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Social Justice: The Moral Foundations of Public Health and Health Policy

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BOOK REVIEW:

SOCIAL JUSTICE: THE MORAL FOUNDATIONS OF PUBLIC HEALTH AND HEALTH POLICY

Authored By: *Madison Powers and Ruth Faden**

In this pathbreaking book, senior bioethicists Powers and Faden confront foundational issues about health and justice. How much inequality in health can a just society tolerate? In a world filled with inequalities in health and well-being, which inequalities matter most and are the most morally urgent to address? In order to answer these questions, Powers and Faden develop a unique theory of social justice that, while developed for the specific contexts of public health and health policy, applies equally well to other realms of social policy, including education and economic development. The book includes a careful comparison of Powers and Faden's approach to social justice with those of other theorists, including notably Rawls, Sen, and Nussbaum. With their eyes firmly fixed on the injustices of this world and what is known about their causal determinants, Powers and Faden place a six dimensional theory of well-being at the heart of their theory of justice. They then explore the implications of this theory for public health, the medical market place, and the setting of priorities in health policy. In the process, they arrive at arresting conclusions about the moral foundations of public health, childhood, the relevance of social groups to questions of justice, and the proper role for economic analysis in social policy. The audience for the book is scholars and students of bioethics and moral and political philosophy, as well as anyone interested in public health and health policy.

SOCIAL JUSTICE, PUBLIC HEALTH, AND CONSTITUTIONAL AUTHORITY

Reviewed By: *Robin L. West***

What does social justice require of our political and legal institutions? What must our basic social structure do, and be, in order for it to be minimally just? Madison Powers and Ruth Faden argue in *Social*

Justice: the Moral Foundations of Public Health and Health Policy,¹ that our institutions must provide a sufficient level of six basic dimensions, or determinants, of human well-being, for every individual: a healthy life and life span (relative to the wealth and technological capability of the society); personal security against violence; the respect of self and others; the ability to form and to benefit from attachments to others, particularly in childhood; autonomy with respect to decisions affecting one's own future; and a healthy dollop of reasoning abilities.² Thus, social justice--not aggregate utility, or amassed preferences, or wealth, or public choice--is the "moral foundation of public health." The reason the state must provide the conditions for health and a reasonable life span to all individuals is that social justice requires it. And, social justice requires, among much else, that states guarantee some level of health to their citizenry. This presents a novel, attractive, and I think compelling account of both the moral foundation of public health--of why states ought to pursue health aims--and of social justice--of what justice requires of states.

Along the way, the authors make two central subsidiary arguments. First, our institutions must prioritize the health and overall well-being of children when forced to make trade-offs between their health interests and those of other subpopulations. This is not for the utility-maximizing reason that children have more "quality adjusted life years" in front of them than do adults or the elderly, but, rather, for the thoroughly pragmatic reason that securing children's health is a necessary prerequisite to their enjoyment, as adults, of self-respect and the respect of others, attachment, autonomy, reasoning, and so on.³ For that reason, it is particularly imperative that we attend to the health needs of children, both individually and as a population. Second, we must respond with special and focused urgency to the inequalities between groups, which can lead to some individuals in subordinated groups suffering the most profound deprivations of the dimensions of

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¹ MADISON POWERS & RUTH FADEN, *SOCIAL JUSTICE: THE MORAL FOUNDATIONS OF PUBLIC HEALTH AND HEALTH POLICY* (Oxford University Press 2006) (hereinafter, *SOCIAL JUSTICE*).

² *SOCIAL JUSTICE*, *supra* note 1, at 16-29.

³ *Id.* at 12, 159-67, 85, 92-95.

wellbeing.⁴ Those inequalities suffered commonly by members of subordinated groups can stem from multiple sources, and, most importantly, they have “cascading” effects.⁵ Thus, economic, social, and educational disadvantages taken collectively can create profound inequalities, and those inequalities in turn can lead to deteriorating health, a lack of self-respect, a dependency that blunts autonomy, and so forth, for members of groups that suffer both disadvantages. When this happens, justice requires a significant political response that brings the resources of the community to bear on the causes of these joint inequalities. The multiple sources of inequality that produce these cascading negative effects on the enjoyment of the six basic dimensions of wellbeing must be identified and rectified. This is, basically, what social justice demands.

