

# Making the Case for a Constitutional Right to Minimum Entitlements

by Erwin Chemerinsky\*

When first asked to be on the Poverty Law Section's panel on a constitutional right to minimum entitlements, I was flattered but somewhat surprised at the choice of topic. Although the plight of the poor is obviously a serious and growing national disgrace, there is little likelihood that the United States Supreme Court will provide a solution. The current Court is extremely conservative and, with four conservative Justices under age fifty-five, likely will remain that way for decades to come. There is more chance that I will become the starting center for the Los Angeles Lakers (I am five foot seven and very uncoordinated) than that the Court will create a constitutional right to minimum entitlements.

Yet, the more I thought about the topic, the more I realized that this is exactly the time when it is essential that we begin considering a constitutional right to minimum government services. The case for such a right is difficult to establish; it is counter to traditional constitutional doctrine and philosophy. The idea of a constitutional right to livelihood runs against deeply embedded social attitudes. However, some prominent scholars such as Charles Black, Peter Edelman, and Frank Michelman, already have begun to advance arguments for such rights.<sup>1</sup> Those, like

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1. Charles Black, *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

me, who believe in a constitutional right to minimum subsistence must build on their writings to make the case for such entitlements.

Besides, establishing a constitutional right to resources for survival might have profound impact even apart from the responses of the federal judiciary. State courts might be persuaded by such arguments and might independently find these rights under state constitutions. Congress might be swayed and be convinced to improve benefits because of a belief in a constitutional right. The rhetoric of rights is extremely powerful, and making the case for such a constitutional entitlement might be used to accomplish legislative action.

Additionally, history shows that the academic scholarship of one generation can shape the constitutional doctrines in the next. The criticism of judicial activism during the *Lochner* era helped produce a Court that was extremely deferential to the government between 1937 and 1954. The activism of the Warren Court, in part, was a reaction to this quiescence. The attack on the Warren Court as usurping democratic prerogatives is very much reflected in the current Court's deference to majoritarian institutions.<sup>2</sup> Contemporary scholarship will have future effects, and among them can be directing the Court towards finding a constitutional right to basic subsistence.

Academic voices from the left are especially important now because those views are almost totally absent from the Court and rarely will be expressed there even in dissenting opinions. There is not a William Douglas, a William Brennan, or a Thurgood Marshall to profess human decency as a core constitutional value or to eloquently speak out about the plight of the poor in this society.

My goal in this paper is to identify the steps in an argument for a constitutional right to minimum entitlements. My objective is not to fully make the argument for these rights. Such an elaboration would take far more space than is available here. In fact, an underlying theme of this article is that making the case will be a difficult and time-consuming enterprise. Thus, my task here is to outline what needs to be established to make the case for such constitutional rights. I also identify some of the problems that must be considered in each step of the analysis.

Specifically, I believe that there are seven steps to making the case for a constitutional right to basic subsistence. (1) Poverty and the plight of the poor are serious social problems. (2) The government has a responsibility to provide individuals with the essentials that are necessary for survival. (3) The government can successfully provide people with what is needed for subsistence. (4) Voluntary government programs will be inher-

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2. I develop this argument more fully in, Erwin Chemerinsky, *The Vanishing Constitution*, 103 HARV. L. REV. 43, 61-64 (1989).

ently inadequate. (5) The Constitution creates affirmative government duties; the Constitution is not just a charter of negative liberties. (6) Included among the affirmative duties that should be found in the Constitution is the right to basic subsistence: food, shelter, and medical care. (7) It is the judicial role to declare and enforce such rights.

The ultimate task is to make persuasive arguments in support of each of these steps. My goal is to discuss, step-by-step, what that likely will entail.

*1. Poverty and the plight of the poor are serious national problems*

At first, it appears that little needs to be done to establish this proposition. The statistics are grim. Thirteen percent of the population, almost 32 million people, lived below the poverty line in 1988. An additional 10.7 million people (4.4% of the population) were only slightly above the poverty line. Whereas 10.1% of whites are below the poverty line, 26.8% of Hispanics and 31.6% of blacks in the United States are poor.<sup>3</sup> Most tragically, 12.4 million children—one in five children in the United States—lives in a family with income below the poverty level. The problem is much greater for minority children. Forty-five percent of all black children and 43% of Hispanic children live below the poverty level.<sup>4</sup>

These figures underestimate the problem. Most notably, the homeless are not included in official poverty statistics.<sup>5</sup> The homeless are estimated to number anywhere from 250,000 to 3,000,000 nationally.<sup>6</sup> The homeless suffer extreme poverty. The average income for the homeless is only \$167 a month (or about a third of the poverty level income), with 18% of the homeless reporting no income whatsoever.<sup>7</sup>

