



Social and Economic Rights in the American Grain

Reclaiming Constitutional Political Economy

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WORK AND LIVELIHOODS; poverty and dependency; economic security and insecurity: For most of our history, their constitutional importance was self-evident. The framers of 1789 had no doubt that personal liberty and political equality demanded a measure of economic independence and material security. They proclaimed that the new national Constitution, plus “equality of rights and liberty” at the state level, would ensure just that measure for all hardworking white men and their families. The main prompting for the Fourteenth Amendment was to give African American men the same rights of contract and property that were thought to ensure white men the opportunity to pursue a calling and earn a decent livelihood. In the wake of industrialization and urbanization, generations of reformers declared that the United States needed a “new economic constitutional order” and a “Second Bill of Rights,” securing the old promises of individual freedom, opportunity, and well-being via new government duties and new social and economic rights. Laissez-faire, unchecked corporate power, and the deprivations and inequalities they breed weren’t just bad public policy; they were constitutional infirmities.

Today, however, with the important exception of employment discrimination, work, livelihoods, social provision, and the material bases of citizenship have vanished from the constitutional landscape. That is a scandal, for the United States is no different from other nations: Constitutional democracy is really impossible here, just as it is elsewhere, without some limits on social and economic deprivation. Mounting poverty and poverty wages; growing job insecurity; a renaissance of sweat shops; a lack of decent education, health care, housing, and other basic social goods: Millions of Americans thus afflicted lack more than money. They are at constant risk of physical and social debilitation. They can't make effective use of their basic civil and political rights. They can't participate on anything like a roughly equal footing in the world of work and opportunity or in the polity, where the terms of social and economic cooperation and competition are meant to be open to democratic scrutiny and revision. "Equal liberty" and the "consent of the governed"—the basic precepts of constitutional democracy—are a hoax in a system that allows such savage inequalities as does the United States.

Yet, "welfare rights," as most Americans understand them, have been tried and rejected. And "redistribution" is more likely to seem constitutionally suspect than constitutionally commanded. What is to be done? How, if at all, should the Constitution be interpreted to safeguard social rights or a social minimum in the twenty-first century?

To understand where we're going, it's good to know where we've been. So, the first part of this chapter is historical. We're all familiar with the anti-redistributive, laissez-faire, or *Lochner* tradition in American constitutional law and politics. Many important judges and scholars are bent on reviving it. *Lochner* revivalists are also originalists; for them, history obliges us to return to the constitutional political economy embodied in *Lochner*. They are wrong to claim that history can bind us to one particular account of our past constitutional commitments. In political economy, as elsewhere, our constitutional past is full of contending commitments and understandings; it offers less determinate and more choice-laden meanings for the present. The right-wing originalists are correct, however, in their practical understanding of constitutional change. Movements for change need an account of past constitutional contests and commitments that add up to a vision of the nation that the Constitution promises to promote and redeem; and the right-wing revivalists have succeeded in constructing such an account, which has aroused citizens, lawmakers, and judges to act boldly on its behalf.

Lately, we progressives have not had any good constitutional narratives to counter the laissez-faire, *Lochnerian* account of an America fundamentally committed to rugged individualism, personal responsibility, and private property safe from state interference and redistribution. The most frequent counters have been these:

1. The New Deal interred *Lochner*; it settled that the Constitution does not speak substantively to economic regulation and redistribution, leaving them to the give and take of the political process. True, some liberal and progressive lawyers and scholars in the 1960s and '70s tried to establish a constitutional right to welfare, but they failed. Now, we admit that social rights or positive rights or affirmative governmental duties are simply foreign to our constitutional traditions.
2. The liberal and progressive champions of constitutional welfare rights were correct. The Supreme Court was on the verge of recognizing a right to welfare when Richard Nixon won a razor-thin victory over Hubert Humphrey and named new, conservative justices who halted that train of doctrinal development. A Humphrey Court would have completed the task; and the liberal and progressive champions still hold fast to the arguments fashioned in the '60s and '70s.
3. The New Deal did more than inter *Lochner*. It gave rise to a new set of constitutive commitments embodied in the "greatest speech of the twentieth century,"¹ Roosevelt's 1944 State of the Union, proposing a Second Bill of (social and economic) Rights. FDR's speech is all but forgotten today. Still, the Second Bill of Rights remains constitutive of our national identity, and we should honor it, at least to the extent of protecting all Americans from desperate want.²

None of these counterstories fits the bill. The first two cede the constitutional past to conservatives' right-wing political economy. That is bad history. And while I'm no strategist, I think it's also bad politics. The third counternarrative reaches deeper into the past, but it isn't credible. If FDR's Second Bill of Rights should be read as a defining statement of modern America's constitutive commitments, why has it been forgotten, and why do social rights seem foreign in today's United States?

