FOREWORD: CONSTITUTIONALISM AND THE POOR

*Mark S. Kende**

TABLE OF CONTENTS

Poverty in the United States is expected to soon reach its highest level in fifty years.[1] Almost 16% of the American population lives below the poverty line.[2] According to the *Guardian*, "20.5 million Americans, or 6.7% of the [United States'] population, make up the poorest poor, defined as those at 50% or less of the official poverty level."[3] There is a large and widening income gap in the United States. The Occupy Wall Street movement—which arose partly out of the anger surrounding the rise of poverty in the United States—has made these troubling statistics front-page news.[4] Some argue that the Tea Party political movement may even

* James Madison Chair Professor of Constitutional Law, Director of the Drake Constitutional Law Center; B.A., Yale University, 1982; J.D., University of Chicago, 1986. Thank you to Matthew Shimanovsky for his assistance with the research. A special thanks to the law firm of Belin McCormick, P.C. for its financial support of this Symposium.

1. *See* Hope Yen, *U.S. Poverty on Track to Rise to Highest Since 1960s*, HUFFINGTON POST (July 22, 2012, 5:47 PM), http://www.huffingtonpost.com/2012/07/22/us-poverty-level-1960s_n_1692744.html; Sabrina Tavernise, *U.S. Income Gap Rose, Sign of Uneven Recovery*, N.Y. TIMES, Sept. 12, 2012, http://www.nytimes.com/2012/09/13/us/us-incomes-dropped-last-year-census-bureau-says.html.

2. ALEMAYEHU BISHAW, U. S. CENSUS BUREAU, POVERTY: 2010 AND 2011: AMERICAN COMMUNITY SURVEY BRIEFS 1 (2012), *available at* http://www.census.gov/prod/2012pubs/acsbr11-01.pdf.

3. Simon Rogers, *US Poverty: Where Are the Super Poor?*, THE GUARDIAN (Nov. 3, 2011, 2:13 PM), http://www.guardian.co.uk/news/datablog/2011/nov/03/us-poverty-poorest.

4. *See* Joseph Tharamangalam, *Occupy Wall Street: Poverty and Rising Social Inequality, Interrogating Democracy in America*, CENTRE FOR RESEARCH ON GLOBALIZATION (Dec. 13, 2011), http://www.globalresearch.ca/occupy-wall-street-poverty-and-rising-social-inequality-interrogating-democracy-in-america (discussing statistics of the rising social inequality as an impetus for the Occupy Wall Street

reflect that anger.[5]

Despite these developments, constitutional law and theory in the United States has largely ignored the issue of poverty. The Drake Constitutional Law Center's 2012 Symposium sought to make the poverty problem more visible. This Foreword provides some thoughts about the connection between poverty and constitutional law, both in the United States and in South Africa. It also summarizes the symposium speakers' major arguments.

I. THE RECENT PAST

Things were different in the 1960s and early 1970s. President Lyndon Johnson declared a war on poverty.[6] And in 1963, the U.S. Supreme Court ruled in *Gideon v. Wainwright* that the Sixth Amendment requires a state court to provide an indigent criminal defendant with an attorney.[7] Due process also supported this view, as shown by the Court's later holdings that poor criminal defendants had a right to counsel for appeals—something not covered by the Sixth Amendment.[8]

In 1964, Yale Law Professor Charles Reich published a seminal law review article titled *The New Property*.[9] Reich argued that in a modern administrative state, property no longer just consisted of the goods or assets that people own; people also had a property interest in the benefits that the government had promised them.[10] These benefits could be

movement).

5. *See* Editorial, *Feeling Poorer? You Have Plenty of Company*, USA TODAY (Oct. 9, 2011, 7:18 PM), http://usatoday30.usatoday.com/news/opinion/editorials/story/2011-10-09/feeling-poorer-wall-street/50712924/1 (correlating "alarming poverty statistics" and the "economic discontent" fueling the Tea Party movement).

6. *See* Robert Siegel, *Lyndon Johnson's War on Poverty: Weeks into Office, LBJ Turned Nation's Focus to the Poor*, NPR (Jan. 8, 2004), http://www.npr.org/templates/story/story.php?storyId=1589660 (discussing President Johnson's iconic State of the Union address declaring a war on poverty forty years earlier).

