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NO SCRUTINY WHATSOEVER: DECONSTITUTIONALIZATION OF POVERTY LAW, DUAL RULES OF LAW, & DIALOGIC DEFAULT

*Julie A. Nice**

INTRODUCTION

Poverty Law in the United States subsists within a constitutional framework that constructs a separate and unequal rule of law for poor people. Across constitutional doctrines, poor people suffer diminished protection, with their claims for liberty and equality formally receiving the least judicial consideration and functionally being routinely denied. As Justice Marshall succinctly put it, poor people receive "no scrutiny whatsoever."[1] This Article surveys some doctrinal causes and systemic effects of this exclusion of poor people from equal constitutional protection.

The classical focus of commentary regarding the intersection of Poverty Law and Constitutional Law relates to the lack of social welfare rights in the United States Constitution,[2] which causes

* Delaney Professor of Law, University of Denver Sturm College of Law. I offer my gratitude to Professors Elizabeth Cooper of Fordham, Leslie Shear, Louise Trubek, and Marsha Mansfield of Wisconsin, Jeffrey Selbin of Berkeley, Juliet Brodie of Stanford, and Rebecca Zietlow of Toledo for inviting me to speak on this topic, as well as the other organizers and participants at the events where I presented various portions of this Article, including Fordham Urban Law Journal's March 2007 Conference on Poverty Law in the Curriculum, the March 2007 Conference on the Future of Equal Access to Civil Justice in Wisconsin (where I presented versions of *The Deconstitutionalization of Poverty Law)*, and the American Association of Law School's January 2008 Programs on *Gender and Class: Voices from the Collective* (where I presented *The Hollow Hope of* THE HOLLOW HOPE) and on *Rights, Religion, Revolution: Theories of Advocacy for the Poor* (where I presented *The Gravity of Dandridge)*. Finally, I thank my colleagues Alan Chen, Sam Kamin, Marty Katz, Viva Moffat, Nantiya Ruan, and Joyce Sterling for their suggestions, and also the excellent editors of the *Fordham Urban Law Journal.*

1. James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting).

2. *See, e.g.*, Peter Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1 (1987); Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). For a comprehensive analysis of how the Supreme Court refused to constitutionalize social welfare rights, see ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION (1997). For a recent summary of scholarship about the lack of constitutional protection for social welfare rights, see, for example, Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1127-28 (2006). For an

courts to reject claims of social welfare rights. This Article does not re-visit that debate, but instead urges greater scholarly attention to more subtle and insidious denials of equal constitutional protection to poor people. This Article's initial claim is that Poverty Law has been deconstitutionalized, that is, the courts generally fail to enforce the Constitution's existing protections when applied to poor people.[3] A brief look at the Supreme Court's normal doctrinal analysis reveals how four major departures from these norms have deconstitutionalized Poverty Law.

First, the Supreme Court normally considers claims of discrimination according to an established doctrinal analysis for determining which level of judicial scrutiny should apply. When those affected are poor, however, the Court instead has created a unique categorical immunization from judicial scrutiny for "social or economic legislation."

Second, the Supreme Court normally considers whether heightened judicial scrutiny might be necessary because either the affected group is a "suspect class" or the trait defining the affected group is a "suspect classification." When those affected are poor, however, the Court has circumvented these questions, never directly or adequately determining whether poor people meet the criteria for a suspect class or whether poverty meets the criteria for a suspect classification.

Third, when cases reveal evidence of invidious governmental discrimination against other groups, the Supreme Court normally has been willing to invalidate such governmental action by applying its rationality review "with bite." When those affected are poor the Supreme Court instead has applied its rationality review without bite, that is, in a reflexive manner designed to uphold governmental regulation.

Fourth, when other groups or individuals claim infringements of various established fundamental rights, the Supreme Court normally applies some version of heightened judicial scrutiny. When

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argument that social welfare rights would be ineffective and counterproductive, see, for example, Frank B. Cross, *The Error of Positive Rights*, 48 UCLA L. REV. 857, 863 (2001).

3. Scholars frequently use the concept of deconstitutionalization to refer to the lack of judicial enforcement of rights. This Article uses deconstitutionalization to refer to the lack of judicial enforcement of rights as well as the lack of judicial protection of classes (in this case, the class of poor people). For a recent analysis of rights-based deconstitutionalization, see, for example, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111 (2004) [hereinafter Chemerinsky, *Deconstitutionalization*].

those affected by the fundamental rights infringements are poor, the Court instead has reversed its normal level of scrutiny, ratcheting down from heightened scrutiny to rationality review and applying it in a reflexive manner to uphold the governmental regulation.

Over time, these forces of deconstitutionalization have constructed dual rules of constitutional law based on economic means.[4] On one hand is the rule of law that respects the dignity of the haves and protects rights that benefit them, thereby perpetuating their advantages. On the other hand is the rule of law that refuses to protect rights in a manner that might protect or benefit the have-nots. This second-class rule of law adds insult to injury by constantly monitoring and invading the lives of the have-nots—comprehensively scrutinizing and regulating both their work and family lives[5]—while simultaneously denying them the protection of legal rights to defend themselves within this regulatory regime.

Both deconstitutionalization and the resulting dual rules of constitutional law operate comprehensively to deny equal constitutional protection to poor people. The reason the Supreme Court has given for reflexively upholding governmental action is that judicial scrutiny is unnecessary precisely because the Justices presume any problems will be remedied within the political process.[6] Here is where the poverty paradox comes in. Not only may poor people not expect equal constitutional protection from the judiciary, they also lack the types of resources typically required for effective political mobilization to pursue protection from the political branches of government. While many impoverished individuals have put up a valiant fight not only for economic survival but also for greater political inclusion and protection, rarely have their ex-

4. For an earlier example of path-breaking research identifying such dual rules of law, see, for example, Jacobus tenBroek, *California's Dual System of Family Law: Its Origin, Development, and Present Status* (pts 1-3), 16 STAN. L. REV. 257 (1964), 16 STAN. L. REV. 900 (1964), and 17 STAN. L. REV. 614 (1965).

5. For a qualitative study documenting how government surveillance of poor people has become increasingly constant and routine, see JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 1-39 (2001). *See also* Austin Sarat, *". . .The Law is All Over": Power, Resistance and the Legal Consciousness of the Welfare Poor*, 2 YALE J.L. & HUMAN. 343, 344 (1990) ("Law is, for most people on welfare, repeatedly encountered in the most ordinary transactions and events of their lives.").

6. *See* Lawrence v. Texas, 539 U.S. 558, 579-80 (2003) (O'Connor, J., concurring) ("Laws such as economic or tax legislation that are scrutinized under rationality review normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" (quoting City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985))).

traordinary efforts proven sustainable,[7] as exemplified by the defeat of the short-lived War on Poverty and its welfare rights movement.[8]

Poor people are trapped: the courts reflexively deny their claims that the political branches have infringed upon their equality or liberty, and poor people otherwise lack the economic or political leverage to persuade the political branches to end such infringements.[9] As for the possibility of scholarly progress toward framing rights claims for poor people, several dominant views have led most research away from constitutional rights. The first view is the "hollow hope" critique of rights, that is, the assessment that "U.S. courts can *almost never* be effective producers of significant social reform."[10] The second view is the belief that a claim for constitu-

7. For recent descriptions of the 1960s welfare rights movement, see, for example, FELICIA KORNBLUH, THE BATTLE FOR WELFARE RIGHTS: POLITICS AND POVERTY IN MODERN AMERICA (2007); PREMILLA NADASSEN, WELFARE WARRIORS: THE WELFARE RIGHTS MOVEMENT IN THE UNITED STATES (2005); ANNELISE ORLECK, STORMING CAESARS PALACE: HOW BLACK MOTHERS FOUGHT THEIR OWN WAR ON POVERTY (2005).

8. Regarding the launching of President Johnson's War on Poverty and the seven-year duration of the National Welfare Rights Organization, see FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 270, 288, 352-53 (1977). Regarding the limited success of legal welfare rights advocacy, see BUSSIERE, *supra*, note 2, at 99; MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973, 145 (1993); SUSAN E. LAWRENCE, THE POOR IN COURT: THE LEGAL SERVICES PROGRAM AND SUPREME COURT DECISION MAKING 150 (1990); CHRISTOPHER E. SMITH, COURTS AND THE POOR 93 (1991).

9. *See* PIVEN & CLOWARD, *supra* note 8, at 22 ("[W]elfare administrators admonish recipients for disrupting relief offices and propose instead that they learn how to lobby in the state legislature or Congress. But welfare clients cannot easily go to the state legislature or national capital, and when a few do, they are of course ignored.").

10. *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 338 (1991). Further, Professor Rosenberg concludes: "In general, then, not only does litigation steer activists to an institution that is constrained from helping them, but also it siphons off crucial resources and talent, and runs the risk of weakening political efforts." *Id.* at 339. To be sure, Professor Rosenberg earned the widespread influence of his critique based on the rigor of his research and cogency of his analysis. For an example of how the hollow hope critique has influenced leading poverty law scholarship, see, for example, Matthew Diller, *Poverty Lawyering in the Golden Age*, 93 MICH. L. REV. 1401, 1426 (1995) ("I agree with the critics that the attainment of political strength provides the best, and perhaps the only, prospect for the lasting and fundamental transformation of poor communities."). Other poverty law scholars have departed from the hollow hope critique and persevered with constitutional analysis. For analysis regarding constitutional rights for poor people, see, for example, William E. Forbath, *Caste, Class and Equal Citizenship*, 98 MICH. L. REV. 1, 3 (1999); Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131 (1999); Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277 (1993); Lawrence G. Sager, *Justice in Plain Clothes: Reflecting on the Thinness of*

tional protection for poor people is either futile or unintelligible within the logic of Supreme Court precedents.[11] The third view is acquiescence to the notion that the Supreme Court has held that poor people are not a suspect class or that poverty is not a suspect classification, presumably as a means to explain the patently clear pattern of constitutional losses experienced by poor people.[12] Moreover, although other rights movements on the ground have resisted these critiques by continuing to pursue constitutional litigation,[13] no comparable movement for constitutional rights persists for poor people.[14]

This lack of either viable constitutional or political claims, or serious scholarly frames, for rights of inclusion for poor people has resulted in what I term a dialogic default—a failure to contest economic injustice within constitutional and political discourse.[15] The

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Constitutional Law, 88 NW. U. L. REV. 410 (1993). For a comparative constitutional perspective, see, for example, MARK TUSHNET, WEAK COURTS, STRONG RIGHTS: JUDICIAL REVIEW AND SOCIAL WELFARE RIGHTS IN COMPARATIVE CONSTITUTIONAL LAW (2008).

11. *See, e.g.*, Frederick Schauer, *Foreword: The Court's Agenda—and the Nation's*, 120 HARV. L. REV. 4, 44-46 (2006) (arguing that involving the Supreme Court in making major social policy decisions is a "counterfactual" that "remains well outside the realm of even remotely possible constitutional change"). Judging by a number of reactions to presentations of this paper, even some scholars sympathetic to those who struggle for economic survival resist returning to a call for constitutional rights, whether due to perceived futility or persistent fatigue. As one friend and poverty law colleague put it, "I don't want to talk about *Dandridge*." While the reasons for this plea are certainly understandable, this Article suggests that justice for poor people demands deconstruction of how *Dandridge v. Williams* has deconstitutionalized Poverty Law, and the dialogic consequences that have followed. To put it another way, *Dandridge* is to the deconstitutionalization of economic justice as *Plessy v. Ferguson* was to the deconstitutionalization of racial justice. Acquiescing to *Dandridge* is to the peril of poor people in much the same way that acquiescing to *Plessy* was to the peril of African-Americans. *See infra* Part I.A.