Also along the way, the authors distinguish their own views from at least five closely related understandings of the relationships between public health, social justice, and individual welfare. All of these distinctions help bring the contours of their own project into very sharp relief (particularly for outsiders to the public health literature). First, as the authors point out repeatedly, their own view is similar to, and owes a substantial debt to, the theory of justice put forward over the past two decades by Amartya Sen and Martha Nussbaum.⁶ Sen and Nussbaum have argued at length that social justice requires states to guarantee a certain set of basic human capabilities to all individuals, some of which (notably, health, reasoning capacity, and autonomy) overlap with Faden and Powers’ list of the dimensions of wellbeing. The similarity, however, is theoretical as well as substantive. Faden-Powers’ list of the dimensions of wellbeing that states are required by social justice to promote, like Sen-Nussbaum’s list of capabilities, are justified in part by the fact that all human beings, whatever their distinguishing goals or interests might be, would and should desire to possess these capabilities or aspects of wellbeing. Both Nussbaum-Sen and Faden-Powers generate their list of what they view as fundamental to human life by reference to what anyone or everyone would desire, regardless of whatever else they might desire that distinguishes their own lives and aspirations from others. Thus, Faden and Powers make clear that their approach owes this much to Nussbaum and Sen.⁷

⁴ *Id.* at 7-9, 71-79, 87-95, 156-58.

⁵ *Id.* at 8, 71-72.

⁶ *Id.* at 4, 22-32, 37-57, 70, 192.

⁷ *Id.* at 4-5, 32, 37-41, 46.

But there are significant differences. The list itself is somewhat different. Nussbaum's is more detailed: she includes the capability to enjoy reproductive rights, and the capability for play, and to interact with the natural world, for example, while Faden and Powers' list is more sparse. More importantly, perhaps, Faden and Powers urge that social justice requires the actual functioning--or existence--of the human capacities essential to the enjoyment of the six interests they identify. Nussbaum and Sen, by contrast, argue that social justice requires only that the state seek to ensure each individual's capability to choose to function in the desirable way--the capability to reason, act autonomously, form attachments, play, interact with nature, if they choose to do so. For Nussbaum and Sen, it is important to stress that the decision whether to develop any of the capabilities they identify must be left to the individual. If an individual wishes to have good health, she must have the capability of pursuing health; if she wishes to enjoy rational decision making, she must be capable of doing so, and so forth.

For Powers and Faden, by contrast, the state must guarantee the actual functioning of these basic dimensions of well-being, or the actual existence of the desirable states of affairs, and not just the individual's potential capability for achieving them.⁸ Thus, the state has an obligation to pursue the individual's health and not just the individual's capability of enjoying good health should the individual so choose. The state also has an obligation to pursue decent education for all and not just create conditions that make it possible for individuals to choose to lead an educated life, and so forth. There are two reasons for this shift, in Faden and Powers' formulation, away from capability and to functioning, and, more broadly, away from both capability and function both, to a focus actual wellbeing. First, the Sen-Nussbaum focus on capabilities, rather than actual functioning, in Faden and Powers' view, is overly driven by concerns for autonomy. In point of fact, most of us are interested in having minimally good health, not in possessing the capability to have good health; likewise, we are interested in having a quality education, not the capability to choose to be educated, and so forth. The introduction of the concept of capability, rather than the direct interest at stake, unnecessarily distances us from the actual requirements of social justice and for reasons that are obscure at best. We are indeed interested in autonomy, but we are interested in much else besides, both for ourselves and fellow citizens: good health, an

⁸ *Id.* at 37-41.

adequate life span, healthy intimate attachments to others.⁹ But second, and more important pragmatically, if not theoretically, the focus on actual functioning rather than the abstracted concern for capability is dictated by Powers and Faden's concern for children. Children must possess good health, education, decent familial attachments, and so on, if they are to have any chance of becoming the adult individuals capable of enjoying the autonomy so cherished by Nussbaum and Sen. For children, we are more properly concerned with whether they possess the actual dimensions of well-being than with their capability to choose to achieve them.¹⁰ Autonomy, then, is over-valued in the Nussbaum-Sen scheme quite generally, but is hugely over-valued with respect to children and particularly with respect to children's health. This is a striking and important amendment to Nussbaum-Sen's capabilities approach to social justice quite generally: it retains and shares the core value of Nussbaum and Sen's revitalization of this Aristotelian vision of social justice, but it quite sensibly demotes autonomy to one dimension of well-being among others, rather than the prism through which all determinants of well-being are viewed.

Second, social justice, the authors contend, is the moral foundation for public health, rather than the absolute value of health per se, or the general duty of beneficence shared by all people with any significant degree of power, or some utilitarian combination of general health and the duty of beneficence.¹¹ Social justice demands that the state guarantee these six dimensions of well-being, of which health is one. Health is not itself the moral value that generates the imperative to promote public health. In this respect, health is on par with education, autonomy, attachment, security, and respect; it is important, but it has no pride of place, and it is one desirable outcome of socially just decision-making. On the other hand, institutions are indeed under a moral imperative to promote it; it is not merely a discretionary component of sound public policy. Justice is the imperative behind the need to attend to health. This understanding of the foundation of the field turns out to have a number of important, if not immediately apparent, consequences, primarily for the way the field of public health is defined and the way the public health professional views his or her professional identity. The public health professional must attend to the demands of justice, and what justice requires, in part, is that public health as a field must address the causes of the multiple inequalities

⁹ *Id.* at 39-41.

