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Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State

Martha T. McCluskey
State University of New York at Buffalo

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Efficiency and Social Citizenship: Challenging the Neoliberal Attack on the Welfare State[†]

MARTHA T. MCCLUSKEY[*]

I. AFDC 799
A. Reconstructing the Economics of Redistribution 802
1. The Rise and Fall of Keynesianism 802
2. The Triumph of the Neoliberal Double Bind 805
B. Neoliberal Citizenship and Welfare Reform 807
1. AFDC as Moral Hazard 807
2. Double Standard of AFDC's Moral Hazard 808
3. From Double Standard into Market Forces 815
4. Reenvisioning Social Citizenship to Reverse Moral Hazard 817
C. Communitarian Citizenship and Welfare Reform 822
1. Resolving Moral Hazard with Moral Control 823
2. Moral Control as Moral Subordination 825
3. Redistributing Moral Control 828
D. Liberal Citizenship and Welfare Reform 832
1. Resolving Moral Hazard with Freedom from Responsibility 833
2. Freedom from Responsibility as Subordinate Citizenship 835
3. Redistributing Freedom from Responsibility 840
II. WORKERS' COMPENSATION 847
A. Neoliberal Citizenship and Workers' Compensation Reform 850
1. Moral Hazard from Expanded Benefits 850
2. Redistributing Moral Hazard Through Benefit Cuts 851
3. Reenvisioning Employers' Moral Hazard as the Beneficial Market 854
B. Communitarian Citizenship and Workers' Compensation Reform 858
1. Double Standard of Moral Responsibility 859
2. Excusing Employers' Irresponsibility as the Market 861
C. Liberal Citizenship and Workers' Compensation 863
1. Separating Compensation from Responsibility 864
2. Double Standard of Responsibility 866
3. Double Standard of Security 870
III. CONCLUSION 872

Defenders of the welfare state are struggling to revive social citizenship, the theory articulated by British sociologist T.H. Marshall that public well-being in a democratic

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* Professor of Law, State University of New York at Buffalo. E-mail: mcclusk@buffalo.edu.
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society depends on rights to economic security as well as on political and civil rights.[1] Against this social citizenship ideal stands the powerful and pervasive neoliberal (free market) ideology[2] asserting that state *abstention* from economic protection is the foundation of a good society.[3] Neoliberalism, the core of law-and-economics theory,

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1. According to Marshall, civil rights include "the rights necessary for individual freedom—liberty of the person, freedom of speech, thought and faith, the right to own property and to conclude valid contracts, and the right to justice"; political rights include "the right to participate in the exercise of political power, as a member of a body invested with political authority or as an elector of the members of such a body"; and social rights "range from the right to a modicum of economic welfare and security to the right to share to the full in the social heritage and to live the life of a civilised being according to the standards prevailing in the society." T.H. MARSHALL, CITIZENSHIP AND SOCIAL CLASS 10-11 (1950). For examples of recent efforts to apply (and improve) Marshall's theory in the context of debates about the contemporary welfare state, see CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL (Martin Bulmer & Anthony M. Rees eds., 1996) [hereinafter CITIZENSHIP TODAY]; MICHAEL B. KATZ, THE PRICE OF CITIZENSHIP: REDEFINING THE AMERICAN WELFARE STATE (2001); BRIAN S. TURNER, CITIZENSHIP AND CAPITALISM: THE DEBATE OVER REFORMISM (1986); Desmond S. King & Jeremy Waldron, *Citizenship, Social Citizenship and the Defence of Welfare Provision*, 18 BRIT. J. POL. SCI. 415-43 (1988); Will Kymlicka & Wayne Norman, *Return of the Citizen: A Survey of Recent Work on Citizenship Theory*, 104 ETHICS 352 (1994). *See also* Lawrence M. Mead, *Citizenship and Social Policy: T.H. Marshall and Poverty*, 14 SOC. PHIL. & POL'Y 197 (1997) (amending Marshall's theory to support a change from social citizenship rights to social citizenship obligations).

2. "Neoliberalism" refers to the contemporary reincarnation of the nineteenth-century "laissez-faire" liberalism that advanced the primacy of "the market" over "government regulation." *See, e.g.*, DANIEL YERGIN & JOSEPH STANISLAW, THE COMMANDING HEIGHTS 15-16 (1998) (favorably presenting this new "liberalism" as a reassertion of nineteenth-century ideas about the primacy of the market and the importance of property rights); Lisa Philipps, *Taxing the Market Citizen: Fiscal Policy and Inequality in an Age of Privatization*, 63 LAW & CONTEMP. PROBS. 111, 115 (2000) (defining "neoliberalism" and discussing its effect on Canadian tax policy). In American legal scholarship, the term has gained currency primarily to describe how this ideology has been applied to international development policy, particularly the "structural adjustment" programs imposed on Latin America by the International Monetary Fund. *See, e.g.*, Owen M. Fiss, *The Autonomy of Law*, 26 YALE J. OF INT'L L. 517, 518 (2001) (describing neoliberalism as a "program for increasing the wealth of nations"); Elizabeth M. Iglesias, *Human Rights in International Economic Law: Locating Latinas/os in the Linkage Debates*, 28 U. MIAMI INTER-AM. L. REV. 361, 384 (1997) (explaining neoliberalism as a discourse masking and promoting political and economic subordination based on race and class). The term is more commonly used outside of the United States, perhaps in part because American scholars and policy analysts tend to present neoliberal international policies simply as "globalization" (rather than as one choice among many alternatives for structuring the global political economy) and to present neoliberal domestic policies simply as uncontested economics rather than as the product of ideology or political movement.

3. Joel Handler insightfully discusses how the recently powerful conservative economic orthodoxy provides an ideological basis for efforts to undermine social citizenship in the U.S. and Europe. Joel F. Handler, *The "Third Way" or the Old Way?*, 48 U. KAN. L. REV. 765, 796-800 (2000). Handler analyzes three parts of the "reigning message of orthodox liberal capitalism": first, the theory that the efficient market is a matter of neutral, value-free laws; second, that "government" is the problem and privatization, decentralization, and deregulation are the answers; and, third, that victims of poverty are at fault for their problems, not structural

establishes economic efficiency—represented by the "free market"—as the primary route to public well-being.[4] In this view, unfettered market competition produces incentives for maximizing overall resources and individual responsibility, thereby making society better off in the long run in spite of harsh short-term effects on some people.[5]

Supporters of social citizenship should squarely contest this neoliberal ideal at its flawed foundation. Two leading responses to neoliberal ideology, communitarianism and pro-welfare liberalism, both attempt to support economic equity alongside efficiency as a separate and complementary societal value. But the problem with the neoliberal emphasis on efficiency is not that it promotes individual self-interest over community solidarity, or economic growth over social equity. Instead, neoliberalism embraces a racialized, genderized, and class-biased vision of social equity and community solidarity that favors the interests of the most privileged members of society.[6] Welfare state advocates should directly reject, not balance or accommodate,

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economic conditions. *Id.* at 796-97. *See also* ANTHONY GIDDENS, THE THIRD WAY: THE RENEWAL OF SOCIAL DEMOCRACY 13 (1998) (asserting that "one of the most distinctive neoliberal traits" is the belief that the welfare state is "the source of all evils"); Michael Ignatieff, *The Myth of Citizenship*, 94 QUEEN'S Q. 966, 982 (1987) ("It should be clear that the market solution is an attack on citizenship and democracy."); Philipps, *supra* note 2, at 113-14 (criticizing the shift from Marshall's ideal social citizenship to "market citizenship").

4. *See, e.g.*, Alan Greenspan, The Challenge of Globalization, Robert P. Maxon Lecture at George Washington Univ. (Dec. 3, 2001), *in Fed. News Serv.*, Dec. 3, 2001, *available at* LEXIS FEDNEW file (rejecting the view that "free markets" lack moral or civic virtue by explaining that neoliberal policies "reflect the value preferences of consumers," maximize these most-valued resources, promote quality and excellence, and facilitate "greater political freedom"); *see also* Jon D. Hanson & Melissa R. Hart, *Law and Economics*, *in* A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY 311, 312 (Dennis Pattersen ed., 1996) (stating that now "the vast majority of law and economics scholarship assumes without hesitation that the goal of law should be efficiency."). For a discussion of the role of law-and-economics in promoting neoliberalism, see Daniel T. Rodgers, *The Revival of Market Ideology*, *in* THINKING THROUGH THE SEVENTIES (Casey Blake & Kenneth Cmiel eds., forthcoming 2003). This neoliberal idealization of an efficient market fits comfortably with—or is even enhanced by—its approval of a supporting role for "redistribution." *See infra* notes 16-18 and accompanying text.

5. *See* YERGIN & STANISLAW, *supra* note 2, at 13 (reporting the move away from government economic involvement "toward reliance on competition in the marketplace as a more efficient way to protect the public"). For examples of neoliberal legal arguments, see generally RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW (5th ed. 1997); *see also* Steve P. Calandrillo, *Responsible Regulation: A Sensible Cost-Benefit, Risk Versus Risk Approach to Federal Health and Safety Regulation*, 81 B.U. L. REV. 957, 984 (2001) (asserting that regulatory policy should adopt the goal of Kaldor-Hicks efficiency because it "intuitively feels closest to serving our nation's best interests by seeking the greatest good for the greatest number"); John O. McGinnis & Mark L. Movsesian, *The World Trade Constitution*, 114 HARV. L. REV. 511, 521-27 (2000) (confidently asserting as a "well established" premise that neoliberal "free trade"—as regulated by the World Trade Organization—promotes countries' overall social welfare in the long run despite harms to "special interests"). For an opposing view, see PIERRE BOURDIEU, ACTS OF RESISTANCE: AGAINST THE TYRANNY OF THE MARKET 30-31 (Richard Nice trans., 1998) (describing and criticizing the neoliberal message of economic productivity as the ultimate human goal and the route to universal liberation).

6. I do not mean to suggest that the benefits and the harms of neoliberal policies fall

neoliberalism's vision of hierarchical citizenship status promoted in the guise of efficiency.

Citizenship defines relationships between society, government, and individuals: who belongs to the "public" and what obligations and rights membership in that "public" confers.[7] On the surface, neoliberalism claims to trim the role of government so that the state functions primarily as a value-neutral facilitator of individual choices. In this vision, citizens' primary role is to maximize their private rational self-interest as buyers and sellers in market exchanges.[8] Social well-being flows not from government enforcement of moral ideals, but from unimpeded private pursuit of individual preferences and interests.

Accordingly, neoliberal public policy centers on the goal of economic efficiency: maximizing aggregate resources, as represented by the sum of individual cost-benefit calculations in the (presumably free) market.[9] Neoliberalism distinguishes this

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absolutely or strictly along hierarchical class (or gender, race, or other status-based) lines, but only that the privileging of economic elites (structured in part by race and gender) is central to neoliberalism's overall purpose and effect.

7. *See* Ralf Dahrendorf, *Citizenship and Social Class*, *in* CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL 31 (Martin Bulmer & Anthony M. Rees eds., 1996) (defining citizenship as "the rights and obligations associated with membership in a social unit of society, and notably with nationality). J.M. Barbalet describes citizenship as "both a status and a set of rights" and explains that citizenship rights attach to a person "by virtue of a legal or conventional status." J.M. BARBALET, CITIZENSHIP: RIGHTS, STRUGGLE AND CLASS INEQUALITY 15-16 (Frank Parkin ed., 1988). *See also* Linda K. Kerber, *The Meanings of Citizenship*, *in* DISSENT 33, 37 (1997) ("It is in citizenship that the personal and political come together, because citizenship is about how individuals make and remake the state.").

8. *See* Ignatieff, *supra* note 3, at 981 (stating that the rise of market ideal has determined "the very language of political community" so that both left and right political rhetoric "addresses the electorate not as citizens but as taxpayers or as consumers"); Philipps, *supra* note 2, at 115-16 (explaining how just as neoliberalism reimagines the state's role, it reimagines the "terms of citizenship" to focus on "individual self-reliance, competition, and consumer choice"). Journalist Naomi Klein describes growing resistance to what she sees as neoliberalism's substitution of consumerism for citizenship. *See* NAOMI KLEIN, NO LOGO: MONEY MARKETING, AND THE GROWING ANTI-CORPORATE MOVEMENT 441-42 (1999); *see also* Susanna Lobez, *Selling Ourselves Short*, SUNDAY HERALD SUN, Feb. 10, 2002, at 73 (quoting Klein's warning that "'citizens [are] rebranded as empowered consumers who are nothing more than a collection of their shopping habits'"). Another example of the neoliberal transformation of citizenship is the idea that Americans should express their patriotism in response to the attacks of September 11, 2001 by going shopping. *See, e.g.*, Stuart Elliott, *Madison Ave. Grapples with Post-Sept. 11 Era*, N.Y. TIMES, Dec. 11, 2001 at C1.

9. *See* POSNER, *supra* note 5, at 18 (defining efficiency). This definition of efficiency reflects what is more technically called Kaldor-Hicks efficiency: resource allocations in which aggregate gains outweigh aggregate costs (despite losses for some individuals). *See id.* In contrast, Pareto optimality is a more ideal version of efficiency that occurs when resource allocations increase aggregate gains without imposing costs on any individual according to that individual's own subjective cost calculation. *See id.* But true Pareto optimality is at worst a tautology and at best of little use in policy debates. By definition, Pareto improvements are only possible when no policy debate exists—and if a policy truly has no net costs, it would be logical to assume it would already have happened. *See* MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 120 (1987) (describing Pareto efficiency as a "banal" concept); Guido Calabresi, *The Pointlessness*

efficiency goal from the goal of social equity, which represents the redistribution of resources according to particular fairness or equality values.[10] In the conventional view, efficiency is about expanding the societal pie; redistribution about dividing it.[11]

This fundamental—and fundamentally flawed—division between redistribution and efficiency is the linchpin that enables neoliberals to turn social citizenship from a public benefit to a public threat. By distinguishing rights to economic security as "redistribution," those rights become implicitly (if not explicitly) suspect and subordinate.[12] If the free market is by definition the system that maximizes overall societal well-being (and individual freedom), then redistribution—which by definition diverges from that market—inherently risks detracting from overall societal well-being (and individual freedom).[13] Neoliberalism's disadvantage is not, as most critics worry,

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of Pareto: Carrying Coase Further, 100 YALE L.J. 1211, 1212 (1991) ("[A]ny given society is always or will immediately arrive at a Pareto optimal point" without the need for analysis or criticism.). Though some use efficiency narrowly in the sense of wealth maximizing (sometimes limited to monetary gain), I use the concept broadly to encompass nonmonetary "resources."

10. *See infra* notes 16-21 and accompanying text.

11. *See* A. MITCHELL POLINSKY, AN INTRODUCTION TO LAW AND ECONOMICS 7 (2d ed. 1989).

12. *See* Martha T. McCluskey, *Subsidized Lives and the Ideology of Efficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 115, 122-23 (2000) [hereinafter McCluskey, *Subsidized Lives*] (comparing the skewed efficiency versus equity opposition to the skewed equal treatment versus special treatment opposition in equality theory); *see also* Martha T. McCluskey, *The Illusion of Efficiency in Workers' Compensation "Reform,"* 50 RUTGERS L. REV. 657, 717-18 (1998) [hereinafter McCluskey, *Illusion*] (explaining and criticizing the implicit favoring of the efficiency side of the dichotomy). For example, one scholar explains that because T.H. Marshall's social rights count as redistribution, they should be subordinated to political and civil rights. Jytte Klausen, *Social Rights Advocacy and State Building: T.H. Marshall in the Hands of Social Reforms*, 47 WORLD POL. 244, 245 (1995) (ignoring the inherently redistributive nature of political and civil rights).

13. *See, e.g.*, POSNER, *supra* note 5 (giving arguments for the theory that equalizing income through government welfare programs often has efficiency costs); POLINSKY, *supra* note 11, at 127 (concluding that "income redistribution generally *is* costly, whether it is accomplished by the tax and transfer system or by the legal system") (emphasis in original). This is not to say that neoliberalism necessarily rejects redistribution, only that it requires that it be restrained. For example, law-and-economics scholarship has devoted much effort to keeping redistribution's risks safely in place by segregating it in the "tax and transfer system" so that it will not "distort" legal rules. *See* POLINSKY, *supra* note 11, at 9-10, 124-27; Louis Kaplow & Steven Shavell, *Why the Legal System Is Less Efficient than the Income Tax in Redistributing Income*, 23 J. LEGAL STUD. 667 (1994). Of course, law-and-economics reasoning also criticizes the "distorting" effects of using the tax system for redistribution. *See* POLINSKY, *supra* note 11, at 120; Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 613 (1982) (explaining that any *real*—as opposed to theoretical—system of taxation will involve exactly the same kinds of supposedly wasteful behavior changes as direct regulation of behavior). And once redistribution is relegated to the position of direct charity outside the supposed normal operation of law and market, neoclassical economic analysis shows that it must be further restrained to avoid distorting supposedly normal market rights. *See* Part I *infra* (discussing neoliberal criticisms of Aid to Families with Dependent Children, the classic direct transfer program).

its inattention to redistribution,[14] but to the contrary, its very obsession with redistribution as a distinctly seductive yet treacherous policy separate from efficiency.[15]

The preoccupation with extracting redistribution from efficiency grows out of neoclassical economics's early-twentieth-century quest for a formal and objective tool for measuring societal well-being that could establish economic policy analysis as a science.[16] Economic historian Mark Blaug explains that, although this goal of a scientific division between equity and efficiency has proved elusive,[17] without faith in the equity/efficiency distinction, the whole "elaborately constructed apparatus" of modern economic policy evaluation "collapses like a house of cards."[18] From the start, non-neoclassical economists have questioned the fundamental efficiency/equity division as false,[19] and have explained, "[T]he whole point is that global welfare

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14. *See* Hanson & Hart, *supra* note 4, at 311, 330 (reporting that the most common objection to law-and-economics is its failure to consider distribution); Laurence H. Tribe, *Constitutional Calculus: Equal Justice or Economic Efficiency?*, 98 HARV. L. REV. 592, 594 (1985) (criticizing what he describes as law-and-economics's characteristic "disregard of the *distributional* dimension of any given problem") (emphasis in original).

15. For insightful arguments and examples showing that the problem of contemporary legal discourse is not the focus on economics per se, but instead the "dichotomization of economics and politics" as a strategic means of "resist[ing] the democratization of both the state and the economy," see Elizabeth M. Iglesias, *Global Markets, Racial Spaces, and the Role of Critical Race Theory in the Struggle for Community Control of Investments: An Institutional Class Analysis*, 45 VILL. L. REV. 1037, 1072-73 (2000). *See also* Martha T. McCluskey, *Deconstructing the State/Market Divide: The Rhetoric of Regulation from Workers' Compensation to the WTO*, *in* FEMINISM CONFRONTS HOMO ECONOMICUS (Martha A. Fineman & Terençe Dougherty eds., forthcoming) (using literary analysis of the "dangerous supplement" to discuss the relationship of government redistribution to the imagined free market in contemporary economic rhetoric).

16. *See* MARK BLAUG, ECONOMIC THEORY IN RETROSPECT 549-93 (5th ed., Cambridge Univ. Press 1996) (discussing the history of general welfare economics as a struggle to find a measure of efficient outcomes separate from distributive judgments); YUVAL P. YONAY, THE STRUGGLE OVER THE SOUL OF ECONOMICS 150-53 (1998) (explaining contested attempts to construct neoclassical economics as a science using an objective standard of efficiency). By purporting to formally measure efficiency gains separate from distributional changes, the concepts of Pareto optimality and Kaldor-Hicks efficiency helped solidify faith in the distinction by mid-century. *See* BLAUG, *supra*, at 573-79 (discussing Pareto optimality and the Kaldor-Hicks efficiency approach). *See supra* note 9 (defining these concepts).

17. BLAUG, *supra* note 16, at 575 (noting that the "long discussion" of efficiency criteria among various theorists such as Pareto, Hicks, and Kaldor "brought us no further" toward "purely 'positive' grounds" for distinguishing efficiency from equity).

18. *See id.* at 592-93 (discussing the history of welfare economics and accepting its assumption of an equity/efficiency division).

19. *See* LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE 2 (Warren J. Samuels & A. Allan Schmid eds., 1981), *cited and discussed in* NICHOLAS MERCURO & STEVEN G. MEDEMA, ECONOMICS AND THE LAW: FROM POSNER TO POST-MODERNISM 119 (1997); YONAY, *supra* note 16, at 153-56 (discussing early-twentieth-century institutionalist critics of neoclassical positivism); *see also* Calabresi, *supra* note 9, at 1227-28 (distributional analysis is an "inevitable and hence essential" part of efficiency analysis); Duncan Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387, 420 (1981) (explaining

maximization is meaningless."[20] Nonetheless, most mainstream economics and policy analysis continues to take this equity/efficiency distinction on faith and to focus instead on dissecting the relationship between the two separated goals.[21]

With this neoclassical distinction as its ground, neoliberalism asserts that redistributive policies replace individual market freedom that promotes the public gain with paternalist government protection that generally benefits particular groups.[22] From this problematic premise follows the deduction that redistribution tends to be the mark of *non*-citizens or *subordinate* citizens: those who are deemed inadequate to assume the responsibilities of freedom because of their incapacity or incivility.[23] In short, neoliberalism revives the *Lochner*-era view that social citizenship is an oxymoron. During the late nineteenth and early twentieth centuries, courts often ruled that federal constitutional rights of due process and equal protection prohibited social and economic regulation designed to change market conditions affecting workers and consumers.[24] But cases such as *Muller v. Oregon*[25] reasoned that the Constitution only permits legislative protection against market risks (maximium hour regulations, for example) for those who do not count as fully responsible citizens, such as women,

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that "the notion of a 'tradeoff' between the 'hard' datum of efficiency and the inherently subjective, 'political' datum of equity is apologetic nonsense"); McCluskey, *Illusion*, *supra* note 12, at 657 (using the example of workers' compensation to show how the distinction between efficiency and redistribution is not grounded in objective logic or fact, but instead amounts to a rhetorical and political strategy).

20. A. Allan Schmid, *Law and Economics: An Institutional Perspective*, *in* LAW AND ECONOMICS 69 (Nicholas Mercuro ed., 1989).

21. *See* Suzanne Elise Shanahan & Nancy Brandon Tuma, *The Sociology of Distribution and Redistribution*, *in* THE HANDBOOK OF ECONOMIC SOCIOLOGY 733, 734 (Neil J. Smelser & Richard Swedberg eds., 1994) (concluding that the prevailing dichotomy between market distribution and government redistribution appears arbitrary and part of classical Western economic thought's false attempt to construct markets as more natural than governments, but nonetheless accepting this division as fundamental to social science).

22. *See, e.g.*, Richard A. Epstein, *The Proper Scope of the Commerce Power*, 73 VA. L. REV. 1387, 1431 (1987) (questioning child labor legislation as paternalism or as anticompetitive protection of some employer interests at the expense of others). For a discussion and modification of the conventional theory, see Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229 (1998).

23. In his discussions of neoclassical economics in law, Neil Duxbury explains that Milton Friedman qualifies his arguments against government intervention in the market by saying that paternalism is acceptable for those who cannot be responsible individuals, like children and the insane. NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 369 (1995) (citing MILTON FRIEDMAN, CAPITALISM AND FREEDOM 33 (1982, original publication 1962)). T.H. Marshall distinguished twentieth-century social citizenship from earlier efforts to grant minimal social protections detached from the status of citizenship. "The Poor Law treated the claims of the poor, not as an integral part of the rights of the citizen, but as an alternative to them—as claims which could be met only if the claimants ceased to be citizens in any true sense of the word." MARSHALL, *supra* note 1, at 24.

24. *See, e.g.*, Lochner v. New York, 198 U.S. 45 (1905) (striking down maximum hour law as a violation of the Fourteenth Amendment's due process rights).

25. 208 U.S. 412 (1908) (upholding a minimum wage law for women on the ground of their special need for protection).

children, or immigrant miners.[26]

Of course, changing politics and jurisprudence after 1937 repudiated the *Lochner*-era view that social and economic rights were *unconstitutional*, clearing the way for some citizens to exercise their political rights to create a "New Deal" that included extensive labor, consumer, and antipoverty protection. With the demise of *Lochner* came the rise of legislation establishing (limited) social citizenship rights in the United States.[27] From T.H. Marshall's mid-century vantage point, centered on Britain and neglecting pervasive race and gender stratification, such social rights seemed to have taken firm root alongside civil and political rights as essential to a "civilized" society.[28]

In the United States, however, the resounding renunciation of *Lochner* worked to impede as well as to advance the cause of social citizenship. The prevailing jurisprudential criticism of the *Lochner* era centered not so much on its substantive free market ideology as on its procedural choice of judicial over legislative and executive power.[29] The famous ghost of *Lochner* helped stifle enthusiasm for expanding

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26. *Lochner*, which struck down a maximum hour law for bakers, reasoned that

> [t]here is no contention that bakers as a class are not equal in intelligence and capacity to men in other trades or manual occupations, or that they are not able to assert their rights and care for themselves without the protecting arm of the state, interfering with their independence of judgment and of action. They are in no sense wards of the state.

Lochner, 198 U.S. at 57. In contrast, the Court distinguished a case upholding a similar law for miners by explaining that the "character of the employees in such kinds of labor [was] such as to make it reasonable and proper for the state to prevent the employees from being constrained by the rules laid down by the proprietors in regard to labor." *Id.* at 54 (discussing Holden v. Hardy, 169 U.S. 366 (1898)). Similarly, the *Lochner*-era Court upheld antipeonage legislation prohibiting contracts for debt service (enacted in part to address African American involuntary servitude) on the ground that the particular people protected were not capable contractors. Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609, 1650 (2001). *See also* Aviam Soifer, *The Paradox of Paternalism and Laissez-Faire Constitutionalism: The United States Supreme Court, 1888-1921*, 5 L. & HIST. REV. 249 (1987) (discussing *Lochner*-era rulings permitting labor market regulation for sailors, Native Americans, and peons).

27. Important New Deal social and economic rights were designed to primarily benefit white male workers and their families. *See, e.g.*, LINDA GORDON, PITIED BUT NOT ENTITLED: SINGLE MOTHERS AND THE HISTORY OF WELFARE, 1890-1935, at 253-85 (1994); ROBERT C. LIEBERMAN, SHIFTING THE COLOR LINE: RACE AND THE AMERICAN WELFARE STATE (1998). Furthermore, the New Deal legislation actually enacted fell far short of the rights many workers supported. William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 MICH. L. REV. 1, 23-61 (1999).

28. In response to neoclassical economist Alfred Marshall's admonition that "measures designed to raise the general level of civilisation of the workers must not interfere with the freedom of the market," T.H. Marshall answered, "[o]bviously this limitation on policy had since been abandoned. Socialist measures, in Marshall's sense, have been accepted by all political parties." MARSHALL, *supra* note 1, at 80-81. By using the term "civilized" to designate the cultural conditions that citizens should share, in place of Alfred Marshall's ideal of the "gentleman," *see id.* at 7, T.H. Marshall implicitly builds on a racialized ideal even as he rejects an explicitly class-based and gendered vision of citizenship.

29. *See* Cass R. Sunstein, Lochner*'s Legacy*, 87 COLUM. L. REV. 873, 874, 882 (1987) (explaining that in addition to the "received wisdom" criticizing *Lochner* for its "judicial activism," *Lochner* can also be criticized for its substantive choice of a common law baseline for

constitutional rights—and in particular placed social and economic regulation outside constitutional concern.[30] In the U.S., therefore, the kinds of broad social citizenship rights that Marshall envisioned—ensuring basic income security, education, health care, and housing, for example[31]—never became elevated to the status of constitutional rights on par with constitutionalized political and civil rights. Although courts and scholars in the late 1960s and early 1970s took some tentative steps in that direction,[32] by the end of the twentieth century, the accepted wisdom in American law pushed constitutional social citizenship rights "'off the table' and 'off the wall'," as William Forbath and Jack Balkin critically note.[33] Forbath quotes Lawrence Lessig's 1996 comment, for example, that one "uncontested 'background assumption'" of American constitutional law is the principle that "'our constitutional tradition' is indifferent to

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constitutional law).

30. The classic case for the post-*Lochner* rule on economic legislation is *Williamson v. Lee Optical*, 348 U.S. 483 (1955) (establishing the minimal rationality test, which places economic and social regulation outside the scope of judicial scrutiny as long as it is hypothetically rational). *See generally* Robert G. McCloskey, *Economic Due Process and the Supreme Court: An Exhumation and Reburial*, 1962 SUP. CT. REV. 34. The choice to reject the *Lochner*-era restrictions on Congressional powers by restricting individual constitutional rights rather than by expanding constitutional rights for workers was not inevitable, but rather was produced in part by the relative power of legal professionals over grassroots labor activists. James Gray Pope, *The Thirteenth Amendment Versus the Commerce Clause: Labor and the Shaping of American Constitutional Law, 1921-1957*, 102 COLUM. L. REV. 1 (2002) (tracing activists' unsuccessful attempts to construe federal labor legislation as the enforcement of fundamental human rights grounded in the Civil War Amendments).

31. *See* MARSHALL, *supra* note 1, at 48-66 (discussing British social citizenship rights to legal aid, housing, education, and income security).

32. *See Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966) ("Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."); GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 755 (3d ed. 1996) (giving examples of equal protection arguments in the cases *Griffin v. Illinois*, 351 U.S. 12 (1956) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."); William E. Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 FORDHAM L. REV. 1821, 1856-67 (2001) (discussing advocacy for due process rights for welfare recipients); *see also* Frank I. Michelman, *Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) (developing a theory of a constitutional right to "minimum protection").

33. Forbath, *supra* note 32, at 1824; J.M. Balkin, *Agreements with Hell and Other Objects of Our Faith*, 65 FORDHAM L. REV. 1703, 1733 (1997). In contrast, socioeconomic rights are commonly constitutionalized outside of the U.S. and are incorporated into international human rights law. *See* CASS R. SUNSTEIN, DESIGNING DEMOCRACY: WHAT CONSTITUTIONS DO 221-37 (2001) (discussing example of socioeconomic rights in the South African Constitution). However, even where these constitutional or international human rights protections are supported in theory, in practice these rights tend to be irrelevant or ineffective, in part because global financial structures often have increased the costs of enforcing these rights. *See* HEINZ KLUG, CONSTITUTING DEMOCRACY: LAW, GLOBALISM AND SOUTH AFRICA'S POLITICAL RECONSTRUCTION 50 (2000) (noting that the globalized capitalist economy imposes challenges for new movements for democracy, but rejecting the view that democratic nation states are powerless in the face of these international constraints).

'economic inequality.'"[34]

But the rise of neoliberal ideology in the last decades of the twentieth century has done more than throw extra dirt on the grave of *constitutional* social citizenship rights. Neoliberalism digs up a deeper challenge to social citizenship by undermining the legitimacy of *nonconstitutional* rights to economic security for workers, consumers, and families in poverty. To justify their constitutional rulings, *Lochner*-era courts conferred on some economic interests the status of property and liberty rights grounded in prepolitical universal principles while relegating other economic interests to the subordinate status of contingent government policy judgments.[35] *Lochner v. New York*, for example, construed some employers' and workers' interest in making labor contracts unrestricted by maximum work hour laws as a natural right to personal liberty.[36] *Lochner* did not consider, however, whether others' interest in maximum hour laws could also reflect individual political rights or different contractual rights; instead, the court debated only whether the law promoted the legitimate policy of public health or the illegitimate policy of labor market regulation.[37] In an infamous *Lochner*-era case, the New York Court of Appeals invalidated that state's workers' compensation law by claiming such legislation reflected "philosophical or scientific speculation" or perhaps "commendable impulses of benevolence or charity," in contrast to what it claimed was a conflicting "right of property" that "has its foundation

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34. Forbath, *supra* note 32, at 1825 (quoting Lawrence Lessig, *Fidelity and Constitutional Theory: Fidelity as Translation*, 65 FORDHAM L. REV. 1507, 1509-10 (1997)).

35. *See* Sunstein, *supra* note 29, at 884-86 (explaining that *Lochner*'s constitutional theory rests on prior definitions of property and liberty interests as neutral and natural baselines). Sunstein criticizes *Lochner* for naturalizing nineteenth-century common law rights at the expense of statutory rights. *Id.* at 885. But these nineteenth-century common law ideas of property and contract themselves were hardly static or uncontested. *See, e.g.*, MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 (1977) (describing changes and controversies in common law definitions of property and liberty during the nineteenth century); JENNIFER NEDELSKY, PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: THE MADISONIAN FRAMEWORK AND ITS LEGACY 226-27 (1990) (explaining that the *Lochner* era's treatment of common law property rights as prepolitical, sacrosanct limits on government policy coincided with active judicial transformation of these rights in response to historical changes). While this construction of property rights was deeply intertwined with class politics, many scholars have concluded that the purpose and effect of this jurisprudence was more complex than a simple judicial favoring of "big business" over "the people." *See* GREGORY S. ALEXANDER, COMMODITY & PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT, 1776-1970 248-50, 270 (1997) (arguing that this era's constitutional due process decisions fostered a shift toward an understanding of property as market commodity rather than as a device for social ordering).

36. 198 U.S. 45, 53 (1905) ("The statute necessarily interferes with the right of contract between the employer and employees, concerning the number of hours in which the latter may labor in the bakery of the employer."). Of course, this decision stood in the face of a long tradition of heavy regulation of labor contracts in Anglo-American law, and even the nineteenth-century move toward "free labor" was a product of social and economic legislation that paradoxically restricted contractual rights. *See* ROBERT J. STEINFELD, COERCION, CONTRACT, AND FREE LABOR IN THE NINETEENTH CENTURY (2001) (analyzing historical development of regulation of criminal and pecuniary sanctions for breach of labor contracts).

37. *See Lochner*, 198 U.S. at 64.

in the fundamental law."[38] Similarly, *Coppage v. Kansas* invalidated a law forbidding "yellow dog" contracts by characterizing the law as government "interference" with the "nature of things" that necessarily and normally requires contract and property rights to produce "inequalities of fortune."[39]

Mainstream law and policy still rejects *Lochner*'s theory that social citizenship legislation aimed at reducing economic inequality counts as policy that breaches the *Constitution*.[40] Nonetheless, mainstream law has thoroughly embraced the neoliberal framework, built on *Lochner*'s foundations, that counts social citizenship laws as government policy that potentially breaches a naturalized market. Although the mainstream view claims to have debunked the *Lochner*-era myth of prepolitical rights to property and contract, it sustains this myth by generally assuming a prepolitical (or at least apolitical) market.[41] This contemporary myth continues *Lochner*'s substance by contrasting social citizenship's "redistributive" policies with a presumptively normal market distribution, though the ground of the market has shifted from natural "human rights"[42] to natural laws of economics.[43]

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38. Ives v. So. Buffalo Ry. Co., 94 N.E. 431, 439-40 (1911).

39. 236 U.S. 1, 17 (1915).

40. The project of resurrecting *Lochner* is not "off the table" of prominent scholarly discussion or powerful legal activism, though it is still mostly at the margins. For an explicit endorsement of *Lochner*'s theory of economic liberty, see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE LAW OF EMINENT DOMAIN 5 (1985). The Institute for Justice was established in 1991 in part to revive *Lochner*'s theory of economic liberty through the Fourteenth Amendment Privileges and Immunities Clause. *See* Clint Bolick, *Dismantling Liberty's Slaughter-House*, *at* http://www.ij.org/slaughter%5Ffolder/Slaughter_Clint.html (reprinting paper presented 1995). Supreme Court Justice Clarence Thomas affirmed this effort in his dissent in *Saenz v. Roe*, 526 U.S. 489, 527-28 (1999). *See also* William Greider, *The Right and US Trade Law: Invalidating the 20th Century*, NATION, Oct. 15, 2001, at 21 (analyzing new corporate rights to be free from certain economic regulation under Chapter 11 of the North American Free Trade Agreement as part of a systematic legal strategy for restoring *Lochner*-era corporate rights to be free from social and economic regulation); Steve Louthan, Note, *A Brave New* Lochner *Era? The Constitutionality of NAFTA Chapter 11*, 34 VAND. J. TRANSNAT'L. L. 1443, 1445 (2001) (describing "the most significant evisceration of state police power" since *Lochner*).

