

# Under the Bridges of Paris: Economic Liberties Should Not Be Just for the Rich

Erwin Chemerinsky\*

## I. INTRODUCTION

When I was invited to participate in this symposium, I immediately accepted without giving any thought to what I would write on the topic of economic liberties. As the date for the symposium approached, I became increasingly worried about what I would say on the topic. I strongly believe that the Supreme Court has gotten it right since 1937 when it comes to economic rights. The Court has been clear that claims of economic rights should receive only rational basis review.<sup>1</sup> Freedom of contract is not regarded as a fundamental right.<sup>2</sup> Government regulations are upheld so long as there is some conceivable permissible purpose and so long as the means are reasonably related to achieving the goal. The Court has greatly deferred to government economic regulations; “the Court has not invalidated an economic regulation on substantive due process grounds since 1937.”<sup>3</sup>

Since the famous *United States v. Carolene Products Co.* footnote,<sup>4</sup> the Court has drawn a distinction between political rights and economic liberties. The former—including the provisions of the First Amendment and the protection of “discrete and insular minorities”—receive heightened judicial scrutiny; but the latter is treated with great judicial deference and receives rational basis review. This is exactly right: the Court has made the correct value choice in terms of the importance of the interests at stake and the relative need for government regulations. There is a far greater

---

\* Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California. I want to thank Tatanya Litovsky for her excellent research assistance.

1 See, e.g., *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487–88, 491 (1955) (upholding an Oklahoma law forbidding opticians from making eyeglass lenses without a prescription); *Lincoln Fed. Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 536–37 (1949) (utilizing rational basis review to uphold state laws preventing employer discrimination against non-union workers).

2 *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 391 (1937). This case marked the end of the *Lochner* era. The Court stated: “What is this freedom? The Constitution does not speak of freedom of contract.” *Id.*

3 GEOFFREY STONE ET AL., *CONSTITUTIONAL LAW* 733 (4th ed. 2001).

4 *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

need for economic regulation in the complex economy of the late twentieth and early twenty-first centuries, than for regulation of speech or for discrimination against minorities. Political and civil rights and liberties—free speech, privacy, voting, and so on—are properly regarded as fundamental rights because of their importance to personhood and for society; but freedom of contract should not be so regarded.

My belief that the Court has clearly gotten it right for the last sixty-five years with regard to economic liberties created a challenge in choosing a topic for this symposium. Was it worthwhile to write a paper defending a status quo that is so widely accepted as correct?<sup>5</sup>

I initially began a paper doing just that—arguing that the Court has taken the right approach to economic liberties since 1937. This felt strange; perhaps because I have spent the last twenty-five years writing articles criticizing decisions, I am unaccustomed to writing articles praising them. So I searched for an alternative topic and realized that the entire discussion of economic liberties, at this symposium and through most of American history, has been about protecting the rights of the rich to keep and use their money and property. The phrase “economic liberties” brings to mind challenges to regulations—minimum wage laws, minimum hour laws, child labor laws—put in place to help the more disadvantaged and powerless members of our society.

But if we are going to engage in a serious discourse about economic liberties, then our focus should be on the rights of the least well off in America. The wealth gap between the rich and the poor has grown wider in recent years and is increasing. I truly believe that in the long-term, the greatest threat to the survival of the nation will come from the growing class divide. History shows that the division between rich and poor is the most frequent impetus for political uprisings. Moreover, it is immoral that the wealthiest nation in the history of the world does so little for its poor.

---

<sup>5</sup> Listening to the other papers at this symposium reminded me that the agreement is not universal. Hearing some of the leading advocates for a revival of economic rights caused me to think that maybe a defense of the status quo might have been appropriate after all. On the other hand, advocacy of a return to the *Lochner* era seems limited to a relatively small group of libertarian and quite conservative scholars. There are no suggestions from the Supreme Court that such a revival is likely to happen any time soon, and the overwhelming weight of academic opinion is in favor of continuing the law as it has been for the last sixty-five years. There also is a more subtle reason why even most conservative law professors and judges do not urge a revival of the *Lochner* era doctrines: at least since the Warren Court, conservatives have been the foremost advocates of judicial restraint. Heightened judicial scrutiny of economic regulations, with frequent invalidations of federal, state, and local laws, would be impossible to reconcile with this philosophy of judicial review.

