Response to State Action and a New Birth of Freedom

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Response to State Action and a New Birth of Freedom

ROBIN WEST*

I have just a few comments. The first comment is a contribution to the “analytic” question posed by Professor Black’s work and made explicit by Professors Peller and Tushnet’s paper. To make the case for the constitutional status of welfare rights, I do not think it is sufficient—although it may well be necessary—to show that the “state action” problem is merely a pseudo-problem, whatever the reason for finding it not to be a problem. I do not agree with one of the claims put forward by Peller and Tushnet,1 that Black’s perceptive analysis of the state action problem in his article, Foreword: “State Action,” Equal Protection, and California’s Proposition 14,2 is in some way the “same thing” or the “same issue” as his appeal to the country and the Court twenty years later3 to construct an argument for the constitutional protection of social welfare rights. Even if Black, Peller and Tushnet are right to claim that the state action “problem” is a pseudo-problem, one still must make the case for social welfare rights. Whereas Black believed this, Peller and Tushnet clearly do not. I side with Black.

The second comment is intended to extend the affirmative argument for welfare rights beyond the barebones account provided in Peller and Tushnet’s paper.4 Here, I draw on and add to Black’s technical views regarding state action and his utopian views regarding the status of welfare entitlements.

The third comment is aimed at redirecting this conversation away from law and toward politics, while keeping our attention focused on the Constitution. I suggest that the case for welfare rights must be made politically, but that the Constitution should inform political argument. We are wrong to think of the Constitution as something that should guide only the deliberations of courts. With respect to welfare rights in particular, the constitutional case for welfare rights is strong, but it is one that must and should be directed to legislatures. However, this does not make the case for welfare rights any less constitutional. In this last comment, I will reflect on some of the advantages and disadvantages of engaging in a constitutionalized political discourse about welfare, rather than either a constitutionalized legal discourse on the one hand, or a purely political conversation—untouched by constitutional tropes, metaphors, or guidance—on the other.

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I. STATE ACTION AND WELFARE RIGHTS

When I go home this afternoon, on my way to Union Station, I will pass several elderly men and women, all apparently homeless and with severe health problems, most of whom are suffering from substance abuse problems as well, who will ask me for money. I will ignore them, frown, look down, more tightly hold my purse, tell myself that I am in a hurry, and tell them that I have neither the time nor cash to spare. All of this is true: I am in a hurry, and money is tight in my household. I may also tell myself that whatever spare cash I do have will go toward paying off my own mortgage, rather than their drug habit. If it is dark and late, I may shadow a trustworthy co-pedestrian for a measure of safety. If I am not in a hurry, if I just got paid, or if I happen to feel bills in my pocket, and if I am sure those bills are ones and not twenties, I may hand over the cash. Rest assured that I do not feel good about the whole transaction, either way.

What law, constitutional or otherwise, governs this non-transaction? As things stand, these panhandlers have a constitutional First Amendment right, maybe, to ask for my cash. All that means, however, is that the panhandlers are protected if the state goes too far in trying to clamp down on their ability to ask for cash. That is about it, as far as the constitutional status of my brief encounters with the homeless. I have rights, for sure, but they are common law rights, or “civil rights” in the old fashioned sense, protected by property, contract, and criminal law, to keep my money in my pocket and avert my gaze, as well as to ward off any attack should one follow the panhandler’s request. And I have a fairly secure expectation that the state will assist me in my self-defense, should I require it, and should I call upon the state to do so. But I have no constitutional right to such police protection, should the panhandler’s request become threatening or assaultive. The panhandler also has common law or civil rights that allow him to keep in his possession whatever property he has managed to accumulate. But today’s standard wisdom (as well as standard doctrine) has it that the Constitution does no more. It provides him no “right” to any minimal level of well-being. The Constitution neither protects my security, nor enhances his welfare.