12. *See* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 785-787 (3d ed. 2006) [hereinafter CHEMERINSKY, CONSTITUTIONAL LAW].

13. Rights movements persist regarding, for example, race, sex, sexual orientation, age, and disability.

14. I do not mean to discount the importance of those constitutional challenges brought on behalf of poor people, but I believe they are too few to constitute a rights movement. Nor do I underestimate the crucial work done by legal services agencies or other advocacy organizations such as the Sargent Shriver National Center on Poverty Law, Children's Defense Fund (CDF), Center for Budget and Policy Priorities (CBPP), and the Center for Law and Social Policy (CLASP), to name only a few, which help on a daily basis to stem the tide of the regulatory welfare regime.

15. In their recent comprehensive review of data produced about welfare reform, Joel Handler and Yeheskel Hasenfeld demonstrate that the political obsession with ending welfare as we know it diverted attention from the problem of poverty, which then virtually disappeared from political discourse. *See* JOEL F. HANDLER & YEHESKEL HASENFELD, BLAME WELFARE, IGNORE POVERTY AND INEQUALITY 1 (2007);

immediate consequence of this dialogic default is the lack of traction toward establishing even the aspiration to greater constitutional protection for those most economically vulnerable.[16] This default is costly.[17] The evolution of constitutional law teaches the importance of rights claims in shaping constitutional interpretation, with history demonstrating the extension of the Constitution's protection to those previously excluded classes that persistently dared to claim rights.[18] As this Article recounts, recent scholarly research regarding both constitutional theory[19] and social movement mobilization[20] has underscored the rights movements' role in shaping

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accord Erik Eckholm, *Childhood Poverty Is Found to Portend High Adult Costs*, N.Y. TIMES, Jan. 25, 2007, at A19 ("For more than 10 years, lawmakers had mainly focused on sweeping welfare changes passed in 1996 that imposed time limits and strict work requirements on welfare recipients. In the process, Democratic staff members in the House and Senate said this week, other crucial poverty-related topics were neglected.").

16. Such an aspiration toward a positive constitutional scheme has been imagined with regard to the general welfare. *See, e.g.*, SOTIRIOS A. BARBER, WELFARE & THE CONSTITUTION (2003).

17. These costs are not only dialogic, but also are economic. *See* Eckholm, *supra* note 15, at A19 ("Children who grow up poor cost the economy $500 billion a year because they are less productive, earn less money, commit more crimes and have more health-related expenses . . . .").

18. To take one prominent example, Reva Siegel has shown how the movement for an Equal Rights Amendment, though technically unsuccessful, contributed to the Supreme Court's transition to applying heightened scrutiny for reviewing claims of discrimination based on sex. Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the de facto ERA*, 94 CAL. L. REV. 1323, 1323 (2006).

19. *See, e.g.*, BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 174 (1991); BRUCE ACKERMAN, WE THE PEOPLE: TRANSFORMATIONS (1998); LARRY KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW (2004); MARK TUSHNET, TAKING THE CONSTITUTION AWAY FROM THE COURTS (1999); Barry Friedman, *Dialogue and Judicial Review*, 91 MICH. L. REV. 577 (1993); Barry Friedman, *The Importance of Being Positive: The Nature and Function of Judicial Review*, 72 U. CIN. L. REV. 1257 (2004); Robert Post & Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 CAL. L. REV. 1027 (2004); Mark Tushnet, *Forms of Judicial Review as Expressions of Constitutional Patriotism*, 22 LAW & PHIL. 353 (2003).

20. Among legal scholars, see, for example, Jack M. Balkin, *How Social Movements Change (Or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); William N. Eskridge, *Channeling: Identity-Based Social Movements and Public Law*, 150 U. PA. L. REV. 419 (2001); Edward L. Rubin, *Passing Through the Door: Social Movement Literature and Legal Scholarship*, 150 U. PA. L. REV. 1 (2001). Among law and society scholars, see, for example, CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998); MICHAEL W. MCCANN, RIGHTS AT WORK: PAY EQUITY REFORM AND THE POLITICS OF LEGAL MOBILIZATION (1994) [hereinafter MCCANN, RIGHTS]. For compilations of interdisciplinary literature, see LAW AND SOCIAL MOVEMENTS (Michael McCann ed., 2006); THE BLACKWELL COMPANION TO SOCIAL MOVEMENTS (David A. Snow, Sarah A. Soule & Hanspeter Kriesi eds., 2006).

constitutional interpretation. Because constitutional discourse is a crucial arena of struggle for questions of justice, a default in the constitutional dialogue signals a broader default in the political contest for economic justice.[21] In a more practical sense, both deconstitutionalization and the resulting dialogic default have left Poverty Law itself as a frontier for endless experimentation with the lives of poor people, at best,[22] or as an accomplice to their

21. Joel Handler's new book documents how "[w]elfare has dropped out of the political discourse and is virtually forgotten. Unfortunately, discussion of poverty and inequality has nearly disappeared as well—even though significant poverty remains, especially child poverty, and inequality has been increasing over the past few decades." HANDLER & HASENFELD, *supra* note 15, at 1. For scholarly analysis of the persistence of poverty, see CHARLES KARELIS, THE PERSISTENCE OF POVERTY: WHY THE ECONOMICS OF THE WELL-OFF CAN'T HELP THE POOR x (2007).

> Relevant data have been compiled by the economist Thomas Hertz and published in *Unequal Chances: Family Background and Economic Success*, edited by Samuel Bowles, Herbert Gintis, and Melissa Osborne Groves (Princeton and Oxford, 2005). These data show that children born in the lowest 10 percent of families ranked by income have a 51 percent probability of ending up in the lowest 20 percent as adults. Roughly speaking, this means that people born very poor face a greater than even chance of ending up moderately or very poor. More striking still, African Americans born very poor have a greater than 40 percent chance of being not just moderately poor but very poor as adults.

Id. For a recent policy analysis of how to reduce poverty, see generally CENTER FOR AMERICAN PROGRESS, FROM POVERTY TO PROSPERITY: A NATIONAL STRATEGY TO CUT POVERTY IN HALF 1-72 (2007).

22. *See, e.g.*, ROBIN H. ROGERS-DILLON, THE WELFARE EXPERIMENTS: POLITICS AND POLICY EVALUATION (2004). In *Promoting Marriage Experimentation: A Class Act?*, 24 WASH. U. J.L. & POL'Y 31 (2007), I examine empirical data regarding class-based experimentation with marriage. President Bush pledged $1.5 billion federal dollars in 2004 to promote marriage, mostly targeted at poor people. *Id.* at 35. This promotion ignored the available data that had shown, first, that marriage needs no public relations campaign because poor women already place marriage on a pedestal but have difficulty affording it, and second, that the overall body of data did not support a conclusion of a causal link between marriage and the reduction of poverty. *Id.* at 37-42. As of 2005, eighty million dollars in government funds were allocated for further study of marriage promotion for impoverished individuals, including major longitudinal research experiments. *Id.* at 39. As this expensive experimentation with promoting marriage continues, the federal government simultaneously continues to enforce what amounts to a marriage-penalty—a more stringent ninety percent work-rate for two-parent families receiving Temporary Assistance to Needy Families (compared to fifty percent for other families). *Id.* at 32, 36. So the promotional campaigns seem largely rhetorical, highly unlikely to be effective in reducing poverty, and contradicted by other policies that effectively have restored the historic discouragement of welfare receipt by two-parent families. I conclude that "[f]ailure to evaluate the marriage promotion experiments based on whether they decrease poverty effectively reduces welfare recipients to mere social science guinea pigs, a phenomenon that is constitutionally allowed precisely because of their class." *Id.* at 45.

economic exploitation, at worst.[23]

Like the contradictions between the rhetoric of equality in the Declaration of Independence and the reality of oppression embedded in the original Constitution, as well as between the Fourteenth Amendment's promise of equal protection under the law and the Supreme Court's historic refusal to enforce it, this separate and unequal rule of law for poor people stands in stark defiance of the Constitution's commitment to equal protection under the law.

Part I of this Article broadly surveys the deconstitutionalization of Poverty Law, identifying four types of departures from normal constitutional doctrine for claims affecting poor people. The first departure is the categorical immunization of "social or economic legislation." The second departure is the circumvention of suspect class or classification analysis. The third departure is the application of rationality review in a reflexive manner to uphold governmental regulation. The fourth departure is the reversal of the normal level of judicial scrutiny for infringements of established fundamental rights, ratcheting down from heightened scrutiny to reflexive rationality review. Part II explores how this deconstitutionalization of Poverty Law has contributed to the construction and perpetuation of dual rules of law, one superior set of rules for the economic haves and an inferior set of rules for the economic have-nots. Part III then examines how both dialogic constitutional theory and social movement mobilization scholarship predict the resulting dialogic default: the stagnation caused by the absence of rights claims for poor people in constitutional and political discourse. Finally, Part IV considers the current opportunity for the mutually constitutive activities of claiming legal rights and mobilizing political support.

23. As Joel Handler and Yeheskel Hasenfeld summarize the current situation: "Nearly a third (32%) of American workers earn less than $15,000 per year, with an additional 20 percent earning between $15,000 and $25,000." HANDLER & HASENFELD, *supra* note 15, at 325. As they further note: "One of the great myths about the low-wage labor market is that it is a stepping stone to better and more stable employment. The reality is far more complex, and in fact, the majority of those employed in the low-wage labor market remain there, stuck with low-wage jobs, have few if any benefits, and experience considerable job instability and insecurity." *Id.* at 239. *See* JENNIFER GORDON, SUBURBAN SWEATSHOPS: THE FIGHT FOR IMMIGRANT RIGHTS 35 (2005); KATHERINE S. NEWMAN, CHUTES AND LADDERS: NAVIGATING THE LOW-WAGE LABOR MARKET 41-42 (2006); WILLIAM P. QUIGLEY, ENDING POVERTY AS WE KNOW IT: GUARANTEEING A RIGHT TO A JOB AT A LIVING WAGE 85-89 (2003).

I. DECONSTITUTIONALIZATION OF POVERTY LAW

This section examines how the Supreme Court has deconstitutionalized Poverty Law. In short, the Court treats constitutional challenges to governmental actions affecting poor people as substantively non-justiciable. In other words, it treats existing constitutional protections, when applied to poor people, as effectively "exempt from judicial enforcement."[24] The Supreme Court has accomplished this deconstitutionalization of Poverty Law through four departures from established constitutional doctrine. These four departures include: (1) categorical immunization of "social or economic legislation"; (2) circumvention of normal suspect class or classification analysis; (3) application of rationality review in a reflexive manner to uphold governmental action; and (4) reversal of normal heightened scrutiny for infringements of established fundamental rights when those affected are poor. These four departures will be examined in turn.

A few preliminary points help to frame this section on deconstitutionalization. First, deconstitutionalization of Poverty Law is not necessitated by the absence of social welfare rights, as the Supreme Court long ago repudiated reliance on a specious distinction between rights and privileges.[25] Second, the Supreme Court has conceded that the reason for not applying heightened scrutiny is the fact that the disproportionate burdens carried by poor people are deeply embedded throughout our legal system.[26] This presents a tautology, of course, as the fact that violations of constitutional protections are widespread hardly can suffice as an answer to why the judiciary fails to redress them. Third, while some might argue

24. Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1898 (2004).

25. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 627 n.6, 638 (1969) (invalidating one-year residency requirement for welfare benefits and explaining that the "constitutional challenge cannot be answered by the argument that public assistance benefits are a 'privilege' and not a 'right'"); Sherbert v. Verner, 374 U.S. 398, 404 (1963) (invalidating denial of unemployment benefits to claimant who refused to work on Saturday due to her religious beliefs based in part on reasoning that: "Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's 'right' but merely a 'privilege.' It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege.").

