The Next Century of Our Constitution: Rethinking Our Duty to the Poor

Peter B. Edelman
As we celebrate two centuries of American constitutional history, a concurrent milestone is the half century that has passed since the Supreme Court's "switch in time" finally validated regulatory legislation to protect workers in a variety of ways.¹ Scholars and activists on the right have certainly noticed this concurrent anniversary, and have called for a return to an early twentieth century reading of the Constitution under which constitutional property and contract protection would be read as invalidating much of the modern regulatory apparatus.² Such

¹. West Coast Hotel v. Parrish, 300 U.S. 379 (1937).
². E.g., R. Epstein, Takings: Private Property and the Power of Eminent Domain (1985); B. Siegan, Economic Liberties and the Constitution (1980). Seeing what these scholars propose to use judicial activism to do is almost enough (but not quite) to turn a "liberal" activist into an advocate of judicial restraint. Their constitutional axe would cut a wide swath, including in its path most if not all of the transfer payment programs which this Essay argues are inadequate. E.g., R. Epstein, supra, at 306-29. It should be noted, though, that while the substantive views of the "left" and "right" judicial activists are in polar opposition, they share a curious parallelism of position as to the court's institutional role which perhaps ought to give pause to both. See Newest Judicial Activists Come From the Right, N.Y. Times, Feb. 8, 1987, at E24, col. 4. Other activists of the right are arguing that the Court also erred 50 years ago in interpreting the spending power to strengthen Congress' leverage over the states. A recent report from a Task Force chaired by Assistant Attorney General...
advocates can, of course, take heart because the Court has overruled longstanding doctrines on other occasions. The lesson from a half century of economic policy experience within the constitutional framework created by the Roosevelt Court is, however, if anything, diametrically opposed to the one presently being drawn by the revisionists of the right. Subsequent history teaches that the Roosevelt Court did not go far enough in assuring minimum economic protection for individual citizens.

For all the injustices and inequalities that persist in American society, none is more serious than the continuing poverty of millions in the midst of the greatest affluence any country has ever known. This injustice continues despite a national declaration more than two decades ago of a "War on Poverty." It is therefore appropriate in celebrating our constitutional bicentennial to consider anew the existence of a constitutional right to some form of minimum income.

The question received attention from scholars in the late 1960s and the 1970s, but is worth reexamining because the condition of the poor has deteriorated alarmingly since 1978. It was perhaps arguable then, as Robert Bork in fact did argue, that the poor had done pretty well legislatively and needed no special judicial protection. But what has occurred since demonstrates pointedly the poor's continuing political powerlessness and suggests again the value of considering judicial intervention. Moreover, examination of the scholarly debate with the benefit of some passage of time reveals theoretical approaches not fully explored in the earlier exchanges.

Charles Cooper called for a return to states' rights with an analysis that is conceptually akin to the public-private upheaval which Epstein and Siegan are advocating. Study Urges Fight for States' Power, N.Y. Times, Nov. 9, 1986, at A1, col.1.


5. Charles Black, for example, recently drew on the ninth amendment, the Declaration of Independence, the preamble to the Constitution, and the general welfare clause to argue for a right to "livelihood." Black, Further Reflections on the Constitutional Justice of Livelihood, 86 Colum. L. Rev. 1103 (1986). By contrast, it is instructive to reread Charles Reich's path-breaking article on the subject, written in 1965. At that time the challenge was to break down the prevailing view that welfare in statutory form was merely charity rather than a legislatively created right to which protection of various kinds attached. Only at the end of the article does
The present Supreme Court will surely not adopt the ideas advanced in this Essay. Indeed, this particular Court has essentially already rejected them. But since there is little prospect of early, massive legislative intervention, and assuming that this will remain the situation, the intellectual groundwork for judicial participation should be laid anyway against the day when a more amenable Court is in place.

The argument I make in this Essay is for a constitutional right to a "survival" income, or if that term seems too elementally biological, the idea of a "subsistence" income may communicate my meaning more clearly. I have chosen this terminology to indicate that I am not arguing for a court-ordered end to "poverty." The latter would raise difficult definitional and remedial questions, as the following discussion will show. On the other hand, I do not mean survival in the literal sense of confining the claim to people who will starve or die of exposure without a court order. If there is a societal obligation to assure survival, I believe it is at a more generous level than a bed in a homeless shelter and meals at a soup kitchen. Again, I am talking about subsistence. How one might define it further is discussed more fully in section III below.

It may help to envision the question of subsistence income coming before the Supreme Court when the Court once again has a "liberal" majority, although I would stress that I believe the argument I make is doctrinally justified right now. It might sharpen my argument to suppose as well that the situation of the poor will have deteriorated further by that time because of a continuing increase in unemployment stemming from international competition and automation and because income maintenance payments have lost further ground to inflation, so that an even greater percentage of the population is poor and the poor are even more deeply in poverty.

Hypothesizing a factual situation more desperate than the current predicament makes it easier to argue that there are constitutional rights which have been violated in that the issue will more clearly be that of

Reich consider the idea of entitlement, and even then he merely argues that the poor have as much of a claim on the legislature for subsidy as do other interest groups. Much of the change in legal perspective for which Reich argued has since occurred, making it plausible to advance the argument put forth herein. See Reich, Individual Rights and Social Welfare: The Emerging Legal Issues, 74 YALE L.J. 1245, 1255-56 (1965).

6. See L. Tribe, Constitutional Choices 265 (1985); L. Tribe, Constitutional Law, supra note 3, at 574; Michelman, One View of Rawls, supra note 3, at 966.

basic subsistence and it will be easier to show that the government has
acted impermissibly in the degree to which it has created and perpetu-
ated severe poverty. It also suggests a plausible and legitimizing institu-
tional and political reason why the Court might be willing to intervene in
a matter which otherwise "feels" so legislative in nature. Of course, mere
legislative inactivity creates no basis for judicial intervention unless there
is a constitutional right which has been violated. 8

I hasten to add, and I will argue in detail later, that a judicially
imposed solution—even the partially judicial solution which the idea of a
"survival" income necessarily entails—is a most inadequate way to pro-
cceed. But court intervention becomes essential in the face of a legislative
impasse blocking vindication of the constitutional rights in question.
Such an impasse already exists, and judicial intervention should not have
to wait but would be justified at present, unlikely as such intervention is
in reality.

What is the constitutional argument, in brief?

My basic point is that the past half century has brought us to a need
for a new constitutional era, 9 one presaged by intimations in existing doc-
trine but admittedly a step or more beyond where we have been, an era
which involves judicial recognition of certain affirmative obligations on
the part of the state to its citizens.

8. But once there is a constitutional right involved, there is "a presumption in favor of
the judicial enforceability of constitutional rights ...." L. Tribe, CONSTITUTIONAL CHOICES,
supra note 6, at 111-12, quoting the Court's restatement in Davis v. Passman, 442 U.S. 228,
242 (1979) of its Baker v. Carr, 369 U.S. 186, 217 (1962), decision. The Court continued:
At least in the absence of a textually demonstrable constitutional commitment of an
issue to a coordinate political department, we presume that justiciable constitutional
rights are to be enforced through the courts. And, unless such rights are to become
merely precatory, the class of those litigants who allege that their own constitutional
rights have been violated, and who at the same time have no effective means other
than the judiciary to enforce these rights, must be able to invoke the existing jurisdic-
tion of the courts for the protection of their justiciable constitutional rights.
Tribe also makes the related point that constitutionally recognized rights must be dealt with in
article III courts rather than some other type of tribunal. L. Tribe, CONSTITUTIONAL
CHOICES, supra note 6, at 94 (citing Ng Fung Ho v. White, 259 U.S. 276 (1922)). Not all
authorities agree with the Davis v. Passman formulation. See, e.g., J. Choper, JUDICIAL

9. I take it as a given that our constitutional theory and doctrine have evolved over time
and can continue to evolve. To use Ronald Dworkin's apt distinction, many rights which we
recognize today as part of due process or equal protection were not specifically part of the
framers' "conception" when the fifth and later the fourteenth amendments were promulgated,
but can be appropriately regarded as part of, or consistent with, their "concept." R. Dwor-
kin, TAKING RIGHTS SERIOUSLY 134 (1977). Obviously this position, while widely shared
and implicitly (if not explicitly) endorsed by the Supreme Court for at least the better part of a
century, is not universally shared. Full examination of that debate is beyond the scope of the
purpose of this Essay.
There are two lines of theoretical justification for this: one, that it is an obligation which has been implicit in our constitutional structure all along, or at least since the American polity has had enough resources to share its wealth more equitably; and two, that it is an obligation which has been acquired as a consequence of the government’s historic and continuing complicity in economic arrangements that foreseeably resulted in the current maldistribution. The first is a substantive due process argument; the second is an equal protection theory.

The framers surely did not contemplate any constitutional right to any degree of redistribution, however modest. They thought of themselves as protecting property rights and interests as distributed at the time. Any notion that effective political participation required economic fairness was irrelevant because suffrage was limited to the propertied. Indeed, it is precisely this recognition of the economic and therefore the political realities of the late eighteenth century that underscores why a narrow jurisprudence of original intent is unacceptable and unworkable. The constitutional premises of 1789, even as modified by the post-Civil War amendments, were based on protecting a propertied, wealthy class. That we still have the same governing document without the same original premises is the reason why arguments of the kind made in this Essay can be advanced and ultimately win acceptance.

The Court further compounded the constitutional plight of the dispossessed during the *Lochner* era. An activist conservative Court, by using notions of freedom of contract to strike down state efforts at regulation to protect workers, ensured continued exploitation and gross maldistribution of income.

That the *Lochner* era ended as the country struggled with the consequences of the Great Depression was no accident. By that time, as Laurence Tribe has put it so well, “[n]o longer could it be argued with great conviction that the invisible hand of economics was functioning simultaneously to protect individual rights and produce a social optimum.”

What occurred with the “switch in time” in 1937 was what Bruce Ackerman calls “the constitutional vindication of the activist welfare state.” Whether one’s view is that the Court was rediscovering a view of Congress’ power set forth over a century earlier by Chief Justice John Marshall, or stating a “new constitutional principle,” as Ackerman

11. *L. Tribe, Constitutional Law, supra* note 3, at 446.
would have it, there is no question but that the "switch in time" radically altered the path which the Court had followed for a half a century or more. Either way, the Court was altering the previously perceived balance between state power and individualistic principles in the economic sphere. The Court recognized that the state has the power to take steps to protect individual citizens from economic exploitation.

That declaration by the Court, together with the array of legislation which it invited and the explosion of economic growth following World War II, had enormous positive effects. Still, another half century later, we need to be aware that the hopes associated with the new constitutional balance of the late 1930s have fallen short of fulfillment. One third of a nation ill-housed, ill-clothed, and ill-fed has diminished to one-sixth of a nation, but it is not getting any smaller. Indeed, the fundamental point of this Essay is that we as a nation have not faced up to the existence of this impasse. We have failed to confront this impasse in our national consciousness and therefore in our politics, our legislation, and our constitutional theory and doctrine.

We came out of World War II with a determination that we would never have another Great Depression and a faith, borne out in general over the next twenty-five years, that we could now pursue a path of prosperity. Our sense of inexorable progress was buoyed by the distinct steps taken toward racial justice in the sixties. But the economy has been largely stagnant for a decade and a half, with little growth in real income. If we ever believed the so-called war on poverty of the sixties would end poverty, the numbers should tell us that we lost that particular war a long time ago. The promise of the sixties that progress in vindicating legal rights for blacks would be followed by progress in remedying economic inequities for all was never fulfilled. In its place we hear cries, mostly negative versions of the age-old saying that the poor will always be with us, and the newer, related "wisdom" that government programs do not work.

Economic growth is, of course, critically important. A rising tide does lift all boats—somewhat. Demographics—the reduced number of young people entering the labor force for the next ten years—will help firm up wages at the low end of the labor market. What we have not

Justice Marshall's view of federal power in Wickard v. Filburn, 317 U.S. 111, 120 (1942) (citation omitted): "At the beginning Chief Justice Marshall described the federal commerce power with a breadth never yet exceeded. He made emphatic the embracing and penetrating nature of this power by warning that effective restraints on its exercise must proceed from the political rather than from the judicial processes."

14. Ackerman, supra note 12, at 1056.
faced up to, though, is that the poor will always be with us unless we put additional policies in place. Indeed, I would question whether we really have had the “activist welfare state” to which Ackerman refers. Our faith has been placed primarily in the rising tide theory. This policy has been the major focus of our post-World War II ethos as to how to spread economic prosperity among all our people. But our belief that economic growth can end poverty without accompanying attention to structural and distributional policy should now be recognized as unsupportable.

The public policies that need to be adopted should be promulgated primarily by legislation, for reasons I will elaborate in greater detail later. The question here is whether there is any appropriate role for the Court.

I think there is. The Court has staked out little new economic ground in half a century. Thirty years ago, in response to an evolving sense of injustice (though hardly majoritarian at the time), it broke new ground on racial matters. But it has taken no fundamentally different stance on distributional issues since the late 1930s. The Court’s leap forward in the economic sphere at that time was propelled by a realization that it was ridiculous to keep on saying people had a right to be exploited. State intervention to prevent exploitation was therefore sanctioned.

Half a century later it is palpable that the legislative arrangements of the 1930s, which were first judicially rejected and later approved, have accomplished a great deal but have proved insufficient to end the victimization entirely. Since judicial intervention to permit legislative intervention to alleviate “the misery of underpaid, overburdened, or unemployed workers,” in Laurence Tribe’s phrase, has not sufficiently ameliorated the conditions which were “a product of conscious governmental decisions,” again to use Tribe’s language, the next step is judicial intervention to require legislative intervention. If the purpose of the “switch in time” was to unleash legislative action to improve economic outcomes, it has been only partially successful. A half century of evidence suggests it is time for a new remedial thrust, which declares that government has an affirmative obligation to assure its citizens enough income to subsist, based alternatively on either the very structure of the Constitution as the compact that creates our American community or on government’s action in helping to create the severe poverty that persists amid our affluence.

The constitutional argument is not the end of the discussion in this Essay. Three further points will follow. First, although the Court could

15. L. Tribe, Constitutional Law, supra note 3, at 447.
act, it would be far more desirable if it did not have to. What is required, beyond provision of a base survival income, to deal with poverty in any sense is very complicated and well beyond the capacity of a court to frame, let alone implement. Legislative action would be much more appropriate and, of course, legislators have taken an oath to uphold the Constitution, too. Second, judicial intervention should be pursued even though it cannot produce a complete antipoverty strategy, since legislative action in adequate measure is not foreseeable. Third, and finally, litigators should continue to pursue pieces of relief under state constitutions, to build a record and a climate for both Supreme Court and legislative intervention (as well as for the intrinsic value of the relief obtained in the state courts).

In summary, the purpose of this Essay is to articulate a constitutional framework for thinking about poverty, or at least "survival," which goes beyond a legislative agenda and accompanying strategies. Thus, the purpose is not merely to discuss constitutional theory, but also to examine the symbiotic relationship between the Court and Congress on the issue, and to explore briefly both the relationship between the Court and the states and the relationship between the states themselves. To the extent that there is a constitutional obligation to provide some measure of economic security, it extends, of course, to all who take an oath of office to support and defend the Constitution, so the constitutional arguments herein have implications in that regard as well.

