

FURTHER REFLECTIONS ON THE CONSTITUTIONAL JUSTICE OF LIVELIHOOD*

Charles L. Black, Jr.†

The first words uttered by the new American people claimed, for all humankind, equality in creation, and acknowledged the rights to life, to liberty, and to the pursuit of happiness, as gifts of God to His human creatures.¹ It is not wonderful that Catherine the Great grew troubled in mind, and mounted a diplomatic offensive designed to bring about the failure of our Revolution. And the ghost of La Rochefoucauld must have smiled, for his most famous maxim, published about a century before, had attained quintessential illustration.

But in less than another century—for only eighty-nine years, a length of human life recorded every day or two in the obituary pages, elapsed between the Declaration of Independence and the thirteenth amendment—La Rochefoucauld might have been moved to add unto his maxim yet a codicil. Hypocrisy is indeed the homage that vice renders to virtue. But hypocrisy may commit itself beyond easy retraction. The thirteenth amendment had lain latent in the Declaration of Independence.

Indeed, the hypocrisy that commits itself may undergo metamorphosis as the commitment is acted upon. It may turn out that what seemed hypocrisy was commitment all the while; no more than persons do nations fully know their own minds all at once. The choice for this metamorphosis can be made only over the lapse of generations. The generation that abolished slavery made such a choice, as to the matter wherein the hypocrisy of the Declaration had seemed most startling.

But the Declaration of Independence is still here. Later generations, yours and mine and others to come, have much work to do, if we, and those who follow us, choose to change *all* the assertions in the second sentence of the Declaration from hypocrisy to commitment.

Kenneth Stampp has said that the imperishable accomplishment of the Reconstruction was the utterance of the fourteenth and fifteenth amendments.² Placed where they were, these amendments were sure sooner or later to bear fruit. The words stayed there, through decades

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† Adjunct Professor of Law, Columbia University; Sterling Professor of Law Emeritus, Yale University. B.A. 1935, M.A. 1938, University of Texas; LL.B. 1943, Yale; LL.D. (Hon.) 1975, Boston University.

1. The Declaration of Independence para. 2 (U.S. 1776).

2. See K. Stampp, *The Era of Reconstruction, 1865–1877*, at 214–15 (1965).

wherein the fifteenth amendment was laid open to frustration by mere monkey-tricks, and wherein the segregation regime made snickering nonsense of the fourteenth. Then, at last, the words would not be denied. There is no reason why the remaining unredeemed words of the Declaration, which likewise cannot be expunged, may not come to have a like history. It wasn't very long ago that national commitment to those words was recorded. Here I stand in front of you, full of fight. Yet just three lives, each the length of mine to now, take you back to the summer of 1774, nearly two years before the Declaration was uttered. It is in awareness of this scale of time that I am trying to move any who will listen toward acceptance of the proposition that there is, "and of Right ought to be,"³ a constitutional justice of livelihood.

Breuer, the early collaborator with Freud in that work on hysteria that led at last to the full development of psychoanalysis, remarked that when any subject is much in the intellectual air, it becomes impossible to separate out lines of influence.⁴ Anybody who in these days writes about the justice of livelihood must feel the force of Breuer's saying. I desire to make no claim of originality in my own thoughts on this. Nor can I with knowledge disclaim all originality; maybe I could if I were a wider reader than I am.

I am calling this lecture "Further Reflections on the Constitutional Justice of Livelihood." Since I cannot assume that everybody here this afternoon has been eagerly following my recent writings, I have to sketch what I have been up to.⁵

I have committed myself to drawing from the ninth amendment⁶ an irresistibly implied legitimation for our doing something we have in fact been doing for quite a long time—first seeking and then protecting rights not named in the constitutional text. I see the amendment not as in itself *referring* to any particular right or rights, but rather as commanding us to use the methods available within our legal system in an ongoing *search* for "unenumerated" rights, with a view to their taking their place, without denial or disparagement, in a rational and therefore productive system. I have proposed, as one general method for that search (besides the ancient methods of analogy and of inference from structure), the use of a test of gross disproportionality—between private human loss and public gain—as marking the governmental act that is discernibly incompatible with a serious commitment to liberty, such as that expressed in the Declaration of Independence and in the pream-

3. The Declaration of Independence para. 32 (U.S. 1776).

4. See J. Breuer & S. Freud, *Studies in Hysteria* 133 (A. Brill trans. 1937).

5. The work immediately preceding the present lecture is my *On Reading and Using the Ninth Amendment*, in *Power and Policy in Quest of Law: Essays in Honor of Eugene Victor Rostow 187* (M. McDougal & W.M. Reisman eds. 1985). For reference to my other relevant work, see *id.* at 209 n.*.