The problem of poverty is growing worse. After dramatic improvements in lessening poverty during the 1960s, the percentage who are impoverished in society increased during the 1980s.<sup>8</sup> Additionally, the gap between rich and poor is widening. In 1988, the richest 20% of households

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3. These statistics are all drawn from, U.S. DEP'T COMM., STATISTICAL ABSTRACT OF THE UNITED STATES—1990 (110th ed. 1990) [hereinafter DEP'T COMM.]. These are the official poverty statistics from the U.S. BUREAU OF THE CENSUS, CURRENT POPULATION REPORTS, series P-60, Nos. 161, 164, and 166 (1987, 1988).

4. DEP'T COMM., *supra* note 3, at 458, table 743.

5. Isabel V. Sawhill, *Poverty in the United States: Why is it So Persistent*, 26 J. ECON. LITERATURE 1073, 1081 (1988).

6. Rossi & Wright, *The Urban Homeless: A Portrait of Urban Dislocation*, ANNALS AM. ACAD. POL. & SOC. SCI. 132, 133 (1989).

7. *Id.* at 135-36.

8. Sawhill, *supra* note 5, at 1082-83.

earned \$9,109 more (adjusted for inflation), whereas the poorest 20% earned an average of \$576 less.<sup>9</sup>

The statistics, of course, do not tell the human effects of poverty. Merely reciting numbers cannot capture the devastating effects of poverty or convey what it is like for a child to grow up hungry and without access to medical care.

Despite these statistics, a general unawareness on the part of the public exists as to the plight of the poor. There is no general sense of social urgency to work to lessen poverty in this country. None of the politicians in the current election campaign have made the problems of the poor an issue. Even in discussing the crisis with regard to access to medical care, the focus has been more on the middle class. There are many explanations for this, including (as discussed below) the sense of futility in dealing with the problem and an apparent lack of resources for new programs.

I believe, though, that the lack of attention and the inadequacy of current antipoverty efforts, in part, reflects the general lack of awareness of what Michael Harrington called, "The Other America."<sup>10</sup> Creating a constitutional right to minimum entitlements will require much more public recognition of the seriousness of the poverty problem in the United States.

The poor are invisible for most Americans. Popular images are shaped by television, and no current television show that I know of depicts the life of the inner-city poor. In most cities, the poor, and especially poor people of color, are physically segregated. A big city dweller can live without ever seeing the poor and where they live. I grew up on the south side of Chicago and know many people who grew up in the north suburbs and never entered the city south of downtown. In Los Angeles, my current home, I know of many who have never been in south-central or east Los Angeles.

Even when the poor are physically visible, people make them psychologically invisible. We are accustomed to stepping over and around the homeless and street beggars. We look at the poor but do not see visibly impoverished people.

I do not think that it was coincidence that the War on Poverty of the 1960s followed the publication of books like Michael Harrington's, *The Other America*,<sup>11</sup> or television broadcasts like Edward R. Murrow's depiction of the plight of migrant farm workers. If there ever will be a right to minimum entitlements, it will happen only after people are made to see

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9. Stanley Meisler & Sam Fulwood, III, *Economic Gap Bodes Ill for the United States*, L.A. TIMES, July 15, 1990, at A1.

10. MICHAEL HARRINGTON, *THE OTHER AMERICA* (1962).

11. *Id.*

that poverty is an enormously serious social problem and to feel a need for action.

2. *The government has a responsibility to provide individuals with the essentials necessary for survival*

Persuading the public and the Court that the government has a moral responsibility to provide every person minimum subsistence will be difficult. Many deeply embedded social attitudes will need to be changed. A fundamental notion exists in this society that people are responsible for themselves and their own fate. Many believe that if people are poor it is a reflection of their own failings and they are responsible for a solution.

Welfare programs, for example, traditionally have helped only the so-called "deserving poor": groups like dependent children, the disabled, and the elderly. Others were thought to be able to care for themselves. General relief benefits traditionally have been unavailable in some states and extremely limited in others.

Two strategies must be pursued to establish a moral case for government responsibility. One is to show that it is generally inappropriate to blame people for their poverty or assume that people can assure themselves of income sufficient for subsistence. Many who are impoverished—perhaps most notably children—are truly blameless. More generally, poverty usually reflects social realities more than individual lack of initiative. National economic policy, discrimination and its long legacy, and inequalities in the educational system are among the social factors that limit the jobs available and relegate a significant part of the population to poverty. People can become poor in countless ways that are no fault of their own, and people often lack the means to do much about it. At the most basic level, there is an insufficient number of jobs paying wages above the poverty level for all who need them.