¹⁰ *Id.* at 39.

¹¹ *Id.* at 9.

that can have negative cascading consequences upon individuals' enjoyment of these six basic interests. There is good reason, then, for public health to concern itself with, for example, distributive questions regarding public resources, the quality of education for the nation's poorer children, and the quality of public support to working families.¹² These are not political questions far afield from the proper domain of the public health professional. Poor children, over-worked and under-insured families, and general economic inequality can produce deprivations that in turn render the minimal dimensions unattainable, including prominently the interest in good health. Ethicists, policy mavens, and political philosophers concerned with social justice must attend to issues of health. But just as important, public health professionals must unapologetically attend to social injustice. Social justice is the moral justification for the existence of public health as a professional concern, and specific social injustices, in the form of multiple inequalities, are often the cause of the lack of good health for subordinated populations. This argument as well strikes me as compelling, presents a fruitful contribution to our understanding of both the requirements of social justice, and the meaning as well as justification of the field of public health as a profession and discipline.

Third, the authors distinguish their own approach to social justice from that of Michael Walzer and others, by stressing that their concept of social justice is unified, not separated into "spheres" with differing demands dependent upon the subject of the inquiry.¹³ This too turns out to have consequential implications for the way the field is defined. Public Health professionals need not and should not be absolutist, arguing for as much of the resource pie as possible for health and then leaving to others the task of affecting trade-offs between differing spheres of justice. Rather, social justice itself sometimes requires trade-offs between health, education, and attachments; it is the work of the public health professional to take an interest in the content of the trade-off--not just as an "advocate" for health, but as a professional dedicated to social justice.

Fourth, Powers and Faden's ethical theory of social justice is largely consequentialist, but it is not utilitarian, at least in the "cost-benefit" understanding of utilitarianism. States are obligated by social justice to take such actions as to bring about a certain desirable state of the world--that is, the sense in which the ethical theory is

¹² *Id.* at 9-10.

¹³ *Id.* at 167-70.

consequentialist.¹⁴ But, the state of the world that is desirable and required by justice is neither a function of the “costs” and “benefits” each possible action necessary to achieve some state would accrue,¹⁵ nor is it a function of the accumulated preferences for health and so forth held by the affected parties of some specified set of public decisions.¹⁶ It is also not a function of the accumulated moral preferences for this sort of distribution over that sort of distribution held by those parties represented in a functioning democracy by the state actors responsible for the relevant decisions.¹⁷ Rather, the state of the world that is desirable, for Faden and Powers, is a function of the demands of social justice, and it is the job of both the public health professional and the state actor to ascertain what justice requires, not just what constituents might want for themselves or might view as morally desirable. In this respect, Faden and Powers’ approach contributes to an increasing body of work that explores various forms of what might be thought of as non-utilitarian consequentialist theories of ethics and justice. This approach includes an ethical orientation that holds consequences of actions to be the main determinant of the moral value of an act, but identifies particular consequences--a desirable state of the world in which health, attachment, education, etc. are enjoyed by all--rather than a minimization of “costs” or a maximization of “benefit,,” “preferences,” or “utility” as the worldly consequences that are of value.

And finally, Faden and Powers’ understanding of the demands of social justice is keenly alert to inequalities, particularly multiple inequalities of the cascading sort. Inequalities trigger an awareness that a particular group is likely lacking in one or more of the basic dimensions of well-being that social justice requires the state to protect.¹⁸ In this way, their understanding of social justice overlaps with the concerns of those who view social justice as centrally, and not just incidentally, about social inequalities. But social justice as Faden and Powers develop it does not require any sort of rigid egalitarianism.¹⁹ An ideal world in which all enjoy some basic, minimal-but-sufficient levels of health, education, autonomy, personal security, attachment, and respect is compatible with a considerable

¹⁴ *Id.* at 32-34.

¹⁵ *Id.* at 144-56.

¹⁶ *Id.* at 153-56.

¹⁷ *Id.* at 184-90.

¹⁸ *Id.* at 3-6, 50-57, 71-78, 87-99.

¹⁹ *Id.* at 50-64.

degree of unobjectionable inequality in distributions of resources. It is also fully compatible with a robust capitalism and the existence of private markets, in most, albeit not all, commodifiable goods. Thus, the Faden-Powers conception of social justice is neither as tied to autonomy as Nussbaum and Sen's, nor as committed to egalitarianism as might be various neo-marxist or anti-subordinationist conceptions. In essence it is more "substantive" than both: value attaches neither to abstract autonomy nor to concrete equality, but rather, to a particular, substantive account of an ideal social world: one in which all human beings enjoy good health, a decent life span, the respect of self and others, the ability to reason, healthy intimate attachments, are free from fears for their own personal safety, and have the autonomy to make decisions regarding their own life plan.