41. Political theorist Jennifer Nedelsky explains that the Legal Realist critique of *Lochner* has partly taken hold: "Virtually everyone pays lip service to the political nature of the law." NEDELSKY, *supra* note 35, at 255.

> But in ways that remain somewhat mysterious to me, mainstream legal scholarship manages to hold those views and proceed comfortably ahead with . . . presumptions such as the sharp split between the public and the private that are only fully intelligible if law, and property in particular, is something other than a set of policy choices backed by the power of the state.

Id. "[T]he tacit denial that property is a social construct is the foundation for everything from the public/private distinction to the ongoing market versus regulation debate and the debates over redistribution." *Id. See also* Warren J. Samuels, *Commentary: An Economic Perspective on the Compensation Problem*, *in* LAW AND ECONOMICS: AN INSTITUTIONAL PERSPECTIVE 193-94 (Warren J. Samuels & A. Allan Schmid eds., 1981) (criticizing conventional law-and-economics for failing to recognize that "[r]ights are made and remade, through both the law and the market; they are not found").

42. *See Coppage*, 236 U.S. at 17 (describing the "right of private property" and "freedom of

Many have followed T.H. Marshall's lead in imagining this purported opposition between market rights and social rights can be bridged through delicate balancing.[44] But, echoing *Lochner*, neoliberalism threatens such a balance by reducing social citizenship *rights* to *policy* calculations—arguing that claims to such rights obscure the underlying questions about the costs and benefits of particular governmental choices.[45]

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contract" as human rights that the Constitution protects from state interference).

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> The virtually uniform usage treats the distribution arising from market transactions as a given and asks whether reallocating that distribution is justified. . . . Even egalitarian liberals adopt the language that implies that it is rearranging the distribution of "the market" that requires justification. This discourse makes sense only if the rules of the market are not themselves the product of collective choices, but neutral and apolitical.

NEDELSKY, *supra* note 35, at 259. *See also* Warren J. Samuels, *Maximization of Wealth as Justice: An Essay on Posnerian Law and Economics as Policy Analysis*, 60 TEX. L. REV. 147, 168 n.145 (1981) (reviewing RICHARD A. POSNER, THE ECONOMICS OF JUSTICE (1981)) (explaining that the law-and-economics critique of "redistribution" is premised on the "fallacious assumption that distribution . . . is independent of the law"). In his book defending equity over efficiency as a guide to law and policy, Cass Sunstein insists that "markets should be understood as a legal construct" neither natural nor voluntary and that "there is no opposition between 'markets' and 'government intervention.'" CASS R. SUNSTEIN, FREE MARKETS AND SOCIAL JUSTICE 5, 384 (1997). At the same time, Sunstein reinforces *Lochner*'s rhetoric of a choice between market freedom and government constraint by presenting the problem as a matter of weighing the costs of "government interferences" to promote social justice (in part through "command-and-control regulation") against the benefits of "market ordering" which he associates with "flexibility, respect for individual autonomy and initiative, and productive potential." *See id.* at 271, 386.

44. *See* MARSHALL, *supra* note 1, at 9 (explaining that the rise of social rights has not eliminated the market, just kept it within limits); SUNSTEIN, *supra* note 43, at 386 (advocating a balance between "market ordering" and "social justice" that nonetheless gives social justice the priority); Patricia Hewitt, *Social Justice in a Global Economy?*, *in* CITIZENSHIP TODAY: THE CONTEMPORARY RELEVANCE OF T.H. MARSHALL 249, 260 (Martin Bulmer & Anthony M. Rees eds., 1996) (searching for ways to make social rights complementary rather than contradictory to civil rights in the global market).

45. For a discussion criticizing how the prevailing emphasis on cost-benefit analysis dominates and trumps social citizenship's attention to rights, see Robin West, *Rights, Capabilities, and the Good Society*, 69 FORDHAM L. REV. 1901, 1921 (2001). In an example of the neoliberal argument, Klausen reduces social rights to "redistributive policies" by reasoning that social rights are unique in their dependence on a state's fiscal capacity and because they represent not individual freedoms against the state but coercion of other citizens through taxation. Klausen, *supra* note 12, at 245-46. Political and civil rights, however, also inherently depend on substantial government taxing and spending (reliable courts, domestic and international law enforcement, and voting machines are not cheap), as well as on private coercion (property rights confer power to restrict others, not just rights against the state).

A parallel critique of rights from postmodern jurisprudence has perhaps reinforced law-and-economics's selective cynicism about economic and social rights. Postmodern theory joins with law-and-economics in recognizing that rights are regulatory mechanisms that impose costs and restrictions as well as freedoms on their recipients. *See, e.g.*, Katherine M. Franke, *Taking Care*, 76 CHI.-KENT L. REV. 1541 (2001) (using example of regulatory effects of post-Civil War social and economic rights for African Americans to question contemporary feminist advocacy for

The right to health care, for example, boils down to a decision to divert dollars from taxpayers' income or employers' productivity, or perhaps education spending or environmental quality—and therefore is best debated as a calculation of the relative costs and benefits (health and otherwise) of such a policy.[46] Implementing neoliberal ideology, law-and-economics scholarship uses the market yardstick of efficiency—purporting to measure the aggregate net societal benefits—to strike at the legitimacy of social and economic regulation as rooted in subjective moral bromides and partisan politics rather than in rigorous and objective rational principle.[47]

Neoliberalism therefore capitalizes on *Lochner*'s legacy in two ways. First, it inherits the mantle of process-over-substance that embodies the legal system's rejection of *Lochner*—but shifts the measure of neutral process from democratic

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social citizenship rights for family caretakers). *See also* BARBARA CRUIKSHANK, THE WILL TO EMPOWER: DEMOCRATIC CITIZENS AND OTHER SUBJECTS (1999) (exploring how citizenship rights discipline as well as empower the subjects they constitute). In theory, such postmodern analysis could also challenge law-and-economics's claims that objective cost-benefit calculations constitute a freedom-promoting alternative to rights reflecting power distributions fixed in some inevitable natural state beyond the reach of law. But I worry that postmodern legal scrutiny of liberal rights tends not to go far enough to similarly challenge the prevailing neoliberal alternative to liberal rights. Without doing so, postmodern critics risk implicitly promoting the neoliberal illusion that a rights-free zone without (or with fewer) regulatory effects awaits those who reject liberal rights claims. For example, in her criticism of feminist advocacy for greater economic rights for family caregivers, Katherine Franke agrees that the prevailing construction of dependent care as a "private" part of a "natural" family unregulated by state or market is fiction. *See* Franke, *supra*, at 1544. Yet she nonetheless seems to build in this fiction and its mystification of existing economic rights by warning about the disciplinary effects of "inviting greater involvement from both state and market actors" into what she describes as private family rule. *Id. See also* Duncan Kennedy, *The Stakes of Law, or Hale and Foucault!*, 15 LEGAL STUD. F. 327, 327, 357-58 (1991) (criticizing Foucault's postmodernism for incorporating a pre-realist understanding of the law that partly undermines its potential to debunk the (neo)liberal mystification of the market).

46. *See, e.g.*, RICHARD A. EPSTEIN, MORTAL PERIL: OUR INALIENABLE RIGHT TO HEALTH CARE? (1997) (arguing that rights to health care mistakenly obscure inevitable tradeoffs); *see also* Hanson & Hart, *supra* note 4, at 329 (summarizing arguments in defense of the prevailing law-and-economics cost-benefit approach to policymaking). Criticizing the classic law-and-economics arguments about the superiority of cost-benefit calculations as circular reasoning, economist Warren Samuels explains that costs are in turn a function of the existing system of rights. Samuels, *supra* note 43, at 159.

47. *See* Greenspan, *supra* note 4; Armond M. Cohen, *High-Tech Justice*, 38 STAN. L. REV. 919, 922 (1986) (reviewing BRUCE A. ACKERMAN, RECONSTRUCTING AMERICAN LAW (1984)) (criticizing Ackerman for adopting law-and-economics's false positivism by quoting his statements against "muddled efforts to improve upon the invisible hand" and legal realism's "loose talk of 'public policy,' 'unconscionability', 'unequal bargaining power' and the like" and his preference for the "hard analytic work" of scientific policy analysis); *see also* Kennedy, *supra* note 19, at 420 (explaining that "the notion of a 'tradeoff' between the 'hard' datum of efficiency and the inherently subjective, 'political' datum of equity is apologetic nonsense"); Duncan Kennedy, *Cost-Reduction Theory as Legitimation*, 90 YALE L.J. 1275, 1283 (1981) (criticizing cost-benefit analysis for its false scientism and for blocking more realistic approaches to public policy that would go beyond the typical neoclassical economic claim that "real explanation" of "why things are the way they are" is that "they have to be that way").

governance to the market, which supposedly impartially reflects the aggregate of individual subjective preferences.[48] Second, and more covertly, it embraces *Lochner*'s substantive stand by embedding other social and economic rights in a naturalized market as baseline civil rights—and therefore not subject to the scrutiny of economic process.[49]

The recent growth in interest in social citizenship theory, in legal scholarship and beyond,[50] reflects in part a dissatisfaction with the primacy of process ideals in the post-*Lochner* era. Many legal experts and advocates have lost faith, for example, in the

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48. Legal scholar Edward Rubin discusses how legal process theory, which dominated American legal scholarship between the New Deal and the 1970s, resurrected from *Lochner*'s grave the ideal of law's neutrality by presenting the majoritarian political process as the solution to the legal Realist's critique of law as politics. Edward L. Rubin, *The New Legal Process, The Synthesis of Discourse, and the Microanalysis of Institutions*, 109 HARV. L. REV. 1393, 1395 (1996). Rubin traces the demise of this legal process theory to the rise of law-and-economics along with critical legal scholarship (and related strands of critical "outsider" jurisprudence), each of which differently attacked the process school's faith that law can transcend subjective private interests. *Id.* at 1398-403. However, Rubin accepts law-and-economics's basic premise of a nonpolitical resource-maximizing market, and overlooks critical scholars's arguments that market efficiency is incoherent (not just inequitable), because it rests on a false economic positivism that masks the political and distributive goals inherent in "efficiency." *See id.* at 1402, 1430-31 (describing law-and-economics as focused on efficiency goals separable from and potentially complementary to critical scholarship's focus on equality). As a result, Rubin misplaces law-and-economics, both by overstating its distance from the legal process theory's illusion of formal neutrality, and by overstating its proximity to realist and critical scholars' efforts to expose law's formal principles as products of social context that further particular utilitarian goals. For some references to critical scholarship deconstructing efficiency concerns as logically indistinguishable from equality concerns, *see* KELMAN, *supra* note 9, at 142 ("The CLS claim, quite simply, is that there is absolutely no politically neutral, coherent way to talk about whether a decision is potentially Pareto efficient, wealth maximizing, or whether its benefits outweigh its costs."); McCluskey, *Illusion*, *supra* note 12, at 666 n.18, 722 n.256. *See also* DUXBURY, *supra* note 23, at 302-11 (explaining that realism and law-and-economics have only superficial affinity).

49. *See* Iglesias, *supra* note 2, at 384-86 (explaining that neoliberalism aims to make Third World human rights dependent on market wealth, rather than making market wealth dependent on human rights—but that the neoliberal market depends on government protection of elite property rights); Kennedy, *supra* note 13, at 566-70 (explaining the market's so-called freedom of contract as produced from a background of substantive legal rights); Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 AM. U. L. REV. 939, 959 (1985) (explaining that efficient market outcomes are not "natural" but "decidedly artificial and manipulable" and inherently inseparable from distributive policies); Arthur Allan Leff, *Economic Analysis of Law: Some Realism About Nominalism*, 60 VA. L. REV. 451, 480 (1974) (criticizing law-and-economics scholarship for selectively removing some government-enforced distributions of resources from its "economic" scrutiny as rights that form "an unquestionable *grundnorm* upon which to base efficiency analyses"); Samuels, *supra* note 43, at 155-56 (criticizing Richard Posner's claim to "efficiency" as the standard for law and arguing that the concept of efficiency itself depends on unstated normative decisions to treat certain interests as rights).

50. *See, e.g.*, Kymlicka & Norman, *supra* note 1 (discussing recent increase in political theorists' interest in citizenship); *see also* sources cited *supra* note 1.

promise of formal equality principles to ease the divisions and hierarchies that have long snarled the hopes of American democracy.[51] And although many share the neoliberal belief that the majoritarian political process has lost much of its post-*Lochner* luster as a beacon for the public good, many nonetheless find the neoliberal market a pale substitute.[52] For some law and policy analysts, T.H. Marshall's vision of substantive socioeconomic rights has cast new light into the perceived formal emptiness of political and civil rights.[53]

By picking up the thread of social citizenship, and exploring its possibilities for escaping neoliberalism's restraints on the welfare state, I aim to affirm this movement back to substantive values as the ground of law and policy. Yet framing the debate over economic welfare questions as social citizenship risks solidifying the exclusionary boundaries of national citizenship that reflect some of history's biggest moral failures.[54] I intervene in the debate over social citizenship in hopes that T.H. Marshall's vision of citizenship can move beyond its nation-state limits to a vision of inclusive membership in a global human society.[55] As neoliberalism has pursued a vision of global market rights for elite capital owners, questions of social citizenship protecting others' economic security similarly should take on global dimensions.

The supposed triumph of the neoliberal global market[56] brings new urgency to T.H. Marshall's concern with the potential tensions between what he identified as twentieth-century social rights and nineteenth-century market rights.[57] But the debate over the

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51. *See, e.g.*, KENNETH L. KARST, BELONGING TO AMERICA: EQUAL CITIZENSHIP AND THE CONSTITUTION (1989) (proposing a theory of equality centered on eliminating the substantive harms of social caste); ROBERT C. POST, PREJUDICIAL APPEARANCES: THE LOGIC OF AMERICAN ANTI-DISCRIMINATION LAW (2001) (criticizing the dominant liberal and formalist conception of equality).

52. *See, e.g.*, SUNSTEIN, *supra* note 43, at 318-25 (describing the failures of the New Deal ideal of a regulatory state that protects the public interest, but arguing for efficiency-oriented reforms that also preserve and improve democratic processes and public deliberation).

53. *See, e.g.*, Ignatieff, *supra* note 3, at 976 (invoking T.H. Marshall's model of social citizenship as an important correction to "purely formal" notions of civil and political citizenship).

54. *See* Linda Bosniak, *Universal Citizenship & the Problem of Alienage*, 94 NW. U. L. REV. 963 (2000) (criticizing new interest in Marshall's citizenship concepts for failing to address questions of rights for aliens); Nora V. Demlietner, *The Fallacy of Social "Citizenship," or the Threat of Exclusion*, 12 GEO. IMMIGR. L.J. 35 (1997) (detailing the increasing exclusion of resident aliens from welfare programs); Gerald L. Neuman, *Rhetorical Slavery, Rhetorical Citizenship*, 90 MICH. L. REV. 1276 (1992) (criticizing the rhetorical strategy of promoting human rights "by enriching the conception of citizenship" because it risks reinforcing exclusion of noncitizens from important rights).

55. *See* Ignatieff, *supra* note 3, at 984 (advocating expanding citizenship to recognize a universal human subject in a world community and rejecting the old citizenship distinction between citizens and barbarians); Hewitt, *supra* note 44. Powerful national governments, however, are critical to the project of promoting and protecting global human rights. Ignatieff, *supra* note 3, at 984-85.

56. *See* YERGIN & STANISLAW, *supra* note 2, at 16 (reporting the "apparent triumph" of "the market" over government in the newly liberalized global economy).

57. *See* Bryan S. Turner, *Outline of a Theory of Citizenship*, *in* 1 CITIZENSHIP: CRITICAL CONCEPTS 199, 220-21 (Bryan S. Turner & Peter Hamilton eds., 1994) (describing citizenship as "a pressing theoretical issue" in light of global economic changes); Hewitt, *supra* note 44

tensions has focused on the appropriate balance between these rights without sufficiently exploring the underlying question of how this division itself shapes and limits citizenship ideas. From *Lochner* to twenty-first-century neoliberalism, opponents of the welfare state have aimed not just to *defend* the market, but also to *construct* a particular substantive vision of the market—and of political and civil rights—by telling stories that identify some elite economic interests as natural and necessary to the public interest.

The two leading strands of social citizenship arguments in response to this recent neoliberal challenge, communitarianism and pro-welfare liberalism, both mistakenly build on, rather than deconstruct, neoliberalism's *Lochner*-era myth of a natural and neutral market. By taking neoliberal free-market rhetoric at face value, these responses tend to misdirect their attention to reforming social citizenship rights in hopes of preserving that naturalized market while neoliberals (like their *Lochner*-era predecessors) actively restructure the market itself.

First, communitarian critics tend to misconstrue neoliberalism as a project to promote individual freedom and value-neutral economics at the expense of social responsibility and community morality. Many communitarians argue that a new emphasis on public morality and individual obligations is the key to renewing or revising social citizenship. But this communitarian defense of the welfare state fails to understand that neoliberal efficiency *redistributes* rather than *rejects* community responsibility and moral commitments.

Second, contemporary pro-welfare liberals misconstrue the neoliberal project as one that favors overall public well-being at the expense of individuals who lose out in the market. These pro-welfare liberals argue that a good society requires attention to shorter-term individual well-being, as well as to the longer-term aggregate gains of the market. This view attempts to revive social citizenship by striking a balance between the purported aggregate concerns of market efficiency and the individualized concerns of social equity. But this liberal response to neoliberalism fails to understand that neoliberal efficiency goals do not objectively promote the overall good at the expense of some individuals. Instead, neoliberalism promotes a vision of the public good based on the interests of the wealthiest individuals at the expense of the majority.

This Article will explore the neoliberal arguments which have helped mobilize restrictive reforms in two U.S. income security programs during the 1990s: first, Aid to Families with Dependent Children ("AFDC"), and second, workers' compensation. These two programs represent opposite sides of the line between redistribution and efficiency: AFDC is the classic redistributive program, while workers' compensation is the classic model of an efficiency-based welfare scheme. In both of these programs, however, the division between efficiency and redistribution serves to undermine rationales for social citizenship. For each program, I will analyze how neoliberal reform arguments use this division to obscure and reinforce a hierarchical vision of citizenship.[58] I will then examine how communitarianism and pro-welfare liberalism

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(discussing challenges facing social citizenship rights as global market rights expand).

58. T.H. Marshall believed the term "citizenship" inherently expressed egalitarian principles. "Citizenship is a status bestowed on those who are full members of a community. All who possess the status are equal with respect to the rights and duties with which the status is endowed." MARSHALL, *supra* note 1, at 28-29. I follow others who instead recognize that citizenship ideals may not only exclude noncitizens, but also can embrace status hierarchies in

respond to neoliberal reform efforts. I argue that, for each social program, both of these citizenship visions end up reinforcing, rather than resisting, the antiegalitarian values of neoliberalism.

I. AFDC

In the United States, the debate over social citizenship has focused on the former federal program known as AFDC, which provided income support for single parent (and some unemployed two-parent) families in poverty. AFDC developed from the 1935 Social Security Act's program called Aid to Dependent Children ("ADC");[59] it then expanded in the 1960s and early 1970s as part of the Great Society's "war on poverty."[60] In its early years, political and public opinion largely (though tenuously) accepted ADC as a program consistent with social citizenship ideals on the theory that, by providing economic security for children, ADC would cultivate and protect the future citizens on whom society's long-term well-being depends.[61] The government committee that initiated the plan for ADC explained that freeing mothers from wage earning would help them "rear [their children] into citizens capable of contributing to society."[62] A congressman explained the value of ADC (along with other child welfare programs) by imagining a "careworn, dejected widow" kissing away her children's tears as she tells them they will now have the financial aid to buy books and clothes so that they can go to public school and Sunday School.[63] A 1946 government handbook

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which duties and rights are distributed unequally among members of different societal groups. *See* ROGERS SMITH, CIVIC IDEALS: CONFLICTING VISIONS OF CITIZENSHIP IN U.S. HISTORY 2 (1997) (analyzing a long history of American law "shot through with forms of second-class citizenship, denying personal liberties and opportunities for political participation to most of the adult population on the basis of race, ethnicity, gender, and even religion"); CITIZENSHIP TODAY, *supra* note 1, at 275 (criticizing Marshall for failing to recognize the prevalence of partial citizenship status, particularly as applied to women).

59. *See* GORDON, *supra* note 27, at 253-85 (discussing the development of the legislation producing ADC).

60. *See* MICHAEL K. BROWN, RACE, MONEY AND THE AMERICAN WELFARE STATE 205-322 (1999) (analyzing the development of the 1960s War on Poverty); *see also* RICKIE SOLINGER, BEGGARS AND CHOOSERS: HOW THE POLITICS OF CHOICE SHAPES ADOPTION, ABORTION AND WELFARE IN THE UNITED STATES 145 (2001) (summarizing the dramatic increase in AFDC expenditures and number of recipients from 1958 to 1977).

61. *See* GORDON, *supra* note 27, at 253-55, 293-303 (stating that ADC was among the least controversial parts of the 1935 Social Security Act because it was literally equated with the presumed benefits of motherhood); *see also* Linda C. McClain, *Care as a Public Value: Linking Responsibility, Resources, and Republicanism*, 76 CHI.-KENT L. REV. 1673, 1702 (2001) (explaining the idea of social contribution as "an important root" of AFDC). Nonetheless, this consensus in favor of ADC did not prevent it from being designed to provide meager benefits as a second-tier welfare program that reflected and reinforced women's subordinate citizenship status.

62. 50TH ANNIVERSARY EDITION OF THE REPORT OF THE COMMITTEE ON ECONOMIC SECURITY OF 1935 AND OTHER BASIC DOCUMENTS RELATING TO THE DEVELOPMENT OF THE SOCIAL SECURITY ACT 56 (Alan Pifer & Forrest Chisman eds., 1985).

63. GORDON, *supra* note 27, at 254-55 (quoting 79 CONG. REC. 5862 (1935) (statement of Rep. Claude Fuller of Arkansas)).

on ADC emphasized the social value of giving an impoverished mother the opportunity to choose to reject wage work in favor of "staying at home to care for her children."[64]

But by the end of the century, AFDC had become a prominent symbol of social pathology inimical to good citizenship.[65] In 1996, the movement for "welfare reform" culminated in the federal Personal Responsibility and Work Opportunity Reconciliation Act,[66] which eliminated AFDC and substituted a more limited and restrictive welfare program, Temporary Assistance to Needy Families ("TANF").[67]

What transformed AFDC from a means to social citizenship to its antithesis? Many scholars have analyzed how popular and political support for AFDC eroded as the program moved away from its original discriminatory focus on white widows and their children to provide increased benefits to women of color and to nonmarital children of all races—a change that accelerated with the civil rights movements of the 1960s.[68] In short, the story of shifting political support for AFDC exemplifies how dominant visions of citizenship in the United States link economic rights to race, gender, and sexual status.[69] The persistently powerful view that the good society rests on maintaining the political, economic, and social dominance of white men tends to limit political support for broad-based economic equality.[70] The original ADC's minimal

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64. BUREAU OF PUB. ASSISTANCE, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, HANDBOOK OF PUB. ASSISTANCE Part IV, §§ 3401, 3401.1 (1946), *discussed in* SOLINGER, *supra* note 60, at 148.

65. *See* KATZ, *supra* note 1, at 1 (describing AFDC as the most disliked public program in America by the 1990s); DOROTHY E. ROBERTS, SHATTERED BONDS: THE COLOR OF CHILD WELFARE 174 (2002).

66. Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, 1996 U.S.C.C.A.N. (110 Stat.) 2105.

67. *See* KATZ, *supra* note 1, at 317-28 (discussing the political and social events that led Congress to end AFDC and enact TANF).

68. *See* KENNETH J. NEUBECK & NOEL A. CAZENAVE, WELFARE RACISM: PLAYING THE RACE CARD AGAINST AMERICA'S POOR 17-35 (2001) (analyzing the scholarly literature attributing declining support for welfare to gendered racism); JILL QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 117-34 (1994) (analyzing how the 1960s expansions of AFDC were undermined by white resistance to African American struggles for equality); ROBERTS, *supra* note 65, at 16 (explaining that beginning in the 1960s, "[t]he image of the welfare mother changed from the worthy white widow to the immoral Black welfare queen.").

69. *See* Dorothy E. Roberts, *Welfare and the Problem of Black Citizenship*, 105 YALE L.J. 1563, 1566 (1996) ("Black citizenship is at once America's chief reason for and impediment to a strong welfare state."); *see also* CHARLES NOBLE, WELFARE AS WE KNEW IT: A POLITICAL HISTORY OF THE AMERICAN WELFARE STATE 111-15 (1997) (analyzing how race played a "'bridge' role" in breaking apart the New Deal coalition and shifting popular opinion against 1960s welfare state expansions).

70. *See* QUADAGNO, *supra* note 68, at 4-5 (concluding that Americans have sacrificed an adequate welfare state as the price of excluding African Americans from the national community); NEUBECK & CAZENAVE, *supra* note 68, at 38 (concluding that all poor people are hurt by the fact that "many whites today will not lend any support to government programs that they even suspect might be targeted at helping 'those undeserving' black people"); *id.* at 31 (summarizing their thesis that the stigmatization of African American women on welfare is a part of a process of racial control to defend white hegemony and patriarchy).

support targeted at the marital children and widows of white men somewhat eased economic inequality among white families while maintaining a social order stratified by race, gender, and sexuality.[71] Efforts to expand AFDC's support for families of color and for white women and children outside of male controlled families directly threatened this hierarchical social order.[72] White supremacist and misogynist politics, media images, and popular prejudices—both intentional and unconscious—have been central to efforts to restrict AFDC from the 1960s through the 1990s.[73]

Nonetheless, facially neutral rationales have been critical to the political success of efforts to change AFDC from an accepted part of social security to a major social threat. It is this ostensively neutral ground that I aim to excavate. In particular, a change in prevailing economic ideology has covered and legitimated caste-based opposition to ADFC by making race, gender, and class stratification seem scientifically justified as "efficient."

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71. For descriptions of the pervasive race and gender discrimination in ADC, the precursor to AFDC, see GORDON, *supra* note 27, at 275-85; LIEBERMAN, *supra* note 27, at 118-61; NEUBECK & CAZENAVE, *supra* note 68, at 46-59; QUADAGNO, *supra* note 68, at 119-20.

72. *See, e.g.*, QUADAGNO, *supra* note 68, at 128 (explaining that Nixon's proposed family income support expansion failed because Southern politicians recognized its potential to undermine black subordination in southern labor markets and in other political institutions of white privilege); George Gilder, *The Coming Welfare Crisis*, 11 HERITAGE FOUND. POL'Y REV. 24, 26 (1980) (stating that the "most fundamental" problem with AFDC is that it tends to "destroy the key role and authority of the father").

73. In the 1960s, AFDC benefit restrictions were used as part of explicit strategies by white politicians to maintain racial segregation and white political dominance in Louisiana, Newburgh, New York, and Washington, D.C. NEUBECK & CAZENAVE, *supra* note 68, at 69-114. The prevailing media images of the poor changed from white to black in 1965, right after the 1964 War on Poverty and Civil Rights legislation (and far out of proportion to the actual racial distribution of poverty). *See* MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 113-16 (1999) (surveying magazine pictures of the poor in *Time*, *Newsweek*, and *U.S. News & World Rep.* from 1950 through 1992 and finding an increase in pictures of blacks from 27% in 1964 to 49% in 1965). From the mid-1960s through the 1990s, the mass media continued to disproportionately identify welfare use with African Americans and to single out African Americans to illustrate negative coverage of welfare (especially welfare fraud) but to use European Americans to illustrate the deserving poor. *See id.* at 121-32. Polling data for the late 1980s through the 1990s show persistent (and sometimes increasing) white stereotyping of African Americans as lazy, unwilling to work, and undeserving of welfare. NEUBECK & CAZENAVE, *supra* note 68, at 133-34 (summarizing various surveys); Roberts, *supra* note 69, at 1566 ("white Americans have resisted the expansion of welfare precisely because of its benefits to Blacks"). For a discussion of how discussions of AFDC policy have relied on and reinforced patriarchal ideology, see MARTHA ALBERTSON FINEMAN, THE NEUTERED MOTHER, THE SEXUAL FAMILY AND OTHER TWENTIETH CENTURY TRAGEDIES 106-25 (1995); SOLINGER, *supra* note 60, at 67-68; GWENDOLYN MINK, WELFARE'S END 36-42, 79-87 (1998).

A. Reconstructing the Economics of Redistribution

1. The Rise and Fall of Keynesianism

Defenders and critics across the political mainstream traditionally have agreed that AFDC is a classic example of a policy that represents government redistribution rather than market efficiency.[74] However, AFDC's rise and fall tracks a dramatic change in prevailing economic views about the relationship between these two apparent goals. As part of the 1935 Social Security Act's income support programs, ADC developed under the growing influence of Keynesian economics, which dominated U.S. theory and policy from the mid-1930s through the early 1970s.[75] Keynesianism accepted the neoclassical economic premise of a scientific division between redistribution and efficiency, but it modified neoclassicism's tendency to support laissez-faire "free market" policies by repositioning equitable redistribution as a means *toward* economic efficiency.[76] In particular, Keynesianism predicted that the size of the overall economic pie (efficiency) sometimes could be increased by aggressive public spending aimed at increasing income among the working class and poor.[77] According to Keynes, under certain conditions, this increased income would promote mass consumption—a rise in demand—that would lead to expanded production and investment.[78] As historian Alan Brinkley has explained, policymakers in the late 1930s and early 1940s "fused the idea of the welfare state to the larger vision of sustained economic growth by defining social security mechanisms as ways to distribute income and enhance purchasing power."[79] Embracing the theory it would reject a half-century later, the 1944 Democratic Party platform presented aggressive spending on social welfare programs

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74. *See, e.g.*, ALAN S. BLINDER, HARD HEADS, SOFT HEARTS: TOUGH MINDED ECONOMICS FOR A JUST SOCIETY 28 (1987) (noting AFDC as an "explicitly redistributive" policy).

75. Keynesianism is named for the work of John Maynard Keynes, especially his book THE GENERAL THEORY OF EMPLOYMENT, INTEREST, AND MONEY (1936). *See* Alan Brinkley, *The New Deal and the Idea of the State*, *in* THE RISE AND FALL OF THE NEW DEAL ORDER, 1930-1980 96-100 (Steve Fraser & Gary Gerstle eds., 1989) (describing how, in his second term, President Roosevelt justified new government economic protections for workers as beneficial to business, reflecting a shift toward what would become known as Keynesian economic ideas); *see also* BLAUG, *supra* note 16, at 642 (stating that "[w]ithin the space of about a decade, 1936-1946, the vast majority of economists throughout the Western world were converted to the Keynesian way of thinking"); GODFREY HODGSON, THE WORLD TURNED RIGHT SIDE UP: A HISTORY OF THE CONSERVATIVE ASCENDANCY IN AMERICA 186-203 (1996) (describing the challenges to Keynesianism during the late 1960s and early 1970s that led to its demise).

76. *See* YONAY, *supra* note 16, at 10-11 (summarizing historical arguments about Keynesianism as both a revolution against and a continuation of neoclassicism).

77. *See* Brinkley, *supra* note 75, at 97-98 (explaining that, although government subsidies had been a central pre-New Deal strategy for promoting economic growth, Keynesian policies shifted the focus of government economic development subsidies from production (capital owners and farmers) to consumption (workers and the poor)).

78. For a summary of Keynes's theory of how consumption can drive economic growth, see Amy Koritz & Douglas Koritz, *Checkmating the Consumer: Passive Consumption and the Economic Devaluation of Culture*, 7 FEMINIST ECON. 45, 50 (2001).

79. Brinkley, *supra* note 75, at 109.

as a central means to overall prosperity.[80]

But in the 1970s, amidst global economic changes that confounded standard Keynesian policy prescriptions and amidst a white backlash against government support for racial equality, a well-funded neoliberal movement coalesced to position efficiency more firmly against equity.[81] This movement aimed to replace Keynesian demand-side government stimulus policies with increased emphasis on "private market" incentives and "supply-side" stimulus policies, including tax cuts, deregulation of business, reduced government social spending, and constricted money supply.[82] This newly prevailing economic theory predicted that "free market" policies benefiting wealthy capital owners at the expense of others would promote economic growth that would, in the long run, trickle down to benefit society as a whole.

While claiming mathematical ground, anti-Keynesian economic ideas drew on and helped refurbish moralistic and antiegalitarian resistance to the 1960s erosion of a social order grounded in racial and sexual control.[83] For example, in 1977, Nobel Laureate economist James Buchanan and coauthor Richard Wagner warned that the Keynesian policies favoring inflation over unemployment contributed to "increasingly liberalized attitudes toward sexual activities, a declining vitality of the Puritan work ethic . . . [and the] explosion of the welfare rolls."[84] Anti-Keynesian economic rhetoric about the failures of "big government" took root in a sociopolitical context that linked a strong federal government with equal protection for African Americans (in contrast,

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80. *Id.* at 110.

81. *See* HODGSON, *supra* note 75, at 186-215 (explaining "The Strange Death of John Maynard Keynes"); ROBERT KUTTNER, EVERYTHING FOR SALE 34-35 (1997) (describing the intellectual counterrevolution of the 1970s). Godfrey Hodgson describes how major Fortune 500 corporations formed the Business Roundtable in 1972, which joined with a group of conservative foundations to attack Keynesian economic policies and to instead advance the interests of wealthy capital owners. HODGSON, *supra* note 75, at 206-08. For a summary of conservative think tanks' effective marketing of opposition to Keynesian welfare state policies, see THOMAS B. EDSALL & MARY D. EDSALL, CHAIN REACTION: THE IMPACT OF RACE, RIGHTS & TAXES ON AMERICAN POLITICS 167 (1991); KATZ, *supra* note 1, at 21-23; JEAN STEFANCIC & RICHARD DELGADO, NO MERCY: HOW CONSERVATIVE THINK TANKS AND FOUNDATIONS CHANGED AMERICA'S SOCIAL AGENDA 82-95 (1996). For an analysis of Keynesianism's failures as a problem of insufficient rather than excessive attention to equity, see James Crotty, *The Rise and Fall of the Keynesian Revolution in the Age of the Global Marketplace*, *in* CREATING A NEW WORLD ECONOMY 163-80 (Gerald Epstein et al., eds. 1993).

82. HODGSON, *supra* note 75, at 194-203 (describing promotion of antitax theories and monetarism); *see also* DANIEL T. RODGERS, THE REVIVAL OF MARKET IDEOLOGY IN THINKING THROUGH THE SEVENTIES (Casey Blake & Kenneth Cmiel ed., forthcoming 2003). Some of the supply-side policies and theories were quickly discredited, but the general shift in economic theory away from Keynes persisted. *See* HODGSON, *supra* note 75, at 214.

83. *See* HODGSON, *supra* note 75, at 213 (discussing the "interweaving of developments in the world of academia and the intellectuals, on the one hand, and the turning tide of national politics"). For discussions of the centrality of mathematical reasoning to economics in the second half of the twentieth century, see Robert M. Solow, *How did Economics Get That Way and What Way Did it Get?*, J. AM. ACAD. ARTS & SCI. (Winter 1997) 55-56; YONAY, *supra* note 16, at 185-90.

84. JAMES M. BUCHANAN & RICHARD E. WAGNER, DEMOCRACY IN DEFICIT 64-65 (1977) (discussed and criticized in BLINDER, *supra* note 74, at 50-51).