So I decided that the focus for this essay would be a simple message: if there is going to be a rebirth of concern for economic liberties, it should focus on creating and protecting rights for the poor, not on safeguarding the wealth and property of the rich from government regulation. In this essay, I make three points. First, the traditional focus of the Supreme Court's economic liberties decisions has been on protecting corporations and the wealthy from government regulation. Second, the real problem when it comes to economic liberties is poverty. Finally, in the long term, the Court should interpret the Constitution as creating a right to minimum entitlements for all Americans to the necessities of life: food, shelter, and medical care.

I, of course, am not the first to argue this; forceful arguments for a constitutional right to livelihood have been made by eminent scholars such as Charles Black, Peter Edelman, and Frank Michelman.<sup>6</sup> Nor do I have any illusion that this is likely to happen in my lifetime. No Justice on the current Court would advocate such a view and it is as much a minority position in the academy as is advocacy for a revival of *Lochner* era doctrines. More generally, there is little social commitment to dealing with the problem of poverty. For at least the last quarter of a century, welfare reform has been all about cutting benefits and eligibility with increasingly draconian laws. Intellectually, there has been a growth in a libertarian philosophy which seems founded on profound selfishness—a desire of people to have the government leave them and their money alone. There has not been a development of a social ethos of caring and duty to others.

Few seem to remember that President Richard Nixon proposed a guaranteed annual income in the form of a negative income tax. The War on Poverty of President Lyndon Johnson's "Great Society" is a distant, and poorly understood, memory. But I deeply believe that someday attention will turn again to the real problem of economic rights: the plight of the poor. And someday, as social attitudes change, the Supreme Court will say that every person has a fundamental right to basic entitlements such as food, shelter, and medical care. This essay is written in the hope and anticipation of that time, undoubtedly far into the future.

## II. THE TRADITIONAL FOCUS OF ECONOMIC LIBERTIES

In this section, I make a simple point: advocacy of economic liberties in the Supreme Court has been about protecting the in-

---

<sup>6</sup> See, e.g., Charles L. Black, Jr., *Further Reflections on the Constitutional Justice of Livelihood*, 86 COLUM. L. REV. 1103 (1986); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969).

terests of corporations and the wealthy to be free from government regulation. Certainly, this was true during the *Lochner* era. The landmark case of *Lochner v. New York* involved a challenge to a state law that limited bakers to working sixty hours a week and no more than ten hours a day.<sup>7</sup> The law obviously was enacted to protect bakers from being pressured into working inhumane and unhealthy hours. The Court's invalidation of this statute was typical of what occurred throughout this era of American constitutional history: the Supreme Court repeatedly invalidated statutes that were enacted to help workers and consumers.

For example, in *Adair v. United States*,<sup>8</sup> and *Coppage v. Kansas*,<sup>9</sup> the Court declared unconstitutional federal and state laws that prohibited employers from requiring employees to sign agreements stating they would not join a union. In the early part of the century, as workers attempted to unionize, many states and the federal government adopted laws to facilitate unionization by prohibiting employers from insisting, as a condition of employment, that employees agree not to join a union. The Supreme Court declared the laws unconstitutional as impermissibly infringing freedom of contract. The effect of these decisions was to protect the rights of management to be free from unions and deny workers the ability to unionize to equalize their bargaining power.

Similarly, the Court during this era repeatedly invalidated state minimum wage laws which had been enacted to ensure that workers were paid a humane, albeit small, amount.<sup>10</sup> Laws protecting consumers from abuses by businesses were also struck down. For instance, in *Weaver v. Palmer Bros. Co.*, the Court declared unconstitutional a state law prohibiting the use of "shoddy" in making bedding.<sup>11</sup> The Court rejected the claim that the ban was needed to protect public health and found that the law interfered with freedom of contract for anyone who wished to buy and sell such products.<sup>12</sup> The Court said that the public interest in health could be served by regulation, such as by mandating sterilization of the material.<sup>13</sup> In *Jay Burns Baking Co. v. Bryan*, the Court declared unconstitutional a law that required standardized weights for bread loaves.<sup>14</sup>

---

7 198 U.S. 45, 52 (1905).

8 208 U.S. 161, 179-80 (1908).

9 236 U.S. 1, 26 (1915).