That, in my view, is the heart of this book's contribution, and virtually all of it--at least what I have attempted to summarize above--strikes me as basically sound. I had thought that Nussbaum and Sen's theory of justice was by far the most compelling Aristotelian, neo-Marxist, but nevertheless loosely liberal view of justice around, until I read this book. Faden and Powers nicely articulate what the Nussbaum-Sen approach gets right and wrong, corrects it, and applies it vigorously to issues of public health. The argumentation is extremely solid throughout. The focus on and then critique of a range of "cost-benefit" approaches to public health and to social justice is particularly good and will prove useful to many readers interested in cost-benefit analysis, well beyond the public health community. Rather than address small differences, in the remainder of this review, I will focus on a question that, as far as I can tell, Faden and Powers did not directly address.

That question is simply this: "Why Social Justice?" Why should states, state actors, or the social institutions states facilitate pursue social justice, regardless of how it is defined? Powers and Faden don't address this in detail. What they do address, and in great detail, is the answer to this question: "What does Social Justice require of our state and the social institutions the state facilitates?" Their answer: social justice requires states (either through intermediary social institutions or directly) to provide for a minimum, but sufficient, level of six basic dimensions of human well-being, one of which is health. They do not, though, as far as I can tell, ask a prior question and that is why states are or should be required to promote social justice at all, regardless of how social justice might be defined. In other words, Faden and Powers' project is to specify what social justice requires,

with respect to health and so forth, of decently functioning states. They don't ask, or answer, the prior question--what it is that requires social justice. To state this one other way, risking redundancy, even assuming Powers and Faden are correct that social justice requires states and institutions to promote the six basic dimensions of well-being, what is it that requires states to promote social justice?

Perhaps it seems too clear to these two authors to argue the point, that states are required to pursue the ends of social justice. Why else would we have states in the first place, if not to promote social justice? The only difficult question is what social justice requires, and that is the subject of the book. Or, perhaps they don't argue the point because they view it as outside the scope of their project. It seems to me, though, that the answer is not so obvious and that it is important to their project, whether or not outside its scope. In the next section, I will suggest a few reasons why the question is both meaningful and difficult. In the section after that, I will try to answer it, within the spirit of the Powers-Faden theory of justice, as I understand it. In the conclusion, I'll briefly speculate on why in my view the question "Why social justice?" does not get the attention it deserves, not only in Faden and Powers' strong book, but also elsewhere in legal and political philosophy.

I. WHY SOCIAL JUSTICE?

So, are there any reasons to think that states might *not* be required to pursue social justice, no matter how it is defined? I think there are at least three. First, ought famously implies "can," and it might be that at least our "State"--meaning the United States' national government--*can not* promote social justice, in which case it can not be true that it "ought" to. Why can't it? Well, one might argue--plenty of people do--that Article One of the United States Constitution specifies a very short list of congressional powers, and the power to promote social justice is just nowhere on that list.²⁰ Congress has power to pass such laws that are necessary to regulate commerce²¹ under Article One, and Section Five of the Fourteenth Amendment specifies that if states fail to do so, Congress also has the power to take such actions that are necessary to ensure that individuals are granted equal protection and due process of law by states.²² Nothing else in the Constitution even

²⁰ U.S. CONST. art. 1, § 8.

²¹ *Id.*

²² U.S. CONST. amend. XIV, § 1, 5.

comes close to granting Congress the power to pursue social justice. And, it is not at all obvious that either “commerce” or the capacious phrases of the Fourteenth Amendment are sufficiently elastic to embrace social justice, no matter how defined.

Of course, Congress has, from time to time, done so anyway. We do all enjoy such programs as Social Security, Medicare, and Medicaid, all of which seem to fulfill some of the imperatives of social justice that Faden and Powers identify. Those New Deal programs, however, in retrospect on the century just passed, increasingly look like constitutional anomalies rather than constitutional paradigms. They just might turn out, after the constitutional dust settles, to be the collective exception that proves the rule, rather than any sort of “constitutional moment” that definitely if obliquely expanded Congress’ power to legislate toward social justice ends. It has, after all, proven exceedingly difficult in the decades that followed the New Deal to build on those programs, in the national legislative agenda, toward a more robust safety net, or set of shared welfare rights, or social justice agenda, that would protect the interests Faden and Powers identify. One reason (among others) why it has been so hard to establish robust social welfare laws, or rights, in this country--much harder than in Europe or Canada, for example--might be the existence of a widely shared sense, or worry, or presumption, or rock-solid belief, that the United States Constitution, perhaps uniquely among the world’s constitutions, denies the United States law-making branch the power to act in these areas, apparently preserving those fields for governance by the states.²³