But merely making a case that most of the poor are "deserving" is not enough to establish a moral imperative for government action. An affirmative argument that the government has a duty to provide for its citizens must also exist. Perhaps this can be based on Rawlsian philosophy, as Frank Michelman has argued,<sup>12</sup> or perhaps it can be based on a social contract philosophy. Alternatively, the argument can be made on self-interest grounds: Each person in society will be better off if the poor are better educated, housed, and fed. Crime likely will decrease, and social productivity will be enhanced. People certainly are most likely to support programs when they perceive themselves as benefitting in some way.

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12. Michelman, *supra* note 1; Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659; Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973).

While such arguments based on jurisprudence or self-interest are important and useful, I believe that the case for minimum entitlements must emphasize human decency. No person should be hungry or die from a lack of medical care when we, as a society, can prevent the harms. An ethos of caring must be professed and take hold. There must be the realization that the government has to be the conduit for such efforts.

3. *The government can successfully provide people with what is needed for subsistence*

One of the worst lessons drawn from the 1960s is that government programs cannot work. There is a strong sense in society that there was a major effort to eliminate poverty, it failed, and future efforts would be futile. The frustration with government efforts helps to explain why there is so little being done to suggest new programs or to expand and revitalize old ones.

In part, the rhetoric of Lyndon Johnson and the "Great Society" is responsible.<sup>13</sup> Johnson declared his effort a "war on poverty."<sup>14</sup> War has winners and losers. The mental image was that the government was going to vanquish and eliminate poverty. The continued existence of poverty was evidence that the battle was lost and the war futile.

But the government's programs were designed to alleviate the effects of poverty—hunger, lack of quality shelter, lack of access to medical care. With limited exceptions, like Head Start and job training programs, the effort was not designed to eliminate poverty itself. The implicit promise was an end to poverty, but little was done in that direction. The effort was at reducing the plight of the poor, but that important goal was not captured in the metaphor of a "war on poverty."

Actually, the programs, for the most part, were quite successful in achieving their objectives. Between 1960 and 1969, the poverty rate declined from 22.2% to 12.1% of the population.<sup>15</sup> In 1986, government cash transfer programs brought 17.3 million people out of poverty. These government efforts reduced the ranks of the poor from 49.7 million people down to 32.4 million, a decrease of 34.8%.<sup>16</sup>

Perhaps more importantly, food stamps alleviated hunger for millions of people; Medicare and Medicaid provided medical care to millions who would have had none; and public housing programs, for all of their problems, offered shelter. Countless lives were improved because pro-

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13. This argument is developed more fully in D. ZAREFSKY, *LYNDON JOHNSON'S WAR ON POVERTY: RHETORIC AND HISTORY* (1986).

14. *Id.*

15. Sawhill, *supra* note 5, at 1082-83.

16. DEP'T COMM., *supra* note 3, at 460, table 747.

grams provided people with basic necessities. This message, however, somehow got lost and was drowned out by the sense of a war that was not won.

Additionally, another war—the one in Vietnam—limited the scope of Great Society programs. The effort to combat poverty was very much hindered by the massive amount of money that was needed to fund the war in Southeast Asia. As William L. O'Neill observed: "\$1.6 billion, however carefully expended, didn't go far toward meeting the needs of thirty or forty million poor people . . . . [T]he main problem was always money. OEO had \$50 million to help 150,000 migrant workers, \$32 million for over 200,000 reservation Indians."<sup>17</sup>

None of this is to say that the programs were perfect or always effective.<sup>18</sup> Fraud was present. Money was misspent. Medical assistance programs helped fuel tremendous inflation in the health care industry. Housing programs often created dangerous projects that were ghettos in themselves.

Why did these failures become the dominant lesson? Some of it was the expectation of a victory over poverty. Some of it was what was dramatic and what was not. The story of a welfare mother abusing the system was used over and over again by Ronald Reagan to illustrate the failure of the entire effort. The sight of poorly designed housing projects offered a visual image of seeming government failure. In contrast, the successes were not at all visible. Politicians did not tell anecdotes about the person who would have died without the medical care provided by Medicaid. Mental images of a family that had food on its table because of food stamps were nonexistent.

Ultimately, creating a right to minimum entitlements will require convincing people that such an effort will make a difference. Government programs can measurably improve the lives of people. The government can provide food, shelter, and medical care to those who need it.

