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# Disability, Universalism, Social Rights, and Citizenship

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# DISABILITY, UNIVERSALISM, SOCIAL RIGHTS, AND CITIZENSHIP

*Samuel R. Bagenstos*<sup>†</sup>

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### I. INTRODUCTION: SOCIAL WELFARE IN THE AGE OF TRUMP, AND THE LESSONS OF DISABILITY POLICY

The 2016 election has had significant consequences for American social welfare policy. Some of these consequences are direct. By giving unified control of the federal government to the Republican Party for the first time in a decade, the election has potentially empowered conservatives to ram through a bill to repeal the Affordable Care Act—the landmark “Obamacare” law that marked the most significant expansion of the social welfare state since the 1960s. Other consequences are more indirect. Both the election result itself, and Republicans’ actions since, have spurred a renewed debate within the left-liberal coalition regarding the politics of social welfare policy.

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<sup>†</sup> Professor of Law, University of Michigan Law School. I presented earlier versions of this paper at the Program on Democracy, Citizenship, and Constitutionalism at the University of Pennsylvania and at a faculty workshop at Stanford Law School. Thanks to the participants at those events, and to the participants at the *Cardozo Law Review* Symposium, for their very helpful comments.

This political debate actually began during the Democratic primary. In his surprisingly successful insurgent campaign, Bernie Sanders strongly endorsed social-policy universalism.<sup>1</sup> His signature policy positions—single-payer health insurance, free college—extended benefits equally to everyone.<sup>2</sup> The eventual nominee, Hillary Clinton, by contrast, offered more targeted approaches: means-tested child care and college tuition plans, an incremental expansion of Obamacare, and so forth.<sup>3</sup> It is not clear that there was any deep difference—of principle or of preferred policy tools—between the coalitions Sanders and Clinton represented. But the dynamics of a contested primary led partisans of each candidate to develop and articulate competing theories of politics under which their own candidate’s proposals represented the most effective way to achieve an expansion of the social welfare state.<sup>4</sup>

On each side, the partisans drew on longstanding arguments from the social policy literature. Sanders partisans thus argued that universal social welfare policy is more likely to be politically durable, because it preempts efforts to divide the polity between those who receive benefits and those who pay for them—or, as House Speaker Paul Ryan (the most prominent opponent of social welfare programs in American public life) memorably put it, “makers” and “takers.”<sup>5</sup> They contended that the Affordable Care Act was politically vulnerable precisely because it provided its new coverage to poorer people (through the Medicaid expansion) and those who did not have health insurance through their

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<sup>1</sup> See, e.g., Anu Partanen, *What Americans Don’t Get About Nordic Countries*, ATLANTIC (Mar. 16, 2016), <https://www.theatlantic.com/politics/archive/2016/03/bernie-sanders-nordic-countries/473385>.

<sup>2</sup> See Bernie Sanders, Sen., Speech at Georgetown Univ.: My Vision for Democratic Socialism in America (Nov. 19, 2015) (transcript available at [http://inthesetimes.com/article/18623/bernie\\_sanders\\_democratic\\_socialism\\_georgetown\\_speech](http://inthesetimes.com/article/18623/bernie_sanders_democratic_socialism_georgetown_speech)).

<sup>3</sup> See Jonathan Cohn, *Clinton Lays out Agenda for Making Child Care Better—and More Affordable*, HUFFPOST (May 10, 2016, 6:00 AM), [http://www.huffingtonpost.com/entry/hillary-clinton-child-care\\_us\\_57313fd7e4b096e9f09275b6](http://www.huffingtonpost.com/entry/hillary-clinton-child-care_us_57313fd7e4b096e9f09275b6); Doug Lederman, *Clinton Borrows from Bernie*, INSIDE HIGHER ED (July 7, 2016), <https://www.insidehighered.com/news/2016/07/07/clinton-proposes-tuition-free-public-higher-education-families-incomes-125000>; Vann R. Newkirk II, *Medicare for More*, ATLANTIC (May 23, 2016), <https://www.theatlantic.com/politics/archive/2016/05/clinton-new-medicare-proposal/483806>.

<sup>4</sup> For an argument that “[p]rimary campaigns tend to emphasize . . . differences,” and that the differences between Clinton and Sanders were largely tactical, see David Cole, *The Progressive Case for Hillary Clinton’s Incrementalism*, NATION (June 10, 2016), <https://www.thenation.com/article/the-progressive-case-for-hillary-clintons-incrementalism>.

<sup>5</sup> See Robbie Nelson, *Engines of Solidarity*, JACOBIN MAG. (Nov. 22, 2016), <https://www.jacobinmag.com/2016/11/donald-trump-democratic-party-welfare-state>. On Ryan, see, for example, Greg Sargent, *Paul Ryan Regrets that ‘Makers and Takers’ Stuff. Sort of, Anyway*, WASH. POST (Mar. 23, 2016), [https://www.washingtonpost.com/blogs/plum-line/wp/2016/03/23/paul-ryan-regrets-that-makers-and-takers-stuff-sort-of-anyway/?utm\\_term=.69620a90007f](https://www.washingtonpost.com/blogs/plum-line/wp/2016/03/23/paul-ryan-regrets-that-makers-and-takers-stuff-sort-of-anyway/?utm_term=.69620a90007f). On the longstanding arguments for the political durability of universal programs, see Samuel R. Bagenstos, *The Meaning of the Civil Rights Revolution: Universalism and Civil Rights (with Notes on Voting Rights After Shelby)*, 123 YALE L.J. 2838, 2848–49 (2014).

jobs.<sup>6</sup> A single-payer plan, by contrast, would put all Americans in the same system and thus give *all* of them a stake in not having it taken away.<sup>7</sup>

Clinton supporters countered that, however durable large universal programs may ultimately prove, it is politically far more difficult to get those programs adopted in the first place except by taking incremental steps.<sup>8</sup> And, indeed, as some Clinton supporters pointed out, the famously “universal” programs of the New Deal were anything but. They often carved African Americans in the South out of their protections, all to smooth their passage in a divided and compromised Democratic Congress.<sup>9</sup> In addition to reinforcing existing structures of racial subordination, those supposedly universal laws also reinforced subordination in gender relations.<sup>10</sup>

After Clinton won the Democratic nomination, she ran in the general election on a platform that adopted many of Sanders’s positions.<sup>11</sup> But Clinton never fully embraced social-welfare

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<sup>6</sup> See, e.g., Kevin Drum, *A Follow-Up: Why the Working and Middle Classes Don’t Like Obamacare Much*, MOTHER JONES (Nov. 20, 2014, 4:51 PM), <http://www.motherjones.com/kevin-drum/2014/11/follow-why-working-and-middle-classes-dont-obamacare-much>; Andrew Sprung, *Obamacare Is a Boon for the Working Poor, and That’s Probably Good for All of Us*, MOTHER JONES (May 5, 2015, 1:00 PM), <http://www.motherjones.com/kevin-drum/2015/05/obamacare-working-poor> (discussing the “good policy/tough politics conundrum” of the Affordable Care Act).

<sup>7</sup> See, e.g., Margaret Flowers, *Single-Payer Is Within Reach: What You Need to Know About the Bill for Improved Medicare for All*, TRUTHOUT (June 14, 2017), <http://www.truth-out.org/opinion/item/40932-single-payer-is-within-reach-what-you-need-to-know-about-the-bill-for-improved-medicare-for-all> (“Previous efforts at universal health care in the US were stymied by racism and classism. A single-payer system would create a sense of social solidarity that has not been experienced in the US. Other countries have figured out that welfare systems are poor systems and universal systems are higher-quality systems, because each person has a stake in making them the best that they can be.”).