Therefore, were the District of Columbia to install a turnstile at the train station requiring my donation to assist the homeless as a condition of entering Union Station, or impose a higher tax on my income specifically for the same purpose, I would not have any constitutional cause for complaint. I do not have a constitutional right not to be taxed toward the end of improving the welfare of the homeless. Even if the state of Maryland or the District were to pass a law requiring me to hand over the two dollars in my pocket when asked to do so by a panhandler, and even if they were to repeal the relevant criminal laws and

5. See Gresham v. Peterson, 225 F.3d 899, 907–09 (7th Cir. 2000) (upholding against First Amendment challenge a city ordinance limiting street begging in public places and prohibiting aggressive panhandling, though noting that “some panhandler speech would be protected by the First Amendment”).

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allow the panhandler to invoke self-help so as to force me to do so if I refuse—even then, presumably, I would not have a constitutional complaint. I currently have common law entitlements to keep what is mine, but the definition of what is “mine” can be altered by legislatures toward public goods and public ends at any time. In fact, that is in large measure what legislatures exist to do. Likewise, however, even if I refuse to donate money, and the state repeals all laws of assistance for the indigent, the panhandler has no constitutional complaint. He has no constitutional right to welfare, shelter, food, clothing, or any of the rest of it, just as I have no constitutional right to enjoy in perpetuity all the goods and possessions I have managed, with the help of common law rules of contract and property, to acquire.

There are two ways the Constitution may be read as affecting this distribution of goods and powers, although neither is currently “good law,” if by good law we mean what the Supreme Court understands the Constitution to require or forbid. The first way the Constitution could be read to affect this distribution is, by shorthand, what we today often call Lochnerism. One might argue, as the Lochner Court more or less did, that I have a constitutional right, not just a common law property, contract, or other right, to keep my wallet in my pocket and avert the panhandler’s gaze. What is mine is really mine, not just by virtue of state legislated laws or common law rules that could well be otherwise, but by virtue of my constitutional rights to liberty and property under the substantive prong of the Due Process Clause, or my contractual entitlements under the Contracts Clause, or my property rights under the Takings Clause, or any one of a number of other clauses. Not only is this panhandler forbidden from taking my cash without my consent by the criminal code of the District of Columbia as well as my common law entitlements, but furthermore, neither Congress, the District of Columbia, nor the state of Maryland can take it by passing a law compelling me to give it to him so as to enhance his welfare, without violating my constitutional property rights.

Now, presumably, all of that has changed. The virtual reversal of Lochner in the 1930s constituted not just a reversal of one case, but a paradigm-shifting

7. See id. at 53.
8. The Contracts Clause is now a dead letter for purposes of protecting property against regulation, but it was not always so, and need not always be so. See, e.g., Trs. of Dartmouth Coll. v. Woodward, 17 U.S. (4 Wheat.) 518 (1819) (state of New Hampshire barred by Contracts Clause from changing the provisions of college’s state charter); Fletcher v. Peck, 10 U.S. (6 Cranch) 87 (1810) (state of Georgia barred from rescinding land grants obtained by bribing state legislators because doing so would impair vested contract rights of ultimate purchasers).
10. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 43–46 (1937) (upholding as constitutional and not unduly restrictive of employer rights a statute restricting employer actions to intimidate or coerce employees and prevent employee organization); W. Coast Hotel Co. v. Parrish, 300 U.S. 379, 391–94 (1937) (upholding Washington statute defining the minimum wage for women and
repudiation of the entire constitutional world view it represented. In the post-
Lochner era, my possessions are mine only by virtue of current and ever-
changing (through democratic means) property and contract law, but they are
not mine by virtue of natural rights themselves immunized from legislative
redistribution by the Constitution. Of course, give the Rehnquist/Scalia Court a
few more years—or, as now seems likely, a few more decades—and they may
be so yet again, but it is fair to say that we are not there yet. However, as has
been amply demonstrated in the first thirty years of the century just past, and as
we may witness in the first thirty years of the century we are embarking upon, it
is certainly possible to read the Constitution as meaning that common law
entitlements should be and in some sense “are” constitutionally protected
against various sorts of redistribution, including legislative redistribution aimed
at improving the lives of the homeless.