10 See, e.g., *Morehead v. New York ex rel. Tipaldo*, 298 U.S. 587, 609 (1936); *Adkins v. Children's Hosp.*, 261 U.S. 525, 559-62 (1923).

11 270 U.S. 402, 415 (1926). "Shoddy" consisted of rags and other debris that were used to stuff mattresses. *Id.* at 409.

12 *Id.* at 412-15.

13 *Id.* at 414.

14 264 U.S. 504, 517 (1924).

The consistent theme in all of these cases is that the Supreme Court during the *Lochner* era was ruling in favor of businesses and the wealthy at the expense of laws enacted to protect workers and the less well off. Not surprisingly, *Lochner* era doctrines did not survive the depression. The reality is that the market, far more than government regulations, denied meaningful bargaining power and economic liberty for most people in society. As Professor Tribe explains:

In large measure . . . it was the economic realities of the Depression that graphically undermined *Lochner's* premises. . . . The legal "freedom" of contract and property came increasingly to be seen as an illusion, subject as it was to impersonal economic forces. Positive government intervention came to be more widely accepted as essential to individual, family, and community survival, and legal doctrines would henceforth have to operate from that premise.<sup>15</sup>

This is not to deny that occasionally challenges to economic regulations were brought by employees who wanted to work more than sixty hours a week or for less than the minimum wage. Rather, the point is that the overarching motif of the *Lochner* era involved the Supreme Court striking down laws intended to help workers and consumers, which in turn benefited corporations and wealthy propertied interests. That is what claims of economic liberties have always been about, even when the Court has ruled in favor of the government. For example, in *Home Building & Loan Ass'n v. Blaisdell*, the Court upheld a moratorium on foreclosure sales of farm mortgages.<sup>16</sup> The case involved an effort by banks to invalidate a law that had been adopted during the depression to protect consumers. Even today, economic liberties cases are about efforts by those with money and property to resist government regulation. The Supreme Court's most recent property rights case—*Tahoe-Sierra Preservation Council, Inc. v. Tahoe Regional Planning Agency*—involved whether temporary delays in the development of property for purposes of environmental review are a *per se* taking.<sup>17</sup>

"Economic liberties" has a clear and consistent meaning throughout American history: efforts to use the Constitution to protect the rights of corporations and property owners by invalidating laws enacted to protect employees, consumers, and the environment.

---

<sup>15</sup> LAURENCE H. TRIBE, 1 AMERICAN CONSTITUTIONAL LAW 1358 (3d ed. 2000) (footnotes omitted).

<sup>16</sup> 290 U.S. 398, 447–48 (1934).

<sup>17</sup> 535 U.S. 302, 306 (2002).

### III. RECONCEPTUALIZING ECONOMIC LIBERTIES TO PROTECT THE POOR

Poverty is a serious problem in American society. 2000 Census data indicated that 31.1 million people lived below the poverty line; and an additional 12.3 million people were only slightly above the poverty line.<sup>18</sup> Whereas 9.4% of whites were below the poverty line, 21.2% of Hispanics and 22% of blacks in the United States are poor.<sup>19</sup> Most tragically, eleven million children—one in six children in the United States—lived in a family below the poverty level.<sup>20</sup> The problem is much greater for minority children. Thirty percent of all black children and 27% of all Hispanic children lived below the poverty level.<sup>21</sup>

A decade of great economic prosperity did not benefit the poor nearly as much as the rich; racial minorities continue to be vastly less well off than whites. In 2000, white households had a median net income of \$44,232; black households had a median net income of \$30,436.<sup>22</sup> According to recent census statistics, 38.7 million people in the United States—14% of the population—went without health insurance during the entire 2000 calendar year.<sup>23</sup> Thirteen percent of whites were without health insurance, compared to 18% of blacks.<sup>24</sup> In 1995, 39% of black households survived on incomes of \$11,612 or less, while only 6% of black households brought in “high incomes” of \$50,000 or more.<sup>25</sup> Conversely, at the close of the 1990s, the number of black household’s earning under \$15,000 exceeded that of whites by more than 11%.<sup>26</sup> As telling as these statistics are, they do not convey the human effects of poverty. Numbers cannot capture the devastating effects of poverty or convey what it is like for a child to grow up hungry and without access to medical care.

