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Utopian Dangers: Chemerinsky's "Right to Minimum Subsistence"

by Dennis D. Dorin*

I. INTRODUCTION

Susan Bandes, a strong proponent of the theory that positive rights are encompassed by the Constitution, nevertheless dismisses arguments for a constitutionally mandated minimum subsistence as "utopian."1 A brief critique of Erwin Chemerinsky's "Making the Case for a Constitutional Right to Minimum Entitlements" may tell us why.

Professor Chemerinsky sets a somewhat modest goal for his article. He seeks to delineate what he believes to be the main steps in the development of a viable argument in support of a constitutional right to minimum entitlements.2 He does this provocatively, summarizing and invoking, although not going far beyond, the relatively small body of literature contending that the Constitution provides such protections.3

Yet, his sketchy and rough-hewn article, which resembles a law office memorandum on case strategy,4 shows that he does far more. He argues candidly that the Supreme Court should create a constitutional right to "(minimum government services" or "resources for survival" or "a livelihood."5 Indeed, he at least intimates that, with the retirement or death of

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3. Id. at 525.

4. Chemerinsky's American Bar Association Article might be described as a somewhat informal "think piece." So, given these parameters, this Article might be viewed as one such piece's response to another.

5. Chemerinsky, supra note 2, at 526-27.
the Reagan and Bush Justices, a future Court might well employ such an approach to effect a solution to the serious national problem of poverty.\textsuperscript{6}

I agree with Chemerinsky that legitimating such roles for the Court and the Constitution will be "difficult and time-consuming . . . ." But I would also add "and probably impossible." And, with one significant reservation,\textsuperscript{8} I find such an undertaking inadvisable.

It must already be obvious that Professor Chemerinsky and I differ substantially in our conceptions of the Court's and the Constitution's natures and functions. Perhaps this divergence might best be illuminated by our respective treatments of two questions: Do the federal government and the states have a moral duty to ameliorate, to a very large degree, the conditions of the poor? And, if so, should the Supreme Court attempt to compel them to do so by articulating a positive constitutional right to basic subsistence? In addressing these questions, I will rely considerably upon Justice Benjamin Nathan Cardozo's method of social engineering as well as my conceptualization of the characteristics of civil rights and liberties.

A. Does the Government Have a Moral Duty to the Poor?

Chemerinsky concedes that his argument runs counter to "traditional constitutional doctrine" and "deeply embedded social attitudes." His case, therefore, draws little support from Cardozo's methods of analogy, evolution, or tradition.\textsuperscript{9} But Justice Cardozo would have been among the first to contend that there are times when the injustices caused by the legal process are so great that jurists "must bend symmetry, ignore history and sacrifice custom in the pursuit of other and larger [societal] ends."\textsuperscript{11} Is constitutional law relating to the poverty problem at least a candidate for such a departure?

\textsuperscript{6} It should be noted that such "moderates" or even "liberals" on the current Court as John Paul Stevens and Harry Blackmun would reject Chemerinsky's conception. See Collins v. City of Harker Heights, Texas, 112 S. Ct. 1061, 1069 (1992).

\textsuperscript{7} Chemerinsky, \textit{supra} note 2, at 526, 541.

\textsuperscript{8} See infra note 64.


\textsuperscript{10} \textit{BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS} 31-97, 142-67 (1921). This work remains a classic delineation of at least the various formal intellectual approaches that justices can bring to their policymaking.

\textsuperscript{11} \textit{Id.} at 65.
Marilyn Quayle’s social commentary notwithstanding, the extent, depth, and recent rapid expansion of impoverishment in America are appalling. Chemerinsky’s statistics reveal that 13% of our 1988 population was below the poverty line. The latest figures dramatically support his observation that the situation “is growing worse, not better.” During just the past year, 2.1 million people have been added to the poverty rolls, boosting the ranks of the poor to 14.2% of the populace.

