizens enables citizens to create a social bond which "is their public political commitment to preserve the conditions their equal relation requires." n56

Understanding why a political conception of equality is a prerequisite to full citizenship requires a closer examination of what it means to be a member of a human community. Michael Walzer asserts that membership is the primary good that we distribute to one another in human community. n57 While Walzer would agree with Sen about the importance of freedom, it is not above the importance of membership. Membership is older than freedom. It is prior in time and importance. Even tribal societies have membership, and being [*988] an alien to that community is a dishonor associated with social death. Membership is critical because "the state owes something to its inhabitants simply, without reference to their collective or national identity." n58 In this way, membership is distinct from freedom, yet integrally related. Citizenship is certainly a precondition for the exercise of civic freedom, but membership is a critical component to citizenship.

It is therefore understandable that Unger, Rawls, Sen, and those who believe in robust involvement in civic societies suggest that need is defined in terms of being a full member of civic society - not just in terms of poverty. Need is defined in terms of being an effective participant in civic society with a view that all other participants are political equals. Rawls deals with this head on in discussing the differences between a welfare capitalist society and a private property owning democracy. A welfare capitalist society is unjust because it starts off with the premise that the consideration for those who are struggling is to give them just enough to survive and that the major service of our concern is capital.

In welfare-state capitalism the aim is that none should fall below a decent minimum standard of life. []The redistribution of income serves this purpose when, at the end of each period, those who need assistance can be identified. Yet given the lack of background justice and inequalities in income and wealth, there may develop a discouraged and depressed underclass many of whose members are chronically dependent on welfare. This underclass feels left out and does not participate in public political culture. In property-owning democracy, on the other hand, the aim is to realize in the basic institutions the idea of society as a fair system of cooperation between citizens regarded as free and equal. To do this, those institutions must, from the outset, put in the hands of citizens generally, and not only of a few, sufficient productive means for them to be fully cooperating members of society on a footing of equality. Among these means is human as well as real capital, that is knowledge and an understanding of institutions, educated abilities, and trained skills. Only in this way can the basic structure realize pure background procedural justice from one generation to the next. n59

[*989] Rawls is not anti-capital. Instead he suggests that the major focus is and should be democracy. Support we give to private property and capital should be in the service of democracy, not the other way around. In essence, need from the Rawlsian perspective is a need to discover how to make sure that we are all members. The difficulty in getting there is that we have different sectors and different clubs so that those in the elite are willing to extend benefits and considerations to fellow members while they extend a different set of benefits and considerations to those outside the club. This has to be challenged. If we do not challenge it and just assume the need to keep people alive or protect property, we are undermining any good faith effort at meeting human need.

The extension and maintenance of membership to all requires a presumption of equality among citizens in the political sphere. Such a conception of a person and citizen requires social insurance. In the "original position" representatives deciding under a veil of ignorance for their constituents would promise or arrange a minimum level of security or social insurance for all. The possibility that one might be forced unwillingly to withdraw from civic life risks sacrificing the political conception of a citizen as someone who can be free and can participate over a complete life. "The concept of the appropriate minimum is not given by the basic needs of human nature taken psychologically (or biologically) apart from any particular social world. Rather, it depends on the fundamental intuitive ideas of person and society in terms of justice as fairness laid out." n60 In this way the concept of a social minimum is contextual, not logically deducible from the premises of human nature but dependent upon how political society itself is conceived by the accepted political conception of justice.

In line with the notion of an appropriate minimum, Rawls argues for a guarantee of primary goods to all citizens:

primary goods are things needed and required by persons in light of the political conception of person, as citizens who are fully cooperating members of society... . These goods are things citizens need as free and equal persons living a complete life; they are not things it is simply rational to want or desire, or to prefer or even crave. n61

[*990] In other words, the primary goods are required for exercising and enjoying civic and personal freedoms. Therefore, one of the roles of the basic structure is to "provide the background institutions of social and economic justice in the form most appropriate to citizens as free and equal." n62

For this reason, one of Rawl's principles of justice is the difference principle, that social and economic inequalities are to "be to the greatest benefit of the least advantaged members of society." n63 What this specifically means is that the optimum production point of society is where both the more well off and the least well off gain at each unit of production. Beyond the equal justice point of the difference principle, the more well off gain at the expense of the less well off, not reciprocally with the less well off. n64 The reason for such a structure is that it encourages "a sense of being treated fairly in view of the public principles which are seen as effectively regulating economic and social inequalities." n65