6. "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people." U.S. Const. amend. IX.

ble to the Constitution. With that general method I shall not deal in this lecture. At this time I want to elaborate on a special derivation—the derivation of a constitutional right to a decent material basis for life—from the Declaration, from the preamble, and from certain parts of the Constitution proper.

If any human rights at all are shielded against denial or disparagement by the command of the ninth amendment, then there could be no third place as good to begin a search for their ground as in the Declaration or in the preamble. Let me say, however—and so perhaps spare a few or many of you some anxiety—that if you just can't bring your mind around to the ninth amendment, if the two-century prescriptive silence about the ninth amendment irreversibly taboos it in your estimation, then one can also say, with equal truth, that the Declaration and the preamble are the most clearly indicated places for starting a search for those "fundamental values" whose identification has seemingly turned out to be necessary for explicating that quaint paradox, now at home in the black-letter, "substantive due process," as well as for a start toward assaying the quantities of suspiciousness in "suspect classifications" under the "new" equal protection clause. You can transpose into those keys, if they are to your taste, any derivation of rights from the Declaration or the preamble. I hope you will allow me to stick with the ninth amendment, in whose words unenumerated rights actually are spoken of and somehow dealt with in the Constitution.

We start with the Declaration: "Life, Liberty, and the pursuit of Happiness."⁷ Well, many people do die, quickly sometimes, sometimes more slowly, of poverty; poverty may be the leading cause of death. Liberty is very often made into a mocking simulacrum by poverty. But I would lay strongest stress on the phrase, "the pursuit of happiness." Can we, the inheritors of the Declaration, of the treasure of its words, dare to treat *these* words as semantically blank, as mere burnished oratoricality without reference?

This latter effect may be achieved by treating the phrase as a truism. It follows from the very existence of consciousness and will that everybody can pursue happiness, in the sense of electing between alternatives, however unpleasant, as these present themselves. A galley-slave could pursue happiness by continuing to row, thus avoiding a whipping. Or the galley-slave might sometimes make the decision that relief from the tedium and exertion of rowing was worth a little whipping now and again—with the consequence that the pursuit of happiness would for the nonce take a different tack.

But the trouble with this line of thought—aside from its general absurdity as an interpretation of such a document as the Declaration—is that it would have been specifically absurd, an implicit contradiction, to use the word "right" in regard to this truism. As a right, and not as a

7. The Declaration of Independence para. 2 (U.S. 1776).

truism, the right to the pursuit of happiness is the right to be in a situation where that pursuit has some reasonable and continually refreshed chance of attaining its goal—or of moving toward its goal, as one may move eastward, though “east” itself will never be attained.

The possession of a decent material basis for life is an indispensable condition, to almost all people and at almost all times, to this “pursuit.” The lack of this basis—the thing we call “poverty”—is overwhelmingly, in the whole human world, the commonest, the grimmest, the stubbornest obstacle we know to the pursuit of happiness. I have suggested that poverty may be the leading cause of death; it is pretty certain that it is the leading cause, at least amongst material causes, of despair in life. Of course some few people, through extraordinary talent or rabbit’s-foot luck (and the possession of talent is itself a kind of luck), do clamber over the obstacle. But the right to the pursuit of happiness is going to be, for all but a small minority of those in poverty, the palest grinning ghost of a right.

Now to the preamble, and to an echoing of the preamble in article I, section 8. I am going to deal with this quite schematically here, because the arrangement of topics further on will suggest a return to this theme.

The preamble declares that a purpose of the Constitution is to “promote the general Welfare.”⁸ Then, in a phrasal echo that can hardly be accidental, means are furnished for serving this very purpose, in the article I, section 8 empowerment of Congress to tax and spend “for the . . . general Welfare.”⁹ Do not these twinned phrases pick up and carry forward the very themes of the pursuit of happiness, and of the duty of government to aim at maximizing happiness, that are found in the Declaration? And does not the possession of the *power* to seek and to support the general welfare generate a resulting *duty* to do these very things—even without the Declaration, strongly corroboratory though that document be?