26. *See* Washington v. Davis, 426 U.S. 229, 248 (1976) (rejecting heightened scrutiny for cases challenging disparate racial impact because such scrutiny "would raise serious questions about . . . a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to the poor and to the average black than to the more affluent white").

that many laws burdening poor people apply equally to the rest of us, the Supreme Court has rejected the logic that equal application suffices to immunize the government from judicial scrutiny.[27] Finally, unless the Supreme Court means to imply that poor people are not included in constitutional protections of equality and liberty or that somehow it is not possible for the government to discriminate against poor people or infringe on their fundamental rights, constitutional questions that arise in the realm of Poverty Law should be as substantively justiciable as those affecting other groups defined by other traits.

A. Categorical Immunization of "Social or Economic Legislation"

The first method of deconstitutionalization is the Court's categorical immunization of social or economic legislation. The primary instrument of this deconstitutionalization is *Dandridge v. Williams*,[28] in which the Supreme Court broadly declared that only the most deferential form of rationality review would be applied to review governmental actions regarding the category of economics and social welfare.

Dandridge represents a significant departure from the Supreme Court's normal doctrinal analysis designed to assess the constitutionality of any governmental reliance on a classification that treats similarly situated people differently. Regardless of the type of regulation at issue, the Supreme Court normally reviews challenges to governmental discrimination by considering whether either the disadvantage of the affected class or the irrelevance of the trait makes the class or classification "suspect."[29] *Dandridge* mandated instead that allegations of discrimination regarding one particular type of regulatory field—economics and social welfare—would be treated differently than allegations of discrimination regarding

27. *See, e.g.*, McLaughlin v. Florida, 379 U.S. 184, 191 (1964) ("Judicial inquiry under the Equal Protection Clause, therefore, does not end with a showing of equal application among the members of the class defined by the legislation. The courts must reach and determine the question whether the classifications drawn in a statute are reasonable in light of its purpose—in this case, whether there is an arbitrary or invidious discrimination between those classes covered by Florida's cohabitation law and those excluded.").

28. 397 U.S. 471, 487 (1970).

29. The Supreme Court famously described legal restrictions burdening a racial group, for example, as "immediately suspect" and subject to "the most rigid scrutiny" in Korematsu v. United States, 323 U.S. 214, 216 (1944).

other types of regulatory fields.[30] By limiting judicial review of this category to its most deferential rationality review,[31] the Court uniquely and categorically immunized the government's social or economic regulation from heightened scrutiny and its greater likelihood of judicial invalidation.

One need only examine the Court's application of its most deferential rationality review in *Dandridge* to understand how effectively it immunizes the government. *Dandridge* involved Maryland's rule of a maximum grant to families receiving welfare, thus disadvantaging larger families compared to smaller ones.[32] The Court found two legitimate state interests to be sufficient to justify the maximum grant. The first interest, encouraging employment, was accepted even though the Court conceded that Maryland's rule affected some large welfare families that did not include any employable person, as the plaintiffs did not, and that Maryland's rule failed to subject small welfare families to this employment incentive.[33] In other words, the Court accepted the sufficiency of a state regulation that was both over-inclusive and under-inclusive. Also, the Court approved a second state interest, avoiding discrimination between welfare families and working poor families.[34] It accepted this interest without citing evidence in the legislative record that would demonstrate Maryland's maximum grant was adopted in fact because of this concern, and without citing any analysis of the data that would show the amount of the maximum grant had any actual relationship to the amount received

30. In the words of Justice Marshall, the decision signaled the Court's "emasculation of the Equal Protection Clause" and its "sweeping refusal to accord the Equal Protection Clause any role in this entire area of the law," due to which he filed a dissent that Justice Brennan joined. Interestingly, Justice Harlan, in concurrence, also indicated that he declined to join the categorical part of the majority's reasoning. Justice Harlan expressed his reservation about "certain implications that might be drawn from the opinion" and specified that his basis for joining the majority was "not because this case involves only interests in 'the areas of economics and social welfare . . . .'" *Id.* at 489-90 (Harlan, J., concurring).

31. The Supreme Court left no question in *Dandridge* that the level of scrutiny would be its most deferential to the government. In a few short paragraphs, the Court specified that the government's social or economic classifications could be "imperfect," need not be made "with mathematical nicety," and may be "illogical" and "unscientific." The Court further specified that such regulation would be upheld so long as "any state of facts reasonably may be conceived to justify it." *Dandridge*, 397 U.S. at 485.

32. *See id.* at 474-75.

33. *See id.* at 486-87.

34. *See id.* at 486.

by workers earning the minimum wage.[35] Instead, as Justice Marshall noted in dissent, "the State virtually conceded that it set out to limit the total cost of the program along the path of least resistance."[36] Finally, the Court also invoked both federalism and separation of powers concerns, noting repeatedly that the federal courts have no power to impose their views of wise economic or social policy on the states.[37]

Perhaps *Dandridge* merely reflects the Supreme Court's commitment, established in the wake of *Lochner*'s[38] demise, to allow the government to wield broad regulatory power over so-called social or economic legislation. Does this arc of history serve to rescue *Dandridge* by making it seem less of an aberration? A closer examination here suggests not. Consider two early decisions from the 1940s. The Supreme Court first used the phrase "social or economic legislation" in 1942 in upholding a state's taxation of estate wealth upon death. Justice Douglas reasoned for the majority: "It would violate the first principles of constitutional adjudication to strike down state legislation on the basis of our individual views or preferences as to policy, whether the state laws deal with taxes or other subjects of social or economic legislation."[39]

What might Justice Douglas have meant to include in this category of "social or economic legislation"? Justice Douglas's stalwart concurrence in a landmark Poverty Law case just the prior year sheds considerable light on his meaning. Justice Douglas joined

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35. The majority dropped a footnote specifying the federal and state minimum wages without analysis of their relationship to the amount of the maximum grant. *Id.* at 486 n.19.

36. *Id.* at 529.

37. *See id.* at 486 (describing the rational basis test as "a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy"); *id.* at 487 ("[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court. . . ."); *id.* ("[T]he Constitution does not empower this Court to second-guess state officials charged with the difficult responsibility of allocating limited public welfare funds among the myriad of potential recipients.").

38. Lochner v. New York, 198 U.S. 45, 64 (1905) (invalidating regulations pertaining to labor conditions for bakers).

39. State Tax Comm'n of Utah v. Aldrich, 316 U.S. 174, 181 (1942). This New Deal-era skirmish over estate taxes reflects the malleability of separation of powers arguments, with Justice Frankfurter arguing in concurrence that: "whether a tax is wise or expedient is the business of the political branches of government, not ours." *Id.* at 184 (Frankfurter, J., concurring). Justice Jackson responded in dissent that "this Court owes all that it has of wisdom and power" to resolve the "jurisdictional snarl" regarding estate taxes because the answer is not found in the Constitution's text. *Id.* at 185, 201 (Jackson, J., dissenting).

the Court's invalidation of California's criminal prohibition against bringing an indigent person into the state.[40] He wrote separately to underscore his view that having different levels of constitutional protection depending on economic means would constitute a "caste system," which would clearly violate the Constitution.[41] It seems specifically unlikely, then, that Justice Douglas would have intended to allow unequal constitutional protection for poor people when he coined the "social or economic legislation" phrase in upholding a so-called "death tax" the following year.[42]

Between the New Deal and the early end of the War on Poverty, punctuated decisively by *Dandridge* in 1970, the Supreme Court invalidated several governmental regulations burdening poor people by taking into consideration the actualities of poverty[43] and holding that government cannot condition important benefits on

40. In its unanimous decision in *Edwards v. California*, the Supreme Court poignantly acknowledged how economic reality affected its constitutional interpretation, noting that the decade of the Great Depression was "marked by a growing recognition that in an industrial society the task of providing assistance to the needy has ceased to be local in character" and that "in not inconsiderable measure the relief of the needy has become the common responsibility and concern of the whole nation." The Court concluded, "we do not think that it will now be seriously contended that because a person is without employment and without funds he constitutes a 'moral pestilence.' Poverty and immorality are not synonymous." Edwards v. California, 314 U.S. 160, 174-75, 177 (1941) (invalidating California's criminal prohibition against bringing an indigent person into the state).

41. *Id.* at 181 (Douglas, J., concurring). As Justice Jackson put it in his separate concurrence, "[w]e should say now, and in no uncertain terms, that a man's mere property status, without more, cannot be used by a state to test, qualify, or limit his rights as a citizen of the United States." *Id.* (Jackson, J., concurring).

42. A little more than a month after Justice Douglas first used the phrase "social or economic legislation" in *Aldrich*, he used the phrase "strict scrutiny" for the first time in his majority opinion for a unanimous Court in *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942). The *Skinner* Court invalidated Oklahoma's version of a three-strikes law authorizing sterilization of those habitually convicted of crimes involving "moral turpitude." Justice Douglas focused his analysis on the governmental discrimination between the person who steals chickens and the clerk who embezzles: "Sterilization of those who have thrice committed grand larceny with immunity for those who are embezzlers is a clear, pointed, unmistakable discrimination." *Id.* The *Skinner* opinion again confirms Justice Douglas's pattern of applying strict scrutiny, rather than rationality review, to governmental discrimination based on poverty.

43. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 23-24 (1956) (Justice Frankfurter arguing that the "law addresses itself to actualities. It does not face actuality to suggest that Illinois affords every convicted person, financially competent or not, the opportunity to take an appeal, and that it is not Illinois that is responsible for disparity in material circumstances. Of course a State need not equalize economic conditions. . . . If it has a general policy of allowing criminal appeals, it cannot make lack of means an effective bar to the exercise of this opportunity.").

one's ability to pay.[44] Comparing two case examples from this period sheds additional light on the categorical "social or economic" exception to normal judicial scrutiny.

One sleeper case decided in 1955, *Williamson v. Lee Optical*,[45] stands now as the prototype for the run-of-the-mill business regulation for which the Court insists on deference to legislative judgments. Justice Douglas, writing for a unanimous Court, applied rationality review quite deferentially to uphold Oklahoma's law prohibiting opticians from providing eyeglass lenses without a prescription from an opthalmologist or optometrist. He specified "the law need not be in every respect logically consistent with its aims to be constitutional."[46] Harkening back to the *Lochner* era, he chastised that the "day is gone" when the Court should strike down business regulations as unwise.[47]

It is telling that the very next year in *Griffin v. Illinois*, the Court did not invoke this clearly established form of deferential rationality review in considering the constitutionality of the cost barrier facing indigent defendants attempting to file criminal appeals.[48] The Court conceded that the Constitution did not require states to provide either appellate courts or criminal appellate review, so it declined to base its decision on a fundamental rights analysis.[49] A majority agreed, nonetheless, that once a state provides appellate review, denying such review on account of poverty would constitute invidious discrimination.[50] As Justice Black wrote in announcing the Court's judgment: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[51] Thus, the deferential rationality review that Justice Douglas and the Court applied just the year before, to uphold regulations of opticians, was simply nowhere to be found in the Court's rebuke of discrimination based on poverty in *Griffin*.

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44. *See, e.g.*, Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); *Griffin*, 351 U.S. at 12.

45. 348 U.S. 483, 488 (1955) ("'For protection against abuses by legislatures the people must resort to the polls, not to the courts.'") (citations omitted).

46. *Id.* at 487-88.

47. *Id.* at 488.

48. *Griffin*, 351 U.S. at 23-24.

49. The *Griffin* Court's view that the appropriate constitutional analysis was about equal access, and not about any fundamental liberty or right of access per se, was reaffirmed forty years later at the end of a lengthy re-examination by Justice Scalia in his majority opinion in Lewis v. Casey, 518 U.S. 343, 368-78 (1996).