<sup>8</sup> See, e.g., Ed Kilgore, *Creating ‘Medicare for All’ Isn’t as Easy as It Sounds*, N.Y. MAG. (May 24, 2016, 7:45 AM), <http://nymag.com/daily/intelligencer/2016/05/medicare-for-all-isnt-as-easy-as-it-sounds.html>; Harold Pollack, *Here’s Why Creating Single-Payer Health Care in America Is So Hard*, VOX (Jan. 16, 2016, 11:20 AM), <https://www.vox.com/2016/1/16/10779270/pollack-single-payer-in-america>; Harold Pollack, *Single-Payer Health Care Is More Popular than Ever. Here Are 10 Questions for Its Future*, VOX (May 23, 2016, 8:20 AM), <https://www.vox.com/2016/5/23/11703190/single-payer-questions>. See generally Jonathan Cohn, *Hillary Clinton Is a Progressive Democrat, Despite What You May Have Heard*, HUFFINGTON POST (May 8, 2016, 6:00 AM), [http://www.huffingtonpost.com/entry/hillary-clinton-progressive\\_us\\_572cca08e4b0bc9cb0469098](http://www.huffingtonpost.com/entry/hillary-clinton-progressive_us_572cca08e4b0bc9cb0469098).

<sup>9</sup> IRA KATZNELSON, *FEAR ITSELF: THE NEW DEAL AND THE ORIGINS OF OUR TIME* (2013).

<sup>10</sup> See ALICE KESSLER-HARRIS, *IN PURSUIT OF EQUITY: WOMEN, MEN, AND THE QUEST FOR ECONOMIC CITIZENSHIP IN 20TH-CENTURY AMERICA* (2001); SUZANNE METTLER, *DIVIDING CITIZENS: GENDER AND FEDERALISM IN NEW DEAL PUBLIC POLICY* (1998).

<sup>11</sup> See Jonathan Cohn, *The Future of America Is Being Written in This Tiny Office*, HUFFINGTON POST (Sept. 21, 2016), <http://highline.huffingtonpost.com/articles/en/hillary-clinton-policy-agenda>; Katrina vanden Heuvel, *The Most Progressive Democratic Platform Ever*, WASH. POST (July 12, 2016), [https://www.washingtonpost.com/opinions/the-most-progressive-democratic-platform-ever/2016/07/12/82525ab0-479b-11e6-bdb9-701687974517\\_story.html?utm\\_term=.c0e42d4aea6e](https://www.washingtonpost.com/opinions/the-most-progressive-democratic-platform-ever/2016/07/12/82525ab0-479b-11e6-bdb9-701687974517_story.html?utm_term=.c0e42d4aea6e).

universalism. And the “establishment” wing of the Democratic Party she represented remained identified with more targeted and incremental programs like the Affordable Care Act. When Trump prevailed, and Democrats focused increasingly on how Clinton had lost many of the “white working class” voters who had cast ballots for President Obama in 2008 (if not 2012), many in the party blamed the targeted nature of Obama-era social welfare policy.<sup>12</sup> And when Trump took quick action to attempt to undo the Affordable Care Act, the political arguments against bold universalism suffered another blow.<sup>13</sup>

Now, the forces of social-policy universalism seem to have the momentum in the left-liberal coalition. A consensus is emerging that the next Democratic president will run on a single-payer health care platform.<sup>14</sup> Many presumed 2020 Democratic presidential candidates—including some previously associated with the “establishment” wing—have now cosponsored Sen. Sanders’s “Medicare for All” bill.<sup>15</sup> Proposals for a universal basic income are gaining traction as well.<sup>16</sup> And free college proposals seem to be gaining support among Democratic elected officials.

The view that universalism is politically powerful thus seems to be carrying the day among left-liberals. In this Essay, I want to offer some

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<sup>12</sup> See, e.g., Catherine Rampell, *Why the White Working Class Votes Against Itself*, WASH. POST (Dec. 22, 2016), [https://www.washingtonpost.com/opinions/why-the-white-working-class-votes-against-itself/2016/12/22/3aa65c04-c88b-11e6-8bee-54e800ef2a63\\_story.html](https://www.washingtonpost.com/opinions/why-the-white-working-class-votes-against-itself/2016/12/22/3aa65c04-c88b-11e6-8bee-54e800ef2a63_story.html) (suggesting that many white working class voters opposed Obamacare, even though they benefited from it, because they believed that it in fact benefited other, undeserving people); Joan C. Williams, *What So Many People Don't Get About the U.S. Working Class*, HARV. BUS. REV. (Nov. 10, 2016), <https://hbr.org/2016/11/what-so-many-people-dont-get-about-the-u-s-working-class> (“Remember when President Obama sold Obamacare by pointing out that it delivered health care to 20 million people? Just another program that taxed the middle class to help the poor, said the WWC, and in some cases that’s proved true: The poor got health insurance while some Americans just a notch richer saw their premiums rise.”).

<sup>13</sup> See, e.g., Ezra Klein, *Republicans Are About to Make Medicare-For-All Much More Likely*, VOX (June 15, 2017, 8:20 AM), <https://www.vox.com/policy-and-politics/2017/6/15/15787626/mitch-mcconnell-single-payer-medicare-all>; Vann R. Newkirk II, *A Political Opening for Universal Health Care?*, ATLANTIC (Feb. 14, 2017), <https://www.theatlantic.com/politics/archive/2017/02/universal-health-care-polls-obamacare-repeal/516504>; Reihan Salam, *The Health Care Debate Is Moving Left*, SLATE (June 9, 2017, 10:23 AM), [http://www.slate.com/articles/news\\_and\\_politics/politics/2017/06/how\\_single\\_payer\\_health\\_care\\_went\\_from\\_a\\_pipe\\_dream\\_to\\_mainstream.html](http://www.slate.com/articles/news_and_politics/politics/2017/06/how_single_payer_health_care_went_from_a_pipe_dream_to_mainstream.html).

<sup>14</sup> See, e.g., Klein, *supra* note 13.

<sup>15</sup> See Addy Baird, *UPDATED: More Democratic Senators Will Co-Sponsor Bernie Sanders’ Medicare for All Bill*, THINKPROGRESS (Sept. 11, 2017, 4:20 PM), <https://thinkprogress.org/even-more-senators-are-co-sponsoring-sanders-medicare-for-all-bill-1403fcfa1fea/>.

<sup>16</sup> See Clay Dillow & Brooks Rainwater, *Why Free Money for Everyone Is Silicon Valley’s Next Big Idea*, FORTUNE (June 29, 2017), <http://fortune.com/2017/06/29/universal-basic-income-free-money-silicon-valley>; Ben Schiller, *A Universal Basic Income Is the Bipartisan Solution to Poverty We’ve Been Waiting for*, FAST COMPANY (Mar. 16, 2015), <https://www.fastcompany.com/3040832/a-universal-basic-income-is-the-bipartisan-solution-to-poverty-weve-bee>; James Surowiecki, *The Case for Free Money*, NEW YORKER (June 20, 2016), <http://www.newyorker.com/magazine/2016/06/20/why-dont-we-have-universal-basic-income>.

reasons to worry about these confident predictions. To be clear, my skepticism is largely about the politics. I support many of the universal programs that are part of the emerging left-liberal social policy consensus, including single-payer health care and a universal basic income. But I am far less certain that universalism solves the political problems that left-liberals face in social welfare policy.

I examine these issues through the lens of disability policy. America's policy concerning individuals with disabilities has often wrestled with the choice between universalism and targeting—across a number of dimensions. As important, many of the key social welfare policy battles of the Trump Administration are likely to focus on programs on which disabled people rely. Medicaid, which any Trump health care plan would likely cut substantially, provides key services to people with disabilities.<sup>17</sup> During the last two decades in particular, those services have included crucial supports to enable disabled people to lead full and independent lives in their own homes and communities, rather than in nursing homes and institutions.<sup>18</sup> Social Security Disability Insurance (SSDI) and Supplemental Security Income (SSI)—the two major cash benefits programs for people with disabilities—also face a significant threat. Indeed, skepticism of SSDI and SSI has grown among policy centrists at least since the rolls expanded in the 2008 recession. With unified Republican control of the federal government, those programs are likely to be the next targets of welfare reform energy.