Now of course there will always be incertitudes about the boundaries of the concept, “general welfare.” But our American generation is in the happy position of not having to worry about these peripheral and penumbral problems. It is a clarifying metaphor, pointing to ugly truth, to say that our country contains two countries—a country wherein everybody has plenty of good food to eat, and a country wherein nutrition is a bad problem and getting worse. In one country, infant mortality, the death of babies, is going down; in the other country it is going up. A house thus divided against itself is not a penumbral case on the general-welfare question. It is a classic case—I ought better say *the* classic case—of welfare diffused not *generally* but instead *par-*

8. U.S. Const. preamble.

9. U.S. Const. art. I, § 8, cl. 1.

tially—with, as we all know, scandalously strong streaks of racism and sexism in that partiality.

Ideas like these cannot be accepted or rejected on the spot; they have to be around, to be revisited in different moods, to be talked over and over. I think one of the most important jobs just now is to deal with certain objections that impede the mind's motion to such plenary consideration. I have been writing and speaking on this matter long enough to have some sense of these objections. I have found it natural to organize today's "further reflections" as replies to a number of them, as I have heard and sensed them, to wit:

1. The Declaration and the preamble are not ordinarily treated as sources of law.
2. The right to a decent livelihood is not named in the Constitution.
3. The constitutional law of human rights is traditionally conceived as being a set of prohibitions only, rather than as containing as well a set of claims to affirmative duties.
4. There is no way to "draw the line" as to the components of a decent material basis for life.
5. Courts, commonly considered the protectors of constitutional rights, cannot form or enforce adequate programs to wipe out poverty.

It will be handy to treat the first and second of these points separately. Then I have found it best to group the last three objections together, in an answer that will say: "The courts probably cannot do very much herein—certainly not enough—though perhaps we will know more about this later, through trial. But Congress too is bound by the Constitution; that instrument imposes many affirmative duties on Congress. Of course no exhaustive and detailed blueprint of constitutionally required action can be laid out, now or ever, but this fact is not to be taken to make impossible the discernment of legal duty, including constitutional duty."

Now, to go back, it is true that the Declaration of Independence and the preamble to the Constitution have not ordinarily been thought to be of avail in the forming of lawyers' law. But to approve of this is to embrace a technical incompetence that would be shocking in a lawyer who had to deal with the interpretation of a will or a contract. It is an especially inane canon in a system of constitutional law that has been groaning and travailing for generations after the discovery and authentication of its "fundamental values"—a quest, I remind you, joined in by some of the most conservative and restrained Justices of our century.¹⁰ The Declaration and the preamble are not the only places wherein such fundamental values can be located. But there can be no

10. See, e.g., *Poe v. Ullman*, 367 U.S. 497, 541-45 (1961) (Harlan, J., dissenting); *Wolf v. Colorado*, 338 U.S. 25, 26-28 (1949) (Frankfurter, J.); *Pierce v. Society of Sisters*, 268 U.S. 510, 534-35 (1925) (McReynolds, J.).

sense at all in our failing to seek in those documents whatever help they can give in this quest—taking them seriously, getting from them all we can. We will find no higher charter of legitimation for our fundamental values or rights than the organic act that made us a separate nation, and the explicit statement of the purposes of our Constitution.

To proceed to the second objection: the right to a decent livelihood, the right to be rescued from poverty, is not named in the Constitution. It is perhaps not needful, in just this professional atmosphere, to say that this fact is not even close to dispositive of the question whether such a right can validly be derived in the American system. But a lot of people do gain a lot of ground, in other atmospheres, out of the astonishing myth, defiant of all readable reality, that American constitutional law has been and is formed entirely by tracing out the references of words and phrases in the text. The proposition that this is not so is the *pons asinorum* of our subject, a bridge that I am sorry to say some people never have been able to cross and to put quite behind them. But our constitutional regimes of governmental empowerment, of federal relations, of interbranch structure, and of human rights, are all saturated with norms—accepted norms—that cannot with a real straight face be said to be mandated by their naming in the text. I will, however, confine myself to the individual rights field, and choose two of the commonest and most luxuriantly developed illustrations—the use of the so-called “dormant” commerce clause as a source of individual immunity from some restrictions, imposed by state regulation and taxation, on transactions having other than local ties, and the protection of freedom of speech against action by state or local authority.

For well over a century, case after case, exhibiting the assertion by private persons of this interstate-commerce immunity, has been decided by the Supreme Court, often in favor of the natural person or corporation claiming the immunity. The regime constituted by these cases has been the subject of ample panegyric; indeed, it has been more than hinted that the putting in place of this shield was the chief purpose of the adoption of the Constitution.¹¹ Is this a “named” right?