If [citizens] who view themselves and their society [as free and equal, and to regard society as a fair system of social cooperation over time] are not to withdraw from their public world but rather to consider themselves full members of it, the social minimum, whatever it may provide beyond essential human needs, must derive from an idea of reciprocity appropriate to political society so conceived. While a social minimum covering only those essential needs may suit the requirements of a capitalist welfare state, it is not sufficient for ... a property-owning democracy in which the principles of justice as fairness are realized. n66

Rawls' view of a primary index of goods is given more substance in replying to a critique from Sen. n67 Rawls claims that his conception of a primary index of goods is convergent with Sen's notion of basic capabilities.

The idea of primary goods is closely connected with the conception of citizens as having basic capabilities, among the most important being the two moral powers. What those goods are depends on the fundamental intuitive idea [*991] of citizens as person with those powers, and with a higher-order interest in their development and exercise. n68

This accords with Sen's view that basic capabilities must be taken into account not only in making interpersonal comparisons, but in laying out a reasonable political conception of justice.

What Rawls and Sen both point to is a redefinition of what it means to be in need. The question is not what do people need to survive; it is what do people need to be a full member of society - and as such have the agency and capacity to become, for Rawls, moral agents with a conception of the good, and for Sen, capable citizens of influencing their own future.

V. Conclusion

At the outset, I briefly sketched a few predominant notions of need. Two models currently animate the discourse. The first model I will refer to generally as the conservative model. This model suggests that people are basically evil (or lazy). n69 As such, force and power are needed to constantly depress the evil, and to motivate people to good. n70 At the core, the conservative model suggests that people are best directed through incentives and disincentives. Harsh prison sentences, strong armies, and the threat of the death penalty are needed to motivate people to behave. This is the Hobbesian model: the state has to mediate the coming out of the state of nature. n71 It was built upon in more sophisticated terms by Freud in Civilization and Its Discontents: it is discontentment that generates our productivity. n72 Unhappy people are driven to create and bring about a better world, or, at the least, are stimulated to think deeply about social conditions and the human predicament. Happy people do not write and prefer not to work or produce anything of importance. Arguably, the Greeks produced the most prolific number of thinkers in human history, and they were among the most discontented.

[*992] In equally sophisticated, but more nuanced terms, the conservative model informs, and actually underpins neoclassical economics. The assumption is that people will pursue their own individual interests, acting and reacting to various incentives and disincentives such as price changes or hunger. Poverty avoidance and need for income stimulate a desire to work, motivating people to forgo further leisure time in favor of income, which may be exchanged for goods and services valued at greater utility than additional leisure time. In pursuing selfish ends, under that model, they increase the welfare of society.

The legitimacy of this model is based upon the assumption, first, that equal opportunity exists and that wealth is a function of hard work. Therefore, those who work hard should not be in poverty. In order to maintain equal opportunity to the next generation, a bare minimum of resources may necessarily be transferred to the poor in order to secure the background legitimacy of the first assumption (in that we do not want children to starve). The second assumption is that structural arrangements are neutral and legitimate. In order to maintain the proper incentives for work, this model suggests that any conception of need has to be mindful of the potential to disincentivize work.

The first assumption is vulnerable to attack in many ways. It ignores that millions work hard in minimum pay jobs and cannot make a living wage. Perhaps more importantly, it ignores that poverty is relative - that it often depends on the relative wealth in the society - and ignores the fact that unfreedoms block opportunities for individuals to improve their lot. In other words, this model tends to ignore the way in which structures inhibit the agency of individuals.

Then there are those who have a more robust conception of need. The liberal model is based upon the assumption that people are essentially good. For liberals, institutions and structures interfere with goodness or create potential inequities. Freeing people from those constraints will allow people to find their goodness. Perhaps the most profound philosopher in recent terms who talks about the goodness of people is Dr. Spock: remove all structures and let the kids run wild; then they will find their natural goodness. n73 Under this [*993] model, one might have a more generous model of need - often associated with a welfare safety net - to help people from experiencing degradation or extreme poverty. The idea is that structures are not always neutral or legitimate, and corrections need to be made for in unfair circumstances. This spurs development of further institutional structures and programs designed to compensate for institutional inequity. This model falters for several reasons. One criticism is that it provides measures which disincentivize behavior that would help get people out of poverty. Further, it ignores that people may both be the products of institutional structures, or become, in some way, oppressed by structures designed to help them. Both models suffer from pluralistic skepticism and ambiguity. However, those two models continue to animate the discussion. n74 Are people basically bad or good?