There is reason to believe, I argue, that the universal, contributory social insurance programs for people with disabilities—notably, SSDI—are *not* likely to be more politically durable than the targeted ones—notably, Medicaid.<sup>19</sup> In part, this is because of the indeterminacy of the universalism/targeting distinction. Many social programs that are commonly characterized as universal could instead be easily understood as targeted depending on one's frame of reference. Whether a social welfare program has the political benefits attributed to universalism depends on the social meaning of that program, rather than on its formal rules for eligibility.<sup>20</sup> That social meaning, in turn, depends crucially on the broader political context, as well as the efforts of activists to shape the public understanding of the program. In

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<sup>17</sup> On the importance of Medicaid to people with disabilities, see Samuel R. Bagenstos, *The Future of Disability Law*, 114 YALE L.J. 1, 56–70 (2004).

<sup>18</sup> See, e.g., Samuel R. Bagenstos, *Federalism by Waiver After the Health Care Case*, in THE HEALTH CARE CASE: THE SUPREME COURT'S DECISION AND ITS IMPLICATIONS 227, 238 (Nathaniel Persily et al., eds., 2013).

<sup>19</sup> For a persuasive, empirically grounded argument against the supposed political benefits of universalism in social welfare policy, see CHRISTOPHER HOWARD, THE WELFARE STATE NOBODY KNOWS: DEBUNKING MYTHS ABOUT U.S. SOCIAL POLICY 92–108 (2007).

<sup>20</sup> This point is one of the underlying themes of my argument in a previously published Article. See Bagenstos, *supra* note 5, at 2864–65.

particular, I will suggest, public debate about social welfare programs often revolves around questions of citizenship—in particular, whether receipt of benefits serves as a recognition of one’s status as a full citizen, or instead whether it stands as an obstacle to citizenship status.

The connection between welfare benefits and social citizenship, of course, is the central subject of T.H. Marshall’s celebrated work, *Citizenship and Social Class*.<sup>21</sup> Writing in postwar Britain, Marshall saw universal social welfare programs as adding a new dimension to citizenship—social citizenship. (Marshall in fact devoted most of his professional life to building the institutions of British social democracy.) My arguments below often intersect and engage with Marshall’s influential discussion. One goal of this Essay is to use the disability context to highlight just how contingent the connection between universal benefits and social citizenship is. As the disability context shows, social rights are often deeply in tension with social—and at times even juridical—citizenship. Social rights, at least in the sense described by Marshall, have been in tension with citizenship because extensions of those rights have in certain circumstances been understood to *deny* full citizenship to the beneficiaries of those extensions.

This may seem a striking claim. The cross-national trend has been to treat social rights as basic human rights. So how can those rights *deny* full citizenship? And it is true that acceptance of social welfare rights is no longer treated in the law as in conflict with *juridical* citizenship (though this was not always true, and continuing efforts to deny immigration and naturalization rights to people who rely on welfare programs demonstrates that acceptance or enjoyment of welfare rights can in practice conflict with juridical citizenship). But social rights continue to conflict with full *social* citizenship. Again, this may seem a striking claim, as Marshall’s influential account treats enjoyment of social rights as tantamount to social citizenship.<sup>22</sup> But social citizenship, as I use the term, implies treatment by society—and not just by particular legal institutions—as a fully equal member of the community.<sup>23</sup> And people who accept or use social welfare rights are often treated, by society at large, as less entitled to participate fully in the life of the community than those who do not accept those rights.<sup>24</sup> This denial of full social citizenship often reflects back on the law and leads

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<sup>21</sup> T.H. MARSHALL, *CITIZENSHIP AND SOCIAL CLASS* (1950).

<sup>22</sup> *Id.* at 8.

<sup>23</sup> I defend this understanding in Samuel R. Bagenstos, *Employment Law and Social Equality*, 112 MICH. L. REV. 225 (2013).

<sup>24</sup> My argument in this regard is much in accord with Joel Handler’s discussion of “workfare” and “active labor market” policies in the United States and Europe, which he contends deny full social citizenship to those who receive benefits but cannot work. See Joel F. Handler, *Social Citizenship and Workfare in the US and Western Europe: From Status to Contract*, 13 J. EUR. SOC. POL’Y 229 (2003).

program administrators and judges to limit the juridical rights of those who rely on social welfare.

Those who have advocated expansion of social rights have therefore been forced to fight a battle on two fronts—to seek that expansion while at the same time working to ensure that it does not undermine the equal citizenship status of those who receive expanded benefits. In Anglo-American law, the disability context has been a prime theater for this two-front battle. Since at least the time of the 1601 Elizabethan Poor Law, disability has been one of the most widely accepted bases for claiming social rights.<sup>25</sup> But acceptance of those disability-specific social rights has long come at a cost to citizenship. Sometimes the cost has been to juridical citizenship, as acceptance of welfare has triggered an explicit denial of civil and political rights. But even when legal limitations of civil and political rights were removed, acceptance of social welfare benefits deprived people with disabilities of full social citizenship—of the status as full and equal members of the community. Those who are excused from the ordinary obligations of citizenship, such as the obligation to work for a living, are often understood in the popular imagination to be disentitled to the ordinary rights of citizenship.

When it organized through the 1970s, the American disability rights movement thus confronted a dilemma. The movement's basic goal was to ensure that people with disabilities were treated as full citizens—as full and equal members of the community. An expansion of what had previously been understood as social rights—both in terms of education, health, and welfare benefits and in terms of disability-specific accommodations by schools, employers, and other governmental and economic actors—seemed necessary to achieve that goal.<sup>26</sup> But that very expansion of social rights would likely serve to underscore public attitudes that people with disabilities were not entitled to be treated as full citizens. Disability rights activists sought to fight this dilemma by working to reframe what had previously been understood as social rights into civil rights and to reframe what had previously been understood as welfare dependence into the promotion of independence. Those reframing efforts were notably, though hardly fully, successful. The story of those efforts helps to illuminate the complex and fraught relationship between social rights and citizenship. And it helps to sharpen understanding of the political possibilities and limitations of universal social welfare policy in our current political moment.

The remainder of this Essay elaborates on these points. Part II

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<sup>25</sup> This is one of the basic arguments made in DEBORAH A. STONE, *THE DISABLED STATE* (1984).

<sup>26</sup> See SAMUEL R. BAGENSTOS, *LAW AND THE CONTRADICTIONS OF THE DISABILITY RIGHTS MOVEMENT* 12–33 (2009).

discusses the way that disability has, throughout Anglo-American history, served as a ticket to social rights—but at the same time as a barrier to full social citizenship. In Part III, I engage with Marshall’s argument that universal social programs respond to this problem by reinforcing social citizenship; I argue that the experience of disability programs complicates Marshall’s account. In Part IV, I discuss the limitations of disability rights advocates’ strategies of pursuing social rights that advance social citizenship. Finally, in Part V, I suggest some lessons we can draw from this experience for current controversies.

## II. DISABILITY AS A TICKET TO SOCIAL RIGHTS, AND OUT OF CITIZENSHIP

Disability has long been central to the provision of social welfare. As Deborah Stone writes, “[t]he very notion of disability is fundamental to the architecture of the welfare state.”<sup>27</sup> For centuries, Anglo-American law has provided some form of social welfare benefits for at least some classes of people who could not work. The classes have changed over time (as has the form the benefits have taken), but disability has typically been an important criterion on which the law has relied to identify the inability to work.