There is, though, a second way this common transaction outside Union
Station might be changed by virtue of the Constitution, and that is by what was
first suggested by Professor Black,11 argued on somewhat different grounds by
Harvard Law Professor Frank Michelman a few years later,12 and argued again
by a number of commentators, including Peller and Tushnet today13: The
Constitution may be read, particularly if we read it in conjunction with the
preamble and the Declaration of Independence, as suggesting that the panhan-
dler, not the property owner, has the relevant constitutional right to some
minimal level of welfare. If the legislature does not allocate some appropriate
level of funding so as to ensure him decent food, housing, and above all medical
care, he has cause for a constitutional complaint. Where and against whom he
will press that complaint is a dicey subject, but he has been constitutionally
aggrieved.

Needless to say, currently no such constitutional right exists in our judicially
produced and authoritative constitutional law. Again, current judicial understand-
ings of the Constitution grant neither a constitutional right to welfare, nor a
constitutional right against having one’s property or income appropriated to-
ward the end of enhancing the welfare of others. It is a mistake, though, to
confuse “constitutional rights” with judicially produced constitutional law. Pro-
fessor Black might have been right, after all, and the current Court’s interpreta-
tion of the document wrong, regarding the existence of constitutional welfare

children because the state can constitutionally restrict freedom if to do so is in the public interest); Nebbia v. New York, 291 U.S. 502, 516-17 (1934) (upholding statute establishing Milk Board and authorizing Board to fix milk prices for a limited time because the state can provide regulation for the public welfare).

11. See BLACK, supra note 3.
rights. "We," meaning the community of all of us, including those panhandlers that I manage to ignore on my way to and from work every day, may well have some such constitutional right to minimal welfare, even though no one in power today believes there to be such. On this view of what it means to say that we have a constitutional right to something, and even though no one currently charged with the right and duty to render authoritative interpretations of the Constitution believes there to be such a right, the Constitution is simply one way, among others, of speaking truth to power. That was Professor Black's project—to use the Constitution to speak truth to power—and it is a project that Peller and Tushnet, notwithstanding their deconstructive impulses to the contrary, are actually furthering today.

I support their project, but I think it is missing a step. To accept the repudiation of *Lochner*, even in this alternative "speaking truth to power" constitutional world, does not automatically imply the existence of constitutional welfare rights. Peller and Tushnet, although certainly not Black, sometimes speak as though it does, as though the two issues—first, the repudiation of the *Lochner* mindset, and second, the existence of welfare rights—are in fact the same thing. But they are not. That I do not have a constitutional right to the property and the contracts I have acquired through all my hard work and not-so-hard inheritances—which is the bottom line meaning of the repudiation of *Lochner*—implies that a legislative decision to provide that minimal welfare through the use of my tax dollars creates no constitutional cause of complaint. But it does not follow from the decision that my property entitlements are not constitutionalized that there is any affirmative constitutional right on the part of others to a minimal level of welfare. I will argue below that there is such an affirmative right. But first, it is worth emphasizing that deconstructing the logic of the Constitution as a shield of the privileged against redistribution makes neither a political, moral, nor constitutional case for redistribution as a right of the disempowered.

My second and related objection to Peller and Tushnet's analytics concerns their dissection of the "state action" doctrine. The phrase is used in their paper, as well as in the writings of many others, to mean two very different things that overlap, intersect, and have a lot in common, but are ultimately different. First, the state action doctrine sometimes expresses the idea that the

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14. There is nothing particularly odd about this conception of constitutional epistemology. It has been embraced at various times by constitutional lawyers and thinkers across the political spectrum. See, e.g., RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977) (distinguishing Supreme Court authority from constitutional truth); LYSANDER SPOONER, THE UNCONSTITUTIONALITY OF SLAVERY (1860) (arguing the unconstitutionality of slavery at a time when it was considered constitutional); Edwin Meese, III, *The Supreme Court of the United States: Bulwark of a Limited Constitution*, 27 S. Tex. L. Rev. 455 (1986) (arguing that a jurisprudence of original intention will limit the Court's discretion in constitutional interpretation and provide consistent constitutional common law).