Well, it might just barely, just possibly, do to say that the commerce clause, in giving Congress the power to regulate commerce among the several states, implied that the states might not at all regulate the thing that Congress was given power to regulate. That’s an unnecessary and most impractical use of the always optional *expressio unius* schema, and even so not quite a direct naming of the immunity. But maybe it’s close. We needn’t worry about how close, because that is not what the force of the dormant commerce clause has really been held to be, at any time, by any Supreme Court. Instead, formulation has succeeded metaphysical formulation, line after tormented line has been drawn, to mark out the areas of permissible and impermissible

11. See *Hood & Sons v. Du Mond*, 336 U.S. 525, 533–34 (1949).

state interference with interstate commerce—as to migration,¹² as to mudguards,¹³ as to milk,¹⁴ as to minnows.¹⁵ Take any one of these formulas—the one in the *Cooley*¹⁶ case or any in later cases—and see whether you can say that it is something the Constitution actually “names” in the commerce clause. Now maybe some people can; the human mind is all-powerful—at least as to perversity. But they will thereby have undermined the very concept of naming rights, robbing it of all intelligibility. Most people, I think, on putting any of these structural and functional formulations alongside a text that says nothing about any restriction on the states, will have to say forthrightly that the set of immunities referred to in these formulations is not named or in any way expressly commanded in the Constitution.

The guaranty of free speech is sometimes pointed to as the paradigm of the named right. In most of its applications, it is the paradigm of the unnamed right. Most of its applications have been against state and local authority. As against these authorities, the protection of free speech is not named, and has had to be pushed through the generalities of the fourteenth amendment.¹⁷ Since the privileges and immunities generality has even yet not become functional,¹⁸ the gate that has had to be passed, or, perhaps better, climbed over at dark of moon, is the phrase “without due process of law.” The celebrated *Gitlow*¹⁹ case held, to be sure, that liberty of speech was one of the liberties of which you couldn’t be deprived without due process of law;²⁰ how could anybody have thought otherwise? But the rest of the road was toilsome for *Gitlow*; the Court held that his liberty had *not* been impermissibly taken away—that he was not being deprived of it without due process of law—when he was put in prison for publishing a pamphlet about revolution, with neither statutory requirement of nor showing of danger, or of any effect at all. The tone of the *Gitlow* opinion is set by the sentence: “Every presumption is to be indulged in favor of the validity of the statute.”²¹ In hindsight we know that much flowed from—mostly

12. See *Edwards v. California*, 314 U.S. 160 (1941).

13. See *Bibb v. Navajo Freight Lines*, 359 U.S. 520 (1959).

14. See *Dean Milk Co. v. Madison*, 340 U.S. 349 (1951).

15. See *Hughes v. Oklahoma*, 441 U.S. 322 (1979).

16. *Cooley v. Board of Wardens*, 53 U.S. (12 How.) 299, 319–20 (1851) (commerce power of Congress exclusive where the “subjects of this power are in their nature national”; commerce power not exclusive where “the nature of the subject when examined, is such as to leave no doubt of the superior fitness and propriety, not to say the absolute necessity, of different systems of regulation”).

17. See *Gitlow v. New York*, 268 U.S. 652 (1925); *De Jonge v. Oregon*, 299 U.S. 353 (1937).

18. See *Madden v. Kentucky*, 309 U.S. 83 (1940) (overruling *Colgate v. Harvey*, 296 U.S. 404 (1935), which had invalidated a state law on the basis of the fourteenth amendment privileges and immunities clause).

19. *Gitlow v. New York*, 268 U.S. 652 (1925).

20. *Id.* at 666.

21. *Id.* at 668 (citation omitted).

away from—*Gitlow*. But the case as it stood in 1925 was not much more than one big toe in the door for the turning of the first amendment against the states, and it was quite unclear whether the door or the toe would win.

By about 1937, as a result of a process never adequately explained in any opinion of the Court or in any dissent, the right to first amendment freedom of speech as against the states—a right nowhere named—is pretty much taken for granted.²² In that year Justice Cardozo tried to say why. It was because, in his famous words, “neither liberty nor justice would exist” if this right were lacking.²³ “Of that freedom,” he goes on, “one may say that it is the matrix, the indispensable condition, of nearly every other form of freedom.”²⁴

Now, come on! Is that the way you name a right? By saying in effect that “without due process of law” means “not at all,” or “only with very strong reason,” when the right is one you think to be “the matrix of nearly every other right”? Or by short-circuiting altogether the phrase “without due process of law”? When that phrase fades out, then of course freedom of speech is a generically named right. But so are all other freedoms or liberties, and order becomes chaos. What makes the due process words fade at some times and not at other times? We have to do here not with namings but with radical glosses written over the text by later scholiasts for reasons extrinsic to the text itself. In the rough-and-ready world of law, the truth is that freedom of speech, as against state and local authority, is a right not named in the Constitution.