Medieval English vagrancy laws, ultimately codified in the Elizabethan Poor Law of 1601, imposed significant restrictions on the giving and receipt of alms, but those laws made exceptions for individuals with various conditions that we would now call disability (such as leprosy, blindness, and mobility impairments).<sup>28</sup> The more modern Poor Law Amendment Act of 1834 (Poor Law) required recipients of poor relief to live in workhouses. The conditions in the workhouses were undesirable, as an effort to discourage people from leaving the workforce to subsist on relief. But that law provided for better workhouse conditions, and sometimes a complete exemption from the requirement to live in the workhouse, for several classes of individuals whom we would now describe as having disabilities: “the sick,” “the insane,” “defectives,” and “the aged and infirm.”<sup>29</sup> The role of the disability category under these laws was apparent—to identify, more or less objectively, a class of people who should be exempt from the ordinary societal obligation to work for a living. As Marshall described it, the Poor Law “offered relief only to those who, through age or sickness, were incapable of continuing the battle, and to those other weaklings who gave up the struggle, admitted defeat, and cried for

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<sup>27</sup> STONE, *supra* note 25, at 12.

<sup>28</sup> *Id.* at 35–37.

<sup>29</sup> *Id.* at 40–48.

mercy.”<sup>30</sup>

As disability welfare entered American law, the disability category served the same purposes. The first federal disability welfare system in the United States was probably the Civil War pension program. That program defined disability—and thus eligibility for benefits—as, in essence, a medical “condition that restricted the veteran’s ability to obtain his subsistence by manual labor.”<sup>31</sup> And our current SSDI program, enacted in 1956, similarly defines disability (at least as a formal matter) as a physical or mental impairment that renders an individual unable to engage in any “substantial gainful activity” in the national economy.<sup>32</sup>

One could, of course, identify the inability to work directly, by examining whether a person has knowledge, skills, and abilities that are valued by employers. Or one could identify the inability to work in a more process-oriented fashion, by considering what the person has done to find or keep a job. But our social welfare system often takes a third approach by looking for an identifiable disability as a trigger for determining whether an individual cannot work and thus deserves more generous benefits. Disability serves this function for two reasons: fault and fraud.<sup>33</sup> In a market system in which people are supposedly expected to work to make a living,<sup>34</sup> providing subsistence benefits for those who are not working is inevitably threatening. If benefits are given to those who can work but choose not to, they will undermine the market system. A similar harm to the market system would occur if individuals could, by their own choices, render themselves unable to work. Taking these premises of the market system for granted—whether because they believed in them on the merits or simply recognized them as political constraints—architects of social welfare programs have therefore sought to limit coverage to those individuals who are not working due to no fault of their own, and who can demonstrate that the condition that makes them unable to work is a genuine one.

Defenders of a limited welfare state have seen the disability category as important not just in limiting relief but also in authorizing it—and fending off challenges to the market system from the left. People of compassion would ask challenging questions about capitalism if the

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<sup>30</sup> MARSHALL, *supra* note 21, at 23.

<sup>31</sup> Peter D. Blanck & Michael Millender, *Before Disability Civil Rights: Civil War Pensions and the Politics of Disability in America*, 52 ALA. L. REV. 1, 17 (2000); *see also* Theda Skocpol, *America’s First Social Security System: The Expansion of Benefits for Civil War Veterans*, 108 POL. SCI. Q. 85 (1993).

<sup>32</sup> 42 U.S.C. § 423(d) (2012).

<sup>33</sup> *See generally* STONE, *supra* note 25.

<sup>34</sup> I say “supposedly,” because our system has no particular expectation that people with family wealth will work for a living. Indeed, our lax estate tax policy affirmatively supports the accumulation of family wealth across generations. *See generally* MICHAEL J. GRAETZ & IAN SHAPIRO, *DEATH BY A THOUSAND CUTS: THE FIGHT OVER TAXING INHERITED WEALTH* (2005).

system failed to provide for people obviously destitute through no fault of their own. But many people would ask at least as challenging questions about a welfare system that allowed people who obviously had the capacity to work to live on benefits financed by others.<sup>35</sup> And if it becomes too easy to obtain relief, and relief is too generous, the expectation that people work for a living may unravel. Those who are especially concerned with maintaining the primacy of the market—which describes most of the people who have set the political environment in which welfare policy designers have worked, even if it does not describe those policy designers themselves—therefore need some mechanism to ensure that relief is not extended too broadly.

Disability as a trigger for relief has long been thought to solve this dilemma. People who cannot work because they have disabilities are understood to be faultless in not working. Similarly, disability has long been understood by many to be an objective, biomedical category that can be used to distinguish those with “genuine” impairments from fakers.

Of course, matters are not so simple. There is a substantial question whether to attribute fault to those individuals who cannot work because of disabilities that stemmed in some respect from their own voluntary choices. One might think here about emphysema or liver cirrhosis—or quadriplegia that resulted from a drunk driving accident. These questions substantially complicate the issue of fault. And, far from being an objective, biomedical determination, the determination of what constitutes a disability necessarily implicates highly contested questions of value.<sup>36</sup> The social model of disability tells us that what counts as a “disability” depends on the interaction between a person’s physical or mental condition and the physical and institutional structures of the society in which that person lives. Only when there is an incompatibility between the person’s condition and those structures—and only when it is the sort of incompatibility that we believe warrants the (positive *and* negative) treatment that we attach to disability—does a biomedical condition constitute a “disability.” What conditions count as disabilities thus varies across societies and changes as social, economic, and political circumstances change.

These complications to the side, disability has long been understood as a key part of the solution to the problem of providing social welfare benefits in a market-oriented system. Because disability

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<sup>35</sup> See Amy L. Wax, *Rethinking Welfare Rights: Reciprocity Norms, Reactive Attitudes, and the Political Economy of Welfare Reform*, 63 L. & CONTEMP. PROBS. 257 (2000).

<sup>36</sup> See Samuel R. Bagenstos, *Subordination, Stigma, and Disability*, 86 VA. L. REV. 397, 412–13 (2000); Matthew Diller, *Dissonant Disability Policies: The Tensions Between the Americans with Disabilities Act and Federal Disability Benefit Programs*, 76 TEX. L. REV. 1003, 1064 (1998); Lance Liebman, *The Definition of Disability in Social Security and Supplemental Security Income: Drawing the Bounds of Social Welfare Estates*, 89 HARV. L. REV. 833, 853 (1976).

entitles people to social welfare benefits they would not otherwise have, it is often thought of as a privileged status in the law.<sup>37</sup> But as the British and American disability rights movements have argued, this seemingly privileged status is at best double-edged.<sup>38</sup> Because work is such an essential part of full membership in the community, social welfare benefits that exempt individuals from the obligation to work for a living will often be understood as excluding those individuals from the class of full citizens. By making disability a ticket out of the workforce, disability-based social welfare programs make disability a ticket out of full social citizenship. Marshall's discussion of the English Poor Laws aptly describes the social status of those who receive disability-based welfare: "[t]he 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."<sup>39</sup>

At times, this denial of full citizenship has been drawn expressly in the law. Beginning with the 1834 Poor Law, British subjects who received poor relief were denied the franchise.<sup>40</sup> The Medical Relief (Disqualification Removal) Act of 1885 gave the right to vote for Parliament to individuals receiving medical (in today's terms, disability-based) relief, but others receiving poor relief had to wait until 1918 to be enfranchised.<sup>41</sup> In the United States today, echoes of that earlier practice of disenfranchisement persist, particularly for individuals who receive benefits due to mental disabilities and for whom courts have appointed guardians.<sup>42</sup>

At times, the denial of full citizenship has been instantiated in the practices of government agencies. Caseworkers assessing initial or continued eligibility for welfare benefits—including disability welfare benefits—have overridden standard boundaries of privacy. They have directed individuals with disabilities to undergo particular medical treatments. They have often disregarded the choices and decisions of individuals with disabilities themselves.<sup>43</sup> And they have justified these actions because the disability welfare recipients are living on the public dole.<sup>44</sup>

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<sup>37</sup> See STONE, *supra* note 25, at 28.