7. Gideon v. Wainwright, 372 U.S. 335 (1963).

8. *See, e.g.*, Douglas v. California, 372 U.S. 353, 357 (1963) (stating that "where the merits of *the one and only appeal* an indigent has as of right are decided without the benefit of counsel, we think an unconstitutional line has been drawn between the rich and poor").

9. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).

10. *Id.* at 738.

lifesaving.[11] Moreover, people viewed these benefits with the same sense of ownership as they viewed their own house or car.[12] To be more technical, these benefits were not a gratuitous privilege; people had an entitlement or right at stake. Indeed, Reich's article helped the poor by nullifying the rights versus privileges distinction.

The U.S. Supreme Court ultimately adopted Reich's view and held that government termination of benefits was a deprivation of property.[13] Thus, in 1970, the Court in *Goldberg v. Kelly* ruled that the government must provide a pre-termination hearing before cutting off welfare.[14] The Court did not go quite so far in *Matthews v. Eldridge*, but it still found the claimant had a property interest in receiving social security disability benefits, which entitled her to a post-deprivation hearing.[15]

Harvard Law School Professor Frank Michelman went beyond Reich, by arguing in 1969 and 1973 law review articles that the U.S. Constitution guarantees a right to welfare.[16] This was provocative because the Constitution had generally been interpreted as only including negative civil and political rights.[17] However, Michelman argued that several Supreme Court cases that had been ostensibly based on the Fourteenth Amendment's equality provision were really about the government's obligation to provide individuals with basic necessities.[18]

Perhaps the most significant case was *Shapiro v. Thompson* in 1969, in which the Court held that a state's one-year residency requirement for receiving welfare benefits discriminated against a person's right to travel.[19]

---

11. *Id.* at 738–39.

12. *Id.* at 738.

13. *See* Goldberg v. Kelly, 397 U.S. 254 (1970).

14. *Id.* at 266–71.

15. Matthews v. Eldridge, 424 U.S. 319, 348–49 (1976).

16. Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights*: *One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962 (1973) [hereinafter Michelman, *In Pursuit*]; Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969) [hereinafter Michelman, *Foreword*]. *See also* Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659 [hereinafter Michelman, *Welfare Rights*].

17. *See generally* Michelman, *Welfare Rights*, *supra* note 16.

18. Michelman, *Foreword*, *supra* note 16, at 9–13.

19. Shapiro v. Thompson, 394 U.S. 618 (1969); *see also* Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974) (rejecting a residency requirement for state assisted medical treatment).

Michelman, however, said the case was actually about the claimant's right to welfare.[20] Michelman relied on philosopher John Rawls for support.[21] Rawls was the twentieth century's most famous philosopher of political liberalism, with a focus on distributive justice.[22] Michelman built the groundwork for later right-to-welfare advocates such as Peter Edelman, Bill Forbath, Sotorios Barber, Goodwin Liu, and several of our other speakers.

However, the Supreme Court ultimately rejected Michelman's viewpoint. In *Dandridge v. Williams*, the Court upheld a state limitation on a family's access to welfare benefits, regardless of the family's size.[23] Moreover, in *San Antonio Independent School District v. Rodriguez*, the Court ruled that education was not a fundamental right, and that students who attend poorer districts had no discrimination claims.[24] Scholars have debated why the Court seemingly reversed course after *Shapiro*.[25] President Nixon's replacement of some Justices was significant.[26] The Court also thought benefit allocations were an area of special legislative competence.[27]

It has now been about three decades since the Court seriously considered rights for the poor. At Drake's symposium, there was consensus that the U.S. Supreme Court is not likely to revisit poverty soon. Indeed, if anything, the current Court hints that it would like to rollback the modern administrative state. The nation and the Court have grown more conservative. Even the once fringe libertarian movement has gained many adherents.

20. *See* Michelman, *Welfare Rights*, *supra* note 16, at 663.

21. *See* Michelman, *In Pursuit*, *supra* note 16.

22. *See id.*

23. Dandridge v. Williams, 397 U.S. 471 (1970).

24. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

25. *See, e.g.*, Todd Zubler, *The Right to Migrate and Welfare Reform: Time for* Shapiro v. Thompson *to Take a Hike*, 31 VAL. U. L. REV. 893, 904–10 (1997) (offering a perspective on the consequences of *Shapiro* and the muddled path of the post-*Shaprio* Supreme Court).