There is a third alternative, partially set out by late and post-modernists, that our nature, if there is such a thing, is not set. The institutional structures are not distributed in terms of primary goods, but are distributive of self and identity. These institutions and structures produce, in some ways, the very people they are supposed to serve. The realization of institutional non-neutrality and potential formative causation plays nicely into the capabilities approach. Roberto Unger has thought deeply about the notion of what he calls "a formative context." The crucial point that he makes is that the formative context is made up of two critical elements: it is first the "order, framework, or structure of social life" but it is also imaginative. n75 "It consists in a set of enacted preconceptions about the possible and desirable forms of human association: assumptions about what relations among people should be like in different domains of social existence." n76 Unger suggests that in Western democracies we set aside the imaginative element - but perhaps this is not so. In American society our ideals are often shaped by our context in a cycle of causation. The narrative story of the nation's formation [*994] and the founding documents point to an ideal that has been expressed time and again. The context is the framework, but the Constitution inspires the imaginative ideals of the people to make course corrections, striving to those ideals. It is in this way that institutions may also be distributive of self and identify, at the same time that they provide the actual framework in which we live.

When we look at what is happening in society, it is clear that the welfare state is too narrowly framed to begin with, and in discussing the role of the state, we are losing ground. The discussion needs to be broadened on several levels. In terms of geography, perhaps the discussion needs to be on a transnational or global level, such as what is coming out of the United Nations.

As we engage in this discussion, we cannot understand it from only one perspective. It is informed by what we think of the state and the people and what meaning is about. Not only is membership distributed, but meaning itself is.

If we frame the discussion of need in a larger way, not just in terms of a safety net to avoid starvation, but as the capacity of members to participate in the constitution of these institutions and structures themselves, then we may be able to meet human needs. Otherwise, there will always be failure.

Central to this discussion has been the issue of membership. There is an implicit understanding that even after we have identified legitimate social needs and the role of government in responding, we are primarily talking about members. A question that we have not yet addressed is who is a member and who is not a member. Virtually all social theorists recognize that the state has a different obligation to its members than to non-members. n77 There is also an assumption that the state has a legitimate interest in not only responding to its members but also in limiting who can be a member. This question is at the heart of many of the most important social issues that this country has faced or will face. Many people believe that Dred Scott pushed the Civil War onto the national agenda. n78 One way to understand Dred [*995] Scott is that it is about membership in our imagined community. More particularly, could free blacks or slaves be considered part of this community? This was, and is possibly, the most defining case in United States history. Segregation under Jim Crow n79 and later embraced in Plessy n80 is an extension of the same issue. The civil rights movement is essentially an effort to make a practical and legal claim about membership and the rights that attach to membership.

It is also interesting to note that in Dred Scott, the Supreme Court asserted that only the federal government could confer citizenship, not the states. n81 After the Civil War, the Privilege and Immunities Clause of the Fourteenth Amendment attempted to correct Dred Scott and confer citizenship on blacks. n82 But the Supreme Court substantially undermined the citizenship implication of the Privilege and Immunities Clause. In a case about the right to work as an incident of national citizenship, the Supreme Court rendered the Privilege and Immunities Clause ineffective and instead returned the matters of citizenship rights for the free slaves and others back to the states. n83 In Dred Scott, the states were trying to protect the rights of slaves and extend membership to them if they traveled to a free state. The Court found that the states had no authority to extend citizenship, because this is a matter for the federal government. The Privileges and Immunities Clause of the Fourteenth Amendment made it clear that free slaves and others were to be given the privileges and immunities of national citizenship. In the Slaughter-House [*996] Cases, the Supreme Court found that this clause was virtually meaningless, as most of the privileges associated with citizenship were offered by the state. The Slaughter-House Cases have been called the most important and worst cases in U.S. history. n84 Recently, the Supreme Court has found some meaning to the Privileges and Immunities Clause and that there are privileges associated with being a citizen of the United States. But what rights and immunities should be associated with citizenship in the United States? In Brown and Grutter, the Supreme Court strongly suggested that education should be a right for all citizens. n85 And in a democracy, there can be no doubt that voting would also be among those privileges and immunities. n86 What would this reading do to our present understanding of education law? There, the impact on felony disenfranchisement that continues to elude many black, brown, and white felons from full membership in their respective states would have to be reviewed.