<sup>38</sup> See BAGENSTOS, *supra* note 26, at 23–25; see also STONE, *supra* note 25, at 173 (“While official policy elevate[s] the disabled as a class to a special, higher category of citizenship, private behavior and even official practice often betray contempt for the particular disabled individual.”).

<sup>39</sup> MARSHALL, *supra* note 21, at 24.

<sup>40</sup> See Eric Briggs, *The Myth of the Pauper Disqualification*, 13 SOC. POL’Y & ADMIN. 138, 138 (1979).

<sup>41</sup> See *id.*

<sup>42</sup> See, e.g., *Mo. Prot. & Advocacy Servs., Inc. v. Carnahan*, 499 F.3d 803 (8th Cir. 2007).

<sup>43</sup> See *id.*

<sup>44</sup> See BAGENSTOS, *supra* note 26, at 22.

At times, the denial of full citizenship has resulted from pervasive social stigma. Whether or not reflected in formal law or the practices of government agencies, there is a broad public sense that people who rely on disability welfare are to be suspected of malingering and mooching. Many members of the public hold to the notion that disability is easily and often faked, and that it is often used as an excuse to get out of the ordinary obligations of citizenship.<sup>45</sup> This set of public attitudes is as much about welfare as it is about disability. People who rely on welfare or relief have been subjected to stigma since at least the time of the English Poor Laws.<sup>46</sup> Disability as a trigger for relief might initially be thought to lessen the stigma—because people understand disability as objectively determinable and as indicating a lack of fault. But the reliance on disability as a trigger for relief may actually have the opposite effect. Associating disability with welfare leads the stigma attached to welfare recipients to reflect back on people with disabilities generally. This is a central reason why American disability rights activists urged a move away from welfare and public benefits as an approach to disability.<sup>47</sup>

However instantiated, social rights for individuals with disabilities often lead to a loss of social citizenship status for those same individuals. This is the basic dilemma of categorical social welfare programs in a market-oriented system. Because disability has so frequently served as a trigger for receipt of social welfare benefits—and people with disabilities do in fact rely on those benefits—that dilemma has served as a persistent obstacle to full citizenship for people with disabilities. The remainder of this Essay discusses two possible approaches for managing that dilemma.

### III. UNIVERSAL CONTRIBUTORY SOCIAL INSURANCE AS AFFIRMING CITIZENSHIP?

In his classic work on citizenship and social rights, T.H. Marshall contended, consistent with the argument I have just made, that poor-law-type relief deprives its recipients of social citizenship. But, he argued, universal contributory social insurance provides a solution to

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<sup>45</sup> See Cary LaCheen, *Achy Breaky Pelvis, Lumber Lung and Juggler's Despair: The Portrayal of the Americans with Disabilities Act on Television and Radio*, 21 BERKELEY J. EMP. & LAB. L. 223 (2000).

<sup>46</sup> See MARSHALL, *supra* note 21, at 24 (“The stigma which clung to poor relief expressed the deep feelings of a people who understood that those who accepted relief must cross the road that separated the community of citizens from the outcast company of the destitute.”).

<sup>47</sup> I press this point extensively in Samuel R. Bagenstos, *The Americans with Disabilities Act as Welfare Reform*, 44 WM. & MARY L. REV. 921 (2003) [hereinafter Bagenstos, *Americans with Disabilities Act*].

this problem. When everyone has the opportunity to pay into a social insurance program, and benefits are paid to broad subsets of those who contributed—subsets in which most people can expect to become members at one point or another—social rights no longer serve a divisive function in society. Instead of dividing the world into “makers” and “takers,” to use the language that is popular in American politics today, Marshall contended that universal, contributory social insurance binds society together and affirms the social citizenship of those who receive it.<sup>48</sup> Many of the architects of the American social welfare state held to a similar view. They believed that “programs for the poor are poor programs.”<sup>49</sup> When poor people are singled out for particular benefits, they argued, the beneficiaries become stigmatized and the benefits become politically vulnerable.<sup>50</sup> They thus argued that, where possible, welfare programs should be framed as universal, contributory social insurance schemes. This is the view that underlies the emerging left-liberal consensus around single-payer health care and the growing support for a universal basic income and free college programs.<sup>51</sup>

Driven by this view, many social welfare programs for people with disabilities in the United States have taken the form of contributory social insurance programs. One such program is Social Security Old Age Insurance, enacted in 1935. That program is not explicitly targeted to disability or poverty at all. Rather, it provides retirement benefits to people who have worked and paid into the system for a sufficient period of time. Yet it is designed in significant respect to provide a living for those individuals who can no longer be expected to work due to the disabilities attendant to aging. In 1956, Congress expanded Social Security to cover disability directly through SSDI—even for those who had not yet reached the retirement age.<sup>52</sup> In so doing, Congress merely took the next logical step from its original Old Age Insurance program. We set the retirement age where we do in part because we believe that many people will be unable to continue working at that point due to the

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<sup>48</sup> See MARSHALL, *supra* note 21, at 56 (“Equalisation is not so much between classes as between individuals within a population which is now treated for this purpose as though it were one class. Equality of status is more important than equality of income.”).

<sup>49</sup> See MARTHA DERTHICK, *POLICYMAKING FOR SOCIAL SECURITY* 217 (1979); see also JACOB S. HACKER, *THE DIVIDED WELFARE STATE: THE BATTLE OVER PUBLIC AND PRIVATE SOCIAL BENEFITS IN THE UNITED STATES* 40 (2002) (calling this belief “ubiquitous” among observers and policymakers).

<sup>50</sup> See William H. Simon, *Rights and Redistribution in the Welfare System*, 38 *STAN. L. REV.* 1431, 1441 (1986).

<sup>51</sup> See *supra* text accompanying notes 5–7. Many supporters of universalism have believed, however, that the less visible rules of contributory programs can be crafted to achieve meaningful redistribution without undermining their political goals. See THEDA SKOCPOL, *SOCIAL POLICY IN THE UNITED STATES: FUTURE POSSIBILITIES IN HISTORICAL PERSPECTIVE* 259–72 (1995).

<sup>52</sup> See EDWARD D. BERKOWITZ, *DISABLED POLICY: AMERICA’S PROGRAMS FOR THE HANDICAPPED* 73–78 (1987).

physical and mental conditions that they have acquired through the years. If an individual who has contributed payroll taxes into the system acquires those conditions sooner than the average person and as a result is unable to work, the basic principles of the system suggest that she should be entitled to “early retirement” benefits.<sup>53</sup>

It is the universal, contributory nature of SSDI that is understood to affirm social citizenship. Because everybody has the chance to pay into the system, that system sends a message that disability insurance is not a special privilege for a lucky few, but a basic entitlement of citizenship. And because people cannot receive SSDI unless they have paid into the system, the benefits are more readily understood as insurance that people have paid for, rather than as welfare or a handout. The universal, contributory structure of SSDI thus frames the system as a solidaristic response in which each of us pays for protection against the risks of life that we all face.

But matters are not so simple. Even the universalist, contributory social insurance form of SSDI threatens in practice to undermine the social citizenship status of people with disabilities. In part, this is because the disability category continues to serve, under that program, as a ticket out of the workforce. Because work remains a key means of proving oneself a full member of society, anyone who is excused from working—even if he or she previously did work for a living—risks substantial stigma.<sup>54</sup>

To some extent, the degree of stigma will depend on the cause of the disability. Those who experience obvious physical disabilities as a result of military service or other particularly dangerous and important work may experience social approval and gratification. But even those individuals will likely experience stigma if they remain out of the workforce for an extended period of time. And those who have mental illness or less obvious physical disabilities are often stigmatized—even if they acquired their conditions through military service or other dangerous and important work. The fears of fakery and fault compound the stigma attached to work disability and lead legislators, judges, and program administrators to narrowly constrict and vigorously guard the boundaries of the class that is eligible for relief.