50. *Griffin*, 351 U.S. at 18.

51. *Id.* at 19. *See also id.* at 23-24 (Frankfurter, J., concurring) (calling such a "money hurdle" implemented by the government a "squalid discrimination").

Taken together, it becomes clear that Justice Douglas marked the category of "social or economic legislation" to defer to governmental regulation of those interests very well represented in the political process, such as those holding estate wealth and those practicing licensed professions, but he specifically refused to apply it elsewhere in a manner harmful to those most economically vulnerable. In nearly thirty years following Justice Douglas's first use of the "social or economic legislation" category, he never used it to uphold governmental discrimination based on poverty. Indeed, he sometimes used rationality review deferentially to uphold governmental regulation of wealth in such a manner that instead advanced the cause of economic justice.[52] In short, there seems to be no question that Justice Douglas, who originally invoked deferential rationality for "social or economic" legislation, did not include discrimination based on poverty within that category.[53] Therefore, linking the category of social or economic legislation with deference to governmental action designed primarily to reduce the costs of protecting those most economically vulnerable seems downright subversive, if not deeply ironic.

In several "outlier" decisions since *Dandridge*, the Supreme Court occasionally has invalidated governmental regulation in social or economic arenas even when no established suspect class or fundamental right was involved.[54] As I have suggested elsewhere,

52. *See* State Tax Comm'n of Utah v. Aldrich, 316 U.S. 174, 181 (1942).

53. For other confirming examples showing that Justice Douglas used the Equal Protection Clause to invalidate discrimination based on poverty, see, for example, Levy v. Louisiana, 391 U.S. 68, 71-72 (1968) (arguing that latitude for social and economic legislation is not appropriate when reviewing an invidious classification, and applying what resembles rationality review with bite to invalidate a classification of non-marital children, even though the classification had "history and tradition on its side"); Harper v. Virginia State Bd. of Elections, 383 U.S. 663, 668 (1966) (closely scrutinizing and invalidating a state poll tax even though the Constitution does not expressly protect the right to vote in state elections because "[w]ealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process").

54. *See, e.g.*, M.L.B. v. S.L.J., 519 U.S. 102, 128 (1996) (invalidating Mississippi's dismissal of indigent mother's appeal of the termination of her parental rights due to her failure to pay appellate fees); Plyler v. Doe, 457 U.S. 202, 216-18 (1982) (invalidating Texas's denial of free public education to undocumented immigrant children). Justice O'Connor subsequently described *Plyler* as not fitting the "pattern" of allowing heightened scrutiny only when the government has infringed a fundamental right or discriminated against a suspect class. *See* Kadrmas v. Dickinson Public Sch., 487 U.S. 450, 457-59 (1988). For a closer examination of how *M.L.B.*, *Plyler*, and other outlier decisions by the Supreme Court can be understood as reflecting the mutually constitutive relations between rights and classes, see Julie A. Nice, *The Emerging Third Strand in Equal Protection Jurisprudence: Recognizing the Co-Con-*

one possible explanation is that the Court understands the mutually constitutive nature of equality and liberty, and therefore is suspicious of governmental actions that in effect make it more difficult for members of disadvantaged groups to engage in activities that are especially important to helping them protect and advance their interests.[55]

Regardless of some outlier exceptions, the gravity of *Dandridge* was simply enormous. It extinguished the hope that poor people would receive meaningful constitutional protection. Its force continues to this day. As a doctrinal matter, *Dandridge* set the precedent that immunizes the government's economic and welfare policies from heightened scrutiny or any real threat of invalidation. As a dialogic matter, it stifles the prospect of meaningful dialogue about any proper scope of the so-called welfare state.[56] As a practical matter, it leaves those most economically vulnerable outside the Constitution's protection.[57]

B. Circumvention of Normal Suspect Class or Classification Analysis

For other disadvantaged groups claiming a violation of the Equal Protection Clause, the Supreme Court generally has considered whether the group meets the criteria for a "suspect class," meaning that the group has suffered historical discrimination, is unable to protect itself in the political process, and is defined by a trait that is immutable or very difficult to change.[58] The Court also has considered whether the trait defining the group is relevant to an individual's ability to perform or contribute to society, and, if not, treats

stitutive Nature of Rights and Classes, 99 U. ILL. L. REV. 1209, 1226 (1999) [hereinafter Nice, *Emerging Third Strand*].

55. Nice, *Emerging Third Strand*, *supra* note 54, at 1218.

56. In the famous words of Justice Stewart, "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court." Dandridge v. Williams, 397 U.S. 471, 487 (1970).

57. *Dandridge* leaves matters of the welfare state virtually unchecked by the judiciary, even though those affected are the most economically vulnerable and are without power to either bargain with the government or withstand government pressure.

58. *See, e.g.*, City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 439-47 (1985) (analyzing factors to determine whether developmentally disabled persons are a suspect class); Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 313-14 (1976) (analyzing factors to determine whether older persons are a suspect class); Frontiero v. Richardson, 411 U.S. 677, 684-87 (1973) (analyzing factors to determine whether women are a suspect class).

any stereotypical reliance on such trait as a "suspect classification."[59]

Because of the categorical immunization of "social or economic legislation," the Supreme Court arguably has never needed to reach and decide the question of whether a classification distinguishing on its face between poor people and non-poor people was sufficiently "suspect" to trigger heightened judicial scrutiny. Moreover, the major Poverty Law cases the Court has considered have not directly presented discrimination between poor and non-poor people, but instead mostly have involved discrimination among subgroups of poor people. With regard to various classifications not facially discriminating on poverty but nonetheless alleged to have a disproportionate impact on poor claimants, the Supreme Court has repeatedly asserted that it has never held that poverty is a suspect classification. Various feedback loops have repeated this dictum—that poverty has never been held to be a suspect classification—to such an extent that they have made it seem as if the direct question had been reached and decided. Legal scholars as well as courts have acquiesced in treating this dictum as a holding.[60]

Tracking the original source of the Supreme Court's supposed holding that poverty is not a suspect classification leads back to frequently-quoted dicta from a canon of cases. Not long after the Court directly suggested it would generally apply heightened scrutiny to wealth or poverty classifications,[61] the Court quickly backpedaled. In three subsequent cases the Court examined government classifications that discriminated among types of poor families but did not present comparisons between poor and non-poor families. As we have seen, the Supreme Court in *Dandridge v. Williams*[62] famously upheld Maryland's maximum welfare grant that disproportionately burdened larger poor families as compared to smaller poor families. The Court declared that "social and economic legislation" would be subjected only to the most deferential

59. *See, e.g.*, *Frontiero*, 411 U.S. at 686; United States v. Virginia, 518 U.S. 515 (1996).

60. *See, e.g.*, Chemerinsky, *Deconstitutionalization*, *supra* note 3, at 121.

61. Harper v. Va. State Bd. of Elections, 383 U.S. 663, 668 (1966) ("Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored. To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor.").

62. 397 U.S. at 485 (applying rationality review to legislation relating to "economics and social welfare").

form of rationality review. Similarly, a pair of abortion funding decisions compared poor women who sought funding for abortion with other poor women who received funding for childbirth. In *Maher v. Roe*,[63] the Court accurately stated that it had "never held that financial need alone identifies a suspect class for equal protection analysis."[64] Three years later in *Harris v. McRae*,[65] the Supreme Court asserted, more problematically, that it had "held repeatedly that poverty, standing alone, is not a suspect classification."[66] In support of this statement, the Court cited only to *James v. Valtierra*.[67] But *James* also did not involve a classification distinguishing between poor and non-poor persons.

In *James*, the Supreme Court upheld a voter initiative that amended California's constitution to require local majority voter approval prior to construction of low-rent housing. The Court's majority ignored Justice Marshall's dissenting argument that California's law singled out poor people as a class, and instead defined the relevant class as "persons advocating low-income housing"[68] and upheld the law. This broader framing of the affected class did not blunt Justice Marshall's ultimate complaint that the majority had applied "no scrutiny whatsoever"[69] in upholding the law.

Similarly, another case sometimes cited for the proposition that poverty is not a suspect classification is *San Antonio Independent School District v. Rodriguez*.[70] But *Rodriguez* also did not involve a comparison between poor and non-poor persons. In *Rodriguez*, the Court considered the constitutionality of public school funding in Texas that arguably advantaged students in school districts with more taxable wealth and disadvantaged students in school districts with less taxable wealth. The Supreme Court refused to assume that the poorest students were concentrated in the poorest school

63. 432 U.S. 464, 471 (1977).

64. *Id.* at 471 ("In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis." (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 29 (1973) and Dandridge v. Williams, 397 U.S. 471 (1970))).

65. 448 U.S. 297 (1980), *reh'g denied*, 448 U.S. 917 (1980).

66. *Id.* at 323 (citing James v. Valtierra, 402 U.S. 137 (1971)).

67. 402 U.S. at 141.

68. *Id.* at 142.

69. *Id.* at 145 (Marshall, J., dissenting).

70. *See, e.g.*, Lewis v. Casey, 518 U.S. 343, 373-74 (1996) (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19 (1973)).

districts[71] and emphasized "the absence of any evidence that the financing system discriminates against any definable category of 'poor' people."[72] As a result, the Court defined the class at issue as "unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[73] Nonetheless, the Court speculated, in a dictum, that lawyers for plaintiffs probably had not relied on a wealth discrimination theory "in recognition of the fact that this Court has never heretofore held that wealth discrimination alone provides an adequate basis for invoking strict scrutiny."[74]

The critical distinction is between the accurate statement—that the Court has not held poor people to be a suspect class or poverty to be a suspect classification—and the inaccurate assertion that the Court has reached and decided that poverty is not a suspect classification or that poor people are not a suspect class. Instead, the Court effectively has avoided reaching the question at least in part because the facts of these cases did not require it to do so. These cases involved discrimination based on family size (between larger and smaller families in *Dandridge*), reproductive choice (between funding childbirth and abortion in *Maher* and *Harris*), advocacy of low-income housing (between those for and against it in *James*), and taxable school district wealth (*Rodriguez*), none of which directly raised the question of the constitutionality of discriminating based on poverty or between poor and non-poor persons.[75] Al-

71. *San Antonio Indep. Sch. Dist.*, 411 U.S. at 23 ("[T]here is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecunity—are concentrated in the poorest districts.").

72. *Id.* at 25.

73. *Id.* at 28.

74. *Id.* at 29.