16. Peller & Tushnet, supra note 1, at 800.
Constitution is directed at states rather than at private actors. So understood, the state action doctrine means that a state actor, rather than a private actor, must be involved to effect a constitutional violation. Public action, not private action, is what the Constitution is all about. Second, the state action doctrine is sometimes invoked to express the different idea that a constitutional violation requires some affirmative action by the state that violates a constitutional provision, instead of simply a failure to act. On this reading, the state action doctrine requires action, rather than inaction. In the first interpretation, the emphasis is on the state—the idea is that the Constitution restrains states rather than private parties. In the second interpretation, the emphasis is on the action—the Constitution forbids particular actions, not inaction. This second interpretation is typically understood as buttressed by the common perception, or observation, that the Constitution is one of “negative rights” only—it protects us against the bad things states do, not against the state’s failure to act. Unfortunately, because these two quite different interpretations of the state action doctrine often are merged, co-mingled, and regarded as synonymous, they both have now become part of our conventional wisdom, as well as our case law, regarding the scope and meaning of the Fourteenth Amendment. As a result, we now have two state action requirements, not just one. First, for there to be a constitutional violation, it must be caused by state actors, not private actors, and second, it must be action, not inaction, that causes the constitutional harm.

Both of these requirements undoubtedly insulate common law entitlements. The state action doctrine in the first sense—the Constitution is addressed to states, and not private parties—means that when I ignore the panhandler on the street, I do not commit a constitutional violation, and I do not commit a constitutional violation no matter what I do with my common law-created property (even if I am committing crimes) because I am not the state. Consequently, I cannot be hauled in front of anybody, much less a court, for having committed a constitutional violation, just because I am not feeling or being charitable, and it is by virtue of the state action doctrine that this is so. To this degree, my “common law entitlements” are protected by the state action doctrine. Whatever other legal or moral norms I may violate, I do not violate the Constitution by keeping my wallet in my pocket. The state action doctrine in the


18. See, e.g., Carlton v. Cleburne County, 93 F.3d 505, 508–09 (8th Cir. 1996) (holding that knowledge of danger to the individual does not create an affirmative duty to protect); DeShaney v. Winnebago County Dep’t of Soc. Servs., 812 F.2d 298, 301 (7th Cir. 1987), aff’d, 489 U.S. 189 (1989) (holding that state has no constitutional duty to protect child from father after receiving reports of abuse).
second sense—the Constitution is violated only when the state acts, as opposed to when it “merely” fails to act—also protects common law entitlements, but in a different way. When the state seemingly does nothing by not legislating, there could not possibly be a constitutional violation because there has been no state action, and therefore, the non-act of leaving common law entitlements unchanged cannot be subjected to constitutional challenge. This too, then, protects existing common law entitlements.

Is the constitutional case for welfare rights at odds with the state action requirement? If “state action” means that the Constitution is only triggered by action rather than inaction, then the answer is “yes”—a state that has failed to provide for minimal welfare has simply failed to act. On this reading, welfare rights seem to fail the state action requirement. If “state action” means that the Constitution is triggered by the action (or inaction) of states and state actors, rather than private parties, then the answer could be “no”; it is the state that fails to provide for welfare, and the state that should be held accountable. Thus, even though the two prongs of our current state action doctrine often work and appear in tandem, it is still a good idea, both in theory and practice, to keep them analytically separate.

Whatever may be the merits of the state action doctrine understood in the first sense, the state action doctrine in the second sense—that the Constitution prohibits state action, rather than state inaction—rests on extremely dubious arguments. This “action rather than inaction” limit on constitutional entitlements is not only unsupported by the text of the Fourteenth Amendment, but it is at odds with it. The Fourteenth Amendment, read literally, comes much closer to prohibiting inaction than action. “No State Shall . . . Deny . . . Equal Protection”19 means, if we take out the double negative, that all states must provide something, namely equal protection of law. Should any state fail to protect—and Professor Black was right to insist that failing to protect is inaction, not action20—then that state has violated the substantive part of the Fourteenth Amendment and, under Section Five, Congress is authorized as well as obligated to act. If anything, the Fourteenth Amendment imposes a requirement of inaction, not action—then that state has violated the substantive part of the Fourteenth Amendment and, under Section Five, Congress is authorized as well as obligated to act. If anything, the Fourteenth Amendment imposes a requirement of inaction, not action, as its trigger. If states fail to do certain things—fail to protect, and equally—then Congress is empowered under Section Five to take remedial action. Thus, it is important to keep the two state action doctrines analytically separate because while one is supported by the text and history of the Constitution, the other is not. For this reason alone, I would resist Peller and Tushnet’s (although not Black’s) suggestion that they are fundamentally the same thing.21