Keynesianism had flourished during a period when the growth in the federal government often accommodated and sometimes strengthened white supremacy).[85] From the late 1970s through 1990s, a substantial portion of prominent experts and popular opinion targeted criticism of government spending toward the few (and comparatively meager) programs disproportionately aiding racial minorities.[86] Right-wing political activists strategized to join this new economic policy with conservative social policies as a means of building a new coalition between wealthy beneficiaries of "free market" economics and working-class white men threatened by race and gender equality.[87] Robert Kuttner observes that economic scholarship alleging a scientific basis for favoring resource distribution through "free markets" rather than "politics" was often heavily subsidized by elites who were simultaneously engaging in concerted political action to redistribute government power in their favor.[88]

Well-organized and well-funded lobbying by organized capital and corporate interests helped drain political support for government antipoverty programs, for example by promoting policies shifting more of the tax burden for welfare programs from corporations and capital owners to low and moderate income workers.[89] As newly

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85. *See generally* NOBLE, *supra* note 69, at 111-15 (explaining how white opposition to the spread of the civil rights movement helped promote resistance to federal government spending, weakening support for New Deal liberalism); QUADAGNO, *supra* note 68 (showing how a white backlash against the civil rights movement defeated attempts to extend New Deal government antipoverty spending); *see also* SOLINGER, *supra* note 60, at 142-43 (suggesting that, as federal government spending became linked to the civil rights movement, many white Americans came to identify federal social programs with the negative image of the "welfare queen").

86. *See* EDSALL & EDSALL, *supra* note 81, at 152-53 (analyzing public opinion poll data to explain antigovernment sentiment in 1980 as white opposition to programs specifically perceived as aiding Blacks and Hispanics); ROBERT RECTOR & WILLIAM F. LAUBER, AMERICA'S FAILED $5.4 TRILLION WAR ON POVERTY 44 (1995) (focusing discussion in this highly influential think tank paper almost entirely on AFDC while combining its relatively small costs with many other welfare state programs to come up with enormous cost figures); STEFANCIC & DELGADO, *supra* note 81, at 82-95 (analyzing think tanks and foundations that promoted intellectual experts' attacks on AFDC in particular). The Reagan Administration's social spending cuts were focused on the programs serving a large percentage of African American beneficiaries and often employing a large percentage of African American staff. EDSALL & EDSALL, *supra* note 81, at 192. In contrast to conservative intellectuals, experts and their funders more sympathetic to welfare state programs may have devoted less effort to promoting programs like AFDC associated primarily with African Americans (in part out of belief in the need to accommodate racism or sexism and to instead focus on more universalist welfare strategies). *See, e.g.*, BLINDER, *supra* note 74 (making unemployment reduction the centerpiece of his "soft-hearted" answer to economic insecurity and defending government social spending without discussing race or gender inequality or AFDC in particular); *see* Roberts, *supra* note 69, at 1588-93 (summarizing and criticizing liberals' universalist strategy for defending AFDC).

87. *See* EDSALL & EDSALL, *supra* note 81, at 141 (giving the example of a 1977 speech by Ronald Reagan on the importance of linking conservative economic and social issues).

88. *See* KUTTNER, *supra* note 81, at 341-42 (criticizing public choice and law-and-economics theories).

89. *See* NOBLE, *supra* note 69, at 129 (noting that, since the 1960s, both political parties have adopted this upwardly redistributive change in the tax burden); *see also* EDSALL & EDSALL, *supra* note 81, at 160-61 (giving data showing how this shift in the tax burden helped Republicans and also redistributed the tax burden from whites to blacks during the 1980s).

mobilized and newly mobile employers seized a larger share of economic gains from workers,[90] influential pro-welfare liberal intellectuals joined conservatives in blaming most Americans' economic insecurity on government intervention in the market rather than on the particular market and government changes driving American 1970s stagflation.[91] By 1980, as historian Michael Katz notes, "Keynesian economics, which had sustained the welfare state, appeared dead."[92] A new consensus has formed for the view that social welfare programs generally exact a tradeoff from overall economic growth—though many still disagree about the degree to which equity should be sacrificed for efficiency.[93]

2. The Triumph of the Neoliberal Double Bind

This post-Keynesian economic orthodoxy continues to present a policy choice between the goals of efficiency and redistribution, now simply rearranged as generally competing values.[94] But neoliberal ideology, which embraces efficiency as the superior goal, recognizes and reinforces an implicit double bind in that choice.[95] The neoclassical framework inherently devalues redistribution as a goal bound to fail.[96] Based on the definitional opposition between redistribution and efficiency, neoclassical economics posits that redistributive policies redirect resources away from efficient allocations that maximize aggregate resources to instead increase the share of resources received by a particular segment of society. But, in exchanging a bigger "pie" overall for a bigger slice for some, the prevailing economic theory predicts that redistributive policies will affirmatively increase overall costs by producing incentives for further inefficiency. Distorted market price signals risk shrinking the "pie" even more. As a result, the beneficiaries of the redistribution may end up with a smaller slice

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90. *See* NOBLE, *supra* note 69, at 106-08; *see also* HODGSON, *supra* note 75, at 302-04.

91. *See* KUTTNER, *supra* note 81, at 34-38 (discussing how liberal intellectuals joined conservatives in rejecting Keynesianism and promoting the belief that free markets are superior to government intervention).

92. KATZ, *supra* note 1, at 24 (citing HODGSON, *supra* note 75, at 214).

93. *See* KUTTNER, *supra* note 81, at 35-37 (describing ARTHUR OKUN, EQUALITY AND EFFICIENCY: THE BIG TRADEOFF (1975) and CHARLES SCHULTZE, THE PUBLIC USE OF PRIVATE INTEREST (1977); *see generally* ROBERT KUTTNER, THE ECONOMIC ILLUSION (1984) (challenging Okun's assumed equity/efficiency tradeoff).

94. *See, e.g.*, BLINDER, *supra* note 74, at 30-31 (describing what he sees as an ethical choice between principles of equity and efficiency); *see* POSNER, *supra* note 5, at 275 (asserting that efficiency is "just one value" choice that can be weighed against the competing value of just distribution); Hanson & Hart, *supra* note 4, at 329-30 (concluding that while many reject the law-and-economics premise that "efficiency should serve as *the* goal of law" many or perhaps most agree that efficiency should be one goal of the legal system to be weighed against competing goals such as equity) (emphasis in original).

95. *See* McCluskey, *Subsidized Lives*, *supra* note 12, at 124-25 (explaining how both choices in the efficiency/equity framework work as losing choices for many women, just like the losing choices presented by the equal treatment/special treatment dilemma in equality theory).

96. *Id.* at 125 (showing how the efficiency/redistribution choice is skewed against redistribution, just like the equal treatment/special treatment choice is skewed to privilege "equality" over "difference").

than they would have without that redistribution.[97] Moreover, those most in need of redistribution may be the ones most harmed by the shrinking economic "pie" that redistribution supposedly produces.[98]

In contrast to this double bind, efficiency goals tend to offer a double benefit, in prevailing neoclassical economic theory. By neoclassical definition, efficiency means internalizing costs so that the total societal costs are taken into account, thereby producing price signals that produce incentives for further maximizing resources. Efficient policies increase net aggregate gain regardless of the particular distribution among individuals or subgroups. Although some may lose out in the short run, neoliberal theory asserts that in the long run, a larger pie will also make it easier to make up for those losses with larger slices for all.[99] In neoclassical economic theory, and the neoliberal ideology that embraces and promotes this theory, efficiency (rather than egalitarian redistribution) best leads to long-term equity as well.[100]

Two prominent post-Keynesian approaches to reviving social citizenship, communitarianism and pro-welfare liberalism, join the general consensus by accepting the basic neoclassical economic assumption of a tough tradeoff between efficiency versus equity. These approaches try to carve out a space for redistribution within the neoclassical double bind by taking steps to minimize the harmful societal effects of redistribution it predicts. But those strategies for accommodating equity with efficiency end up reinforcing rather than resisting the double bind that makes welfare seem so costly. Instead, defenders of welfare should challenge the double standard underlying the neoliberal double bind, and the hierarchical vision of citizenship it both obscures and promotes. This double standard identifies some people's interests in increasing their share of the pie as part of an efficient and naturalized market that benefits the public, while others' interests in increasing their share of the pie are instead labeled redistributive, and therefore potentially harmful to the public well-being.

In Part I.B below, I will analyze how the neoliberal double bind operated to promote and rationalize the welfare reform movement that led to ADFC's demise. I will end this Part by contrasting the neoliberal vision of citizenship that underlies this double bind with three alternative (but not politically prominent) citizenship visions that directly reject the dichotomy that has constrained both Keynesian and post-Keynesian welfare policy. In Parts I.C and I.D, I will then explore the two more prominent responses to the neoliberal critique of AFDC and show how they fail to escape the neoliberal double bind.

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97. *See, e.g.*, Gordon Tullock, *The Reality of Redistribution*, *in* POVERTY & INEQUALITY: ECONOMICS OF INCOME REDISTRIBUTION 127-31 (Jon Neill ed., 1997).

98. *Id.*

99. Former House Speaker Newt Gingrich—a leader of efforts to end AFDC—argued "that emphasizing redistribution is a dead loser in helping the poor, compared to focusing on the production of wealth. . . ." Newt Gingrich, Remarks at Progress and Freedom Foundation Conference (Jan. 22, 1996), *available at* LEXIS, News Library, Fed. News Service file. The objective, historic long-term fact is "that societies which focus on getting rich bring everybody up at a dramatically faster rate than societies which focus on redistribution succeed in raising the bottom." *Id.*

100. *See* McCluskey, *Illusion*, *supra* note 12, at 719-20 & nn.248-49 (discussing and criticizing this theory).

B. Neoliberal Citizenship and Welfare Reform

1. AFDC as Moral Hazard

In particular, neoliberalism has used the seemingly technical economic tool of "moral hazard" to reposition AFDC from social virtue to social vice. This concept is at the center of arguments that AFDC benefits do not spill over from individual recipients to enhance society as a whole (as originally claimed), but instead produce larger negative effects that damage society.[101] "Moral hazard" appears to shift such arguments linking welfare to social pathology away from their timeworn foundations in race, gender, and sexual *status* to instead ground them in seemingly more neutral questions of costly *conduct*.[102]

The term "moral hazard," which developed from insurance industry practices and has been incorporated into neoclassical economic analysis,[103] refers to the problem that those who are "insured" (protected from bearing costs) tend to take less care to reduce those costs, to the extent those costs remain under the "insured's" control.[104] While efficient market incentives "internalize" social costs so that self-interested individuals also act in the interest of society as a whole, redistribution (by neoclassical definition) alters the cost-benefit calculations faced by individuals so that their self-interested actions diverge from the overall interest of society. Moral hazard describes the problem that those who are protected by redistribution against the costs of certain actions will tend to increase those activities more than they would if they faced the full costs.

Applying the moral hazard theory to AFDC, critics often argued that by giving needy families income support, AFDC made more families needy.[105] In the conventional economic analysis, AFDC's income protection for poverty-stricken single

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101. This Article benefits from Tom Baker's groundbreaking critical analysis of the use of moral hazard in arguments for welfare reform. *See* Tom Baker, *The Genealogy of Moral Hazard*, 75 TEX. L. REV. 237, 237-40 (1996).

102. For example, Lawrence Mead argues that white opposition to black welfare recipients is motivated not by white opposition to blacks' citizenship status, but by white opposition to blacks' dependency behavior. Lawrence M. Mead, *The Politics of Conservative Welfare Reform*, *in* THE NEW WORLD OF WELFARE 207-08 (Rebecca M. Blank & Ron Haskins eds., 2001). I will show below how this shift from status to conduct runs back to status. *See infra* Parts I.B.2-I.B.3. For discussions of the slippage between status and conduct in the history of the insurance industry's use of the term "moral hazard," see Baker, *supra* note 101, at 250-62; CAROL HEIMER, REACTIVE RISK AND RATIONAL ACTION: MANAGING MORAL HAZARD IN INSURANCE CONTRACTS (1985). Scholars of other legal shifts from status to conduct have traced a similar slippage, similarly recognizing the interdependence of these two concepts. *See, e.g.*, JANET E. HALLEY, DON'T: A READER'S GUIDE TO THE MILITARY'S ANTI-GAY POLICY 126 (1999) (discussing how antigay policies "render status a sign of conduct and vice versa").

103. For thorough and excellent analyses of moral hazard, see generally Baker, *supra* note 101; HEIMER, *supra* note 102.

104. Baker, *supra* note 101, at 239.

105. *See, e.g.*, RECTOR & LAUBER, *supra* note 86, at 3. *See* KATZ, *supra* note 1, at 319 (discussing and criticizing these arguments). *See generally* Baker, *supra* note 101 (explaining and criticizing the moral hazard rationale for reducing welfare programs).

mothers (who are the vast majority of beneficiaries) reduced their incentives to avoid the costs of single motherhood by staying in the wage labor market, by avoiding pregnancy and child-rearing, or by marrying wage-earning men.[106] This moral hazard theory explains that AFDC created a cycle of dependency whereby more women are encouraged to take less care to escape their poverty.[107] As a result of these "perverse incentives," according to this theory, in the long run the increasing reliance on welfare support hurts both its beneficiaries and the public in general.[108]

The 1996 federal welfare reform legislation replacing AFDC with TANF aimed to reduce this moral hazard by reorienting the program to a more market-oriented approach that minimizes protection from the need to seek wage work.[109] For example, the replacement TANF program requires states to establish five-year lifetime cumulative time limits for receiving welfare (with some exceptions) to ensure that families in poverty use income support only as a transition to wage work, not as a long-term substitute for wage income.[110] The reforms explicitly state that welfare assistance is no longer an entitlement owed by the federal government to all qualifying citizens, but instead is a state-controlled program contingent on funding availability.[111] In addition, TANF requires a substantial portion of each state's welfare recipients (50% by 2002) to participate in thirty hours a week of nonfamily work activities (including waged work, unpaid workfare, high school education, or short-term job training) while receiving benefits.[112]

2. Double Standard of AFDC's Moral Hazard

Neoliberalism's emphasis on economic efficiency overturns the social citizenship rationale of AFDC not because its economic view brings to light previously unrecognized incentive effects, but because neoliberal economics values long-recognized incentive effects differently, based on a different vision of citizenship. Deborah Stone explains that incentives produced by protection against losses can be "moral opportunities" rather than "moral hazards."[113] To construct AFDC's incentives as public harms, rather than as public gains, the neoliberal "moral hazard" critique builds on status-based moral and political judgments.

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106. *See, e.g.*, OKUN, *supra* note 93, at 111 (noting such incentives as an example of the efficiency costs of AFDC).

107. *See* RECTOR & LAUBER, *supra* note 86, at 3.

108. *See* McCluskey, *Subsidized Lives*, *supra* note 12, at 125-26, 138-49 (explaining and criticizing this theory).

109. *See* 42 U.S.C. § 601(a) (2000 & Supp. 2002) (purpose statement); *see* KATZ, *supra* note 1, at 324 (stating that, as a result of the TANF legislation, "market models now pervaded the goals, administration, and philosophy of welfare").

110. *See* 42.U.S.C. § 608(a)(7) (2000 & Supp. 2002); JOEL F. HANDLER & YEHESKEL HASENFELD, WE THE POOR PEOPLE: WORK, POVERTY, & WELFARE 7 (1997).

111. 42 U.S.C. § 601(b) (2000).

112. 42 U.S.C. § 607 (2000 & Supp. 2002); *see* HANDLER & HASENFELD, *supra* note 110, at 6-7.

113. Deborah A. Stone, *Beyond Moral Hazard: Insurance as Moral Opportunity*, 6 CONN. INS. L.J. 11 (2000).

a. Recipients' Bargaining Power

First, the incentive effects neoliberalism calls "moral hazard" boil down to questions of relative bargaining power. As one party to a transaction gets more bargaining power in relation to another, that party is better able to shift the costs of the transaction to the other party. Bargaining power depends on relative elasticity of supply and demand: a party with relatively elastic demand for a particular product can buy less as the price rises—using substitute products as protection against increased costs—while a party with relatively inelastic demand for a particular product will absorb more of any price increase. The standard moral hazard principle that protection against the costs of certain choices induces more of those costly choices can be restated as the theory that protection against the costs of certain choices induces fewer costly alternative choices.

By providing a partial substitute for wage work (or for wage-earning spouses), welfare programs like the former AFDC can increase impoverished parents' bargaining power—that is, their relative elasticity of demand for wages (or for wage-earning spouses). That means welfare makes impoverished single mothers more sensitive to the costs of wage income (or marriage): they become less captive "customers" in the labor (or marriage) market, able to reduce wage labor (or marriage) as the costs of that labor (or marriage) rise so that they are able to hold out for higher quality jobs (or spouses or other intimate relationships).[114] This change in bargaining power that enables families to avoid rather than absorb certain costs decreases those families' incentives to reduce the costs of poverty by marrying or earning wages—the so-called moral hazard effect. Of course, these incentive effects exist only to the extent that impoverished single mothers have control over jobs (or spouses), and only to the extent that income support such as AFDC provides a substitute for wage income (or for wage-earning spouses).[115] Nonetheless, to some extent and in some contexts, welfare benefits potentially give recipients more bargaining power with which to refuse work or family arrangements that interfere with their perceived well-being (whether economic, social, physical, or emotional).

The purportedly economic term "moral hazard" begs the inherently political

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114. *See, e.g.*, ANN CRITTENDEN, THE PRICE OF MOTHERHOOD: WHY THE MOST IMPORTANT JOB IN THE WORLD IS STILL THE LEAST VALUED 114 (2001) (giving examples of mothers who chose not to leave abusive husbands because of lack of sufficient alternative income supports). Similarly, AFDC can improve impoverished mothers' bargaining power in the adoption and foster care markets. Family income support policies are thoroughly interwoven with adoption and foster care policies, as Dorothy Roberts expertly explains. *See generally*, ROBERTS, *supra* note 65. For some impoverished women, relinquishing parental rights has been a substitute (however inadequate, painful, and undesired) for parental income as a means of meeting the financial demands of raising children. Changes in ADC and AFDC availability to white unmarried mothers have been directly related to the "supply" of white American babies for adoption. *See* SOLINGER, *supra* note 60, at 20-32, 76-77, 124-25. The recent welfare reforms replacing AFDC with TANF have directly reduced impoverished mothers' ability to retain parental rights to their children, and have sharply increased the breakup of African American families in particular—transferring many black children into foster care, and to a lesser extent, into the (often subsidized) care of wealthier adoptive parents. *See generally* ROBERTS, *supra* note 65; *see* SOLINGER, *supra* note 60, at 183-95.

115. See *infra* Part I.D.2.

question why any particular change in bargaining power is a dangerous moral problem rather than a valuable moral opportunity. Throughout the history of AFDC and its precursor ADC, the question whether welfare recipients' increased bargaining power is good or bad has turned on prevailing judgments about their citizenship status, typically based on moral views about their race, gender, class, and sexuality. AFDC lost its virtue in the 1960s not because it changed the behavior of single mothers, but because (in the prevailing view) the behavior changes it facilitated were virtuous mainly when targeted to white mothers with marital children.

To the extent it increased the bargaining power of recipients, the income support of ADC and AFDC encouraged a change in conduct that threatened social, economic and political stratification: more power to negotiate for different choices means more power to resist the bad choices that represent and reinforce subordinate status. Government officials originally construed the behavioral changes induced by ADC as moral opportunities, not moral hazards, because of political interest in protecting the citizenship status of white widows and their children (to a limited extent). In 1942, for example, government officials advocated more generous benefits free of work requirements precisely because they wanted to increase incentives for (presumably white) mothers to "stay at home where they were needed."[116] In theory, more income support for certain parents can induce more of those parents not just to choose more welfare income over other alternatives (more wage income or less family care), but also can induce parents to reduce the costs of those other alternatives—allowing them to hold out for better choices among jobs, child care, or intimate partners. In 1946, a government handbook described ADC's incentive effects as a socially valuable increase in choices for eligible mothers: reduced economic pressure for wage work meant white mothers would have more power to decide how best to meet their own and their children's needs.[117]

In contrast, increased choices for some women and children have counted as moral hazards because of political resistance to improving their citizenship status. In what legal scholar Dorothy Roberts explains as "a deliberate effort to maintain a Black menial labor market caste in the South,"[118] New Deal politicians and planners carefully designed the original ADC to preserve and enhance racial stratification.[119] In 1939, a southern field representative reported that race discrimination in welfare reflected a

> unanimous feeling on the part of the staff and board that there were more work opportunities for Negro women and to [the welfare board's] intense desire not to interfere with local labor conditions. The attitude that "they always have gotten along," and that "all they'll do is have more children" is definite.[120]

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116. SOLINGER, *supra* note 60, at 148 (quoting BLANCHE COLL, SAFETY NET: WELFARE AND SOCIAL SECURITY, 1929-1979, 120 (1995).

117. BUREAU OF PUB. ASSISTANCE, U.S. DEP'T OF HEALTH, EDUC., AND WELFARE, HANDBOOK OF PUB. ASSISTANCE Part IV, §§ 3401, 3401.1(1946), *discussed in* SOLINGER, *supra* note 60, at 148.

118. ROBERTS, *supra* note 65, at 179.

119. *See* LIEBERMAN, *supra* note 27, at 118-76; NEUBECK & CAZENAVE, *supra* note 68, at 53.

120. NEUBECK & CAZENAVE, *supra* note 68, at 39 (citing quote from WINIFRED BELL, AID TO DEPENDENT CHILDREN 34-35 (1965)).

Another Southern welfare administrator in the 1930s justified race discrimination in ADC by explaining that there is "no reason why the employable Negro mother should not continue her usually sketchy seasonal labor or indefinite domestic service rather than receive a public assistance grant."[121] Some western states similarly excluded Native American or Mexican American families from ADC and AFDC to help maintain the racial caste systems particular to those states.[122]

In addition to overtly racial exclusions and restrictions, many states have a long history of devising facially neutral welfare rules to constrain black workers' labor market and family choices. In 1943, Louisiana adopted a policy restricting ADC for children when agricultural employers wanted them or their mothers for cotton picking.[123] Through the 1960s (when federal courts ruled them unconstitutional), residency restrictions on AFDC were designed to decrease African American workers' interstate mobility, so that they would have less bargaining power in intrastate labor markets.[124] In another example, Dorothy Roberts quotes Senator Russell Long's 1967 comments on work requirements aimed implicitly if not explicitly at encouraging black women's domestic service:

> Either I do the housework or Mrs. Long does the housework, or we get somebody to come in and help us, but someone has to do it, and it does seem to me that if we can qualify these people to accept any employment doing something constructive, that is better than simply having them sitting at home drawing welfare money.[125]

These examples of efforts to control AFDC's incentive effects—the so-called moral hazard problem—show that reducing welfare's moral hazard is about distributing, not maximizing, labor market choices and opportunities. Senator Long worries about *who* does his housework (and perhaps about *who* has more time for leisure or family care), not about making sure more or better work or less unpaid family care or leisure gets done. The racial structure of ADC and AFDC has aimed not to promote wage work among parents of color, but to channel those parents into low-waged work less conducive to good family care. For example, although ADC and AFDC provided relatively well-paying administrative and social work jobs, some states refused to open these jobs fully to workers of color (at least until civil rights laws intervened).[126] More recently, TANF was designed to increase pressure on women to substitute low-waged work for education and training for higher-wage opportunities.[127]

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121. Mary S. Larabee, *Unmarried Parenthood Under the Social Security Act*, 1939 PROC. OF THE NAT'L CONF. SOC. WORK, 454, *available at* http://www.hit.umich.edu/n/ncosw/, *quoted in* BELL, *supra* note 120, at 35, and *cited in* MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN 318-19 (1988).

122. *See* NEUBECK & CAZENAVE, *supra* note 68, at 55-56.

123. *Id.* at 58.

124. *See id.* at 61.

125. ROBERTS, *supra* note 65, at 179 (citing quote in Judith Olans Brown, *The Mythogenesis of Gender: Judicial Images of Women in Paid and Unpaid Labor*, UCLA WOMEN'S L. J. 457, 487 n.134 (1996)).

126. NEUBECK & CAZENAVE, *supra* note 68, at 56-57.

127. TANF prohibits states from counting higher education toward work requirements, limits participation in vocational education to twelve months, and prohibits states from having more than 20% of their TANF work participants in secondary school or vocational education.

Similarly, attention to ADC's and AFDC's incentive effects on family behavior has long been a means of preserving a patriarchal social order by redistributing bargaining power concerning family formation and family care. States often designed ADC and AFDC rules to penalize unmarried mothers so that their families would have less power to choose better child care, wage work, and household partners;[128] TANF continues the practice of stressing incentives to reduce unwed motherhood.[129] Rules penalizing unmarried women and their children have reflected and reinforced prevailing political judgments that women's nonmarital sexuality renders them incapable of making good moral choices.[130] Such restrictions controlled welfare's alleged moral hazard (inducing increased unwed motherhood) not by giving unmarried mothers and their children better alternatives (for income, child care or parenting partners), but by reducing their decisionmaking power so that they are forced to accept the costs of poor women's alternatives to single motherhood.[131] Dorothy Roberts explains how recent "welfare reform" policies penalizing unmarried black mothers continue a long caste-based history of hurting, not enhancing, black families—by using welfare restrictions to induce the redistribution of black women's caretaking skills from black children to white children, and to redistribute the care of black children from their families to inadequate or abusive state custody in foster care and incarceration.[132] Rickie Solinger describes how, during the 1950s and 1960s, restrictions on ADC and AFDC benefits for unmarried mothers similarly operated (along with other policies) to help redistribute mothering choices, shifting bargaining power in the adoption market from unmarried white women to social service agencies and white infertile married couples.[133] After legal, political, and social changes expanded access to welfare (and other rights) for unmarried mothers,[134] this income support probably helped white unmarried mothers' wrest more control over the adoption process from both state agencies and adoptive parents.[135]

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42 U.S.C. § 607(d) (2000). *See* Martha Davis, Testimony of NOW Legal Defense and Education Fund, House Education and Workforce Committee, Hearing on "Welfare Reform: Success in Moving Toward Work," Oct. 16, 2001 (discussing and criticizing this policy).

128. *See* ABRAMOVITZ, *supra* note 121, at 318-26; MINK, *supra* note 73, at 44-49.

129. *See* Megan Weinstein, *The Teenage Pregnancy "Problem": Welfare Reform and the Personal Responsibility and Work Opportunity Act of 1996*, 13 BERKELEY WOMEN'S L.J. 117, 126 (1998) (discussing and criticizing TANF's focus on promoting marriage and discouraging out-of-wedlock mothering especially among teenagers).

130. *See* SOLINGER, *supra* note 60, at 67, 99; Linda C. McClain, *"Irresponsible" Reproduction*, 47 HASTINGS L.J. 339, 345-64 (1996) (discussing how ideas about welfare mothers' irresponsibility are tied to ideas about single mothers being fundamentally immoral); FINEMAN, *supra* note 73, at 101-25 (discussing attacks on welfare as reflecting a patriarchal construction of single mothers as deviant because of their threat to male authority).

131. *See* SOLINGER, *supra* note 60, at 195-96 (discussing how Reagan Administration policies promoting both restrictions on AFDC and restrictions on day care funding were aimed at reducing poor women's choices). These costs may include violence. *See infra* note 236.

132. *See* ROBERTS, *supra* note 65, at 173-200.

133. SOLINGER, *supra* note 60, at 68-71, 98-101, 186-87.

134. *See id.* at 93-97 (discussing changes leading to more acceptance of single mothers in the 1970s).

135. *See* Carol Sanger, *Separating from Children*, 96 COLUM. L. REV. 375, 490 (1996) (explaining that state adoption policies became more open as birth mothers recognized they had

Finally, political leaders have criticized and regulated the incentive effects of AFDC and other family welfare programs because they viewed recipients' increased political bargaining power as a threat to the political racial caste system.[136] After the 1965 Voting Rights Act was enacted, for example, southern politicians recognized that access to welfare income would create the incentive effect of increased voting and civil rights activism by many impoverished African Americans otherwise dependent for income on white employers and landowners who had made compliance with black political subordination a condition of jobs.[137] To control this supposed moral hazard effect, southern politicians opposed expansion of family income assistance and state officials attempted to exclude African American voters from existing welfare programs—explaining that benefits would be restored only when blacks "surrendered their uppity ideas about changing the local balance of power."[138] Although the term "moral hazard" tends to be used in contexts where it can more easily mask the moral values it promotes, this example dramatizes how inherently moral citizenship visions, rather than impartial "efficiency" calculations, determine whether the bargaining power to resist bad choices is hazardous or helpful to society.

b. Employers' Bargaining Power

Neoliberal "moral hazard" arguments deceive not only by repackaging caste constraints as individuals' market-based conduct, but also by narrowing our view of costly market behavior. A second problem with the moral hazard concept is that it tends to obscure the reciprocal nature of the incentive changes at issue.[139] If AFDC increases impoverished parents' bargaining power relative to employers, it reduces employers' bargaining power relative to workers and families. Other things being equal, if AFDC provides a substitute for wage-earning, employers in certain labor market sectors will have to offer higher wages or better working conditions to employ parents who can substitute welfare for work—or they will lose their supply of labor for some jobs.

"a desirable commodity in short supply" and therefore could "think through the terms under which they might be willing to part with it"); MARY LYNDON SHANLEY, MAKING BABIES, MAKING FAMILIES 33 (2001) (explaining that with open adoption "the birth mother changed from supplicant to partner in making a decision about the placement of her child; the terms of adoption, once thought to be absolute, became negotiable to some extent"). In the Reagan-Bush era, Republican politicians responded to the decline in white babies available for adoption by trying to revive policies pressuring mothers on welfare to relinquish their children. *See* SOLINGER, *supra* note 60, at 198-99.

136. *See* NEUBECK & CAZENAVE, *supra* note 68, at 71-73 (discussing the role of AFDC policies in Louisiana's resistance to movements for desegregation and civil rights in the early 1960s).

137. *See* QUADAGNO, *supra* note 68, at 129 (discussing evidence that black voter turnout between 1965 and 1970 depended heavily on blacks' freedom from dependence on white employers or landowners for income).

138. *Id.* (quoting U.S. Congress, Hearings on H.R. 16,311, p. 1512; Lester M. Salamon, *The Stakes in the Rural South*, THE NEW REPUBLIC 18 (1971)).

139. Tom Baker has explained the reciprocal, or multisided nature of moral hazard. Baker, *supra* note 101, at 275. However, as Baker observes, discussions of AFDC and social insurance programs tend to oversimplify moral hazard by assuming it works only in one direction.

The goal of protecting the bargaining power of employers dependent on cheap labor has long motivated opposition to family income support programs.[140] Dorothy Roberts reports that in the early 1970s, a Georgia Congressman opposed proposals to expand AFDC into a guaranteed income system by warning, "There's not going to be anybody left to roll these wheelbarrows and press these shirts."[141] This comment incorporates unstated assumptions about welfare's effect on employers' choices. The congressman's fear of a labor shortage depends on the premise that employers cannot or should not be pressured to maintain the supply of labor by raising wages to a level competitive with minimal welfare support. That is, the congressman appears to assume that employers of this cheap labor, rather than their low-waged workers, have a right to choose among options that better suit their self-interest.

By considering incentive effects of AFDC on employers, as well as on impoverished parents, neoliberalism's double standard becomes clearer. Increased bargaining power for impoverished single mothers, but not for employers, counts as moral hazard in the neoliberal view. As welfare for impoverished parents becomes less available or less adequate, employers have more protection against the costs of labor because the increased supply of labor (and of particularly needy labor) allows for lower wages (up to the point of any mandated minimum wage) and for working conditions less favorable to workers (for instance, less regular or convenient hours, less comfort and safety, or higher productivity requirements).[142] This protection for employers potentially increases costs to workers and others, leaving them with worse choices. For example, this protection for employers' bargaining power might encourage less care to avoid risks to the long-term physical and emotional health of workers and their families, thereby impairing their future productivity as workers, family members, and citizens; it might encourage workers to increase their demands on charities, or to increase the social problems from children whose parents' low-waged work leaves them without adequate parental supervision, nutrition, or housing; and the increased supply of low-waged workers and resulting downward wage pressure might trickle up the wage scale to increase economic insecurity for struggling middle class families.[143]

Without such protection against labor costs, other things being equal, employers would have more incentives to reduce the costs of production in other ways, perhaps through lower executive salaries, lower investor returns, more cost-effective operations, or even by forgoing certain lines of business that are unprofitable without cheap labor. For example, if better welfare benefits provided an alternative to low-wage work for black domestic workers, the men who wear the shirts the Georgia Congressman feared would not get pressed might instead do the pressing themselves, replacing some of their unproductive leisure time. Perhaps the shirts would be replaced by apparel needing less costly maintenance. Or perhaps the shirts would be pressed by more productive mechanized commercial laundries employing fewer but more highly

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140. *See* GORDON, *supra* note 27, at 266, 276; MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA 261 (1996).

141. Roberts, *supra* note 69, at 1584 (citing QUADAGNO, *supra* note 68, at 130 (quoting Rep. Phillip Landrum)).

142. *See* Robert M. Solow, *Lecture II: Guess Who Pays for Workfare*, *in* WORK AND WELFARE 23, 26-30 (Amy Gutman ed., 1998).

143. *See id.*

paid workers. Or, without international trade and human rights rules to control incentives for cross-border cost-shifting, perhaps the shirts would be pressed by workers in countries where wages were even lower and social welfare systems even more inadequate.

Just as moral hazard by welfare recipients can create a "cycle of dependency," moral hazard by employers from the protection of inadequate welfare can create a comparable vicious cycle, often termed the "race to the bottom," whereby employers are increasingly dependent on keeping workers in poverty to maintain profitable production. If cheap and docile labor provides an easy means of avoiding changes and innovations that would lower overall costs in the long run by providing better working conditions along with better profits, then that cost-protection will encourage employers to choose investments and business plans that make such "high-road" production strategies even more difficult to achieve, locking them into arguably less efficient behavior.

3. From Double Standard into Market Forces

Neoliberal ideology rationalizes its double standard of moral hazard by attributing employers' increased bargaining power from welfare *restrictions* to the efficient market while attributing poor families' increased bargaining power from *more expansive* welfare benefits to inefficient redistribution. How do we know which incentive effects are efficient market results and which are redistributive? By deciding whether the incentive effects internalize costs (as efficient market prices) or whether they externalize costs onto others. But how do we distinguish costs that are internalized from costs that are externalized? According to standard economic analysis, costs are internalized to parties in a transaction when the private costs of the transaction incorporate the total societal costs of the transaction—thereby creating incentives to maximize overall societal resources. If any costs of the transaction spill over to others, then those costs are externalized—so that resources are redistributed rather than maximized. But to decide what costs belong to whom (and therefore which are internalized versus externalized), neoclassical economics tells us to look to efficient markets for the answer—costs are internalized if a transaction represents efficient market conditions.

Following this circular reasoning, neoliberal ideology assumes that the incentive effects of employers' increased bargaining power from welfare reform are cost-internalizing incentives, because any resulting benefits to employers reflect overall net gains to society as a whole rather than a transfer of resources to employers at a net loss to others. In neoliberal ideology, the premise that employers' increased ability to escape labor costs takes place within the "market" also serves as a conclusion that society as a whole benefits from this transaction. That premise locating employers' increased bargaining power in the "market" correspondingly serves as a conclusion that any resulting costs to workers are their private responsibility—the price internal to a mutually beneficial labor contract.[144] Similarly, the premise that increased bargaining

144. *See* Martha Albertson Fineman, *Contract and Care*, 76 CHI.-KENT L. REV. 1403, 1424 (2001) (explaining how the idea of the "market" separate from family or state has been a means of constructing a misleading distinction between public and private).

power for impoverished single mothers from AFDC is nonmarket "redistribution" serves as a conclusion that the transaction comes at the expense of society as a whole.

This tautological reasoning masks the underlying citizenship question: Whose ability to get more of what they want by shifting costs to others should count as a societal gain, and whose should count as a private gain at the expense of others? By making the market stand for the public gain, neoliberalism implicitly confers superior citizenship status on those centrally identified with the market—they are members of the public whose gains count. For example, if welfare cutbacks provide owners of a credit card telemarketing company with more cheap labor, inducing increased earnings from increased promotion of credit card debt, then the neoliberal view presents this gain as the product of market "efficiency" that benefits the public, not just particular shareholders or executives—regardless of the possible public harms from, for instance, those families' inability to provide adequate care for their children. On the other hand, if impoverished families gain from AFDC by escaping low-waged jobs, inadequate child care, or abusive spouses, then neoliberalism tends to count those gains as redistribution for private gain at the expense of the public—regardless of the possible spillover benefits to overall economic or social well-being. By designating employers' cost-savings from welfare reform as the efficient market price, not the result of (upward) redistributive policies, the neoliberal analysis constructs this government-created employer windfall as a cost-savings "earned" as part of a mutually beneficial exchange that contributes to overall well-being.