26. Cass Sunstein, *Constitutional Politics and the Conservative Court*, AM. PROSPECT (Dec. 26, 2000), http://prospect.org/article/constitutional-politics-and-conservative-court (discussing President Nixon's four rapid appointments and the significant impact they had on the Court).

27. *See, e.g.*, *Dandridge*, 397 U.S. at 487 (stating that "the Constitution does not empower [the] Court to second-guess state officials" in allocating welfare benefits).

Yet, in this Foreword, I want to call attention to two hopeful developments. The first is the breakdown of the levels of scrutiny used by the Supreme Court in evaluating rights claims. The second is the jurisprudence of the South African Constitutional Court, which has shown the judicial enforceability of affirmative socioeconomic rights. Indeed, the international trend is towards liberalization here, not retrenchment. This may be one of the reasons why the U.S. Supreme Court's conservatives strongly oppose the liberals who are citing to foreign law.

II. LEVELS OF SCRUTINY

The Supreme Court ostensibly utilizes three types of scrutiny: rationality, intermediate, and strict.[28] However, there are actually several other types. For example, low-level rationality[29] is not the same as rationality with a bite[30]—the Court hypothesizes purposes in the first, but looks at actual purpose in the second.[31] As for strict scrutiny, *Grutter v. Bollinger*[32] and *Korematsu v. United States*[33] are more deferential than *Parents Involved in Community Schools v. Seattle School District No. 1*[34] and *Adarand Construction v. Pena*.[35] The Court in *Grutter* said it would respect the university's First Amendment interests.[36] And, on intermediate

28. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152–53 n.4 (1938) (describing the need for different levels of scrutiny).

29. *See, e.g.*, U.S. R.R. Ret. Bd. v. Fritz, 449 U.S. 166, 179 (1980) (reasoning that rationality review requires only "plausible reasons for Congress' action," and that legislative intent is irrelevant to the Court's inquiry).

30. *See, e.g.*, Romer v. Evans, 517 U.S. 62, 634 (1996) (demonstrating the Court's willingness to look beyond the proffered state interest to make "the inevitable inference that the disadvantage imposed is born of animosity towards the class of persons affected").

31. *See id.* at 635; *Fritz*, 449 U.S. at 178.

32. Grutter v. Bollinger, 539 U.S. 306 (2003) (deferring explicitly to the university's First Amendment interests, and holding that not all racial classifications are equally objectionable).

33. Korematsu v. United States, 323 U.S. 214 (1944) (stating that pressing public necessity may sometimes justify restrictions that curtail the civil rights of a single racial group).

34. Parents Involved in Cmty. Schs. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007). The court in *Parents Involved in Community Schools* struck down two voluntary school desegregation plans. *Id.*

35. Adarand Constructors, Inc. v. Pena, 515 U.S. 200 (1995) (holding all race-based classifications by the federal government are subject to strict judicial scrutiny).

36. *Grutter*, 539 U.S. at 329–30.

scrutiny, Justice Ginsburg's famous reference to an "exceedingly persuasive justification" in *United States v. Virginia* approached strict scrutiny.[37]

The reality is the Court has a sliding scale of scrutiny levels depending on the importance of the interests at stake, despite pretending there are only three levels.[38] If the Court were candid, then it could utilize a higher level of scrutiny regarding laws that burden the vitally important needs of the poor. This sliding scale was what Justice Marshall advocated for in *Rodriguez*.[39] This approach would make it harder for the legislature to terminate benefits for the poor, or to rollback the administrative state. Julie Nice emphasized the need for higher scrutiny in her presentation.

III. SOUTH AFRICA

The U.S. Supreme Court has long thought that the judiciary lacks competence to decide questions of positive socioeconomic rights, and that such decisions would intrude on separation of powers.[40] The South African Constitutional Court however, has revealed how the judiciary can enforce such rights successfully.[41] Admittedly, their constitutional text differs from that of the U.S. Constitution, so a complete comparison is imperfect, but the question of judicial competence is similar.