I. The Facts: The Poor Are Getting Poorer

There was, arguably, less reason to search for a constitutional right a decade ago than there is today. The percentage of people who were poor had steadily decreased through the 1960s until 1973 and had remained essentially steady from then until 1978.16 The severe deterioration since provides evidence to support the need for the "survival" idea discussed below and for the necessity of the Court becoming a participant. At the same time, however, examination of the facts will lay the groundwork for another point made later, that a complete antipoverty strategy cannot possibly emanate from a judicial decree.

Over the past eight years there has been a visible and measurable increase in the number of people who are so poor that they have great difficulty in obtaining basic necessities of survival like shelter and food. What is visible, of course, is the increase in the ranks of the homeless and the hungry. In every major city the scores of people sleeping in parks

16. See infra text accompanying notes 30-33.
and on grates have increased. Facilities providing overnight shelter have appeared everywhere, and are often unable to serve all who need a place to sleep. Every television network has repeatedly dramatized, on the news and in documentaries, the increase in hunger. It is evident that the homeless are not merely disturbed people who are not getting appropriate mental health services, but also now include significant numbers of families with children.

The Reagan Administration places the number of homeless people at 250,000 to 350,000, while private advocates argue that the correct number is between 2,000,000 and 3,000,000. The U.S. Conference of Mayors surveyed eighty-three cities and found that the demand for emergency shelter went up 71.3 percent from 1982 to 1983. A 1985 U.S. Conference of Mayors survey of twenty-one cities found that emergency food facilities were unable to meet the demand in fifteen of them. The Food Research and Action Center found that, nationwide, the demand for emergency food supplies went up by twenty percent from 1983 to 1984, a period following the most recent recession. At the end of 1986 the U.S. Conference of Mayors reported that the demand for shelter had increased that year in twenty-five cities by an average of yet another twenty percent.

A. What Is "Poverty"?

The foregoing is, unfortunately, just the tip of the iceberg. To understand more fully the degree of the deterioration, one must begin with an understanding of how poverty is measured. The poverty "line" was established in 1959 by taking the cost of what the United States Department of Agriculture then called the "economy food plan" (itself a lower cost diet than the "minimum standard diet") and multiplying it by three. A few years later the number was indexed to annual changes in

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22. Census and Designation of Poverty and Income: Joint Hearing Before the Subcomm.
the rate of inflation rather than an annual recalculation of the cost of the economy food plan. The level of income necessary to escape poverty was deliberately understated at the start, so, by definition, that understatement was locked in by indexation.

The income measured for purposes of the poverty line is cash, before taxes. Thus, income for poverty-measurement purposes includes cash assistance like Aid to Families with Dependent Children (AFDC) but excludes food stamps, medical assistance, and public housing. For people who work, income is measured before taxes of any kind are paid. Thus, if an income of $8,277 was the "true" poverty boundary for a family of three in 1984, somewhat fewer recipients of food stamps, Medicaid, and other noncash transfers were poor than the official numbers show (and others were still poor, but less so), while more people with jobs were effectively poor than the official numbers show (a family of four

on Census and Population of the Comm. on Post Office and Civil Service, and the Subcomm. on Oversight of the Comm. on Ways and Means, House of Representatives, 98th Cong., 2d Sess. 8, 11, 14 (1984) (testimony of Mollie Orshansky) [hereinafter Joint Hearing on Poverty and Income]. The factor of three was based on surveys by the Bureau of Census done in 1955 which showed that the "economy food plan" would cost approximately one-third of the median household budget for a family of three. Ms. Orshansky testified that "in choosing the lowest food plan that the Agriculture Department had...as in choosing the so-called multiplier that I did and that I got approved, I thought...that it was better to maybe understate the need." Id. at 11.

23. Id. at 15-16. The indexing of the poverty rate to the Consumer Price Index was a compromise made in 1969. At that time, Ms. Orshansky and the head of her group in the Social Security Administration, Mrs. Marion, decided that the poverty line should be raised to compensate for changes in food budget patterns reflected in a 1965 survey conducted by the Census Bureau. They first asked the permission of the Office of Management and Budget and the Council of Economic Advisers and were told, "You can't change it [the poverty line]; it is no longer yours." Id. at 11. The indexing was a compromise.

24. See supra note 22.

25. Even if the original poverty line in 1959 was realistic, its counterpart today is if anything too low, since the costs of shelter, home heating and health care for the poor have increased at rates exceeding the rate of inflation. CENTER ON BUDGET AND POLICY PRIORITIES, supra note 20, at 39; Joint Hearing on Poverty and Income, supra note 22, at 14.


27. Plotnick and Skidmore note that disposable cash income (net income after all taxes) is a more exact measure for two reasons. It would take into consideration tax increases and eliminate inequalities between those who earn taxable income (wages) and those who receive nontaxable income (such as social security benefits). R. Plotnick & F. Skidmore, supra note 26, at 34. However, pretax income was and is used for a good reason—there is no reliable after-tax income series that can presently be used to define poverty statistically. Joint Hearing on Poverty and Income, supra note 22, at 8.

28. The poverty line for a family of four in 1984 was $10,609. STAFF OF HOUSE COMM. ON WAYS AND MEANS, 99TH CONG., 2D SESS., BACKGROUND MATERIAL AND DATA ON PROGRAM WITHIN THE JURISDICTION OF THE COMM. ON WAYS AND MEANS 54 (Comm. Print 1986) [hereinafter Staff of House Ways and Means Comm.].
with one full-time worker and wages at the poverty line was paying a little over ten percent of its income in federal income and payroll taxes in 1984.29 The realities vary by region as well, due to differences in shelter costs. More people are effectively poor than officially so in New York City, while the opposite is the case in Mississippi.

B. Trends in Poverty

From 1959, when the counting of poor people began in the United States, the percentage of Americans who were poor dropped steadily until 1973, from 22.4 percent to 11.1 percent.30 From that year until 1978 the changes were mainly cyclical, reflecting the severe recession of 1974-1975, but ending with a poverty rate of 11.4 percent, not much different from 1973.31 After 1978 the rate began a steady upward trend until it peaked at 15.3 percent in 1983, and then dropped back slightly in 1984 and 1985, ending at fourteen percent.32 The 1985 figure represented 33.1 million people, compared with 24.5 million in 1978 (and 23.1 million in 1973).33 The arithmetic is obvious, but it is nonetheless worth emphasizing that 8.6 million more people were poor in 1985 than in 1978, a thirty-five percent increase.

Further, a major shift has occurred in the composition of the poor, with major decreases occurring in poverty among the elderly and disproportionate increases occurring among the nonelderly. As a consequence of the indexing of Social Security and the enactment of the Supplemen
tal Security Income (SSI) program, the percentage of the elderly who are poor has dropped dramatically, from 35.2 percent in 1959 to 12.4 percent in 1984,34 so that the elderly are now somewhat less poor than the population as a whole (although subgroups of the elderly such as blacks, Hispanics, women, and the very old are still disproportionately poor). By contrast, poverty among families with children, especially single-parent families (which are largely female-headed), has skyrocketed. The child poverty rate has climbed from 13.8 percent in 1969 to twenty percent in

29. CENTER ON BUDGET AND POLICY PRIORITIES, supra note 20, at 33-35. Census data show that in 1983, 2.6 million people were pushed below the poverty line when taxes were taken out of their paychecks. Id.


31. Id.

32. Id.

33. Id.

34. BUREAU OF THE CENSUS, supra note 30, at 21.
In 1959, 26.3 percent of the poor lived in female-headed families; in 1984 the figure was 48.8 percent. Translating this to children, more than half of all poor children live in female-headed families, and more than half of all children in female-headed families are poor. The phrase, the "feminization of poverty," is dramatized by these figures, although that phrase masks the drastic accompanying deterioration in the situation among children.

The poor are getting poorer as well. Nearly two out of five (37.9 percent) persons lived in families with incomes below half the poverty line in 1984, compared to a third in 1980 and less than thirty percent in 1975. This percentage figure, which perhaps sounds a bit abstract, translates to nearly thirteen million people. For a family of four, existing with an income below half the poverty line meant living on less than $5,300 in 1984; for a family of three this meant existing on less than $4,150. The number of families with income below $5,000, adjusted for inflation, rose thirty-nine percent between 1978 and 1984. The median income of two-member and three-member poverty families was approximately two-thirds of the poverty line in 1984. In other words, something like half the poor had incomes of less than 66.7 percent of the poverty line.

Given all these figures, the phenomenon of increased homelessness, now extending to large numbers of families with children, is far more understandable, especially in light of the increasing scarcity of low-income housing and the consequent increase in rents which has far outstripped the general rate of inflation. A constitutional "right to survival" may seem more plausible once the foregoing figures are digested.

C. Why Has Poverty Increased?

Why did these huge increases in poverty among the nonelderly occur? One theory currently receiving a good deal of notoriety is that "welfare" causes poverty, and that if AFDC, food stamps, and other welfare programs were ended, people would stop being dependent on the government, would have to go out and work, and, presumably, would no longer

35. Id.
36. CENTER ON BUDGET AND POLICY PRIORITIES, supra note 20, at 12.
38. CENTER ON BUDGET AND POLICY PRIORITIES, supra note 20, at 15.
39. Id.
40. BUREAU OF THE CENSUS, supra note 30, at 89, 122.
be poor.\textsuperscript{41}

It is important to understand that in its extreme form this argument is nonsense. Welfare is surely a factor which does contribute to chronic dependency among some of its recipients, but chronic welfare recipients represent a minority among the poor and other factors contribute to the persistency of their dependency. There are two major reasons why so many more nonelderly people are poor: problems with the general health of the economy and a deterioration in the real value of transfer payments.

There are fewer jobs available now, relative to the number of people who want to work. Unemployment at the depth of each recession and the peak of each recovery since 1970 has been higher than it was at the previous nadir or zenith. The economy performed admirably in creating new jobs in the 1970s, with the number of people working rising from 82.8 million in 1970 to 106.9 million in 1980.\textsuperscript{42} But there was a huge influx of new workers during the decade, including baby-boomers, women, and immigrants (both legal and illegal). The economy was simply unable to keep up.

Therefore, in April of 1986, in the midst of a recovery, unemployment was still 7.1 percent, a figure representing 8.3 million people. In addition, 1.1 million were counted as so discouraged they have stopped looking for work and 5.9 million were working part-time only because they could not find full-time work.\textsuperscript{43} In total there were not 8.3 million but 15.3 million who were either unemployed or involuntarily underemployed. Not all these people were poor, of course. Many of the 8.3 million were only temporarily between jobs, but 1.1 million had been unemployed over six months.\textsuperscript{44} And, largely due to congressional reductions in the scope of the unemployment compensation system, only 28.7 percent were receiving unemployment compensation in April 1986\textsuperscript{45} as opposed to seventy-five percent during the recession of 1974-1975.\textsuperscript{46}

Given that there are and for some time have been about fifteen million more people who want to work full-time than there are full-time jobs

\textsuperscript{41} See, e.g., C. Murray, Losing Ground (1984).
\textsuperscript{44} Id.
\textsuperscript{45} Hearings Before the Subcomm. on Employment and Housing of the House Comm. on Government Operations, 99th Cong., 2d Sess. 3 (1986) (statement of John Bickerman, Research Director, Center on Budget and Policy Priorities).
\textsuperscript{46} Id.
available, it stands to reason that the number of people who remain on welfare even though they could get a job is relatively small.

The softening of the economy, with the effect it has had in creating a trend of increasing unemployment, is one cause of increasing poverty. The changes in the economy have also brought about an increase in the number of people who work but do not earn enough to get out of poverty. Their numbers now exceed seven million, having increased by more than sixty percent since 1978.\(^4\) Nearly two-thirds of the heads of nonelderly poor families work at some point during the year.\(^4\) Over two million people work full-time year-round and are still poor\(^4\) (with dependents, this figure represents 6.4 million people, or nineteen percent of the poor). The phenomena of increased unemployment and the softening of wages at the low end of the scale are, of course, related to one another. With so much unemployment, employers do not have to bid strenuously to hire unskilled labor. Not surprisingly in light of these facts, the age of entry into the labor force has been creeping upward, and the wages of entry-level workers have deteriorated in their purchasing power.\(^5\) This accentuates poverty among young parents and therefore among children.

Another factor behind the increase in the number of working poor is the erosion of the minimum wage. The last adjustment to it, voted during the Carter years, took effect in January 1981, and has since lost twenty-five percent of its value to inflation. Consequently, any family of two or more which has one wage earner receiving the minimum wage as its sole source of income will be in poverty.\(^5\) Where does welfare fit into all of this? About 10.8 million people are receiving AFDC,\(^5\) the main cash program for families with children. These families typically receive food stamps as well. Between 1970 and 1985 AFDC, which is not indexed for inflation, lost thirty-three percent in real value on the average around the nation.\(^5\) No state—not one—

\(^4\) Center on Budget and Policy Priorities, supra note 20, at 13.
\(^4\) Bureau of the Census, supra note 30, at 28.
\(^4\) Id. at 27.
\(^5\) "Between 1969 and 1983, the ratio of median earnings of males under age 25 to those of males over 25 dropped from 74 percent to 55 percent." The percentage of under 25 year olds in low wage jobs increased from 49 to 64. Lawrence, Sectoral Shifts and the Size of the Middle Class, Brookings Rev., Fall 1984, at 3, 5, 9.
\(^5\) A full-time worker receiving the minimum wage will earn $6,968. The poverty line for a nonelderly two person household in 1985 was $6,983. Bureau of the Census, supra note 37, at 122.
provides benefits which, even when combined with food stamps, get families out of poverty. In 1985 AFDC and food stamps combined brought three-person families with no other income up to sixty-six percent of the poverty line in the median state, with the lowest paying state, Mississippi, paying at forty-four percent of the poverty line. Mississippi's AFDC payment level, taken alone, is at sixteen percent of the poverty line. In Illinois in 1970, AFDC, without food stamps, brought a family of four with no other income up to ninety-two percent of the poverty line; in 1985 Illinois' AFDC payment was at forty percent of the poverty line.

AFDC has not only eroded very substantially in value, it was also reduced in scope by the federal budget cuts of the early 1980s. Nearly half a million families lost their AFDC eligibility at that time. A larger number had their benefits reduced. Particularly damaging was the destruction of the work incentive which had enabled recipients to go to work and nonetheless retain some of their benefits. Previous to the 1981 budget cuts, the first thirty dollars a month of their earnings and one-third of the remainder were not counted in calculating the impact of their earnings on the amount of their benefit. This provision was substantially eliminated in 1981.

Thus the poor have been caught in a pincer. Work is less available and the work that exists is worth less. Cash benefits which supplement earnings from work have been cut, and benefits for those who do not work have been eroded substantially. In 1979 and 1980 the impact of inflation was extremely injurious, and in 1981 through 1983 the recession and the federal budget cuts took over to continue the damage. Throughout this period the working poor were hurt further by payroll tax increases and by federal income taxes becoming applicable to their modestly inflated incomes, even though these tax effects do not show up in the official poverty statistics.