By contrast, the history on offer here gives shape and depth to social and economic rights in the American grain; it is at least as resonant today as its laissez-faire rival, and it shows how the tangled knot of race and class thwarted efforts to enact FDR's Second Bill of Rights and why

FDR's language of social rights is forgotten. Instead of enacting the Second Bill of Rights, the New Deal ended up creating a divided system of social insurance, which rested on generous *private* social provision for a broad and fortunate swath of Americans and a miserly, racialized system of public welfare assistance for the poor. Finally, the history and analysis on offer here illuminate the present as a critical moment, when this divided New Deal system is in crisis, and the opportunity beckons for renewing and reinventing social citizenship for all Americans.

Social rights are coming back. For the first time in a generation, we saw the leading 2008 Democratic presidential contenders championing "universal rights" to health care and to decent education. Their rhetoric often sounded in the key of social citizenship:³ Certain basic social goods must be available to every member of the national community; the market must not govern who enjoys them; no one can justly be excluded. Every American is *entitled* to a decent education. Every American has a *right* to health care.

It is a good time, then, to recall the provenance of social rights. I'll outline this deeper constitutional-historical narrative, and then I'll sketch a couple of the plans for new social provision that have the most traction today. I'll note these plans' promises and their pitfalls and suggest some ideas and sources of political energy for making them more inclusive and bringing the racialized poor into the fold of twenty-first-century U.S. social citizenship.

Social and Economic Rights: A Whirlwind Historical Tour

We need to reacquaint ourselves with the rich, reform-minded, *distributive* tradition of constitutional law and politics. And we also need to examine how it arrived at its present infirm state. Elsewhere, I have reconstructed this story in some detail.⁴ Here, a condensed account will do. The core of the U.S. social citizenship tradition always has been a commitment to enabling every American to participate in the common world of citizenship, work, and opportunity. Its roots lie in the same eighteenth-century sources as the *Lockmerian* outlook, and it never conceded to conservatives the classic liberal language of individual liberty, risk taking, and personal responsibility. Rather than redistribution of income after the fact, U.S. social citizenship traditions have emphasized redistributing opportunities and life chances, incentives and rewards to effort, and "predistributing" the initial endowments and security (like education and health and old-age insurance) necessary to take risks and

fulfill personal responsibilities and citizenly duties. This puts the moral basis of a progressive program on the bedrock promises of liberal capitalism: work for the willing, a decent income for those who work, and opportunity to rise above the minimum by making full use of one's talents and abilities. For much of U.S. history, this was the economic heart of the constitutional promise of "equal rights." Until the 1970s, it had a deeply gendered aspect. It also remains hard ground on which to plant social rights claims that aren't rooted in work, opportunity, and responsibility, but simply in our common vulnerability and interdependence. We'll return to these challenges.

As far back as the mid-nineteenth century, Abraham Lincoln and the other founders of the Republican Party held that equal rights demanded not only equal legal rights to contract and own property but a fair distribution of initial endowments, and therefore free homesteads and federally funded public state universities alongside free elementary and secondary education.

FDR's Second Bill of Rights, with its emphasis on education, employment, and earnings, expressed this outlook. At the same time, New Deal constitutionalism reflected the modern (late nineteenth- to early twentieth-century) progressive insight that industrial America's political economy was not a natural but a "manmade" order, constructed in ways that made poverty, unemployment, and vulnerability in illness and old age inevitable hazards of modern marketplace life. Made vivid by the Great Depression, this insight combined with the specter of rising fascism in Depression era Europe to link social security and freedom in New Deal thought. "A necessitous man is not a free man."⁵ "Every man has a right to life," Roosevelt proclaimed, and a "right to make a comfortable living." The government "owes to everyone an avenue to possess himself of a portion of [the nation's wealth] sufficient for his needs, through his own work."⁶ By the same token, "economic or social insecurity due to old age[,]...infirmity, illness or injury...[or] unemployment" was an injury to liberty itself, and government must enable "all Americans" jointly and severally to insure themselves against those injuries.⁷ Thus, alongside education, "training and retraining,"⁸ decent work, and decent pay, FDR's Second Bill of Rights set out rights to decent housing and social insurance, including health care.