Recent media controversies regarding SSDI highlight this problem. Even though the program is in key respects a system of contributory social insurance, it has still been the subject of harsh, and to a large extent unfair, media criticism. That criticism has asserted that SSDI permits undeserving people to freeload off of the public dole. Criticism in the media has walked hand in hand with proposals to cut SSDI benefits and tighten eligibility standards.

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<sup>53</sup> See *id.* at 41–78.

<sup>54</sup> See generally Bagenstos, *supra* note 23.

I could pick many recent media stories to highlight here, but, because it appeared in a stereotypically liberal outlet, an NPR story that drew wide attention in the middle of the Obama Administration provides an especially nice example.<sup>55</sup> The piece spoke in alarmist tones about the “skyrocket[ing]” number of “Americans who are on Disability.”<sup>56</sup> It also expressed great skepticism regarding whether the “disability” category adequately screens in those who have clearly defined conditions that prevent them from working—and adequately screens out those who can work. Thus, the piece discussed the “squish[iness]” of the disability category.<sup>57</sup> It focused on conditions like high blood pressure, back pain, and mental illness, which trigger receipt of SSDI for some people but do not limit others’ ability to work.<sup>58</sup> The piece also highlighted the way that rates of applications for disability seem to rise and fall with the strength of the macroeconomy, even though there is little reason to think that changes in economic conditions should have such a great effect on working-age individuals’ medical conditions.<sup>59</sup>

The NPR story triggered a great deal of discussion and concern throughout the news media over exploding SSDI rolls. That is not particularly surprising. In times in which many believe that we face a fiscal crisis, the piece drew attention to what it presented as a major contributor to that crisis. Yet the story was unfair in many respects. It overstated the degree to which SSDI had merely substituted for the Aid to Families with Dependent Children program that Congress eliminated in 1996, and it suggested a far greater degree of fraud in claiming or determining disability than the evidence appears to support.<sup>60</sup> What is more interesting for my purposes, though, is not the fairness of the NPR story’s portrayal, but the way the entire controversy demonstrates that the universal, contributory structure of SSDI does not insulate that program from being attacked in precisely the same way that a targeted welfare program is attacked. In earlier budget-cut fights, SSDI was able to escape the cuts that welfare programs experienced. (As I will discuss below, though, it is an open question whether this outcome resulted from the program’s universal, contributory structure or, instead, the charitable feelings that the public harbors towards people with

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<sup>55</sup> See Chana Joffe-Walt, *Unfit for Work: The Startling Rise of Disability in America*, NPR (Aug. 24, 2017, 11:47 PM), <http://apps.npr.org/unfit-for-work>.

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> Harold Pollack, *Misleading Trends with Benefits*, THE CENTURY FOUND. (Mar. 28, 2013), <http://tcf.org/content/commentary/misleading-trends-with-benefits>; see Dean Baker, *Planet Money Misses the Boat on Social Security Disability*, CTR. FOR ECON. AND POL’Y RES.: BEAT THE PRESS (Mar. 25, 2013), <http://www.cepr.net/index.php/blogs/beat-the-press/planet-money-misses-the-boat-on-social-security-disability>.

disabilities.) The reaction to the recent NPR story—one echoed in debates among policymakers and politicians, as well as across the media—shows the limits of universalism as a strategy to protect the social citizenship status of recipients of disability benefits. Even if everyone contributes to the system at some point, those who stop contributing and start drawing benefits will trigger suspicion regarding whether they have a sufficiently good excuse for leaving the workforce. That disability is not a purely objective, medical status, but instead incorporates value-laden questions involving how to deal with people who have limited opportunities in the labor market, only heightens the stigma and suspicion.

The award of cash benefits to individuals who are deemed unable to work—even those who have contributed to the system in the past—also leads to paternalism. Thus, the recipients of SSDI benefits have sometimes been subject to a legal presumption of incompetence. Courts often find individuals who receive SSDI unqualified for workplace accommodations under the Americans with Disabilities Act (ADA).<sup>61</sup> Benefits are often paid not to the individual with a disability directly but to a “representative payee,” who has substantial practical control over the individual’s financial choices.<sup>62</sup> And where the public is paying for the living expenses of individuals with disabilities, program administrators feel empowered and entitled to control the day-to-day lives of those individuals. Jacobus tenBroek and Floyd Matson put the point starkly: “the recipient is told *what* he wants as well as *how much* he is wanting.”<sup>63</sup>

Moreover, universal, contributory social insurance cannot provide all people with disabilities everything they need to become full participants in society. For one thing, many people acquire disabilities at birth or during childhood—well before they have an opportunity to contribute to a social insurance system. The United States has responded by creating separate means-tested welfare programs for people who acquire disabilities as children. The SSI program is the most prominent in this regard. Perhaps not surprisingly, SSI benefits have been exceptionally politically controversial. Rather than being treated as a form of universal social insurance, SSI is often treated in public discourse—even more than is SSDI—as a form of welfare, whose recipients should be suspected of mooching off of the system. The recent media discussion of Social Security disability included

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<sup>61</sup> For a discussion of the case law, see Bagenstos, *Americans with Disabilities Act*, *supra* note 47, at 936–44.

<sup>62</sup> See Reid K. Weisbord, *Social Security Representative Payee Misuse*, 117 PENN. ST. L. REV. 1257 (2013).

<sup>63</sup> Jacobus tenBroek & Floyd W. Matson, *The Disabled and the Law of Welfare*, 54 CAL. L. REV. 809, 831 (1966).

exceptionally harsh criticism of SSI. Both the NPR story and a roughly contemporaneous piece from liberal *New York Times* columnist Nicholas Kristof accused parents of making their children do worse in school so they could be designated as having disabilities and make their families eligible to receive benefits checks.<sup>64</sup> A long, deeply reported *Washington Post* piece recently returned to the same, seemingly perennial, theme.<sup>65</sup> As one critic of the most recent *Post* article explained, the (largely unsupported) suggestion that parents are getting their children to fake disabilities plays into the hands of those, like the Trump Administration, who are seeking to adopt a 1990s-style welfare reform policy for disability insurance.<sup>66</sup>

But there is a more fundamental problem with relying on universal, contributory social insurance programs to affirm the citizenship status of people with disabilities. Benefits programs such as SSDI and SSI are ultimately exceptionally limited tools. They can provide for basic human needs, but only to a limited extent. And they do not assist people with disabilities to become full contributors to and participants in the broader society. To do so requires more than cash benefits, and it requires benefits that are obviously targeted at people with disabilities. For these reasons, disability rights activists—in the United States and in the United Kingdom—have harshly criticized a response to disability that relies on providing cash benefits to those who are deemed unable to work. They argue that a reliance on such disability welfare programs “merely ‘buy[s] off’ a potentially troublesome group,” and therefore relieves pressure to make more fundamental changes to society to achieve integration and equality.<sup>67</sup> In the terms I am using in this Essay, disability rights activists argued that cash benefits for disability—whether through contributory social insurance programs or not—were an obstacle to full social citizenship. Whether or not one goes so far, it should be clear that contributory social insurance programs have not fully integrated people with disabilities into the status of full social citizens.

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<sup>64</sup> Nicholas Kristof, *Profiting from a Child's Illiteracy*, N.Y. TIMES (Dec. 7, 2012), <http://www.nytimes.com/2012/12/09/opinion/sunday/kristof-profiting-from-a-childs-illiteracy.html>; see Joffe-Walt, *supra* note 55.

<sup>65</sup> See Terrence McCoy, *Generations, Disabled*, WASH. POST (June 2, 2017), [http://www.washingtonpost.com/sf/local/2017/06/02/generations-disabled/?utm\\_term=.5cd5a71efb22](http://www.washingtonpost.com/sf/local/2017/06/02/generations-disabled/?utm_term=.5cd5a71efb22).