One of the great tragedies under Apartheid was that the government restricted urban housing options for blacks.[42] This created severe overcrowding and subsequent "squatting."[43] The most famous South African positive rights case is *Grootboom v. Republic of South Africa*, in which the government forcibly removed some illegal squatters from public land even though the individuals had nowhere to go.[44] The Constitutional

37. *See* United States v. Virginia, 518 U.S. 515, 531 (1996).

38. JEFFREY M. SHAMAN, CONSTITUTIONAL INTERPRETATION: ILLUSION AND REALITY 111 n.1 (2001); Suzanne B. Goldberg, *Equality Without Tiers*, 77 S. CAL. L. REV. 481, 482 (2004).

39. *See* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 90 (1973) (Marshall, J., dissenting).

40. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970).

41. *See generally* MARK S. KENDE, CONSTITUTIONAL RIGHTS IN TWO WORLDS 243–85 (Cambridge Univ. Press 2009).

42. *Gov't of the Republic of S. Afr. v. Grootboom* 2000 (11) BCLR 1 (CC) at 5 para. 6 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2000/19.pdf.

43. *Id.*

44. *Id.* at 9 para. 11.

Court found that the government violated the constitutional right to access housing by its actions since the South African constitution has a provision that states: "(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of this right."[45] More specifically, the Court found that the national government's failure to have any law assisting the homeless was not "reasonable," and thus was unconstitutional.[46] Here, the government failed to progressively realize access to the right.

As a remedy, however, the Constitutional Court did not design the government's policy. Instead, the Court instructed the parliament to develop a national policy for the homeless under the supervision of the South African Human Rights Commission.[47] The Court vindicated the right while respecting separation of powers.

There have since been dozens of South African socioeconomic rights cases, and they do not threaten economic growth.[48] Another innovative approach taken in recent South African cases is called "meaningful engagement."[49] In these cases, the Constitutional Court requires opposing parties (such as squatters, the municipality, landlords, and developers) to negotiate with each other in good faith to resolve issues like trespassing and ejectment.[50] This makes the poor visible, and it ensures they are treated with respect. If no resolution occurs, the Court can still intervene and decide the case. This is yet another way the Court has assisted the poor while minimizing separation of power problems.

Beyond housing, cases have been brought involving the right to water,[51] the right to toilets,[52] and the right to education.[53] These are all

45. *Id.* at 54 para. 69; S. AFR. CONST., § 26, 1996.

46. *Grootboom*, (11) BCLR 1 (CC) at 19–20 para. 24.

47. *Id.* at 66 para. 95. Tragically, the commission failed to monitor the situation adequately. Thus, while things temporarily improved for the *Grootboom* squatters, the situation eventually deteriorated.

48. *See, e.g.*, *Occupiers of 51 Olivia Rd. v. City of Johannesburg* 2008 (24) BCLR 1 (CC) (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2008/1.pdf (holding the City of Johannesburg's housing program did not comply with the Constitutional guarantees giving access to housing).

49. *Id.* at 5 para. 5.

50. *Id.* at 7 para. 9.

51. *See, e.g.*, *Mazibuko v. City of Johannesburg* 2009 (39) BCLR 1 (CC) at 3 para. 3 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2009/28.pdf

areas in which most American municipalities already affirmatively provide benefits; however, people in the United States who cannot pay utility bills get cutoff. Many of these South African decisions show that courts can be protective without going too far. The Constitutional Court also saved hundreds of lives by ruling in *Minister of Health v. Treatment Action Campaign* that the right to access healthcare meant that the government must provide pregnant women in South Africa, who have AIDS, with nevirapine—a drug that prevents transmission of the disease to babies.[54] Certainly given all of the government protections that the United States provides the wealthy (such as estate laws, tax loopholes, tax incentives, the best police and fire protection, etc.), some protection for the poor against the temperamental free market only seems fair.

IV. THE SYMPOSIUM

In April 2012, the Drake Constitutional Law Center was honored to host some of the nation's leading experts on the question of constitutionalism and the poor. The Center is very grateful to the prestigious Des Moines, Iowa firm of Belin McCormick, P.C. for its continued support of the symposium. Georgetown Professor Peter Edelman gave the keynote address, and his article is titled Dandridge v. Williams *Redux: A Look Back from the Twenty-First Century*.[55] Besides being an aide to Senator Robert Kennedy during the war on poverty in the 1960s, Professor Edelman was in charge of welfare under the Clinton Administration. However, he later resigned to protest the enactment of welfare reform.