Old understandings of constitutional rights, Roosevelt explained, were inadequate in industrial America. The terms of our basic rights "are as old as the Republic," but new conditions demand new readings. The old constitutional economic guarantees, like equality in the enjoyment of the "old and sacred possessive [common-law] rights" of property and

labor had rich significance for the “welfare and happiness” of ordinary Americans in the preindustrial United States. Now, only recognition of new governmental responsibilities would enable “a return to values lost in the course of...economic development” and “a recovery” of the old rights’ once robust social meaning. “‘To Promote the General Welfare,’ it is our plain duty to provide for that security upon which welfare depends...the security of the home, the security of livelihood, and the security of social insurance.”

Why then have we forgotten FDR’s Second Bill of Rights? And how did constitutional welfare rights for the very poor become the paradigmatic social right for progressive lawyers and constitutional scholars in the 1960s? FDR’s Second Bill of Rights emerged from deep and widely shared constitutional aspirations. But another fundamental feature of the political and constitutional order of FDR’s day was white supremacy. Mass disenfranchisement in the South (not only blacks but the majority of poor and working-class white southerners lost the vote by dint of devices like the poll tax) meant that an astonishingly small proportion of the region’s adult population was entitled to vote. The solid South was ruled by a planter and new industrialist oligarchy. That oligarchy chose the bulk of the South’s congressional delegation, and they, in turn, formed a reactionary core to counter the heart of Roosevelt’s liberal coalition. They insisted that New Deal social and labor standards rest on decentralized state administration, and they demanded that key bills exclude the main categories of southern labor. More encompassing and inclusive bills, those with national, rather than local, standards and administration, enjoyed solid support from northern Democrats (and broad but bootless support from disenfranchised southern blacks and poor whites), but the southern Junkers exacted their price. By the late ‘30s, southern Democrats openly joined ranks with conservative members of the minority party Republicans. This conservative coalition thwarted FDR’s and congressional New Dealers’ efforts to enact national health insurance, to remedy the many gaps and exclusions in the Social Security Act, and to create a federal commitment to full employment.

Social citizenship aspirations didn’t vanish, however. Instead, they flowed into private channels. By the 1940s, the new industrial unions had emerged as the only powerful, organized constituency for social and economic rights. Blocked at every legislative crossroads, the unions during the 1940s–1960s fashioned a robust *private* welfare state by bargaining for private entitlements to job security, pensions, and health insurance for their members. Beyond the unionized sectors of the

economy, industrial prosperity, liberal tax incentives, and the hope of thwarting unionization prompted large firms to adopt the main features of this generous, publicly subsidized, private welfare system.

So social rights talk fell into disuse after the 1940s, until it was reborn in the 1960s with a new shape and constituency. The private welfare state and the segmented and caste-ridden system of public social insurance bequeathed by the New Deal excluded most African Americans, whose anger exploded in many of the large cities of the North, where millions of southern blacks had moved over the preceding decades to escape Jim Crow and rural unemployment. For them, public assistance stood as the sole federal protection against poverty. Public assistance meant federal Aid to Families with Dependent Children (AFDC), and it was this separate, decentralized, and deeply gendered and racialized benefits program, stamped with many of the centuries-old degradations of poor relief, that the welfare rights movement sought to transform into a dignifying national right to a guaranteed income.

Many African American leaders tried to craft a broader social rights agenda—invoking FDR’s Second Bill and its rights to decent work and livelihoods—but the mass constituencies and organizations for such an agenda weren’t there. What Congress and Lyndon Johnson’s administration’s War on Poverty supplied were community action programs, thousands of attorneys, and tens of thousands of social workers and community resident-activists, often veterans of civil rights activism. They set about getting poor people to apply for welfare and attacking the social and legal barriers to their getting it.