<sup>66</sup> See Rebecca Vallas, *The Washington Post's Reporting on Disability Is Giving Trump Cover for Disability Cuts*, TALK POVERTY (June 2, 2017), <https://talkpoverty.org/2017/06/02/washington-posts-reporting-disability-giving-trump-cover-disability-cuts>.

<sup>67</sup> BAGENSTOS, *supra* note 26, at 23.

## IV. PURSUING SOCIAL RIGHTS THAT ADVANCE SOCIAL CITIZENSHIP

But disability rights advocates cannot abandon disability-based benefits. Because of workplace discrimination, inaccessible facilities, and failure to provide reasonable accommodations—if not because of the disabilities themselves—many people with disabilities are unable to find work on the competitive market. Cash benefits will, accordingly, remain necessary for the foreseeable future. And, for many people with disabilities, to enter the workforce will itself require substantial public investment: in health insurance, to remove the most significant obstacle to employment for people with disabilities; in personal assistance services, to assist people with disabilities to get out of bed and to work; in assistive technology, to enable people with disabilities to perform work-related tasks; and in accessible transportation, to enable people with disabilities to get to the workplace in the first place.<sup>68</sup> (The Trump Administration's various health care proposals all would slash the funding for these important benefits.) All of these public investments are well understood as social rights.

Indeed, even the requirement of workplace accommodation might well be understood as a form of social rights. The line between civil and social rights, as I previously noted, has always been a contested and changing one. Disability rights activists have long argued that the requirement of workplace accommodation is best understood as a civil right that represents nothing more than the application of nondiscrimination principles to disabilities.<sup>69</sup> And, indeed, there are substantial congruences between nondiscrimination requirements like those regarding race and sex and accommodation requirements for disability. For one thing, as many disability rights activists argue, employers accommodate valued (nondisabled) employees all the time.<sup>70</sup> They provide chairs for employees to sit in, desks that fit the typically sized nondisabled employee, and so forth. Employers also often provide many individualized accommodations for particular nondisabled employees. A workplace that took people with disabilities seriously as potential workers would extend similar accommodations to the disability context. It would not, for example, have an entrance that can be traversed only by stairs. And it would include desks and equipment to accommodate its employees with disabilities, just as it includes desks

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<sup>68</sup> See BAGENSTOS, *supra* note 26, at 128–29.

<sup>69</sup> Michael Ashley Stein, *Same Struggle, Different Difference: ADA Accommodations as Antidiscrimination*, 153 U. PA. L. REV. 579 (2004). For extensive efforts to establish the substantive point, see Samuel R. Bagenstos, “Rational Discrimination,” *Accommodation, and the Politics of (Disability) Civil Rights*, 89 VA. L. REV. 825 (2003) [hereinafter Bagenstos, *Rational Discrimination*].

<sup>70</sup> Bagenstos, *Rational Discrimination*, *supra* note 69.

and equipment that accommodate its nondisabled employees. Although this might entail some additional costs, even basic antidiscrimination laws require employers to assume additional costs in the interest of promoting an integrated workplace.<sup>71</sup>

Nonetheless, requirements of workplace accommodation often feel quite different than more traditional antidiscrimination requirements. In many of their applications, accommodation requirements demand that employers treat individuals with disabilities differently than they do other employees. Some of the exclusion of people with disabilities from the workplace can be cured by universal design. A workplace with a ramp and no stairs at the front treats people with disabilities identically to people without disabilities and is accessible to all, for example. But some exclusions cannot be overcome without individualized accommodation. For example, it may be impossible to design a workplace so that all file cabinets are within reach of a person who uses a wheelchair. In such circumstances, a wheelchair user who applies for a secretarial job might demand and be granted an exemption from the requirement that the incumbent engage in filing (at least if filing is not too central a task for the particular job). The filing task will then be reallocated to another worker, who may resent what she understands as the special treatment that the wheelchair-using worker receives.

The dilemma remains significant. In order to participate fully in community life—including, notably, the workforce—many people with disabilities need to rely on government interventions. Those interventions include health care provision, personal assistance services, accessible technology and transportation, and workplace nondiscrimination and accommodation requirements. But those very government interventions can readily be understood by the public as “special rights,” which are highly vulnerable in the political process, are narrowly and grudgingly administered, and ultimately undermine the goal of achieving full social citizenship for people with disabilities.<sup>72</sup>

The disability rights movement has sought to avoid this dilemma through a clever reframing strategy—a strategy that has had real, though limited, success. That strategy was to invoke and redefine the concept of independence. Instead of speaking of *physical* independence, disability rights movement advocates urged that what was more important was *decisional* independence—“the ability of people with disabilities to make their own choices concerning how to live their lives, what services to

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<sup>71</sup> I explore these points in some detail in Bagenstos, *Rational Discrimination*, *supra* note 69.

<sup>72</sup> Peter J. Rubin, *Equal Rights, Special Rights, and the Nature of Antidiscrimination Law*, 97 MICH. L. REV. 564 (1998). On the political difficulties confronted by those who seek rights characterized as “special,” see Karen Engle, *What’s So Special About Special Rights?*, 75 DENV. U. L. REV. 1265 (1998).

receive, and how and where to receive them.”<sup>73</sup> “[A]ssistance in personal hygiene, transportation, or other activities,” far from compromising decisional independence, actually promotes it, “so long as those who provide the assistance are subject to the control and direction of the individuals with disabilities who receive it.”<sup>74</sup> This notion of independence, as an organizing principle or frame for the disability rights movement’s arguments, played a key role in developing support for the movement during the 1980s. Civil rights policy was becoming increasingly controversial in American politics at that time, with great suspicion regarding the extension of new civil rights. Deregulatory positions were ascendant as well, and so were efforts to cut the federal budget. In this political context, the independence frame gave disability rights activists a tool with which to argue for additional rights and services without suggesting that they were merely extending the already controversial civil rights project still further. Whatever costs attended to disability accommodations, movement activists argued, would be more than offset by the financial benefit to society of avoiding the need for disability welfare—not to mention the moral benefit to individuals with disabilities of enabling them to make their own way in the world and avoid dependence.<sup>75</sup> In that time of mythical welfare queens, the utility of such an argumentative frame was readily apparent.

Independent living has offered a frame to justify a broad array of social rights provisions—including in the areas of antidiscrimination accommodation, health care, personal assistance services, transportation, and others. But much of its success has depended on two baseline premises. One premise is that the United States will, for charitable or humanitarian reasons if nothing else, provide costly benefits programs to those people with disabilities who cannot make their own living in our current system. The other premise is that the interventions that serve independence will cost less than the benefits payments that they avert. Only if these two premises hold will the fiscal arguments for government intervention for people with disabilities have sufficient traction. And it is the fiscal arguments that have been the key to the political success of the independence frame. They played a crucial role in securing the enactment of the ADA.<sup>76</sup> They also have helped to promote deinstitutionalization of individuals with various disabilities *and* in recent years the creation of robust infrastructures of community-based services to enable those individuals to participate more fully in civic life.<sup>77</sup>

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<sup>73</sup> BAGENSTOS, *supra* note 26, at 25.

<sup>74</sup> *Id.*

<sup>75</sup> See Bagenstos, *Americans with Disabilities Act*, *supra* note 47.