In his article, Edelman argues that national progress fighting poverty would have to occur outside the judiciary given the current U.S. Supreme Court's pro-business conservatism.[56] Nonetheless, Edelman also maintains

(regarding the right to water). This is one of the court's most disappointing cases, as it treated legal formalism as having more value than the human rights of the individuals in need of water.

52. *Beja v. Premier of the W. Cape* 2011 (10) BCLR 1077 (S. Afr.).

53. *Governing Body of the Juma Musjid Primary Sch. v. Essay N.O.* 2011 (8) BCLR 761 (CC) (S. Afr.).

54. *Minister of Health v. Treatment Action Campaign* 2002 (9) BCLR 1 (CC) at 8 para. 9 (S. Afr.), *available at* http://www.saflii.org/za/cases/ZACC/2002/16.pdf.

55. Peter Edelman, Dandridge v. Williams *Redux: A Look Back from the Twenty-First Century*, 60 DRAKE L. REV. 981 (2012).

56. *Id.* at 989–90.

that the argument for a baseline constitutional right to welfare is stronger than at the time of *Dandridge v. Williams* since intermediate scrutiny did not exist back then.[57] In *Dandridge*, the Court could only choose between very lenient or very strict scrutiny, and the Court chose the more lenient rationality review.[58] Under intermediate review, however, Edelman argues that the Court would have certainly struck down the family-benefit cap.[59] Edelman also asserts that the current Temporary Assistance to Needy Families (TANF) block grant program, which replaced the AFDC entitlements, is unconstitutional as applied by the states.[60] For example, Wyoming covers only 4% of its children, whereas California covers 73%.[61] This disparity can't even pass rationality.

Edelman also defends the war on poverty by arguing that there would be 40 million more poor people without it.[62] He says current problems such as the economic shift to low paying jobs are hard to combat,[63] but a greater array of social programs involving healthcare and bolstering families would provide a cushion.[64] More support for legal aid is also essential. Edelman further advocates that legislatures enact "civil Gideon" rules that provide counsel to the poor in vital cases, such as landlord–tenant disputes, family law custody battles, and the like.[65] Professor Edelman has published a recent book containing many of these recommendations titled, *So Rich, So Poor: Why It's So Hard to End Poverty in America*.[66]

The article authored by Ilya Shapiro and Carl DeNigris of the Cato Institute disputes many of Professor Edelman's assumptions. It is titled *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*.[67] The authors argue that federal programs such as "Obamacare" and the Troubled Asset Relief Program (TARP) interfere

57. *Id.* at 982–88.
58. Dandridge v. Williams, 397 U.S. 471, 484–87 (1970).
59. Edelman, *supra* note 55, at 988.
60. *Id.*
61. *Id.*
62. *Id.* at 995.
63. *Id.*
64. *Id.* at 994.
65. *Id.* at 997.
66. PETER EDELMAN, SO RICH, SO POOR: WHY IT'S SO HARD TO END POVERTY IN AMERICA (2012).
67. Ilya Shapiro & Carl G. DeNigris, *Occupy Pennsylvania Avenue: How the Government's Unconstitutional Actions Hurt the 99%*, 60 DRAKE L. REV. 1085 (2012).

with the efficiencies of the marketplace and thus hurt the poor and the general public.[68] They also argue that financial regulations such as Sarbanes-Oxley and Dodd-Frank burden business and reduce opportunity.[69] Economic growth assists the poor, unlike the incentive squashing of redistribution.[70]

Although the Shapiro-DeNigris article was authored before the U.S. Supreme Court ruled on the constitutionality of the Affordable Care Act (ACA),[71] the paper presciently argues that the law's Medicaid provisions were coercive, and it asserts that the individual mandate exceeded the scope of the Commerce Clause and Necessary and Proper Clause.[72] The paper also argues that the ACA has hindered economic growth and hurt the poor by creating economic uncertainty.[73] Regarding TARP, the authors argue "the program quickly morphed—from one designed to buy and secure troubled assets to a scheme equipped to inject capital directly into financial institutions by acquiring their stock."[74] The authors further argue that TARP funds give federal bureaucrats remarkable power over the fate of such institutions, with few guidelines, rather than letting the market take its course.[75] For example, TARP money was even re-routed to bailout the auto industry.[76] They provide many other examples to bolster their claims that the Obama Administration's government intervention has made the poor more vulnerable, not safer.[77]

Professor Frank Michelman authored *Poverty in Liberalism: A Comment on the Constitutional Essentials*, in which he addresses the views of the twentieth century's leading liberal political philosopher, John Rawls.[78] Michelman's philosophical article provides a great counterpoint

68. *Id.* at 1094–96, 1097–98.