(Parenthetically, I would like to look Cardozo straight in his gentle eyes and ask him to consider whether the rights to freedom from gnawing hunger and from preventable sickness may not form “the matrix, the indispensable condition, of nearly every other form” of freedom.)

The freedom of speech, moreover, has generated in its field of force many smaller unnamed rights; these, where they prevail against state and local power, might be called unnamed rights of the second degree. The 1981 case of *Citizens Against Rent Control v. Berkeley*²⁵ will do as an illustration of an exceedingly profuse development. The city ordinance prohibited anyone’s giving more than \$250 in connection with a referendum campaign. Giving money is not speech, except in an extended metaphorical sense. Speech may accompany the giving of money, or it may not. The Court, speaking through the now incumbent Chief Justice,²⁶ knocked out the ordinance. He said, “The restraint . . . plainly contravenes both the right of association and the speech guar-

22. See, e.g., *De Jonge v. Oregon*, 299 U.S. 353 (1937); *Herndon v. Lowry*, 301 U.S. 242 (1937).

23. *Palko v. Connecticut*, 302 U.S. 319, 326 (1937).

24. *Id.* at 327.

25. 454 U.S. 290 (1981).

26. This lecture was delivered during the tenure of Chief Justice Burger.

antees of the First Amendment.”²⁷ He also stated that “regulation of First Amendment rights is always subject to exacting judicial scrutiny.”²⁸ Think about those utterances, from such a man as we know our Chief Justice to be. The fourteenth amendment is no longer even a formal bridge; now it’s just the first amendment *proprio vigore* against the City of Berkeley. The presumption that set the tone of *Gitlow* now runs strongly the other way. And now there’s a “right of association” which isn’t mentioned in the first amendment, though very free use of functional equivalence or similarity arguments might connect the peaceable assembly and petition clauses to the act of slipping somebody \$300. But, *da capo*, these assembly and petition clauses are limits, expressly, only on Congress, a textual fact which would strongly have supported a *Barron v. Mayor of Baltimore*²⁹ holding as to the first amendment,³⁰ quite apart from the more general arguments Marshall adduced in that case.

I have picked these two clusters of well-weathered and copiously litigated unnamed rights because, regardless of the patency of the record, some of us tend to forget the actual derivation of unnamed rights, once they have been around a long time. We get so used to them that even calling them “unnamed” seems captious. They have, as it were, acquired named status *honoris causa*, or by prescription, or perhaps by the fiction of a lost constitutional clause. Then, when yet another unnamed right is added to the large unclosed class of such rights, lots of people—naive, disingenuous, or a little of the worst of both—point aghast to the fact that the Constitution doesn’t say anything about the new subject.

I believe there has been no Supreme Court Justice in this century who has not voted to support some right that could on no common-sense basis be said to be named in the Constitution; the great majority have cast such votes in some numbers over a wide range. I should think well over half the cases in any good casebook concern the often successful invocation of unnamed rights, or of other norms without evident textual basis. The fact that the right to a decent livelihood is not named cannot be a valid objection, unless we are prepared to rewrite our constitutional law in all its branches (in the words of the old Texas judge) “*de novo*—from the egg.” And it would have to be a sterile egg.

Now I shall treat together the last three of the objections I set out a little way back. I go on to the affirmative constitutional duty of Congress diligently to devise and prudently to apply the means necessary to ensure, humanly speaking, a decent livelihood for all.

We have been brought up on the largely unspoken concept of con-

27. 454 U.S. at 300.

28. *Id.* at 298.

29. 32 U.S. (7 Pet.) 243 (1833).

30. *Cf. id.* (immediately concerning the fifth amendment, holding that it did not apply to the states).

stitutional human-rights law as a set of limitations on governmental power. This concept contains in abundance both truth and health. But a serious thirst for human rights, and so for human-rights law, cannot be slaked with no more than a canon of "thou shalt not's." Sins against human rights are not only those of commission, but those of omission as well. Other nations seem to have gotten ahead of us in explicit and detailed recognition of this; herein the papacy has outstripped the United States of America.

But since we are talking about human rights as a part of our own constitutional law, it might be useful to ask whether affirmative duties are exotic in that law. We closely study the empowerments of the national government, the distributions of power within it, and the limitations that lie upon it, devoting little attention to the Constitution as a source of affirmative obligation to act, sometimes on a very grand scale.