#### *4. Voluntary government programs will be inherently inadequate*

All of the analysis thus far could be directed at a legislature to persuade it to do more to care for the poor in this society. Why is it a matter for the courts and for constitutional analysis? In part, the answer is that legislative action will be inherently insufficient. Programs adopted voluntarily by the government are unlikely ever to be adequate.

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17. WILLIAM O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960S* 131 (1971).

18. For a powerful account of one failure based on the desire to involve the poor as much as possible in running programs, see DANIEL P. MOYNIHAN, *MAXIMUM FEASIBLE MISUNDERSTANDING* (1969).

Certainly, current programs are grossly inadequate. As explained above, they always have been limited in the numbers served because of a philosophy of only providing for the "deserving poor." Additionally, the level of benefits in the programs always has been minimal. In California, for example, General Relief benefits in 1990 were capped at \$312 per month.<sup>19</sup> A family of four on Aid to Families with Dependent Children ("AFDC") received \$788 per month.<sup>20</sup> It is impossible to imagine surviving, paying for the essentials, on that amount.

In the early 1980s, Ronald Reagan was successful in substantially cutting government programs by saying that the reductions still would leave a "safety net."<sup>21</sup> In the early 1980s, nearly a half million families lost their AFDC benefits and a much larger number had their benefits reduced.<sup>22</sup> Since then, there have been repeated cuts and talk of a safety net has disappeared.

Now, there is another wave of dramatic cuts, perhaps the largest yet. During 1991, "forty states cut or froze benefits in AFDC programs, the primary cash program for poor families with children."<sup>23</sup> One of three people on general assistance—the primary program for single individuals and childless couples—had their benefit levels reduced.<sup>24</sup> Indeed, a study found that "[f]rom welfare benefits to homeless shelters, cash-strapped states cut more deeply into programs for poor people in 1991 than any year in the last decade . . . ."<sup>25</sup>

Moreover, programs are sure to remain inadequate for the foreseeable future. The poor truly are a "discrete and insular minority."<sup>26</sup> This famous phrase, coined by the Supreme Court in *United States v. Carolene Products Co.*,<sup>27</sup> refers to groups unlikely to succeed in the political process and thus deserving judicial protection.<sup>28</sup> The poor possess little political power and are such a group. The poor are greatly underrepresented in legislatures. There are few poor legislators or executive officials.<sup>29</sup> The

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19. *Poor: Living Below the Poverty Line in L.A.*, L.A. TIMES, Nov. 23, 1990.

20. *Id.*

21. Howell Raines, *Launch Blitz to Sell 'Recovery'*, N.Y. TIMES, Feb. 22, 1981, § 4, at 1.

22. Edelman, *supra* note 1, at 15; GEN. ACCOUNTING OFFICE, AN EVALUATION OF THE 1981 AFDC CHANGES: FINAL REPORT 18, 24 (1981).

23. *States Cutting Programs for Poor, Study Says*, CHI. TRI., Dec. 19, 1991, at 8.

24. *Id.*

25. *Id.*

26. The phrase, of course, comes from *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

27. 304 U.S. 144 (1938).

28. See JOHN ELY, *DEMOCRACY AND DISTRUST* (1980) (explaining the importance of the concept for judicial action).

29. This is true by definition because once a person is elected or hired to government office there is a salary that brings that person above the poverty line.



poor lack the ability to get their message across. They lack money to give contributions to political candidates or to set up political action committees. They do not have the resources to buy advertising time to use the media to communicate.

More importantly, the self-interest of the majority of citizens is counter to the interests of the poor. People do not want to give up their hard earned money in tax dollars to help others. People are most likely to support programs from which they might benefit. Social Security is a paradigm example. But welfare programs for others are a low priority in the public's consciousness.

An ugly element of racism in the inadequacy of funding for government programs also exists. As the statistics presented earlier revealed,<sup>30</sup> race and poverty are closely correlated in American society. Welfare programs are perceived as serving primarily people of color. This has had a number of effects on government efforts. During the 1960s, the urban riots helped to lessen the desire to fund poverty programs. There was an unstated feeling of ingratitude that the beneficiaries of government largesse would engage in such violence. At the same time, the perception that the beneficiaries would be predominantly black and Hispanic lessened the political appeal of poverty programs. Deeply embedded racist attitudes create stereotypes about welfare recipients, and these stereotypes themselves become a basis for limiting programs and benefit levels.

For all of these reasons, welfare programs will not succeed in assuring minimal subsistence to all in the United States. Programs will exist, but they will be inadequate in who they cover and what they provide.