69. *Id.* at 1107–16.

70. *Id.* at 1114–15.

71. *Id.* at 1089 (citing Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119 (2010) (codified as amended in scattered sections of 26 U.S.C. & 42 U.S.C.)).

72. *Id.* at 1090–92.

73. *Id.* at 1089.

74. *Id.* at 1098 (footnote omitted).

75. *Id.* at 1105–07.

76. *Id.* at 1100.

77. *See generally id.* at 1086–125.

78. Frank I. Michelman, *Poverty in Liberalism: A Comment on the Constitutional Essentials*, 60 DRAKE L. REV. 1001 (2012).

to Professor Edelman's more policy-oriented venture. Michelman explains "[o]ne requirement of justice that is decidedly *not* included by Rawls in the constitutional essentials is 'fair' (material) equality of opportunity."[79] Michelman's article then clarifies why Rawls excluded this element, but questions the underpinnings of the Rawls position.[80]

More specifically, Michelman examines two possible sources to counteract poverty.[81] He finds humanity-based reasons—the idea that we all have a shared humanity—surprisingly unconvincing.[82] Michelman elaborates, noting that many fellow citizens simply do not wish to have "the state . . . tax away their wealth to fund the provision of goods and services" to others.[83] Instead, he finds legitimacy-based reasons more convincing, though not conclusive.[84] He also notes that Rawls insists that a legitimate constitutional order must provide certain basic individual rights such as freedom of conscience and expression, as well as the more general principle of fair equality of opportunity.[85] Rawls supports a bare safety net for the poor, but Michelman insists that a legitimate system must include an "institutional arrangement," such as a court with the power of constitutional review, to allow the citizenry to debate the amenability of the state's activities "in the field of fair equality of opportunity."[86] That system could go further than just providing a bare safety net—and probably should in Michelman's view.

Professor john powell challenges Ilya Shapiro's view expressed at the symposium that the decision in *Lochner v. New York*[87] was good for society because it promoted economic freedom. Powell's article is titled *Constitutionalism and the Extreme Poor: Neo*-Dred Scott *and the Contemporary "Discrete and Insular Minorities."*[88] Powell says that *Lochner* coincides with Jim Crow segregation laws and a repressive

79. *Id.* at 1005 (footnote omitted).
80. *See id.* at 1005–21.
81. *Id.* at 1006–14.
82. *Id.* at 1006–08.
83. *Id.* at 1008.
84. *Id.* at 1014–17.
85. *Id.* at 1016–17.
86. *Id.* at 1019.
87. Lochner v. New York, 198 U.S. 45 (1905).
88. john a. powell, *Constitutionalism and the Extreme Poor: Neo*-Dred Scott *and the Contemporary "Discrete and Insular Minorities*," 60 DRAKE L. REV. 1069 (2012).

expansion of the penal sphere.[89] *Lochner* also coincides with the Court's mistaken ruling that corporations are persons.[90] He explains that the framers of the U.S. Constitution were skeptics about concentrated economic power.[91] Powell further shows how Justice Harlan's dissent in the *Civil Rights Cases* supports the alternative view that the government possessed significant affirmative obligations to black citizens.[92] He says this viewpoint coincides well with footnote four of *United States v. Carolene Products Co*.[93]

Powell argues that today's poor are being unconstitutionally excluded from the rights of other citizens and even from public spaces.[94] He points to Arizona's anti-immigrant laws and the fact that public spaces are being replaced by private and corporate spaces.[95] Vulnerable groups are being pushed out of our "circle of human concern."[96] Meanwhile the Supreme Court has become preoccupied with protecting the wealthy.[97] Powell also notes that the solution must include a constitutional vision that bolsters Section 5 of the Fourteenth Amendment and takes an affirmatively empowering approach like Justice Harlan.[98] Institutional racism and subordination must be curtailed to democratize the "circle of human concern."[99]