Never before had poor African American women formed the rank and file of a nationally organized social movement. Like earlier movements for social and economic justice, they claimed decent income as a right; unlike the earlier movements, they did not tie this right to waged work. Most strands of social-citizenship thought constructed their programs and ideals in a gendered fashion, around the working man-citizen; a decent income and social provision were rights of (presumptively white male) waged workers and their dependents. By the 1960s, poor black women had had enough experience in urban labor markets to know that decent jobs were hard to find and enough experience with workfare to think it coercive and demeaning. A guaranteed adequate income also was a way to fulfill what, in the 1960s, remained a dominant norm: full-time mothering at home. The National Welfare Rights Organization (NWRO) demanded it as an unconditional right, essential to equal respect and an appropriate touchstone of equality in an affluent America.

The links and continuities with the civil rights struggle were not lost on the federal courts, as they decided cases undoing the exclusion of black women from welfare rolls. Hundreds of cases brought by Legal Services attorneys dramatically broadened eligibility standards; federal judges went a long way toward transforming a grant-in-aid to the states to be administered as meanly as local officialdom saw fit, into a no-strings and no-stigmas national right to welfare. The whole push of these developments was reflected in the Supreme Court's repeated insistence that public assistance for impoverished citizens was a basic commitment—not charity or largesse, but a right. The Court evoked the social and constitutional outlook of FDR and the New Deal: "From its founding the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty."¹⁰ And like FDR, the Court rang out the changes on the Preamble to the Constitution, only now on behalf of those conspicuously excluded from New Deal social citizenship: "Welfare... can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community." Public assistance, then, is a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity."¹¹

Gaining welfare as a matter of right promised to relieve unjustifiable suffering and indignities. It was a social rights claim that highlighted the coercive and gendered aspects of older employment-based models of economic justice. But it would not do enough to help poor African Americans make their way into a shared social destiny of work and opportunity.

In any case, welfare rights were in trouble. Not only the racialized cast of welfare and the changing cast of the Supreme Court, but also the massive entry of white working- and middle-class women into the full-time paid labor force left AFDC vulnerable and exposed. Assailed for years, in 1996, a Republican Congress and a Democratic president (Bill Clinton) repealed poor Americans' federal right to welfare assistance, ending "welfare as we [knew] it."

Social and Economic Rights in the Twenty-First Century

To recall the historical heft of these century-long efforts to make good on the constitutional justice of livelihoods and social and economic rights is to see that these ideas are not strangers in the province of U.S.

constitutional experience. If the nation had remained true to the commitments made during Reconstruction and had southern blacks and poor whites enjoyed the vote during the New Deal, then the votes probably would have been there in Congress for more of the Second Bill of Rights legislation, and a divided, caste-ridden system of welfare and social provision might have been averted. But what can we draw today from this imperfect past?

First, as a practical matter, bear in mind: The divided system is collapsing. The end of welfare has made the "undeserving poor" into the "working poor." At the same time, the nation's once ample supply of stable, secure, decently paid unskilled or semi-skilled jobs has dwindled, and the generous private welfare state has been dismantled. Across the political spectrum, commentators liken the economic order of today to the harsh, laissez-faire capitalism of the Gilded Age, a century ago.

Long-term job security and job ladders are disappearing; temporary and contingent work is growing. Yet, unemployment insurance has been cut back. Since the 1980s, business leaders and lawmakers have been chipping away at the public and private social benefits forged during the New Deal and expansive postwar decades. We have seen a crusade against corporate and governmental responsibility for individual welfare, sweeping like a grim reaper through pension plans, health insurance, and labor standards; cutting the bonds of social solidarity; and shifting the burdens of and responsibilities for economic risk from government and corporations to workers and their families. From the progressive perspective, this marks a constitutional-political-economic crisis and an opportunity. With the end of the divided system of welfare for the poor and generous, publicly subsidized, private social provision for the working and middle classes has come the possibility of proposing new social rights for all working Americans and their families.