5. *The constitution creates affirmative government duties; the constitution is not just a charter of negative liberties*

An initial reaction to the suggestion of a constitutional right to minimum entitlements is that the Constitution contains only negative liberties restricting government action; it does not create affirmative government duties. For example, at the plenary session of the American Association of Law Schools conference in San Antonio, Texas, in January 1992, Professor Henry Monaghan's immediate response to the suggestion of such a constitutional right was to point out that the Constitution does not create affirmative entitlements, but is a restriction on government conduct.

This view of the Constitution is deeply entrenched. A prominent recent case embodying this view was *DeShaney v. Winnebago County Department of Social Services*.<sup>31</sup> A six year old boy was severely beaten by his

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30. DEP'T. COMM., *supra* note 3.

31. 489 U.S. 189 (1989).

father and suffered irreversible brain damage. The State brought a lawsuit under the due process clause against the Department of Social Services on the ground that their failure to respond to complaints of child abuse over a two-year period was responsible for the harms.<sup>32</sup> The Court declared that "nothing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors."<sup>33</sup>

In other words, the view is that the Constitution's protection of rights is entirely a restriction of what government can do, such as by preventing abridgement of freedom of speech or imposition of cruel and unusual punishment. Judge Richard Posner summarized this view: "[T]he Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."<sup>34</sup>

Making the case for a constitutional right to minimum entitlements requires challenging this conventional wisdom. Already there are important articles, by scholars such as Susan Bandes and Laurence Tribe, disputing the view that the Constitution does not create affirmative rights.<sup>35</sup>

Rather than repeat their arguments or develop a full argument on this point, I want to make three observations. First, it is important to emphasize that it is inaccurate to depict the Constitution as solely a charter of negative liberties. Many parts of the Constitution create affirmative duties. The Fourth Amendment requires police to obtain a warrant before a search or an arrest except under relatively limited circumstances.<sup>36</sup> Almost the entire Fifth Amendment imposes affirmative duties on the government, including the requirement that the government convene a grand jury to indict a person before trial in a federal court.<sup>37</sup> Also, the Fifth Amendment, as interpreted in *Miranda v. Arizona*,<sup>38</sup> requires the police to administer warnings before interrogation.<sup>39</sup> That Amendment additionally requires the government to pay just compensation if it takes private property for public use.<sup>40</sup> And the due process clauses in the Fifth and Fourteenth Amendment often require the government to provide notice

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32. *Id.* at 191.

33. *Id.* at 195.

34. *Bowers v. DeVito*, 686 F.2d 616, 618 (7th Cir. 1982).

35. Susan Bandes, *The Negative Constitution: A Critique*, 88 MICH. L. REV. 2271 (1990); Laurence Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

36. U.S. CONST. amend. IV.

37. *Id.* amend. V.

38. 384 U.S. 436 (1966).

39. *Id.* at 443; U.S. CONST. amend. V.

40. U.S. CONST. amend. V.

and hearing as part of procedural due process.<sup>41</sup> The Sixth and Seventh Amendments require the government to provide a jury trial in criminal and civil trials, respectively.<sup>42</sup> The Sixth Amendment mandates the provision of counsel in cases in which there is a possible prison sentence.<sup>43</sup>

Numerous parts of the body of the Constitution also create affirmative government duties. Notable examples in Article I include the requirement for Congress to keep a journal of its proceedings, to give a regular statement and account of all expenditures, and to conduct a census.<sup>44</sup> Simply put, it is descriptively wrong to see the Constitution as solely negative liberties.

Second, the argument that the Constitution provides only negative liberties is based on a questionable distinction between government action and government inaction.<sup>45</sup> The due process clause, for example, prevents government from depriving a person of life, liberty or property without due process of law.<sup>46</sup> If a police officer stands by and does nothing while a severe beating occurs, the government effectively has deprived the victim of his or her liberty. The equal protection clause prevents the government from denying any person equal protection of the laws.<sup>47</sup> If the government watches blatant racial discrimination and remains actionless, the government has effectively denied the person equal protection. Therefore, government inaction in the face of poverty, which results in harm or even death, can be viewed as a constitutional violation.

Finally, in the realm of minimal entitlements, the argument based on negative liberties confuses rights and remedies. The Constitution's rights almost all can be phrased negatively, but remedies virtually always can be stated affirmatively. For example, a classic statement of a negative right is that the Fourth Amendment generally prohibits searches and seizures without warrants based on probable cause.<sup>48</sup> The remedy, which is an affirmative duty, is that police usually must seek warrants before searches or arrests.<sup>49</sup> The Fifth Amendment prohibits involuntary self-incrimination, again a negative right.<sup>50</sup> The Court has prescribed the affirmative duty of administering *Miranda* warnings as part of the solution.<sup>51</sup> The

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41. *Id.* amends. V, XIV.