In addition to the claim of blacks and other marginalized racial and ethnic groups to be full members of this political community called the United States, there is also the question about new immigrants and their status as members. I cannot fully address these important issues here, but would like to share some thoughts. A number of

writers have asserted that it is the role of the state to protect and help address the social needs of its members. n87 It may be that in the age of global capitalism, the rationale for the boundaries of members and non-members should be reconsidered. Maybe we need some more nuanced gradation besides members and non-members. In a period where capital is increasingly free to move across national boundaries with national and international protection, does it make sense to confine labor to one nation-state with little protections? This may create a structural inequality that both undermines the legitimate role of the state and renders the worker and the citizen unable to [*997] engage effectively in a meaningful discourse about needs. n88

In this article there are a number of issues touched on in thinking about needs and the role of government in addressing those needs. There is skepticism of foundationalism in defining and thinking about needs. n89 This is not a relativistic approach. Instead it entails a much greater reliance and importance on the democratic ideals and the importance on participation. n90 We return then to the questions asked at the beginning of this article. What are our needs and what is the government responsibility to address these needs? These turn out to be interrelated questions about the legitimacy of government as well as the social understanding of need. What I have asserted in this article is that both of these questions are joined around the issue of participation or civil engagement. It is through civil engagement that we identify our social needs, prioritize them, and assign the role of government to actualize them. This does not mean until then we are looking at an empty vessel. Instead, it suggests, in the spirit of Unger, Rawls, Sen, and Walzer, that we recognize that the first good to be addressed is that of membership and the civil participation and engagement that goes with it in a democratic society.

FOOTNOTES:

n1. It would probably not be controversial to assert that in the United States, the government has no affirmative role in meeting our spiritual needs. Even this observation has some complexities that suggest we must be provisional even in making this assertion. We feel relatively sure making this statement because of the agreement that we live in a secular democracy, and a market-oriented society. In a theocracy, there may be less reason for any confidence that the government has no role in meeting spiritual needs. In our society, there are reasons to be more tentative even about the question of spiritual needs despite an immediate inclination to think of this as an obvious place where the government should not be involved. Part of the reason for our unreflected assurance is that in our society there is no positive role for government in addressing our spiritual needs. We accept that we are a secular society where matters of spirituality are private. There are a number of thinkers who are questioning if in fact the secular and spiritual should be or even can be kept separate. See john powell, Lessons from Suffering: How Social Justice Informs Spirituality, 16 St. Thomas L. Rev. (forthcoming 2004). For an excellent discussion of lack and suffering, see generally David R. Loy, The Great Awakening: A Buddhist Social Theory (2003). Loy asserts that the sense of lack is the heart of spiritual questioning that profoundly impacts both our spiritual and secular suffering. See id. The inquiry of whether the government is meeting the needs of its citizens and workers invites a closer look at needs.

n2. One can think of the social welfare system as a safety net that stands to prevent the untimely end of the person. Safety from what? Falling into or out of what?

n3. The political-economic discourse is a tax-and-transfer-style social democracy. Its intellectual background in the political economy of the second half of the twentieth century was the attempt to wed the requirements of a countercyclical management of the economy with a commitment to popularizing consumption opportunities. Its philosophical expression has been a redistributive theory of justice focusing on resource outcomes rather than on institutional arrangements, and on equality rather than on empowerment or greatness.

Roberto Mangabeira Unger, False Necessity, xxxvii-iii (2d ed. 2001).

n4. See generally Robert Nozick, Anarchy, State, and Utopia (1981).

n5. See infra note 10 and accompanying text.

n6. See Bishop John Bramball, The Catching of Leviathan, in Leviathan Authoritative Text Backgrounds Interpretations 279 (Richard E. Flathman & David Johnston eds., 1997).

n7. See Johnson v. McIntosh, 21 U.S. 543 (1823). In this case, Justice Marshall makes it clear that the regime of property is a function of the state and does not precede the state. See id. at 591-92.

n8. See Orlando Patterson, Freedom in the Making of Western Culture 1-2, 10 (1991).

n9. The type of state that Nozick and Hobbes defend can be thought of as a capitalistic state with an instrumental requirement for welfare as opposed to a democratic state. See discussion of Rawls, infra Part II; see also discussion infra Part IV.