Neoliberal reasoning presumes employers' protection from the costs of cheap labor counts as a normal and voluntary resource-maximizing market, despite the role of government policies in shaping the market price of that labor and in constraining the choices of workers. And neoliberal reasoning presumes AFDC recipients' protection from the costs of cheap labor counts as coerced government intervention, despite the role of market incentives and rational self-interest maximizing in shaping their choices.[145] Accordingly, welfare recipients do not have a right to cost-savings and resulting behavior changes from cheaper, or better, child care comparable to employers' right to cost-savings and resulting behavior changes from cheaper labor costs from welfare reform. Which gains count as normal and voluntary and which as abnormal and coerced interventions depend on unstated moral judgments about who has the right to benefit from others' constrained choices in a normal market.

By locating employers', but not welfare recipients' gains, within the market, neoliberal reasoning obscures its moral judgments about the distribution not only of rights to personal gain, but also of responsibilities to avoid losses to others. In the neoliberal moral hazard analysis, welfare reforms restricting benefits do not seem to give employers inefficient protection against their labor costs—because this analysis assumes that employers have no responsibility to cover the costs of working (aside from minimum wage requirements and other wage laws, perhaps). In particular, the neoliberal view assumes that capital owners do not owe workers, or the public, a living

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145. For some examples of legal scholarship explaining the political contingency and indeterminacy of the conventional division between market "freedom" and government "coercion," see Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 POL. SCI. Q. 470 (1923); Robert L. Hale, *Force and the State: A Comparison of "Political" and "Economic" Compulsion*, 35 COLUM. L. REV. 149 (1935); STEINFELD, *supra* note 36, at 14-15.

wage capable of supporting workers' families or even single workers. In this view, any cost-savings to employers resulting from cheaper labor due to welfare restrictions belongs to employers as a matter of right without any reciprocal obligations: employers can change their wage-paying behavior in response to this protection without being perceived as irresponsible or dependent. In contrast, by identifying impoverished families' benefits from AFDC as government redistribution, outside of the market, neoliberal theory constructs the cost-savings from welfare received by those families as protection against costs that are the moral responsibility of those families alone. The moral hazard criticism of AFDC assumes that welfare recipients have a societal obligation to assume the costs of supporting children themselves without compensation (or to forgo the children). Their cost-savings and resulting behavior changes from welfare benefits therefore raise the possibility of dependency and potential irresponsibility that threatens good citizenship.[146]

4. Reenvisioning Social Citizenship to Reverse Moral Hazard

This distribution of societal rights and responsibilities is by no means an inevitable or uncontested vision of citizenship. This Part will highlight three examples of alternative social citizenship visions that escape the double bind of neoliberal moral hazard by rejecting its double standard, based on its hierarchical vision of citizenship rights and responsibilities.

First, legal scholar William Forbath explains that, during the New Deal period, a powerful and broad-based (though divergent) popular movement expressly called for a new understanding of citizenship in which the government and capital owners were obligated to support workers and their families and in which citizens were entitled to "decent work, a measure of economic autonomy and democracy, and social provision."[147] Though this social citizenship vision was not implemented in the New Deal social security legislation that produced AFDC, it offers a counterpoint to the currently prevailing neoliberal assumptions by suggesting that a work-centered view of citizenship can embrace rather than constrain workers' bargaining power, based on a citizenship vision where workers are given rights and status to promote their well-being.

The Supreme Court partly recognized this alternative citizenship vision when it overturned its *Lochner*-era reasoning to uphold a minimum wage law in *West Coast Hotel v. Parrish*.[148] In part, *Parrish* explained that the law was a reasonable (and therefore constitutional) effort to correct for the harmful public effects of employers' superior bargaining power. Previous doctrine in *Muller v. Oregon* had upheld maximum hour laws for women as special protection deviating from a market presumed to promote the public well-being.[149] Part of the Court's opinion in *Parrish*

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146. *See* Fineman, *supra* note 144, at 1410 n.17 (comparing welfare "dependency" to institutional support of armed forces members who are not labeled "dependent" as a result of their rights to government compensation and other benefits for their service).

147. Forbath, *supra* note 27, at 4.

148. 300 U.S. 379 (1937).

149. 208 U.S. 412 (1908). Another *Lochner*-era case, *Adkins v. Children's Hosp.*, 261 U.S. 525 (1923), struck down minimum wage laws for women on the ground that the Nineteenth Amendment meant special protection for women was outdated.

took the different approach of questioning the citizenship responsibilities incorporated in the market. The Court rejected the view that employers had a constitutional right to their gains from low-waged labor, and instead supported as reasonable (and therefore constitutional) state legislators' view that employers are obligated to pay workers a living wage. In effect, the Court portrayed the minimum wage law as *reducing* rather than *creating* moral hazard, reasoning that the law internalized costs that employers had wrongly spread to society. The Court explained, "[t]he community is not bound to provide what is in effect a subsidy for unconscionable employers" and that the community may "correct the abuse which springs from [employers'] selfish disregard of the public interest."[150]

Second, alternative citizenship visions have questioned neoliberalism for its problematic moral judgments not only about the distribution of the rights and responsibilities of work, but also about what should count as work that makes a valuable contribution to society. Feminists have long argued that family caretaking work performed primarily by women in the home should be recognized and rewarded for its important social, political, and economic benefits.[151] For example, legal scholar Martha Fineman makes a powerful case for expanding social citizenship rights to include economic support for dependent care on the ground that such work provides a substantial subsidy from family caretakers—most of whom are women—to the state and market that is not sufficiently recognized or compensated.[152] Fineman reverses the neoliberal moral hazard analysis by explaining that the state and market are dependent on unpaid or underpaid caretaking work that produces and reproduces society, and that government and employers have avoided their responsibility to recognize and support caretaking labor.[153] Fineman (and other feminist scholars) have renewed and improved the early-twentieth-century maternalist social citizenship visions (expressed in original ADC and earlier mothers' pensions programs) by making the family's value to society depend on its caretaking labor rather than on the family's race, gender, marital, and sexual status.[154]

Third, alternative citizenship visions have challenged the neoliberal assumptions about how the value of both market work and family care should be distributed among families and workers. Scholars and advocates focusing on race and citizenship have long presented the problem of subordinate citizenship for people of color not as a matter of exclusion from state, market, and family, but as a problem of inclusion in a state, market, and family defined and structured to privilege whites according to a racial vision of citizenship.[155] This vision suggests that strong social citizenship rights support political and civil rights not because impoverished people lack personal

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150. *Parrish*, 300 U.S. at 399-400.

151. *See* McClain, *supra* note 61, at 1697-702; Reva B. Siegel, *Home as Work: The First Woman's Rights Claims Concerning Wives' Household Labor, 1850-1880*, 103 YALE L.J. 1073 (1994).

152. Martha Albertson Fineman, *Cracking the Foundational Myths: Independence, Autonomy, and Self-Sufficiency*, 8 AM. U. J. GENDER SOC. POL'Y & L. 13 (2000).

153. Fineman, *supra* note 144, at 1410-11, 1410 n.17.

154. See Linda C. McClain, *Citizenship Begins at Home: The New Social Contract and Working Families*, *in* PROGRESSIVE POLITICS IN THE GLOBAL AGE 95, 101-04 (2001).

155. *See* Roberts, *supra* note 69, at 1575 (explaining America's unequal welfare state as a problem of adherence to a racial definition of citizenship).

capacity for participating in state and market,[156] but because egalitarian social rights help create incentives for a state and market that values equal political and civil rights.[157]

Legal scholar Dorothy Roberts, for example, explains that African American women criticized for receiving AFDC have lacked full citizenship status because their extensive contributions to society through work, family care, and political activism have been valued less than white citizens' contributions.[158] Roberts reverses the neoliberal moral hazard arguments by portraying the problem of AFDC as a cycle of dependency among white citizens who have long relied on government protection for cheap labor by people of color to maintain both market production and family reproduction.[159] In this vision, white citizens have sought to achieve the supposed "autonomy" and "responsibility" associated with good citizenship by constraining and stigmatizing the economic gains of racialized others.[160] Welfare reform, in this view, is

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156. *See* King & Waldron, *supra* note 1, at 428 (discussing a long history of political theorists who argue that the poor cannot be good citizens because "desperate need is conceived to interfere with the processes of reflection and deliberation that civic politics requires").

157. Discussing Jill Quadagno's history of the Great Society programs, Dorothy Roberts notes the interdependence of social, civil, and political rights for both black activists and for their white supremacist opponents. Roberts, *supra* note 69, at 1584-86. For example, Quadagno explains that access to housing affects access to political representation—not because people who lack safe houses are necessarily any less enlightened politically than people who live in mansions or suburbs, but because residential segregation acts to systematically fragment and impede effective political organization and coalition building by those denied residential mobility. QUADAGNO, *supra* note 68, at 59. Similarly, barriers to equal employment impeded black voting in the South not because exploited low-waged (or unwaged) workers with no other income options lacked political awareness or civic virtue but because their employers could use economic and physical coercion to systematically discourage their voting. *See* Roberts, *supra* note 69, at 1585-86 (discussing QUADAGNO, *supra* note 68, at 129).

See also Dorothy E. Roberts, *The Moral Exclusivity of the New Civil Society*, 75 CHI.-KENT L. REV. 555, 561-62 (2000) (discussing barriers to political participation in poor Black neighborhoods as a problem not of individual character problems but of illegitimate legal and economic institutions that systematically deprive poor residents of their well-being). Contrary to standard social citizenship arguments, *supra* note 156, many impoverished peoples around the globe have demonstrated high levels of political awareness and participation when offered the hope of a government responsive to their material needs—for example, in 1999 millions of impoverished South African blacks waited in long lines to exercise their newly won rights to vote, outshining U.S. voting rates. *See* TOM LODGE, CONSOLIDATING DEMOCRACY: SOUTH AFRICA'S SECOND POPULAR ELECTION 206, tbl.2 (1999) (reporting voter participation rates of 68% in South Africa's 1999 election and similarly high rates in a number of other African and Eastern European countries); *id.* at 166 (describing voters in a black township waiting patiently in a three-kilometer-long line to cast their ballots).

158. *See* Roberts, *supra* note 69, at 1576 (discussing how Progressive Era reformers advocating for maternal assistance ignored the value of black women's family care); *id.* at 1584 (discussing how welfare policies have been designed to minimize black wages); *id.* at 1572-73 (discussing how opposition to AFDC for black families in the 1960s was tied to opposition to black political activism).

159. *Id.* at 1584 (explaining how welfare policy has been designed to maintain "a Black menial labor force" that sustains white privilege).

160. Roberts contrasts AFDC with social security programs to demonstrate how a racially

part of a long history of government policies targeted directly toward controlling the freedom of people of color to make work and family choices in their interests, based on a racial definition of the public interest.

For example, Roberts explains recent welfare reforms as part of a broader policy change aimed not at withdrawing government support for families of color to make them "independent," but rather at redirecting government expenditures on children of color toward an expensive system of discriminatory state intervention designed to reduce black families' power to support their own children and to increase their children's dependence on a state that devalues their care.[161] As part of a racially stratified system of economic protections that limits many people of color to bad choices, welfare reform helps to reinforce stereotypes of people of color as bad choicemakers, thereby rationalizing the racially stratified citizenship vision that produces such policies.[162] Roberts argues that ending the racial caste system in the United States requires an explicitly antiracist system of broad supports for families and for workers, including an increased minimum wage, guaranteed minimum income, national health insurance, subsidized high-quality child care and preschool education, paid parental leaves, and affordable housing.[163]

All of these alternative visions of social citizenship reject *Lochner*'s substance by recognizing "the market" as an inherently moral—or immoral—institution organized around a particular and politically contingent distribution of rights and responsibilities. Because these alternative visions refuse to define existing market structures as necessarily and naturally efficient—in the overall societal interest—they escape the problem that alternative distributions of rights and responsibilities are inherently harmful to aggregate well-being. Each shifts the debate about the immorality of government protection from assistance for those at the bottom of the social hierarchy (based on class, gender, and race) to assistance for those at the top. Each reconstructs

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stratified system of economic protections directs stigma and restrictions to welfare for families of color based on their status as subjects, not citizens. "The very relegation of subjects to inferior programs that supervise and humiliate them reinforces their lack of citizenship qualities while bolstering the virtues of the citizens who receive dignified entitlements." *Id.* at 1578. Judy Scales-Trent explains that dominant groups lose the moral autonomy they pretend to achieve through their oppression of others: "How dependent are white Americans on the existence of this group, black Americans, that they keep on the bottom?" Judy Scales-Trent, *Oppression, Lies, and the Dream of Autonomy*, 40 WM. & MARY L. REV. 857, 863 (1999).

161. ROBERTS, *supra* note 65, at 174-207 (explaining how welfare reform works together with recently changed child protection and criminal justice policies, administered in racially discriminatory ways, to break up black families in particular and to transfer black children into often inadequate, abusive, and costly state custody in foster homes and prisons).

162. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 5-6 (1997) (describing how AFDC "reforms" aim to restrict African American reproductive choices as part of a broader policy to blame African Americans for their own inequality in order to justify the racist structures that perpetuate that inequality).

163. ROBERTS, *supra* note 65, at 268-69; Dorothy E. Roberts, *Irrationality and Sacrifice in the Welfare Reform Consensus*, 81 VA. L. REV. 2607, 2623-24 (1995). Citing the history of racist administration of supposedly neutral welfare programs, Roberts rejects a "universalistic" strategy of designing such social supports to appeal to white self-interest and instead rests the hope for an inclusive welfare system on directly confronting white privilege. Roberts, *supra* note 69, at 1591-92.

the increased bargaining power resulting from government protection for impoverished families as socially beneficial moral opportunity, not moral hazard. And because each focuses on poverty as a problem of harmful market privilege as well as harmful market disadvantage, each of these citizenship visions includes not just a right to be free from the most severe economic disadvantages, but a right to share in broader economic privileges.[164]

And these alternative visions each go further than the Keynesian justification of "redistribution" because they each show that government protections altering existing market behavior do not necessarily constitute an *alternative* to the market (redistribution), or a *correction* to an otherwise neutral market (efficiency), but instead can be an alternative approach to structuring the market itself. As Fineman explains, government protection of rights should not be viewed as a means of responding to market failures, but as means of creating and sustaining particular markets.[165] These visions recognize government "interference" with the market as the norm, not the exception. They present the market as thoroughly structured by laws and ideologies that represent and enforce particular citizenship values. Forbath explains how the law of "laissez-faire" capitalism has not simply facilitated free-market contracts, but has used coercive redistribution to enforce caste: for example, by giving employers' property interests in workers' labor and obedience, by criminalizing unemployment, and by restricting workers' collective bargaining rights.[166] Fineman argues that ideologies and laws governing the family are integral to the market.[167] Roberts recognizes that the long history of government policies engendering black poverty (from slavery through Jim Crow and the more recent backlash against civil rights and welfare) stem not from irrational prejudice that deviated from free market self-interest maximizing, but from a political economy rationally and often successfully designed to maximize white power.[168]

Although predominant public opinion may not go as far as Forbath, Fineman, and Roberts in reenvisioning the rights and responsibilities of citizenship, there is hardly a clear popular consensus in favor of the neoliberal assumption that the social good requires markets structured to increase employers' bargaining power relative to workers with children.[169] Nor is it obvious that the popular support for welfare reform reflects general agreement that society will benefit from providing incentives for more

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164. *See* Forbath, *supra* note 32, at 1887 (distinguishing true social citizenship that transforms the labor market to provide broader economic equality from minimal welfare assistance for those outside the labor market).

165. Fineman, *supra* note 144, at 1425.

166. *See* Forbath, *supra* note 27, at 21-22.

167. *See* Fineman, *supra* note 152, at 13-15.

168. *See* Roberts, *supra* note 69, at 1589, 1596 (arguing that the problem of social citizenship is a problem of institutionalized white privilege that pervades current economic arrangements). *See also* NEUBECK & CAZENAVE, *supra* note 68, at 180-87 (analyzing evidence that the late 1990s welfare reforms were designed to exacerbate racial control and race discrimination in employment).

169. Roberts describes some ways in which welfare state proponents could capitalize on broad interests in increasing government support for working families. Roberts, *supra* note 163, at 2623. *See also infra* notes 277-78 and accompanying text.

low-wage jobs and less parental child care.[170] Although white racism and patriarchal values undergird much popular sympathy with neoliberal reform arguments, popular disillusionment with AFDC's "redistribution" also may partly reflect the problem that AFDC failed to go far enough to change the distribution of bargaining power of those left insecure by the prevailing market. The three alternative visions of women on AFDC take this popular criticism of welfare "dependency" in a different direction: they recognize that social citizenship programs like AFDC have failed to support full citizenship for its recipients but explain the problem as a failure to sufficiently increase (not constrain) recipients' bargaining power (in state, market, or family).

Exposing the market as a construction of politics will not in itself change the class, race, and gender antipathy that has helped construct the current market. However, by removing the economic mask that has sheltered that antipathy and its resulting privileges from direct debate, perhaps we can better challenge the inegalitarian citizenship vision it represents. Defenders of social citizenship should look beneath the line between redistribution and efficiency to directly address the question of which distribution of private gains, encouraged through which government protections, will produce the greatest public good.

C. Communitarian Citizenship and Welfare Reform

Communitarianism presents one of the most politically powerful alternatives to neoliberalism's emphasis on market efficiency.[171] Although this ideological movement takes a variety of overlapping but differing directions across a spectrum of political views,[172] in general, communitarians aim to balance individual rights with community obligations and to promote social institutions that actively cultivate moral character and community solidarity.[173]

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170. For example, in a 1995 poll, 61% of respondents supported exempting from work requirements single mothers on welfare with children under three years old. GILENS, *supra* note 73, at 187, 186 tbl.8.1. However, Gilens shows that pervasive white racist beliefs that blacks lack a strong work ethic mean that many whites single out blacks as undeserving of welfare and are less likely to support welfare programs identified with black recipients. *Id.* at 67-79. Dorothy Roberts argues that popular support for maternal care is racialized: predominant white racism constructs black children as inherently unworthy of care and black mothers as inherently unfit caretakers (unless under white control as domestic workers). *See* ROBERTS, *supra* note 65, at 179-180.

171. *See* ANTHONY GIDDENS, THE THIRD WAY AND ITS CRITICS 63 (2000) (asserting that "The communitarians have had a direct and visible influence upon the New Democrats and New Labour, as well as upon social democratic parties elsewhere.").

172. *See* Linda C. McClain & James E. Fleming, *Some Questions for Civil Society-Revivalists*, 75 CHI.-KENT L. REV. 301 (2000) (analyzing and criticizing different strands of communitarian ideas related to the "civil society" movement). Michael Sandel, for example, distinguishes his civic republican ideas from "communitarianism" more generally. MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE ix-xvi (2d ed. 1998). For a discussion of communitarian critiques of liberal rights-based discourse, see generally Linda C. McClain, *Rights and Irresponsibility*, 43 DUKE L.J. 989 (1994).

173. *See* Amitai Etzioni, *The Responsive Communitarian Platform: Rights and Responsibilities*, *in* THE SPIRIT OF COMMUNITY: RIGHTS, RESPONSIBILITIES, AND THE COMMUNITARIAN AGENDA 253 (1993).

Communitarians have often singled out AFDC and its reform as particularly important to community well-being. They tend to join (or overlap with) neoliberals in criticizing AFDC as a source of moral hazard, although communitarians typically use overtly moralistic rather than economic terms to describe the problem of welfare's destructive incentives.

But while neoliberal critics attribute moral hazard to policies that fail to give free reign to market incentives, communitarian critics instead attribute moral hazard to policies that fail to sufficiently *restrain* market incentives. Commentators often cite AFDC to illustrate the problems of retreating from an emphasis on public obligations of moral responsibility in favor of individual self-interest and entitlement.[174] Like pro-welfare liberals, communitarians reject the neoliberal claim that community well-being is solely a matter of individual preference-maximizing determined through market competition. Instead, communitarians generally believe that some degree of protection against economic need and insecurity can benefit communities.[175]

1. Resolving Moral Hazard with Moral Control

The communitarian answer to the moral hazard problem of AFDC, therefore, is not to reject policies promoting economic security, but to tie them to stronger regulation of morality.[176] In theory, moral hazard can be reduced not just by reducing protection against costs, but also by controlling the "insured's" behavior to prevent the effects of incentives for increased costs.[177] In the predominant communitarian view, reviving

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174. *See, e.g.*, MICHAEL J. SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 285-89 (1996) (discussing liberal individualist justifications for AFDC); William A. Galston, *Civil Society, Civic Virtue and Liberal Democracy*, 75 CHI.-KENT L. REV. 603, 605, 609-10 (2000) (criticizing liberal notions of a "right to welfare" and defending the 1996 welfare reform legislation that eliminated AFDC); Douglas J. Besharov, *The Moral Voice of Welfare Reform*, THE RESPONSIVE COMMUNITY, Spring 1994, at 13 (criticizing emphasis on rights rather than moral guidance by AFDC caseworkers); Mary Ann Glendon, *Rights and Responsibilities Viewed from Afar: The Case of Welfare Rights*, THE RESPONSIVE COMMUNITY, Spring 1994, at 33.

175. A CALL TO CIVIL SOCIETY: WHY DEMOCRACY NEEDS MORAL TRUTHS 4-5 (Institute for American Values 1998) (criticizing growing economic inequality); Etzioni, *supra* note 173, at 264 (stating the "Responsive Communitarian Platform" position that "the community is responsible for . . . ensuring the basic needs of all who genuinely cannot provide for themselves."); Philip Selznick, *Social Justice: A Communitarian Perspective*, *in* THE ESSENTIAL COMMUNITARIAN READER 62 (Amitai Etzioni ed., 1998) (asserting that "collective responsibility includes obligations of care for the vulnerable and disadvantaged"); *see also* SANDEL, *supra* note 174, at 333 (communal provision of economic security would affirm civic identity of rich and poor alike). Although Sandel disavows the communitarian label and distinguishes his civic republican views, *see supra* note 172, he shares the interest in turning from individual rights to community values that is relevant to my discussion here.

176. *See, e.g.*, Anthony Giddens, *Introduction* to THE GLOBAL THIRD WAY DEBATE 1, 8 (Anthony Giddens ed., 2001) (arguing for maintaining welfare rights by linking those rights to responsibilities in order to reduce welfare's moral hazard and "culture of deceit").

177. *See* Steven Shavell, *On Moral Hazard and Insurance*, 93 Q.J. ECON. 541, 541 (1979) (describing two economic solutions to moral hazard as, first, incomplete coverage against loss, and second, regulation by the insurer of loss-producing behavior).

social citizenship depends on moving away from AFDC's individual rights-based approach to welfare to an approach grounded in enforcing responsibility and morality.[178] For example, Anthony Giddens, advisor to Britain's New Labour party, advocates a "Third Way" that claims to steer a course between what he says is the left's failure to sufficiently regulate families and neoliberals' failure to sufficiently regulate the economy.[179]

In particular, communitarians have advocated conditioning welfare assistance for parents of dependent children on requirements for wage work or unwaged "workfare."[180] For example, the Responsive Communitarian Platform introduces its section on "Social Justice" with the statement, "At the heart of the Communitarian understanding of social justice is the idea of reciprocity: each member of the community owes something to all the rest, and the community owes something to each of its members."[181] The first and foremost responsibility this platform lists for individuals is "to provide for themselves and their families: honorable work contributes to the commonwealth and to the community's ability to fulfill its essential tasks."[182] A Heritage Foundation publication recommends "reciprocity and work" as a major theme of welfare reform.[183] Left-leaning economic theorists Samuel Bowles and Herbert Gintis argue that deeply rooted moral values of reciprocity could provide strong popular support for welfare programs if these were redesigned to encourage social contributions such as employment.[184]

Though many communitarians would no doubt disagree with the details, the 1996 federal welfare reforms embrace the general communitarian emphasis on linking family income assistance to reciprocal obligations for wage work in addition to family caretaking.[185] Single parents of children under six receiving TANF are expected to contribute twenty hours a week of work activities other than caring for their own child (with some exceptions to account for child care problems),[186] and are expected to return to wage work (or marry a wage earner) after a cumulative total of five years of benefits.[187]

In addition to conditioning welfare on participation in wage labor, communitarian

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178. *See, e.g.*, MARVIN OLASKY, THE TRAGEDY OF AMERICAN COMPASSION (1992); Etzioni, *supra* note 173, at 263-64. For analysis and criticism of such communitarian calls to replace rights (particularly welfare rights) with responsibility, *see* McClain, *supra* note 172, at 1014-17, 1023-24, 1014-17; McClain, *supra* note 130, at 372-95.

179. GIDDENS, *supra* note 171, at 49-50; *see also* Giddens, *supra* note 176, at 8 (warning that giving welfare rights without welfare responsibilities "creates major problems of moral hazard in welfare systems").

180. *See, e.g.*, LAWRENCE M. MEAD, BEYOND ENTITLEMENT: THE SOCIAL OBLIGATIONS OF CITIZENSHIP 124-26 (1986).

181. Etzioni, *supra* note 173, at 263-64.

182. *Id.*

183. RECTOR & LAUBER, *supra* note 86, at 4.

184. Samuel Bowles & Herbert Gintis, *Is Equality Passé? Homo Reciprocans and the Future of Egalitarian Politics*, BOSTON REV., Dec./Jan. 1998-99, at 4.

185. *See supra* notes 109-112 and accompanying text; McClain, *supra* note 154, at 97-99 (explaining and criticizing the mid-1990s welfare reforms as a new social contract based on "Third Way" theories demanding mutual contributions in the form of wage work).

186. 42 U.S.C. § 607(c)(2)(B) (2000).

187. *See* HANDLER & HASENFELD, *supra* note 110, at 7; 42 U.S.C. § 608(a)(7) (2000).

efforts to control welfare recipients' behavior have focused on regulating sexuality and family composition. For example, many communitarian arguments for reviving social citizenship stress the importance of redesigning welfare to promote marriage, to reduce pregnancy and sexual behavior by teens and unwed mothers, and to encourage paternal income support.[188] TANF, along with the state welfare reform legislation it encourages, incorporates this theme as well. For example, TANF requires states to give special emphasis to reducing teen pregnancy and out-of-wedlock births.[189] TANF prohibits federal welfare funds from supporting teen parents who do not live under adult supervision or attend school.[190] In addition, TANF requires states to reduce benefits to mothers who fail to cooperate with efforts to establish paternity.[191] Furthermore, many states have taken advantage of TANF's discretion to implement other measures to regulate families, such as "family caps" denying increased benefits for recipients who have additional children while on welfare.[192]

2. Moral Control as Moral Subordination

But this communitarian strategy of reducing AFDC's moral hazard through moral control reinforces rather than resolves the conflict between good citizenship and protection against poverty. Even if regulation succeeds in reducing the incentive effects of welfare, countering its presumed public harm, the communitarian approach to welfare still assigns recipients of family income assistance subordinate citizenship status.

The communitarian approach to welfare implicitly measures good citizenship according to the existing market. Although communitarians claim to value community moral obligations over (or in addition to) market values of self-interested individualism, they tend to make economic self-reliance a central moral obligation to the community. And they define economic self-reliance as successful participation in the existing labor market, without welfare assistance. That is, communitarian defenders of social citizenship accept the core neoliberal assumption that government protection of families through AFDC or TANF counts as "redistribution": a one-way transfer external to and distinct from the reciprocal exchanges of the "market." Moreover, communitarians, like neoliberals, generally assume that this unilateral, extramarket gain provided by welfare is a detriment to others.

In this reasoning, welfare recipients can only be good citizens by accepting a position of failed citizenship that requires correction. By using moral control to solve the moral hazard problem, the communitarian approach to welfare remains within the double bind of the neoliberal welfare critics: redistribution undermines the citizenship qualities it seeks to promote. To make redistribution acceptable as a transition to self-sufficiency and moral responsibility, welfare recipients must sacrifice their autonomy and moral agency—the very characteristics that have traditionally distinguished

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188. RECTOR & LAUBER, *supra* note 86, at 36-37; A CALL TO CIVIL SOCIETY, *supra* note 175 (recommending that states design their welfare reforms to promote marriage).

189. HANDLER & HASENFELD, *supra* note 110, at 210.

190. *Id.* at 206; 42 U.S.C. § 608(a)(4), (5) (2000).

191. HANDLER & HASENFELD, *supra* note 110, at 206; 42 U.S.C. § 608(a)(2) (2000).

192. Thomas L. Gais & Cathy M. Johnson, *Welfare Reform, Management Systems & Their Implication for Children*, 60 OHIO ST. L.J. 1327, 1337 (1999) (eighteen states have family caps).

citizens from subjects. Echoing *Muller v. Oregon*,[193] the communitarian approach carves out a space for redistribution for those undeserving of full citizenship status. Socioeconomic rights stand opposed to civil and political rights as a mark of subordinate membership in society.

The promise of communitarian social citizenship is that refashioning welfare into a regulatory tool will help lead recipients from dependent status to full citizenship. However, the communitarian emphasis on welfare as transition to social inclusion obscures how communitarian moral regulation aims to revise not just welfare recipients but also the market and society into which they are to be included. The communitarian approach constructs the good society as one in which poor families—especially single mothers—have relatively little bargaining power. By characterizing AFDC's incentives for substituting wage work with parental child care as harmful "moral hazard," communitarians join with neoliberals in supporting an ideal of a society with less, and lesser, child care (especially by parents) and more, and cheaper, wage work.[194]

The moral discipline promoted by many of the more conservative communitarian approaches to welfare explicitly aims to correct not just AFDC's incentives for replacing parental child care with wage work, but also to correct AFDC's incentives for raising the market value of wage work—especially for African American workers.[195] One study of the 1996 welfare reforms shows that tougher state work requirements correlated with states with tighter labor markets and with states that had high rates of incarceration of workers of color.[196] The "work first" approach, advocated by some communitarians and incorporated into some states' welfare reforms, promotes the idea that welfare recipients benefit from taking any job rather than seeking training or education to secure better jobs.[197] Marvin Olasky, whose "compassionate conservative" approach to welfare influenced presidential candidate George W. Bush,[198] writes that welfare programs went wrong during the 1960s when "[s]uddenly it became better to accept welfare than to take in laundry" and when "young men were told that shining shoes was demeaning, and that accepting government subsidy meant a person 'could at least keep his dignity.'"[199] Olasky is one of several conservative communitarians who advocate making welfare shameful again

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193. 208 U.S. 412 (1908).

194. Linda McClain argues that the "Third Way" model of citizenship based on mutual responsibility "requires a more explicit focus upon the public value of care and upon care work as socially valuable work, work that the market insufficiently 'honours' or 'rewards.'" McClain, *supra* note 154, at 99.

195. Mississippi used tough work requirements in the 1990s to reduce largely African American caseloads by 71% despite high poverty rates in that state, leading some commentators to describe that policy as a racialized attempt to provide a "desperate and docile labor force, with workers prepared to take slave wages." NEUBECK & CAZENAVE, *supra* note 68, at 191-92 (quoting Kensington Welfare Rights Union, The New Welfare Reform: Delivering Slaves to the Auction Block 3 (1998), *available at* http://www.universityofthepoor.org/library/kwruw-r.html).

196. Joe Soss et al., *Setting the Terms of Relief: Explaining State Policy choices in the Devolution Revolution*, 45 AM. J. POL. SCI. 378, 391 (2001).

197. *See* Davis, *supra* note 127.

198. Alison Mitchell, *Bush Draws Campaign Theme From More Than the Heart*, N.Y. TIMES, June 12, 2000, at A1.

199. OLASKY, *supra* note 178, at 168-69.

to correct this purported harm.[200]

This approach to moral control enforces a vision of citizenship in which "some people"—often racially coded, as in Olasky's shoe-shining and laundry examples—must accept low-waged work as their place in society.[201] This vision aims to value work not through policies designed to improve pay or working conditions, but by reducing the citizenship status accorded those who do not engage in wage work (increasing welfare's relative stigma). Although this vision offers persons in poverty moral rewards—better citizenship status—for low-waged labor, that status comes at the cost of forgoing material and emotional interests in different work and family choices. As some advocates of welfare reform insist, being poor means being morally obligated to refrain from bearing or raising children you cannot afford to support.[202] Having a family becomes a privilege allocated by class, race, and gender status, rather than a basic expectation of citizenship.[203]

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200. *See, e.g.*, CHARLES MURRAY, LOSING GROUND: AMERICAN SOCIAL POLICY 1950-1980 178-84 (1984) (criticizing attempts to take the stigma out of welfare, and arguing that stigma and status provide appropriate incentives for shaping the behavior of the poor); MYRON MAGNET, THE DREAM AND THE NIGHTMARE: THE SIXTIES' LEGACY TO THE UNDERCLASS 143 (1993) (arguing that the poor should not be viewed as victims of economic structures, but should be morally judged because "if it is not blameworthy *not* to work, no definitive praise attaches to someone who works and supports his [sic] family" (emphasis in original)).

201. The punitive approach to welfare reform correlates highly with the percentage of African Americans receiving welfare. *See* NEUBECK & CAZENAVE, *supra* note 68, at 184-87; Soss et al., *supra* note 196, at 191.

202. *See* Kevin Butler & Charles Murray, *Welfare's Woes and the Ills of Out-of-Welfare Births*, INVESTOR'S BUS. DAILY, Sept. 1, 2000 (quoting Murray's discussion comparing the decision to bear a child "even though you have very little money, very little education and are very young" to child abuse and neglect); Galston, *supra* note 174, at 608 (criticizing births by poor, single teenaged mothers on the grounds that "[i]t is wrong to bring a child into the world if one is not adequately prepared to raise the child"). For critical discussions of such arguments, *see* McClain, *supra* note 130, at 352-57; Christopher Jencks & Kathryn Edin, *Do Poor Women Have a Right to Bear Children?*, AMERICAN PROSPECT, Winter 1995, at 43.

203. *See* ROBERTS, *supra* note 65, at 182-93 (discussing welfare reforms as part of a racially driven policy of breaking up black families and penalizing black motherhood); SOLINGER, *supra* note 60, at 183-224 (explaining how welfare reforms have contributed to the ideology that "motherhood [is a] class privilege in America"); CRITTENDEN, *supra* note 114, at 252 (reporting that a business executive denied a high-level employee a work day reduced to eight hours by saying that "any woman who can't afford a nanny shouldn't have children"); *id.* at 172 (contrasting divorced men's assumption of a right to a second family despite their financial inability to continue supporting their existing children). A television documentary of welfare reform in New York interviewed a woman who lost her children to state custody after losing her welfare benefits, despite agreement that she was a good mother. *See* Julie Salamon, *When Their Bootstraps Just Aren't Long Enough*, N.Y. TIMES, July 23, 2001, at E5 (reviewing *Take it From Me*, PBS television broadcast, July 24, 2001). Joan Williams has analyzed how domesticity historically has been a class-based privilege. Joan C. Williams, *Notes of a Jewish Episcopalian: Gender as a Language of Class; Religion as a Dialect of Liberalism*, *in* DEBATING DEMOCRACY'S DISCONTENT: ESSAYS ON AMERICAN POLITICS, LAW, AND PUBLIC PHILOSOPHY 105-06 (Anita L. Allen & Milton C. Regan, Jr. eds., 1998). For a discussion of the centrality of freedom of family choices to citizenship, see generally PEGGY COOPER DAVIS, NEGLECTED STORIES: THE CONSTITUTION AND FAMILY VALUES (1997).