If welfare is not what has caused the increased poverty, there are certainly observers who will allege that it has caused the all-too-real in-

54. Id. at 371-72.
55. Id.
56. Id.
57. Id. The Census Bureau's 1985 poverty line for a three person family was $8,570 or $714 monthly. In 1985, Alabama's monthly maximum for a three person family was $118. For Mississippi, the monthly maximum was $120.
58. Id.
59. Id.
crease in the number of female-headed families and the alarming percentage of the births to unmarried mothers. The problem with that hypothesis is that welfare benefits, as indicated, vary widely across the nation, but the increases in female-headed households and in the percentage of teen births to unmarried mothers are fairly uniform around the country.\(^6\) If young women are having children with the intent or at least the expectation of continuing to be dependent, one would think they would do so at least somewhat more frequently in states with higher welfare payments. They do not.

Perhaps then, the problem is that limited as welfare is, it is more attractive than work, and that causes welfare dependency. Again the facts are otherwise, notwithstanding the erosion of the minimum wage, work remains more attractive than welfare mainly because benefits are so low in most places. Moreover, food stamps remain available to people who work and are still poor. In no state do welfare and food stamps for a family of three exceed the returns on a minimum wage job plus food stamps. And in any of the few places where it is more attractive for a larger family to be on welfare, that is only because the budget cuts of 1981 wiped out the previous work incentive provision, as explained above. There is of course a connection between welfare and work. Benefits can be so high as to constitute a disincentive to work. That, generally speaking, is not the case at the present time.

D. The Incidence of "Persistent" Poverty

Nevertheless, we are becoming aware that "persistent" poverty—a period of poverty lasting at least eight years—is more prevalent than was previously supposed. Data gathered by University of Michigan researchers indicates that at any one time 55.8 percent of the poor in the cohort they have studied are persistently poor.\(^2\) About half the children in the cohort who are poor at any given time are persistently poor, even though they constitute only one-seventh of the children who are poor at some point during the fifteen years for which data on the cohort are now available.\(^3\) How can this be? Imagine eleven poor children. Ten are poor for one year each, consecutively, over ten years, and one is poor all ten years. Only one out of the eleven children who were poor was persistently poor,


\(^{62}\) Bane, Wilson & Young, Poverty and Welfare in America 22 (unpublished paper prepared for New York State Department of Social Services, May 28, 1986).

but half the children who were poor in any given year were persistently poor. And the welfare bill for the persistently poor child will constitute half the total cost of the welfare paid over the decade. This approximately depicts the problem we face, except that many poor children do not even qualify for welfare.

Why so much persistent poverty? Much is due to regional distress. A disproportionate number of the persistently poor live in rural areas and the South. This supports the conclusion that the major reason for persistent poverty is chronic unavailability of work for the adults involved; these are the areas of the nation with the greatest lag in economic development. But other individuals are persistently poor because they do not have the basic skills to perform in jobs. And some are disorganized, disturbed, or developmentally disabled people who are going to have a difficult time functioning in the labor market even if they are given an opportunity. Living in a female-headed family is a major predictor of persistent poverty. Being born into a single-parent family means it is more likely than not that one will experience persistent poverty during childhood.

Some—actually a minority—of the persistently poor live in the inner cities with which they are stereotypically associated. For them the situation is perhaps the most complicated, since there are some economic opportunities not impossibly distant from them, and yet they do not get there. The gravity of the problem is illustrated by the employment figures for blacks sixteen to nineteen years of age, which reflect the situation of the inner city. One is accustomed to reading that black teenage unemployment hovers around forty percent, and that is bad enough. But that implies that six out of ten blacks sixteen to nineteen years of age are working. In fact, the situation is far worse. Over six out of ten black teenagers are not even in the labor force or trying to find work. When the full picture is taken into account, we find that only one in three black teenagers is working as compared to one out of two white teens (in both cases a considerable number are in school). About half of those who do work have part-time jobs, and usually not because they prefer part-time work. Less than twenty percent of blacks aged sixteen to nineteen years have a full-time job. Among adult black males, only fifty-four percent are working according to one study, as opposed to seventy-eight percent.

64. Id. at 45.
of adult white males. Again, the situation of the inner city is reflected in these figures.

The persistent poverty of the inner city is associated with racial isolation, poor schools, terrible housing, rampant drug abuse, and high crime rates, and has produced what might be called, however much one dislikes the phrase, a "culture of poverty." There is certainly chronic dependency here, and too much of it. These "ghetto" residents are the stuff of television documentaries, although the inner city also contains large numbers of people who work extremely hard, often for very low wages. These are neighborhoods where most of the middle class moved out the minute that was possible and left behind a population composed disproportionately of the least stable and the least able. They suffer from the concentration effects of their disproportionate poverty, and their consequent disorganization means that the necessary remedies will have to be complex and sustained.

Thus the poor are not only getting poorer and more plentiful, but for some of them the reverberative effects of the environment in which they are trapped make their situation even more complicated.

E. Conclusion: The Diverse Faces of Poverty

The all-too-prevalent public stereotypes of the poor are the black female unmarried welfare recipient with many children and the black male "hustler" who lives off the welfare checks of the various women whose children he has fathered. That a majority of the poor and a majority of welfare recipients are white, and that less than forty percent of the nonelderly poor receive AFDC or general assistance (state-financed welfare for individuals not eligible for AFDC), are facts which never seem to come across clearly.

There are "shiftless" poor of all races, to be sure. But we need a broader understanding of who is poor and why. A significant number are beyond working age and are disabled and do not receive enough in retirement benefits or other assistance to escape poverty. Many are working and do not earn enough to escape poverty (and have been burdened further by the tax structure). Still others are able-bodied and sufficiently skilled to work but cannot find a job where they live and do not receive enough government assistance to escape poverty. Too many lack skills or suffer discrimination or cannot obtain affordable child care, and

67. CENTER FOR BUDGET AND POLICY PRIORITIES, supra note 20, at 9.
therefore have no job, and, again, receive insufficient government assistance. Some people lack capability. Some lack interest.

To recapitulate: macroeconomic policy and the economy's health, poor schooling, racism and discrimination, inadequate child care services, severely inadequate public benefits, and failures of individual capacity and responsibility are all causes of poverty.

Problems in the economy and deterioration in the public benefit structure have made matters significantly worse since 1978. If anyone thought that the years after World War II finally created a reality of inexorable progress, the past decade shattered that myth. Things are so bad for a large number of the poor that we can say their survival is in question. But if the foregoing lays the basis for an argument for judicial intervention, it also implies that a full antipoverty strategy necessarily involves legislative action.

II. The Right to a "Survival" Income: Where Does It Come From?

Whether there is a "right" to a minimum income and whether it can be found in the Constitution are two different questions. It may be that we can establish a claim on the legislature, based on considerations of moral and political philosophy and economic principles, but that we cannot connect that claim to the Constitution. Consequently, we need to ask the two questions.

A. The Moral Question

Is there a moral "right"? This is the easy question, although it is certainly not without controversy. One does not have to engage in fancy philosophy to prove that, in the present generation, many philosophers who differ with each other on other fundamental matters agree on the basic point that there is a right to enough income to survive.

68. See supra text accompanying notes 38-40.
69. There are, of course, other definitions and applications of the word "rights." One recent commentator on Rawls, for example, points out that "for some universal moral rights the role of the government is incidental or even nonexistent. These rights are strictly between persons." R. MARTIN, RAWLS AND RIGHTS 35 (1985). He gives as an example the moral right not to be lied to.
70. The more controversial questions come when we start grading the importance of the right for purposes of constitutional analysis. John Hart Ely wryly captured the essence of the lack of unanimity when he said, "[W]atch most fundamental-rights theorists start edging toward the door when someone mentions jobs, food, or housing: these are important, sure, but they aren't fundamental." J. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 59 (1980).
Perhaps the most striking expression of fundamental human rights is found in the United Nations' Universal Declaration of Human Rights, particularly Article 25:

Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . .71

This document represents both an extension of traditional liberalism beyond laissez-faire into the realm of positive welfare rights, and a reaction to the highly relativistic, utilitarian thinking of the first part of this century which was incapable even of condemning the evils of Nazism.72 A strong doctrine of human rights was required—one that could not be subordinated to utilitarian concepts of maximized individual interests. The anti-utilitarian nature of human rights is captured by Ronald Dworkin's definition: "If someone has a right to something, then it is wrong for the government to deny it to him even though it would be in the general interest to do so."73

Ratification of a human rights doctrine by a majority of nations, however, does not in itself prove the existence of those rights.74 Philosophers of fundamental human rights generally derive their position by relying on one of four grounds: intuition, convention, the social contract, or the positing of conditions necessary for human self-realization.75

The intuitive approach that all individuals possess self-evident inalienable rights is easily used to justify a right to a survival income, but only until someone else intuitively asserts the opposite.

Under the conventional morality approach, voluntary customs, accepted and institutionalized to the point where individuals come to rely on their existence, eventually develop into socially recognized moral rights. Thus, legislated or voluntary social welfare benefits could, at some point, develop into rights. This theory puts the judge in the position of wise philosopher who has the duty of sifting through majoritarian culture to determine its moral principles.76 Critics charge that society is

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73. R. Dworkin, supra note 9, at 269.
74. The Universal Declaration of Human Rights was adopted by the General Assembly of the United Nations with no dissenting votes. Pennock, Rights, supra note 72, at 5.
75. E.g., A. Gewirth, Human Rights 198 (1982); Pennock, Rights, supra note 72, at 10-12.
too diverse to share normative moral principles\textsuperscript{77} and that such a doctrine of rights is too value-laden by societal theories of worth, domination, and prejudice to be valid.\textsuperscript{78} But proponents respond that no method will allow us to start outside the existing social order; the best we can do is to make reasoned choices with the knowledge we have.\textsuperscript{79}

The contract approach to fundamental human rights asks what would people expect to gain when they give up the unbridled freedom of the "state of nature"? What level of protection would be the \textit{quid pro quo} for their agreeing to forgo behavior not punishable in the pre-governmental state? Whatever that minimum is, the poorest of the poor in America have gotten such a raw deal as to constitute the bad end of any bargain their forebears made. It is hard to argue, short of blaming them for their own situation, that "they" would have voluntarily entered into a social contract that would leave them as destitute and desperate as this one has.\textsuperscript{80}

John Rawls argues that people in the "original position," not knowing what is in store for them individually, would choose an equal distribution of basic goods such as food and income.\textsuperscript{81} Rawls' seminal work has spawned a veritable cottage industry of critics and commentators,\textsuperscript{82}

\textsuperscript{77} Id. at 1068.
\textsuperscript{78} Harry Wellington, an advocate of the conventional morality approach to fundamental rights, captured this point: "The major difficulty for the official charged with the task of determining how the [conventional] moral principles bear in a particular case is in disengaging himself from contemporary prejudices which are easily confused with moral principles." Wellington, \textit{Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication}, 83 \textit{Yale L.J.} 221, 248 (1973).
\textsuperscript{80} John Locke wrote that rational men would enter society only if they could anticipate that it would be to their benefit.

But though men when they enter into society give up the equality, liberty and executive power they had in the state of Nature into the hands of society \ldots yet it being only with an intention in every one the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse).

\textit{Concerning Civil Government, Second Essay, Ch. IX, Sec. 131 in 35 Great Books of the Western World 54 (R. Hutchins ed. 1952).}
\textsuperscript{81} J. Rawls, \textit{A Theory of Justice} 19, 141-42 (1971). The "original position" is Rawls' hypothetical first meeting of citizens of a yet to be formed polity. In this meeting, these citizens decide what sort of government on which they will agree. Rawls hypothesizes that if men and women with ordinary talents, ambitions, and ideas are in ignorance of their own traits, as if behind a veil, and if they act rationally and in their own self-interest, they will choose to form a government based on Rawls' principles of justice.

\textsuperscript{82} Among the most prominent scholars with sharply differing views are: B. Barry, \textit{The Liberal Theory of Justice} (1973); C. Fried, \textit{Right and Wrong} (1978); R. Nozick, \textit{Anarchy, State, and Utopia} (1974). For other criticism of Rawls' views, see
some of whom take the plausible position that people "behind the veil," in making the choice which they believe will maximize the general welfare, will not choose an equal distribution of income or even a guaranteed minimum but an approach without insurance. In this view, the prediction of people while behind the veil is, in effect, that someone else will be poor.

The contract approach is criticized for its air of unreality. Michael Sandel, for example, argues that the idea of choice behind the veil has no meaning because people have no preferences outside of some community in which they live and function. And the idea of an individual existence antecedent to and separate from the society has deeply troubled a number of "progressive" thinkers.

Paul Brest has stated it well:

If consent is a heuristic metaphor that allows theorists to speculate about what people under certain circumstances might have consented to, one faces the problem that different philosophers have found hypothetical consent for schemes ranging from Hobbes's monarchy to Locke's democratic minimal state to Rawls's welfare state... Consent may get you in the right ballpark, but once there it cannot distinguish among blades of grass.

A final approach defines human rights as those conditions necessary for human self-realization. Alan Gewirth argues that since all humans share the same physical need for basic shelter, food, and clothing as a necessary condition for human action, all humans therefore have a logical claim and a right to such objects. Thus if A lacks food and the group has such a surplus of food that their own basic needs are met and they are able to transfer some food to A, then A has a right to have food.

The roots of this "needs" approach go deep into Western thought. Aristotle recognized the right of the disabled to a share of the communal surplus:

For there is a law that anyone with property of less than three minae who suffers from a physical disability which prevents his undertaking any employment should come before the [council], and if his claim is approved he should receive two obols a day subsistence from public


84. E.g., Lasch, Individualism, Community, and Public Conversation 4-7 (address delivered in Cedar Rapids, Iowa, Apr. 25, 1985).

85. Brest, supra note 76, at 1101-02 (emphasis in original).

86. A. Gewirth, supra note 75, at 198.

87. Id. at 203.
funds.88

In times of plenty or when there was bounty from a conquest, the Romans distributed free food to their poor.89 John Locke approved private appropriation of property through an investment of one's labor, but only so long as there be "enough, and as good, left in common for others."90 Even Nozick recognizes the right to survival embodied in the Lockean proviso when he condemns cases "where someone appropriates the total supply of something necessary for life."91

Whether one believes that fundamental rights can be intuited, derived from conventional norms, the subject of a just contract, or logically deducible from human needs, there is ample ground to conclude that human beings have a moral right to a survival income. Unanimity on what it means to be human is not necessary in order to agree that positive human rights, such as those embodied in the Universal Declaration of Human Rights, are so fundamental as to be just.

We could go further, of course, but it suffices to say that there is a respectable case for a moral right to some kind of a minimum income.

B. The Constitutional Question: The View From This Side of the Rubicon

We must now address the even harder question. Can we find a right to minimum income in the Constitution? Those who reject the idea at the moral level will probably go no further, although it is certainly possible that one who rejects the idea of a moral requirement might still find it to be constitutionally required, on positivistic grounds. And many who accept the notion of a moral obligation do not agree that it is embodied in the Constitution.

I am hardly writing on a clean slate. For example, Judge Richard Posner recently wrote that "the 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."92

This position is also represented in a recent brief essay by then-Judge Antonin Scalia. He wrote that "the moral precepts of distributive justice . . . surely fall within the broad middle range of moral values that may be embodied in law but need not be. It is impossible to say," he

91. R. NOZICK, supra note 82, at 179.
92. Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982).
continued, "that our constitutional traditions mandate the legal imposition of even so basic a precept of distributive justice as providing food to the destitute."^{93}

Surely fall within the middle range? Impossible to say? Why surely? Why impossible? That is Scalia's view. Others say differently, and defend their position with elaborate philosophical justifications. It depends on one's view as to the basic obligations of government and their inclusion in the Constitution. But Scalia is now in a position to have his view on the subject count more heavily.