Next, as a matter of constitutional history and tradition, don't forget that legislation is an integral part of the constitutional framework, and many of our most important constitutional battles are fought outside the courts in movement building, public debate, and legislative and policymaking arenas. Quite simply, the progressive constitutional narrative I've sketched tells us that the United States that the Constitution promises to promote and redeem is one fundamentally committed to all Americans enjoying a chance to work and earn the decencies as well as the necessities of life and being insured for when they cannot work; having a chance to engage in the affairs of their communities and the larger society; and enjoying a chance to do something that has value in their own eyes. As the 2008 Democratic contenders showed, it is a narrative

that remains resonant. What kinds of new framework statutes and institutional innovations are best suited to bringing these old commitments back to the nation? And how should we address the perils of exclusion which any new effort at social citizenship brings in its wake?

The politics of promoting a twenty-first-century progressive constitutional political economy seems likely to begin with rights to decent and continuing education and health care. But these seem likely, in turn, to open onto other preventable forms of severe vulnerability and insecurity. With the dismantling of the old systems of social support and the balance of responsibility swinging wildly and unjustly toward the unaided individual and her family, a reformed Social Security system could become a centerpiece of a progressive constitutional political economy. This could create a shared system of social rights and social support for working families across classes and generations. In addition to providing pensions for the elderly and meeting the unmet needs of Americans in between jobs, a progressive Social Security system would underwrite periods of training and retraining, as well as periods of part-time work or time off for working parents with small children. Because Social Security is the nation's most popular "universal" program, the social policy mavens around Barack Obama have been right to promote bringing that program into the twenty-first century in just this fashion.

The risk is that such a reform will shortchange those millions of marginalized Americans likely to be excluded from a revamped Social Security system because they don't meet minimum contribution requirements. Suppose, for example, that a revamped system were to begin providing income for periods of full- or part-time child or elder care in working people's lives. How might a rekindled poor people's movement overcome the concatenation of ethnic, racial, gender, and class mistrust and scorn that would greet efforts to extend such support to poor inner-city African Americans, Hispanics, and others lacking the requisite periods of paycheck contributions?

Part of the answer might lie in this. The welfare rights movement of the '60s found no allies or common ground with the labor movement. But the wide gulf that used to separate organized labor from poor people of color has narrowed. Some of the most innovative and fast-growing provinces of the labor movement today are those populated by low-wage, service-sector black and Hispanic women workers. There, one finds local and statewide unions successfully prodding employers into partnerships that are turning demeaning jobs into decent ones in sectors that are largely immune from outsourcing but known for low-wage, dead-end work. Aware of the straits that lead constituents to cling

to low-wage jobs *and* why they often can't hold onto them, these unions would have many good reasons to champion federal support for "care" work among the inner-city poor. Not least, such support for work outside the labor market would strengthen the bargaining power of individual poor workers and their unions inside the labor market. Union leaders and activists in a coalition laying claim to this kind of social right would assail the moral division of poor Americans into the deserving and undeserving based on who is doing full-time waged work; they'd speak for the dignity and deserts of poor people doing different kinds and combinations of waged and unwaged work at different moments in their lives and in the vicissitudes of cities' and regions' labor markets. Such a coalition for poor Americans could build on one of the most striking progressive developments since the 1990s: organized labor's reversal of a century-old anti-immigrant politics and its increasingly firm embrace of racial inclusion.

Imagine a President Obama forced, like FDR, to make good on his promise to help organized labor with pro-union legislation, reducing the extraordinary costs and risks of union organizing today. As it did in the 1930s, such a climate-changing development might release the great pent-up demand for unions among low-wage workers. And an upsurge in militancy and mobilization in those quarters could enable a pro-poor progressive coalition to push President Obama some distance away from some of his neoliberal inclinations in the direction of more robust and inclusive redistributive reforms, much as FDR was pushed beyond some of his classic liberal instincts by the unbidden support of the Congress of Industrial Organizations (CIO).