Even when formulated in more supportive and less punitive terms, the emphasis on welfare recipients' reciprocal obligation to work tends to undermine the citizenship status communitarians hope it will build. The more progressive versions of communitarian welfare reform attempt to reduce the degree of sacrifice required from parents taking low-waged work by redirecting (or even increasing) government protection to provide work-based assistance. Some welfare policies also take this approach, for example through the Federal Earned Income Tax Credit for low-waged workers.[204] Wisconsin and other states have incorporated welfare reforms that offer child care, transportation, health care, and training to low-waged workers or welfare recipients seeking work.[205]

3. Redistributing Moral Control

But reconstructing welfare as assistance with the obligation to work for wages still divides government support for the poor from good citizenship because it retains a double standard of moral hazard: poor families, but not employers and others, threaten the public well-being when they have the power to bargain for a greater share of the benefits of waged labor. That double standard creates a double bind that limits work-based social citizenship: employers and wealthier others, not families in poverty, have the moral right to increased gains from increased wage work. Communitarian policies of employment assistance tend to aim to increase welfare recipients' contributions to the community through more wage work, not to make poor families better off economically from wage work.[206]

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204. *See* Jared Bernstein, *Two Cheers for the Earned Income Tax Credit*, AMERICAN PROSPECT, Summer 2000, at 64; HANDLER & HASENFELD, *supra* note 110, at 106-10. *See generally* Anne L. Alstott, *The Earned Income Tax Credit and the Limitations of Tax-Based Welfare Reform*, 108 HARV. L. REV. 533 (1995) (questioning the EITC for attempting what she sees as redistribution through the tax system).

205. *See* HANDLER & HASENFELD, *supra* note 110, at 117-26 (discussing programs implemented prior to TANF); Governor Tommy Thompson, featured speaker, Manhattan Institute, Next Steps in Welfare Reform Conference (1999), *at* http://www.manhattan-institute.org/html/next_steps_4.htm.

206. One analysis of state welfare reforms analyzes two possible purposes of employment assistance: improving resources for poor families and improving families' supposed moral or cultural environment through increased wage work. Gais & Johnson, *supra* note 192, at 1329. They conclude that most states reforms are designed to promote the latter goal. *Id.* at 1346-47; *see also* KATZ, *supra* note 1, at 337 (discussing evidence that welfare reforms moving families from AFDC to wage work have left many working parents in poverty). One study of the effects of TANF in three cities showed that 75% of women in 1999 who had been on welfare (TANF) for two years or less had incomes below the poverty line. William Julius Wilson & Andrew J. Cherlin, *The Real Test of Welfare Reform Still Lies Ahead*, N.Y. TIMES, July 13, 2001, at A21. Although a number of welfare recipients found jobs in the booming late-1990s economy, many of these jobs did not result in a long term net increase in spendable family income. *See* ROBERTS, *supra* note 65, at 182-83 (summarizing studies). And although some studies suggest that one-half of families leaving welfare for work may be better off financially, this result is probably due to a combination of a strong economy, increased child care, and EITC assistance. Wendell Primus, *Comment*, *in* THE NEW WORLD OF WELFARE 131 (Rebecca M. Blank & Ron Haskins eds., 2001). Black families are particularly likely to be worse off economically from

If the purpose of employment-based assistance is to lead nonworkers into the economic self-reliance that constitutes good citizenship, then those in need of economic assistance to sustain their wage work will retain suspect status as citizens.[207] And if family-supporting wage work is the key to demonstrating personal responsibility for public well-being, work-based family assistance will need to be limited and heavily regulated to prevent recipients from benefiting at the expense of others.[208] In practice, state welfare programs that have implemented employment assistance programs have made this assistance a short-term means to reducing welfare caseloads, and have imposed cumbersome and often racially discriminatory reporting and recertification requirements on recipients to determine eligibility and compliance with work obligations.[209] In 2002, President George W. Bush proposed to increase most TANF recipients' work requirements from thirty to forty hours a week and from 50% of a state's adult welfare recipients to 70%, without increased funding for child care or other assistance.[210]

Employment-based assistance protects employers as well as low-waged workers from the costs of labor. Yet communitarian arguments for employment assistance generally do not advocate comparable regulation of employers to ensure that their individual gains are matched by community contributions. Instead, they implicitly equate employers' gains from assistance with public gains, taking their good citizenship status as an unconditional given regardless of effects on others.

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work requirements because of race discrimination in employment and in state administration of job requirements. *See* NEUBECK & CAZENAVE, *supra* note 68, at 177-214 (discussing Gooden's work along with other examples); Susan T. Gooden, *All Things Not Being Equal: Differences in Caseworker Support Toward Black and White Welfare Clients*, 4 HARV. J. AFR.-AM. PUB. POL'Y 23-33 (1998); Susan T. Gooden, *The Hidden Third Party: Welfare Recipients' Experiences with Employers*, 5 J. PUB. MGMT. & SOC. POL'Y 75 (1999).

207. For many, "leaving welfare" has meant a shift in welfare from TANF benefits to low-waged labor supported by food stamps and the earned income tax credit. *See* Wilson & Cherlin, *supra* note 206 (reporting results of a study of TANF in three cities). Numerous reports have linked welfare reforms to dramatic increases in demand for charitable assistance for food and housing. *See* ROBERTS, *supra* note 65, at 183. In contrast, Linda McClain argues for a view of personal responsibility that makes improving families' ability to provide care for children a community moral goal on par with participation in the workforce. McClain, *supra* note 154, at 101.

208. *See* McClain, *supra* note 154, at 100 (warning of "a real risk of the problem of childcare being inadequately addressed if it continues to feature merely as incidental to 'supporting work'").

209. Gais & Johnson, *supra* note 192, at 1347-48; KATZ, *supra* note 1, at 332 (discussing administrative problems of work assistance programs, including high rates of incorrect benefit cuts for failure to comply with rules); *see also* NEUBECK & CAZENAVE, *supra* note 68, at 186-89 (discussing examples of race discrimination in local administration of TANF requirements, such as requiring more documentation from Latina applicants than from white applicants); Gooden, *supra* note 206, at 32 (reporting from a study of Virginia's welfare reforms that caseworkers used discretion to provide assistance, such as job referrals and transportation aid, to white welfare recipients far more than to black recipients).

210. Robert Pear, *Study by Governors Calls Bush Welfare Plan Unworkable*, N.Y. TIMES, Apr. 4, 2002, at A8; *see also* Amy Goldstein, *Bush Presses Lawmakers to Back Welfare Changes*, WASH. POST, Jan. 15, 2003, at A4 (reporting the President's plans to pressure the new Congress to adopt increased work requirements for TANF).

Other things being equal, government assistance with working expenses such as transportation and child care allows employers to benefit from increased reliability and productivity from workers without raising wages or otherwise improving working conditions, thereby encouraging a cycle of dependency on government assistance with the costs of low-waged labor.[211] Yet in the communitarian vision, employers' additional profits from low-waged labor, even if facilitated by government assistance, remain a matter of basic right requiring no additional community obligations in return. If this assistance allows capital owners to gain at the expense of workers and their families, by keeping wages lower than they would be otherwise, then they are simply pursuing market self-interest maximizing which presumably maximizes resources for all. Even the more progressive communitarian view of work obligations tends to reinforce poor families' subordinate citizenship status by continuing to identify employers' interests with a beneficial market but to identify poor families' interests with socially deviant withdrawal from the market. And even the progressive communitarian proposals for generous work assistance tend to incorporate an individualized vision of workers as job consumers rather than as collective producers of better jobs and communities. For example, one study of the impact of welfare reform in Massachusetts found that some community-based organizations have redirected their resources toward providing individual services for the transition from welfare to work and away from strengthening neighborhood institutions, building coalitions, and engaging in civic participation aimed at long-term community economic and social development.[212]

The alternative social citizenship visions of Forbath, Fineman, and Roberts differ from prevailing communitarian views not because they reject the importance of work and responsibility to community well-being, but because they value responsibility for more egalitarian communities and work. Dorothy Roberts envisions antipoverty programs that incorporate a vision of the poor not just as dependent individuals to be included in "the community" through economic assistance, but as political and civic actors deserving of the power to build communities to better meet their interests.[213] For example, the Great Society's social citizenship program provided not just individual aid, but also government support for community action groups run by black activists.[214] Similarly, the New Deal-era social citizenship vision that William Forbath describes focuses not just on individual economic rights, but on the importance of government support for workers' collective political and economic action through policies

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211. Anne Alstott discusses such market-changing effects from employment subsidies designed to induce welfare recipients to increase their wage labor. Anne L. Alstott, *Work vs. Freedom: A Liberal Challenge to Employment Subsidies*, 108 YALE L.J. 967, 1006-07 (1999). My criticism, however, is not that such incentive effects are an artificial distortion of some "real" market incentives, but that they represent a policy choice to favor a market structure that reflects and reinforces a hierarchical vision of workers' and employers' citizenship status. *See infra* notes 242-58.

212. NEUBECK & CAZENAVE, *supra* note 68, at 203-04 (discussing study by James Jennings, *The End of Welfare As We Know It? Or Ending Neighborhoods As We Have Come to Know Them?*, NEIGHBORHOOD FUNDERS GROUP REPORTS (Washington, D.C.), Winter 1999, *available at* http://www.nfg.org/reports/64welfare.htm).

213. Roberts, *supra* note 69, at 1596-97.

214. *Id.* at 1571.

promoting cooperation and democratic community in the workplace.[215]

Like contemporary communitarians, that New Deal-era social citizenship vision asserted that public morality and good citizenship depend on work. Yet that previous vision of work-based social citizenship differed from contemporary communitarian visions by making *employers'* obligations the key to full participation in society.[216] Similarly, Martha Fineman's feminist social citizenship vision stresses public moral responsibility toward caretakers.[217] She not only redefines family-based labor as "work" central to a good society, but also advocates shifting responsibility for sustaining that work from caretakers and low-waged workers to the state and the broader market by obligating employers and governments to accommodate and reward caretaking.[218] Dorothy Roberts analyzes how black feminist activists often have presented welfare rights not as a substitute for either market rights or market obligations, but as a means of transforming labor market rights structured to promote white and male supremacy.[219] For example, late-nineteenth and early-twentieth-century African American reformers advocated family assistance that would support wage-working mothers as fully deserving citizens and that also would support family caretaking by treating that as work deserving of wages.[220] In an antiracist citizenship vision, income support that allows parents of color to withdraw from racially discriminatory waged labor can be a moral opportunity (not a moral hazard) increasing pressure on employers and on white families to take responsibility for better valuing workers of color both in and out of the home.[221]

In short, these three visions differ from the communitarian call to ground social citizenship in public morality, because all demand additional moral responsibility from those identified with the market. By challenging the morality of the market, these alternative social citizenship visions shift deviance and blame for public harm away from those who lose out under existing market conditions. Moreover, these alternative visions recognize markets as fundamentally moral institutions—not fixed as a matter of natural law, but shaped by ideology and power. Dorothy Roberts, for example, argues that the prevailing communitarian emphasis on morality fails to recognize and redress the immorality of economic institutions that perpetuate poverty through longstanding barriers to housing, jobs, and political participation.[222]

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215. *See* Forbath, *supra* note 27, at 61.

216. *Id.* at 73-75. *See* MINK, *supra* note 73, at 26 (arguing that congressional feminists supporting welfare reform "conflated their own *right* to work outside of the home with poor single mothers' *obligation* to do so") (emphasis in original).

217. *See* Fineman, *supra* note 144, at 1409-11; *see also* McClain, *supra* note 154, at 101 (arguing for a recognition of childcare as a component of responsible self-government so that parents deserve societal help in providing both parental and nonparental child care).

218. Fineman, *supra* note 144, at 1436-39 (arguing for restructuring workplaces to support family caretakers, not just as a "special" treatment, but as a basic right to work).

219. *See* Roberts, *supra* note 69, at 1570-71 (discussing early-twentieth-century activism). *Id.* at 1571-72, 1585 (discussing 1960s activism).

220. *See id.* at 1570-71; GORDON, *supra* note 27, at 136-37; Eileen Boris, *The Power of Motherhood: Black and White Activist Women Redefine the "Political"*, 2 YALE J.L. & FEMINISM 25, 26 (1989).

221. *See* NUEBECK & CAZENAVE, *supra* note 68 and accompanying text (discussing how welfare reforms reinforce racially discriminatory labor markets).

222. Roberts, *supra* note 69, at 560-61.

The predominant communitarian vision fails to rescue social citizenship from the neoliberal double bind, because it construes government support for poor families as "redistribution" that departs from market responsibility,[223] implicitly accepting the given distribution of market responsibilities as generally moral or at least beyond moral scrutiny. While more egalitarian communitarians such as Anthony Giddens theoretically advocate enforcement of responsibilities from the rich as well as the poor,[224] in practice they tend to accept the bargaining power of wealthy citizens as market facts that must be accommodated, while condemning the bargaining power of poor citizens as a cultural problem that must be regulated.

For example, Giddens notes that "entrenched interest groups" will resist welfare reform aimed at controlling moral hazard among poorer citizens, but that enforcing such responsibilities "is an absolute necessity" to sustain and strengthen those welfare programs.[225] In contrast, when Giddens discusses the question of taxing billionaires like Bill Gates to support "redistribution" to those facing increased economic insecurity, he explains that high income tax rates for the rich are "no longer feasible or desirable" because the rich have the power to evade taxes.[226] Giddens accepts a system that imposes greater responsibility on the poor than on the rich for curtailing their self-interest in maximizing personal gain, because Giddens assumes that the personal gains chosen by the rich are inherently more moral—more conducive to the good society—than the personal gains of the poor. He explains that when the poor evade low-waged work, they hurt society through excessive leisure (without considering the societal value of increased child care or pressure for better jobs),[227] and when the rich evade taxes they help society by producing jobs (without considering the societal value of those jobs or the possibility that tax evasion by the rich supports short-term speculation or luxury consumption rather than productive investment).[228] By identifying welfare recipients' gains as inefficient moral hazard and tax cuts for the wealthy as promoting an efficient market, Giddens implicitly affirms a citizenship vision in which the poor have subordinate moral status. In contrast, by questioning rather than presuming the moral superiority of those the market has traditionally privileged, Forbath, Fineman, and Roberts provide stronger justifications for expanding individual social and economic rights for impoverished families as a means of more fully enhancing community responsibility.

D. Liberal Citizenship and Welfare Reform

The prevailing pro-welfare liberal approach to social citizenship rejects both communitarian and neoliberal attempts to justify government economic support on the

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223. *See, e.g.*, Giddens, *supra* note 176, at 180 (arguing that equality of opportunity requires "redistribution" for those "left behind" by the market).

224. *Id.* at 8 (arguing that the call for more responsibilities for people with welfare should be extended to elites).

225. *Id.* at 11.

226. *Id.* at 184-85.

227. *Id.* at 180 (noting that high levels of social welfare encourage unemployment associated with low self-esteem and an "oppression of surplus time").

228. *Id.* at 185 (arguing that high taxes "penalize effort and therefore job creation and economic prosperity" and that tax cuts can "create more profit and more disposable income").

ground of overall societal benefits, whether moral or economic. Instead, liberals tend to defend social citizenship on the theory that the good of society depends on individual well-being, not simply on aggregate gain or public virtue.[229] In contrast to mid-twentieth-century pro-welfare liberals, contemporary liberals generally have moved away from relying on the Keynesian theory that redistribution promotes aggregate gain.

Like neoliberalism, pro-welfare liberalism claims the goal of "state neutrality toward competing visions of the good life."[230] Liberalism assumes a citizenship norm of individuals who have the power to govern themselves by making choices as autonomous agents. And like neoliberalism, liberalism assumes a market that generally promotes the public well-being by allowing individuals to maximize their own welfare through freely chosen exchanges. But liberals tend to depart from neoliberalism by arguing that the aggregate good produced by market freedom is sometimes inconsistent with individual well-being.

In the pro-welfare liberal view, state support can augment rather than diminish freedom for individuals who lose out when the market produces aggregate gain. For example, Anne Alstott argues for a liberal revision of welfare founded on the principle that providing basic resources gives each individual "*real* freedom to shape her life."[231] In their book *True Security*, Michael Graetz and Jerry Mashaw justify their ambitious proposal for a comprehensive social safety net on the ground that the market's success in achieving overall well-being should be balanced with individual security.[232] Framing their proposal with the story of the three pigs, whose houses provide different degrees of protection against wolves, they conclude that "[d]espite our nation's affluence, . . . too many little pigs are still being gobbled up."[233]

But contemporary liberals, like communitarians, tend to accept the two central premises of the neoliberal attack on social welfare. First, the liberal defense of welfare assumes that the market stands for efficiency principles that promote the overall good—the public interest. Second, liberals tend to assume that AFDC's assistance for single mothers in poverty deviates from those market principles to promote redistribution, not efficiency. As a result, the liberal response to neoliberal welfare criticisms, like the communitarian response, must grapple with the problem that welfare threatens to harm both the public and, in the long run, its beneficiaries—the moral hazard problem.

1. Resolving Moral Hazard with Freedom from Responsibility

The primary liberal response has been to defend or redesign AFDC as protection against costs not attributable to individual behavior. If limited moral autonomy or

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229. Alstott, *supra* note 211, at 980 ("In contrast to utilitarians, whose goal is to maximize aggregate utility, liberals seek to ensure that every individual has the greatest possible freedom to shape her own life.").

230. *Id.*

231. *Id.* (citing and discussing egalitarian theories of Bruce Ackerman, Ronald Dworkin, John Rawls, and Philippe Van Parijs) (emphasis in original).

232. MICHAEL J. GRAETZ & JERRY L. MASHAW, TRUE SECURITY: RETHINKING AMERICAN SOCIAL INSURANCE 8, 15-25 (1999).

233. *Id.* at 320.

economic agency makes welfare recipients unlikely to significantly affect public costs, welfare is possible without the harsh moral or economic discipline of either the communitarian or neoliberal approaches. In the typical contemporary liberal view, welfare recipients are not irresponsible agents of public harm; instead, they are freed from responsibility for harm.

In reply to charges that welfare produces incentives for more children, less marriage, and less wage work in impoverished families, liberals tend to argue that these incentives do not in fact significantly affect welfare recipients' behavior. In *True Security*, for example, Graetz and Mashaw explain that the problem of moral hazard need not defeat comprehensive public assistance because incentives do not translate directly into behaviors.[234] Liberal critics of restrictive welfare reforms often cite empirical evidence suggesting that recipients of AFDC have not significantly altered family composition or other behavior in response to benefits.[235]

In one explanation of the gap between the moral hazard theory and the actual behavior of welfare recipients, decisions about childbearing, child raising, marriage, and wage work are to a great extent out of recipients' control. For example, some women on AFDC are forced to remain out of the work force or to bear children because of violence, particularly by intimate partners.[236] Single mothers may resort to welfare from lack of marriage or job opportunities, rather than from strategic choices to substitute public assistance for wages or husbands. Poor physical or mental health, failed contraception, random misfortunes, or absent, noncontributing fathers may put families in unanticipated economic need. All of these arguments present women on welfare as victims of external, arbitrary, or systemic forces, which prevent them from exerting individual responsibility for their choices.[237]

In another explanation of the gap between incentives and behavior, even if recipients sometimes have control over their decisions about marriage, childbearing, or wage work, they tend to make these decisions based on irrational or extrarational grounds where economic incentives hold little sway. For example, women in poverty might attempt to raise children and forgo job opportunities because of love, other emotional needs, mental illness, addiction, or religious values.

Or, liberals sometimes try to present welfare recipients as innocent of any harmful incentive effects by construing *children* rather than single mothers as the beneficiaries of assistance. Graetz and Mashaw, for example, justify income support for

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234. *Id.* at 296.

235. *See* JOEL F. HANDLER, THE POVERTY OF WELFARE REFORM 106 (1995); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 739-40 (1992); McClain, *supra* note 130, at 382.

236. *See* Lisa D. Brush, *Harm, Moralism, and the Struggle for the Soul of Feminism*, 3 VIOLENCE AGAINST WOMEN 237, 249 (1997) (explaining the problem that abusive partners use violence to prevent women on welfare from gaining economic independence); Lucie E. White, *No Exit: Rethinking "Welfare Dependency" from a Different Ground*, 81 GEO. L.J. 1961, 1987-89 (1993) (describing examples of how violence—by family members, coworkers, employers and others—restricts women's ability to escape from poverty and welfare).

237. In contrast to standard pro-welfare liberal efforts to focus on structural rather than individual causes of economic need, Linda McClain uses liberalism and feminism to develop a more sophisticated analysis of welfare mothers' choices that recognizes the interrelationship between personal responsibility and social structures. *See* McClain, *supra* note 130, at 434-53.

impoverished families as protection against "the risk of being born into the wrong family,"[238] or more impassively, the risk of being raised by parents of limited earning capacity.[239]

2. Freedom from Responsibility as Subordinate Citizenship

But these contemporary pro-welfare liberal arguments fail to escape the neoliberal double bind that makes redistribution a threat to good citizenship. If welfare is assistance for passive victims of circumstance who fail to achieve the liberal norm of market autonomy, then welfare will be a mark of noncitizenship. Communitarians make this argument when they criticize liberals for failing to treat people in poverty as capable of taking personal moral responsibility as full citizens.[240] While liberal arguments discounting incentive effects offer an alternative to the subordination implicit in communitarian moral control, these liberal arguments tend to support welfare as a means of self-determination only for those whose self-determination is limited. Once again, as in *Muller v. Oregon*,[241] the price of redistribution is status as "others" not capable or deserving of full membership in society.

In addition, because liberalism tends to make market autonomy the model for good citizenship and to distinguish welfare support from market autonomy, it reinforces as public-interested a market in which those in poverty have limited bargaining power. For example, Anne Alstott makes a strong liberal case for basic income assistance without work requirements as a means of enhancing individual self-determination, particularly individual freedom to choose between work and family care or other pursuits not valued in the existing labor market.[242] Alstott argues that work-based assistance programs like TANF designed to encourage wage work by mothers in poverty rely on a paternalistic moral vision that wrongly romanticizes low-wage work.[243] By constructing increased alternatives to wage work for poor mothers as a beneficial moral opportunity—an increase in individual freedom of choice—rather than as harmful moral hazard, she begins to a construct a liberal vision of welfare that does not depend on denying recipients' freedom to reshape the market in their interest.

Nonetheless, Alstott backs away from such a vision by advocating an income assistance program designed to accommodate (or even to exacerbate) a market in which low-income families are limited to the tough choice between below-subsistence government income[244] and low wages.[245] She argues that income assistance should be

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238. GRAETZ & MASHAW, *supra* note 232, at 124.

239. *Id.* at 119.

240. *See* Mitchell, *supra* note 198, at 24 (reporting President George W. Bush's campaign remarks praising charities that use "demanding love" to treat aid recipients as "moral individuals, with responsibilities and duties," and criticizing liberal welfare programs that consider recipients "wards or clients or dependents or numbers").

241. 208 U.S. 412 (1908).

242. Alstott, *supra* note 211, at 988-89.

243. *Id.* at 1011-12 (arguing that policies increasing low-waged work in place of maternal child care do not necessarily enhance either societal well-being or individual freedom).

244. *Id.* at 979 (proposing a $6000 cash grant invariant to family size and below poverty levels).

245. *Id.* at 1005-09 (explaining that no one "has the right to sell her labor for more than her

combined with "deregulation" of the labor market,[246] which she explains as eliminating "regulatory barriers" such as minimum wage laws that keep wages "artificially high for low-skilled workers."[247] Her approach seems to depend on keeping basic income grants, along with wages, low enough so that this assistance does not substantially distort what she assumes are beneficial market incentives.[248] This part of her plan embraces rather than rejects the moral premise that policies increasing low-waged work enhance both overall social utility and individual freedom.[249] She defends this vision of the citizenship virtues of low-waged work by arguing that "[r]eal freedom does not demand that everyone be given unlimited choices or that everyone be happy . . . . Every individual is free to decide whether to work for the wage she commands, or to use her time elsewhere if the wage seems too low."[250]

By assuming individual workers, not politically structured markets, "command" the low (or high) wages they receive, she adopts the *Lochner*-era view that the market naturally operates through voluntary, resource-maximizing exchanges rather than through government distribution and enforcement of rights and responsibilities. And by singling out minimum wage laws as a central barrier to virtuous labor market freedom—rather than, say, laws that prohibit wages for spousal housework,[251] laws that protect employers who discriminate against mothers,[252] laws that provide large subsidies to wealthy married men whose wives replace wage-earning with family care,[253] or laws that discourage strong labor unions[254]—Alstott assumes as natural a

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free counterparts will pay").

246. *Id.* at 1008.

247. *Id.* at 1004-05. Alstott does advocate strong enforcement of civil rights laws against race discrimination in employment, implicitly distinguishing those laws from "artificial" regulatory barriers, but she does not offer any specific details about how to prevent employment discrimination from hindering her liberal vision of free choice between wage work and family care. *Id.* at 1008. For discussions of how race and sex discrimination in employment prevent such free choices, see NEUBECK & CAZENAVE, *supra* note 68, at 193-95; Vicki Schultz, *Life's Work*, 100 COLUM. L. REV. 1881, 1898-99 (2000).

248. *See* Alstott, *supra* note 211, at 1008 (explaining elimination of "mandates" such as the minimum wage as a way of making "transparent" the "real wages for low-skilled labor"). Alstott says she is leaving aside the question whether basic income *should* be set at a subsistence (rather than below subsistence) level, *id.* at 979 n.46, but her justification for the income grant as freedom-enhancing seems to rest on keeping the cash grant low enough to avoid significant reductions in income for upper earners (i.e., substantial economic equality), in part on the theory that upper earners' income contributes more to society. *See id.* at 984-86.

249. *Id.* at 1008 (describing such a market as "freer").

250. *Id.* at 1006.

251. *See generally* Siegel, *supra* note 151 (discussing case law imposing status-based contractual constraints on women's ability to negotiate for wages for family caretaking); Amy Wax, *Is There a Caring Crisis?*, 16 YALE J. ON REG. 327, 340 (1999) (book review) (considering the reasons why societies have "uniformly frowned on the very notion of a free market in women's work").

252. Laura T. Kessler, *The Attachment Gap: Employment Discrimination Law, Women's Cultural Caregiving, and the Limits of Economic and Liberal Legal Theory*, 34 U. MICH. J.L. REFORM 371, 391-419 (2001) (showing how narrow interpretations of sex discrimination law have perpetuated employment discrimination against pregnant women and caretaking mothers).

253. The federal income tax law's marital income-splitting scheme provides a tax shelter, worth about $33 billion annually, for middle and upper income wage earners married to

market governed by policies that constrain the bargaining power of many family caretakers and low-waged workers compared to wealthier others.[255] While her plan challenges neoliberal citizenship norms by demanding a "little bit of extra freedom and

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nonearning or low-earning spouses. Congressional Budget Office, For Better or Worse: Marriage and the Federal Income Tax (1997), *discussed in* Lawrence Zelenak, *Doing Something About Marriage Penalties: A Guide for the Perplexed*, 54 TAX. L. REV. 1, 1 (2000); Deborah Sandorfy, *The "Marriage Penalty" and Innocent Spouse Provisions*, 71 CPA J. 66 (2001) (describing the income splitting bonus as a tax shelter). The taxpayers who gain financially from this provision are disproportionately upper-income white men (and their families). *See also* Dorothy A. Brown, *The Marriage Penalty/Bonus Debate in Black and White*, 16 N.Y.L. SCH. J. HUM. RTS. 168 (1999) (analyzing the racial disparity in subsidies for marriages that do not share wage-earning equally and the failure of proposed reforms to correct it). This bonus provides incentives for the lower-earning spouse to withdraw from substantial wage labor especially in upper income families (and it encourages lower earning parents to remain single). *See* EDWARD J. MCCAFFERY, TAXING WOMEN 17-19, 66, 218-19 (1997) (discussing incentive effects of the federal income tax law's marriage bonus and marriage penalty). While recent legislation gradually phases out the related marriage penalty on many married couples with two relatively equal earners, it increases the marriage subsidy so that high-earners are still better off married to a nonearner than they are if they remain single or if they divide wage earning and family care equally. *See* Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, §§ 301-303 (codified at various sections of 26 U.S.C.); Marvin J. Williams, *The Marriage Penalty Dilemma: Some Relief on the Way*, 46 NAT'L PUB. ACCT. 32 (2001) (explaining that this law reduces tax penalties on low and middle income married couples but retains the joint filing system and related rate structures that provide the marriage bonus). While some construe the marriage bonus as a recognition of the value of women's caretaking labor, *see* Anne L. Alstott, *Tax Policy and Feminism: Competing Goals and Institutional Choices*, 96 COLUM. L. REV. 2001, 2032 (1996), others argue that this scheme's direct effect is to reward breadwinners in certain families with unequal labor division and that women's caretaking labor (both waged and not) would be more directly and equally rewarded by taxing married persons as individuals. *See* JULIE A. NELSON, *Feminist Theory and the Income Tax*, *in* FEMINISM, OBJECTIVITY AND ECONOMICS 97-117 (1996).

The Social Security system similarly subsidizes the traditional breadwinner/homemaker family, arguably penalizing married women's work both in and out of the home. *See* NANCY FOLBRE, INVISIBLE HEART: ECONOMICS AND FAMILY VALUES 98-99 (2001). "A large majority of women pay social security taxes for years, but . . . receive the same benefits they would have had had they never held a paying job at all" because of rules assigning benefits based on a choice between primary breadwinner or "dependent" status. CRITTENDEN, *supra* note 114, at 297-98 n.12 (citing HOW WELL DO WOMEN FARE UNDER THE NATION'S RETIREMENT POLICIES?, H.R. DOC. NO. 102-879, at 12 (1992)).

254. *See, e.g.*, James Atleson, *Confronting Judicial Values: Rewriting the Law of Work in a Common Law System*, 45 BUFF. L. REV. 435 (1997) (giving an overview of the moral assumptions that have shaped U.S. labor law so that it restricts workers' freedom and control relative to employers).

255. Another "regulatory barrier" Alstott mentions is import restrictions. Alstott, *supra* note 211, at 1008. Again, this view singles out government protections for some workers as "barriers" and "mandates" that impede market freedom while not questioning government protections for wealthy capital owners like new international regulatory protections for intellectual property rights. *See* McCluskey, *supra* note 15 (criticizing the assumptions of "real" versus "artificial" market prices in the debate over international trade policies).

dignity" for "low-earners"[256] it also accommodates those norms by accepting that freedom and dignity must still largely vary by economic class (and possibly by race and gender)[257]—implicitly associating a market that fosters high rates of inequality with good citizenship. In sum, Alstott's social citizenship scheme would increase low-income individuals' freedom to choose low-income family care (or other activities) over low-income wage work, while embracing a market designed to constrain individuals' freedom to work for a family-supporting wage.[258]

In contrast, Graetz and Mashaw adopt a liberal vision of welfare that would increase impoverished parents' power to support their family through wage work, but would not substantially increase their power to choose family caretaking over wage work. Graetz and Mashaw acquiesce in TANF's work requirements on the traditional liberal theory that welfare must aim to benefit those perceived as "innocent," like children, and to avoid too much freedom for those perceived as "indolent or inattentive parents."[259] They would support children in poverty through comprehensive assistance with housing, health insurance, and child care costs for working families.[260] This scheme, like Alstott's, falls short of its liberal ideals not because it reflects a moral preference for wage work over family care (or family care over wage work in Alstott's case), but because both liberal visions continue to assume that the public benefits from a market which constrains workers' and parents' power to bargain for substantially better choices for both wage work and family care. Neither challenge the neoliberal double standard of moral hazard that makes employers' increased dependence on low-waged labor an efficient market and families' increased dependence on government support potentially inefficient redistribution.

Graetz and Mashaw's liberal effort to target welfare to support true "innocence" not

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256. Alstott, *supra* note 211, at 984.

257. *See id.* at 1008 (acknowledging that income assistance will do little to counter race discrimination).

258. A basic income guarantee of $6000, as Alstott describes, would add some significant support to low-waged workers by providing supplemental income that could offset the costs of low-waged work. *Id.* at 1008 (noting that the grant could help pay for low-waged workers' transportation and child care). It would also provide incentives for employers to improve wages and working conditions: in an effect that could be described as a "moral opportunity" (rather than "moral hazard"), the guaranteed income would serve as a substitute for work that allows workers to "strike" to improve their power to bargain for better wages and working conditions. *See id.* at 1011 (noting that the cash grant would help the poor "weather a period of unemployment"). But if the minimum wage law were eliminated, this would provide a somewhat countervailing increase in employers' power to bargain for low wages—an effect which Alstott's plan embraces as a moral opportunity (rather than moral hazard) on the theory that a market with more jobs at lower wages is more "free" and beneficial (at least as long as the government provides a low-income alternative to low-income jobs). The net effect of these changes on individuals' ability to "choose" work that allows them to escape poverty would depend (among other things) on what other "regulatory barriers" were removed to enhance employers' "market freedom" and on what other government protections for low-waged workers remain available (Medicaid, food stamps, housing assistance, and child care assistance).

259. GRAETZ & MASHAW, *supra* note 232, at 229, 312 (asserting that political support for family income security is easier because "[m]ost people view children as economically vulnerable through no fault of their own").

260. *See id.* at 227-54.

only requires restricting single parents' choice of child care over work. Their attempt to carve out a claim for innocence as the basis for public support seems destined to remain a losing battle, since welfare critics almost always can respond by describing a plausible way in which different and arguably more responsible individual choices might have avoided the need for welfare support. If TANF's work requirements reflect the premise that impoverished parents (unlike children) are responsible for engaging in wage work to support themselves in the market, then (as neoliberals and conservative communitarians would ask) why should we protect impoverished parents against the costs of market work? After all, if it is good to discourage parental moral hazard by restricting support for those who do not work, then it might seem even better to further discourage parental moral hazard by restricting support for those who do not work hard enough or well enough to support a family, or who do not constrain their family choices to fit their market earnings.[261]

Moreover, if the goal is to truly separate support for innocent children from support for irresponsible parents, and if parents who have children they cannot support are irresponsible, then some will logically conclude that the solution is to remove children from parents incapable of supporting them. Graetz and Mashaw are wrong when they assert that support for children must necessarily be provided through parents.[262] Historically, policies removing children from impoverished parents to state custody or to work or adoption in wealthier families have often been a means of enforcing the subordinate citizenship status of poor families, Native Americans, and other racial and ethnic minorities.[263] Dorothy Roberts shows that recent welfare reforms have worked together with changes in child welfare policy to create a system particularly aimed at breaking up black families.[264] Rickie Solinger reports that, in the 1980s, Republican policymakers promoted adoption of poor children by wealthier families as a strategy for reducing welfare costs.[265]

In short, popular ideas of welfare recipients' "innocence" have long depended on racial, gender, and sexual status. Without directly challenging the inegalitarian ideologies underlying beliefs about who deserves economic protection, it is likely that the generous and comprehensive family income support systems Graetz and Mashaw advocate will be skewed or limited by the assumption that some children are more

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261. In 2002, for example, President Bush stated he was making a priority of pushing for further welfare reforms that would strengthen work requirements. Robin Toner & Robert Pear, *Bush's Plan on Welfare Law Increases Work Requirement*, N.Y. TIMES, Feb. 26, 2002, at A23. Although Bush's plan would allow states additional flexibility to count substance abuse treatment or job training toward work requirements, it made no mention of additional funding for assistance with family needs. *Id.*

262. *See* GRAETZ & MASHAW, *supra* note 232, at 314.

263. *See, e.g.*, LINDA GORDON, THE GREAT ARIZONA ORPHAN ABDUCTION (1999).

264. *See generally* ROBERTS, *supra* note 65; *see also id.* at 186 (giving example of California county which uses TANF sanctions cutting welfare payments as a trigger for scrutiny by child protection services); Nina Bernstein, *Side Effect of Welfare Law: The No-Parent Family*, N.Y. TIMES, July 29, 2002, at A1 (reporting that research on the effect of welfare reforms shows that a rising share of black children receiving welfare live in no-parent households); Jason DeParle, *Wisconsin Welfare Overhaul Justifies Hope and Some Fear*, N.Y. TIMES, Jan. 15, 1999, at A1 (reporting that 5% of mothers removed from welfare were forced to "abandon their children").

265. SOLINGER, *supra* note 60, at 198.

innocent than others, and that those "others" may be more deserving of incarceration, state supervision, or work than of family assistance.