Every impoverished person is not a product of irresistible genetic, social, economic, or political processes. But what percentage of Americans born into severe poverty is so extraordinary—spiritually, mentally, and physically—that it can raise itself above poverty’s dehumanization? As Chemerinsky argues, racial, ethnic, and sexual discrimination, as well as highly deficient educational systems, are just some of the many powerful forces limiting the available jobs and relegating “a significant part of the population to [impoverishment].”

The government’s duty to eradicate a substantial part of the poor’s suffering is there. But, a moral imperative and a legal obligation are not always coterminous. Morality can sometimes be embodied into the law, but not always. While Justice Cardozo proclaimed that “the final cause of law is the welfare of society,” he was also well aware that both sides in appellate litigation often represent legitimate societal interests. Such contests might appropriately be settled only through a highly delicate and chancy determination of which side possesses the preponderance of justice.

Yet what seem to be understated in Chemerinsky’s Article, as well as other works by advocates of a positive right to entitlements, are a number of seemingly telling arguments that can be directed against reading such liberties into our jurisprudence.

B. Should the Supreme Court Proclaim a Right to Subsistence?

Justice Cardozo maintained that even when a court properly invoked the method of social engineering, it inescapably exercised a legislative power. Then why did it not violate the separation of powers? A judge’s
approach, Cardozo contended, diverged from that of a legislator in a number of ways. But, ultimately and critically, what distinguished the judiciary from the rest of the government was that its policymaking had to be interstitial. The great sweeps of policy formulation were for the presidency and the Congress. The federal courts were merely to fill in the gaps in their policies.

Does Chemerinsky’s Supreme Court fit this model? And, if not, can its role be justified by more transcendent values?

We might answer the first question by considering what the Court would have to address were it to legitimate a right to minimum subsistence. This, in turn, might be inferred from the characteristics of all civil rights and liberties.

One important aspect of a civil right or liberty is its location—where it is anchored in the text of the Constitution. Another is its range—which similarly situated individuals and groups are subject to its protection? A third is its depth—how deeply does it penetrate society? That is, what must the government do not to violate it? The fourth is its celerity—how fast is it expanding or constricting?

An argument can be made that the courts’ adoption of proposals like Chemerinsky’s would open the floodgates to destructive litigation. An analysis of such a right’s location, range, depth, and celerity suggests that such concerns are well founded.

Chemerinsky’s right has an inchoateness that makes its assessment, from any perspective, problematical. Is “a constitutional right to minimum subsistence,” for example, the same as one to a “livelihood?” The latter sounds like it would include, in contrast to the former, education, training, employment, and child care. Such indefiniteness, of course, might be expected in a liberty that is at such an early developmental stage. But this right’s substantial ambiguity does make it difficult to ascertain its likely location, range, depth, and celerity.

There is a more disquieting aspect to Chemerinsky’s attempt to locate a right to minimum government services; it at least has the appearance of a foraging through the Constitution for whatever might prove useful.

19. Id. at 69-75.
20. Id. at 69.
21. Id. at 69-75.
22. See Bandes, supra note 1, at 2326-35 for an attempt to rebut such contentions.
24. Id.
25. The brevity of Chemerinsky’s and my Articles does not permit either of us to develop fully our doctrinal arguments. Suffice it to say here that constitutional provisions detailing housekeeping responsibilities for the House of Representatives and similar institutions seem inapposite. Cases like Miranda v. Arizona, 384 U.S. 436 (1966), spring from criminal proceedings, in which the government is employing its near monopoly of legitimate
Perhaps all American legal movements begin this way. But Chemerinsky's casual canvassing of one provision after another seems so narrowly result-oriented that it ignores a major dimension of American constitutionalism—the imperatives of federalism.

What could seemingly be more anachronistic, at this time, than to invoke states' rights arguments? Yet a holistic and indeed, structural, view of the Constitution shows that the federal system presents a formidable obstacle to the establishment of such a liberty.

Is Professor Chemerinsky's right, for example, to be found in the Fifth Amendment's Due Process Clause? If so, then the federal government apparently has the crucial responsibility to underwrite it. But, if it rests upon the Fourteenth Amendment's Due Process, Equal Protection, or Privileges and Immunities Clause, then perhaps the states and their instrumentalities have the ultimate duty to finance it. In the event of a crunch, can both of these Amendments be operative? Could the Court make a fifty-fifty or seventy-thirty allocation?