Fortunately, while unions are invaluable, they are not the only way that reformers are fashioning good jobs out of bad ones. There are other novel schemes afoot for restructuring the low-wage labor market and blueprints for imagining framework statutes aimed at securing this most dauntingly difficult social right. Consider a statute that progressives love to hate: the 1996 Personal Responsibility and Work Opportunity Reconciliation Act, which ended welfare as we knew it. The act took millions of welfare recipients off the rolls, forced them into dead-end jobs, and did not enable most of them to raise themselves and their families out of poverty. It disbursed billions of dollars to the states to administer as they pleased. True, the statute demanded that states meet certain federal requirements, but these addressed time limits on welfare and numbers of welfare recipients taken off the rolls. The statute set no goals along the axis of "making work pay." It allowed but it did not require the states to use the grants to assist former welfare

recipients heading off to the world of work. Some states squander the money by contracting workfare to private temp agencies that channel clients to the worst kind of unstable, dead-end jobs; others have diverted the money into general state funds; but others have used the grants in fruitful ways, supporting a great variety of public and private, for-profit and nonprofit agencies aimed at getting welfare clients not only off the rolls but out of poverty. So, more than a dozen years later, we have some experience with federally funded but locally fashioned workforce institutions that succeed in improving the job prospects and long-term career trajectories of poor Americans. Some of these new model workforce intermediaries serve particular cities, others particular industries. Some have brought community colleges together with employers to incorporate career ladders into welfare-to-work programs. Others focus on training and organizing as ways to secure self-sufficiency and strong floors under wages.

Imagine a revised PRWORA. It still would devolve authority over block grant resources to states and localities. But instead of targeting simple workforce participation rates or welfare roll reductions, it would set goals and incentives aimed at decent livelihoods and opportunities to advance. It would require states to monitor the performance of local agencies, benchmark their progress, and encourage the local agencies to share best practices, and it would provide for judicial remedies if the state administrators or the state legislatures were not meeting their obligations to monitor the performance of local workforce intermediaries and to respond in case poorly performing ones fail to improve. Courts would not have the authority to specify the goals and strategies for local workforce intermediaries, nor to monitor local agencies themselves: Those tasks are beyond courts. But courts could compel the state agencies to perform their functions or face the transfer of federal resources into simple living allowances and training, child care, and transportation vouchers for workfare clients, unless and until the state got its act together.

Conclusion

Those are quick sketches of some of the terrain on which movements and initiatives for social rights might reemerge in the reform climate produced by an Obama presidency. The welfare rights movement appeared at a moment when the private economy seemed to be producing decent jobs and a decent mix of public-private social provision for working-class Americans. Today is different.

An Obama presidency, we can hope, may bring substantial new job creation and new means for working families to draw decent incomes from Social Security during periods of unemployment, job training, and child or elder care. Against this backdrop, pro-poor advocates could make a different case, demanding the simple justice of extending to poor Americans the social rights enjoyed by everyone else. And they could build a coalition with the most dynamic sector of the labor movement, transformed since the 1960s. The blueprints are there. What is lacking is political will. Here, as elsewhere, creating that political will may be aided by the stories we tell and the constitutional past we remember and commit ourselves to redeeming.

Notes

1. Cass R. Sunstein, *The Second Bill of Rights: FDR's Unfinished Revolution and Why We Need It More Than Ever* 9 (Basic Books, 2004).
2. *Id.*
3. See William E. Forbath, *Caste, Class, and Equal Citizenship*, 98 Mich. L. Rev. 1 (1999).
4. See *id.*; William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L.J. 165 (2001); Forbath, *Constitutional Welfare Rights: A History, Critique and Reconstruction*, 69 Fordham L. Rev. 1821 (2001).
5. Franklin D. Roosevelt, Acceptance of the Renomination for the Presidency, Philadelphia, Pennsylvania, June 27, 1936, 5 Public Papers and Addresses of Franklin D. Roosevelt 234 (Samuel I. Rosenman, ed., 1938).
6. Franklin D. Roosevelt, *New Conditions Impose New Requirements upon Government and Those Who Conduct Government*, Campaign Address at the Commonwealth Club, San Francisco, Cal. (Sept. 23, 1932), in 1 Franklin D. Roosevelt, *The Public Papers and Addresses of Franklin D. Roosevelt* 742, 754.
7. 80 Cong. Rec. 9223 (1936) (statement of Sen. Henry Ashurst).
8. U.S. Nat'l Resources Planning Bd., *Security, Work, and Relief Policies* 508 (1942).
9. Franklin D. Roosevelt, Message to the Congress Reviewing the Broad Objectives and Accomplishments of the Administration (June 8, 1934), in 3 *The Public Papers and Addresses of Franklin D. Roosevelt* 291-92.
10. *Goldberg v. Kelly*, 397 U.S. 254, 264-65 (1970).
11. *Id.*