3. Redistributing Freedom from Responsibility

Graetz and Mashaw do, however, partially recognize the importance of ideology about citizenship status in deciding whose economic need is considered beyond their control and therefore deserving of assistance. They support the change from AFDC's support for nonworking mothers to TANF's preference for maternal wage work on the ground that the change reflects new social norms about moral responsibility for wage work.[266] Now that most middle-class mothers depend on their own wage labor to support their families, Graetz and Mashaw agree that the public as a whole will no longer accept AFDC's premise that mothers in poverty need protection from wage work.[267]

But by concluding that "working mothers [have become] the norm for all families,"[268] Graetz and Mashaw make maternal wage work requirements seem to be a benign matter of equalizing moral responsibilities for wage work across class lines and perhaps across gender lines. This egalitarian construction of TANF's work requirements belies the deeper class, race, and gender inequalities that these requirements reflect and reproduce. The increased substitution of wage work for parental child care in white middle-class families is not simply a matter of changing gender roles but of the declining economic security of middle-class breadwinners, as Graetz and Mashaw appear to recognize.[269] To a great extent, the rise in working hours by middle-class mothers (and many fathers) at the expense of family care in the United States has been the result of employers' increased bargaining power in relation to many workers, due to falling or stagnant wages throughout the 1980s and 1990s, increased job insecurity from downsizing, deunionization, and changing global competition.[270]

Consistent with the theory that rising class inequality (not just falling gender inequality) has increased mothers' wage work, responsibility for child care remains heavily gendered—as does primary responsibility for family wage earning.[271] Of

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266. GRAETZ & MASHAW, *supra* note 232, at 230.

267. *See id.*

268. *Id.*

269. *See id.* at 30-31.

270. *See id.* at 31-33. By the 1990s, Americans worked for wages nine weeks more each year, on average, than Europeans—even though in the 1960s, Americans averaged shorter work weeks than any other industrialized nation. Louis Uchitelle, *How to Succeed in Politics Without Really Working*, N.Y. TIMES, June 22, 1999, § 4, at 3 (citing Labor Department data), *discussed in* CRITTENDEN, *supra* note 114, at 260; *see also* ROBERT PERRUCCI & EARL WYSONG, *Preface* to THE NEW CLASS SOCIETY x (1999) (concluding that the American class structure has changed to replace the large middle class of the mid-twentieth century with a society bifurcated into a new working class comprised of 80% and a wealthy privileged class consisting of 20% of the population).

271. In her study of contemporary motherhood, journalist Ann Crittenden concludes that "rising *income* inequality in the United States has brought with it increasing *gender* inequality" in work/family choices (emphasis in original). CRITTENDEN, *supra* note 114, at 117. *See also id.* at 139-40 (stating that most married Americans with children still have a "semitraditional arrangement, with the husband the primary breadwinner and the wife the primary homemaker—

course, traditional gender norms never exempted all American women from responsibility for noncaretaking work to sustain their families. Women of color have been traditionally expected to combine parenting with wage work (or to forgo motherhood).[272] Most American women traditionally engaged in substantial productive noncaretaking labor at home as farmers, craftspersons and entrepreneurs.[273] AFDC

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even if she also works outside the home"). For example, a study on Social Security estimated that even by 2030, only 40% of women will earn enough to qualify as earners rather than as "dependents" for purposes of old age benefits. *See* HOW WELL DO WOMEN FARE UNDER THE NATION'S RETIREMENT POLICIES?, H.R. DOC. NO. 102-879, at 12 (1992), *discussed in* CRITTENDEN, *supra* note 114, at 195, 297-98 n.12. More than one-quarter of American wives with children earn nothing, and the average married woman earns only about half of what her husband earns. CRITTENDEN, *supra* note 114, at 110, 290 n.1 (citing unpublished data for 1995, Current Population Survey, U.S. Bureau of the Census). More than one-third of married women with children under six earn no wage income. Kessler, *supra* note 252, at 386 (citing Press Release, Bureau of Labor Statistics, U.S. Dep't of Labor, Employment Characteristics of Families in 1997, tbl.4 (May 21, 1998), *available at* http://stats.bls.gov/blslnewsrels.htm). Families at the top of the economic scale, where two incomes are not necessary for survival, show a strong, and increasing tendency toward traditional gender divisions of labor: in 1998, nearly half of upper income marriages had just one breadwinner, and 90% of the breadwinners were men. Nancy Ann Jeffrey, *The New-Economy Family*, WALL ST. J., Sept. 8, 2000, at W1, *discussed in* CRITTENDEN, *supra* note 114, at 117, 291-92 n.15 (citing statistics that at the highest income levels, male-breadwinner/female-homemaker marriages are even more predominant). A survey of college-educated women in 1991 showed that fewer than 20% had achieved both motherhood and career by their late thirties or forties. CLAUDIA GOLDIN, CAREER AND FAMILY: COLLEGE WOMEN LOOK TO THE PAST (Nat'l Bureau of Econ. Research, Working Paper No. 5188, 1995) (studying 1,200 college graduates and defining a career as earnings of $11 an hour), *discussed in* CRITTENDEN, *supra* note 114, at 32. On the other hand, rising class inequality may sometimes contribute to gender equality in lower-income married couples with children. *See* FRANCINE M. DEUTSCH, HALVING IT ALL: HOW EQUALLY SHARED PARENTING WORKS 169-94 (1999) (analyzing results of interviews with working class dual-earner married parents who, despite embracing traditional gender ideologies in theory, often demonstrated more actual equal sharing of housework, child care, and job investments than wealthier couples who professed more egalitarian gender beliefs).

This is not to deny that changing laws (and norms) have reduced gender inequality in the workplace, thereby encouraging more women to work. However, many barriers to women's equal employment still persist, particularly for women who do not conform to the dominant norm of the ideal worker as a man without family responsibilities (or much of a nonwork personal life). *See generally* JOAN WILLIAMS, *UNBENDING* GENDER: WHY FAMILY AND WORK CONFLICT AND WHAT TO DO ABOUT IT 1-6 (2000) (proposing eliminating the "ideal-worker norm" in market work and family entitlements); Schultz, *supra* note 247, at 1894-97 (arguing that women's lower pay and labor market participation is due to discrimination and segregation rather than to women's "choice" of family care over wage work).

272. *See* DOROTHY ROBERTS, KILLING THE BLACK BODY: RACE, REPRODUCTION, AND THE MEANING OF LIBERTY 203-07 (1997) (discussing how black women have generally been excluded from policies designed to support women's caretaking labor); ABRAMOVITZ, *supra* note 121, at 123-24 (discussing how black women were unable to fit new nineteenth-century gender ideals emphasizing women's role in the home).

273. *See* CRITTENDEN, *supra* note 114, at 45-53 (tracing the historical development of the idea that housewives' labor is economically unproductive); Reva B. Siegel, *Home As Work: The First Woman's Rights Claims Concerning Women's Household Labor 1850-1880* 103 YALE

benefits are set low enough so that most welfare recipients need to engage in (often unreported) waged or bartering work for others to help their families survive.[274] In the 1990s, much of the political support for work-based welfare reforms was based on a highly inegalitarian citizenship vision that valued not maternal wage work, but instead the redistribution of mothers' work to benefit some families at the expense of others.[275] Contrary to Graetz and Mashaw's benign picture, the prevailing citizenship vision driving welfare reform appears to make poor single mothers, especially mothers of color, morally responsible for replacing care for their children with wage work for others, but to make married middle class mothers, especially white mothers, morally responsible for forgoing substantial wage work to care for their own children.[276]

But while Graetz and Mashaw accommodate what they perceive to be changing

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L.J. 1073, 1086-91 (1994) (describing women's critical role as workers in the antebellum economy and explaining that industrialization did not displace home-based nonwaged production).

274. *See* KATHRYN EDIN & LAURA LEIN, MAKING ENDS MEET: HOW SINGLE MOTHERS SURVIVE WELFARE AND LOW-WAGE WORK 6 (1997) (reporting that interviews with nearly 400 welfare-reliant mothers show that all but one engaged in income-generating activities, and the one exception who did not, risked losing her child for neglect because she could not provide enough food and clothing).

275. *See* MINK, *supra* note 73, at 109 (criticizing TANF as grounded in an ideology "giving social approval to [single mothers'] care-giving work only when it is provided for other people's children"); *id.* at 129-31 (criticizing welfare-to-work requirements for "institutionalizing [poor and single] mothers as a caste of providers for other people—of goods, services, and care for other people and their children"). Dorothy Roberts quotes a cartoon that shows how TANF's work requirements aim to promote a redistribution of work's value, rather than simply increasing valuable work: A politician explains that an AFDC recipient is a bad mother because she "hang[s] around the house taking care of the kids" and that she will be cut off welfare if she doesn't take a job. "Doing what?" the welfare mother asks. "Taking care of someone else's kids," the politician answers. ROBERTS, *supra* note 65, at 180 (quoting Wasserman's View, BOSTON GLOBE, Sept. 25, 1995, at 10). *See also* Dorothy E. Roberts, *The Value of Black Mothers' Work*, 26 CONN. L. REV. 871-73 (1994).

276. Similarly, Amy Wax explains TANF's work requirements as a way of making the division between "deserving" and "undeserving" poor gender neutral, ignoring how these requirements reflect new race, class, and gender norms aimed at constructing many women as deserving of fewer rewards from both work and family. Amy L. Wax, *Something for Nothing: Liberal Justice and Welfare Work Requirements*, University of Pennsylvania Law School, INSTITUTE FOR LAW AND ECONOMICS RESEARCH PAPER NO. 02-11 2 (Mar. 2002). *See* MINK, *supra* note 73, at 23-25 (explaining that "Many welfare reformers view work requirements as necessary not because all mothers should be in the labor market, but because *poor single* mothers ought to be" and because prevailing racial mythology cast black women in the role of "other people's workers rather than their own families' mothers."). *See also* NEUBECK & CAZENAVE, *supra* note 68, at 174-76 (arguing that popular support for welfare's work requirements had the purpose and effect of maintaining racial stratification rather than advancing gender equality for poor mothers). Rickie Solinger similarly shows that the political view driving welfare reforms in the 1990s aimed not to promote a new class equality based on a public norm favoring working mothers, but to making motherhood a class privilege unavailable to poor women and to encourage middle class women to stay at home with their kids. SOLINGER, *supra* note 60, at 216-17 (contrasting Congressional glorification of nonworking middle class mothers with Congressional castigation of welfare mothers' caretaking).

popular values making welfare mothers' caretaking a moral hazard, they dismiss changing popular values about others' responsibility for labor market changes perceived as harmful to society. Many Americans view the rising economic insecurity of the middle class as a problem not only of irresponsible families, but also of irresponsible markets and irresponsible political processes. For example, one 1996 survey found that 83% of average (nonwealthy) Americans agreed (and almost three-fifths strongly agreed) that "average working families have less economic security today, because corporations have become too greedy and care more about their profits than about being fair and loyal to their employees."[277] Popular opinion has shown substantial concern about the harmful effects of policies governing international trade and campaign finance on families dependent on wage income.[278]

Graetz and Mashaw acknowledge that economic changes have produced hardship for many American families,[279] but they assume this hardship is the product of inevitable, and generally beneficial, market forces.[280] By identifying widespread economic insecurity as a problem of random market risks,[281] Graetz and Mashaw take the typical liberal strategy of attempting to relieve impoverished families from responsibility for their hardship to justify government aid in the face of moral hazard concerns. But by failing to attribute responsibility to anyone else for that hardship, this liberal defense of welfare undermines its case.

If economic insecurity comes from the market, and if the market is taken as

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277. Robert L. Borosage & Ruy Teixeira, *The Politics of Money*, NATION, Oct. 21, 1996, at 21-22, *discussed in* PERRUCCI & WYSONG, *supra* note 270, at 174. In a BUSINESS WEEK/HARRIS poll of 1100 Americans, 95% said they agreed more strongly with the statement that "in addition to being concerned about shareholders, corporations should be concerned about their employees, the communities in which they operate, and sometimes they should sacrifice the interests of shareholders for the benefit of employees and the communities in which they operate" rather than the statement that "corporations should only be concerned with maximizing profits for shareholders, and if they do, everything will be right with the American economy." Russell Mokhiber & Robert Weissman, *A Corporate Lawyer Speaks Out*, *available at* http://lists.essential.org/pipermail/corp-focus/2002/000110.html.

278. *See* Lawrence R. Jacobs & Robert Y. Shapiro, *Government Responsiveness in Decline*, 12 PUB. PERSP. 50 (2001) (arguing that government policies increasingly fail to reflect public opinion, and giving public views about campaign finance reform and trade policies as examples); Deepak Gopinath, *Rewriting the Rules*, INSTITUTIONAL INVESTOR, Feb. 2001, at 45 (reporting polls showing that 52% of the public sympathized with Seattle protests against the WTO while 39% were opposed); *The Politics of Trade*, THE ECONOMIST, Oct. 23, 1999, at 27 (reporting popular resistance to "free trade" and support for human rights, labor, and environmental standards instead, and citing poll data showing 46% of respondents agreed that "the U.S. should slow the trend toward globalisation because it hurts American workers"); *see also* PERRUCCI & WYSONG, *supra* note 270, at 123-26 (discussing working class resistance to economic protections for the privileged class in trade policy and election reform policy).

279. *See* GRAETZ & MASHAW, *supra* note 232, at 31-33.

280. *See, e.g.*, *id.* 219-20 (summarizing how a changed political economy has "heightened our anxieties about our individual economic fortunes, notwithstanding our strong economy" but concluding that "[d]espite our nation's affluence, we have yet to adequately protect Americans from the many wolves that come to call—both inevitably and unannounced").

281. *See, e.g.*, *id.* at 48 (describing the purpose of their social insurance scheme as protection against "the risk that circumstances or events will make one unsuccessful in the free market for labor").

beneficial to the public in general, then deviating from the market to assist market "losers" will appear to risk deviating from the public good—no matter how excusable the failings of those who lose. And by relieving others—employers, wealthy capital owners—of responsibility for increased burdens on workers' families, this liberal strategy assumes these market "victors" deserve to pursue self-interested gains at the expense of many others' well-being. In contrast, this liberal strategy concedes that welfare recipients' self-interested gain-seeking produces undeserved harmful moral hazard. The liberal vision affirms a double standard of self-interested gain by which support for those harmed by the market is suspect while support for those identified with the market is normal and publicly beneficial.

Graetz and Mashaw view policies creating incentives for capital owners to shift costs to low-wage and middle-class workers not as harmful moral hazard, but as beneficial moral opportunity. For example, they insist that protecting employers' "flexibility" to control workers' hours and other working conditions (without, for example, accommodating family care demands) will promote economic growth that will trickle down to benefit the public.[282] Their vision accommodates popular disapproval of low-income parents who seek to reduce work in favor of family time, but dismisses popular disapproval of capital owners who seek to reduce wages and workers' flexibility in favor of greater shareholder wealth.

It is true that Graetz and Mashaw's expansive income security proposals would require wealthier taxpayers to take more responsibility for the social costs of a market structured in their favor.[283] But their vision depends on the willingness of those wealthy taxpayers to view others' market losses as worthy of their sacrifice. They hope to expand the potential for political support by designing their work-support system to benefit much of the shrinking middle class as well as the working poor. But their proposals will also require substantial sacrifice from politically powerful upper-class and upper-middle-class taxpayers[284] because their scheme redirects government support away from upper-class and upper-middle-class families (who disproportionately benefit from current tax breaks for housing, dependent care, and health insurance).[285] They hope to sell this redistributive change as a benefit for the public in general on the theory that the risks of income loss are widely shared.[286] In their view, market success or failure is a product not only of individual effort and merit, but of luck and random circumstances;[287] those who are now affluent would therefore benefit from a society that protects those who are not.

But the success of the currently affluent may reflect not just their superior luck and merit, but their superior power to establish comprehensive government policies promoting upward redistribution and protection against market risks for the wealthy.[288]

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282. *See id.* at 284-85.

283. *See id.* at 304 (explaining that some of their policy proposals would "shift support from the affluent to the less affluent").

284. They acknowledge that "[s]upports for the affluent must be redirected, at least in part, to the needy." *Id.* at 231.

285. *Id.* at 290, 304.

286. *See, e.g., id.* at 23, 304-05.

287. *See id.* at 284.

288. *See* PERRUCCI & WYSONG, *supra* note 270, at 121-36, 143-76, 252-62 (explaining the many ways the privileged class of wealthiest Americans has mobilized the media and other

If those who might lose by sharing economic protections more broadly understand their wealth as a product of political design as well as market accident, the prospect of redirecting income protection to low-waged and lower-middle-class workers seems a difficult sell. This liberal political project seems particularly difficult given that it rests on a liberal vision that accepts the premise that, unlike impoverished families, those who succeed in the market have no citizenship obligation to sacrifice their self-interest for others. Instead, the political viability of broader support for working families probably depends on the political power of those who would directly gain from downward redistribution. However, the policies that might remove current barriers to shifting political power from the more affluent minority to the struggling middle and working class—such as campaign finance reform and limits on capital mobility[289]—lie outside the scope of Graetz and Mashaw's social citizenship vision as matters of the market separate from redistribution.

In sum, contemporary liberal efforts to defend social citizenship as a departure from the market to support individual well-being conflict with liberal efforts to defend that market as the ultimate route to maximum individual freedom and well-being. In contrast, the visions of social citizenship offered by Fineman, Forbath, and Roberts aim to defend individual freedom and well-being by changing the market. AFDC and TANF both have failed to promote social citizenship not because they have encouraged mothers to make the wrong choices between work and family, but because neither affirms as socially valuable the increased bargaining power that would allow mothers (and others) more freedom to control the conditions, timing, and rewards of both their wage work and their family formation and care.

Legal scholars Vicki Schultz and Linda McClain both show how liberal notions of individual dignity (or communitarian notions of societal responsibility) can be used to push for a richer vision of citizenship that would allow more mothers to avoid tough tradeoffs between wage income and family care. In McClain's citizenship vision, policies that better recognize the societal value of family caretaking will better enhance individual freedom and fulfillment (as well as community well-being).[290] In Schultz's citizenship vision, policies that better recognize the societal value of wage work will better enhance individual freedom and fulfillment (as well as community well-being).[291] But both visions converge by recognizing that either approach to good citizenship requires major government restructuring of the market and family to better value mothers' work both in and out of the home, both waged and unwaged.

For example, McClain argues that meaningful government support for caretaking must go beyond either individual income or capital grants that would allow individual mothers (or others) to opt out of wage labor for family care.[292] Instead, she advocates a

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resources to increase government protection of their interests at the expense of most Americans).

289. *See, e.g., id.* at 262-73 (describing efforts to resist the policies promoting class inequality by changing rules governing labor organizing, media concentration, elections, and corporate charters).

290. *See generally* McClain, *supra* note 154.

291. *See* Schultz, *supra* note 247, at 1886-92.

292. Linda C. McClain, *Toward a Formative Project of Securing Freedom and Equality*, 85 CORNELL L. REV. 1221, 1251-53 (2000) (discussing BRUCE ACKERMAN & ANNE ALSTOTT, THE STAKEHOLDER SOCIETY (1999)); *see also* Handler, *supra* note 3, at 799 (arguing for a social

government and market restructured to give public support to recognize family care as a public, rather than just an individual value, based on its importance in creating a society of self-governing individuals: for example, she advocates enhanced public health and education services to support parents,[293] and employment law changes that would allow individual parents to better combine wage work and family care.[294] Vicki Schultz recognizes that meaningful government support for wage workers must go beyond assistance that encourages individuals to substitute wage work for other pursuits; she advocates policies that encourage a shorter work week as standard to allow both men and women to integrate wage earning with caretaking, community and political involvement, and pleasure.[295] As many black feminists have long suggested,[296] poor mothers' have lacked equal citizenship status not from insufficient participation either in work or family care, but from a market designed to limit their individual freedom and dignity for the benefit of others. Without challenging the market as well as welfare as a source of government constraint and redistribution, as McClain and Schultz both do, the conventional liberal approach to welfare remains caught within the double bind that defeats social citizenship goals.

For most of its history, Western citizenship theory has presented market labor as a major *barrier* to the individual autonomy and responsibility it deemed necessary for a democratic society.[297] Recognizing the employment relationship as a status of legal and economic dependency, political theory and practice traditionally made capital ownership a key to good citizenship.[298] It was this traditional vision—embraced in American law—of citizenship centered on capital rather than labor that was challenged by the early-twentieth-century labor activists Forbath describes.[299] Despite the now prevailing rhetoric of wage work as freedom,[300] it is this traditional vision privileging

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citizenship vision that recognizes the importance of collective solutions to poverty, rather than the individualized stakeholder solution proposed by Ackerman & Alstott).

293. McClain, *supra* note 292, at 1256.

294. *See* McClain, *supra* note 154, at 102-03, 96-107; *see also* WILLIAMS, *supra* note 271, at 64-113.

295. Schultz, *supra* note 247, at 1955-57. In addition to proposing that the right to work include a living wage, she proposes "vigorous anti-discrimination, affirmative action, and pay equity measures" to ensure equal access to fulfilling work. *Id.* at 1955-56.

296. *See, e.g.*, GORDON, *supra* note 27, at 136-43 (discussing black women activists' views of collective support for mothers in the early 1900s).

297. King & Waldron, *supra* note 1, at 429-31 (giving examples from the theories of Plato, Locke, Burke, and Hegel).

298. *See id.*; *see also* Forbath, *supra* note 27, at 19-20 (noting that "The political theories of the Framers confirmed that the hireling's status of dependence and submission disqualified him for citizenship" and that even after white working men won political rights they retained subordinate status shared—though not equally—by women of all races and men of color); Nancy Fraser & Linda Gordon, *A Genealogy of 'Dependency': A Keyword of the U.S. Welfare State*, 19 SIGNS: J. OF WOMEN IN CULTURE & SOC'Y 309 (1994) (tracing historical understandings of the term dependency).

299. Forbath, *supra* note 27, at 19-23 (describing the subordinate caste status of "free" white male wage laborers), 66-67, 89-91 (describing an unimplemented New Deal Constitution ideal based on an alternative distribution of citizenship rights more favorable to workers).

300. *See generally* STEINFELD, *supra* note 36 (discussing the modern conception of free wage labor as a relatively recent construction of state policy and of contingent historical and

capital citizenship—intertwined with race and gender privilege—that continues to undermine egalitarian social citizenship ideals.[301] Without questioning the prevailing norms that equate market and state freedom with capital owners' freedom to remain dependent on constraining employees' and unpaid caretakers' bargaining power, liberal citizenship visions will perpetuate the subordinate (and gendered and racialized) citizenship status of both wage work and unpaid family caretaking.

II. WORKERS' COMPENSATION

The neoliberal critique of social citizenship has reached beyond AFDC to a broad array of welfare programs. Workers' compensation, the state program protecting against income loss from work-related disability, also has been the target of a powerful benefit-cutting reform movement in the late-twentieth-century United States.[302] Although workers' compensation contrasts sharply with AFDC, its purported differences have not shielded it from neoliberal attack.

Looking at these parallel welfare reforms together underscores the flaws of both the communitarian and liberal attempts to defend social citizenship without disrupting neoliberalism's core premise of the primacy and impartiality of the market. This broader view of welfare state reform gives further evidence that the neoliberal-inspired policy change from AFDC to TANF does not reflect a new social citizenship ideal emphasizing wage work as the means to full membership in the community. Instead, the parallel attack on workers' compensation again shows how neoliberal policies represent and reinforce a vision of citizenship in which wage workers, not just welfare recipients, are also subordinate and suspect members of the community, deserving of only minimal public economic support.[303]

Workers' compensation is a classic example of a program promoting social citizenship rights grounded in wage work. Workers' compensation traditionally has been viewed as conferring benefits based on market contributions, not government charity.[304] In the conventional story, workers' compensation is a voluntary compromise where injured workers give up their right to tort suits against employers in exchange

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ideological judgments about what constitutes labor market freedom).

301. *See* Forbath, *supra* note 27, at 89-91.

302. *See* McCluskey, *Illusion*, *supra* note 12.

303. For an analysis of how recent restrictive changes in another social welfare program, unemployment insurance, also rely on reconstructing workers as deviant, see Lucy A. Williams, *Unemployment Insurance and Low-Wage Work*, *in* HARD LABOR: WOMEN AND WORK IN THE POST-WELFARE ERA 158-74 (Joel Handler & Lucie White eds., 1999).

304. REP. OF THE NAT'L COMM'N ON STATE WORKMEN'S COMPENSATION LAWS 36 (1972) [hereinafter NAT'L COMM'N REP.] ("Workmen's compensation must be an insurance program, not a welfare program."); DAVID A. MOSS, SOCIALIZING SECURITY: PROGRESSIVE ERA ECONOMISTS AND THE ORIGINS OF AMERICAN SOCIAL POLICY 57 (1996) (explaining history of workers' compensation as part of a broader effort to establish social insurance distinct from poor relief); John D. Worrall & David Appel, *Some Benefit Issues in Workers' Compensation*, *in* WORKERS' COMPENSATION BENEFITS: ADEQUACY, EQUITY AND EFFICIENCY 11 (John D. Worrall & David Appel eds., 1985); Emily A. Spieler, *Assessing Fairness in Workers' Compensation Reform: A Commentary on the 1995 West Virginia Workers' Compensation Legislation*, 98 W. VA. L. REV. 23, 130-31 (1995).

for more limited no-fault compensation of medical costs and lost wages.[305]

This story portrays workers' compensation as an economically efficient "bargain": a reciprocal exchange that produces an overall gain, not a redistributive one-way transfer.[306] According to the traditional theory, workers' compensation maximizes overall resources compared to the prior fault-based tort system, because it simplifies claims administration (reduces disputes), and because it improves safety incentives by regularly and predictably internalizing some of the costs of work injuries to employers and consumers.[307]

Workers' compensation's distinction as economically efficient reflects and confers a perception that it deserves superior status among welfare programs in the United States.[308] The story of the efficient workers' compensation bargain affirms workers' standing as virtuous citizens. As equal cocreaters of a "social compact,"[309] workers are autonomous and rational citizens participating in governing society. Workers "earn" their protection through a reciprocal contribution, the sacrifice of workers' civil right to tort damages. By accepting a compromise, workers demonstrated responsibility for society and shrewdly cut a better deal for themselves at the same time.

Nonetheless, the history of workers' compensation is one of social citizenship rights subject to continuous challenge and rarely delivered. From the beginning, narrow definitions of covered injuries meant many work-related injuries and illnesses were not compensated at all, despite persistent efforts by workers.[310] Disability benefits often consisted of temporary subsistence or token payments rather than meaningful wage replacement,[311] were often limited by procedural and evidentiary barriers,[312] and were

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305. *See, e.g.*, Lawrence M. Friedman & Jack Ladinsky, *Social Change and the Law of Industrial Accidents*, 67 COLUM. L. REV. 50, 71-72 (1967).

306. *See, e.g.*, ORIN KRAMER & RICHARD BRIFFAULT, WORKERS' COMPENSATION: STRENGTHENING THE SOCIAL COMPACT 3 (1991) ("society as a whole benefits" from workers' compensation); McCluskey, *Illusion*, *supra* note 12, at 672.

307. At its origins, proponents of workers' compensation explained it as *internalizing* the costs of work accidents into the costs of production and resulting consumer prices so that "the price of the product bears the blood of the workingman." HERMAN MILES SOMERS & ANNE RAMSAY SOMERS, WORKMEN'S COMPENSATION: PREVENTION, INSURANCE, AND REHABILITATION OF OCCUPATIONAL DISABILITY 282 (1954). In the typical explanation, this cost internalization produces incentives that promote overall cost-savings, since consumers seeking cheaper products will pressure employers to improve safety. *See* KRAMER & BRIFFAULT, *supra* note 306, at 2.

308. *See* McCluskey, *Illusion*, *supra* note 12, at 672.

309. *See* KRAMER & BRIFFAULT, *supra* note 306, at 1 (describing workers' compensation as "a truly great social compact").

310. *See* McCluskey, *Illusion*, *supra* note 12, at 770. It is a mistake to think that this narrow view of injury reflected a cultural consensus or ignorance that failed to recognize the potential work-relatedness of occupational illnesses and gradually-occurring injuries. *Id.* at 771, 771 nn.449-50.

311. KRAMER & BRIFFAULT, *supra* note 306, at 23 (asserting that the goal of early workers' compensation systems was to prevent hardship, not to replace lost wages); LINDA DARLING-HAMMOND & THOMAS J. KNEISER, THE LAW AND ECONOMICS OF WORKERS' COMPENSATION 8 (1980) ("[T]he goal of compensation was not to reimburse the injured worker for all of his losses but to 'tide him over' until he could return to work."); *See* PHILIPPE NONET, ADMINISTRATIVE JUSTICE: ADVOCACY AND CHANGE IN A GOVERNMENT AGENCY 19-20 (1969).

significantly eroded due to inflation during the decades after 1940.[313]

In 1972, a bipartisan national commission found that state workers' compensation systems provided grossly inadequate benefits, and recommended comprehensive state reforms, or if those failed, a new federal workers' compensation system.[314] That report helped push state legislatures to increase and improve workers' compensation benefits in the late 1970s and early 1980s, though nationwide benefits still fell short of the recommended expansions.[315] However, those benefit expansions sparked a reform movement led by employers and insurers that produced the most significant period of benefit cutbacks in the history of workers' compensation. From the late 1980s through the 1990s, the majority of states enacted comprehensive reform legislation that has had the effect of reducing disability benefits (especially for permanent injuries), restricting or eliminating compensation for certain types of injuries, and reducing procedural protections for claimants whose claims are denied.[316]

The example of workers' compensation shows the difficulties of defending social citizenship on economic efficiency grounds. Workers' claim to protection against work injury costs at the expense of employers rests uneasily next to employers' claim of rights to maintain profits and control productivity. Even though the efficiency rationale explains workers' protection as a public benefit, that rationale at the same time supports restricting that protection to avoid public harm. As a result, workers' compensation remains caught in the double bind that makes social citizenship inconsistent with good citizenship.

Workers' sacrifice of their civil rights in tort law is what justifies workers' compensation as a publicly beneficial reciprocal exchange instead of a redistributive transfer. Yet, in the conventional understanding, that exchange of a civil right for a social citizenship right relocates workers' claim for benefits outside of the efficient market. From that position, protection for workers at the expense of employers will tend to appear inefficient and, therefore, detrimental to the public. Without going further to question the *Lochner*-era theory that employers' right to a market structured in their favor is a fundamental citizenship right, workers' claims for government-mandated protection in the employment relationship will remain suspect and subordinate.

The example of workers' compensation, like AFDC, helps show how the question of social citizenship rights does not simply raise the tension T.H. Marshall famously described between supplementing the market with substantive economic protection and contradicting the market's emphasis on civil rights based on individual contractual freedom.[317] More fundamentally, the question of social citizenship poses the problem

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312. *See* Glenn Merrill Shor, The Evolution of Workers' Compensation Policy in California, 1911-1990, 119 (1991) (unpublished Ph.D. dissertation, University of California, Berkeley) (available from the UMI dissertation reprint service).

313. *See* NAT'L COMM'N REP., *supra* note 304, at 19 (stating that, in most states, from 1940 to 1972 maximum benefit levels decreased in proportion to average wages).

314. *Id.* at 119.

315. *See* McCluskey, *Illusion*, *supra* note 12, at 683-84.

316. *See id.* at 684-90, 809-16.

317. *See* MARSHALL, *supra* note 1, at 68 (describing how "social rights . . . imply an invasion of contract by status"); KATZ, *supra* note 1, at 344 (explaining that "Marshall stressed the conflict between civil and social citizenship at the heart of the welfare state.").

of which rights should count as "civil"—part of normal market freedoms—and which as "social"—part of political protections external to that market.[318] The example of workers' compensation shows how neoliberal ideology aims not just to reject social rights, but to redefine citizenship rights as a whole by constructing certain market structures as essential civil rights (employers' immunity from workers' torts) and others as expendable social subsidies (employers' strict liability for workers' injuries).[319]

A. Neoliberal Citizenship and Workers' Compensation Reform

1. Moral Hazard from Expanded Benefits

In recent state campaigns for benefit restrictions, reform advocates often relied on neoliberal economic theory to argue that workers' compensation deviated from its efficiency-based origins to become a redistributive "welfare" program. How did workers' compensation, like AFDC, change from being perceived as a program producing positive to negative spillover effects on society—from a means of enhancing to eroding good citizenship? Just as with AFDC, the neoliberal concept of moral hazard was key to this conceptual change. In particular, reformers stressed that increased protection for workers created a moral hazard problem.[320]

Reformers argued that benefit expansions increased coverage of claims for which the cause or severity of the disability appears uncertain—occupational diseases, gradually developing strains, or psychological stress, for example.[321] In the conventional moral hazard analysis, as more generous and accessible benefits provide a less costly alternative to work, they produce incentives for workers (and their advocates) to exploit this uncertainty in their favor by filing more claims, and by filing claims for greater losses.[322] Reform advocates argued that, because of expanded benefits, workers are more likely to seek compensation for nonwork injuries (including problems from general health conditions, leisure activities, or aging)[323] or for wage loss unrelated to disability (such as from economic downturns or lack of motivation to

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318. Marshall did recognize that one answer to the question of the conflict between social and civil rights is that "the replacement of free bargain by the declaration of rights" is a principle "entrenched within the contract system" of the market. MARSHALL, *supra* note 1, at 68.

319. *See* Baker, *supra* note 101, at 275 (explaining that assumptions about which market distributions count as legal entitlements and which count as political "redistributions" underlie recent economic arguments about the harmful incentive effects of expanded workers' compensation benefits).

320. *See id.* at 238-39, 273 & n.178; McCluskey, *Illusion*, *supra* note 12, at 744, 816-17; *see also* PRICE V. FISHBACK & SHAWN EVERETT KANTOR, A PRELUDE TO THE WELFARE STATE: THE ORIGINS OF WORKERS' COMPENSATION 201-02 (2000) (explaining recent reforms limiting benefits as an effort to reduce moral hazard problems created by the benefit expansions of the 1970s).

321. *See* McCluskey, *Illusion*, *supra* note 12, at 767-88.

322. *See id.* at 742-45.

323. *See id.* at 788-94.

return to work).[324]

As a result, the expansion of workers' compensation benefits in the 1970s and 1980s became an example of the standard neoliberal theory that departing from economic principles for social welfare purposes, however well-intentioned, leads to public harm. Insurers, employers, and other supporters of reforms complained that benefit expansions have threatened jobs and economic competitiveness by burdening employers with costly benefit costs beyond their control,[325] and that expanded opportunities for filing illegitimate claims have added costly "friction" to the process of administering claims.[326] Reform advocates insisted that although individual workers might suffer harm from benefit restrictions, such sacrifices are the price of protecting overall economic growth and of keeping the system affordable for the benefit of injured workers and society as a whole.[327]

In response to these concerns, many states have attempted to reduce claimant moral hazard by restricting compensation for losses perceived to result primarily from cost-increasing by workers rather than from workplace harms or actual disability. For example, some reforms change disability benefit calculations to reduce or restrict payment for wage losses exacerbated by workers' skill levels, age, or education.[328] Other recent law revisions require claimants to prove that work is a "primary" or "major" or "substantial" cause of their injury, changing the traditionally loose causation requirement that (in theory) had allowed compensation for injuries with any nontrivial connection to work.[329]

2. Redistributing Moral Hazard Through Benefit Cuts

But the late-twentieth-century problem of moral hazard in workers' compensation (as in AFDC) was not a problem of a change in incentive effects but of a change in moral judgments about the social value of those incentive effects. By attempting to distinguish and control claims attributable to workers' "personal" attributes or behavior, recent neoliberal reform arguments helped reshape the goal of workers' compensation from a purportedly no-fault system that partly compensates work injuries regardless of workers' responsibility to a system which holds workers responsible for avoiding a larger share of accident costs. By weeding out claims for injuries to which workers' lifestyle, skill levels, leisure activities, age, preexisting health conditions, or job choice may have contributed, recent reforms reintroduce employers' nineteenth-century fault-based defenses of contributory negligence and assumption of risk, to some extent.[330]

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324. *See id.* at 809-43.

325. *See id.* at 689-90.

326. *See id.* at 857-60.

327. One lawmaker responded to concerns about harm to injured workers from benefit cuts by saying, "Is it a perfect system? The answer is no. But it's as fair as the system can afford." Stuart Steers, *Still Hurting: Injured Workers' Have Borne the Brunt of Workers' Comp "Reform" in Colorado*, DENVER WESTWORD, Mar. 28, 1996 (quoting Colorado House Majority Leader Tim Foster).