75. Another case cited for the proposition that only rationality review applies is Ortwein v. Schwab, 410 U.S. 656, 660-61 (1973) (per curiam), which rejected a challenge to the state's filing fee required for appellate review of a reduction of welfare benefits. *See* Kadrmas v. Dickinson Public Schools, 487 U.S. 450, 461 (1988) (noting that *Ortwein* applied only rationality review). *Ortwein* was decided by a per curiam summary affirmance, issued without the benefit of full briefing and oral argument. *See Ortwein*, 410 U.S. at 666 (Marshall, J., dissenting) ("Because I am not ready to decide that question summarily, sub silentio, and without the benefit of full briefing and oral argument, I must dissent from the Court's decision."). The per curiam opinion in *Ortwein* invoked *Dandridge* and its categorical exclusion described above, to wit: "this litigation, which deals with welfare payments, 'is in the area of economics and social welfare.'" *Id.* at 660. The per curiam opinion did not address whether poor people are a suspect class or whether poverty is a suspect classification, but merely asserted: "[n]o suspect classification, such as race, nationality, or alienage is present. The applicable standard is that of rational justification." *Id.* As the Supreme Court subsequently explained, *Ortwein* involved discrimination between welfare

though *Rodriguez* came the closest because it directly compares the poverty of one school district with the wealth of another, the Court there painstakingly explained why it refused to treat the case as presenting a wealth-based classification.[76]

This level of doctrinal nitpicking matters because the Supreme Court simply has never grappled with whether poor people meet the indicia of a suspect class, nor with whether poverty is irrelevant to ability or merit such that it should be treated as a suspect classification. During the New Deal era reversal, repudiating the judiciary's prior heightened scrutiny of economic regulation, the Supreme Court famously noted that "prejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly greater searching judicial inquiry."[77] The Court has not given actual consideration to whether poor people meet the suspect class criteria or whether they need judicial protection because they have suffered historical discrimination, are unable to protect themselves in the political process, and find it difficult or sometimes impossible to reduce their poverty—especially given recent data demonstrating the difficulty of an impoverished child escaping poverty as an adult.[78] Nor has the Court determined whether poverty is such an inadequate proxy for ability as to be

claimants appealing adverse agency hearings for which Oregon did not allow waiver of fees, and poor people bringing other types of civil appeals such as terminations of parental rights for which Oregon did allow *in forma pauperis* waiver of fees. *See* M.L.B. v. S.L.J., 519 U.S. 102, 115-16 (1996). Thus, like other cases described in the text, Ortwein involved discrimination among poor people, not between poor and non-poor people. The weakness of *Ortwein* as a precedent was reflected most recently when a majority of the Supreme Court did not address *Ortwein* in invalidating the federal condition prohibiting lawyers employed by Legal Services Corporation grantees from challenging welfare laws. *See* Legal Servs. Corp. v. Velazquez, 531 U.S. 533, 548 (2001) (concluding "[t]he attempted restriction is designed to insulate the Government's interpretation of the Constitution from judicial challenge. The Constitution does not permit the Government to confine litigants and their attorneys in this manner"). Moreover, Justice Scalia mentioned *Ortwein* only briefly in his dissent. *Id.* at 554 (Scalia, J., dissenting).

76. *Rodriguez*, 411 U.S. at 22-27.

77. United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938). The Court subsequently invoked the famous reasoning of footnote four of *Carolene Products,* for example, when it considered whether it should depart from *Dandridge* rationality and grant heightened scrutiny to persons age fifty and over by considering whether older people comprise a "discrete and insular" group that needed "extraordinary protection from majoritarian political process." *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312-13 (1976) (citing *Carolene Prods.*, 304 U.S. at 152-53 n.4).

78. *See* Eckholm, *supra* note 15; KARELIS, *supra* note 21.

irrelevant, or whether reliance on stereotyping about poor people reflects bare prejudice, and thus makes suspect any classification according to poverty.[79]

C. Application of Rationality Review in a Reflexive Manner

Until the Supreme Court extends heightened scrutiny to poor people, might rationality review that is extremely deferential to the government nonetheless afford sufficient constitutional protection for poor people? This depends on how the Court applies it. For some "discrete and insular minorities,"[80] such as hippies,[81] disabled people,[82] and gay people,[83] the Supreme Court has applied its rationality review with bite,[84] and has invalidated governmental actions burdening these groups. Such meaningful review has not been afforded to poor people. Instead, and again presumably because of its categorical exception for "social or economic legislation," the Supreme Court has emphasized that regulations affecting poor people should receive only minimal rationality review, meaning extreme deference to the government, which will rarely result in invalidation.[85] As a result, poor people are left with no judicial scrutiny to smoke out and protect them from invidious discrimination. In other words, when applying rationality review to poor people, the Supreme Court has applied it reflexively, that is mechanically, and routinely has upheld governmental actions that burden those living in poverty.

As a result of *Dandridge*, courts typically apply the most highly deferential form of rationality review when Equal Protection chal-

79. Frontiero v. Richardson, 411 U.S. 677, 686 (1973). If courts ever directly analyze the criteria for suspect class or classification. they might be hard-pressed to deny that "our Nation has a long and unfortunate history" of discrimination against poor people, who still face "pervasive, although at times more subtle, discrimination," and that imposing disadvantage based on "the accident of birth" into a poverty-stricken family would be illogical and unjust. *Id.* at 684. *See also* Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175 (1972).

80. *Carolene Prods.*, 304 U.S. at 152.

81. U.S. Dep't of Agric. v. Moreno, 413 U.S. 528, 534-35 (1973).

82. City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 435 (1985).

83. Romer v. Evans, 517 U.S. 620, 626-27 (1996).

84. *See, e.g.*, Kimel v. Florida Bd. of Regents, 528 U.S. 62, 84 (2000) (explaining that because classifications subjected to the *Dandridge* rationality review test are "presumptively rational," then "the individual challenging its constitutionality bears the burden of proving that the 'facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker'").

85. *See* CHEMERINSKY, CONSTITUTIONAL LAW, *supra* note 12, at 678 ("The Supreme Court generally has been extremely deferential to the government when applying the rational basis test. . . . The result is that it is very rare for the Supreme Court to find that a law fails the rational basis test.").

lenges require examination of governmental actions regulating the lives of poor people. The effect of what Justice Marshall once characterized as "no scrutiny whatsoever"[86] is to immunize welfare regulation not only from judicial invalidation but also from meaningful judicial scrutiny. If a regulation affecting poor people is challenged in the courts, the burden on attorneys representing the political branches is merely to imagine some legitimate government purpose that the regulation conceivably might serve.[87]

To put it another way, other groups receiving only rationality review have enjoyed some judicial protection when the Court has applied its test with bite. Poor people have not enjoyed the benefits of the Court's bite, but instead routinely lose their challenges because review of their claims has been limited to the reflexive version of rationality review, in other words, "no scrutiny whatsoever." This general lack of meaningful constitutional protection leaves those most economically vulnerable subject to the whims of the political branches of government, which enjoy great deference to exercise the same broad regulatory power over poor people as over run-of-the-mill business enterprises.[88]

D. Reversal of Normal Heightened Scrutiny for Fundamental Rights

The argument thus far has related to the Supreme Court's deconstitutionalization of Poverty Law within the context of the Equal Protection doctrine. The specific argument has been that the Supreme Court fails or refuses to enforce existing constitutional protections when applied to poor people due to three types of departures from its doctrinal norm. These three departures have included categorical immunization of social or economic legislation, circumvention of normal suspect class analysis, and application of rationality review in a reflexive manner. Might poor people nonetheless receive protection of established rights guaranteed by other constitutional provisions? The Supreme Court normally applies some version of heightened judicial scrutiny to enforce established constitutional rights, regardless of the nature of the class

86. *See* James v. Valtierra, 402 U.S. 137, 145 (1971) (Marshall, J., dissenting) (disagreeing with the Supreme Court majority's refusal to invalidate a state constitutional provision that required low-rent housing to be approved by a majority of local voters and arguing that the Supreme Court majority chose "to subject the article to no scrutiny whatsoever" and treat it "as if it contained a totally benign, technical economic classification").

87. Heller v. Doe, 509 U.S. 312, 320 (1993).

88. *See* Loffredo, *supra* note 10, at 1278.

asserting an infringement. But, again, the Court has departed from its normal use of heightened scrutiny for alleged infringements of established constitutional rights when those affected are poor. With regard to fundamental rights, this fourth type of departure occurs when the Court reverses its normal heightened scrutiny and substitutes the reflexive version of rationality review, or when it invokes heightened scrutiny but actually applies rationality review in a reflexive manner to uphold the government's action.

An alternative way to frame this type of departure is that the Court has allowed the government to require a waiver of constitutional rights in exchange for welfare benefits. Much scholarly ink has been spilled about the doctrine of unconstitutional conditions and its application in the social welfare arena.[89] While not all of it can be surveyed here, it might be helpful to highlight several salient examples. The doctrine of unconstitutional conditions states that the government may not do indirectly (e.g., via conditions) what it may not do directly (e.g., via prohibitions). Professor Kathleen M. Sullivan has argued that the government should refrain from exercising coercive influence over a benefit recipient when the government enjoys monopoly power over the benefit and also when the government has contributed to the recipient's dependency on the benefit. She has analyzed how welfare benefits are a paradigmatic example of both of these circumstances.[90]

Other scholars have examined how the Court has circumvented other existing constitutional protections by attaching conditions to government benefits. With regard to reproductive and family autonomy, for example, Professor Susan Frelich Appleton's work has led a parade of scholars who have critiqued the Court's double standard that affords heightened scrutiny for Substantive Due Process challenges to protect the choices of women who are not poor but effectively reverses its scrutiny to the reflexive version of rationality review to decline to protect the choices of women who are poor.[91] In my prior work, I have documented the double standard

89. In my view, Professor Kathleen Sullivan's trenchant analysis set the template in the area of social welfare. *See* Kathleen M. Sullivan, *Unconstitutional Conditions*, 102 HARV. L. REV. 1415, 1472-73 (1989).

90. *Id.* at 1452-54.

91. *See* Susan Frelich Appleton, *Beyond the Limits of Reproductive Choice: The Contributions of the Abortion-Funding Cases to the Fundamental-Rights Analysis and to the Welfare-Rights Thesis*, 81 COLUM. L. REV. 721, 746-57 (1981); Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invading Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1, 17-22, 25 (1996).

of the Court's application of heightened scrutiny to Establishment Clause and Takings challenges affecting non-poor people as compared to the reflexive version of rationality review for welfare recipients.[92] Other scholars and I have critiqued the lack of enforcement of the Thirteenth Amendment's prohibition of involuntary servitude with regard to those who work at the very bottom of the labor force.[93] Thus with regard to both work and family, an enormous body of scholarly literature identifies and critiques such double standards, usually related to a specific doctrinal area of constitutional law.

For a recent example demonstrating just how little has changed for welfare recipients and illustrating how the double standard creates dual rules of constitutional law, one need look no further than the Ninth Circuit's recent decision upholding San Diego County's draconian program that permits snooping in welfare applicants' homes for evidence of fraud or other criminal activity as a condition of eligibility.[94] San Diego County requires an unannounced home "walk-through" to gather information confirming the amount of assets claimed, the presence of an eligible dependent child, an actual residence in California, and the actual absence of

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92. *See* Julie A. Nice, *Making Conditions Constitutional by Attaching Them to Welfare: The Dangers of Selective Contextual Ignorance of the Unconstitutional Conditions Doctrine,* 72 DENV. U. L. REV. 971, 986-87 (1995); *see also* S. Elise Kert, Bowen v. Gilliard*: Out of the Mouths of Babes and Into the Government Coffers*, 14 J. CONTEMP. LEGAL ISSUES 399, 401-02, 406 (2003) (poor families suffer material consequences, for example, as a result of the government's "taking" of child support to repay welfare expenditures). *See, e.g.*, Erik Eckholm, *Parents Scrimp as States Take Child Support*, N.Y. TIMES, Dec. 1, 2007, at A1.

> Close to half the states pass along none of collected child support to families on welfare, while most others pay only $50 a month to a custodial parent, even though the father may be paying hundreds of dollars each month. Critics say using child support to repay welfare costs harms children instead of helping them, contradicting the national goal of strengthening families, and is a flaw in the generally lauded national campaign to increase collections.

Id.

93. For an exploration of how workfare or the exploitation of other low-wage workers might violate the Thirteenth Amendment prohibition against involuntary servitude, see, for example, RISA L. GOLUBOFF, THE LOST PROMISE OF CIVIL RIGHTS (2007); Baher Azmy, *Unshackling the Thirteenth Amendment: Modern Slavery and a Reconstructed Civil Rights Agenda*, 71 FORDHAM L. REV. 981 (2002); Risa L. Goluboff, *The Thirteenth Amendment and the Lost Origins of Civil Rights*, 50 DUKE L.J. 1609 (2001); Julie A. Nice, *Welfare Servitude*, 1 GEO. J. ON FIGHTING POVERTY 340 (1994); Maria L. Ontiveros, *Immigrant Workers' Rights in a Post-Hoffman World—Organizing Around the Thirteenth Amendment*, 18 GEO. IMMIGR. L.J. 651 (2005); Lea VanderVelde, *The Thirteenth Amendment of Our Aspirations*, 38 U. TOL. L. REV. 855 (2007).