Over the last twenty years particularly, on the rare occasion when Congress has taken some act that apparently seemed designed to promote one of these interests, the constitutionality of those acts have been quickly brought into question.²⁴ For example, when the constitutionality of the Family and Medical Leave Act²⁵--a federal law passed in the 1990s that requires that large employers provide very limited and unpaid leave to mothers or fathers with newborns--was challenged in Court, that act was eventually successfully defended.

²³ For a good restatement of this traditional view, *See Developments*, 82 HARV. L. REV. 1065 (1969).

²⁴ *See, e.g., U.S. v. Morrison*, 529 U.S. 598 (2000) (holding that Congress lacks authority to create a civil cause of action for unredressed violence against women); *U.S. v. Lopez*, 514 U.S. 549 (1995).

²⁵ Family and Medical Leave Act, 29 U.S.C. § 2601-2654 (2007).

However, it was *not* defended on the straightforward “social justice” grounds that the law is necessary to improve the quality of attachments of mothers and infants (or any other combination of dependents and care providers) and that Congress was right to so find. Rather, the law was defended and ultimately sustained on the quite different ground that the act was necessary to combat illegal sex discrimination in the workplace--something well established as within Congress’ commerce clause powers, if not its remedial powers under Section Five of the Fourteenth Amendment.²⁶ Nowhere did the Court suggest--and nowhere did the advocates of the law argue--that the law should be sustained because it furthers legislative goals necessitated by the state’s obligation to pursue ends of social justice, including the goal of strengthening family attachments in the face of onerous workloads.

There is simply no clear authority for the proposition that Congress even has the power, much less the duty, to legislate in such a way as to promote health, education, attachment, autonomy, self-respect, or individual security, and plenty of authority for the proposition that its powers to do so are limited. Now of course, *states* presumably have this power, but states have the economic wherewithal to provide for the six interests that social justice requires only to varying degrees, resulting in the massive inequalities that Faden and Powers rightly argue must be corrected by concerted political action.²⁷ If the national government is constitutionally disabled from promoting social justice and if state governments are precluded by limited resources from doing so in a minimally equal way, then it is awkward at best to say that governments, whether national or state, ought to do so. I would like to call the national part of this dilemma the “problem of authority.” Without some authority to act, Congress lacks power, and if it lacks power, it simply can not do what Powers and Faden declare it ought to do.

Further, and entirely apart from the problem of authority, one might argue--again, plenty of people do--that, even assuming a state at any level (federal or state) can promote social justice it should not, the dangers posed by an over-reaching state outweigh the dangers to life and limb posed by individuals’ collective inability to enjoy some minimal level of health, security, education, attachments, autonomy, and self-respect. It is better to risk these material deprivations than to

²⁶ Nevada Dep’t of Human Res. v. Hibbs, 538 U.S. 721 (2003)

²⁷ For a compelling argument that school inequality, for example, is as much a matter of inter-state inequality as intra-state inequality, See Goodwin Liu, *Education, Equality, and National Citizenship*, 116 YALE L. J. 330 (2006).

risk the tyranny that would come with the territory of guarding against them. A state charged with the task of assuring these minimal interests would perforce have to be granted so much power over our private and social lives as to itself be a danger, not only to our actual enjoyment of those minimal interests, but also to any number of other interests we might seek to enjoy as well. Such a state might, for example, have to be so confiscatory of private property as to make life unpleasant for all--more unpleasant than the cumulative affects some of us would suffer by a world in which a state is not so tasked. What we would gain in security with respect to the basic interests, we would lose in vulnerability to an overly powerful central government. That is a trade-off that might be struck by different people in different ways and at different points along a continuum, but trade we must. The minimum for which Faden and Powers argue may be set quite low, but nevertheless it might imply too large an enhancement of governmental power as to be worth the risk. It is better to limit the state to more limited tasks--protection against outside threats, for example--than to take that risk, whatever might be the enhancement of individual well-being.