Would the Court ever find itself facing such issues? A four-trillion dollar debt is savaging the federal government. A great many states are experiencing their worst budgetary crises since the Great Depression. Why would the Court not inexorably be drawn into determinations of which of these governmental systems would ultimately be responsible for specific entitlements? And what guidance at all, from the Constitution's text, history, and leading cases, would it have for such decisions?

Similar major difficulties would attend the Court's attempts to ascertain the range of a right to governmental assistance. Professor Chemerinsky contends that the United States v. Carolene Products Co. Footnote should be read to include the poor as a "'discrete and insular minority.'" With little to no representation in the White House, the governors' mansions and the federal and state legislatures; finding themselves unable to contribute to candidates or political action committees; and lacking resources to buy advertising time, the impoverished, Chemerinsky

physical force directly to threaten suspects' or defendants' liberties or lives. The Just Compensation Clause and Seventh Amendment relate to direct attempts, through the governmental process, to take persons' property. The Equal Protection Clause does permit the government to remain actionless in the face of blatant racial discrimination. See Moose Lodge v. Irvis, 407 U.S. 163 (1972). Regarding the Equal Protection Clause's and the Due Process Clause's application to a police officer who stands by while a person is beaten, however, see infra note 64.

27. 304 U.S. 144 (1938).
28. Chemerinsky, supra note 2, at 532.
finds, can only turn to the courts if they are ever to have an impact upon the nation's policymaking.\textsuperscript{29}

But what about the National Welfare Rights Organization, the National Urban League, the NAACP, the Children's Defense Fund, the ACLU, and even the National Center on Homelessness and Poverty? Do they not count because they are not sufficiently effective? Then are we not gauging not whether poverty-stricken people are represented in the executive and legislative branches, but whether they are "effectively" represented? If the latter, then why are not mentally ill persons, children, victims of spouse abuse, and individuals insufficiently protected from violent crime members of discrete and insular minorities entitled to government intervention into their situations under the Constitution?\textsuperscript{30}

Congress has once again failed to pass the Brady Bill.\textsuperscript{31} If the National Rifle Association really is able to smother such a reasonable piece of legislation, despite our current national bloodbath of gun-related killings and woundings, then how well are the proponents of gun control legislation being represented? What positive right would seem to merit more protection than that against being a victim of gun-induced violence?

Numerous such examples could be suggested. The point is that Chemerinsky's expansive interpretation of \textit{Carolene Products} does not begin to tell us how badly a group must lose in the executive or legislative branches before it qualifies for such positive rights and liberties. In such a state of the law, with the possible gains so enormous (that is, constitutionally protected entitlements) and the cost so relatively low (that is, litigation expenses, in contrast to those for lobbying executive and legislatures), why should we not expect a wave of such new cases to drown already overburdened judiciaries?

What would be the depth of such a constitutional protection; that is, what would the government have to do in order not to violate it?

Obviously, the federal government or the states or both would have to provide "adequate" or "sufficient" subsistence payments. How these could be computed would be directly dependent upon how the Court would determine the extent to which food, shelter, medical assistance, education, training, and child care considerations should be reflected in them.

In addition, what mix of AFDC, Medicaid, and food stamp entitlements would be acceptable? How would the overall minimal value of such packages be calibrated? How could they be adjusted to the different costs of living in various parts of the country? (In light of unemployment rates?

\textsuperscript{29} Id. at 532-33.
For inflation? In accordance with which econometric models?) Such concerns, to put it mildly, would be formidable, especially in light of the less than impressive facility with statistical methodology reflected in the Court’s performances in cases like *McCleskey v. Kemp.*

Yet, even these considerations might pale in contrast to others. “Adequate” and “sufficient,” for example, are relational terms. As I have already intimated, the only way the Court can hope to employ them effectively would be through the development of standards for a large number of services in a wide variety of social, economic, and political contexts.