<sup>76</sup> *Id.*

<sup>77</sup> See Samuel R. Bagenstos, *The Past and Future of Deinstitutionalization Litigation*, 34

But the two key underlying premises highlight the limitations and threat of the fiscal arguments that underlie the success of the disability rights movement's independence frame. The first premise—that the United States will continue to provide costly welfare benefits for people with disabilities who cannot make their own living—has largely proven true up to this point. To the extent that it is true, however, is because many members of the public continue to have a view of people with disabilities as the proper recipients of charity—as the paradigm of the deserving rather than the undeserving poor.<sup>78</sup> It was precisely that public attitude that the disability rights movement challenged as itself denying equal citizenship status to people with disabilities. But the success of the independence frame, paradoxically, depends on people continuing to hold that attitude. As I suggested earlier, when disability advocates defeated efforts to roll back Social Security disability programs in the 1980s, they were successful in significant part because political actors and the public were disposed to offer charity to individuals with disabilities.<sup>79</sup>

Moreover, there are good reasons to think this first premise will prove increasingly shaky. SSDI rolls continue to expand, largely because the 2007–2009 recession drove a massive increase in unemployment, and the post-2009 recovery has done much more for those at the top of the income distribution than for those at the bottom. Workforce participation for individuals with disabilities dropped far more during the recession than for nondisabled individuals. Since then, workforce participation has recovered far less for those with disabilities than for those without them.<sup>80</sup> As the disability rolls continue to expand, and fiscal pressure—particularly surrounding “entitlement” programs like Social Security—creates increased pressures for retrenchment, programs of largesse for people with disabilities are likely to be far less secure. The Trump Administration, and its Republican allies in Congress, have made that clear. Their health care legislation—which at this writing looks like a zombie, not exactly alive but never fully dead—slashes Medicaid programs on which disabled people rely. And the Trump Administration's budget proposes a major retrenchment in cash disability benefits. If Congress follows through on these cuts, the workplace accommodations and other interventions that are sold as avoiding the need for disability benefits will look more expensive, and less attractive, by comparison.

Moreover, the second premise—that the interventions necessary to

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<sup>78</sup> See BAGENSTOS, *supra* note 26 at 24, 144.

<sup>79</sup> See *id.*

<sup>80</sup> For recent statistics, see SAMUEL R. BAGENSTOS, *DISABILITY RIGHTS LAW: CASES AND MATERIALS* 170–71 (2d ed. 2014).

enable people with disabilities to participate fully in the community are relatively cheap—is only true up to a point. When that point is reached, the independence frame will no longer succeed in promoting social-rights interventions for people with disabilities. And, unfortunately, that point is very much in sight in key areas of disability policy. As deep-rooted structural barriers like the organization of our health care system, the lack of accessible transit and assistive technology, and the failure to provide personal assistance services become ever more important, the cost of integrating individuals with disabilities into the workplace will rise. As it does so, the fiscal arguments for accommodation and integration will lose their political force, and support for social rights for people with disabilities can be expected to slacken.

#### CONCLUSION: UNIVERSALISM IS NO PANACEA

What lessons can left-liberals developing social policy positions in the age of Trump take from this discussion? One overriding lesson is that universalism in social welfare policy is not a political panacea. SSDI is a universal program, in most senses in which analysts typically use the term in social policy. Everyone who works pays into the program, and everyone who pays into the program is entitled to collect benefits if the insurable event—disability—occurs. In these respects, just like Old Age Insurance, SSDI is a classic universal, contributory program.

But that is not the perception—at least among many political actors. Rather than considering matters *ex ante*—when everyone who works pay into the program and thus becomes eligible to collect—public debate over SSDI takes an *ex post* perspective and considers matters from the point at which an individual collects benefits. At *that* point, the people who are collecting the benefits do look very different from those who are not. People who receive SSDI are out of the workforce. They are collecting, not financing, benefits. Those who remain at work, by contrast, are financing, rather than collecting, benefits. If one is so inclined, it is easy at that point to see those who are on disability as “takers,” and those who are being paid for by the “makers.” Because disability has been so stigmatized, the *ex post* “makers”-“takers” perspective is especially salient for many observers. It is no surprise, then, that many people look past the universal, contributory features of SSDI and focus principally on the moment at which the program grants its benefits to a particular class of people.

Some might argue that the SSDI experience has limited implications for the universal programs that are becoming the consensus proposals of left-liberal policy analysts. In particular, one might argue that the problem with SSDI is precisely that it is not truly

universal. Everyone (who works) may *pay into* SSDI, but not everyone will benefit from it. Single-payer health care, one might say, is very different, because (basically) everyone uses health insurance. Even if SSDI has not achieved the political benefits of universalism, the argument goes, single-payer will, because single-payer is truly universal.

But it all depends on your frame of reference. As with SSDI, *ex ante* and *ex post* perspectives suggest very different conclusions regarding the universalism of a single-payer program. *Ex ante*, everybody is insured under single-payer—but essentially the same is true of SSDI. *Ex post*—once the insurable event occurs—some beneficiaries of single-payer health care are going to receive more than others. If a person contracts a condition like cancer for which treatment is very expensive, or if a person acquires a chronic disease or disability that requires treatment or services over a long period of time, that person will receive a greater allocation of health care resources than a person who never experiences an expensive condition. In this sense, single-payer is like SSDI. One lesson we learned from the political and legal debate over the Affordable Care Act is that many people view health insurance in precisely these terms: many people who have not yet experienced an expensive medical condition resent what they understand as being forced to pay for the health care of others. In the terms Deborah Stone used in a very perceptive article, many people view health insurance as governed by the distributive principle of “actuarial fairness” rather than by the “solidarity principle.”<sup>81</sup> There is reason to doubt that framing a national health care program as universal will overcome that dynamic. To the contrary, I would suggest, the fact that so many Americans adhere to the actuarial fairness principle will lead them to see even a single-payer program as not truly universal.

Just as in the SSDI context, stigma and judgments about moral desert will play a major role in shaping public attitudes about a single-payer health plan. If the program spends large amounts of money on conditions that are stigmatized, or are widely understood to result from poor personal choices, it will be more likely to be seen as a transfer from the deserving to the undeserving than as a universal guarantee for everyone. Moreover, the construction of any health insurance program will require choices about just what conditions it will insure against, what treatments it will reimburse, and what limitations it will place on coverage, whether in general or in particular cases. These choices will further complicate the effort to frame such a program as universal.

And there is yet another way in which assessments of a single-payer program’s universalism depend on one’s frame of reference. Even if a single-payer program appears universal once it is in place—despite

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<sup>81</sup> Deborah A. Stone, *The Struggle for the Soul of Health Insurance*, 18 J. HEALTH POL. POL’Y & L. 287 (1993).

the reasons for skepticism I have just laid out—it will not appear universal when compared to the *status quo ante*. As many analysts have noted, a fundamental political obstacle to the United States moving toward universal health care has been the uneven way in which our pre-reform health care system provides insurance.<sup>82</sup> Most Americans receive health insurance through their jobs, and many are reasonably satisfied with that insurance. A single-payer program won't look especially universal to them. Rather, they will see a single-payer program as taking something from them to give something to others—as taking away their current, reasonably satisfactory insurance in order to provide insurance to people who currently don't have it. To the extent that people who newly receive insurance are not working—or working in only contingent jobs—those with stable jobs who lose their current health insurance are especially unlikely to see single-payer in solidaristic terms. That is another lesson of the disability context—because of the high normative value the American public places on work, benefits programs are likely to be received more skeptically the more they are disconnected from work.

None of this is an argument against a single-payer system on the merits. And I certainly do not intend to endorse the normative argument for tying basic health benefits to work. In a country as wealthy as the United States, I believe that health care is a basic human right that should be enjoyed by everyone, period. But the supposed *political* benefits of single-payer health care—or other universal programs—are less than meets the eye. Left-liberals should not be deterred from advocating broad social policies like single-payer that will have good substantive results and instantiate our moral commitments. But we should do so with a recognition that the politics are unlikely to be simple.

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<sup>82</sup> Jacob S. Hacker, *The Historical Logic of National Health Insurance: Structure and Sequence in the Development of British, Canadian, and U.S. Medical Policy*, 12 *STUD. AM. POL. DEV.* 57, 125 (1998) (describing political obstacles to President Clinton's health reform efforts); see, e.g., Harold Pollack, *Medicare for All—If It Were Politically Possible—Would Necessarily Replicate the Defects of Our Current System*, 40 *J. HEALTH POL. POL'Y & L.* 921 (2015).