42. *Id.* amends. VI, VII.

43. *Id.* amend. VI.

44. *Id.* art. I.

45. For an excellent development of this point, see Bandes, *supra* note 37, at 2279.

46. U.S. CONST. amends. V, XIV.

47. *Id.* amend. XIV.

48. *Id.* amend. IV.

49. *Id.*; see *Weeks v. United States*, 232 U.S. 383 (1914).

50. U.S. CONST. amend. V.

51. *Miranda v. Arizona*, 384 U.S. 436 (1966).

Fourteenth Amendment prohibits government imposed segregation;<sup>52</sup> the courts have mandated desegregation as a remedy.<sup>53</sup>

Similarly, the Court could find that the Constitution forbids the government from ignoring starvation and homelessness in that they constitute deprivations of life and liberty without due process. Notice that this is a negative liberty, a prohibition on what the government may do. The remedy is affirmative: assuring minimal entitlements.

In other words, those who view the Constitution as solely a charter of negative liberties focus on the rights aspect and ignore the remedies. These individuals look at minimum entitlement solely as a remedy and ignore the underlying right. If the whole picture is examined, almost all rights—including the right to be free from the harms of homelessness, lack of medical care, and lack of adequate food—can be stated in negative terms; while virtually all remedies—including minimum entitlements—can be stated in affirmative language.

This, of course, is not a full exposition of reasons why the Constitution should be viewed as containing affirmative duties. There is no doubt, however, that making the case for minimum entitlements will require establishing this step in the argument.

6. *Included among the affirmative duties that should be found in the constitution is the right to basic subsistence: food, shelter, and medical care*

Discussions about a constitutional right to minimum entitlements have focused primarily on this step. One of the major points of this essay is to describe the groundwork that must be set before even reaching this point in the analysis. But this step obviously cannot be ignored. There must be doctrinal arguments as to where in the Constitution a right to subsistence can be found and why it is a proper interpretation of the Constitution to find a guarantee of such entitlements there.

Obviously, a fundamental aspect of the constitutional issue is whether it is appropriate to interpret the Constitution as protecting nontextual rights that are not based on the intent of the framers or long-standing traditions. Conservative jurists and scholars who oppose nontextual rights, such as privacy,<sup>54</sup> certainly will challenge a constitutional right to

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52. U.S. CONST. amend. XIV.

53. See, e.g., *Swann v. Charlotte-Mecklenburg Bd. of Educ.*, 402 U.S. 1 (1971); *Brown v. Board of Educ.*, 347 U.S. 294 (1954).

54. See, e.g., ROBERT H. BORK, *THE TEMPTING OF AMERICA* (1990) (arguing against judicial creation of rights not stated in the text or intended by the framers); Michael H. v. Gerald D., 491 U.S. 110, 127-28 n.6 (1989) (plurality opinion) (Scalia, J.) (arguing that the Court should protect only rights that are supported by tradition stated at the most specific level of abstraction).

minimum entitlements as being unsupported by the Constitution. An ample and impressive literature is already responding to these arguments that shows that the Constitution long has been interpreted to protect nontextual rights and that normatively the Constitution's meaning should not be narrowly confined to what the framers intended or what tradition allowed.<sup>55</sup>

Arguments must be developed as to how the Constitution can be interpreted to create rights to minimum entitlements and why it is desirable to understand the Constitution in this way. Obviously, my goal is not to develop such constitutional arguments. Rather, I want to suggest several approaches that might be used.

Frank Michelman has developed arguments that the equal protection clause can be used for such rights.<sup>56</sup> Charles Black argued that the Ninth Amendment permits judicial protection of such rights and explained that a number of constitutional provisions can be read together to support the conclusion that "there is and of right ought to be, a constitutional justice of livelihood."<sup>57</sup> Black especially emphasizes the language in the Declaration of Independence, the preamble to the Constitution, and Article I that declare the importance of the government's securing the "general welfare."<sup>58</sup>

I would briefly suggest three additional arguments to be considered and developed. One is to resurrect the "privileges or immunities clause" of the Fourteenth Amendment.<sup>59</sup> In its very first case construing this provision, the *Slaughterhouse Cases*<sup>60</sup> in 1873, the Supreme Court construed it so narrowly as to effectively read the clause out of the Constitution.<sup>61</sup> Indeed, never in the entire history of the Fourteenth Amendment has a majority of the Supreme Court used the privileges or immunities clause as a basis for declaring government action unconstitutional.<sup>62</sup>