There is a serious problem with poverty in this country, but there seems a general lack of awareness on the part of the public to the plight of the poor. The poor are invisible to most Americans. Popular images are shaped by television, yet few television programs focus on the life of the poor in America. In most cities,

18 BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 441 tbl.668 (122d ed. 2002).

19 *Id.*

20 *Id.* at tbl.669.

21 *Id.*

22 *Id.* at 433 tbl.653.

23 *Id.* at 102 tbl.137.

24 *Id.*

25 Beverly I. Moran & William Whitford, *A Black Critique of the Internal Revenue Code*, 1996 WIS. L. REV. 751, 752 n.9 (1996) (citing MELVIN L. OLIVER & THOMAS M. SHAPIRO, *BLACK WEALTH/WHITE WEALTH: A NEW PERSPECTIVE ON RACIAL INEQUALITY* 100–01 (1995)).

26 BUREAU OF THE CENSUS, U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES: 2002, at 433 tbl.652 (122d ed. 2002).

the poor, and especially poor people of color, are physically segregated from the rest of society. A big city dweller can coexist with thousands of homeless people without ever seeing the poor where they live. Even when the poor are physically visible, we make them psychologically invisible. We have become accustomed to ignoring the homeless and stepping over and around street beggars.

None of the presidential candidates in 2000 advocated efforts to deal with poverty in the United States. Over thirty years ago, some in the Richard Nixon administration proclaimed that there should be "benign neglect" of the problem of poverty.<sup>27</sup> What has occurred in recent decades is certainly neglect, but there has been nothing benign about it. Decades have passed since the last new program was created to help the poor. Instead, recent efforts have focused on restricting eligibility and cutting benefits. The current weak economy obviously will make the problem much worse.

#### IV. TOWARDS A CONSTITUTIONAL RIGHT TO MINIMUM ENTITLEMENTS

Persuading the public, and ultimately the Supreme Court, that the government has a moral duty to provide every person minimum subsistence will be difficult. Many deeply embedded social attitudes will need to be changed. A fundamental belief exists in this society that people are responsible for themselves and their own fate. Consequently, it is a widely accepted notion that, if people are poor, it is a reflection of their own failings and that they are responsible for a solution. In harmony with this commonly-held misconception about the causes of poverty, welfare programs traditionally have helped only the so-called "deserving poor:" dependent children, the disabled, and the elderly. Others are thought to have the responsibility for caring for themselves. General relief benefits traditionally have been unavailable in some states and extremely limited in others.

But it is wrong to blame the poor for their financial plight. People can become poor in countless ways that are no fault of their own, and people often lack the means to do anything about it. Many who are impoverished—most notably children—are truly blameless. National economic policy, discrimination and its long legacy, and inequalities in the educational system, are among the social factors that limit the jobs available and relegate a signifi-

---

<sup>27</sup> Jill Zuckman, *Senate's Longtime Scholar, Champion of Change, Dies; N.Y. Shoeshine Boy Grew Up to Become 'An Intellectual Pioneer and a Trusted Advisor to the Presidents,'* CHI. TRIB., Mar. 27, 2003, at C19, available at 2003 WL 17256554. Senator Daniel Patrick Moynihan, a controversial democrat and congressional scholar, died March 26, 2003, as this essay was being completed. Surprisingly, he agreed to remain in the White House as an advisor in the Nixon administration, where he infamously suggested that government exercise "benign neglect" toward minorities. *Id.*

cant proportion of the population to poverty. Regardless, though, why people are poor, the government has a moral obligation to care for those who are less well off. In a society with tremendous wealth—enough to spend \$100 billion on a war in Iraq—it is unconscionable that millions of children go to bed hungry and are without health insurance.

Government actions can successfully provide people with what is needed for subsistence. One of the worst, and most inaccurate, lessons of the 1960s is that government poverty programs cannot work. To the contrary, the programs of the 1960s were quite successful in achieving their objectives. Between 1960 and 1969, the poverty rate declined from 22.2% to 12.1% of the population.<sup>28</sup>

Perhaps more importantly, the general relief measures implemented thus far have undeniably raised the quality of life for the poor in America. Food stamps alleviate hunger for millions of people; Medicare and Medicaid provide medical care to millions who have none; and public housing programs, for all their problems, provide shelter. Countless lives were improved because programs provided people with basic necessities.