But what if the federal government or a state argued that its commitment to subsistence had to be seen as “adequate” or “sufficient,” given the severe budgetary exigencies it was experiencing and the other disbursements it was compelled to make in areas such as deficit reduction, job creation, law enforcement and corrections, defense, education, infrastructure maintenance, pollution control, health programs for the non-indigent, and so on almost ad infinitum? Would such claims be dismissed as frivolous? Or would the Court eventually find itself drawn into an assessment of the entire sweep of governmental expenditures to see if those for the poor, in their complete context, were “adequate”? And how far would the federal government and the states be expected to go in their relationships with particular impoverished individuals? Critical to such a determination would be whether Chemerinsky’s right is “inalienable,” in the peculiar sense in which Laurence Tribe has employed that term. Could it ever be waived? And, if so, could a waiver be implicit as well as explicit?

Consider, for example, a recent newspaper report that San Francisco has spent, during the last five years, one million dollars for emergency ambulance rides and hospital services for a single homeless person, “Diego.” San Francisco’s 911 regulations require its paramedics to take every person to whose call they are responding to the hospital, if he or she desires. The hospitals are then obligated to conduct a series of routine tests upon such individuals, inter alia, to protect themselves from malpractice suits. The resulting costs to the city of each pickup can easily be one thousand dollars. And given that other homeless persons have learned to use the system similarly to “Diego”—that is, as a means for obtaining free food or shelter or the treatment of minor ailments that could be addressed by walk-in clinics—San Francisco’s 911 expenditures are soaring.

In such circumstances, we might ask Professor Chemerinsky, what would be the extent of a "Diego's" rights to "adequate" medical care? And, if he engaged in physically or mentally self-destructive behavior, such as bouts of drinking or consuming other drugs to intoxication, could he somehow waive them? Or would the government, especially if alcoholism or cocaine or heroin addiction are viewed as diseases, have the duty proactively to seek out homeless people in the streets, alleys, and abandoned buildings to make sure that their health is being protected?

And if such persons did become seriously ill, when would the medical care provided by the government be sufficient? Must it provide one or more specialists? Prolonged intensive care? Measures some ethicists would regard as heroic?

Chemerinsky's right to minimum entitlements would also raise major celerity issues. At what speed would this "liberty" develop? How much would it fluctuate with changes in the economy, medical science and technology, and educational innovation? As just one example, how often would the federal government and the states be compelled to adjust their payments to reflect current societal realities? Annually? Every five years? The first option would most likely induce enormous confusion into public policymaking at all levels of the government. The latter may well produce such a lag in the implementation of what, under Chemerinsky's Constitution, is a fundamental right, that the poor could persuasively claim that they were being effectively denied their liberty.

Of course, it might be argued that the Court has ample powers to control the speed with which such a right expands. It can broaden or narrow its rules on standing. It can similarly employ its certiorari powers. Through its formulation of doctrines, it can fine-tune the frequency with which litigants bring before it expansive or incremental legal claims.

Is such a scenario likely to play out constructively, however, when the cultural, social, political, and economic conditions with critical significance to such "rights" may well be changing daily? And would this seem plausible, given that these liberties would encompass such complex, intractable, and volatile questions as how properly to contain the costs of health care and how effectively to resuscitate the economy?

A more likely outcome would be a Supreme Court besieged by an as yet unmatched influx of new cases—ones putting it on highly uncertain paths of public policymaking. State and federal courts could be expected to "light up" with such litigation. Distressing "conflict on the circuits" would pressure the Supreme Court to intervene. Under such pressures, there is no guarantee that the Court could orchestrate an optimum, or even controllable, rate of development for such a right, especially in light of its docket's other pressing responsibilities.

The foregoing would seem to demonstrate that if the Supreme Court would legitimize the "liberty" for which Chemerinsky is contending, it
would find itself engaged in "macropolitical" decisionmaking. It would be playing a role far transcending Cardozo's "molecular" one. But the Court has played a dramatically "molar" role in launching social, political, and legal movements before. Why should it not do so here, when the very lives of men, women, and children cry out for protection?