n10. "We cannot do without the concept of entitlement because it is fundamental to citizenship. Citizens have rights to which they are entitled by law, and losing this understanding endangers the republic." Linda Gordon, Pitied But Not Entitled 288 (1994).

n11. See Michael Walzer, Spheres of Justice: A Defense of Pluralism and Equality 68 (1983); see also infra text accompanying note 58.

n12. See The Declaration of Independence para. 1 (U.S. 1776); see also Roberto Mangabeira Unger, Passion: An Essay on Personality 11 (1984) ("To gain a higher freedom from the context is to make the context available to the transforming will and imagination rather than to bring it to a universal resting point.").

n13. See Unger, supra note 12, at 7-13. "Context-breaking remains both exceptional and transitory. Either it fails and leaves the pre-established context in place, or it generates another context that can sustain it and the beliefs or relationship allied to it." Id. at 9.

n14. See William Julius Wilson, The Truly Disadvantaged, the Inner City, the Underclass, and Public Policy app. at 165 (1987). Wilson notes that "people unable to make it in the East were advised to go West" where there was an abundance of fertile land. Id. After industrialization, however, this view began to change.

n15. Amartya Sen, Development as Freedom 6 (1999).

n16. Id. at 87.

n17. Id. at 3.

n18. Even the most libertarian view which accepts a role for the state suggests that the protection of property and stability facilitates economic transactions, which are a means to human well-being through the process of economic growth.

n19. United Nations, Human Development Index, available at http://hdrc.undp.org.in/content/hdr/india_extracts_2001/chap1.htm (last visited May 13, 2004).

n20. See Sen, supra note 15, at 4-5.

n21. See id.

n22. See, e.g., Peter Wilensk: The Delivery of Health Services in the People's Republic of China (1976).

n23. See Sen, supra note 15, at 99-104 (presenting data about under-nutrition, infant mortality, female literacy, and life expectancy for Sub-Sahara Africa and India).

n24. See id.

n25. Unger makes the same point: "If massive inequalities are rooted in structural divisions between advanced and backward sectors of the economy, compensatory transfers would also have to be massive to redress them." Unger, supra note 3, at lxviii.

n26. Gunnar Myrdal, The American Dilemma 77 (Transaction Publishers 1996) (1944).

n27. Glenn Loury, The Anatomy of Racial Inequality 52 (2002).

n28. Sen, supra note 15, at 62-63.

n29. See infra note 65 and accompanying text.

n30. See generally Adam Smith, An Inquiry into the Nature and Causes of the Wealth of Nations (Andrew Skinner ed., 1979) (1776).

n31. Sen, supra note 15, at 161.

n32. The right that members can legitimately claim is of a more general sort. It undoubtedly includes some version of the Hobbesian right to life, some claim on communal resources for bare subsistence. No community can allow its members to starve to death when there is food available to feed them ... no government of or by or for the community. The indifference of Britain's rulers during the Irish potato famine in the 1840s is a sure sign that Ireland was a colony, a conquered land, no real part of Great Britain.

Walzer, supra note 11, at 79.

n33. See generally John Rawls, Justice as Fairness (2001).

n34. See id. at pt.IV.

n35. See id.

n36. See generally Sen, supra note 15.

n37. Id. at 16.

n38. See Patterson, supra note 8.

n39. Id. at 50-51.

n40. Id. at 3-4.

n41. Id. at 4.

n42. Id. at 5.

n43. Id. at 3.

n44. See generally Sen, supra note 15.

n45. Sen, supra note 15, at xii.

n46. Id. at 3.

n47. Id. at 41.

n48. Id.

n49. See generally Sen, supra note 15.

n50. This explains our welfare system: there is an elite with a notion of equality among themselves - but for those outside the club, there is a notion of being lorded over. See generally Gordon, supra note 10.

n51. See Max Weber, The Protestant Ethic and the Spirit of Capitalism 160-61 (Talcott Parsons trans., 1930).

n52. Loury, supra note 27, at 52.

n53. Unger, supra note 3, at xx.

n54. See Forbes.com, Forbes World's Richest People 2004, available at http://www.forbes.com/maserati/billionaires2004/LIRBH69.html?passListId=10+passyear=2004+Passlisttype=person+UniqueId=BH69+datatype=person.

n55. Rawls, supra note 33, at 24.

n56. Id. at 132.