94. Sanchez v. County of San Diego, 464 F.3d 916, 931 (9th Cir. 2006).

any "absent parent."[95] The Ninth Circuit panel's majority conceded that investigators from the District Attorney's office conduct the walk-through, carry their official peace officer badges but not weapons,[96] and that the investigators are "trained to look for items in plain view," and "make referrals for criminal investigation if, for example, they discover evidence of contraband, child abuse, or a subject with outstanding felony warrants."[97] The panel majority also conceded that the Supreme Court has "repeatedly held that consensual administrative searches qualify as searches under the Fourth Amendment, even though refusal to consent carried no criminal penalty and the searches were not part of a criminal investigation."[98] The panel majority nonetheless held that the Supreme Court's prior decision in *Wyman v. James*, upholding "rehabilitative" home visits for welfare recipients, directly controlled their conclusion that the *Sanchez* walk-through was not a search, even though the *Wyman* home visit was "rehabilitative" rather than investigative, and even though *Wyman* was decided before the Supreme Court's more recent string of Fourth Amendment decisions holding that similar fraud investigations for people who are not poor constituted searches.[99]

The *Sanchez* majority did not hide their specific reliance on the fact that those subjected to the walk-through were welfare recipients.[100] Comparing the welfare walk-through to the Supreme Court's decision upholding warrantless searches for convicted criminals, the majority openly argued, "a person's relationship with the state can reduce that person's expectation of privacy even within the sanctity of the home."[101] Next, the majority asserted that verification of residence for welfare recipients is a reasonable means "to ensure that funds are properly spent."[102] Finally, they relied on the county's requirement that the welfare recipient give "express consent" for the walk-through, and claimed that the dissent's concerns about coercion were dismissed in *Wyman* because "*nothing of constitutional magnitude is involved.*"[103]

95. *Id.* at 918-19.

96. *Id.* at 919.

97. *Id.* at 919 n.3.

98. *Id.* at 922 n.8.

99. *Id.*

100. *Id.* at 926 (requiring San Diego County to identify a "valid 'special need'" because the walk-through was not primarily for general law enforcement purposes).

101. *Id.* at 927.

102. *Id.*

103. *Id.* at 927 n.15.

The dissenting judge on the *Sanchez* panel emphasized that *Wyman* was factually distinguishable, especially because it involved a rehabilitative visit by a social assistance caseworker, and that the panel majority's reasoning contradicted the Supreme Court's post-*Wyman* interpretation of the Fourth Amendment. In an impassioned dissent to the Ninth Circuit's en banc denial of a rehearing, seven Ninth Circuit judges dissented.[104] Judge Pregerson, writing for the seven dissenters, argued that the panel majority's decision "clings to *Wyman v. James*," "ignores over thirty-five years of intervening law," and ignores the differences in the "quality and character" of the *Wyman* and *Sanchez* programs.[105] The en banc dissenters emphasized that there could be no true consent where applicants "are not given notice of when the visit will occur; they are not informed of their right to withhold consent; they are told the visit is mandatory; and they are aware of the severe consequences of refusing the search."[106] Most importantly for purposes here, the en banc dissenters recognized the double Fourth Amendment standard at work:

> We do not require similar intrusions into the homes and lives of others who receive government entitlements. The government does not search through the closets and medicine cabinets of farmers receiving subsidies. They do not dig through the laundry baskets and garbage pails of real estate developers or radio broadcasters. The overwhelming majority of recipients of government benefits are not the poor, and yet this is the group we require to sacrifice their dignity and their right to privacy.[107]

Sanchez is simply one recent example of how the courts reverse scrutiny when those affected are poor by refusing to apply the normal heightened scrutiny otherwise associated with various existing constitutional protections. This example also reveals how deconstitutionalization tends to construct a dual rule of law for the economic haves and have-nots. As the en banc dissenting judges in *Sanchez* described it, subjecting the have-nots to a different Fourth

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104. Sanchez v. County of San Diego, 483 F.3d 965, 966 (9th Cir. 2007).

105. *Id.*

106. *Id.* at 968.

107. *Id.* at 969. For similar analysis of the double standard in *Sanchez*, see *Recent Cases, Constitutional Law—Fourth Amendment—Ninth Circuit Upholds Conditioning Receipt of Welfare Benefits on Consent to Suspicionless Home Visits*—Sanchez v. County of San Diego, 464 F.3d 916 (9th Cir. 2006), 120 HARV. L. REV. 1996, 1998-2003 (2007); Adam Liptak, *Full Constitutional Protection for Some, but No Privacy for the Poor*, N.Y. TIMES, July 16, 2007, at A9; Editorial, *A Loss for Privacy Rights*, N.Y. TIMES, Nov. 28, 2007, at A26.

Amendment than the one that protects the haves is "nothing less than an attack on the poor."[108]

II. Dual Rules of Law

According to Jacobus tenBroek, arguably the most original constitutional Poverty Law scholar of the twentieth century, unequal enforcement of existing constitutional protections for poor people—in other words, deconstitutionalization—has constructed dual rules of law for the economic haves and have-nots. As an example, tenBroek's famous trilogy of articles meticulously demonstrated how dual rules of law have differently regulated the family lives of people who are poor as compared with the rest of us.[109] As tenBroek put it, the two systems of family law are:

> different in origin, different in history, different in substantive provisions, different in administration, different in orientation and outlook. One is public, the other private. One deals with expenditure and conservation of public funds and is heavily political and measurably penal. The other deals with the distribution of family funds, focuses on the rights and responsibilities of family members, and is civil, nonpolitical, and less penal. One is for underprivileged and deprived families; the other for the more comfortable and fortunate.[110]

Professor tenBroek's path breaking research about dual rules of family law sparked a scholarly symposium and an edited volume of essays on Poverty Law in 1966.[111] Described by tenBroek as barely beginning to determine the myriad ways the separate legal rules for poor people might violate the Constitution,[112] this volume surveyed the unique, recurring legal problems facing poor people and also included essays challenging tenBroek's critique and explicitly

108. *Sanchez*, 483 F.3d at 966 (Pregerson, J., dissenting) ("[A]llowing this opinion to stand is an assault on our country's poor as we require them to give up their rights of privacy in exchange for essential public assistance. . . . This case is nothing less than an attack on the poor."), *denying reh'g*, 464 F.3d 916 (9th Cir. 2006) (upholding mandatory investigative home visits of welfare recipients as not violating the Fourth Amendment), *cert. denied*, 128 S.Ct. 649 (2007).

109. *See* tenBroek, *supra* note 4. Professor Joel Handler edited and reprinted tenBroek's articles in a separate volume, published a few years after tenBroek's death in 1968. *See* Family Law and the Poor: Essays by Jacobus tenBroek (Joel Handler ed., 1971).

110. tenBroek, *supra* note 4, at 257-58.

111. *See* The Law of the Poor (Jacobus tenBroek & Cal. L. Rev. eds., 1966). Funding and support for this project was provided by the Center for the Study of Law and Society at the University of California.

112. *See id.* at vii.

defending such "dual systems" of law.[113] Thus, at the moment of Professor tenBroek's untimely death in 1968, the conversation about what he called "substantive equal protection" had gained considerable momentum. Two years later, *Dandridge* put a stop to it.

Has the conversation regarding dual rules of law for the haves and have-nots ended because such separate systems have been abolished? The recent *Sanchez* decision, discussed previously, makes clear this is not the case. For mothers receiving welfare, the government's historic search for a man in the house as a basis for denying welfare has not changed much,[114] except that it is now framed as a fraud investigation for failure to report the presence of an absent parent. Although general concern about the potential of fraud is not a sufficient basis for invading the privacy of most Americans under the Fourth Amendment, it has been accepted as sufficient when the home being invaded belongs to a poor mother receiving welfare to help support her family. This is what dual rules of law look like today, which is barely different from what tenBroek described.

Since *Dandridge*, the Supreme Court has rejected many constitutional claims brought by poor people who, for the most part now, have stopped bringing them. As welfare reform progresses, the government continues to subject the family and work lives of those most economically vulnerable to systematic regulation, with few if any constitutional challenges protecting either their liberty or equality.

It is precisely this largely abandoned project of exposing the pattern of dual rules of law to which I urge scholars to return. As prior sections revealed, poor people routinely receive the very least judicial consideration when governmental actions burden them, which is in actuality no scrutiny whatsoever. Moreover, when governmental actions infringe established constitutional rights designed to protect liberty, poor people do not receive the same benefit of heightened scrutiny otherwise granted to the haves. The bottom line is, except for a few outlier cases,[115] poor people simply do not receive equal judicial consideration or application of the

113. Thomas P. Lewis & Robert J. Levy, *Family Law and Welfare Policies: The Case for "Dual Systems"* and Albert A. Ehrenzweig, *Dual Systems of Family Law: A Comment*, *in* THE LAW OF THE POOR 424, 457 (Jacobus tenBroek & Cal. L. Rev. eds. 1966).

114. *See* King v. Smith, 392 U.S. 309, 309 (1968).

115. For a closer examination of many of these outlier cases, see, for example, Nice, *Emerging Third Strand*, *supra* note 54.

Constitution's protections. As Justice O'Connor reminded us, the very reason the courts defer to the political branches is because they presume those branches will remedy any problems.[116] For poor people, this presumption is sorely misplaced. Indeed, the hope of political protection for poor people may be at least as hollow as the hope of judicial protection.

III. Dialogic Default

The deconstitutionalization of Poverty Law and resulting dual rules of law for the economic haves and have-nots contribute to the overall dialogic default that has occurred on the question of economic justice. American exceptionalism is marked in part by this absence of any serious dialogue about a collective or governmental duty to the economic have-nots. As the earlier sections of this Article reveal, the absence of social welfare rights is not the only way that poor people are burdened here more than in most of the other so-called western industrialized democracies. Hidden beneath the absence of social welfare rights is the broader acquiescence of allowing the have-nots to bear the costs of governmental actions that disparately, and sometimes uniquely, burden them.

How does a dialogic default in constitutional discourse matter? I suggest much insight can be obtained by connecting two strands of scholarship themselves separated in a dialogic divide between those who study constitutional interpretation from within the legal academy and those who study rights, litigation, and social movements from within the interdisciplinary law-and-society tradition.

First, from within the legal academy, much recent constitutional theory has focused on the dialogic role of constitutional law. For constitutional law scholars, the notion of some back-and-forth between the Supreme Court's interpretations of the Constitution and those preferred by the political branches is common. Those in the trenches of a social movement seeking to persuade the judiciary to interpret the Constitution in accordance with the movement's preferences certainly might presume, intend, or at the very least hope, that their work will affect the courts. According to many prominent constitutional theorists, dialogue is exactly what the Constitution produces and reflects.

116. *See* Lawrence v. Texas, 539 U.S. 558, 579-80 (O'Connor, J., concurring) ("Laws such as economic or tax legislation that are scrutinized under rationality review normally pass constitutional muster, since 'the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes.'" (citation omitted)).