It is pragmatically wise, in this context, to keep these two meanings of “state action” distinct. Let us assume that the Constitution only addresses states rather

20. See Black, supra note 2.
21. Peller & Tushnet, supra note 1, at 779, 797, 815.
than private actors. This means that whatever the District of Columbia Council or Congress or the Maryland Assembly may decide, I am under no constitutional obligation to give my money to the panhandler on the street; my refusal to do so does not involve state action, so no matter what else it may be, that refusal alone is not a violation of anyone’s constitutional rights. But even if we accept the state action doctrine in this sense, that does not defeat the case for constitutional welfare rights—the indigent may still have a constitutional claim against the state for failing to provide for his minimal welfare. The state, after all, is a state actor. By failing to legislate, the state has failed to provide for minimal welfare. Thus, even if there are constitutional welfare rights, that does not mean that there is no state action requirement, if by state action we mean that the Constitution is directed toward states rather than private actors. There may be constitutional welfare rights, even assuming the existence of the state action requirement, if by “state action requirement,” we mean that those constitutional welfare rights must be understood as rights against the state rather than against private parties.

However, if “state action” also means that there must be state action, and not just state inaction, then there is a much more substantial hurdle against the indigent’s claimed constitutional right. The gravamen of the panhandler’s constitutional complaint is that the state has unconstitutionally done nothing to protect him against indigence—the state has failed to act. So, if by “state action” we mean not only that the Constitution is directed at states rather than private actors, but also that states only violate the Constitution by doing something impermissible, rather than by failing to do something that is constitutionally required, then there quite simply can be no constitutional welfare rights. The state has not done anything it is not allowed to do; it just has not done anything, period. Put differently, if the state action requirement is another way of insisting that the Constitution consists of “negative rights only,” then there is no claim that can be pressed against the state that involves only its failure to act.

Thus, it is the second understanding of the state action requirement that poses the greatest hurdle to the construction of constitutional welfare rights. However, as suggested above, that second understanding of state action rests on the weakest grounds. Again, even assuming that the Constitution only addresses state rather than private actors, textually it lays the groundwork for inaction as the cause of a constitutional violation. The Constitution, in other words, does obligate the states to do something, as Black insisted; for example, it requires the states to provide equal protection of the law. If a state fails to do so, it has violated the Constitution.

So, let us keep these two understandings of the state action requirement


23. See Black, supra note 2.
If the Constitution is indeed directed at states rather than at private actors, it nevertheless explicitly requires the states to do things. Inaction as well as action can be constitutionally problematic, even given a robust state action requirement that insulates private actors from constitutional scrutiny. The existence of constitutionalized welfare rights does not require the annulment of the state action requirement as a precondition. Likewise, the existence of a strong state action requirement does not nullify the existence of constitutional welfare rights. The state action requirement properly understood means that the state, not private parties, is constrained by constitutional mandates. It does not mean that the Constitution only prohibits action rather than inaction. The argument for the existence of constitutional welfare rights rests on a repudiation of this second, decidedly insupportable understanding of the state action requirement. It does not require that we reconceptualize the Constitution as being directed toward private rather than state actors.

II. CONSTITUTIONAL WELFARE RIGHTS

One can make a compelling constitutional case for welfare rights, but I will only briefly spell it out because I have done so in detail many times before.\(^{24}\) The Fourteenth Amendment requires that states provide equal protection of the law. Linguistically and historically this means that the state must protect everyone equally against various dangers, most prominently against private violence. To fail to provide equal protection against private violence is to condone the existence of private, violent, and hierarchic relationships, such as the relationship of master to slave: If I can assault, maim, or kill you without fear of state reprisal, but you cannot do likewise to me, then I am literally your master.\(^ {25}\) To fail to provide equal protection against private violence also condones practices such as lynching: If the state permits me to kill you without fear of legal redress, it is not providing you equal protection of the law. Similarly, if the state does not protect me against private violence in the home, sexual or otherwise, it is not providing equal protection of the law.\(^ {26}\) If the state does not equally protect poor or minority communities against private violence, whatever the reason, it is not providing equal protection of the law. If the state punishes perpetrators of crime against African-Americans more leniently than perpetrators of crime against whites, it is not providing equal protection of the law.