Third, democratic principles of representative government might limit the degree to which states ought to pursue social justice and for two separate reasons. First, it may be that representatives ought to represent only the interests, including the basic interests identified by Faden and Powers, of their constituents. If so, then the basis for public health is democracy, not social justice, and the extent to which public health of all, including subordinated populations, is required of states depends upon representational facts. Namely, if the interests of dominant populations are simply weightier than the interests of subordinated populations, then a good deal of inequality in the distribution of goods that might satisfy those interests is tolerable. Second, democracy might best be understood as a system of government in which, ideally, not only the "first order" desires of constituents are represented and pursued by legislators, but also their moral preferences for particular distributions of resources are respected and, where possible, reflected in enacted law. Thus, if constituents think its morally best for states to invest shared resources totally in collective self-defense and only a little or not at all in public health, then that is what states ought to do. Either way, whether states are understood as best promoting their constituents interests or their constituents' "moral preferences," expenditures on public health are both justified and required, if at all, by reference to those preferences or

the representation of those interests, and not by reference to any conception of social justice.

II. SOCIAL JUSTICE AND CONSTITUTIONAL IDEALISM

Now, why, in the face of these objections, might states *be* obligated to pursue social justice on behalf of their citizens? To ask the same question, but in a way more familiar to constitutional lawyers concerned with these sets of issues, what is the *authority* for the existence of this obligation and is the claim of authority a compelling one? The possibility most frequently alluded to by Powers and Faden--although not argued in any detail--is that the source of the obligation is a particular moral and ethical imperative: we all have a "basic human right" to these dimensions of well-being that social justice requires states to promote.²⁸ From those human rights follows the obligation of states, as well as other social (and international) institutions, to take the actions necessary to protect human rights. This answer is not fully satisfying. First, it is not clear that our human rights protect these dimensions, or that, if they do, they impose obligations on states, rather than on other social institutions, to meet them. Nor is it clear why, if it is our human rights that imply the obligation, our state or any other is not required to do what it can to meet the same rights held by non-citizens. In other words, it is not clear why states have particular obligations based on human rights to tend to the dimensions of wellbeing of their own citizens rather than all humans--the citizens of the world. Most damningly, though, it is not clear how the United States government could possibly have an obligation to meet the human rights even of only its own citizens, if its own constitution denies it the power to do so, as briefly argued above.

A second possibility, not pursued at all by Faden and Powers, is that the constitutional claim premised on the short list of Article One powers made above is wrong, and in point of fact, the United States Constitution does impose positive obligations upon the national government to provide for these basic dimensions of well-being. The "authority" for the existence of the basic obligation of states--including the United States government--to pursue social justice, then, would basically be positive constitutional law. This is barely arguable as evidenced by the still lively, but fading, constitutional discourse in

²⁸ SOCIAL JUSTICE, *supra* note 1, at 45-49, 85-87, 180.

dissenting scholarship supporting the proposition that, contrary to various opinions of the Supreme Court, the Constitution does indeed recognize certain positive welfare rights.²⁹ Nevertheless, as a matter of brute-fact constitutional law (rather than constitutional aspiration), the position that the Constitution not only permits but also requires positive welfare rights, and hence imposes duties on legislators and other state actors to protect them, is becoming less and less plausible with each declaration by the contemporary Court that the Constitution does no such thing.³⁰ As Dworkin argued some time ago, Constitutional law (unlike, perhaps, constitutional politics or constitutional morality) is a product of both the best political and moral reading the actual constitution can sustain, as a matter of interpretation, and of some minimal “fit” with the pattern of decision-making by its authoritative interpreters, which is the collective known as the Supreme Court. Even if supported by morality, language, text, or political theory, it has become wildly implausible to read our Constitution, as understood by the Supreme Court, as containing any sort of positive welfare rights or imposing any sort of duties on legislators to provide for them.

A third and to my mind very promising possibility is alluded to, but again not argued in any detail, in some of Martha Nussbaum’s writings on the closely aligned “capabilities approach” to matters of social justice, both here and globally. Particularly in her book *Women and Human Development*, Nussbaum argues at various points that the capabilities approach (or more broadly for these purposes, the “wellbeing” approach) ought to be understood by liberal constitutional states as simply a “good idea”--one that states with liberal constitutions will hopefully embrace as a guide to decent governance.³¹ The suggestion, in other words, is that constitutional liberal democracies ought to protect these interests (or, in her argument, these capabilities) simply because it would be a very good idea for them to do so.

This might initially sound a bit vacuous, so let me turn the formulation around a bit, in order to make it more specific, and possibly more plausible. I would put it this way: perhaps it is the very

²⁹ See, e.g., CHARLES BLACK, *A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED* (1999); Frank Michelman, *Foreword: On Protecting the Poor Through the 14th Amendment*, 83 HARV. L. REV. 7 (1969); Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 (1979); Robin West, *Katrina, The Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127 (2006); Robin West, *Unenumerated Duties*, U. PA. J. CONST. L. (2006).