The various dialogic theorists each tend to use their own terminology to explain how the courts are in conversation with the other branches of the federal government, the states, and the people about the meaning of the Constitution. Jacobus tenBroek provides an early account of the dialogic theory in his book meticulously documenting how arguments from the abolitionist movement were translated into constitutional terms and subsequently adopted by the leaders of Congress in the Thirteenth and Fourteenth Amendments.[117] One account of evolutionary change in constitutional interpretation compares it to the development of the common law.[118] Other more empirical research documents how the Court tends over time to reflect changes in societal consensus on constitutional questions.[119] Some scholars previously associated with critical legal studies have made a surprisingly realist argument that the Constitution is no less enmeshed in politics than is the rest of law,[120] as well as a normative argument that the people have every right to

117. *See* JACOBUS TENBROEK, THE ANTISLAVERY ORIGINS OF THE FOURTEENTH AMENDMENT 183-91 (1951). In the summer of 1953, Thurgood Marshall, then chief counsel to the National Association for the Advancement of Colored People, wrote to Professor tenBroek to inform him that he and his research team had "taken full advantage" of tenBroek's book in preparation for the re-arguments in Brown v. Board of Education, 347 U.S. 483 (1954). FLOYD MATSON, BLIND JUSTICE: JACOBUS TENBROEK AND THE VISION OF EQUALITY 117 (2005). Professor tenBroek also foreshadowed with uncanny prescience how equal protection theory would emerge from this history and how its doctrine would develop in the future. *See* Joseph Tussman & Jacobus tenBroek, *The Equal Protection of the Laws*, 37 CAL. L. REV. 341, 343, 352, 379-81 (1949). For example, he plucked the Supreme Court's nod to "rigid scrutiny" of "suspect" racial restrictions in Korematsu v. United States, 323 U.S. 214, 216 (1944), and reframed the analysis as "suspect classification." *Id.* at 356. Long before Professor Charles Reich's famous article on The New Property, Professor tenBroek predicted that:

> whatever our past or present preferences, it is certain that a concern with equality will be increasingly thrust upon us. We have tended to identify liberty with the absence of government; we have sought it in the interstices of the law. What happens, then, when government becomes more ubiquitous? Whenever an area of activity is brought within the control or regulation of government to that extent equality supplants liberty as the dominant ideal and constitutional demand.

Id. at 380. He powerfully concluded: "The equal protection clause of the Fourteenth Amendment appears thus to be entering the most fruitful and significant period of its career. Virtually strangled in infancy by post-civil-war judicial reactionism, long frustrated by judicial neglect, the theory of equal protection may yet take its rightful place in the unfinished Constitutional struggle for democracy." *Id.* at 381.

118. *See* David A. Strauss, *The Irrelevance of Constitutional Amendments*, 114 HARV. L. REV. 1457, 1468-69 (2001).

119. *See* Friedman, *supra* note 19.

120. *See* Mark Tushnet, *Popular Constitutionalism as Political Law,* 81 CHI.-KENT L. REV. 991, 995-96 (2006).

assert their views of constitutional meaning.[121] Other critics have articulated a "relational" process of "responsive interpretation"[122] or cultural constitutionalism.[123] Still others have decried the antidemocratic nature of either "judicial unilateralism," when the courts end the dialogue prematurely by deciding disputes still being debated in society,[124] or "partisan entrenchment," when the political parties seek to influence the dialogue's outcome by putting partisan judges on the federal courts.[125] Another prominent interpretation surmises that the Supreme Court engages in moments of higher lawmaking by ratifying shifts in constitutional interpretation that are signaled politically by the people.[126] While these dialogic theories differ in many details, what they have in common is an understanding of constitutional interpretation as dynamic rather than static and influenced by an interactive public discourse.[127]

A separate strand of empirical and historical law-and-society scholarship examining the role of rights, courts, and/or social movements strongly supports this strand of constitutional theorizing. Mirroring their foundational insight that law and society inter-relate in a mutually constitutive manner, much of this research reflects both the tension and synergy between legal rights and social movements. Stuart Scheingold's somewhat paradoxical thesis set the template for the eclectic body of interdisciplinary research that has emerged. Scheingold first critiqued the American "myth of rights" for failing to produce much meaningful social change, but also identified in this persistent belief in rights the possibility of

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121. *See* LARRY D. KRAMER, THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW 246-47 (2004).

122. *See* ROBERT C. POST, CONSTITUTIONAL DOMAINS: DEMOCRACY, COMMUNITY, MANAGEMENT 35-50 (1995).

123. Robert C. Post, *Foreword, Fashioning the Legal Constitution: Culture, Courts, and Law*, 117 HARV. L. REV. 4, 8 (2003) ("I shall argue that constitutional law and culture are locked in a dialectical relationship, so that constitutional law both arises from and in turn regulates culture.").

124. *See* JEFFREY ROSEN, THE MOST DEMOCRATIC BRANCH: HOW THE COURTS SERVE AMERICA 8, 17, 198-99 (2006). For a similar analysis exploring how Justice John M. Harlan viewed the courts as "subject to a form of democratic correction," see Bruce Ledewitz, *Justice Harlan's Law and Democracy*, 20 J.L. & POL. 373, 374 (2004).

125. *See* Jack M. Balkin & Sanford Levinson, *Understanding the Constitutional Revolution,* 87 VA. L. REV. 1045, 1068 (2001) (arguing "partisan entrenchment" influences judicial appointments, which shape constitutional interpretation).

126. *See* ACKERMAN, *supra* note 19.

127. *See* Tushnet, *supra* note 120, at 997-1001 (noting that across history, this dialogue has taken different forms, has occurred in longer and shorter time frames, and has been terminated by different actors who signaled that the conversation was over).

a "politics of rights" by which social movements might leverage legal rights as a means of mobilizing support for desired social change.[128]

One of the most impressive progeny in this vein of research is political scientist Michael McCann's pioneering study of rights pursued by the pay equity movement. McCann's systematic, qualitative study provided strong empirical evidence of the importance of rights in developing consciousness of inequality, creating a common identity among those affected, organizing and mobilizing them to assert rights as remedies, and cultivating a greater sense of inclusion and empowerment.[129] McCann concludes that legal rights are not fixed, but instead are "subject to constant battles over official enforcement, extension to different relational contexts, and substantive reformulation by variously situated citizens."[130]

Beyond his impressive empirical study showing how such nebulous phenomena may be studied systematically, McCann's broader contribution has been to synthesize the larger body of relevant research[131] to develop a theoretical framework for understanding the interplay between social movements and law, and to organize the many areas where additional research is needed.[132] His knowledge and synthesis of existing research is analytically insightful and practically very helpful. McCann identifies two general types of research: first, evaluating the use of legal action for direct effects of winning cases and setting precedents; and, second, exploring the

128. STUART SCHEINGOLD, THE POLITICS OF RIGHTS: LAWYERS, PUBLIC POLICY, AND POLITICAL CHANGE 5-6 (1974).

129. *See* MCCANN, RIGHTS, *supra* note 20, at 304. In a subsequent reflection on the implications of this empirical study, Professor McCann noted that nearly all of the pay equity participants he interviewed "confirmed the pivotal catalytic role of legal action in movement evolution. This effective mobilization was achieved despite the fact that courtroom victories were few, were narrowly tailored, and never achieved the judicial legitimation of comparable worth theory under federal law that activists desired." LAW AND SOCIAL MOVEMENTS 15 (Michael McCann, ed., 2006) [hereinafter MCCANN, LAW AND SOCIAL MOVEMENTS].

130. MCCANN, RIGHTS, *supra* note 20, at 304.

131. *See* MCCANN, LAW AND SOCIAL MOVEMENTS, *supra* note 129, at xv-xvi. Professor McCann provides a wonderfully concise summary of relevant law-and-society scholarship in his introduction to the compilation of essays he edited.

132. Regarding future research, McCann cautioned that legal norms "neither guarantee justice nor are they simply obstacles and diversions to the pursuit of a more just society," and therefore he urged scholars "neither to celebrate nor to dismiss rights strategies in the abstract," but instead to study closely the use of rights in a variety of contexts to develop a deeper understanding of how the politics of rights advocacy informs "the actual process of democratic change itself." MCCANN, RIGHTS, *supra* note 20, at 309-10.

indirect effects of "catalyzing movement building efforts, generating public support for new rights claims, or providing pressure to supplement other political tactics."[133] Focusing on these under-theorized indirect effects, he offers a typology that tracks the procedural stages of building a movement, negotiating policy reform, implementing policy reform, and establishing the legacy of policy reform.[134]

The synthesis of current research about building a movement is especially relevant here. McCann examines the initial development of an agenda, observing that this may occur in either the neat manner of translating existing political demands into rights claims, or the messier process of gradually conceiving of new rights claims while grappling with the meaning and implications of extant legal rules.[135] Agenda development specifically implies that engaging in legal rights advocacy itself holds a generative capacity from which new rights claims may emerge. McCann identifies the second stage as "generating mass involvement," which involves building a constituent base of those who are directly affected and others who support their cause, by raising awareness, increasing expectations about remedies, and forging a common identity among these constituents.[136] According to McCann, extensive empirical evidence confirms the role of rights rhetoric and legal advocacy in these stages of movement development.[137]

McCann acknowledges that legal rights do not always succeed in building a movement or increasing public support.[138] Borrowing from Frances Fox Piven and Richard Cloward's classic study of poor people's movements, McCann agrees that the impact of rights on movement development is "delimited by the social structure."[139] He further incorporates social science theories positing that these limits derive from availability of "structural opportunities" for collective action, especially changes or strains in political

133. McCANN, LAW AND SOCIAL MOVEMENTS, *supra* note 129, at 8. For an in-depth and nuanced study tracking the direct effects of a United States Supreme Court decision ordering metropolitan-wide housing desegregation, see LEONARD S. RUBINOWITZ & JAMES E. ROSENBAUM, CROSSING THE CLASS AND COLOR LINES: FROM PUBLIC HOUSING TO WHITE SUBURBIA (2000).

134. McCANN, LAW AND SOCIAL MOVEMENTS, *supra* note 129, at 9.

135. *Id.* at 10-11.

136. *Id.* at 12.

137. *Id.* at 13.

138. *Id.* at 14 ("The actual impact of such legal tactics and rights appeals has proved to be highly uneven in different struggles, of course.").

139. *Id.* at 17 (quoting FRANCES FOX PIVEN & RICHARD A. CLOWARD, POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL 3 (1977)).

or economic circumstances,[140] and also capacity for "resource mobilization," especially the existence of movement leaders and organizational ties.[141]

While McCann does not assume that rights are a panacea, he explains rights are "both a resource and a constraint,"[142] perhaps especially for those most disadvantaged. He writes: "Given the overwhelming systemic inequalities and scarcities in basic resources that oppress subordinate groups, even limited, contingent, uncertain resources such as our legal traditions offer should be appreciated."[143]

So how might a claim of rights matter? Rights might constitute inclusion, as articulated by Professor Kim Crenshaw in her now-classic defense of the civil rights movement against the Critical Legal Studies critique:

> The expression of rights, however, was a central organizing feature of the civil rights movement. Because rights that other Americans took for granted were routinely denied to Black Americans, Blacks' assertion of their 'rights' constituted a serious ideological challenge to white supremacy. Their demand was not just for a place in the front of a bus, but for inclusion in the American political imagination. In asserting rights, Blacks defied a system which had long determined that Blacks were not and should not have been included. Whether or not the extension of these rights has ultimately legitimated the subordinate status of Blacks, the use of rights rhetoric was a radical, movement-building act.[144]

According to Crenshaw and other identity scholars, rights claims are about inclusion. As McCann and other social movement researchers have shown, inclusion is both a cause and effect of mobilization. Adding the primary agreement of the dialogic

140. McCANN, LAW AND SOCIAL MOVEMENTS, *supra* note 129, at 17 ("It is precisely this context of increased hardship, denied entitlements, and expanded opportunities for creative action that social movement theorists often see as most ripe for collective citizen mobilization around new rights claims.").