If we start at the beginning, we read no further than article I, section 2, before we find that Congress lies under the mandated duty of providing for a decennial census.³¹ Failure to make such provision would be plainly unconstitutional. Congress is under an affirmative duty to assemble at least once a year.³² Each House must keep a journal.³³ Congress must provide a compensation for its own members,³⁴ for the President,³⁵ and for the article III judges.³⁶

The President lies under the highly general affirmative duty to "take Care that the Laws be faithfully executed."³⁷ Here is exhibited a characteristic that may be seen to inhere in some degree in all the most important duties mandated by the Constitution. The President cannot do everything imaginable to bring it about that the laws be faithfully executed; he is limited by his own physical and mental powers, by other claims on these, and by the amplitude of the means put at his disposal by Congress. The duty has to be a duty to act prudently within these limits, without ulterior motive, sensitive to the force of the powerful conscience-stirring word "faithfully." It cannot be any more—or, I should think, any less—than that. But is it not a duty?

Let us take a closer look at some of the mandated congressional duties. The duty to provide for the decennial census must be a duty to commit reasonable resources, in a prudent way, to producing a serviceably accurate count; to produce a wholly accurate count, as of any given moment, is rigorously impossible. Yet who can doubt that a congressman who openly refused to vote for any census, or who would vote only

31. U.S. Const. art. I, § 2, cl. 3.

32. *Id.* art. I, § 4, cl. 2.

33. *Id.* art. I, § 5, cl. 3.

34. *Id.* art. I, § 6, cl. 1.

35. *Id.* art. II, § 1, cl. 7.

36. *Id.* art. III, § 1.

37. *Id.* art. II, § 3.

for a census-taking procedure which he knew to be grossly flawed, would be in flagitious breach of constitutional duty?

Something like this must be said of Congress' affirmative duty to appropriate money for compensating the President, the judges, and indeed its own members. The words "a compensation" must mean an amount of money that reasonably compensates; otherwise the provision, thrice carefully set out in respect of all the principal officers of the United States, could easily be brought to nothing. Nobody can say, with any show of reason, that there is a duty to compensate the President at one exactly calculable level. Yet a Congress that refused to appropriate a reasonable compensation for the President would be in breach of constitutional duty.

All or most of the constitutional duties expressly set out combine two characteristics. They are, on one hand, real duties. But they can be fulfilled by good-faith action, over a pretty wide and indistinctly bounded range. In these respects they resemble a very great many duties in law outside constitutional law.

I rather guess that my self-chosen task, for the rest of my years as a constitutionalist, is going to be arguing, in all weathers, the case for the proposition that a constitutional justice of livelihood should be recognized, and should be felt by the President and Congress as laying upon them serious constitutional duty. In the early phases of this work, I find I am most often asked the question, "How much?" or "Where will you draw the line?" I think it well to try to suggest, at the beginning, that the establishment of a duty is one thing, while the specification of prudent quantities and means is another—though it must be remembered as well that the decently eligible range of means and measures is one thing when you are under no duty at all to act, and quite another when you are under a serious duty to act effectively.

This characteristic continues to be visible as we consider constitutional duties that arise from structural and relational considerations. Congress is literally commanded, as to the support of the other branches of government, only to provide for compensation for the President and the judges. Yet the Constitution assigns to the President duties and functions that require the spending of money—for people, space, travel, supplies, and so on. Since, under article I, section 9, clause 7, Congress alone can provide this money, Congress must lie under a constitutional duty to appropriate such money in reasonable amounts, and even to levy taxes, or to borrow, so that the money will be there to appropriate. The same duty is discernible, *mutatis mutandis*, as to the judiciary. These duties, derived from the Constitution, cannot be given exact arithmetical shape, but are nonetheless constitutional duties.

I go now to a higher level of magnitude. The preamble to the Constitution says that one of the purposes of that instrument is to "provide

for the common defence."³⁸ Congress is then given the power to lay and collect taxes to "provide for the common Defence"³⁹ as well as several other powers over military concerns. Now is it doubtful that the *power* to provide for the common defense generates a resulting *duty* to provide for the common defense—that a Congress that embarked on a course of making knowably insufficient provision for the common defense would be in breach of constitutional duty? The power is a power held in trust—hardly a difficult concept within the legal regime of a Constitution that, even on the judicial side, is looked on as capable of generating cases both in law and in equity.