24. See Robin West, Progressive Constitutionalism: Reconstructing the Fourteenth Amendment (1994) [hereinafter West, Progressive Constitutionalism]; Robin West, Re-Imagining Justice (2003); Robin West, Rights xi (2001); West, supra note 13.

25. See Mark Tushnet, Slave Law in the American South: State v. Mann in History and Literature (2003) (providing history and legal analysis of State v. Mann, 13 N.C. (2 Dev.) 263 (1829), in which a state court overturned a jury verdict, holding that a slave owner could not be criminally liable for an assault and battery on a slave).

26. See West, Progressive Constitutionalism, supra note 24, at 9–44; Robin West, Equality Theory, Marital Rape, and the Promise of the Fourteenth Amendment, 42 Fla. L. Rev. 45, 68–71 (1990) (discussing marital rape laws as failing to protect women from domestic violence and as violating the Equal Protection Clause).
If we accept the mandate that the state must protect against violence, and do so equally, as the core value protected by the Equal Protection Clause—rather than, as current doctrine holds, the mandate that the Equal Protection Clause merely polices against state irrationality—then we must ask: "What else must the state protect us against, and equally?" The answer to that question is: "It depends." It depends on why we insist that the state must protect us against violence. If violence is *sui generis*, then that is an answer—equal protection of the law means that the state must protect all, equally, against private violence. But if violence is not *sui generis*, yet is so bad that it triggers this constitutional obligation of states to protect us against it, then the question becomes why we have a constitutional right to the state's protection against violence. The answer to that question provides us with the contours of the right's penumbra.

I suggest three different answers. The Constitution may require that the state protect us against violence because violence has a radically subordinating effect on private life, with all the attendant harms of that subordination. If so, the Constitution also protects against much else that carries with it those attendant harms. Call it the anti-subordination interpretation—or even better, the Hobbesian interpretation—of the Fourteenth Amendment. Alternatively, it may be that the Constitution provides us with a constitutional right to be protected against violence, and the state with a constitutional duty to protect, because violence threatens life itself. We might call this the "pro-life interpretation" of the clause. If that is at the core, then we may have a constitutional right also to be protected against life's various calamities—volcanoes, hurricanes and the like—whatever the source. Finally, we may have a constitutional right to be protected against violence because violence makes us incapable of enjoying our basic human capabilities, incapable of participating as citizens in public life, and incapable of achieving anything remotely called happiness. Call this the welfarist interpretation. If that is why we have a constitutional right to the protection of the state against violence, then the penumbra of such a right may include a right to be protected against starvation, cold, and preventable debilitating illness.

There are other ways to construct the constitutional case for welfare rights. My point is that the case must be made. It does not follow from the incoherence


of the state action requirement that there are no constitutional welfare rights, although such rights are precluded by an insistence on an overly broad understanding of what the state action requirement means. The Constitution requires the state to do certain things. If the state action requirement suggests otherwise, then that requirement precludes the viability of constitutional welfare rights, but this understanding of the “state action” requirement, I have suggested, is wrong. However, it does not follow that one of the things the state is required to do is protect our welfare. That must be argued; I think it can be. I also think it would behoove progressives to make the argument.

III. THE POLITICAL CONSTITUTION

Black surely saw some version of everything I just said, and expressed it better. Returning to the question posed by Peller and Tushnet’s paper, why did he not draw the connection between the incoherence of an overly broad understanding of the state action doctrine and the case for constitutional welfare rights? I do not think it was because of a myopic attention to race, or because of the obfuscating impact of common law entitlements, or because of an intellectual compromise made with the defenders of a strong civil libertarian understanding of the Constitution.30 I think it was because the strongest case for welfare rights, as well as the strongest case against the state action requirement that precludes it, directly suggests that some constitutional rights must be actualized through legislative action (through a “constitutionalized politics”) and not through adjudication (through a “constitutionalized law”). If the state is constitutionally obligated to protect us against violence, or to police against private-sphere discrimination, or to provide minimal levels of welfare, as I believe it is, and as I believe Black believed it is, then the state will have to do so through legislative and not adjudicative action.