The real problem with anti-poverty efforts is that they have always been terribly underfunded. During the 1960s, at the height of social commitment to the war on poverty, another war—the one in Vietnam—limited the scope of Great Society programs. The effort to combat poverty was very much hindered by the massive amount of money that was needed to fund the war in Southeast Asia. As William L. O'Neill observed, "\$1.6 billion, however carefully expended, didn't go far toward meeting the needs of thirty or forty million poor people. . . . [T]he main problem was always money. OEO [the Office of Economic Opportunity] had \$50 million to help 150,000 migrant workers, \$32 million for over 200,000 reservation Indians."<sup>29</sup>

Unfortunately, history shows that voluntary efforts will not provide adequate resources for the poor to ensure minimum subsistence. The poor are truly a "discrete and insular minority."<sup>30</sup> The poor possess little political power, and are obviously under-represented in legislatures. By definition, they lack money to give contributions to political candidates or to set up political action

---

<sup>28</sup> Isabel V. Sawhill, *Poverty in the United States: Why is it So Persistent?*, 26 J. ECON. LITERATURE 1073, 1082 (1988).

<sup>29</sup> WILLIAM L. O'NEILL, *COMING APART: AN INFORMAL HISTORY OF AMERICA IN THE 1960's* 131 (1971).

<sup>30</sup> William E. Forbath, *Why Is This Rights Talk Different from All Other Rights Talk? Demoting the Court and Reimagining the Constitution*, 46 STAN. L. REV. 1771, 1774 (1994). See also *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).



committees. They lack the resources to buy advertising time to use the media to communicate.

Most importantly, the self-interest of the majority of citizens is counter to the interests of the poor. Taxpayers are loath to give up their hard earned money to support programs that will not directly benefit them. Social Security is a paradigm example. But welfare programs are a low priority in the public's consciousness. An ugly element of racism also explains the inadequacy of funding for government programs. Deeply embedded racist attitudes create stereotypes about welfare recipients, and these stereotypes become a tacit basis for limiting programs and benefit levels.

All of this is to explain why it must be for the courts and the Constitution to ensure protection of economic rights. The immediate response to this is that the Constitution is concerned only with negative liberties, not affirmative rights. This is flawed for several reasons. First, it is inaccurate to depict the Constitution as solely a charter of negative liberties. Many parts of the Constitution create a duty on the part of the government to take affirmative acts. The Fourth Amendment requires the police to obtain a warrant before a search or an arrest except under relatively narrow circumstances.<sup>31</sup> Almost the entire Fifth Amendment imposes affirmative duties on the government, including the obligation to convene a grand jury before trying a person for a crime and the requirement that the government pay just compensation if it takes private property for public use.<sup>32</sup> The Due Process Clauses of the Fifth and Fourteenth Amendments require notice and hearing as part of procedural due process.<sup>33</sup> The Sixth and Seventh Amendments require the government to provide a jury in criminal and civil trials, respectively.<sup>34</sup> The Sixth Amendment mandates the provision of counsel in cases in which there is a possible prison sentence.<sup>35</sup> Simply put, it is descriptively wrong to view the Constitution as encompassing solely negative liberties.

Second, in the realm of minimum entitlements, the argument based on negative liberties confuses rights and remedies. Most constitutional rights can be phrased negatively, but remedies are almost always phrased affirmatively. For example, a classic statement of a negative right is that the Fourth Amendment generally prohibits searches and seizures without warrants based on probable cause. The remedy, however, is an affirmative duty: the police must seek warrants before searches or arrests. The Fifth Amendment prohibits involuntary self-incrimination, a negative right.

---

<sup>31</sup> U.S. CONST. amend. IV.

<sup>32</sup> *Id.* amend. V.

<sup>33</sup> *Id.* amends. V, XIV.

<sup>34</sup> *Id.* amends. VI, VII.

<sup>35</sup> *Id.* amend. VI.

The Court has prescribed the affirmative duty of administering Miranda warnings to give effect to the Fifth Amendment guarantee. The Fourteenth Amendment prohibits segregation; the courts have mandated desegregation efforts as a remedy.