So those who insist on narrow devotion to original intent will not be convinced. But then I think our constitutional history proves them wrong in any case.^{94} The Constitution has acquired new meaning as times have changed, and properly so.

Frank Michelman has done perhaps the most extensive theoretical work on the question, explicating Rawls to infer that a constitutional convention would provide an income guarantee at least on the basis of "insurance rights" if not offering a straight Rawlsian theory of the distribution of "social primary goods."^{95} Michelman also reasons that judicial review would be appropriately viewed as extending to enforcement of the right.^{96}

Michelman seems uncomfortable with the idea that an income guarantee inheres in our actual American Constitution viewed as a clean slate, prior to or absent any initial legislative implementation. He makes no argument that a poverty-bound class of Americans could approach a court with a copy of the Constitution and ask for an order that a check be written. After discussing his hypothetical constitutional convention, Michelman turns to judicial review on the assumption that the legislature has already done something which the plaintiffs are challenging as inadequate or involving arbitrary classifications, and makes his argument for

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^{93} Scalia, Scalia Speaks, Wash. Post, June 22, 1986, at C2, col. 1 (emphasis in original). Like Scalia, Epstein stresses that his constitutional view "does not imply . . . there is no moral case for helping those who are in need." But he argues that government has very little power to help. R. Epstein, supra note 2, at 319.

^{94} The free market libertarians, see supra note 2, are in fact helpful here. They, of course, reject "the flawed moral arguments of liberal judicial activists," but they also reject "the jurisprudence of the New Right" for "condemning the resort to morality altogether." Their position is that everything we know about history draws "conscientious interpreters toward, and not away from, morality" in understanding the Constitution. Macedo, How Should Judges Protect Liberty?, in Cato Policy Report 6 (1987).

^{95} Michelman, One View of Rawls, supra note 3, at 966-67, 1001-03. By "insurance rights," Michelman means "a right to provision for a certain need—on the order of shelter, education, medical care—as and when it accrues." Id. at 966.

^{96} Id. at 991-97, 1003-19.
judicial action in that context.  

This is understandable. One Rubicon in American constitutional law, as Judge Posner's comment illustrates, has been the idea of inferring affirmative rights to invoke state action. Our constitutional rights are primarily negative, involving protection against state action rather than any state obligation to "provide."  

It is time we crossed that Rubicon, and I think it justifiable doctrinally to do so. I say this reluctantly because, as I have indicated and will discuss in more detail later, the primary public policy impetus regarding poverty has to be legislative. And I certainly do not advocate going much beyond the other side of the divide in terms of what I would have the courts do. But we have come to a legislative impasse on the problem of poverty that the poor are powerless to break, so if there is a justifiable constitutional claim it should be vindicated.

In that regard I want to explore two ideas, which I introduced earlier. One idea is that there is a fundamental right to enough income to survive. This is, for lack of a better term, a substantive due process argument. If there are certain fundamental rights with which the government cannot interfere, and if these rights are guaranteed under the due process clauses, then, if the right to subsist is fundamental and if failure to assure subsistence constitutes interference with the right, the right to governmental assistance in order to "survive" can properly be termed one of substantive due process. The other idea is that government has been guilty of complicity in the persisting poverty. This is an equal protection argument. If government policy has created conditions which have helped some to prosper mightily and left others in a state of total and absolute deprivation, it has denied the latter the equal protection of the laws, and steps must be taken to remedy that denial.

97. Id.

98. Cf. Tribe, The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependency, 99 Harv. L. Rev. 330 (1985) ("[T]he rights protected by the United States Constitution... are... usually understood... to impose on government only a duty to refrain from certain injurious actions, rather than an affirmative obligation to direct energy or resources to meet another's needs.").

99. This notion of fundamental rights goes back at least to Meyer v. Nebraska, 262 U.S. 390 (1923) (holding that the liberty guaranteed by the due process clause prohibits state laws forbidding the teaching of foreign languages in grammar schools).

100. The preamble to the Constitution states the framers' undertaking to "establish Justice, insure domestic Tranquility, ... promote the general Welfare, and secure the Blessings of Liberty..." While these phrases have not acquired legal significance in the way that the due process clauses and others have, they support the idea that the Constitution is not simply a set of negative guarantees against governmental overreaching but contains affirmative undertakings that are fundamental to the establishment of a community within a constitutional framework.
C. Substantive Due Process

(1) The Roosevelt Court: The Unfinished Agenda

What the Roosevelt Court was doing a half century ago with the "switch in time" is intimately related to the subject of this Essay. The Court was concerned with aspects of subsistence and survival as we are here. Millions of workers were being exploited by low wages and unsafe working conditions. The Court can be said to have been making a bet: if it stepped out of the way and allowed Congress and the states to legislate the minimum wage and other protection for workers, the ensuing outcomes together with the economy's recovery from the Depression would result in achievement of an acceptable minimum level of economic security for all Americans. As we approach the golden anniversary of the "switch in time," the moment seems especially auspicious to examine what it has accomplished and what should be done next, particularly because it, too, occurred about a half century after the adoption of the laissez-faire doctrine it supplanted.

West Coast Hotel v. Parrish 101 and its progeny involved two dimensions of change, one a reassessment of the balance between the state and the individual on economic matters and the other a reassessment of the balance between legislative bodies and the courts on such matters. The Court was saying, first, that the state would not be violating individuals' rights if it enacted legislation to protect their economic status in various ways, and, second, that it would presume the validity of laws falling in that category. That these twin reassessments were confined to economic matters was quickly confirmed by subsequent history. Beginning with footnote four of United States v. Carolene Products Co., 102 the Court made clear that in matters involving personal liberties and "discrete and insular minorities" it was signalling neither greater state power over individuals and groups nor greater judicial restraint in assessing the validity of laws in those categories.

Mainstream constitutional scholarship has treated West Coast Hotel as the Court awakening from a half century-long crazed binge and finally ending its narrow-minded, decades-long sojourn in the pockets of the captains of industry. Ackerman calls this position the "myth of rediscovery." 103 Chief Justice John Marshall, to be sure, had articulated a far greater respect for Congress' handiwork (although not for that of state legislatures) than the pre-1937 Court had evidenced, so in that sense the

102. 304 U.S. 144, 152 n.4 (1938).
103. Ackerman, supra note 12, at 1052.
Roosevelt Court was returning to a position for which there was historical precedent.

But the circumstances of 1937 were a far cry from those Marshall was addressing. We really have no idea where he would have stood on legislation like the Fair Labor Standards Act or the National Labor Relations Act. The bet which the 1937 Court made was brand new. The idea that legislatures left to their own devices would provide adequate economic protection for individual citizens if the Court would just stay out of the way was a new one. The framework of the bet was conservative in that the Court would assume a passive stance, allowing change to happen by leaving legislative decisions alone. But the idea was radical: a new formulation of the separation of powers for the purpose of enhancing the autonomy and power of individual citizens.

There was no need to frame the issue as one of the fundamental right of citizens to subsist. The language of permissible economic regulation sufficed. Underlying the framework of regulation, though, was the issue before us here. Assuring subsistence can be seen as the other side of the coin of preventing exploitation.

Ackerman, as I said before, refers to this as the legitimation of the activist welfare state. He is right that the Court legitimized the welfare state, but he is wrong if he means to imply that in practice the promise of an activist government in assuring economic security has been fulfilled. Actual implementation of the authority thereby given has been very spotty. For the elderly the promise has largely been kept, although not until the sixties and seventies even for them. For everybody else it has not. There have been improvements, in the sense of food stamps, Medicaid, Head Start, and a few other items, but there are gaping holes left, as described in detail earlier. So the implementation was limited, although the idea was certainly far reaching.

Moreover, in overruling *Lochner*, the Court did not outlaw “Lochnerizing,” to use Tribe’s clever construct. It certainly stated that phony notions of freedom of contract were not protected, but it did not overrule *Meyer v. Nebraska* and *Pierce v. Society of Sisters*, in which the Court had recognized other fundamental rights as protected from state intervention. As one observer has said, the Court’s real objection was that *Lochner* “generally selected the wrong values for

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105. 262 U.S. 390 (1923) (striking down state statute prohibiting instruction in a foreign language in any school prior the ninth grade).
106. 268 U.S. 510 (1925) (striking down a state statute mandating that students attend public as opposed to private schools).
In recent years fundamental rights inferred from the values underlying the due process and equal protection clauses have been recognized with considerable frequency. This is important to my argument for two reasons. One is the simple point that there are constitutional rights which arise by giving contemporaneous content to broad words and phrases in the Constitution, as opposed to the specific, narrow text interpreted as a matter of original intent. The broader point is that many of the fundamental rights that have been recognized relate to family and personhood, and these are interests which are as deeply jeopardized by poverty as by any threat or sanction. The cases so far go only to the water's edge, striking down state interference with the fundamental right in question, while I want to require the state to go a large step further and force intervention to protect these rights. But I want to emphasize that we are already at the water's edge.

The Court has lost the bet it made in 1937. Legislatures left to their own devices have not provided adequate economic protection for individual citizens. If the Court made a new bet now, it would, of course, be quite different institutionally from the previous one. It would involve telling legislatures that they must do better than they have done instead of saying they may intervene, and it would entail action by the Court rather than approving legislation already enacted. But a broader view of the underlying reality places such action in a framework that is consistent with what the Court did in 1937; the Court would be addressing one aspect of the role of the state in framing the boundaries of economic relationships among private parties.

It was legitimate to stop short in 1937. The Court has ordinarily stopped short in all contexts for a variety of reasons that we might call institutional economy. When it has seen that a further remedy was


108. E.g., Griswold v. Connecticut, 381 U.S. 479, 486 (1965) (invalidating prohibition on contraception as violating "a right of privacy older than the Bill of Rights"); Roe v. Wade, 410 U.S. 113, 153 (1973) (invalidating prohibition on abortion as violating a "right of privacy . . . founded in the fourteenth amendment's concept of personal liberty"); Moore v. City of East Cleveland, 431 U.S. 494, 503 (1977) (invalidating limitation on dwelling occupancy to narrowly defined families as violating "appropriate limits on substantive due process" which protect "the sanctity of the family"); Zablocki v. Redhail, 434 U.S. 374, 381, 387 (1978) (invalidating on equal protection grounds a prohibition on marriage by people with child support obligations without court permission as interfering "directly and substantially with the right to marry," which is "a fundamental right"); see Westen, The Empty Idea of Equality, 95 Harv. L. Rev. 537 (1982).

109. See infra notes 127-174 and accompanying text.
needed and appropriate, it has provided that remedy. The Court originally thought that legislatures, unleashed, would do what was necessary. What was not foreseeable was that even though the Depression would end and general prosperity would ensue, there would still be significant poverty—big enough to be very distressing but too small to be an effective base from which to demand an adequate legislative response.

(2) Legitimizing the Right: Ackerman’s Notion of Structural Amendment

We have seen that there is a strong philosophical case for a right to a minimum income. If the Court were to act toward redress of the imperfections in the denouement of the 1937 revolution by decreeing a new relationship between the individual and the state in the area of economics and poverty, it would constitutionalize that right, by holding that the due process clauses encompass a legal obligation on the part of government to ensure that membership in society is not denuded of meaning by abject poverty.

It would be considerably harder than it was in 1937 to use Ackerman’s myth of rediscovery in order to place this in a justifiable historical context. One possible way to explain and legitimize what would be taking place would be as an example of Ackerman’s “structural amendment” of the Constitution: when all three branches join in actions which alter the previous constitutional understanding, it is appropriate to view what has occurred as effectively being an amendment to the Constitution.110

The “switch in time,” in this view, is a situation in which Congress and the Executive in effect proposed a constitutional change and the Court “ratified” it. The “switch in time” is not the only example of this. Brown v. Board of Education111 can be seen as another. While scholars have argued that Brown represents a correct interpretation of the history of the fourteenth Amendment,112 Ackerman takes the position that the history of that clause is less clear than one would like,113 making it plausible to argue that history provides no more justification for Brown than for Plessy v. Ferguson.114 Thus, Ackerman says, perhaps a better way to justify Brown is as a “structural amendment” on which all three branches

110. Ackerman, supra note 12, at 1055-56.
113. Ackerman, supra note 12, at 1063-69; see also G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, CONSTITUTIONAL LAW 463 (1986).
114. 163 U.S. 537 (1896).
came to agree, albeit in a different institutional order from *West Coast Hotel*.

The *Brown* analogy is important in two respects. First, a critic of this argument might point out that in *West Coast Hotel* Congress had acted first, so that the "structural amendment" of the Constitution there involved Supreme Court "ratification" of Congress' proposed "amendment," while the proposal I am advocating involves the Court taking the initiative. *Brown*, unlike *West Coast Hotel*, did involve the Court acting first. It might well be said, in fact, that the "structural amendment" process in *Brown* was not complete until Congress joined by enacting the Civil Rights Act of 1964 and the Voting Rights Act of 1965. So *Brown* was a case, like the one before us, where the Court saw a political and legislative impasse regarding very basic and important rights, and decided to initiate a process of constitutional change. Moreover, our case is easier than *Brown* in the respect, so important to Michelman,¹¹⁵ that Congress and the states have been legislating with regard to income transfer programs for decades, so that the Court, while escalating the dialogue, would not be initiating it.

The other relevant point raised by *Brown* concerns the role and obligation of the state. Michael Seidman argues that *Brown* accentuates the state's obligation to intervene affirmatively "to prevent the perpetuation of entrenched hierarchies," adding that *Marsh v. Alabama*,¹¹⁶ which held that government "has an affirmative obligation to prevent private corporations from interfering with freedom of speech," is in the same "alternative tradition."¹¹⁷ I shall return to this point shortly.¹¹⁸

(3) Who Decides? Is This An Issue for the Courts?

There is a companion issue here, which I have mentioned in passing. While there may be a right here, even one which members of Congress and state legislatures have a constitutional obligation to vindicate, is it one a court can properly address? This is the question of who decides.

In part this is a question of whether a court has the capacity, or even the assigned responsibility in our structure, to decide how much is enough. In *Spheres of Justice*, Michael Walzer raises this issue in "the case of physical security in a modern American city," and concludes that "how much less" than "absolute security . . . can only be decided politi-

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¹¹⁸. See infra notes 161-64, 173-74 and accompanying text.
In another essay, Walzer specifically expresses doubts, on separation of powers grounds, about Michelman's argument for a judicially declared right to welfare. If rights are really at issue," he says, "there must be a right answer," and a court has no way to know what distribution of income to choose.

This problem is one reason why I propose a "lowest common denominator" judicial remedy, which I will discuss in detail in section III. While there is precedent for the Court going quite far in fashioning a remedy once it finds a violation of constitutional rights, Walzer correctly notes that it makes us uncomfortable to have the Court drawing lines in realms that seem political.

Nonetheless, I think Walzer oversimplifies. He himself reminds us of Rousseau's admonition that the people must be "a true people, a community" in order for us to ensure that they will "will the common good." And he warns that the people should have the "right to act wrongly" only if their action "does not preclude future democratic action within the area." My point is precisely that these features are not present when it comes to poverty in America. The very wealth that has been achieved for eighty-five percent of us means that we are, sad to say, not a "true people" as to the poor and that there is no prospect of "future democratic action" to eliminate poverty.