The constitutional status of welfare rights implicates the constitutional obligation of legislatures, not courts, to act, therefore implying a robust, not passive role for legislatures in interpreting, applying, and enforcing constitutional rights and remedies. Thus, the obstacle to a strong appreciation for the constitutional status of welfare rights or, more modestly, for the possible constitutional status of welfare rights, is the myopic fixation on courts as the fountain of all constitutional truth and the guardian of all constitutional values. It is that fixation, not the words of the text, which has led to the widely accepted but transparently antitextual conventional wisdom that the Constitution is a shield and never a sword, protects negative but not positive rights, and imposes restraints but no duties on Congress and legislatures. It is accordingly that myopia that has perverted, thwarted, or indeed truncated a full discussion of a constitutional voice in our quest for decent and humane rights of wellbeing.

30. Peller & Tushnet, supra note 1, at 801–09.
Lastly, then, on the politics of this argument. Should those of us who would like to see some sort of guarantee of minimal welfare for the most indigent of our fellow citizens pursue this goal through any sort of constitutional argument? As we see the judicially constructed Constitution drift rightward and emphatically away from any regard whatsoever for welfare, witnessing the reconstruction of the *Lochner* mindset with every passing incremental decision—a reconstruction that threatens even political, much less constitutional, recognition of wellbeing as something worth protecting—the temptation is surely to say, no: The Constitution, as constructed by the Court, is part of the problem, not part of the solution. We need to avoid it. We need to reassert the wisdom behind the repudiation of *Lochner*, the effect of which is to minimize the influence of constitutionalism on politics, not maximize it. The Constitution just may be, as many have now argued, at its heart a property-protecting document, profoundly conservative, protective above all else of the privileges of property against the ravages of change—especially politically effectuated change. If so, the successes of the civil and reproductive rights movements notwithstanding, the sensible strategy is to cabin it, shrink it, minimize it, not to continue a futile reliance upon increasingly counterfactual, counterhistorical, and wildly utopian interpretations of its most basic provisions. It is well and good to speak truth to power, but the Constitution is a part of the apparatus of power that needs to be spoken to with the check of truth, not the other way around. We truly may be better off without the illusion that the Constitution is on the side of progressive politics.

Nevertheless, I will close with a word of caution against this “constitutional diss-ism” for just one reason, related to our imagistic, impressionistic, thoroughly constructed, only vaguely historical, mostly mythical, but nevertheless profoundly influential national self-identity. Who are we, at the end of the day, when we look in the mirror? On National Public Radio, a visiting professor of psychiatry at Harvard University, whose name I did not catch, worried that we are becoming a callous warrior nation. He opined that the tenor of the coverage of what is happening in Iraq is making it worse: We bask in militaristic accomplishments without confronting or even seriously contemplating the human suffering being caused in our name. Something comparable may be happening domestically (and perhaps has been happening for some time): We bask in our individualistic, entrepreneurial, technological, competitive victories, becoming callous to the suffering of our co-citizens wrought in our name. We do not see that suffering on TV, just as we do not see the “civilian casualties” that are broadcast to the rest of the world on *Al Jazeera*.

The political Constitution, meaning the Constitution as used in politics, debate, and public speech (rather than in courts of law) is a potent communicator, as well as repository, of our self-image. A Constitution that serves exclusively, and without challenge, individualistic, over-achieving, do-it-yourselfers, all of whom have lifted themselves by their meritorious bootstraps, battling for advantage and position against a democratic state and politics derided from the outset as vindictive and envy-driven—and a Constitution increasingly oblivious to the harms wrought by those competitions—is a rhetorical and cultural force to be reckoned with. Left unattended and unanswered, that constitutional vision may well become our unchallenged national self-image—what we see in the morning in our national, collective mirror. We do not reckon with it, or answer it, by ignoring it. Neither do we do so, I believe, by filing heroic briefs seeking to minimize its impact, or its “holdings,” or its legal effectiveness. We can only reckon with this constitutional self-image by engaging with the politics that produced it, and by producing something better. We engage it by constitutionalizing, and thereby humanizing, our politics. To do so, I think, would be true to Professor Black’s hopes for our new birth.