Even this one huge instance establishes that the systematic frame of constitutional rights and duties can comfortably contain, and quite evidently does contain, a duty not expressly declared as such, but of vast scope and highest essentiality, a duty derived from the grant of a power that is held in trust, a duty, moreover, which can be (because it has to be) fulfilled by prudential choice over a wide range of means—but over a range to be located by good faith acknowledgement of the duty as a duty. That is exactly what I want as to the duty of Congress continually to move, by the general diffusion of welfare, to give life to a constitutional justice of livelihood, and so to prepare the way for the "Pursuit of Happiness"—thus taking on, as to all the people, *both* of the tasks allotted to government in the Declaration of Independence: "to effect their Safety and Happiness."⁴⁰

When we are faced with these difficulties of "how much," it is often helpful to step back and think small, and to ask not, "What is the whole extent of what we are bound to do?" but rather, "What is the clearest thing we ought to do first?" When we descend to that level, one reasonable answer occurs. Somebody's count is that a million and a half people in the State of New York are undernourished;⁴¹ somebody else's count is that 13% of the American people live in poverty,⁴² which pretty much always implies hunger more or less serious. This hunger is disproportionately high among children;⁴³ about half our black children under six lived in poverty in 1984.⁴⁴ Some helpless old people eat dog food when they can get it; it is not recorded that any Cabinet member has yet tried this out on elderly persons in his own extended family.

38. U.S. Const. preamble.

39. U.S. Const. art. I, § 8, cl. 1.

40. Declaration of Independence para. 2 (U.S. 1776) (emphasis added).

41. See Hunger Called More Prevalent in the Summer, N.Y. Times, July 3, 1985, at B4, col. 6.

42. See Novak & Lenkowsky, Economic Growth Won't End Poverty, N.Y. Times, July 24, 1985, at A19, col. 1 (prediction of Commerce Secretary Malcolm Baldrige).

43. Compare Panetta, Hunger is Growing, But Relief Isn't, N.Y. Times, Sept. 9, 1985, at A19, col. 1 ("nearly one-fourth of all American children under 6 live in poverty") with Novak & Lenkowsky, *supra* note 42 (estimated overall American poverty rate not higher than 15.2 percent over previous 18 years).

44. See Panetta, *supra* note 43.

Now you can bog down in a discussion about the exact perimeter of "decent livelihood," or you can cease for a moment from that commonly diversionary tactic and note that, wherever the penumbra may be, malnourished people are not enjoying a decent livelihood. In a constitutional universe admitting serious attention to the Declaration of Independence, a malnourished child is not enjoying a "right to the pursuit of happiness."

And we are very lucky herein, because we know pretty much what to do. We suffered chronic, endemic malnutrition in America. We got rid of it, humanly speaking, by foodstamps, school lunches, and a few smaller measures. Then we just let it come back, because we wanted our own taxes lowered. The Great Society nutrition programs, widely spoken of as having somehow failed, in fact succeeded brilliantly⁴⁵—a thing that often happens when you attack a problem directly and simply, giving hungry people more food the shortest way, instead of feeding them rancid metaphors about boats that rise when the tide rises. All we have to do is to reinstitute adequate funding for these programs. Then we can think about the next thing. We won't have to think very long.

Now I know that I'm talking into the political wind. The country is now infatuated with an idol called "the economy," which most high priests seem to agree is doing real well, though millions of children are not getting enough to eat, and millions of adults who want work cannot find it. But winds change; they always have, and doubtless they always will. A period of no power is a period for the reformation of thought, to the end that when power returns it may be more skillfully, more fittingly, used. The way I want to see thought reformed is by our ceasing to view the elimination of poverty as a sentimental matter, as a matter of compassion, and our starting to look on it as a matter of justice, of constitutional right.

Now I want to make two last general points—inspirational points if you like, because this theme, the constitutional justice of livelihood, inspires my age as I wish it to inspire the youth of the young among you.

I will make the first point by reminding you of the prolificity of application of the free speech guaranty against state and local actions. Remember? The *Berkeley* case? The present Chief Justice⁴⁶ (no reckless innovator he) in 1981 wrote for a Court that by that time felt itself, so far as concerned state and local subjection to first amendment norms, to be travelling *super vias antiquas*—almost in an ancient and even comfortable rut.