121. Id. at 392.
122. E.g., Milliken v. Bradley, 433 U.S. 267, 279 (1977) ("federal courts can order remedial education programs as part of a school desegregation decree").
123. Walzer, supra note 120, at 384.
124. Id. at 385.
125. See Ackerman, Beyond Carolene Products, 98 HARV. L. REV. 713, 740-46 (1985) (constitutional protection of "insular minorities" remains largely ineffective against existing political realities). J. Kenneth Galbraith makes a similar point. He calls contemporary American poverty, which afflicts a minority, the new poverty, and contrasts it with the old poverty, which reflected a general situation of misery. J. GALBRAITH, THE AFFLUENT SOCIETY 245 (3d ed. 1976). Michael Harrington picks up the point, noting that the poverty of the thirties and earlier represented "the condition of life of an entire society," in contrast to today's poor who are "the first minority poor in history, the first poor not to be seen, the first poor whom the politicians could leave alone." M. HARRINGTON, THE OTHER AMERICA 8, 10 (rev. ed. 1971). Galbraith, too, discusses the political consequences:

As a result, the modern liberal politician regularly aligns himself not with the poverty-ridden members of the community but with the far more numerous people who enjoy the far more affluent income of (say) the modern trade union member or the intellectual. . . . Reform now concerns itself with the needs of people who are relatively well-to-do—whether the comparison be with their own past or with those who are really at the bottom of the income ladder.

In consequence, a notable feature of efforts to help the very poor is their absence of any very great political appeal.
Thus when Ely argues for a "representation-reinforcing orientation" as the touchstone for determining when to afford judicial review, our case would seem directly on point. He might be able to argue, to his own satisfaction anyway, that other aspects of "fundamental rights" should be kept out of the courts because of the political prowess of their proponents. But—if there is a constitutional right to a "survival" income—the poor have no political power to obtain a remedy legislatively, and the courts should see no barrier on separation-of-powers grounds to their getting involved. Moreover, Walzer's framing the criterion for judicial involvement in terms of whether a "right answer" can be found represents the snare of the well-turned phrase. Where was it written that single-celling is what the Constitution mandates in prisons? That a particular level or degree of training and service is what makes a school for the mentally retarded pass constitutional muster? There is no "right answer." Yet the courts have entered the field and issued decrees.

(4) Standing at the Water's Edge: Strands of Support in Existing Doctrine

This, then, is my first constitutional argument: The framework and structure of our Constitution implicitly create affirmative obligations for government in a democratic society, among them an obligation to provide basic food and shelter.

It should be noted again that this is neither an argument based on a call for significant redistribution nor one based on a demand for income at a level of adequacy—say, half the median income—which could raise serious issues about substantial destruction of incentives of those paying taxes or sufficiency of national resources. There is no intention here of a broad scale attack on wealth; we are only discussing subsistence.

There are strands of doctrine, in addition to the Court's repeated actions to support family life mentioned earlier, which suggest that the Court has taken a number of paths to the water's edge in expressing a solicitude for and even protection of the poor. No decision states an affirmative obligation to "provide." Yet a substantial number evince a sig-

126. J. ELY, supra note 70, at 101-02.
127. Cf. Michelson, One View of Rawls, supra note 3, at 966 (noting that although Rawls can be used to support the idea of a right to a fixed or calculable rate income, it is the right to shelter, education and medical care—the "insurance right"—that is "susceptible of convincing recognition and enforcement").

J. GALBRAITH, supra, at 249-50. There is an irony here, of course. For, as the nation acquired the capacity to remedy the misery of the poor by virtue of an affluence that shrank the percentage of those who are poor to a relatively small minority, it lost the political will to do so. When the poor represented a larger percentage of the vote, they had more power. This point buttresses the observation that there is a legislative impasse regarding further assistance to the poor which makes judicial intervention more appropriate.
significant concern for the poor and mandate extra sensitivity on the state’s part in dealing with them. In the area of education the cases go beyond the water’s edge even if not all the way to the opposite shore.\textsuperscript{128}

a. Education

The strongest strand of doctrine supporting the idea that government has some affirmative obligations to meet basic needs derives from the Court’s handling of education. Here the Court has arguably gone past the water’s edge. Even as it refused to invalidate Texas’ system of school finance in \textit{San Antonio Independent School District v. Rodriguez,}\textsuperscript{129} and even as it found that education is neither an “explicitly” nor an “implicitly” protected right under the Constitution,\textsuperscript{130} it noted that “some identifiable quantum of education”\textsuperscript{131} might be required. In an intriguing footnote, the Court indicated that imposition of a tuition charge for public education would present a “far more compelling” case than the facts presented.\textsuperscript{132}

If what Justice Powell had in mind in the footnote was a tuition charge covering the full cost of education, the economic effect would be the same as abolishing public education altogether. If there were no public education, those with sufficient resources would purchase it in the private market, and the poor would receive no education. If the state were to provide “public” education by charging a market price for it, the poor would be affected in precisely the same way; they would get no education. If the Supreme Court believes this is unacceptable, it follows that abolition of public education without making provision for the poor would be equally unacceptable.

On the other hand, perhaps all Justice Powell had in mind was a partial tuition involving continuing public subsidy of the remainder of the cost, but with the tuition set at a level high enough to exclude the poor. Even so, if education is fundamental enough that a fee charged for it cannot be set at a level which excludes the poor, it is not at all clear why it is not fundamental enough for the state to be required to provide it to the poor regardless of whether tax dollars subsidize it for the rich. How can anyone participate effectively in America’s democratic processes or the economy without some minimum amount of education?

\textsuperscript{128} Cf. Tribe, \textit{supra} note 98, at 334 (arguing that the government is not free to leave distribution of all goods and services to the open market; access to certain things, such as the franchise and education, must be protected).

\textsuperscript{129} 411 U.S. 1 (1973).

\textsuperscript{130} \textit{Id.} at 35.

\textsuperscript{131} \textit{Id.} at 36.

\textsuperscript{132} \textit{Id.} at 25 n.60.
Whatever the situation was in 1787, in 1987 education is essential for everyone.

Notice, by contrast, what the analysis would be with regard to, say, the municipal opera. Even if the state subsidized the opera and also charged an admission fee effectively excluding the poor, it is unlikely that any constitutional problem would be presented. As limited an interest as education was in the Rodriguez Court’s view, it was clearly more fundamental than the interest in attending the opera. Indeed, charging a fare to ride the municipal bus may pose a barrier to some poor people, and riding the bus is far more essential than going to the opera. Yet bus fares which burden some poor people would probably not be unconstitutional, even under my “survival” theory. The tuition footnote tells us that education is different, different enough, perhaps, that some modicum of it must now be provided to those who cannot afford to purchase it. And if there is a right to some minimum amount of education from the state, at least for those who cannot afford to buy it, a right to some minimum amount of income would arguably follow. If education is fundamental to participation in a democratic society, surely a “bare minimum” income is at least as fundamental. People who are literally struggling to find enough to eat are highly unlikely to participate in the political process.133

Rodriguez is important in two other respects. First, the Court stressed that the case before it did not represent “an absolute deprivation of the desired benefit.”134 In Plyler v. Doe135 it struck down a denial of public education to certain alien children, concluding that this was a case which did constitute an impermissible absolute deprivation. While Plyler and the comment in Rodriguez refer to situations in which education is being provided to others, the further point is that there is something especially important about education.136 The obvious question is, if poor

133. I am well aware that even Justice Thurgood Marshall in his Rodriguez dissent said that “insufficient food . . . [and] inadequate housing . . . have never been considered to bear the same direct and immediate relationship to . . . our political processes as education has long been recognized to bear.” Id. at 115 n.74 (Marshall, J., dissenting). With all respect, I would say that Justice Marshall did not focus fully on the real-life consequences of severe poverty. Perhaps an empirical study of the political participation of the poorest of the poor would help win Justice Marshall’s vote the next time.

134. Id. at 23.


136. While paying obeisance to its Rodriguez holding that education is not a fundamental right, the Plyler Court went to some lengths to stress the distinctive nature of education, citing its “importance . . . in maintaining our basic institutions” and its “fundamental role in maintaining the fabric of our society,” commenting that “education provides the basic tools by which individuals might lead economically productive lives to the benefit of us all,” and quoting from earlier cases in which it had placed similar emphasis on the supreme importance of education. Id. at 221-23.
or vulnerable children cannot be absolutely deprived of education when it is provided to others, why can they be absolutely deprived when it is not?137 What has happened to some of the poor in America can surely be viewed as absolute deprivation. Why must others be receiving a benefit in order for those absolutely deprived to claim a right to survival income?

Second, the Court in Rodriguez indicated that one criterion for whether any group constitutes a "suspect" class is whether it has been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."138 It then denied that the poor fit this description. Justice Powell got into the right church and then seated himself in the wrong pew.139 Especially in light of the trend of the past eight years, it seems clear that the poor, or at least the extremely poor, fit the description precisely.140

The foregoing discussion of education is relevant to both our substantive due process argument and our equal protection argument. I suggested that education is fundamental enough to be required for those who cannot afford it regardless of whether any education is offered to those who can pay. When the state subsidizes the rich but charges a tuition that excludes the poor, the problem is soluble along equal protection lines. If the state provides no education at all, the claim the poor can make is based on a substantive due process theory. It would appear, in fact, that there are three tiers of fact patterns: one tier where the claims involve interests so unimportant that the state violates no constitutional rights when it subsidizes so as to exclude the poor (the opera case); a second where the interests are important enough that the state creates an equal protection problem when it subsidizes so as to deny access to the poor yet has no obligation to get into the business (arguably

137. The Court seems to be rethinking the matter, commenting in a 1986 case that "this court has not yet definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review." Papasan v. Allain, 106 S. Ct. 2932, 2944 (1986).


139. Justice Powell's dissent in Papasan indicates he was still seated in the same pew as to whether the poor can be viewed as a suspect class. The majority's hint, however, discussed in note 137, supra, indicates some movement on their part in a new direction. Nor did Justice Powell seem intractable, provided he could find the right theory. He concurred in Plyler on the basis that penalizing the children solely because of the parents' status properly evoked heightened scrutiny, and went on to say that if the same denial had occurred with regard to welfare, it would also have been "an impermissible penalizing of children because of their parents' status." Plyler, 457 U.S. at 239 n.3 (Powell, J., concurring).

140. Cf. Ackerman, supra note 125, at 742 (Ackerman describes the victims of poverty as "both diffuse and anonymous," and unlikely to command their deserved attention from the majority.).
the municipal bus case); and a third where the state can neither subsidize in a way that excludes the poor nor drop out altogether, thus implicating both equal protection and substantive due process theories (the education case according to my reading of Rodriguez and Plyler).

b. *Griffin* and the Benefits Cases

There is a series of cases, beginning with *Griffin v. Illinois*,\(^{141}\) on the threshold of the third tier just outlined if not within it. They all involve services which, if supplied by the State, may not be provided in a discriminatory manner against the poor or among groups of the poor; in other words, the second tier pattern. But all these cases contain implications that the state may have a duty that goes beyond nondiscriminatory treatment.

The interesting point in *Griffin* is Justice Harlan’s dissent from the holding that the state must provide indigent defendants a trial transcript for purposes of appeal. One might have thought that, with a person’s liberty at stake, the required provision of a transcript to an indigent accused would be easy to discern, at least when other appellants are allowed to purchase transcripts. Justice Harlan did not think the case was obvious at all. He accused the Court of creating an affirmative duty on the state’s part:

> All that Illinois has done is to fail to alleviate the consequences of differences in economic circumstances that exist wholly apart from any state action. . . . [The] issue here is not the typical equal protection question of the reasonableness of a “classification” on the basis of which the State has imposed legal disabilities, but rather the reasonableness of the State’s failure to remove natural disabilities.\(^{142}\)

Justice Harlan’s logic applies to the subsistence income issue here. We are arguing for a state obligation to provide a subsistence income given what is, to use Justice Harlan’s terminology, the unreasonableness “of the State’s failure to remove natural disabilities.” If the state’s obligation to remove the consequences of indigency can be said to arise independently of the threat by the state to take away the defendant’s liberty, *Griffin* is surely relevant to our case for a right to subsistence income.

The benefits cases came later. The first was *Goldberg v. Kelly*,\(^{143}\) in which the Court held that AFDC benefits could not be terminated without a prior hearing, and referred to AFDC as “the means to obtain essential food, clothing, housing and medical care . . . the very means by

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142. *Id.* at 34-36.
which to live.” It said welfare was “not mere charity,” but rather a way “to help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community.”

The Goldberg Court did not precisely declare why the state, which had created the limited property interest in Goldberg, was not therefore free to do as it wanted in tailoring the procedures accompanying the benefit. The Court’s rhetoric about the essentiality of AFDC suggests that the state, in conferring the benefit, was conferring something important enough that it could not add a condition allowing revocation without a full hearing. Laurence Tribe goes further, calling the Goldberg holding “a rule explicable only in terms of an underlying right to subsistence at least when a welfare program has been established.” In no case since Goldberg has administrative withdrawal of a benefit been held to entail such elaborate procedural protection. To some extent this is because the Court has moved away from Goldberg, but this is also because, with one strongly arguable exception, no case has involved the essentials of life itself.

Another recognition of the fundamental importance of welfare occurred the same year as Goldberg in Shapiro v. Thompson, in which the Supreme Court, in striking down a one-year residency requirement for welfare, again referred to welfare as “aid upon which may depend the ability of families to obtain the very means to subsist—food, shelter, and other necessities of life.” Four years later, in Memorial Hospital v. Maricopa County, the Court struck down a durational residency requirement for free indigent medical care, referring to such care as “as much ‘a basic necessity of life’ to an indigent as welfare assistance.”

144. Id. at 264.
145. Id. at 265.
147. L. Tribe, Constitutional Law supra note 3, at 1117.
150. Id. at 627.
152. Id. at 259. Cf. Fuentes v. Shevin, 407 U.S. 67, 89-90 (1972) (“a stove or a bed may be . . . essential to provide a minimally decent environment for human beings in their day-to-day
The Court treated these two cases as involving right-to-travel issues, but the right to travel was triggered only because of the fundamental nature of the interest in subsistence that had been interfered with by the durational residency requirements.153

Still a third indication of the Court's concern comes from cases in which Congress or a state has totally denied a "survival" benefit to a subgroup of poor people on a basis that the Court decided had no justification. One such case is *United States Department of Agriculture v. Moreno*,154 in which Congress had denied food stamps to households containing unrelated individuals. Another is *New Jersey Welfare Rights Organization v. Cahill*,155 in which the state had denied AFDC benefits to households containing illegitimate children. The Court has been far less solicitous in situations where the deprivation was not total, rejecting challenges to a Maryland law that capped benefits regardless of family size after the fourth child156 and a Texas law which afforded elderly and disabled welfare recipients more help than children.157 Even a total deprivation of an unimportant benefit would be unlikely to evoke the Court's wrath. It is, again, the fundamental nature of the "survival" interest that has made the Court willing to strike down arbitrary total deprivations of basic benefits.