³⁰ See, e.g., *DeShaney v. Winnebago County Dep’t of Soc. Serv.*, 489 U.S. 189 (1989); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³¹ MARTHA NUSSBAUM, *WOMEN AND HUMAN DEVELOPMENT* 103 (2000).

good *idea* of constitutionalism, whatever might be the positive content of actual constitutions, which suggests that states should promote social justice. In the past, perhaps, a different idea of constitutionalism held sway: the idea of constitutionalism, at the time of the drafting of our own constitution, for example, was that governmental power should be restrained, separated, or contained in some way. These days, though, a different idea of what it means to embrace constitutionalism might be carrying the day. Knowing what we *now know* about the extreme vulnerabilities of citizens in liberal market economies, given what we *now know* about the misery to which vulnerability and deprivation leads, knowing what we *now know* about the extreme precariousness of one's economic wellbeing in an economy that treats labor as a commodity, and knowing what we *now know* about the difficulties facing even the most rugged individualists trying to move from having nothing to having something, a Constitution--any Constitution--that truly emanates from the people and that establishes a government that truly serves the people, requires the state to promote social justice. This seems like a very sensible "constitutional idea" for a modern era, whatever might have been the case in the founding era. It is, for example, a very good reason for individuals in the proverbial states of nature that they may find themselves in, to come together and form a constitution, not just establish a sovereign government, states should, such individuals might think, pre-commit to provide for social justice. That a constitution commits the state to social justice might also be a good reason for citizens to feel and profess some loyalty to their own constitution; it is a constitution about which citizens could feel some pride. A constitution that requires the state it constitutes to promote social justice, might also cloak the democracy it creates with some degree of legitimacy as well: such a democracy, and not just such a state, is legitimate, not only because it represents constituents' preferences (and so forth), but also because it is pre-committed to social justice. Although surely not dispositive, it is certainly relevant that just such a "constitutional idea" tracks actual constitutional provisions that are now quite routinely contained in constitutions written in the late twentieth century, rather than the late eighteenth. In short, that states ought to promote social justice is a morally appealing notion of what constitutional governance should be about. It is not just a "good idea" that liberal states might embrace. It is also a "good constitutional idea" that liberal democracies must promote social justice.

Finally, if “states must promote social justice” ranks as a good constitutional idea, it might also be a good guide not only to the criticism of the United States Constitution, but also, conceivably, to its interpretation and perhaps amendment as well. The Fourteenth Amendment of the United States Constitution contains broad guarantees that surely can be read to *suggest* the existence of such duties, Supreme Court authority notwithstanding.³² The preamble to the United States Constitution likewise contains clauses suggesting as much,³³ as does the Declaration of Independence,³⁴ as well as any number of state constitutional provisions. Whether specifically so mandated by the Constitution’s text or history, it might be fair to say that the notion that states ought to promote social justice is arguably within even our own constitutional tradition, and whether that is too much of a stretch, it is certainly well within the emerging constitutional traditions of the world. If so--if the obligation of states to promote social justice is a “good constitutional idea”--then it might be an idea that could impress itself upon legislators, including United States senators and congressmen. If the obligation of states to promote social justice is a good constitutional idea, it might sensibly become a part of the moral duty of lawmakers at every level of government.

³² U.S. CONST. amend. XIV, § 1 states that “no state shall *deny* citizens the equal protection or due process of the laws.” Taking out the double negatives, states are required to actively do something: to protect citizens with law, and to do so equally. It may be that to “protect” citizens with law requires states to protect their personal security, safeguard their autonomy, and so forth. I argue this at greater length in *Unenumerated Duties*, *supra* note 29; *Katrina, the Legal Question Doctrine, and the Fourteenth Amendment*, *supra* note 29; and, in *PROGRESSIVE CONSTITUTIONALISM: RECONSTRUCTING THE FOURTEENTH AMENDMENT* 9-104 (1994).

³³ U.S. CONST., pmbl. (“We the People of the United States, on Order to form a more perfect Union, establish Justice, insure domestic Tranquility. . . promote the general Welfare. . . do ordain and establish this Constitution . . .”).

³⁴ Specifically, THE DECLARATION OF INDEPENDENCE, pmbl. (U.S. 1776) (“We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are *Life, Liberty and the pursuit of Happiness*. — *That to secure these rights*, Governments are instituted among Men, deriving their just powers from the consent of the governed, — That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, *as to them shall seem most likely to effect their Safety and Happiness*”) (emphasis added).