Similarly, the Court could and should find that the Constitution forbids the government from ignoring starvation and homelessness in that these are deprivations of life and liberty without due process. These are negative liberties; prohibitions on what the government may do. The remedies are affirmative: assuring minimum entitlements.

Other scholars have developed arguments as to how the Constitution can be interpreted to create rights to minimum entitlements, and why it is desirable to understand the Constitution in such a way. Frank Michelman argued that the Equal Protection Clause should be interpreted to create such rights.<sup>36</sup> Alternatively, the Privileges or Immunities Clause of the Fourteenth Amendment might be construed to include a right to basic entitlements. In fact, conservative scholar Philip Kurland suggested this possibility in a law review article two decades ago.<sup>37</sup> A privilege guaranteed to all would be the essentials needed for life: food, shelter, and medical care. In *Saenz v. Roe*, the Supreme Court revived the Privileges or Immunities Clause and used it for the first time in over a century to invalidate a state law that discriminated against new residents in a state in receiving welfare benefits.<sup>38</sup> The Court declared unconstitutional a California law which provided that those moving into the state would have welfare benefits set at the level of the state from which they moved.<sup>39</sup>

Another possibility is to use the Due Process Clause's protection of "life." The effect of government failure to provide minimum subsistence is to deny individuals life without due process of law. Even if people do not actually die from the lack of basic necessities, the adverse effects on the quality of life from hunger, homelessness, and a lack of medical care are sufficient to constitute a deprivation within the meaning of the Due Process Clause. Basic subsistence is the prerequisite for the exercise of all rights.

Another alternative is to emphasize international law, which does create a right to minimum subsistence for all. Scholars, such as Professor Nadine Strossen, have argued that the interpretation of the American Constitution should be influenced by interna-

---

36 Michelman, *supra* note 6, at 11-12.

37 Philip B. Kurland, *The Privileges or Immunities Clause: "Its Hour Come Round at Last"?*, 1972 WASH. U. L.Q. 405, 419-20.

38 526 U.S. 489, 501-03, 510-11 (1999).

39 *Id.* at 493, 510-11.

tional law norms.<sup>40</sup> The United Nations' Universal Declaration of Rights expressly declares in Article 25: "Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . ."<sup>41</sup>

My goal here, obviously, is not to develop these constitutional arguments. Rather, I want to indicate what arguments might be made. Nor is my objective to suggest that these arguments can be developed in a way that would persuade the current Supreme Court. Instead, my contention is that the Court should, at some future time, find such constitutional rights. Critics are sure to argue that this is an inappropriate judicial role. The Court can declare the right to minimum entitlements and leave the legislatures with discretion as to how to assure provision of the benefits.<sup>42</sup> Legislatures might choose a guaranteed annual income or a negative income tax. Alternatively, legislatures can choose guaranteed employment with sufficient income, together with assistance programs for those unable to work. Another possibility would be a combination of cash programs and in-kind assistance, such as food stamps and Medicaid. However the government chooses to meet its responsibilities, the judicial role would be to guaranty that the government has acted to assure every person of basic essentials needed for life. The Court would declare the rights and then leave to the legislature the choice as to how to provide for them.

## V. CONCLUSION

Throughout American history, including in this symposium, it is conservatives who argue for the protection of economic rights. The *Lochner* era featured conservative Justices who were deeply committed to a laissez-faire economy, protecting business from legislative regulation. My objective in this essay is to offer an alternative progressive vision: to see economic liberties as a way for helping not the rich, but the poor. The rich have no problem protecting themselves in the political process. They can make campaign donations and afford lobbyists and do all of the other things incident to the influence of money on the political process. But the poor obviously lack money to do these things. They are the ones who need judicial protection.

---

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

41 UNIVERSAL DECLARATION OF HUMAN RIGHTS, U.N. Doc. A/811 (1948), reprinted in BASIC DOCUMENTS ON HUMAN RIGHTS 26 (Ian Brownlie ed., 2d ed. 1981).

42 Mark S. Kende, *The South African Constitutional Court's Embrace of Socio-Economic Rights: A Comparative Perspective*, 6 CHAP. L. REV. 137 (2003).

In the wealthiest nation in the history of the planet, there should not be starving children, or people without medical care, or people without homes. I believe that someday in the distant future, a more humane Supreme Court will find a constitutional right for every person to have the minimum entitlements needed for subsistence.