In 1922, fifty-nine years before the *Berkeley* case, the Chief Justice-to-be was a lad of fifteen springs. In that year the Court decided

45. See Levitan & Taggart, *The Great Society Did Succeed*, 91 Pol. Sci. Q. 601 (1976-77).

46. See *supra* note 26.

Prudential Insurance Co. of America v. Cheek.⁴⁷ The insurance company assailed the federal constitutionality of a state statute that required employers to furnish discharged employees with letters stating the grounds for discharge. Argument was multifarious and ranging, but the Court made short work of one contention:

But, as we have stated, neither the Fourteenth Amendment nor any other provision of the Constitution of the United States imposes upon the States any restrictions about "freedom of speech" or the "liberty of silence"; nor, we may add, does it confer any right of privacy upon either persons or corporations.⁴⁸

When those words were uttered in an opinion of the Court, the fourteenth amendment had been around for fifty-four years—"substantive due process" had already strongly come on the scene. By 1937, just fifteen years after *Cheek*, Mr. Justice Cardozo, in the famous *Palko* passage that I have quoted,⁴⁹ was explaining, after the fact, why it was that the free speech guaranty of the first amendment had been held binding on the States. The rest of the way to the *Berkeley* case was only a matter of filling in detail.

In 1922, the *Cheek* year, Hugo Black was thirty-six, a seasoned though not yet grizzled general practitioner in Birmingham, just over half the age promised in the Bible. Now what do you think his Alabama friends would have said if someone had read out this brush-off sentence in the *Cheek* case and had added, "Now do I prophesy: It won't be long before the States *are* held subject to the first amendment guaranty, and Hugo here, by twenty years hence, will have played a big part in all that"? I guess such a person would have been judged crazy—about as crazy as somebody who this afternoon insists that this nation is permanently committed, as a matter of constitutional right, to a generous use of its oceanically overabundant resources to keep all its people out of poverty, all the time.

History does not always repeat itself. But history does show what is possible. The movement from the *Cheek* brush-off to the Chief Justice's opinion in the *Berkeley* case shows that a vast revolution in legal doctrine and action, a revolution to astound and bewilder the old people, can take place in a very short time, and that revolutionary doctrine may after not very much more time be looked upon as ancient doctrine by a Chief Justice who was almost fully grown when the revolution started.

As the lifeline of Hugo Black shows, such a total turnabout can comfortably be contained in the span of one professional career in law, with years to spare at both ends, and a good deal of time left over for playing tennis. I stress this because I am talking to young people, who

47. 259 U.S. 530 (1922).

48. *Id.* at 543.

49. See *supra* note 23 and accompanying text.

need to form some first-approximation estimate of how much they may accomplish if they decide to fight. You have time; just add the other ingredients.

In closest connection, I want to resay something I believe I said somewhere earlier,⁵⁰ and cannot now find because I somehow have not prepared an index to my fugitive writings.

Holmes once remarked of the first Justice Harlan that the latter's mind resembled a powerful vise, the jaws of which could not be brought closer than two inches apart.⁵¹ This was a much-admired remark among the mandarins, though it ought to have lost a bit of its savor when one reflected, after 1954, that the first Justice Harlan, in *Plessy v. Ferguson*,⁵² wrote the lone dissent—a dissent full of passion and of common wisdom—that became the law of the land in *Brown v. Board of Education*,⁵³ while Holmes, as far as I can find, never showed any irresistible discontent with *Plessy*.

What I said (and I hope I said it in the Harvard Law Review) was that, in constitutional-law work, jewelers' vises are well enough for tasks of detail, but the lack tremblingly to be feared is the lack of a vise whose jaws can be got *more* than two inches apart, because if you lack such a vise you cannot handle the big beams. I exhort each of you young people (and I mean to include the young in spirit of any age): In thinking about the constitutional justice of livelihood, ask of your mind that it be a vise that can handle the big beams. We have to do with some big ones here. If we succeed in cutting them to fit and in joining them for the ages, we will once again have given the world a new thing—this time a constitutionally based system of human rights that takes into account at last *all* the needs of humanity for life spiritual and physical—these two together, just as they occur in nature. We will once again be the City on the Hill; our achievement, promised in our beginning, will be seen to be moving toward completion. If we fail in this cutting and joining, all our brave words about human rights will slowly or soon come to be seen as fatally flawed, it will grow too late to transmute hypocrisy into commitment, and such part of the hope of earth as we still guard and cherish will be found one morning to have flickered out in the night.

50. This belief proved to be a realistic one. See Black, *The Supreme Court, 1966 Term—Foreword: "State Action," Equal Protection, and California's Proposition 14*, 81 *Harv. L. Rev.* 69, 98–99 (1967).

51. 2 O. Holmes, *The Pollack Letters* 7–8 (M. Howe ed. 1941).

52. 163 U.S. 537 (1896).

53. 347 U.S. 483 (1954).