All of these cases involve limitations on what a state can do when it confers a benefit, as opposed to obliging it to initially confer the benefit. But there was a time when the argument for any limitation at all would have been dismissed out of hand on the ground that the state did not have to confer the benefit and that "the greater includes the lesser."158 The precise circumstances under which a particular condition attached to a benefit will be struck down are beyond the scope of this Essay, but it is now clear that certain benefits are more fundamental than others.

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153. Compare the result in *Shapiro* and *Memorial Hospital* with that in *Sosna v. Iowa*, 419 U.S. 393, 396 (1975), where the Court upheld a one-year durational residency requirement for access to state's divorce courts.

154. *413 U.S. 528* (1973); see also *United States Dep't of Agriculture v. Murry*, 413 U.S. 508, 514 (1973) (striking down federal statute denying food stamps to college dormitory "households" with members over 18 years old who had been claimed as dependents on their parents' tax returns for the previous year); *Wohlgemuth v. Williams*, 416 U.S. 901 (1974), aff'd *366 F. Supp. 541, 546-49* (W.D. Pa. 1973) (summary affirmance of decision striking down state denial of general assistance to unemancipated minor living with unrelated person who was not receiving assistance).


Conditions on such benefits will be invalidated more readily.\footnote{159} Once we accept the proposition that certain benefits are so basic as to bring into serious question a considerable list of conditions that might be appended to them, the leap to inferring a state obligation to provide help in the first place becomes less prodigious.

This precise point worried Robert Bork a great deal. Commenting on the benefits cases of the early seventies, he noted that their adherents apparently [conclude] that a claimant cannot go into a court and demand a welfare program as a constitutional right, but if a welfare program already exists, he can demand that it be broadened. The right to broadening rests upon the premise that there is a basic right to the program. If so, why cannot the Court order a program to start up from scratch?\footnote{160}

Like Justice Harlan in \textit{Griffin v. Illinois}, Judge Bork correctly saw the analytical implications of the benefits cases.

The distinction between acts and omissions is a hazy one in any case. Sometimes a failure to act occurs under circumstances in which the omission results in liability. Recently, for example, the Court, in deciding that a prisoner's warning to officials about his fear of being attacked by another prisoner did not create liability when they took no steps to protect him, conceded that a case "where officials simply stood by and permitted the attack to proceed" would be "quite different."\footnote{161} The analogy is from tort law, but the point can be made with rhetorical, if not legal, force that, at least as to the poorest of the poor, the United States today is in the position of the jailer who stands by and lets the attack proceed.

The haziness of the act-omission distinction is evident when we look at speech. There is no legally significant difference between the act of refusing to grant a permit for a rally in a public park and the omission of failing to provide police protection for the rally when it occurs.\footnote{162} Free

\footnotetext{159}{In 1986 the Court decided a case in which recipients of AFDC and food stamps claimed that obtaining a social security number for their two-year-old daughter as a condition of her getting those benefits violated the family's Native American religious beliefs. While the Court, for reasons unnecessary to explain here, vacated an injunction the recipients had obtained below, a majority stated that the government has an affirmative obligation to provide a religious exemption to the facially neutral requirement that applicants and recipients provide the state with a social security number. \textit{Bowen v. Roy}, 106 S. Ct. 2147 (1986). "The rise of the welfare state," Justice O'Connor wrote, "was not the fall of the Free Exercise Clause." \textit{Id.} at 2169.}

\footnotetext{160}{Bork, \textit{ supra} note 3, at 699.}

\footnotetext{161}{\textit{Davidson v. Cannon}, 106 S. Ct. 668 (1986).}

\footnotetext{162}{\textit{E.g.}, \textit{Gregory v. Chicago}, 394 U.S. 111, 123-24 (1969) (demonstrators peacefully exercising their first amendment rights are denied due process when they, and not hecklers, are arrested after hecklers threaten to cause "impending civil disorder" during rally).}
speech, of course, is explicitly guaranteed by the Constitution, and therefore entails an affirmative obligation on the part of the state to protect it, while the right to a "survival" income is not. But, as we have already seen, there are some fundamental interests with which state action cannot interfere that are nowhere explicitly written in the Constitution.\(^{163}\)

Logically, the unworkability of the act-omission distinction would apply to them, too. If a state's omission can interfere unacceptably with speech, why is it not the case, for example, that a state's omission might be the basis for concluding there has been an impermissible interference with privacy? If the state cannot condition marriage on the prospective groom satisfying certain preexisting statutory support obligations,\(^{164}\) why, as we said earlier, should the state be able to interfere with marriage by failing to provide a level of survival assistance sufficient to keep inability to survive from being what stands in the way of a wedding?

It must be conceded that *Harris v. McRae*\(^{165}\) looms rather directly across the path toward finding support in existing law for a state obligation to help the poorest of the poor. One would have thought medically necessary abortions for indigent women raised an issue of need at a fairly elemental level, especially in light of the existence of the Medicaid program. But the Supreme Court said the state has no obligation in this connection. In *Maher v. Roe*,\(^{166}\) while the issue—nontherapeutic abortions—was relatively less compelling, the Court made a point of adding, gratuitously from an analytical point of view, that "*[t]he Constitution imposes no obligation on the States to pay . . . any of the medical expenses of indigents.*"\(^{167}\)

How should we deal with *Harris v. McRae*? We have already acknowledged that the current Court will not declare the right to a "survival" income advocated here and that the support in the cases is not for a right to a "survival" income per se, but rather is in the form of bits and pieces of special protection for the poor, and even that is hardly explicit

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163. *See supra* note 108 and accompanying text.
164. Zablocki v. Redhail, 434 U.S. 374 (1978) (holding unconstitutional a Wisconsin statute that precluded the issuance of a marriage license to any resident with a minor child not in his custody unless the resident could show that child support obligations had been met); *see also* Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) ("This Court has long recognized that freedom of choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."); *cf. Boddie v. Connecticut*, 401 U.S. 371, 375-77, 382-83 (1971) (due process requires that indigents be allowed access to divorce courts regardless of their inability to pay costs).
165. 448 U.S. 297 (1980).
167. *Id.* at 469.
and uncontradicted.\textsuperscript{168}

We might, therefore, suggest that \textit{Harris} is simply wrong, as four Justices thought in dissent.\textsuperscript{169} Moreover, \textit{Harris} represents only one of the possible positions which the Court might take, based on history and theory and the judicial philosophy of the justices sitting at the time. The \textit{Harris} majority in fact acknowledged that a "penalty" on protected activity would be unacceptable, but said "a refusal to fund protected activity, without more, cannot be equated with" a penalty.\textsuperscript{170} But we have already seen that the line between act and omission is hazy, and the Court has itself acknowledged that the line between penalties and benefits is not supportable once a benefit is extended.\textsuperscript{171} Moreover, the issue in \textit{Harris} can be framed in terms of a condition on a benefit—that medical assistance is available to indigent pregnant women provided they do not use it to obtain an abortion. The condition is that one not seek an abortion; the penalty is that assistance is lost when one engages in that particular protected activity.\textsuperscript{172}

Pursuing our argument that \textit{Harris} is wrong, we can return to the speech analogy of a moment ago. If the state acts unconstitutionally when it fails to protect a speaker from private interference with his speech, what is the difference when it fails to protect a pregnant woman from interference by a physician with her right to an abortion because of her inability to pay? As Michael Seidman and Mark Tushnet and their colleagues have put it:

If one begins with the premise that it is important for women to have the abortion option, is there a sensible theory under which it is possible to distinguish between interference with that option by state action and interference by private action which the state fails to prevent?\textsuperscript{173}

To demonstrate that there is an obligation to provide a "survival" income, we would have to take one further step to make our "dissent" in \textit{Harris} work for us. We must argue that "survival" is as fundamental as

\begin{itemize}
\item \textsuperscript{169} Cf Tribe, \textit{supra} note 98, at 336-37 (remarking that the \textit{Harris} decision is especially weak in light of the government's decision to pay for childbirth for poor women).
\item \textsuperscript{170} \textit{Harris}, 448 U.S. at 317 n.19.
\item \textsuperscript{171} Bowen v. Roy, 106 S. Ct. 2147 (1986), is the latest in a line of cases to make this point.
\item \textsuperscript{172} \textit{See Harris}, 448 U.S. at 329, 334 (Brennan, J., dissenting); \textit{id.} at 337, 338 (Marshall, J., dissenting).
\item \textsuperscript{173} G. Stone, L. Seidman, C. Sunstein & M. Tushnet, \textit{supra} note 113, at 685.
\end{itemize}
privacy. If the state cannot jeopardize survival without procedural due process, and if the state cannot totally deprive one group of recipients of survival help when it extends that help to others similarly situated, then the Court has already recognized that survival is important. Our Harris "dissent" would provide precedent by analogy for the proposition that the state also has an obligation to prevent the private action of the market from jeopardizing survival.

Harris can be viewed as wrong in light of Plyler v. Doe, as well. What the Court denies in Harris is a right to a few hundred dollars in funding for alleviation of an acute condition which is sometimes voluntarily acquired. What the Court goes a considerable distance toward recognizing in Plyler is a right to a minimum education that costs much more, for the purpose of alleviating a chronic condition of ignorance that is involuntarily acquired. It can surely be argued that the greater includes the lesser, and that Plyler serves to highlight the dubiousness of Harris.

We could also remove Harris from the path of our argument by distinguishing it. The whole point of Roe v. Wade, we would say, was to make abortion a matter to be left totally outside government and in the private sphere. Harris and Maher are cases in which the Court went to extraordinary lengths to assure that the government would be totally removed from the decision whether to have an abortion. If it is appropriate to view Roe v. Wade as involving an underlying right to maintenance of a private sphere, it is not so surprising that there is no right to governmental intervention. The right of survival asserted here is exactly the opposite: it is an argument for a right to governmental intervention and extension of the public sphere to minimum income. The appropriate analogy is not public funding for abortion but the right, for example, to a public forum in free speech cases. The abortion cases, an effort by the Court to assure an area of liberty completely free from government, are distinguishable.

Thus, case law takes our proposition to the water's edge and perhaps a bit further. The sensitivity in Rodríguez and Plyler to the interests of the poor in the analogous area of education, the strong language in Goldberg accompanying the decision requiring extensive procedural protection, the similar language in Shapiro and Maricopa County striking down unacceptable conditions on benefits, and the willingness in Moreno and New Jersey Welfare Rights Organization to reject denials of benefits to similarly situated beneficiaries, all suggest the Court's recognition, at least on occasion, of the importance of subsistence. Perhaps it is not out of place to recall that creatures which look like ducks, quack like ducks,
and flap like ducks turn out to be ducks. The Court has not faced up to the implications of its own reasoning.174

D. Equal Protection

Regardless of any argument that the state has an affirmative obligation to "provide," there is a second major constitutional approach. We can infer an equal protection obligation to assist the poor if the state has "done" something to cause the undue poverty and thereby has treated the poor differently from everyone else (saving for later the issue of whether it has to have done so with discernible discriminatory intent). With such evidence we can infer the state's obligation to assure "survival" not by writing on the clean slate of basic constitutional structure but by drawing it from the state's complicity in placing people in such severe economic jeopardy.

What has the state "done"? The answer is a lot. To argue that the poor are in that condition purely because of the operation of a free market is to ignore volumes of history. Indeed, the government chose a so-called free market as well as the incidents and attributes of that structure. Government policy has been shaping the market and the ability of people to participate in it for a long time.

I need to make one thing clear before I proceed. I am not arguing that government's conscious efforts to aid the poor have made them worse off. The poor would definitely be worse off without the programs that exist today.175 The government's specific efforts to alleviate poverty have not been counterproductive, only gravely insufficient. Rather, the entire economic structure of American society and a series of specific governmental policy decisions over time have contributed to the existence, scope, depth, and perpetuation of poverty.

The idea that the legal arrangements which government makes to create the rules of the game for the private economy are themselves state action is neither a new nor a simple idea. Paul Brest twitted the posi-

174. Commentators have stopped at the water's edge with the same uncomfortable result. A recent student note defines "subsistence" as the "bare means of survival," states that "deprivation of subsistence for too long results in death," criticizes the courts for not applying at least a heightened form of scrutiny to benefits laws or regulations that deprive a subgroup of eligibility, and then states, "It is not asserted here that a citizen has an affirmative constitutional right to welfare, nor that the denial of subsistence by itself should trigger heightened scrutiny. A state could deny welfare to all its citizens without raising equal protection concerns." Note, Intermediate Equal Protection Scrutiny of Welfare Laws That Deny Subsistence, 132 U. Pa. L. Rev. 1547, 1560-61 (1984) (emphasis in original). My suggestion is that the author gave up too easily.

tivists for implying that all property interests are creatures of the state, pointing out that "since any private action acquiesced in by the state can be seen to derive its power from the state, which is free to withdraw its authorization at will, positivism potentially implicates the state in every 'private' action not prohibited by law." Justice Rehnquist, aware of the trap, made sure in *Flagg Brothers v. Brooks* to say, after describing property rights in positivist fashion:

> It would intolerably broaden, beyond the scope of any of our previous cases, the notion of state action under the Fourteenth Amendment to hold that the mere existence of a body of property law in a State, whether decisional or statutory, itself amounted to "state action" even though no state process or state officials were ever involved in enforcing that body of law.

Beyond Brest's telling comment that "positivists . . . cannot so readily have it both ways," there is obvious sense in the idea that the "invisible hand of economics," as Tribe calls it, is not invisible at all. Discussing the demise of *Lochner*, Tribe observes that the preexisting working conditions addressed by the minimum wage laws were a product of conscious governmental decisions to take *some* steps affecting the affairs of economic life—punishing some people as thieves, awarding damages to others as the victims of trespass or breach of contract, immunizing still others through concepts of corporate law—while *not* taking *other* steps that might rescue people from conditions of intolerable deprivation.

It is worth noting that the Supreme Court has in fact intervened to strike down laws which allowed people to make economic bargains with one another that represent unacceptable outcomes from a social point of view. In *The Peonage Cases*, a very conservative Supreme Court decided early in this century that two Alabama statutes permitting coerced

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178. Id. at 160 n.10.
179. Brest, supra note 176, at 1302; see also L. Tribe, *Constitutional Choices*, supra note 6, at 253 (commenting that "if particular state rules . . . themselves . . . [are] properly challenged, a different kind of state action would . . . [be] at issue," and characterizing *Flagg Brothers* as a case in which "the Court continued to elaborate on the conventional if largely empty categories of state action.").
181. Id. at 447-48 (emphasis in original).
labor under certain circumstances constituted peonage and therefore violated the thirteenth amendment. It is more than a rhetorical flourish to say that if such a conservative Court was willing to take the minimalist step of saying certain market outcomes enforceable under state law were too extreme to be permitted, even our current conservative Supreme Court should take the equally minimalist step of holding that an income that does not even permit subsistence is an outcome of state-sanctioned economic arrangements that will not be tolerated.

Our entire system of legal rules shapes wealth and poverty in the United States. The same kinds of governmental decisions that caused people to need the protection of the minimum wage and other labor standards, and in the extreme form evoked The Peonage Cases, are shaping poverty today. The laws of property and contract, the laws which create corporations and set the terms under which they operate, and the criminal laws preventing theft, among others, are really at issue here.