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55. See, e.g., H. Jefferson Powell, *The Original Understanding of Original Intent*, 98 HARV. L. REV. 885 (1985); Larry G. Simon, *The Authority of the Framers of the Constitution: Can Originalist Interpretation Be Justified?*, 73 CAL. L. REV. 1482 (1985); Jeffrey Shaman, *The Constitution, the Supreme Court, and Creativity*, 9 HASTINGS CONST. L. Q. 257 (1982); Ronald Dworkin, *The Forum of Principle*, 56 N.Y.U. L. REV. 469 (1981). I elaborate my views on the appropriateness of judicial protection of nontextual rights in ERWIN CHEMERINSKY, *INTERPRETING THE CONSTITUTION* (1987).

56. See Michelman, *supra* note 12.

57. Black, *supra* note 1, at 1104.

58. *Id.* at 1105-06.

59. U.S. CONST. amend. XIV.

60. 83 U.S. (16 Wall.) 36 (1873).

61. *Id.* at 78. For an excellent criticism of the decision in *Slaughterhouse*, see Michael J. Gerhardt, *The Ripple Effects of Slaughterhouse: A Critique of a Negative Rights View of the Constitution*, 43 VAND. L. REV. 409 (1990).

62. The closest the Court came to a majority opinion was in *Edwards v. California*, 314 U.S. 160 (1941), when four Justices used the privileges or immunities clause to invalidate a

There is no reason why the Court cannot exhume the privileges or immunities clause. In the *Slaughterhouse Cases*, the Court's very narrow construction of the equal protection clause as only protecting blacks and its restrictive view of the due process clause as not encompassing substantive rights have long been rejected. There is no reason why its incredibly narrow view of the privileges or immunities clause should continue to control. In fact, the Court's reasoning for limiting the privileges or immunities clause already has been totally rejected. The Court based its decision on the premise that the Fourteenth Amendment was not meant to change the relationship between the federal and state governments or to protect rights from state interference.<sup>63</sup> The Court rejected the view that the privileges or immunities clause "was intended as protection to a citizen of a State against the legislative power of his own state."<sup>64</sup> But throughout this century, the Supreme Court repeatedly has used the Fourteenth Amendment to protect rights from state interference, and it is widely accepted that the Amendment does safeguard individual rights from state interference.<sup>65</sup>

Even conservatives have begun to call for a revival of the privileges or immunities clause.<sup>66</sup> There is likely at least one voice for this position already on the Supreme Court. Clarence Thomas, prior to becoming a Supreme Court Justice, argued that the privileges or immunities clause should be used to protect natural rights from government interference.<sup>67</sup>

If the privileges or immunities clause were to become a living part of the Constitution, one could argue that a "privilege" of citizenship is basic subsistence. In fact, conservative scholar Philip Kurland suggested this possibility in a law review article two decades ago.<sup>68</sup> A privilege guaranteed to all would be the essentials needed for life: food, shelter, and medical care.

A second possibility is to use the due process clause, and especially the word "life" found there.<sup>69</sup> Although the term liberty in the clause has been the traditional basis for substantive due process, the protection of

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California law limiting migration of indigent persons into the state. *Id.* at 181, 183-85 (Douglas, J., concurring and Jackson, J., concurring).

63. 83 U.S. at 78.

64. *Id.* at 74.

65. See, e.g., BRUCE ACKERMAN, *WE THE PEOPLE: FOUNDATIONS* (1991) (arguing that the Fourteenth Amendment and Reconstruction fundamentally changed the Constitution and provided federal protection from state government actions).

66. See, e.g., Philip B. Kurland, *The Privileges or Immunities Clause: 'Its Hour Come Round at Last'*, 1972 WASH. U. L.Q. 405.

67. Clarence Thomas, *The Higher Law Background of the Privileges or Immunities Clause*, 12 HARV. J.L. & PUB. POL'Y 63 (1989).

68. Kurland, *supra* note 66, at 420.

69. U.S. CONST. amend. V.

life also can be used. The argument here is straightforward: When the government fails to provide minimum subsistence, the effect is to deny individuals life without due process of law. Even if people do not actually die from the lack of basic necessities, the adverse effects on the quality of life from hunger, homelessness, and a lack of medical care are sufficient to constitute a deprivation within the due process clause. Basic subsistence is the prerequisite for the exercise of all rights.