It may be easy to say that the Court could successfully meet such challenges, given its record in areas of the law suggested by such cases as *Brown v. Board of Education* I and *Brown v. Board of Education* II, *Baker v. Carr*, and *Miranda v. Arizona*. But, despite how revolutionary these cases may have seemed in their times, all of them appear to have had far more support in the text, history, and precedents relating to the Constitution than would a right to minimal subsistence.

And are all these cases unquestionably success stories? Despite the enormous good *Brown* and *Miranda* have done, the battles attending their expansion or constriction rage on. And the dreams Earl Warren envisioned for *Baker* are still tragically far from fruition. Finally, the "rights and liberties" encompassed by Chemerinsky's proposal would be markedly "inelastic." That is, their recognition in behalf of some very unpopular members of society would represent, during a period of very hard times for a great many, a clear-cut, obvious, and palpable diversion of funds from others.

But even if the Court encounters fierce resistance from other branches and levels of government, it might be contended, it is not essential that such "rights" attain substantial enforcement. The important thing, according to this view, would be that the Court would put its imprimatur upon them. For, with its finding them in the Constitution, they could serve as powerful ideals for the society.

What such an argument may downplay, however, is that the Court's, and even the Constitution's, legitimacy may pay a substantial price to the extent that they proclaim "liberties" that achieve scant support and realization from both the government's other subsystems and the public. Con-

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38. 369 U.S. 186 (1962).
40. The jury, of course, is still out on whether *Brown* will ever be fully implemented. For just one of the many legal battlegrounds over the values represented by *Miranda*, see *Arizona v. Fulminante*, 111 S. Ct. 1246 (1991).
41. Warren believed that redistricting and reapportionment would free up the country for a far more viable legislative process—one that would much better meet the people's needs.
institutional crises would seem far more likely when the Court appears im-
potent in enforcing its holdings.

Regardless of all of these concerns, Chemerinsky makes what might be
an overriding assertion—that the courts are simply the poor's last hope.43
The executive and legislative branches at all levels of American govern-
ment, he argues, are incapable of properly responding to the needs of the
impoverished without the critical variable of judicial leadership.44

II. "Voluntary" Anti-Poverty Policies: Will They Inherently Fail?

Professor Chemerinsky contends that the executive and legislative
processes will inevitably deny the poor what he considers a minimal level
of subsistence.45 His argument is therefore an institutional one. It does
not matter what people, policies, and programs, at any particular time,
dominate these branches. Literally, by definition, the impoverished will
be denied a legitimate voice in these branches' policymaking.46

Yet, Chemerinsky curiously credits these very institutions with re-
sponding effectively to the poor's needs, at least for a few years during
the 1960s.47 Then why, institutionally, is it impossible for them ever to do
so again?

Chemerinsky's response is inadequate. Twelve years of Reagan-Bush
"trickle down economics" and "a thousand points of light" are far too
sketchily mentioned. "Gridlock" government receives similarly insuffi-
cient attention, as does the substantially conservative cast of post-Jimmy
Carter America. Such a perspective brushes aside the role in such areas as
welfare reform that a "liberal" or "moderate" Democratic Administration
and Congress might play in the future, for example, now that Bill Clinton
and many of his supporters in congressional races have triumphed.48

43. Chemerinsky, supra note 2, at 532-33.
44. Id. at 532-33, 539-40.
45. Id. at 532-33.
46. For an attempt by a political scientist to delineate the critical distinction between
support for the persons in power and the governmental institutions themselves, see DAVID
EASTON, A FRAMEWORK FOR POLITICAL ANALYSIS 124-26 (1965).
47. See Chemerinsky, supra note 2, at 530.
48. BILL CLINTON, PUTTING PEOPLE FIRST—A NATIONAL ECONOMIC STRATEGY FOR
AMERICA (1992) promises to "make welfare a second chance, not a way of life by scrapping
the current system and empowering those on welfare by providing the education, training
and child care they need to go to work." Id.
And what about Chemerinsky's contention that the Court could effectively goad the rest of the political system into providing acceptable levels of subsistence? He bases this argument on his conclusion that "the War on Poverty" worked very well in many instances. But, he finds, the "main problem" with it "was always money." The costs of the Vietnam War intervened to make a truly adequate national commitment impossible.