III. SOCIAL JUSTICE AND DISCIPLINARY AUTHORITY

Faden and Powers are surely not the only writers loosely within the “social justice” field to not specifically address the constitutional or quasi-constitutional source of the state’s obligation to pursue social justice. This is a lacuna--a gap in the literature--caused in part, I think, by a sense of disciplinary boundaries between the fields of political theory and ethics, on the one hand, and constitutional law and theory on the other. The handful of dissenting constitutional theorists that have asserted various sorts of arguments for the existence of welfare rights, typically argue that legislators must have the power to legislate in such a way as to enforce them and rarely reach the question of whether legislators have a duty to do so. Constitutional theorists that oppose the existence of such rights do so on the grounds that the Constitution not only imposes no such obligation on legislators, but it also does not grant power to legislators to promote social justice, should they so choose. Thus, there are very few writers within the constitutional canon that specifically address whether legislators are under moral or constitutional obligations to promote social justice.³⁵ Within philosophy, writers such as Faden, Powers, Nussbaum, and Sen that address these issues typically assume that states have the power to pursue social justice and then proceed to argue that since justice is a virtue, it is one that imposes obligations on whoever has the power to promote it. They only rarely, if ever, attend to the possibility that our positive, inherited constitution might constitute an obstacle, rather than a vehicle, for social justice. Therefore, they rarely attend with any detail to the project of constructing an alternative constitutional vision that might centralize, rather than marginalize, the duty of legislators to promote social justice. So, in brief, constitutional lawyers and theorists pay little or no attention to the possibility that legislators may have specific moral duties to attend to the demands of social justice. Philosophers, on the other hand, do not pay much attention to “the problem of authority”: the need to find either some sort of authority--constitutional legal, political, or otherwise--for the existence of the social and moral duties for which they argue or to argue explicitly that no authority, beyond the authority of strong moral argument, need be found. There is a space, then, or a gap, at least in the United States

³⁵ One exception is LAWRENCE SAGER, *JUSTICE IN PLAINCLOTHES* (2002).

scholarship, between the arguments propounded by our contemporary moral philosophers, including Nussbaum, Sen, Faden, and Powers, for state obligations to pursue social justice and the arguments propounded by even sympathetic constitutional theorists, arguing, at most, that the state legislative branch has the power to enact law of this sort and rarely, if ever, touching upon whether they have a positive duty to do so.

This disciplinary gap, I think, has serious consequences. Various possible relations between constitutional theory and moral philosophy, all of which are very much relevant to any philosophical discussion of the demands of social justice, are obscured by this division of constitutional and philosophical labor. Let me just suggest two.

First, the main skeptical argument rehearsed above--that since Congress has no constitutional authority to pursue social justice, there cannot possibly be any such moral duty to do so--only holds if the Constitution is unchangeable. But the Constitution is not unchangeable, and whether it ought to be changed might depend quite crucially on whether Faden, Powers, Nussbaum, or Sen are right about the existence of this moral duty that is arguably at odds with our constitutional scheme of governance. In other words, if Faden, *et al.*, are right that there is a duty, and the Supreme Court and countless commentators are right that there is no constitutional authorization for Congress to act on that duty, then what follows is not that Faden *et al.* are wrong, but, rather, that constitutional law ought to be faulted and changed. "Ought implies can," and "can't implies no duty," but only if the "can't" is truly a "can't," otherwise, "ought" implies the need to change the range of the constitutionally possible. Constitutional law is not, at the end of the day, a law of nature like the laws of planetary motion. It is contingent, positive and malleable. But, this possibility--the possibility that the Constitution should be faulted and therefore should be changed because it fails to create an explicit Congressional power to act in accordance with Congress' moral duty--is obfuscated by this division of labor: philosophers' inattentiveness to questions of authority and constitutionalists' inattentiveness to questions of moral duty.

The second possibility also obscured by this division of labor is just this: if "states"--meaning states in the ordinary sense, such as the state of Maryland or Tennessee--do have the power to promote social justice, even if Congress does not, then it should very much matter to constitutional lawyers and theorists, no less than moral philosophers,

what social justice requires of them when they exercise that power. Constitutional lawyers, however, have been overwhelmingly concerned, at least over the last half century, with the limits, rather than the content, of legislative powers, and, as a result, they elide just that question. What states ought to do to promote the ends of social justice is a philosophical question to be sure, but it is also one of the central political questions of our day. And, it may be a “good constitutional idea” for states to be obligated to promote social justice--or at least so Martha Nussbaum, Ruth Faden, and Madison Powers all in different ways seemingly suggest. If they are right and I think they are, then this ought to be a central, not peripheral, concern of constitutional lawyers and scholars, regardless of whether it is state or federal actors that carry out this central governmental obligation. If that is right, then Faden and Powers’ book would be a good place to start the conversation regarding what state actors ought to be doing when they act on this duty. Faden and Powers have produced a compelling and important argument regarding what social justice requires of states and the various social institutions they facilitate. One can only hope that their articulation of this very good constitutional idea--that as a very fundamental, constitutional matter states ought to promote social justice and that what that means is that states must provide for human well-being along these six crucial dimensions--will receive a wide readership, not only by public health professionals or the lay public, but also by constitutional lawyers and theorists.