Moreover, a whole series of specific governmental policies have contributed to the intensification of poverty. Governmental decisions that have shaped the location of jobs and the location of people in relation to those jobs are a good example. This argument does not go to the overall number of jobs but rather to the disparity between available jobs and available people. Government policy drew people to the cities to work in the war plants in two world wars, then took few steps to facilitate their adjustment later, when the war jobs were gone. Large numbers of poor people were left in inner cities, distant from jobs, and without sufficient resources to relocate. Government policy since World War II has helped to destroy small, family farms in favor of larger, mechanized, agribusiness, forcing some people into the cities and leaving others in rural areas with no livelihood. At least insofar as those who were drawn into the cities by the war or the destruction of small farms were black, government policy helped assure that they had very limited choices concerning where to live, usually far from available work. Government policy increased that distance by paying vast sums for highways which decentralized work even further while policies of racial and, for that matter, economic segregation kept the poor of all races pinned in the central cities. Thus, many are poor in part because of where they live, and this is in significant part not the result of private market forces.

Second, government has shaped the ability of people to participate in the labor market by the schooling it has provided. Many of the poor cannot find jobs because they are so badly undereducated and underskilled. America's public schools, especially those in the inner cities, are inescapably part of this problem. Those whose poverty is perpetuated by
inadequate education—and there are many for whom this is a very significant factor—have unquestionably been injured by government policy.

Third, government shapes the total number and quality of jobs available in the economy and the take-home pay of those who have work. Fiscal, monetary, and trade policies all affect the total number of jobs and the tax bites on those who do work. When the Federal Reserve decides on a policy of high-interest rates to fight inflation, and there is no concomitant Congressional response to aid the people who lose their jobs as a consequence, the new recruits to the ranks of the poor are there because of government policy. Government's stance on occupational health and safety and on disability and workman's compensation is also important. If accidents or disease stemming from the work place make a person poor when better regulation would have prevented the outcome and better compensation would ameliorate it, government has played a role in intensifying poverty. The government's direct job-creation policies are also relevant here. For example, the location of defense contractors affects the ability of the poor to find work. Thus the day is long past when the number of jobs and their effective pay were solely determined by market forces (although even a governmental stance of total laissez-faire is also a government policy that affects the incidence of poverty).

All right, it will be admitted for purposes of argument, there has been state action that has helped to make certain people poor and keep them that way. But where is the proof of discriminatory intent or purpose? Do not Washington v. Davis and Arlington Heights v. Metropolitan Housing Development Corp. tell us that disparate outcomes stemming from the application of facially neutral statutes are not enough? Moreover, has the Court not told us pretty explicitly that poverty is not a suspect classification and subsistence is not a fundamental interest?

There is case law that we could point to as a basis for distinguishing these cases. For example, sometimes we simply "know" that a facially neutral race-specific statute is racially motivated in a negative way, and sometimes a facially neutral state action will be invalidated because

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185. E.g., Maher v. Roe, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for the purpose of equal protection analysis.").
186. E.g., Loving v. Virginia, 388 U.S. 1, 11 (1967). Stone, Seidman, Sunstein & Tushnet ask the following question about Loving: "Is the point that in a culture dominated by whites, blacks are harmed more than whites by laws separating the races or suggesting that race is a relevant factor in decisionmaking?" G. STONE, L. SEIDMAN, C. SUNSTEIN & M. TUSHNET, supra note 113, at 575. It can be argued that Brown v. Board of Education is such a case.
the negative racial context is so clear. Another way to view these cases is that sometimes the outcome of a particular statute or state action is so unacceptable that we dispense with proof of intent. That, we would say, is our case.

Thus, if it were established that Davis and Arlington Heights apply only when the disparate racial impact of a facially neutral statute is so minimal or incidental as to carry no indication of legislative purpose, that would make them of less concern. The fact is, however, that they are pernicious and dangerous, as shown by the Court's 1987 decision that mere statistical evidence of racial disparity in the application of capital punishment is constitutionally irrelevant, a decision that is a direct "descendant" of Davis and Arlington Heights.

How sweeping are the implications of these cases? One has to speculate that a Court which thinks like the Davis and Arlington Heights Courts would not have decided The Peonage Cases as they were decided. While the issue there was obviously not one of a classification for equal protection purposes, the statutes were arguably not facially defective. One could imagine, for example, a modern community sentencing program, benignly administered, that looks on its face like the Alabama practice condemned in United States v. Reynolds. The defendant is sentenced to work for a private employer instead of being sent to prison. If he violates the conditions of that employment he goes to jail. What infected the Alabama practice is that everyone knew it was not a progressive, benign policy but exactly the opposite. Would a Washington v. Davis approach require proof of malevolent legislative purpose nonetheless?

Davis and Arlington Heights seem inconsistent with Griffin v. Illinois and some of the ensuing poverty cases, too. If allowing the purchase of trial transcripts to build a record for the purpose of criminal appeal does not create a wealth classification on the face of the statute, one could well argue, as Justice Harlan in effect did in his dissent, that the disparate effect on poor defendants is of no constitutional consequence in the absence of proof of bad legislative intent.

Thus we need to argue either that Davis and Arlington Heights are wrong and should be overruled in whole or in part or that they can be distinguished. Either way, our argument would be that when a large array of governmental actions, taken as a whole, has had a foreseeable

impact as severe as the extreme poverty that it has had a definite role in causing, the constitutional rights of the "extremely" poor should be regarded as having been violated, regardless of the level of scrutiny we use to examine the state action involved. This is, in an important sense, a narrow argument, one without immediate, broad implications for other cases. The challenge would not go to the poverty producing impact of a particular state road building or zoning decision but rather to the impact of decades of governmental action. Nor would the effort be to say that all "poverty" as it is officially defined is illegal but rather to focus on extreme poverty that does not even allow subsistence.

We would be recognizing that facially neutral state action has played a significant part in creating what now threatens to become a permanent underclass in society. The state has helped put people in a position of being unable to find work and unable to perform available work. There should not have to be proof that the state intended this result. Disparate outcomes are ordinarily not enough to invalidate state action but, if we are not going to overrule Davis and Arlington Heights, this should be one of those circumstances where we do not require proof of intent or purpose. The outcome—millions with inadequate or even no shelter and not enough to eat and no prospect of escaping their fate—is unconscionable in a society as wealthy as ours has become. The state has interacted with the private economy to create a system that leaves people in a subservient caste. It must now intervene.

III. The Remedy: Do We Want the Courts Involved, or Not?

Suppose there is some kind of a right here. What is the remedy? How will the suit be framed? It is unlikely that a class of poor people will at any foreseeable time come to the courthouse and ask that Congress or a state legislature be told to pass a law providing them a guaranteed income. It will make more sense for the plaintiffs to challenge a particular statutory scheme, rather than to say nakedly that they are challenging the government's failure to act.

A. Attacking AFDC

There are a number of possibilities. My discussion only involves attacks on AFDC, and this of course assumes that the AFDC structure will continue to resemble what it does today.

There are at least two considerations in deciding upon the scope of an AFDC-based action to achieve a subsistence or "survival" income. One is whether the attack should focus on AFDC nationwide, or state by state. The former is certainly possible, since AFDC is a federal statute.
The latter is more focused and, in a low-paying state like Mississippi, would be more unambiguous in character. The second consideration is whether the attack should be confined to seeking a remedy as to payment levels to existing recipients, or whether it should address as well the arbitrary exclusion of similarly situated people from AFDC coverage.

Given the line running through the benefits cases, discussed earlier, that total deprivation is the touchstone most attractive to the courts, the total exclusion of some of the most seriously needy from eligibility is a logical starting point. Two-parent families are currently eligible in only about half the states. Childless families and single individuals are not eligible for AFDC at all. Even in states which provide AFDC to two-parent families, one parent must have worked recently for a fairly lengthy period of time in order to qualify. Because the purpose of the two-parent program is to supplement inadequate unemployment compensation and then replace unemployment benefits when they run out, young families with little or no work experience lose out. All of these gaps in benefits could be challenged under a total-deprivation theory.

The challenge to payment levels, whether or not accompanied by a challenge to the total exclusion of some people, would be based on the theories set forth earlier. Hence, the payment level in, say, Mississippi is so low (less than half the poverty line with food stamps included) as to be below subsistence, which constitutes such a totality of deprivation as to trigger both a substantive due process and an equal protection right to a higher benefit.

Both the gaps in eligibility and the inadequacy of benefits can be challenged in either a national attack on AFDC or an attack on the program in a single, low-paying state. A national action would argue that the entire AFDC structure is unconstitutional because it permits gross disparities among the states in benefit levels, including payment levels below a reasonable definition of subsistence, and because it contains arbitrary boundaries on eligibility categories that have nothing to do with need. There is certainly factual merit to the allegations, and all of the legal theories laid out above would apply. The objections are therefore tactical. The remedy sought would be broad in two respects: first, it would seek a nationally applicable minimum income guarantee at some "survival" level; and second, it would seek to apply that minimum to everyone who is in jeopardy and not just to those currently eligible. The remedy would involve annual expenditures of billions of dollars, although probably less than the current administration seeks in annual

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increases to the defense budget but costly nonetheless.\footnote{Current estimates are that it would cost $46.6 billion annually to bring all of the poor up to the poverty line by way of straight cash grants. \textit{Staff of House Ways and Means Comm.}, \textit{supra} note 28, at 568. In constant dollars the poverty “gap” rose from $28.4 billion in 1975 to $46.6 billion in 1984. \textit{Id.} This estimate does not take into account any expenditures necessary to prevent work disincentives for jobs paying about the same amount as the level of income guaranteed.} The suit presumably would be directed at Congress, and would cut against the current financing structure of AFDC which involves varying degrees of state matching. And it would be highly visible and perhaps vulnerable as a political matter (although it is certainly possible that by the time such a case reaches the Supreme Court all of these barriers may seem less formidable than they do now even if the structure of AFDC itself has not changed substantially).

What therefore may make more sense is to mount an attack on one state’s low AFDC payment level and seek “survival” relief against that one state, with consequent implications for suits against other states. This would be more manageable politically and fiscally. It could more feasibly include as plaintiffs persons not now eligible for AFDC, because the decree would have less far reaching fiscal and political implications if accomplished originally in relation to the program of one state.

\section*{B. What Is A “Survival” Income?}

If the most practical framework for suit is to challenge one low-paying state’s AFDC program, what level of income guarantee should the plaintiff seek? In other words, what is a “survival” income?

The existing benefits cases show that the Court has responded favorably to petitioners who had been totally deprived of assistance, albeit in circumstances where others had been helped.\footnote{See \textit{supra} cases cited in notes 154-55 and accompanying text.} The Court has not been sympathetic to people whose complaint was that they were receiving less than others.\footnote{See \textit{supra} cases cited in notes 156-57 and accompanying text.} The \textit{Rodriguez} Court mentioned that it would be sympathetic to an “absolute deprivation” of education,\footnote{See \textit{supra} notes 129-40 and accompanying text.} and it was, in \textit{Plyler v. Doe}.\footnote{457 U.S. 202 (1982); see \textit{supra} notes 135-36 and accompanying text.} The remedy in these cases gave the plaintiffs what existing recipients were receiving. Here, however, there are no similarly situated recipients in the particular state who are receiving the assistance the plaintiffs are demanding. By analogy, if the allegation that is received most favorably is total deprivation, the remedy, it would seem to follow, is alleviation of that deprivation, or a minimum “survival” income.
So the idea of a "survival" income as a rather bare minimum—which is in contrast to "absolute deprivation"—has support in the cases. Can we eke out a more generous view on other premises? It would be nice to assure everyone an income at the poverty line. That, as we have seen, is not a generous amount. The problem is that moving to an income guarantee at the poverty line, at least given current wage structures, would create work disincentives in larger families, unless sufficient work incentives were built into the policy and the minimum wage or the Earned Income Tax Credit were raised substantially at the same time. The poverty line for a family of three passed $8,500 in 1985 (and passed $11,000 for a family of four) while the minimum wage remained at $6,800. Even with the few hundred dollars of food stamp eligibility that a family of three with one person working at the minimum wage would retain, an $8,500 cash guarantee would be more attractive than a $6,800 job for any worker who calculated the matter strictly on the basis of the money (the surprise being that some people would continue working anyway).

In order to encourage the head of a household of three or four to work at a minimum wage job, assuming an income guarantee at the poverty line and no change in the minimum wage, the income guarantee would have to be calibrated with wages so that the total return on working plus income supplementation would exceed the guarantee received by a person not working.\(^\text{194}\) Other relevant policy responses to accomplish this would be an increase in the minimum wage or, perhaps more practically as a political matter, an increase in the Earned Income Tax Credit, which currently adds about $800 to the income of the minimum wage worker.\(^\text{195}\) These steps, properly calibrated, would eliminate the work disincentive effect of defining "survival" at the poverty line.

The problem with the foregoing analysis, in the context of a discussion of what a court might do, is that it is complex. Given current reali-

\(^{194}\) Suppose, for example, an income guarantee of $11,000 for a family of four, and that the question is how to supplement the income from a minimum wage job in order to make sure working is more attractive than relying totally on the cash transfer. We would need to take into account the costs of working and we would need a formula which "taxes" away the benefits as more money is earned. Suppose, therefore, that the cost of transit, lunch, and required uniforms was $1,500 annually, and suppose (as was the law until 1981) the worker could "keep" one-third of his net earnings. The $6,800 from the minimum wage job would be reduced by the $1,500, then by $1,767 (one-third of $5,300). The $3,533 remaining would then be deducted from the $11,000 guarantee so the family of four would receive income supplementation of $7,467 and its total net income (exclusive of the expenses of working but before payroll taxes and income tax) would be $12,767. This should be sufficient to encourage the head of household to accept a minimum wage job.

ties concerning wages, income guarantees which approach the poverty line will necessitate fairly complicated work incentive structures, and these in turn may go beyond what a court, even the Supreme Court, feels comfortable in ordering.

In light of the complex interplay between income guarantees and work, a judicially manageable "survival" income might be defined at sixty percent of the poverty line at present. As indicated earlier, this is surely not the "right answer," but it is a "right answer." It is a level which would minimize work disincentive effects, given that the minimum wage is currently about sixty-five percent of the poverty line for a family of four and about eighty percent for a family of three, and that such families would retain some hundreds of dollars of food stamp eligibility if they had a minimum wage worker. In addition, sixty percent of the poverty line is the current approximate median payment among the states for AFDC and food stamps combined, so that a definition of "survival" at sixty percent of the poverty line based on current data would result in increased transfer payments in half the states. Finally, a guarantee at sixty percent of the poverty line is sufficiently low that it could encompass the extension of aid to those not currently eligible without enormous definitional difficulty.

The foregoing is not impracticable. Some will be reluctant to allow the courts to make Congress or the states appropriate money, but despite such reluctance there is ample precedent for this kind of order by a court. Such an order would not have serious unforeseen and unforeseeable consequences, and it is far from massively redistributitional. Indeed, the income of those currently on welfare and food stamps in half the states, including many states where there are many homeless and hungry people, would not even be affected.