The main problem was money? What about our present four trillion dollar national debt, with its two hundred billion dollar annual interest outlay? And what about the at least thirty-five states (comprising eighty-five percent of our population) that are experiencing budgetary crises? Chemerinsky's failure adequately to address these problems is remarkable.

But perhaps I have undervalued the future usefulness of constitutionalization in substantially ameliorating American poverty. Massive budget deficits constitute, for example, a major causative factor in our nation's impoverishment. And at least thirty-two states, the Republican Party, and George Bush have suggested "the solution"—a balanced budget amendment!

All we need do, then, is to imagine presidencies and Congresses in the coming years that are attempting to cope with severe recessions, or even depressions, within the constitutional frameworks bequeathed to them by a President Bush and a Professor Chemerinsky! Any chance of a viable governmental response would be straitjacketed by the powerful, and suffocating, strictures of constitutionally mandated budgetary ceilings, on the one hand, and a panoply of entitlements also required by the Constitution on the other!

But presently, we already find ourselves confronted with an economic emergency. Misery is widespread in a time, not of scarcity, but of overabundance. The long continuing "recession" has brought an unprece-
dented kind of unemployment and a volume of capital losses that threatens our financial institutions. Economists are searching for the causes of this disorder and are re-examining the basis of our industrial structure. Businessmen are seeking possible remedies. Most of them realize that a failure to distribute more widely the profits of industry has been a prime cause of our present difficulties. Rightly or wrongly, many people think that one of the major contributing factors has been unbridled competition. Who is right nobody knows. Sometimes the obstacles seem insuperable. For we are learning once again that the social, and specifically, economic, sciences are largely uncharted seas.

Enormous demands are therefore being made upon our fallible reasoning powers, as well as our less than perfect institutions. Hence, in such a setting, the last thing the Court should do is to constrict radically the parameters of executive and legislative socio-economic experimentation. Indeed, it should ever be on its guard, lest it erect its own economic ideologies into legal principles.

If the previous paragraph seems familiar, that is because it was lifted, except for minor revisions, from Justice Louis Brandeis's classic opinion in New State Ice Co. v. Liebmann. Brandeis was then inveighing, of course, against the Court's creating constitutionally protected economic rights that would possibly emasculate the Federal Government's and the states' attempts to save the country from the Great Depression. Yet, its relevance to Chemerinsky's proposals, in our economically distressed America, seems obvious. For, as Justice Holmes warned us in Lochner v. New York, the Constitution "is not intended to embody a particular economic theory ..." Obviously, Holmes told us, it does not encompass Mr. Herbert Spencer's Social Statics. But he also admonished us that it does not contain Chemerinsky's conceptions of "paternalism and the organic relation of the citizen to the State . . . ."

III. Conclusion

It is therefore not surprising that such a zealous proponent of "positive rights" as Susan Bandes views proposals like Chemerinsky's as hopelessly
"utopian." The "rights" advocated by Chemerinsky do not seem to garner much support from Cardozo's methods of analogy, history, and custom. And, as we have seen, there are many reasons why they may be highly inadvisable from the perspective of social engineering.

Yet, there is little solace in the conclusion that constitutionalizing "basic subsistence" would prove dysfunctional. Nor can one morally be indifferent to the suffering of the millions of Americans struggling through impoverished lives.

But, perhaps the lesson of this exchange might be that we can best come to their rescue through the executive and legislative branches. I agree fully with Professor Chemerinsky that we misperceive the pluralistic republic bequeathed to us by the Framers if we believe judicial review is perpetually tainted by "antimajoritarianism." Nevertheless, to conclude that the Court can creatively intervene in many of our national problems, and even crises, that far-reaching social engineering is legitimate in such instances, does not mean that it will work in all. Maybe we should seek yet again, as a society, to breathe life into yet another Holmes caveat, this one from Missouri, Kansas & Texas Railway v. May: "[L]egislatures are ultimate guardians of the liberties and welfare of the people in quite as great a degree as the courts."