Professor Julie Nice's article is *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection.*[100] She argues the following:

> How did we come to this dramatic breach of the social contract of

89. *Id.* at 1069–70.
90. *Id.* at 1070–71.
91. *Id.* at 1071.
92. *See id.* at 1073–75.
93. *See id.* at 1075–76 (discussing how Justice Harlan's dissent arguing for a broad interpretation of the Fourteenth Amendment and the footnote in *Carolene Products* defining "insular minorities" could together provide greater protections for those in poverty).
94. *Id.* at 1076.
95. *Id.* at 1077.
96. *Id.* at 1078.
97. *Id.* at 1080.
98. *Id.* at 1073.
99. *Id.* at 1081.
100. Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023 (2012).

> shared prosperity in the United States and the virtual exclusion of poor people? I believe part of the answer lies in constitutional interpretation. This diagnosis is derived from my study of the mechanisms by which the judiciary has excluded poor people from constitutional protection. In particular, I have identified three major trends relating to poverty and the Constitution: deconstitutionalization of poverty law, dual rules of law for the haves and have-nots, and a general dialogic default on questions of economic justice.[101]

She adds that constitutional interpretation is of vital importance because it has a "productive synergy" with social movements as shown by the abolition movement and by the research of political scientist Michael McCann.[102]

Nice relies on several troubling cases to support her arguments. For example, the U.S. Court of Appeals for the Ninth Circuit upheld a requirement that authorized local law enforcement officials to walk through welfare recipient homes, searching for evidence of crimes, even without individualized suspicion.[103] The dissenting judges said this was an "'attack on the poor.'"[104] She also makes a sophisticated argument that the U.S. Supreme Court's decisions still permit the adoption of higher scrutiny if the Court would engage in a more pragmatic contextual analysis of the situations faced by the poor.[105] Nice argues that laws burdening the poor should not get the same scrutiny as laws that burden business entities.[106]

Finally, the Honorable Mark Cady, Chief Justice of the Iowa Supreme Court, gave a presentation on funding issues related to the judiciary.[107] Chief Justice Cady explained that state court systems throughout the nation have experienced funding problems, including Iowa. During Iowa's last fiscal year, "all judicial employees, including judges were furloughed for ten days" to reduce spending.[108] Staffing is at the

101. *Id.* at 1029 (footnote omitted).
102. *Id.* at 1030.
103. *Id.* at 1032 (citing Sanchez v. Cnty. of San Diego, 483 F.3d 965 (9th Cir. 2007)).
104. *Id.* (quoting *Sanchez*, 483 F.3d at 969 (Pregerson, J., dissenting)).
105. *See id.* at 1050–53.
106. *See id.*
107. *See* Mark S. Cady, *The Iowa Judiciary, Funding, and the Poor*, 60 DRAKE L. REV. 1127 (2012).
108. *Id.* at 1129.

1986-level yet there is a 60% workload increase.[109] One of the groups that is the most burdened by these problems is the poor since they often cannot afford an attorney and sometimes do not know how to effectively participate in the system.[110]

Chief Justice Cady also explained how the Iowa court system is generally revenue-neutral because courts levy fines, fees, and the like, which help pay for operating costs.[111] Thus, the judiciary is an odd target for budget reductions.[112] A well-functioning court system also benefits business and productivity, as it ensures that disputes will be resolved through the rule of law.[113] It provides a modicum of certainty, lacking in states or nations where the courts have credibility issues.[114] Moreover, the courts are the backbone of our constitutional system, as they ensure that people's rights are protected.[115] Thus, courts are both a good financial deal and are absolutely essential to our democracy.[116] The chief justice claimed that one reason for the lack of funding is that the legislature sometimes targets the court for political purposes and also due to a lack of understanding.[117] He urged the legislature and the courts to avoid politicizing the judicial system, and he further promised that the Iowa courts will do their part to become more transparent.[118]

109. *Id.*
110. *Id.* at 1127.
111. *Id.*
112. *See id.*
113. *Id.* at 1128.
114. *See id.*
115. *Id.*
116. *Id.* at 1127–28.
117. *Id.* at 1128.
118. *Id.* at 1130.