328. *See* McCluskey, *Illusion*, *supra* note 12, at 830-34.

329. *See id.* at 792-93.

330. *See id.* at 798-99; Martha T. McCluskey, *Rhetoric of Risk and the Redistribution of*

In the traditional theory of workers' compensation, those old fault-based tort defenses were the *source* of inefficient moral hazard, not its *solution*. According to the old theory, the public benefits from *protecting* workers from responsibility for accident costs because the old fault-based defenses encouraged employer moral hazard by providing incentives for the employer to take less care to avoid accidents or wasteful litigation.[331] In the conventional wisdom, this original no-fault theory was based on a system where the consequences and causes of traumatic industrial injuries were more certain and therefore less subject to claimants' cost-inflating "moral hazard" behavior.[332]

But the change from the traditional no-fault approach to the recent fault-based reforms does not reflect a change in the difficulty of weeding out illegitimate claims for injury compensation. In fact, workers' compensation developed from a period of vigorous controversy about the legitimate causes and effects of workers' injuries.[333] The prevailing early-twentieth-century advocates of workers' compensation rejected a fault-based approach precisely because they believed the industrial revolution had introduced great uncertainty over responsibility for work accidents.[334] Just like today, early disputes about work injuries were impossible to resolve with "objective" medical evidence, because, both then and now, the underlying "uncertainty" about causes and effects of work accidents inherently involves questions of moral responsibility.[335] For example, strongly contested issues in the early debate over workers' compensation included whether to attribute limbs severed by industrial equipment to employers' failure to spend money on safer machines or to workers' failure to work more carefully, to choose a safer occupation, or simply to workers' bad luck;[336] or whether to consider workers' post-injury loss of wage income a cost of workers' preinjury wages, a cost of employers' decision to profit from a risky workplace, or a cost of workers' failure to procure alternative income sources.[337]

Social Insurance, *in* EMBRACING RISK: CHANGING CULTURE OF INSURANCE AND RESPONSIBILITY 146, 157-58 (Tom Baker & Jonathan Simon eds., 2002) [hereinafter *Rhetoric of Risk*].

331. *See* CRYSTAL EASTMAN, WORK-ACCIDENTS AND THE LAW 14-15 (1910) (arguing that replacing this tort system with workers' compensation would protect valuable labor resources and reduce charity); MOSS, *supra* note 304, at 64-65, 74-75 (discussing economic arguments that workers' compensation would better internalize the costs of work and therefore would prevent accidents and reduce injury costs).

332. KRAMER & BRIFFAULT, *supra* note 306, at 18 ("Since the place and physical cause of most injuries are readily apparent [in the early industrial accident case], it was assumed that employers and administrators could easily distinguish between work-related and non-work-related accidents, without resort to protracted dispute resolution processes, litigation or attorneys.").

333. For an example of a famous effort to discuss and resolve this debate, see EASTMAN, *supra* note 331.

334. MOSS, *supra* note 304, at 121.

335. For discussions of how legal disputes over "causation" are about questions of value, despite attempts to construct them as questions of scientific fact, see MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW: 1870-1960, 51-53 (1992); Mark Kelman, *The Necessary Myth of Objective Causation Judgments in Liberal Political Theory*, 63 CHI.-KENT L. REV. 579, 580 (1987).

336. *See* McCluskey, *Illusion*, *supra* note 12, at 796-97.

337. *See* EASTMAN, *supra* note 331, at 128-31 (disputing arguments that workers' actual

The early-twentieth-century change from tort law to no-fault compensation for occupational injury represented a moral judgment to resolve those uncertainties about responsibility for work accident costs partly in workers' favor, on the theory that the public as a whole will benefit from treating the costs of work injuries as an inevitable fact of industrial employment regardless of workers' cost-avoiding efforts.[338] In workers' compensation, as in AFDC, recent reforms supposedly directed at reducing moral hazard instead are directed at redistributing moral hazard. The reforms change the relative distribution of bargaining power through which workers or employers can exploit uncertainty at the expense of others, reflecting and reinforcing a change in prevailing views of workers' and employers' relative citizenship status.

As workers' compensation benefits become high enough (or accessible enough) to substitute for wage income, they become an alternative to wage work that increases workers' elasticity of demand for work.[339] That increased elasticity means workers have the bargaining power to pay a smaller share of the costs of work: the alternative income source afforded by workers' compensation allows them to work less when work imposes greater health costs. For instance, workers may extend their recovery period after an injury to lessen the risk of further health problems, or they may seek compensation for injury costs that they would otherwise have suffered on their own. Or their increased elasticity of demand for work may allow them to pressure employers' to raise wages or otherwise improve employees' rewards from work.[340]

In contrast, the recent workers' compensation reforms (like AFDC reforms) increase employers' (or insurers') moral hazard by increasing their bargaining power relative to workers (assuming other things are equal). As disability benefits become a less adequate or accessible alternative to work for workers, employers (and insurers) will have more power to pay less of the costs of work injuries. Lower (or less accessible) disability benefits give employers (and insurers) more incentives to avoid work disability costs: they have more power to substitute minimal or no compensation for prevention, to force workers back to work before they are sufficiently recovered, or to avoid mitigating injury costs by providing good and prompt medical care or work modifications to accommodate disabled workers.[341] As benefit restrictions shift bargaining power from workers to employers, the ability to take less responsibility for reducing work injury costs shifts from workers to employers.[342]

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economic loss was insignificant because wage premiums for risky work already compensate this loss).

338. *See Rhetoric of Risk*, *supra* note 330, at 158; McCluskey, *Illusion*, *supra* note 12, at 898-99.

339. *See* McCluskey, *Illusion*, *supra* note 12, at 760-62; *see also* Emily A. Spieler, *Perpetuating Risk? Workers' Compensation and the Persistence of Occupational Injuries*, 31 HOUS. L. REV. 119, 217-20 (1994) (arguing that high costs of filing claims often affect this benefit calculation).

340. *See* McCluskey, *Illusion*, *supra* note 12, at 762; *see also* MICHAEL J. MOORE & W. KIP VISCUSI, COMPENSATION MECHANISMS FOR JOB RISKS 67-68 (1990) (explaining this redistribution of bargaining power but attempting to construct it instead as a problem of inefficiency to justify benefit reforms).

341. *See* Baker, *supra* note 101, at 274-75, 280; McCluskey, *Illusion*, *supra* note 12, at 747-48.

342. *See* McCluskey, *Illusion*, *supra* note 12, at 764-65.

3. Reenvisioning Employers' Moral Hazard as the Beneficial Market

Just as with AFDC, reducing moral hazard—or bargaining power—for benefit recipients increases moral hazard—or bargaining power—for employers. By counting workers', but not employers', increased cost-shifting as inefficient moral hazard, neoliberal arguments for reform incorporate a double standard that measures workers' increased bargaining power as a civic threat and employers' and insurers' increased bargaining power as a civic virtue. As in AFDC, this double standard for moral hazard is grounded in moral judgments about workers' and employers' relative rights and responsibilities as citizens. And like the neoliberal AFDC reform arguments, the workers' compensation reform arguments rationalize these citizenship judgments by identifying employers' interests with a market that furthers the public's interest while identifying employees' interests with deviations from that market.[343]

In the traditional theory of workers' compensation, workers earned the no-fault system's limited freedom from responsibility (elimination of employers' fault defenses) by granting tort immunity to employers and accepting limited damages. In contrast, as a result of some recent state reforms, workers owe even more for their workers' compensation benefits: they must contribute not just tort immunity but also (for instance) good physical and mental health not hampered by nonwork demands, pre-existing weaknesses, or age; and they must contribute the skills, attitudes, occupational choices, and labor market value sufficient to prevent most permanent injuries from resulting in substantial income loss.[344]

The one-sided view of moral hazard incorporated into recent reforms not only increases workers' obligations in the imagined social compact, but also diminishes employers' obligations. Recent reforms partially adopted the idea that payment of no-fault compensation (claims that workers arguably could have avoided) is an inequitable burden on employers instead of their reciprocal responsibility. In the prevailing analysis, employers' tort immunity became not a government protection subject to inefficient moral hazard and contingent on mutual social contribution, but a right basic to the normal free market.[345] During the recent period of benefit-cutting reforms, states generally have sustained or even strengthened strict employer tort immunity rules, often cutting off tort remedies even for work injuries excluded from workers' compensation.[346]

Neoliberal "economic" arguments singling out workers' moral hazard are about redistributing citizenship status, not maximizing aggregate growth, because these arguments are about revaluing workers' and employers' relative worthiness as

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343. *See Rhetoric of Risk*, *supra* note 330, at 164-65 (using workers' compensation as one of several examples of how neoliberal ideology has reconstructed self-interest maximizing by some as harmful moral hazard while glorifying similar risk-increasing behavior by others as market-enhancing activity).

344. *See id.* at 151-58 (discussing how reforms making physical "impairment," rather than lost wages, the standard for determining disability awards represent a policy of requiring workers rather than employers to bear the costs of many of the uncertainties in workers' compensation).

345. *See* Baker, *supra* note 101, at 275; Spieler, *supra* note 339, at 232.

346. *See* McCluskey, *Illusion*, *supra* note 12, at 893-95.

members of the public.[347] By moving back toward the nineteenth-century tort system that made employers' protection from most occupational torts a civil right and workers' protection from most occupational injury a personal responsibility (or at best a public charity), recent reforms reflect and reinforce what historian Christopher Tomlins explains was the traditional legal assumption that workers were not citizens, but servants excluded from membership in the deserving public.[348] In the early twentieth century, in contrast, proponents of workers' compensation helped justify better protections for workers by idealizing injured workers as heroic veterans who have strengthened the nation by braving the risks of waging the Industrial Revolution.[349]

The late-twentieth-century reformers revised this image of injured workers by justifying reductions in workers' bargaining power with anecdotes of claimant fraud, demonizing workers as greedy criminals. Widely publicized fraud stories frequently used prejudicial race, class, gender, and other stereotypes to portray claimants as deviant others with antisocial morals.[350] For example, an NBC news story exposing an allegedly fraudulent workers' compensation payment identified the claimant as "a recent Polish immigrant."[351] This news report quoted an insurance company investigator's angry comment, "This is the only job this guy ever had in America, and this is what he did with it," and concluded that he has now learned that "in this country" being caught at such behavior "can get you jail time."[352]

While these moral hazard stories depict workers as selfish and antisocial when they pursue benefit claims, they depict employers and insurers as public-spirited good citizens when they *contest* claims. In the same NBC report, news anchor Tom Brokaw automatically identifies the insurance industry's interest in reducing claims fraud, and employers' interest in reducing insurance premium costs, with the public interest.[353] He describes the alleged claimant fraud as "an outrageous example of the fleecing of America," that such fraud costs insurance companies "more than five billion dollars a year" (relying on insurers' highly speculative numbers),[354] and that "we all end up

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347. *See Rhetoric of Risk*, *supra* note 330, at 155-58.

348. CHRISTOPHER L. TOMLINS, LAW, LABOR, AND IDEOLOGY IN THE EARLY AMERICAN REPUBLIC 384 (Cambridge Univ. Press ed., 1993).

349. For example, in 1893 Interstate Commerce Commission Secretary Edward A. Moselely compared "hardworking and faithful railway employees" to Civil War casualties, saying that "more of the grand army of railway men of this country were cut and bruised and maimed and mangled last year than all the Union wounded and missing on the bloody field of Gettysburg." Melvin L. Griffith, *The Vindication of a National Public Policy Under the Federal Employers' Liability Act*, 18 LAW & CONTEMP. PROBS. 160, 163 (1953), *cited in* JOSEPH W. LITTLE ET AL., WORKER'S COMPENSATION: CASES AND MATERIALS 3 (4th ed. 1999).

350. *See* McCluskey, *Illusion*, *supra* note 12, at 885-86.

351. Tom Brokaw & John Larson, *False Claim for Workers' Compensation Discovered by Hidden Camera* (NBC Nightly News, May 30, 2000).

352. *Id.*

353. *See id.*

354. The U.S. Chamber of Commerce circulated this figure, stating that it was based on estimates by the insurer-financed National Insurance Crime Bureau and Insurance Information Institute. *See* Stephen Blakely, *Fighting Fraud in Workers' Comp*, NATION'S BUS., Apr. 1, 1998, at 14. However, the insurance industry appears to have derived this highly speculative number from surveys gauging popular attitudes about fraud rather than from direct evidence of

paying through higher premiums."[355]

Why, in this view, does workers' gain-seeking from increased benefit claims count as "fleecing" the public, while insurers' and employers' gain-seeking from reduced benefit claims count as saving the public's money? These stories erase insurers' and employers' power to bargain in their own interest and instead identify their actions as passive reflections of neutral market processes that enhance aggregate gain.[356] When insurers and employers deny claims as illegitimate, in these stories, they are not seeking to maximize their benefits at the expense of others; instead, they are simply impartially implementing an efficient market bargain—the basic quid pro quo of workers' compensation. By giving employers and insurers this passive role, these stories can then suggest that the gains from denying claims flow naturally to the public, including consumers (who get lower prices for insurance and other products) and other workers (who have more money left for legitimate claims), thereby promoting both efficiency and equity.[357]

In contrast, these stories highlight workers' power to bargain for personal gains. When workers pursue questionable or contested injury claims, these stories emphasize that workers (and their lawyers and doctors) have the power not just to follow market rules, but also to manipulate the rules in their interest—exploiting uncertainties in the claims process to violate the terms of the efficient workers' compensation bargain. As a result, these stories obscure the possibility that workers' gains from maximizing their injury claims also might flow through to others. For example, through more pressure on employers and insurers to minimize other workers' injuries, through workers' willingness to accept offsetting wage decreases, or, more indirectly, through more spending power by injured workers that increases consumer demand for employers' products.[358]

A more complete view of recent antifraud campaigns, however, shows that insurers and employers, as well as workers, exercise their self-interested power to reshape as well as follow the rules of the presumed workers' compensation bargain. Employers and insurers have promoted these popular stories about workers' fraud not simply out of abstract or altruistic concern for the public's well-being, but because stories portraying workers' compensation claimants as undeserving have been a politically and

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fraud. *See* Ruth Gastel, *Insurance Fraud*, INS. INFO. INST. INS. ISSUES UPDATE, Mar. 2002 (repeating the $5 billion figure and generally citing a series of studies in the 1990s showing the percentages of respondents who believe workers' compensation fraud is widespread or who believe it is often acceptable to stay out of work even after a doctor has authorized a return to work); AFL-CIO, *Fraud, Fraud and More Fraud*, WORKERS' COMP NOTES, Mar./Apr. 1998 (no pagination on electronic copy) (criticizing the $5 billion estimate for having "absolutely no relationship to fact" because it is based only on survey respondents' opinions that they know someone capable of working while receiving workers' compensation).

355. Brokaw & Larson, *supra* note 351.

356. *See* McCluskey, *supra* note 15 (explaining how neoliberal "economic" arguments rely on narrative strategies to construct employers, insurers, and elite executives as passive receptors of policy and workers as powerful agents).

357. *See Rhetoric of Risk*, *supra* note 330, at 156 (discussing how recent workers' compensation reforms reflect an ideology embracing public solidarity with employers and insurers but not with workers, on the assumption that the public shares in employers' and insurers' gains but not in workers' gains).

358. *See id.*

economically powerful strategy for increasing their profits at the expense of injured workers' arguably legitimate claims. That is, the recent political focus on claimants' moral hazard can be a form of employer and insurer moral hazard: a strategy for protecting them from paying the costs of claims for legitimate work injuries. In many states, subjective, exaggerated, and even false accounts of claimant fraud helped convince lawmakers to enact sweeping benefit cuts.[359] Employers' and insurers' efforts to combat worker moral hazard have served not so much to increase benefits for more deserving workers, but more to reduce claims in general—by increasing potential stigma and penalties attached to claims filing.[360] Indeed, most evidence suggests that the costs of claimant fraud are small (less than one percent of total claims costs) and are overshadowed by the problem of false reports of claims fraud (often for harassment purposes).[361]

In sum, the neoliberal claim to restore efficiency through recent workers' compensation reforms instead should be understood as a claim to restore a vision of the good society as one in which employers and insurers, but not workers, are entrusted with the power to distribute the costs of work accidents to their benefit. To challenge this neoliberal citizenship vision, critics must reject rather than accommodate the underlying assumption that equates employers' and insurers' self-interest with the public good and workers' self-interest as a public threat. Defenders of strong workers' compensation protections will not escape the neoliberal double bind that makes workers' protections increase harm to both workers and to society as a whole without challenging the neoliberal double standard that makes workers, not employers, primarily responsible for sacrificing their self-interest for the public good.

Though they do not specifically discuss workers' compensation reforms, Forbath, Fineman, and Roberts offer a different citizenship vision that makes human beings' physical and mental well-being, not just employers' and insurers' profit making, central to the public well-being. For example, in an article comparing social insurance programs for disability to welfare assistance for the nonearning poor, Dorothy Roberts

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359. *See* McCluskey, *Illusion*, *supra* note 12, at 873-86; Ted Rohrlich & Evelyn Larrubia, *Anti-Fraud Drive Proves Costly for Employees Benefits*, L.A. TIMES, Aug. 7, 2000, at A1.

360. *See* McCluskey, *Illusion*, *supra* note 12, at 887-93 (arguing that the main purpose and effect of the emphasis on claimant fraud has been to benefit insurers and employers at the expense of workers); Ted Rohrlich & Evelyn Larrubia, *Public Fraud Unit Favors Those Who Privately Fund It*, L.A. TIMES, Aug. 6, 2000, at A1 (explaining that California's antifraud law giving insurers and employers a role in controlling and funding state criminal fraud investigations has worked to detract attention from employer and insurer fraud and to harass workers with legitimate claims).

361. An insurance industry research institute using California state data found that 1000 fraud referrals per quarter resulted in about 60 convictions, out of nearly 70,200 total quarterly disability claims. *See* Workers' Compensation Notes (AFL-CIO Dep't of Occupational Safety and Health, Washington, DC), May/June 2000, at 2 (citing the California Workers' Compensation Institute). A study by the state of Wisconsin found that "[m]ost claimant fraud allegations are made anonymously, by telephone, and from people who identify themselves as former friends or spouses, relatives, co-workers or neighbors of the person alleged to be committing claims fraud," and that in nearly a third of the allegations, the persons accused were receiving no workers' compensation benefits. *See Allegations of Workers' Compensation Fraud*, 1999 Wis. Dep't of Workforce Dev. (2000) (studying an average of 60,000 annual lost-time injuries from 1994 to 1998).

and coauthor Jennifer Pokempner criticize the theory (often violated in practice) that privileges workers' disability as deserving of government assistance but treats poverty a personal failing.[362] Roberts and Pokempner recognize that public discourse has reconstructed disability benefit programs, like welfare programs, to emphasize benefit recipients' responsibility for minimizing their economic disadvantages.[363] In both, this focus on claimant moral hazard distracts attention from the others' protections institutionalized in the market structures that produce the (interrelated) economic disadvantages of both disability and family poverty.[364] They note that in disability compensation as in welfare, the risks of economic loss—whether from occupational injury or poverty—are distributed not by neutral market processes or individuals' free contracting, but by a race, gender, and class status hierarchy institutionalized through law.[365] They argue that both for disability and welfare, work will be better valued by and more valuable to society as a whole not by denying full citizenship to those unable to benefit from or contribute to the labor market, but by reenvisioning market labor so that it promotes health and well-being more equally.[366]

B. Communitarian Citizenship and Workers' Compensation Reform

Despite rhetoric celebrating the virtues of work and workers, communitarian messages about public morality tend to reinforce rather than resist the neoliberal vision of workers as subordinate citizens. In the prevailing communitarian approach to social citizenship, a viable welfare state must cultivate public morality by encouraging those in economic need to take personal responsibility for wage work. But by building on, rather than challenging, the neoliberal division between the market and morality, the emphasis on work's public virtue in even some of the more progressive strands of communitarianism cuts against workers.

The most prominent communitarian writings define moral virtue as a question of individual character, shaped mainly by the family and other voluntary civil society institutions.[367] As Martha Fineman and Dorothy Roberts each critically observe, most communitarian discussions of morality devote less attention to questions identified with "the market," such as the terms and conditions of employment.[368] Accordingly,

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362. Jennifer Pokempner & Dorothy E. Roberts, *Poverty, Welfare Reform, and the Meaning of Disability*, 62 OHIO ST. L.J. 425, 426, 445-46 (2001).

363. *See id.* at 429-30 (discussing examples of increasing perceptions of fraud and waste in Supplemental Security Income benefits for children with disabilities).

364. *See id.*

365. *See id.* at 430-45 (discussing the interrelatedness of poverty, race, gender, and disability); *id.* at 458 (concluding that "[t]he interplay of race, poverty, and disability, highlights the degree to which state action creates and intensifies patterns of illness and impairment that reflect inequitable social and economic structures").

366. *See id.* at 458 ("Welfare and disability programs have been superimposed upon a market structure that reflects the inequalities in our society. . . . [D]isability and antipoverty programs that leave these structures intact will neither help individuals escape poverty nor allow them to fully enter the political and social world as valued citizens.").

367. *See generally* Benjamin Stein, *Work Gets No Respect on TV*, THE RESPONSIVE COMMUNITY: RTS. AND RESP., Vol. 3, Issue 4, Fall 1993, at 32-37 (discussing the role of television in shaping societies views of work).

368. Martha Albertson Fineman, *The Family in Civil Society*, 75 CHI.-KENT L. REV. 531,

workers' compensation reform (unlike AFDC's reform) has not been a significant subject for communitarian scholarship or policy analysis.[369]

Despite this silence, the predominant communitarian vision of social citizenship sends a general message that reinforces the neoliberal double standard of moral hazard in recent workers' compensation reforms. The communitarian attempt to recenter society on moral responsibility rather than on market self-interest falters on its equation of morality with participation in a market structured to further employers' and wealthy capital owners' self-interest at the expense of many workers and communities. The most prominent communitarian visions assume that citizens have a moral responsibility not only to work, but also to work in an employment relationship that disproportionately sacrifices their interests to those of employers.

1. Double Standard of Moral Responsibility

Communitarian literature often portrays protection for workers, but not for employers, as the central threat to public well-being. As a result, the communitarian solution to occupational health and safety problems tracks the neoliberal solution by focusing on increasing workers' responsibilities.

The Responsive Communitarian Platform ("Platform"), a public summary of key communitarian principles endorsed by many academic and policy leaders,[370] has a section titled "Public Safety and Public Health" that emphasizes individual worker and consumer behavior as the central threat to community well-being.[371] The public health hazards it considers consist of alcohol abuse, gun violence, and AIDS.[372] To protect against these threats, the Platform recommends controlling individual freedom in the interest of public well-being. For example, it advocates drug and alcohol testing for workers such as pilots and train engineers who affect public safety.[373] In contrast, the Platform says nothing about potential threats to public safety from managers, employers, shareholders, or from social or economic institutions. Nor does it consider furthering the public well-being through any comparable regulatory controls on businesses or capital owners,[374] such as recommending better regulation of work hours and conditions to ease occupational pressures for drug use, restoring tort liability for

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535-36 (2000); *see generally* Roberts, *supra* note 157, at 560-61.

369. For example, the *Responsive Community*, a leading journal of communitarian ideas, lists no articles with titles addressing occupational health and safety, wage levels, or collective bargaining law, compared to numerous articles with titles focusing on matters such as family, education, AFDC, religion and immigration.

370. This Platform is reprinted in AMITAI ETZIONI, THE SPIRIT OF COMMUNITY 253-67 (1993), *available at* http://www.gwu.edu/~ccps/rcplatform.html.

371. *See id.* at 264-65.

372. *Id.*

373. *Id.*

374. The Platform does obliquely suggest some responsibilities on businesses when it says that certain privacy rights of carriers of sexually transmitted diseases like AIDS "should be scrupulously protected." *Id.* at 265. However, the passive voice avoids holding any particular actor responsible for this problem, and the failure to suggest any concrete regulatory strategy to control this threat underscores the primary emphasis on individual rather than business responsibility. *See id.*

employers who violate health and safety regulations, improving OSHA standards or enforcement powers, or denying corporate subsidies or tax breaks for companies that violate health and safety regulations.[375]

In another example of a communitarian approach to workplace moral responsibility, the Christian Institute in Basic Life Principles specifically addresses workers' compensation issues through a widely promoted and well-funded moral education program called "Character First!" adopted by many private businesses, public schools, and local governments.[376] Although the Institute takes a more overtly conservative approach than many academic proponents of communitarianism, its transparently hierarchical citizenship vision shares similar assumptions about whose personal responsibility—and whose freedom from responsibility—is most important to the public good. The "Character First!" program teaches that submission to authority is a central part of good character,[377] drawing on the Institute founder's theology of divine support for authority figures in church, government, and corporate management.[378] "Character First!" features a manager training program encouraging employers to evaluate workers' job performance by measuring their "character qualities."[379] Advocates of the "Character First!" program focus on high workers' compensation claims as evidence of character problems among employees, and they boast that the program leads to dramatic reductions in workers' compensation claims.[380]

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375. *See* David Barstow & Lowell Bergman, *Deaths on the Job, Slaps on the Wrist*, N.Y. TIMES, Jan. 10, 2003, at A1 (reporting how weak regulatory oversight contributed to deaths and serious injuries in one corporation); Marc Breslow, *Improve Corporate Standards*, BANGOR DAILY NEWS, July 3, 2000, *available at* 2000 WL 22129078 (reporting that several corporations heavily subsidized by Maine taxpayers in 1998 and 1999 have repeatedly violated environmental, OSHA, or labor laws, and advocating legislation tying corporate welfare to higher standards of corporate citizenship).

376. The Character First program has been officially adopted by the state of Oklahoma, as well as by cities such as Baton Rouge, Louisiana; Augusta, Georgia; and Aiken, South Carolina, leaders of the program say it has been presented (though not necessarily implemented) in over 100 cities. Virginia Norton, *Mayor Launches Character Program*, AUGUSTA CHRON. (GA), May 5, 1999, at C12, *available at* 1999 WL 17575656; *see also* Lisa Miller, *Character First! Volunteers, with Links to Religion, Teach Traditional Values*, WALL ST. J., Oct. 25, 1999, at A1 (discussing the "wave called 'character' education that's sweeping the nation's schools" including 600 schools using Character First! often funded by businesses and groups like the Kiwanis).

377. Jenny Slater, *Character City Program Taking Root*, SPOKESMAN-REVIEW (Spokane, WA), May 11, 2000, at A1, *available at* 2000 WL 6761325 (reporting a Fresno, California official's defense of that city's Character First! program on the ground that "bringing the community back to an authority-based structure" makes life better).

378. P.J. Lassek, *Councilor Wants Character Taught to City Workers*, TULSA WORLD, Apr. 15, 2001 (reporting that the Character First! program adopted by numerous schools and city councils has raised concerns about the program's ties to the religious views of Institute leader Bill Gothard).

379. *Id.*

380. *See* Norton, *supra* note 376 (reporting program staff's claims that a carpet manufacturer reduced its workers' compensation claims from $476,000 to $47,000 in eighteen months after using Character First); Russ Pulliam, *Character Qualities Do Count*, INDIANAPOLIS STAR, Nov. 19, 1999, at D2 (editorializing enthusiastically about the successes of the program); Julia Silverman, *LR Mayor Backs Plan of Ministry*, ARK. DEMOCRAT-GAZETTE, Apr. 7, 2000

As one critic notes, the "Character First!" program implies that workers are morally obligated to avoid getting injured on the job or to shoulder the pain and income loss resulting from work injury.[381] In contrast, the program appears silent about employers' possible moral duties to promote health and safety. Such duties might arguably include, for instance, paying compensation claims promptly, generously, and respectfully; refusing to relocate operations to states or nations with less stringent compensation or safety laws; complying with or exceeding OSHA standards; lobbying for better health and safety laws; or encouraging labor organizing and worker control of safety-related production decisions. Nor does this program appear to recommend that investors, financial analysts, or purchasers make comparable measures of moral characteristics in evaluating corporate stock or contractors' performance. The program does not appear to address the moral question of how managers or corporate shareholders should reconcile any conflicts between profit-maximizing and workers' health and safety.[382]

2. Excusing Employers' Irresponsibility as the Market

As in the neoliberal view, the prevailing communitarian view tends to portray employers' rights as economic and therefore natural and inevitable, while workers' rights are social and contingent on performance of social responsibilities. By identifying the interests of wealthy capital owners with the market, communitarian morality depersonalizes and universalizes their interests, thereby excusing them from moral responsibility.

In a recent book advocating a "Third Way" balance between state, market, and community, communitarian author Amitai Etzioni distinguishes his views from neoliberalism by asserting that "market forces" must sometimes be restrained to promote public well-being.[383] Nonetheless, he warns that concern for "social problems created by market forces" such as overwork or unemployment "should not blind us to the basic merit of strong economic growth"[384] and should not lead to state interventions that "disable the economic engines of innovation and change."[385] After a public talk on his "Third Way" approach to economic policy, Etzioni responded to an audience question about occupational health hazards by warning against the costs to employers of increased health and safety regulation.[386]

Etzioni's analysis elides capital owners' interests and moral agency by portraying business profit-seeking as inhuman "engines" or "forces" that operate primarily to benefit the general public. He equates government support for multinational capital's interests, such as neoliberal international trade policies, with the growth-producing market and, therefore, with the community well-being. In contrast, he presents support

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(reporting a claim that one of the first employers to adopt the program reduced its workers' compensation claims by 80%).

381. John Brummett, *Back Off, Mayor*, ARK. DEMOCRAT-GAZETTE, Apr. 18, 2000, at B7.

382. The program stresses that employee character-building increases productivity. *See* Editorial, *Good Character on the Job*, INDIANAPOLIS NEWS, Apr. 15, 1999, at A14.

383. AMITAI ETZIONI, THE THIRD WAY TO A GOOD SOCIETY 43 (2000).

384. *Id.* at 47.

385. *Id.*

386. Amitai Etzioni, The Future of the Third Way, Address at the Plenary Session of the 12th Annual Meeting on Socio-Economics, London School of Economics (July 7, 2000).

for workers' interests—labor standards or security against unemployment—as "social" regulations that tend to run counter to the presumptively beneficial market.[387]

As invisible drivers of a basically virtuous market, in Etzioni's view, employers and shareholders can take their status as good citizens for granted. In contrast, Etzioni's vision suggests that good citizenship for individual workers and consumers requires them to take additional responsibility for avoiding or bearing costs that affect society. In his "Third Way" proposal for public health, Etzioni mentions that a good society requires that the state assume responsibilities such as vaccinations, water fluoridation, and food and drug safety.[388] He then stresses that citizens also have the responsibility to contribute individual "changes in lifestyle" such as more exercise and less smoking.[389] As an example of the communitarian demand for responsibility "from all, for all," Etzioni mentions that people with quadriplegia should be expected to do tasks for themselves as much as possible rather than receiving public support for nursing assistants.[390] However, he omits any discussion of "the market's" or capital owners' responsibilities for public health.[391]

When Etzioni acknowledges the potential costs to workers from the global "private sector" and its pursuit of economic efficiency, he urges the state and civil society to take (limited) steps to ameliorate these costs, for instance, by retraining redundant workers, by targeting assistance to workers hurt by global job relocations, or by forming international coalitions to limit corporate law-breaking.[392] He does not mention, however, any specific responsibility by the private sector (either businesses or capital owners) to avoid such problems. In a *USA Today* essay, Etzioni notes that President George W. Bush's proposal to change laws to permit arsenic in drinking water was not "especially encouraging" in light of communitarian ideals, but he concludes by approving what he sees as Bush's strategy of promoting community morality over market profits through modest symbolic exhortation rather than legislation.[393] And while Etzioni advocates public shaming of some people to assert the priority of community standards over personal preferences,[394] he assumes community moral standards must defer to some others' freedom to make personal moral choices, however harmful to the community as a whole. He explains that vigorous attempts to require the wealthy to contribute to others' material well-being "will cause a flight of wealth and damage the economy in other ways."[395] As a result, Etzioni asserts that the

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387. ETZIONI, *supra* note 383, at 47.

388. *Id.* at 42.

389. *Id.* at 43.

390. *Id.* at 30.

391. *Id.* at 42-43.

392. *Id.* at 47-48.

393. Amitai Etzioni, *Bush's Community-based Plan Faces Bumpy Road*, USA TODAY, Aug. 30, 2001, at 13A.

394. AMITAI ETZIONI, THE MONOCHROME SOCIETY, at xv (2001) ("The good society is not a neutral one that leaves it up to its members to decide on their own whether or not they wish to pollute the environment, abandon their children, abuse their spouse, drink and drive, and so on."); AMITAI ETZIONI, NEXT: THE ROAD TO A GOOD SOCIETY 22-23 (2001) (arguing that a good society must curb some kinds of behaviors, preferably through approbation and censure rather than through government coercion).

395. ETZIONI, *supra* note 383, at 56.

"tantalizing problems plaguing modern societies" must await a spiritual awakening through which "the affluent would be willing to support serious reallocation of wealth and power."[396]

In an essay on health policy, Etzioni argues that superior health care for the rich is unavoidable, asserting that "[n]either America nor any other country has ever been egalitarian. Those that tried—the Soviet Union, Cuba, North Korea—had to rely on the massive use of force."[397] He insists that the problem that some people lack health care or other basic needs is not caused by "hard-earned or inherited" gains by the rich or, for example, by physicians who substitute personal gain for principles of professional (or civic) morality.[398] He explains, "[o]ur no. 1 employment problem is not that some people are paid more than others, but that millions cannot find jobs. Our most urgent housing problem is not that some people buy mansions and summer houses, but that we have people who cannot afford even marginally adequate housing."[399] Like the neoliberal efficiency-oriented vision, Etzioni's communitarian moral vision assumes that freedom from community responsibility for wealthy individuals and corporations is an inevitable fact of life in a free society that must be accommodated by others' increased suffering and community obligation.

By conceding (like Etzioni) if not celebrating (like Character First!) the moral authority of those who gain the most from a market that sacrifices public health, the prevailing communitarian moral order ends up endorsing market inequality as a public virtue despite community harms. Martha Fineman offers a contrasting vision of how to recognize the public value of encouraging workers to take more responsibility for caring for their own health (physical and mental).[400] She suggests restructuring market labor (with shorter hours and higher minimum wages, for example) so that employers do not require workers to sacrifice so much of their lives for work.[401] In contrast to the predominant communitarian revival of moral authority, Fineman—like Forbath and Roberts—sees the problem of the market's harm to communities not as a problem of individual workers' or employers' lack of good moral character, but as a problem of government distribution of market authority to promote the wrong moral order.[402]

C. Liberal Citizenship and Workers' Compensation

The traditional no-fault theory of workers' compensation parallels the liberal justification for AFDC: government protection fosters individual autonomy when it

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396. Amitai Etzioni, *The Good Society: Goals Beyond Money*, 35 THE FUTURIST, July-Aug., 2001, at 68.

397. Amitai Etzioni, *Critics of "Boutique" Doctor Care Miss the Point*, USA TODAY, Jan. 24, 2002, at 15A (not discussing, for example, Scandinavian egalitarian policies).

398. *Id.* (criticizing proposals to make second-rate care a violation of professional ethics or to tax premium care for the rich).

399. *Id.*

400. Fineman, *supra* note 144, at 1439.

401. *Id.*

402. *See* Roberts, *supra* note 157, at 581-82 (arguing that social inequities are "our chief moral problem" but that communitarians tend to reinforce a long tradition of defending those inequities in the name of community values).

ameliorates economic losses beyond individual control.[403] If work accidents are largely inevitable and random facts of industrial life, then a broad requirement that employers compensate work injury regardless of fault does not increase workers' moral hazard.

The traditional liberal view distinguishes workers' compensation from AFDC as efficiency-oriented, not redistributive. Workers' compensation corrects a failure in the market system of individual contractual freedom. In the standard analysis, workers' compensation's no-fault principles of strict liability and limited compensation properly internalize the costs of work accidents to the inherently risky employment relationship. Accordingly, in this theory, no-fault compensation not only helps individual victims but also benefits society overall by maximizing incentives for accident deterrence.[404]

1. Separating Compensation from Responsibility

Nonetheless, in their book *True Security*, Graetz and Mashaw point out a tension in liberals' embrace of the efficiency rationale for no-fault protection from work injury costs.[405] By making responsibility for social well-being (deterring social harm) the basis of this social citizenship right, rather than individual need or entitlement, the efficiency rationale brings back the problems of fault-based systems that workers' compensation was supposed to avoid.