Another alternative is to emphasize international law as the basis for American constitutional interpretation. Recently, scholars such as Professor Nadine Strossen have argued that the construction of the American Constitution should be influenced by international norms.<sup>70</sup> The United Nations' Universal Declaration of Human Rights expressly declares in Article 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services."<sup>71</sup> An argument can be developed that this provision, and others like it, should be the basis for American constitutional assurance of minimum subsistence.

In developing these arguments one must remember that the task is not to fashion arguments that will persuade the current Court. That is an impossible task. The goal is to develop persuasive constitutional arguments that can gain acceptance over time and convince a future more humane judiciary.

#### 7. *It is the judicial role to declare and enforce such rights*

Although the discussion of the sixth step in the argument considered the judicial role, it is worth carefully separating the two issues. There are two distinct questions: Should the Constitution be understood as assuring a right to minimum entitlements; and, if so, is it the role of the judiciary to declare and enforce such rights? It is possible to answer the former question in the affirmative, but the latter negatively, thus leaving enforcement to the political process.<sup>72</sup>

However, I believe that if the right to minimum entitlements is to exist, judicial action will be needed. As argued above, voluntary legislative solutions are unlikely to be adequate. There are two dimensions to establishing the judicial role in articulating and enforcing the right to basic subsis-

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70. Nadine Strossen, *Recent U.S. and International Judicial Protection of Individual Rights: A Comparative Legal Process Analysis and Proposed Synthesis*, 41 HASTINGS L.J. 805 (1990).

71. United Nations, *Universal Declaration of Human Rights*, in BASIC DOCUMENTS ON HUMAN RIGHTS 26 (Ian Brownlie ed. 1981).

72. See, Lawrence Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 HARV. L. REV. 1212 (1978) (judicial enforcement need not be coterminous with the scope of constitutional norms).

tence. First, it must be shown that it is within the appropriate scope of judicial power to identify and implement such a right. Constitutional rights should not be left to the political process for their enforcement. If there is a constitutional right to food, shelter, and medical care, the courts should be able to enforce it.

Undoubtedly, critics will charge that this type of judicial action is inconsistent with democracy and usurps the prerogatives of the legislature. Opposition to judicial action virtually always makes this argument based on democracy. But as I have argued elsewhere, the proper definition of American democracy includes substantive values and judicial enforcement of these norms is appropriate.<sup>73</sup> Although the legislature has traditionally determined welfare eligibility and benefits, the judiciary has a crucial role once a constitutional right exists.

The other aspect of considering the judicial role is more practical: Is it realistic to imagine the judiciary creating a right to basic entitlements? Would this inevitably place the Court in the role of running the welfare bureaucracy, determining the eligibility and benefit levels for a myriad of programs? What is the content of the right; what must be provided to constitute basic subsistence?

This practical dimension will need to be addressed, though it should be emphasized that creating a right to minimum subsistence need not entail the Court in managing welfare programs. The Court can declare the right to minimum entitlements and leave the legislatures with discretion as to how to assure provision of the benefits. Legislatures might choose a guaranteed annual income, or its cousin, a negative income tax. Or legislatures can choose guaranteed employment with sufficient income, together with assistance programs for those unable to work. Another possibility would be a combination of cash programs and in-kind assistance, such as food stamps and Medicaid. However the government chooses to meet its responsibilities, the judicial role would be in ensuring that the government has acted to assure every person of basic essentials needed for life.

Professor Peter Edelman has suggested that such judicial action could spark legislative solutions.<sup>74</sup> He writes:

Using the courts when the legislature is unresponsive has a value beyond the net benefit achieved in terms of limited relief initially obtained. History suggests that judicial involvement can spark legislative reverberation (and retaliation, to be sure). The Supreme Court's involvement in race cases was surely one of the cornerstones in the foundation that underlay the great civil rights legislation of the 1960s. A declaration from

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73. See, e.g. Erwin Chemerinsky, *Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43, 74-76 (1989); Chemerinsky, *supra* note 55, at 11-24.

74. Edelman, *supra* note 1, at 54-55.



the Court of a right to survival income might evoke a resonating legislative response.<sup>75</sup>

#### CONCLUSION

It is easy to become demoralized when confronted with a very conservative Court that likely will remain that way throughout most of the rest of my life. The temptation is to give up on the idea of using the Constitution for social justice. But such surrender is short-sighted. Arguments that today fall on deaf ears can be the basis for future action.

A constitutional right to minimum entitlements is not going to happen in the foreseeable future. But if it will happen at all, it will result from carefully constructed arguments fully developing each point in the case that needs to be made.

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75. *Id.*