The fundamental status in political society is to be equal citizenship, a status that all have as free and equal persons. It is as equal citizens that we are to have fair access to the fair procedures on which the basic structure relies. The idea of equality is, then, of significance in itself at the highest level: it enters into whether political society itself is conceived as a fair system of social cooperation over time between persons seen as free and equal, or in some other way. It is from this point of view of equal citizens that the justification of other inequalities is to be understood. All this enables us to say that in a society well ordered by the principles of justice as fairness, citizens are equal at the highest level and in the most fundamental respects. Equality is present at the highest level in that citizens recognize and view one another as equals. Their being what they are-citizens-includes their being related as equals; and their being related as equals is part both of what they are and of what they are recognized as being by others.

Id.

n57. Walzer, supra note 11, at 31.

n58. Id. at 43.

n59. Rawls, supra note 33, at 139-40.

n60. Id. at 132.

n61. Id. at 58.

n62. Id. at 48.

n63. Id. at 43.

n64. Id. at 62-63.

n65. Rawls, supra note 33, at 57.

n66. Id. at 130.

n67. See id. at 169-76; see also Sen, supra note 15, at 63-65.

n68. Rawls, supra note 33, at 175.

n69. Ken Wilber, Up from Eden 332 (1996).

n70. See id.; see also Thomas Hobbes, Leviathan 93 (Richard E. Flathman & David Johnston eds., 1997).

n71. Hobbes, supra note 70, at 93.

n72. Sigmund Freud, Civilization and Its Discontents (James Stracky ed. & trans., W.W. Norton & Co. 1961) (1929).

n73. See generally Benjamin Spock, Dr Spock's Baby and Child Care (7th ed. 1998).

n74. "The dominant project [either the conservative or the liberal model] trusts "social safety nets,' financed by tax-and-transfer, to redress these inequalities in the short run. It trusts education to prevent them in the long run. Historical experience fails to support either hope." Unger, supra note 3, at 1xviii.

n75. Id. at 58.

n76. Id.

n77. See John Rawls, The Law of Peoples (1999); see also supra notes 57-58 and accompanying text.

n78. See Dred Scott v. Sandford, 60 U.S. 393 (1856).

n79. See The Civil Rights Cases, 109 U.S. 3 (1883).

n80. See Plessy v. Ferguson, 163 U.S. 537 (1896).

n81. See Dred Scott v. Sandford, 60 U.S. 393 (1856).

n82. U.S. Const. amend. XIV.

n83. See The Slaughter-House Cases, 83 U.S. 36, 74 (1872):

The language is, "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." It is a little remarkable, if this clause was intended as a protection to the citizen of a State against the legislative power of his own State, that the word citizen of the State should be left out when it is so carefully used, and used in contradistinction to citizens of the United States, in the very sentence which precedes it. It is too clear for argument that the change in phraseology was adopted understandingly and with a purpose.

Id. In the words of Charles Black Jr., "in the exact etymological sense, the Court annihilated the privileges and immunities of national citizens, insofar as these were to be seen as ordained by the Fourteenth Amendment." Charles L. Black Jr., A New Birth of Freedom 55 (1997).

n84. Black, supra note 83, at 55.

n85. Brown v. Bd. of Educ., 347 U.S. 483 (1954); Grutter v. Bollinger, 539 U.S. 306 (2004).

n86. For a more extensive list, see John Denvir, Democracy's Constitution (2001).

n87. See, e.g., Walzer, supra note 11; supra note 59 and accompanying text; see also Lester C. Thurow, The Future of Capitalism 294 (1996) (arguing that the role of government is to mediate democracy and capitalism).

n88. Unger supra note 3, at cx ("The basic regime should favor a range of solutions encouraging the connected and gradual development of more transnational mobility for capital and labor, rather than leaving capital free and labor unfree."). Unger earlier emphasizes the "extreme contrast between freedom for capital to cross borders and imprisonment of labor within the nation-state." Id. at lv.

n89. For a discussion on the limit of foundational thinking and an alternative, see john powell, Worlds Apart: Reconciling Freedom of Speech and Equality, 85 KY. L.J. 9, 11 (1997):

Most of us operate from one of these narratives rather than the other. When a problem arises, one sees the problem from the narrative or world view in which one lives and then proceeds to analyze the problem from that same narrative. In most instances, people are unaware of the extent to which they operate within a particular conceptual framework or even that there are other, competing frameworks. Obviously, if one is either unaware of alternative narratives or is aware, but simply asserts the priority of one's own conceptual framework, there is no serious engagement between the competing narratives.

Id.

n90. Id. at 94.

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