Graetz and Mashaw astutely observe that even when the goals of compensation (redistribution) and deterrence (efficiency) appear to coincide, as in the workers' compensation's no-fault rationale, deterrence goals will create pressure for reduced compensation in the long run.[406] If social welfare programs aim to induce overall cost-savings, those with the least market power will end up bearing the responsibility for that cost-savings, despite attempts to target incentive effects toward others. As a result, the focus on overall cost-savings will lead to less protection for those most vulnerable to market risks and will frustrate the goal of compensating those most in need. Consistent with the prevailing liberal strategy, Graetz and Mashaw accept as inevitable the conflict between efficiency-oriented deterrence—maximizing overall resources—and distribution-oriented compensation—helping those who lose out from that overall resource-maximizing. They then try to resolve this conflict by defending compensation as a separate, supplementary redistributive goal worth a small loss in efficiency.

Graetz and Mashaw summarize the history of workers' compensation as a bad deal that has delivered inadequate benefits at exorbitant administrative cost with dubious effects on occupational health and safety.[407] In contrast to neoliberal reformers, however, they claim workers' compensation's flaw is an *excessive* rather than *insufficient* focus on efficiency. When workers' compensation replaced employers' old fault-based tort defenses with a strict obligation to (partially) compensate injuries, that

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403. *See, e.g.*, Philip Harvey, *Joblessness & the Law Before the New Deal*, 6 GEO. J. ON POVERTY L. & POL'Y 1 (1999) (explaining the liberal view that joblessness is largely a structural problem beyond individual control).

404. *See* MOSS, *supra* note 304, at 60-74 (discussing the American Association for Labor Legislation's theory that workers' compensation would be a means of internalizing externalities).

405. *See* GRAETZ & MASHAW, *supra* note 232, at 58, 82-87.

406. *See id.* at 58, 85-86.

407. *See id.* at 83-85.

change did not substantially diminish employers' labor market bargaining power relative to workers. As a result, workers' compensation left open other opportunities for employers to use their power to escape responsibility for sharing the costs of work injuries.

Graetz and Mashaw explain that workers' compensation has not internalized work injury costs to the employment relationship, but instead has produced incentives for employers to reduce or resist compensation claims.[408] They observe that employers tend to avoid high workers' compensation insurance premiums not by reducing work accidents or by adapting the workplace to support injured workers, but by exploiting uncertainties about work injuries to avoid paying the high costs of work injuries. For example, employers may aggressively deny or discourage workers' injury claims, reduce wages for high risk work (especially for workers with few options), replace covered "employees" with noncovered "independent contractors," lobby state legislatures to reduce benefit levels, or threaten to move to states (or nations) with lower benefit costs.[409] As a result of these incentives for employer moral hazard, Graetz and Mashaw conclude that workers' compensation has failed both to increase deterrence and to adequately compensate injured workers.

The lesson of Graetz and Mashaw's story of workers' compensation is that, in both the fault-based tort approach and the no-fault workers' compensation system, compensation gets sacrificed when tied to responsibility.[410] Their solution is to give up on attempting to refashion social citizenship protections into an efficiency model, and to instead trim down social citizenship to fit the needs of individual compensation rather than overall responsibility (whether moral or economic).

Accordingly, they propose a kind of super-no-fault approach that would offer workers minimal compensation for total disability regardless of work-relatedness and that would be funded by spreading more of the costs of disability from employers to workers and to taxpayers in general.[411] In particular, they advocate replacing temporary workers' compensation benefits with a new federal temporary disability compensation limited to total work incapacity, whether work-related or not, lasting up to a year.[412] For permanent total disability, they propose partly replacing workers' compensation with the existing Social Security Disability Insurance ("SSDI") scheme, supplemented for nonearners or for very low-earners with the existing means-tested Supplemental Security Insurance ("SSI") program.[413]

But Graetz and Mashaw's liberal plan for buttressing social citizenship by *subtracting* responsibility from workers' compensation has the same flaw as the communitarian plan for *adding* responsibility. Both incorporate rather than challenge the neoliberal double standard of moral hazard that treats employers' cost-increasing

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408. *See id.* at 58 ("[Workers' Compensation's] effort to serve compensatory justice forces workers' compensation programs to adopt an inappropriate and inefficient adversarial process for deciding claims.").

409. *See id.* at 86.

410. *See id.* at 211-12 (stating that security and opportunity may be at cross-purposes, because of recipient moral hazard).

411. *See id.* at 287 (explaining that this program would be funded by a tax on employers based on a percentage of payroll financing).

412. *Id.* at 219-21.

413. *Id.* at 221-23.

behavior as normal and workers' cost-increasing behavior as deviant. Both aim to accommodate rather than challenge a market structured to make overall accident cost-savings disproportionately the personal responsibility of workers. As a result, this classically liberal claim to strictly separate security from responsibility instead serves to redistribute both: workers get less security and more responsibility, while capital owners get more security and less responsibility. Graetz and Mashaw miss their mark by viewing the ideological barrier to workers' security as the conflicting goal of "efficiency" rather than as a conflicting vision of workers' citizenship status.

2. Double Standard of Responsibility

First, Graetz and Mashaw shift deterrence requirements from employers to workers and call this shift a necessary feature of redistribution. Regulation of worker moral hazard is fundamental to their compensation proposal, even though this requires sacrifices in compensation.[414] They carefully tailor their proposed redistributive protections to minimize (though not eliminate) incentives for compensation of disability costs they attribute to workers' personal characteristics, like motivation and skill.[415]

For example, their federal benefits proposal excludes compensation for permanent *partial* disabilities, which account for the bulk of workers' compensation benefit costs and the vast majority of the claims for permanent disability.[416] Because of the uncertainty of distinguishing this source of income loss from general personal "failures" such as "demoralization," "declining energy," or poor education, they leave these injuries to be compensated by a residual workers' compensation system where benefits are likely to be denied, delayed, or sharply limited.[417] The failure to improve this system means workers will retain a significant risk that disability will bring financial crisis and destitution sufficient to rob them of their homes, cars, savings, families, health, and even their lives.

To receive the Social Security system's permanent *total* disability benefits, which Graetz and Mashaw present as an alternative to workers' compensation, workers must prove they are unable to perform any job in the national economy that provides "substantial" income (in the late 1990s, defined as $500 a month). This strict eligibility requirement for permanent disability gives seriously injured workers responsibility for assuming the burdens of retraining, moving away from established connections with family, community, and medical providers, and accepting virtually any job no matter what the conditions, hours, or wages. Eligibility requirements for their proposed temporary disability insurance scheme are less stringent, requiring workers only to prove they are unable to perform their "usual" job, but this program still regulates worker behavior through requirements of periodic medical recertification, participation

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414. "We have attempted to design social insurance protections to minimize the disincentives that many aspects of today's U.S. social insurance policies embody." *Id.* at 297. They conclude that too much attention to "security" goals as opposed to "opportunity" goals leads to "runaway costs" and "withdrawal of individual work effort." *Id.* at 211.

415. *Id.* at 213.

416. *Id.* at 217.

417. *Id.* at 218.

in rehabilitation, and a one-year time limit.[418]

In Graetz and Mashaw's plan, even workers compensated by the federal total disability programs must absorb a large portion of the costs of their injuries: both their temporary and permanent disability benefit proposals aim to provide subsistence-level income, not substantial wage replacement. Workers can expect to assume increased responsibility for financing this protection against the risk of permanent disability because the shift from workers' compensation to an expanded social security disability program would likely increase workers' payroll or general income taxes, or both.[419]

In sum, Graetz and Mashaw impose steep responsibilities on injured workers for the costs of work disability in order to "balance" their need for security against efficiency-based deterrence concerns.[420] Ironically, this liberal attempt to move away from workers' compensation to a more purely no-fault redistributive system instead ends up adopting some of the worker-fault provisions revived by the efficiency-oriented neoliberal workers' compensation reforms.

In fact, when Graetz and Mashaw claim to shift the goal of disability protection from deterrence to compensation, they really mean that they aim to reduce *employers'* responsibility for disability costs. Why is deterring cost-increasing behavior by workers, but not by employers, integral to their system? Because they identify employers' cost-increasing behavior, but not workers', with an efficient market. When Graetz and Mashaw discuss the problem of workers' compensation's incentives for employers (or insurers) to manipulate the system's uncertainty by shifting work injury costs to workers and taxpayers, they do not explicitly name this behavior "moral hazard."[421] Instead, they use that term exclusively for workers' incentives for behavior that increases injury costs.[422] They construct workers' opportunistic cost-shifting as personal gain-seeking at the expense of public well-being, produced by redistributive protections against market risk. For example, they explain that disability benefits encourage some workers to avoid work by "faking disability" or at least "accentuating" their impairments.[423]

In contrast, they depersonalize capital owners' role in avoiding responsibility for preventing or mitigating the costs of work injuries and illnesses. They identify personal gain-seeking by workers, but not by employers, as a cause of work disability. They generalize risks resulting from employers', insurers', and shareholders' profit-seeking (or law-breaking)—or from workers' race and class status[424]—as "environmental"

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418. *See id.* at 220-21.

419. Whether reduced workers compensation insurance rates will be passed on to workers depends on their bargaining power relative to insurers and employers.

420. GRAETZ & MASHAW, *supra* note 232, at 211.

421. See their discussion of employers' resistance to paying adequate workers' compensation benefits, *id.* at 85-86; employers' tendency to game the system when faced with benefit mandates, *id.* at 293-95; employers' tendency to "shift the costs of employer mandates," *id.* at 285.

422. *See id.* at 296-99.

423. *Id.* at 296.

424. *See* Pokempner & Roberts, *supra* note 362, at 435 & n.44 (citing Gary King & David R. Williams, *Race and Health: A Multidimensional Approach to African American Health*, *in* SOCIETY AND HEALTH 93, 110 (Benjamin C. Amick et al. eds., 1995)).

factors or as abstract labor market structures.[425] Aside from workers' behavior, they describe the problem of work disabilities simply as a matter of the "inherent risks of working and living in a market economy."[426]

Graetz and Mashaw similarly turn other forms of opportunistic cost-shifting by capital owners into background forces, sometimes using the passive voice to obscure the underlying human and corporate agency. For example, when they refer to employers' and insurers' strategic efforts to resist expansion of workers' compensation benefits, they state that "[o]ne state legislature after another *has been importuned* to do something about rising insurance rates"[427] and that "states *are forced into* a race . . . to the bottom in terms of the adequacy of workers' compensation coverage and benefits."[428] In addition, they blame flawed "systems" for the costly intervention of lawyers, doctors, and legislators,[429] obscuring the self-interested actions of the employers and insurers who fund or provoke this intervention through questionable or arbitrary claims denials and who also promote media campaigns to shift popular blame for high injury costs from employers or insurers to such "special interests."[430]

By portraying capital owners' incentives for moral hazard as a neutral fact of life, Graetz and Mashaw make it seem more reasonable to accommodate rather than to regulate that moral hazard. In contrast, by making workers' moral hazard seem to be the result of a contingent policy choice—the design of redistributive programs—regulating that moral hazard by limiting compensation seems reasonable and politically practical. But their plan helps create the limits they presume are inevitable. Workers would not need to assume so much responsibility for the costs of work disability if there were other ways of minimizing those costs. With effective regulation of occupational health and safety and disability discrimination, and with widespread good wages and working conditions, generous compensation of permanent partial disability might seem much more practical and inexpensive.[431]

Indeed, Graetz and Mashaw do partially (and implicitly) recognize that regulating employers' moral hazard is critical to designing effective compensation systems. They insist on federalizing compensation programs, recognizing that fragmented systems increase employers' power to strategically avoid compensation by provoking a race to the bottom in state benefit levels. But their effort to control employer moral hazard is half-hearted because they defer to the dominant neoliberal view that capital owners' strategic cost-shifting is not an inefficient moral hazard, but a moral opportunity *promoting* efficiency. For example, Graetz and Mashaw acknowledge that trade policies deregulating the international movement of capital have increased employers' bargaining power,[432] and that such policies may have helped capital owners reap a

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425. GRAETZ & MASHAW, *supra* note 232, at 213-14.

426. *Id.* at 8.

427. *Id.* at 86 (emphasis added).

428. *Id.* (emphasis added).

429. *Id.* at 85.

430. *See generally* Rohrlich & Larrubia, *supra* note 360.

431. Some U.S. companies have taken this approach to reducing high workers' compensation costs of permanent partial disability, at least in the short term and at least with more skilled employees. *See* McCluskey, *Illusion*, *supra* note 12, at 923 n.1117.

432. *See* GRAETZ & MASHAW, *supra* note 232, at 285.

larger share of the gains from production than workers.[433] But in contrast to their efforts to restrain a *national* race to the bottom, they urge giving free reign to this *international* race to the bottom.[434] Though they note that this market structure change has probably increased the risks they seek to compensate,[435] they contradict that observation—and much outside evidence[436]—by asserting that unrestrained global capital power will bring the best protection to workers in the long run.[437] That is, following the conventional neoliberal wisdom, Graetz and Mashaw identify capital owners' opportunity for strategic gains with public-spirited growth. They take on faith (despite recognizing evidence to the contrary) that those gains "ultimately" will trickle down to workers in the form of lower prices and more jobs.[438]

This double standard of moral hazard built into their compensation proposal helps sap its strengths. In recent years, wealthy corporations and taxpayers often have used their growing political and economic bargaining power to advocate decreased federal funding for social welfare spending that would improve security for most workers and their families.[439] Graetz and Mashaw vaguely attribute this political movement against "redistribution" to "[i]deological opponents," "economists," or "critics,"[440] who are motivated by abstract and altruistic principles such as "individual responsibility" and "economic productivity" rather than by personal gain.[441] They hope to appease that opposition by fashioning protections that accommodate rather than threaten "efficient markets and high productivity."[442] But by presenting the interests of those who benefit

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433. *See id.* at 31-32.

434. *See id.* at 284-85.

435. *See id.* at 31-32.

436. First, during the 1980s and 1990s, as international policy has increasingly followed neoliberal prescriptions for capital mobility and flexibility, economic growth has declined in most of the world compared to the 1960s and 1970s—with the exception of East Asia, particularly China. Mark Weisbrot, et al., *Growth May be Good for the Poor—But are IMF and World Bank Policies Good for Growth?: A Closer Look at the World Bank's Most Recent Defense of Its Policies* (May 2001), *at* http://www.cepr.net/globalization/Growth_May_Be_Good_for_the_Poor.htm. Second, even if neoliberal policies increasing wealthy capital owners' bargaining power did promote economic growth, gains from growth may be distributed primarily to the rich. *Id.* at text between footnotes 7-9 and Fig. 3. In the United States, for example, per capita income has risen since 1973 while median wages and bottom-quintile income has fallen. *Id. See also* discussion *infra* Part III.

437. *See* GRAETZ & MASHAW, *supra* note 232, at 285.

438. They state that prices of many of the most important necessities have increased, *Id.* at 36-37, and that the standard of living of many workers has fallen, *Id.* at 31 (implying that falling wages are not offset by falling prices).

439. *See* David Callahan, *$1 Billion for Ideas: Conservative Think Tanks in the 1990s*, (National Committee for Responsive Philanthropy, Mar. 12, 1999), *at* http://www.ncrp.org/psr/pressreleases/thinktanks.htm (estimating conservative think tanks spent over $1 billion during the 1990s to argue for "privatization of the public sphere and elevation of the market as the prime mechanisms for social arbitration and resource allocation"); PERRUCCI & WYSONG, *supra* note 270, at 107-36 (describing many well-funded lobbying efforts aimed at resisting expansion of health insurance, occupational health and safety regulations, and other worker protections and redirecting government spending toward upper class interests).

440. *See* GRAETZ & MASHAW, *supra* note 232, at 4-5.

441. *See id.* at 23.

442. *Id.* at 310.

from upward redistribution as public values to which workers' needs must be subordinated—rather than challenging these interests as private greed or public harm—the liberal argument for workers' social citizenship instead supports its demise.

3. Double Standard of Security

By shifting the focus of deterrence from employers to workers, Graetz and Mashaw's liberal approach also ends up redistributing security from workers to capital owners. In effect, their proposal trades hopes for improved compensation for the largest group of workers with serious occupational injuries—those with permanent partial disabilities—for better temporary compensation for a wider range of injured workers. In keeping with the liberal view of "redistribution" as a market gap-filler, their compensation scheme provides transitional assistance to help smooth bumps in labor market participation rather than to replace market income.

But again, Graetz and Mashaw rest their analysis of security on a double standard. After struggling with the question of what should count as redistributive social insurance,[443] they decide to narrow the concept to refer only to protections against loss of wage income for workers and their families,[444] not to government protections against risk of profit loss to employers and capital owners, like crop insurance[445] or general fiscal or monetary policies.[446] By leaving government security for corporate and capital interests off their "redistributive" table, they implicitly privilege compensation for these interests as part of the background rules of a normal market.[447]

Because employers' protections do not count as redistributive social insurance, these protections need not be sharply limited in deference to competing "efficiency" values. For example, Graetz and Mashaw do not discuss whether tort immunity for employers should be eliminated as part of their plan to partially replace (and otherwise give up on) workers' compensation. Their analysis implies that this protection is a separate regulatory concern, rather than a form of social insurance for employers that raises moral hazard concerns comparable to disability compensation.[448]

Indeed, employer protections take on the guise of efficiency in conventional liberal analysis, which typically construes their resulting moral hazard as beneficial moral opportunity ("flexibility") that drives the market. In this analysis, protections of wage income confer private gain to workers, but protection of corporate profit spills over to benefit workers and the overall public. For example, Graetz and Mashaw assume that their plan to partly replace workers' compensation will result in "redirecting" resources to support disability benefits elsewhere.[449] But it seems as likely that advocates for

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443. *See id.* at 56-60.

444. *See id.* at 58.

445. *See id.*

446. *See id.* at 56.

447. *See* Martha T. McCluskey, *Whose Risk, Whose Security?*, THE AMERICAN PROSPECT, Jan. 31, 2000, at 38-41 (describing and criticizing neoliberal policies that increase social insurance for wealthy capital owners).

448. *See* Baker, *supra* note 101, at 272-73 (explaining that insurance is a broad concept not limited to the products of traditional insurance companies, and that as a result, the moral hazard issues are correspondingly broad).

449. GRAETZ & MASHAW, *supra* note 232, at 224.

business and insurer groups, and others who seek gains from upward redistribution, will use their disproportionate political power to try to redirect any savings in workers' compensation benefits toward increased capital earnings (perhaps in the name of economic competitiveness and maintaining investor confidence).[450] Graetz and Mashaw are not as willing to assume that gains in workers' security from, say, generous federally funded permanent partial disability benefits, might spill over to the public through increased productivity from better worker health and morale or through pressures for higher wages and safer workplaces.

If, instead, capital owners' protections are as likely to produce moral hazard as workers' protections, then more security for capital owners will produce more incentives for further constraining workers' security. For example, Graetz and Mashaw's plan to protect employers against the costs of permanent partial disability will produce incentives for employers to shift more of those costs to workers through unsafe working conditions, with the result that workers will bear even more of the risks of permanent partial disability. And without an adequate alternative to wage income, injured workers will become less able to avoid the health costs of returning to work in jobs that exacerbate their injuries. In another example, Graetz and Mashaw reject regulation of employers' employment decisions as outside the scope of social insurance and part of employer "flexibility" necessary for "robust economic growth."[451] But although laws protecting employers' freedom to fire workers may reduce risk of profit loss, this protection also gives employers more bargaining power with which to limit workers' access to disability benefits. In practice, employers' relatively broad freedom to fire workers will probably deter many workers from taking advantage of Graetz and Mashaw's proposed temporary disability protections, at least beyond the twelve-week period currently protected (for some workers) by the Family and Medical Leave Act.

In sum, the liberal solutions to the problem of work disability show that protection for workers gets sacrificed when supposedly severed from efficiency as well as when tied to it. Graetz and Mashaw wisely recognize that the old social citizenship vision of workers' compensation failed because it did not sufficiently constrain employers' relative power to profit from workers' insecurity. But then they rest their hopes for reviving workers' social citizenship on yielding to that power, conceding a social order in which wage earners' security derives from and takes second place to security for capital owners. If policies promoting workers' security constitute protection for market losers, or even protection against market failures, while capital owners' security counts as protection within the beneficial market, then workers will retain subordinate citizenship status.

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450. In the 2000 Presidential campaign, both major party candidates made reducing government spending (and debt) a top priority, following the neoliberal economic theory that overall economic well-being depends on catering to wealthy global investors who fear rising interest rates or a falling dollar value. *See* Susan Page, *When It Comes to Economics, the Differences Are Hard to Find*, USA TODAY, June 26, 2000, at 1A (discussing comments by Al Gore and George W. Bush). A survey of Fortune 500 executives found much stronger support for reducing taxes, especially individual taxes, and for reducing the federal debt than for new federal spending. Jeffrey H. Birnbaum, *How CEOs Will Vote: Almost All the Way with Bush*, FORTUNE, Feb. 21, 2000, at 68 (describing phone survey of 195 CEOs in January, 2000).

451. GRAETZ & MASHAW, *supra* note 232, at 285.

III. CONCLUSION

At the beginning of the twentieth century, American law was the field of a struggle over the transformation of citizenship in a reintegrated and reconfigured national political economy.[452] The questions of how government should distribute the risks and gains of that economy, and whose market freedom should be central to a national economy built on and still entangled with slavery, were answered in part by *Lochner*-era judicial rulings. Those rulings privileged some economic protections as fundamental citizenship rights central to both societal well-being and individual freedom, but jeopardized other economic protections by positioning these outside the bounds of good citizenship as the product of special interests and individual dependence.[453]

At the beginning of the twenty-first century, American law is again the field of a struggle over the transformation of citizenship in a reintegrated and reconfigured international political economy. The questions of how government should distribute the risks and gains of this economy, and whose market freedom should be central to a global economy grown from racialized colonialism, has been answered in part by a powerful neoliberal "Washington consensus" that has worked to restructure social and economic rights in developing countries.[454] As in the *Lochner* era, the recently triumphant free-market ideology promotes some government economic protections as fundamental personal freedoms essential to aggregate well-being, but disparages and jeopardizes other economic protections as special interest paternalism that endangers global welfare.[455] And, as in the *Lochner* era, the dominant wisdom insists that the

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452. *See* MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY 4 (1992) (discussing "fantastic social and economic changes" that shaped the controversy between classical legal thought and progressive legal thought).

453. *See supra* notes 22-53 and accompanying text.

454. *See* YERGIN & STANISLAW, *supra* note 2, at 236 (identifying the "Washington Consensus" with free-market development policies first used in Latin America); Iglesias, *supra* note 2, at 384 (criticizing this supposed consensus as a contested ideology of subordination). The International Monetary Fund's ("IMF") neoliberal policies, shaped by the U.S. government, conditioned loans to developing countries on "structural adjustment" measures designed to protect international capital and reduce social spending. *See* Joseph Stiglitz, *Thanks for Nothing*, THE ATLANTIC MONTHLY, Oct. 2001, at 36 (describing how the IMF's undemocratic and "fundamentally unsound" policies penalized Ethiopia for directing aid to schools and health clinics and for reducing high-interest debt, rather than building up reserves to protect certain international investors); ROBIN HAHNEL, PANIC RULES: EVERYTHING YOU NEED TO KNOW ABOUT THE GLOBAL ECONOMY 50-66 (1999) (explaining IMF policies and their failures); *see generally* GARY TEEPLE, GLOBALIZATION AND THE DECLINE OF SOCIAL REFORM: INTO THE TWENTY-FIRST CENTURY (1995) (linking neoliberal structural adjustment policies to restructuring of economic rights and welfare state policies in developed nations like the U.S.).

455. For example, *New York Times* writer and best-selling author Thomas Friedman belittles opponents of global neoliberalism as backward "turtles," incompetent workers, and irrational criminals who mistakenly perceive that their self-centered economic interests should count as rights. THOMAS L. FRIEDMAN, THE LEXUS AND THE OLIVE TREE: UNDERSTANDING GLOBALIZATION 271-75 (1999). In contrast, Friedman gives Enron as an example of the beneficial market forces driving the neoliberal global economy with "relentless, coherent, well-funded, and efficient business plans." *Id.* at 242. He presents Enron as one of the transnational

greatest equality will eventually come from markets that are free to reward and reinforce the privileges and penalties of race, class, and gender stratification.[456]

But as the neoliberal promise of a new global community of peace and prosperity horribly eludes much of the world,[457] cracks in the supposed "free market" consensus

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corporate "Electronic Herd" that exercises global market power to pressure local governments for access to cheap labor and natural resources, tax breaks, and social spending cuts. *Id.* at 110-13, 231. However, these demands represent not self-serving special interests or criminal greed, but a superrational democratic accountability that "turns the whole world into a parliamentary system," *id.* at 115, and that creates progress bringing "hope for salvation" to those it threatens, *id.* at 231. *See generally* McGinnis & Movsesian, *supra* note 5 (presenting critics of the World Trade Organization's supposed "free trade" policies as anti-democratic "special interests" who threaten global well-being with protectionist regulation and contrasting proponents of this new international regulatory body as public-interested and democratic advocates of freedom).

In his book criticizing neoliberal policy, Gary Teeple explains that it represents a global movement for new government protection of property rights in the guise of "free market" deregulation. TEEPLE, *supra* note 454, at 76-94. For an in-depth deconstruction of the supposedly natural law of comparative advantage used to justify and mystify neoliberal "free trade" law, and the parallels to the *Lochner*-era mystification of freedom of contract, see Michael H. Davis & Dana Neacsu, *Legitimacy, Globally: The Incoherence of Free Trade Practice, Global Economics and Their Governing Principles of Political Economy*, 69 UMKC L. REV. 733, 763-64 (2001). *See also* Marjorie Cohn, *The World Trade Organization: Elevating Property Interests Above Human Rights*, 29 GA. J. INT'L & COMP. L. 427 (2001) (explaining the debate over so-called "free trade" as a conflict between competing views of fundamental legal rights).

456. *See* Iglesias, *supra* note 2, at 384-86 (countering arguments that racial subordination and other human rights violations will follow from supporting neoliberal economic policies rather than human rights standards). For a brilliant exploration of the ways in which the late-twentieth-century Supreme Court has used free market ideology to reverse the gains of the civil rights movement, see Kenneth M. Casebeer, *The Empty State and Nobody's Market: The Political Economy of Non-Responsibility and the Judicial Disappearing of the Civil Rights Movement*, 54 U. MIAMI L. REV. 247 (2000).

457. One best-selling version of this promise was Francis Fukuyama's *The End of History and the Last Man*, which cheered on capitalism after the fall of the Soviet Union with a prediction that this new free market consensus would solve the world's conflicts once and for all. *See generally* FRANCIS FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992). Others tempered this story by arguing that this progress would come more unevenly through a dialectic balancing of the dominant force of the neoliberal global market against countervailing pressures from government and tradition. *See, e.g.*, FRIEDMAN, *supra* note 455, at xvii-xviii (affirming Fukuyama's faith in the "new triumph of liberalism and free-market capitalism as the most effective way to organize a society" but noting a continuing threat from what he describes as old "power politics" rooted in an antiliberal tradition). Friedman presents the neoliberal promise as his "Golden Arches Theory of Conflict Prevention," which holds that "No two countries that both have McDonalds had fought a war against each other since each got its McDonald's." *Id.* at 195. He explains that neoliberal globalization constrains war-making because interdependent markets spread wars' costs more broadly and because neoliberal markets create large middle classes composed of people who "[do not] like to fight wars anymore, [because] they prefer to wait in line for burgers." *Id.* at 196-97.

For descriptions of how and why this neoliberal promise deludes, see generally BENJAMIN R. BARBER, JIHAD VS. MCWORLD: HOW GLOBALISM AND TRIBALISM ARE RESHAPING THE WORLD (1995) (arguing that neoliberal free-market policies exacerbate and even require increasing

have widened to admit new discussions about the societal benefits of other approaches to economic security.[458] Nonetheless, most mainstream U.S. "experts" who discuss the global market's shortcomings remain critical of the prominent protests against the costs of the policies promoted by the World Trade Organization, the International Monetary Fund, and other organs of global market governance.[459] Though many share the concern for those left out of global market gains, many fear the protestors' concerns are misdirected.[460] Why challenge the market just because some are left out?[461] In the prevailing wisdom, harm to market losers is best addressed by supplementing the market with protections that alleviate that harm while preserving the market's presumed overall benefits.[462]

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insecurity from sectarian conflict); Iglesias, *supra* note 2, at 385 (countering that the neoliberal strategy of making basic human rights subordinate to so-called market freedoms means that "Third World countries will remain susceptible to the cycles of military authoritarian dictatorships, government takeovers, and civil war, all of which destroy the free market . . . ."); WIM DIERCKXSENS, THE LIMITS OF CAPITALISM: AN APPROACH TO GLOBALIZATION WITHOUT NEOLIBERALISM (2000) (analyzing data showing how neoliberal global market policies have decreased economic growth and increased economic inequality); HAHNEL, *supra* note 454 (showing that average world economic growth per capita along with the annual growth rates of most countries decreased during the neoliberal era—and that neoliberal policies create not a growing middle class but extreme inequality and poverty); Joseph E. Stiglitz, *Globalism's Discontents*, THE AMERICAN PROSPECT, Special Supp. Winter 2002, at A16 (explaining that the few countries with increased economic growth and reduced poverty have succeeded by rejecting the Washington Consensus policies of market fundamentalism).

458. *See, e.g.*, Louis Uchitelle, *Challenging the Dogmas of Free Trade*, N.Y. TIMES, Feb. 9, 2002, at B7 (reporting that the World Economic Forum allowed a small group of experts to offer alternative strategies to neoliberal globalization but kept such discussions sharply limited); Louis Uchitelle, *Globalization Marches on, as U.S. Eases up on the Reins*, N.Y. TIMES, Dec. 17, 2001, at C12 (reporting that "the economic theory that justifies globalization is increasingly debated these days" and that as a result the Doha meeting of the World Trade Organization included some concessions to opponents of neoliberal policies).

459. *See, e.g.*, Juan M. del Aguila, *The Politics of Free Trade in Latin America*, 50 EMORY L.J. 759, 762-63 (2001) (criticizing "violent protests" in Seattle, Washington D.C., Vienna, and Quebec for showing "appalling ignorance of what it takes to integrate weak economies into global processes" but acknowledging the need for more convincing evidence of the concrete benefits of neoliberal trade policies to appease the growing "hostility" among "important segments of Latin American societ[y]"); Susan Tiefenbrun, *Free Trade and Protests: The Semiotics of Seattle*, 17 ARIZ. J. INT'L & COMP. L. 257, 282 (2000) (characterizing protestors as "ancients" resisting modernity but arguing that unemployed workers who lose out from what she presumes are inevitable overall gains deserve some compensation).

460. *See, e.g.*, Editorial, *Stopping the World*, N.Y. TIMES, Apr. 15, 2000, at A16 (arguing that "misguided but heartfelt" protests against the neoliberal policies of the World Bank, International Monetary Fund, and World Trade Organization represent a "growing popular unease" that would be "dangerous to ignore," but that "there is no realistic—or beneficial—way to reverse or even slow the forces that are driving the world economy").

461. *See* Jim Chen, *Globalization and Its Losers*, 9 MINN. J. GLOBAL TRADE 157, 216 (2000) (imagining neoliberal trade policies as part of a natural and inherently good evolutionary process so that, "In a world full of losers, the case for trade liberalization becomes all the stronger.").

462. *See, e.g.*, GARY BURTLESS ET AL., GLOBAPHOBIA: CONFRONTING FEARS ABOUT OPEN

However, attempts to revive social citizenship as a complement or balance to the neoliberal market are caught within a double bind. In the mainstream view, the welfare state is both the only cure for the neoliberal market's devastating casualties and the critical disease the neoliberal market must constantly fight off.[463] Protection against market losses always threatens to disrupt that market.[464] As a result, either the protection, or the market losers (or both) must be sharply restrained.[465] This double bind descends from the market fundamentalism of *Lochner* that still spooks the project of moving egalitarian economic protections from the margins to the center of

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TRADE 127-32 (1998) (denouncing attacks on neoliberal "globalization" as meritless and futile, but suggesting that the "winners share some of their gains with the losers"); Greenspan, *supra* note 4 (arguing that "those displaced by 'creative destruction'" should be assisted by private retraining programs, or "[i]f necessary, selected income maintenance programs . . . where retraining is problematic" rather than "protectionism"); McGinnis & Movsesian, *supra* note 5, at 525 (asserting that "with the wealth generated by free trade, society can provide transfers to people with less income, including those for whom trade provides no advantage or even a net disadvantage").

463. For example, Federal Reserve Chairman Alan Greenspan suggests the answer to the problem of neoliberal market "losers" is income support programs, not changes in trade or development policy. *See* Greenspan, *supra* note 4. But Greenspan has devoted his career to blocking increased government social spending by insisting that markets depend on reduced government debt (except for tax breaks for the wealthy) and on worker insecurity to prevent inflation. *See* Jeff Faux, *Bait and Switch: How Alan Greenspan Snookered the Democrats*, THE AMERICAN PROSPECT, Feb. 25, 2002, at 17-18 (analyzing Greenspan's contradictory positions on balancing the budget as a strategy to entice Democrats into supporting his underlying project of promoting upward redistribution); *see also*, Chen, *supra* note 461, at 166-67 ("Traditional tax and spend responses to globalization inflict 'Eurosclerosis,' a cure arguably worse than the disease of industrial decay."); TEEPLE, *supra* note 454, at 69-74 (explaining how neoliberalism's shift to monetarism through increasingly powerful central banks results in government's declining ability to finance the welfare state).

464. *See supra* notes 103-146 and accompanying text (explaining that moral hazard effects can be redistributed, or revalued as moral opportunity, but not reduced or eliminated in an absolute sense); *see also supra* note 463; *Rhetoric of Risk*, *supra* note 330, at 158-64 (analyzing how neoliberal policies depend on reducing government spending on social insurance for workers as a central means of increasing investor security); Lucy A. Williams, *Property, Wealth and Inequality Through the Lens of Globalization: Lessons from the United States and Mexico*, 34 IND. L. REV. 1243, 1260 (2001) (advocating more analysis of the interrelationships between neoliberal welfare reforms in the U.S. and global economic policy).

465. In response to the attacks of September 11, 2001, some commentators and policy experts suggested that the war on terrorism is at least in part a war on global market "losers" who oppose neoliberalism's "winners." Interview by Mike Schuster with Strobe Talbott, Director, Yale Center for the Study of Globalization and former deputy Secretary of State, *Attacks on Sept. 11 Considered to Be Possible Attacks on Globalization*, (All Things Considered, National Public Radio broadcast, Dec. 14, 2001), *available at* http://search.npr.org.

Many critics have noted the irony that neoliberal policymaking, despite its claim to represent voluntary choices made by free individuals, has become increasingly dependent on insulation from normal democratic processes (like fast-track trade authority) and restraints on free expression (relying on police state controls to reduce protests). *See* Matthew Rothchild, *Why Qatar Was Chosen as the Site of the Next World Trade Organization Meeting*, (All Things Considered, National Public Radio broadcast, Feb. 1, 2001), *available at* http://search.npr.org (explaining that Qatar bans human rights organization and free speech).

citizenship.

To escape this double bind, advocates of social citizenship must be willing to change rather than accommodate the neoliberal market and the race, gender, and class hierarchies it embraces. Social citizenship ideals cannot remain outside the market as complementary goals because those ideals are inextricable from the structures of government rights and responsibilities inevitably internal to markets. Helping market losers will always seem to threaten the public good if that good is identified with market winners' gains. Social citizenship ideals have been sidetracked by the debate between pro-welfare liberalism and communitarianism over whether to focus on protecting individuals or on protecting communities. Instead, we should focus on the underlying question of *which* individuals and *what kinds of* communities our markets should be structured to protect and to benefit.