C. Specifics of the Decree

How would the decree be structured? Suppose the lawsuit had been brought in Mississippi, which currently pays $120 a month in AFDC for a family of three, or sixteen percent of the poverty line. With food stamps such a family receives $311 a month ($3,732 annually), or forty-four percent of the poverty line. The court would be ordering that AFDC be raised to the point where the annual total of $5,142 in AFDC payments and food stamps combined would be at sixty percent of the poverty line. Mississippi is a state which is entitled to seventy-eight per-

cent reimbursement from the federal government under the current AFDC structure, so the order would result in Mississippi's legislature having to increase AFDC benefit levels in the state, with commensurate federal reimbursement.

So far, so good. But Mississippi does not have AFDC-TP, and there is no such thing as a federal program of assistance to nonelderly, nondisabled individuals and childless couples. Yet my argument has been for a "survival" income for all, not one that depends on how many parents are present in the home or whether there are children.

Here is where the going gets a little trickier, although those who are similarly situated but not eligible at all are even more totally deprived of assistance than those who are receiving the current inadequate payments. Moreover, judicially expanding the list of those who are eligible is not unprecedented—the Court has expanded eligibility when a particular classification, especially a gender classification, was found to be invalid. Expanding cash assistance from its present limited categories to a principle based solely on need is a larger jump than any taken by any court so far, but it can be done. The court will have found that AFDC in Mississippi is unconstitutional for some or all of the reasons argued earlier. The remedy must necessarily involve effectively rewriting the statute as it applies in Mississippi. The court need not do this itself, unilaterally and unaided. It can ask the assistance of the parties both federal and state. At sixty percent of the poverty line the design questions will not be insuperable.

D. Is Judicial Intervention Really Desirable?

Having "proved" that a limited judicial decree which when applied nationally would have the effect of increasing the income of millions of people is legally sound and practicable, is it desirable?

The answer is no, it is not desirable. The better response to poverty is legislative. A full antipoverty strategy is far more complex than any court, however activist, would have the capacity to handle. For complete and appropriate relief, legislative "rights" must be created.

Even if giving a lot more money to the poor were a complete anti-
poverty strategy, we have already examined the problems involved in trying to accomplish this judicially, especially with reference to the necessary steps that would have to be taken to make the system congruent with the facts of life in the work place.

More fundamentally, however, giving more money to the poor, as an antipoverty strategy in and of itself, unaccompanied by other remedies, is not good social policy. It would in fact increase the degree of chronic dependency absent other, accompanying policies. The government's role in a complete strategy against poverty among the nonelderly nondisabled must also involve the creation or stimulation of more jobs in the private sector, the possible creation of more public jobs or more jobs financed with public funds, an increase in the minimum wage or the Earned Income Tax Credit or both, increased funding for child care, strong antidiscrimination policies, and investments in education, training, health care, and housing for low-income people. Adequate cash assistance is a sine qua non but it must be accompanied by all of the foregoing. (I would add, though, that if government is unwilling to take the steps necessary to put people to work, it should pay them a minimum income. Dependency is better than starvation.)

These steps are not the stuff of judicial decrees. What I have described is in its totality the stuff of legislative and executive action, although, obviously, bits and pieces can be and have been appropriate subjects for litigation. Having a court intervene in the matter, even in the relatively limited way I have suggested, emphasizes cash transfers unduly as a substantive matter and distorts ideal relationships among the branches of government.

The problem, though, is that the other branches are not about to act. Once again we are confronted with a less than ideal set of choices and, while it seems terribly pessimistic, we may still be confronted with an unresponsive Congress by the time the kind of litigation I suggested is brought before a more responsive Supreme Court. Under these circumstances it seems to me that there is no alternative but to use the courts as soon as there is any likelihood that they will be responsive.

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 sometimes retaliation, to be sure). The Supreme

200. There is an additional subquestion as to whether these would be permanent, career jobs doing things the taxpayers need done but are not now investing in, or temporary jobs performing needed tasks for the additional purpose of tiding people over until they can find permanent employment.
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 the Court of a right to survival income might evoke a resonating legislative response. 201

IV. Interim Litigation Strategies

This Essay has suggested that there are theories with some underpinning in traditional doctrine to support a judicial declaration of a constitutional right to a "survival" income. Significant legislative action dealing with poverty is not imminent, and an approach through litigation may therefore be a strategic necessity at such time as the Supreme Court becomes more receptive.

At present, however, neither leap forward is about to occur. What can advocates do in the meantime? The major areas for activity are multiple, and include pursuing all possible initiatives at all levels of government and encouraging private responsibility and activity as well.

But incremental litigative steps can be pursued, too. These may bring concrete benefits and also have a secondary benefit by enhancing the later receptivity of the Supreme Court to addressing the problem of survival.

The state courts are an important theatre for such activity. Individual state constitutions may provide specific language not present in the Constitution of the United States, one state may be influenced by what another has done, and ultimately the Supreme Court may be influenced by what a number of states have done.

The Supreme Court has for some years been encouraging states to utilize state sources of law to go beyond what is required by the federal constitution. The suggestion has come from both left and right on the Court, with liberals encouraging it as a partial antidote to the Court's conservatism and conservatives espousing it as a kind of judicial "new federalism" 202 (although the conservatives have done it with tongue a bit


202. See, e.g., City of Mesquite v. Aladdin's Castle, Inc., 455 U.S. 283, 293 (1982), where Justice Stevens, speaking for a unanimous Court and citing Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977)), stated the following:
As a number of recent State Supreme Court decisions demonstrate, a state court is entirely free to read its own State's constitution more broadly than this Court reads the Federal Constitution, or to reject the mode of analysis used by this Court in favor of a different analysis of its corresponding constitutional guarantee.

in cheek, striking down state forays that were not accompanied by an explicit, plain statement of reliance on state law as the basis for the state court decision.  

Moreover, the Court is influenced by what states do. Technically speaking, what the states do with their constitutions is irrelevant to the meaning of the federal Constitution. In practice, however, the Court pays attention. Another logic intervenes. Notwithstanding Attorney General Meese, a broad spectrum of liberals and conservatives agrees that the Constitution is a living document, rooted strongly in history, to be sure, but one that acquires new applications of its text as times change. If the states are properly viewed as laboratories, then what happens to the successful results of the experiments? When the Court sees that a state approach has "worked," it sometimes adopts it regardless of differing textual language or previously conflicting interpretation.

The history of the exclusionary rule is a case in point. In *Wolf v. Colorado*, Justice Frankfurter said "we cannot brush aside the experience of states" which had not deemed it necessary to have the exclusionary rule. He specifically reviewed the history of state response since *Weeks v. United States* had adopted the exclusionary rule in federal prosecutions, and found the number that had adopted the *Weeks* rule (sixteen) to be inconclusive. Twelve years later the Court reversed itself and decided *Mapp v. Ohio*. Justice Clark said the state experience was "not basically relevant," but not until after he had made a point of saying that over half the states that had considered the exclusionary rule had adopted it in whole or in part and that experience had shown other remedies to be ineffectual.

_Batson v. Kentucky_, decided in 1986, is also illustrative. The Court had held in 1965, in *Swain v. Alabama*, that a prosecutor's use of peremptory challenges to remove all blacks from the jury did not vio-

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204. 338 U.S. 25 (1949).
205. *Id.* at 31-32.
209. *Id.* at 653.
210. *Id.* at 651.
211. 106 S. Ct. 1712 (1986).
late the rights of a black defendant even if it could be shown that the prospective jurors were removed because they were black. In the late 1970s, beginning in California, states began using their own constitutions to fashion a different approach, which essentially shifts the burden to the prosecution to show that the challenges are specifically relevant to the case once the defense shows that those excluded are members of a group cognizable as part of the representative cross section of the community required for a fair trial. In a clear instance of "horizontal federalism," the California lead was followed by Massachusetts, Delaware, Florida, and New Mexico. Each state cited the California decision. When the issue finally returned to the Supreme Court in Batson, it proceeded to adopt an approach like that of the California court, and Justice Powell specifically cited and credited the state developments as part of the evolution that had occurred.

Advocates have followed a somewhat similar strategy in the area of education. The Court's 1973 decision in Rodriguez was by no means the end of litigative efforts to attack inequitable educational financing. Instead the focus necessarily switched to an exclusive concentration on state constitutions. A number of successes have been recorded with many of the decisions relying "horizontally" on what sister states had done under their own constitutions. The horizontal strategy has also been used successfully to obtain state constitution-based decisions striking down school registration and textbook fees.

221. E.g., Herschler, 606 P.2d at 332 (citing precedents from California, New Jersey, and Connecticut).
These education decisions have a number of relevant implications, beyond similar suits in additional states. One, most obviously, is that, as it did in *Mapp* and *Batson*, the Supreme Court will revisit the issue at some point, based on the "laboratory" findings of the states. It should be instructive to the Court that Governors and legislatures have responded, without creating constitutional crises, to state court orders that they restructure their state's system of educational finance. This will certainly alleviate one of the Court's concerns, stated or unstated. Indeed, as indicated earlier, the Court has in recent years spoken about education in a tone rather different from much of what it said in *Rodriguez*, even though the cases are distinguishable.223 So it is not at all unrealistic to suggest that, even now, education is going through a period of ripening at the state level which may bear fruit in the Supreme Court.

The recent wave of state educational reform statutes has created another potential avenue for litigation in the state courts.224 Much of this litigation will be based on the state statutes, arguing essentially that the states have set up new educational standards and requirements and have not provided the funds necessary for children, especially poor children, to be able to comply. But state constitutional provisions will undoubtedly play a role in such litigation, too, reinforcing the plaintiffs' claims of statutory rights. And success in a new wave of educational reform cases will reinforce the climate for a more sympathetic Supreme Court response for claims of educational rights of one kind or another.

This process in the realm of education relates to the survival issue as well, especially when courts discuss education in terms of its necessity for political participation and economic self-sufficiency, as the Washington Supreme Court did in state school finance litigation.225 If advocates were to focus especially on including "survival" arguments in their educational-equity litigation, they might as a side effect create a foundation for "survival" income litigation. Perhaps it will soon be timely for litigators to bring a survival-income lawsuit under the state constitution in a jurisdiction which has an especially aggressive court, particularly if that court

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has already responded favorably to education litigation premised in part on the idea that education is fundamental to survival.\textsuperscript{226}

The need of shelter for the homeless is another area of litigation that may ultimately prove relevant to the securing of a right to a survival income. As with education, this strategy is developing under state constitutions and statutes in the face of Supreme Court pronouncements that nothing in the federal constitution guarantees any right to shelter.\textsuperscript{227}

The primary focus of litigation for the homeless so far has been in New York. The litigative strategy in New York initially produced a consent decree benefitting homeless single men,\textsuperscript{228} and this was followed by litigation extending the decree to single women on an equal protection basis.\textsuperscript{229} In May of 1986 \textit{McCain v. Koch},\textsuperscript{230} a complicated piece of litigation relating to homeless families, reached a decisional phase in the Appellate Division after a flurry of grants and denials of preliminary injunctions, restraining orders, class certification motions, and the like. While the outcome is complex, the opinion stands for the proposition that there is some kind of right to shelter within the framework of relevant federal and state statutes and regulations, and under the New York State Constitution.\textsuperscript{231}

Not surprisingly, advocates have been busy trying to develop a horizontal strategy. The West Virginia Supreme Court declared a right to shelter under state statutes,\textsuperscript{232} and trial courts in Atlantic City, New Jersey\textsuperscript{233} and Hartford, Connecticut have entered orders on behalf of the homeless.\textsuperscript{234} Litigation pending in Los Angeles is already credited with resulting in increased aid for the homeless.\textsuperscript{235}

The New York Appellate Division’s recent opinion in \textit{McCain v. Koch} illustrates the promise and the pitfalls in the implications of right-

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\item \textsuperscript{226} But see infra text accompanying note 40 (discussion of another type of obstacle, as, raised in \textit{Tucker v. Toia}).
\item \textsuperscript{227} Lindsey v. Normet, 405 U.S. 56, 74 (1972); see also James v. Valtierra, 402 U.S. 137, 142 (1971) (upholding art. XXXIV of the California Constitution, which requires local referendum vote before any low-rent housing project can be built).
\item \textsuperscript{228} Callahan v. Carey, No. 79-42582 (Sup. Ct. N.Y., Aug. 26, 1981).
\item \textsuperscript{229} Eldridge v. Koch, 98 A.D.2d 675 (1983).
\item \textsuperscript{230} McCain v. Koch, 117 A.D.2d 198 (1986).
\item \textsuperscript{231} Basler, Ruling Widens Shelter Rights for Homeless, N.Y. Times, May 14, 1986, at B1, col. 6.
\item \textsuperscript{232} Hodge v. Ginsberg, 303 S.E.2d 245 (W. Va. Sup. Ct. 1983).
\item \textsuperscript{235} Werner, Homelessness: A Litigation Roundup, \textit{18 CLEARINGHOUSE REV. 1255}, 1258 (1985).
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to-shelter litigation. The court found it "likely that plaintiffs will succeed on their claim that NY Constitution article XVII obligates defendants to provide emergency shelter for homeless families." Article XVII is critical to the "survival" discussion here. It is not a provision about shelter per se, but about need: "The aid, care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."237

The appellate division's reference to Article XVII is promising, except that the court was then constrained to point out that *Tucker v. Toia*238 and *In re Bernstein v. Toia*,239 earlier holdings of the New York Court of Appeals, stand in the way of a court ordering a specific minimum level of relief under article XVII. In *Tucker* the court did say that article XVII "unequivocally prevents the legislature from simply refusing to aid those whom it has classified as needy." However, it also said the same provision "provides the legislature with discretion in determining the means . . . the amount of aid, and in . . . defining the term 'needy.' "240

The appellate division in *McCain* took a fairly unusual step following its explication of *Tucker* and *Bernstein*. The court noted that "the inability of courts to set even minimum standards . . . is discouraging, saddening, and disheartening," and added that "it is time for the Court of Appeals to reexamine and, hopefully, change its prior holdings in this area."241

*Tucker* and *Bernstein* were decided in 1977, not too long after the Supreme Court's strong negative signals in *Dandridge v. Williams*242 and *Jefferson v. Hackney*,243 and before the downward spiral in the status of the poor that has been a major premise for the arguments in this Essay. Perhaps it is not too much to hope that the New York Court of Appeals will see things differently in light of the visibility of the crisis of homeless-

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237. N.Y. Const. art. XVII, § 1.
240. 43 N.Y.2d at 8, 371 N.E.2d at 452, 400 N.Y.S.2d at 731.
242. 397 U.S. 471, 485 (1970) (holding that a state does not violate the equal protection as long as the differences in the way various AFDC recipients are treated are rationally based); see also Lavine v. Milne, 424 U.S. 577, 584 n.9 (1976) ("Welfare benefits are not a fundamental right, and neither the State nor the Federal Government is under any sort of constitutional obligation to guarantee minimum levels of support.").
243. 406 U.S. 535 (1972) (holding that differences in welfare benefits do not violate the equal protection clause as long as the differences are rationally based).
ness and the deterioration in the situation of the poor of which it is a part.

Conclusion

Anyone who argues that the poor are now fully heard in Congress and the state legislatures has not examined the history of their situation since 1978. A lack of political representation does not in itself create constitutional rights. It does help, however, to justify a decision by a court that it is now institutionally appropriate to involve itself. In my view we are going to see a deterioration in the situation of the poor until there is judicial intervention to change the equation. The votes are not there on the Court now. That is unfortunate. Millions of the poor are now facing survival questions that they did not face less than a decade ago. They should be able to look to the courts for help.