141. *Id.* at 18. For a confirmation of the resources associated with claiming rights and mobilizing support based on comparative empirical data, see CHARLES EPP, THE RIGHTS REVOLUTION: LAWYERS, ACTIVISTS, AND SUPREME COURTS IN COMPARATIVE PERSPECTIVE (1998).

142. McCANN, LAW AND SOCIAL MOVEMENTS, *supra* note 129, at 6.

143. McCANN, RIGHTS, *supra* note 20, at 309.

144. Kimberle Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364-65 (1988) (citations omitted). For a comprehensive examination, see MARTHA MINOW, MAKING ALL THE DIFFERENCE: INCLUSION, EXCLUSION, AND AMERICAN LAW (1990).

constitutional theorists, judicial interpretation responds to the pressures social movements claiming rights in the dialogic process exert, a process which gradually shapes constitutional meaning. Taken together, these theories reveal what it means both legally and politically for poor people to suffer the absence of both rights claims[145] and movement mobilization: they effectively are denied both the defense of constitutional rights protections by the judiciary and the offense of pursuing protection in the political process. Moreover, it is not only each of these separately that is absent, but also the mutually reinforcing interactions between these synergistic methods of leveraging toward greater inclusion for poor people.

IV. The Co-constitutive Relation Between Claiming Rights & Mobilizing Support

Every now and then, moments in time present themselves when the conditions seem right for either mobilizing politically or claiming rights legally. Yet, as Piven and Cloward so astutely warned in their classic analysis:

> Opportunities for defiance are not created by analyses of power structures. If there is a genius in organizing, it is the capacity to sense what it is possible for people to do under given conditions, and to then help them do it. In point of fact, however, most organizing ventures ask that people do what they cannot do, and the result is failure.[146]

Piven and Cloward thus remind us that organizing is, like claiming rights, "delimited by the social structure."[147] If Piven and

145. For an excellent empirical examination of how the absence of social rights discourse has made it difficult to make political progress toward obtaining governmental assistance to meet long-term care needs, see Sandra R. Levitsky, Private Dilemmas of Public Provision: The Formation of Political Demand for State Entitlements to Long-Term Care 112 (2006) (unpublished Ph.D. dissertation, University of Wisconsin, Madison) (on file with author) (concluding "[i]f in this case caregivers had recourse to a resonant social rights frame, their claims might have challenged us to develop new ways of conceptualizing citizenship, community, and social responsibilities of care. In the absence of a resonant social rights discourse, caregivers' claims challenge us to do something substantially less: to ensure only that our most basic needs are met by family, with help when absolutely necessary from the state.").

146. Piven & Cloward, *supra* note 8, at 22.

147. *Id.* at 3 ("The occasions when protest is possible among the poor, the forms that it must take, and the impact it can have are all delimited by the social structure in ways which usually diminish its extent and diminish its force."). Calling the point that opportunities are delimited by the social structure their first main argument, Piven and Cloward add a second point especially important for present purposes: "It is our second general point, then, that the opportunities for defiance are structured by fea-

Cloward, McCann, and other empirical researchers are correct, then organizing or otherwise mobilizing support and rights advocacy relate in a mutually constitutive manner. This suggests that the key may be to develop conditions for *both* movement mobilizing and legal leveraging, and also to make the best use of those conditions whenever they occur.[148]

Are the conditions now ripe for mutually constitutive movement mobilization and rights advocacy? At this particular moment in American history, poverty is making a rare appearance as an urgent concern on the political radar screen. In the midst of the campaign for the 2008 presidential election, poverty has been included on the stump by most Democratic candidates, with former Senator John Edwards having made it the centerpiece of his candidacy.[149]

Much recent media attention has also focused on the show-down between the Bush Administration and Congress over expanding health insurance coverage to children through the S-CHIP program, with the White House winning the war thus far by exercising the presidential veto.[150] The S-CHIP dispute has echoes of *Dandridge*, which highlighted the purported conservative concern about the danger of government treating welfare poor people more favorably than working poor people. So it is especially revealing that, in the current S-CHIP debate, noticeably absent are expressions of *Dandridge*-like concerns about equality between some working people who are very poor and receive health care benefits and other working people who are relatively poor but lack health

tures of institutional life. Simply put, people cannot defy institutions to which they have no access, and to which they make no contribution." *Id.* at 23. For an overview of scholarly literature about law and organizing, see Loretta Price & Melinda Davis, *Seeds of Change: A Bibliographic Introduction to Law and Organizing*, 26 N.Y.U. REV. L. & SOC. CHANGE 615 (2000-2001).

148. Piven & Cloward did not judge the welfare rights movement a failure because it failed to build a lasting movement. Instead, in their words: "Rather, we judge it by another criterion: whether it exploited the momentary unrest among the poor to obtain the maximum concessions possible in return for the restoration of quiescence. It is by that criterion that it failed." PIVEN & CLOWARD, *supra* note 8, at 353.

149. *See, e.g.*, Matt Bai, *The Poverty Platform*, N.Y. TIMES, June 10, 2007, (Magazine), at 66; David Brooks, *Edwards, Obama, and the Poor*, N.Y. TIMES, July 31, 2007, at A23; David Leonhardt, *Two Candidates, Two Fortunes, Two Distinct Views of Wealth*, N.Y. TIMES, Dec. 23, 2007, at A1; Leslie Wayne, *Edwards Embarks on Tour in South to Focus on Poverty*, N.Y. TIMES, July 16, 2007, at A11. Although former Senator Edwards has withdrawn from the 2008 presidential race, analysts have credited him with moving the other Democratic candidates to more detailed policy proposals regarding, for example, universal health care. *See, e.g.*, Paul Krugman, *The Edwards Effect*, N.Y. TIMES, Feb. 1, 2008, at A23.

150. *See* Robert Pear, *Missteps on Both Sides Prevented Compromise on Children's Bill*, N.Y. TIMES, Nov. 5, 2007, at A23.

insurance. Instead, conservatives focus on the danger of an expanded welfare state, which they urge must be fought at all costs, even if those who suffer the consequences are uninsured children.[151] The denial of health insurance to children presents a mobilization opportunity, given public support for such benefits. It is also more apparent today that almost all poor people are working and can no longer be academically divided between the welfare poor and the working poor, and also it is clearer that the uninsured are no longer limited to people who are very poor. The current economic and political conditions surely create the basis for recognition of a common struggle and formation of a common identity that are helpful for movement mobilization.

Other signs suggest that the conditions might be right for mobilizing a movement to extend protection and inclusion to poor people. For example, some states and local governments have taken the lead in health care and various anti-poverty initiatives. To begin to provide coverage for the nearly fifty million people who are uninsured,[152] a few states are fulfilling their "laboratories of democracy" function by experimenting with various versions of universal health care,[153] although they are struggling with how to pay for it.[154] An especially bright note is that advocates for poor people have been involved directly in negotiations with state officials to help design a program to keep the out-of-pocket costs as low as possible,[155] and also have been urging state officials to assess and

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151. *See* Paul Krugman, *An Immoral Philosophy*, N.Y. TIMES, July 30, 2007, at A17.

152. The most recent Census Bureau count puts the number at 47 million for 2006, up dramatically from 44.8 million the prior year. Abby Goodnough, *Census Shows a Modest Rise in U.S. Income*, N.Y. TIMES, Aug. 29, 2007, at A1.

153. *See* Danny Hakim, *Spitzer Plans Major Push to Extend Health Care*, N.Y. TIMES, July 11, 2007, at B1; Christopher Lee, *Massachusetts Begins Universal Health Care*, WASH. POST, July 1, 2007, at A6; Kevin Sack, *California Takes Big Step Toward Universal Health Care*, N.Y. TIMES, Dec. 18, 2007, at A25.

154. *See* Kevin Sack, *States' Widening of Health Care Hits Roadblocks*, N.Y. TIMES, Dec. 25, 2007, at A1 (explaining that the California program is expected to exceed its first year budget by at least $150 million).

155. *See* Pam Belluck, *Massachusetts Agency Proposes Health Coverage That Most Can Afford*, N.Y. TIMES, Apr. 12, 2007, at A14.

> The proposal represents a carefully hammered-out compromise. Business groups wanted to make sure that premiums for state-sponsored insurance would not be too much less than the employee contributions to an employer's plan because they fear that people would flock to the government-sponsored plans, driving up the cost to the state. Advocates for poor people had wanted lower costs for more residents.

Id.

learn directly from this experiment.[156] Some cities are taking action as well, enacting living-wage ordinances[157] and also working to establish better methods for determining who is poor.[158] Simultaneously, leaders of bar associations around the country are organizing a virtual movement of lawyers to push for greater Access to Justice for poor people, or what is sometimes called a "Civil Gideon."[159] As for poor people themselves, an authentic movement of low-wage workers is becoming increasingly well-organized.[160] All of this is occurring as the economic inequality gap is the largest since 1929[161] and recession fears loom, which are likely

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156. *See* Kevin Sack, *Amid Health Care Debate, Massachusetts Faces Test*, N.Y. TIMES, Nov. 25, 2007, at A34 ("John E. McDonough, executive director of Health Care for All, an advocacy group based here, said he found it breathtaking that political leaders were calling for an individual mandate well before there was any way to measure the success of the Massachusetts experiment.").

157. *See* HANDLER & HASENFELD, *supra* note 15, at 326 ("Thirteen states (including the District of Columbia) have increased the minimum wage above the federal level; three more states have it under serious consideration. . . . At the current minimum wage, a full-time worker earns only $10,712 per year. . . . Current rates allow employers to exploit the lack of bargaining power of the low-wage worker.") (citations omitted).

158. Leslie Kaufman, *Bloomberg Seeks a Modern Way to Determine Who Is Poor in the City*, N.Y. TIMES, Dec. 30, 2007, at A21.

159. *See, e.g.*, Beverly Balos, *Domestic Violence Matters: The Case For Appointed Counsel in Protective Order Proceedings*, 15 TEMP. POL. & CIV. RTS. L. REV. 557, 557 (2006) (arguing that due process requires that victims of domestic violence be appointed counsel); Howard H. Dana, Jr., *Introduction: ABA 2006 Resolution on Civil Right to Counsel,* 15 TEMP. POL. & CIV. RTS. L. REV. 501, 501, 505 (2006) (describing the unanimously adopted ABA resolution urging states to provide lawyers for poor people in civil proceedings involving "shelter, sustenance, safety, health, or child custody" as "a first step" that "is intended to engender broader discourse about equal justice in our nation within the organized bar, among the general public and by policy makers").

160. *See, e.g.*, Gordon, *supra* note 23, at 281. I hasten to add that Professor Gordon has a different take on the questions of rights advocacy. As she summarizes:

> For at least the last quarter of the twentieth century, activist lawyers and legal scholarship have been plagued by questions about whether lawyers inevitably dominate and derail collective action, and whether law has much if anything to offer to social change. I have a sense that the tide has turned. As a quiet but persistent chorus of voices maintained all along, we seem to be reaching a consensus that there is little use in asking questions about law and organizing in grand or abstract terms. The real issue is, what kind of lawyers, in what kind of relationships with community groups or movements, using what sorts of strategies, make sense in which contexts?

Id. at 294-95.

161. *See* Editorial, *It Didn't End Well Last Time*, N.Y. TIMES, April 4, 2007, at A14.

> Not since the Roaring Twenties have the rich been so much richer than everyone else. In 2005, the latest year for which figures are available, the top 1 percent of Americans—whose average income was $1.1 million a year—received 21.8 percent of the nation's income, their largest share since 1929. Over all, the top 10 percent of Americans—those making more than about

to bring the kind of destabilization that then creates the structural opportunity for mobilization.

As for claiming rights, some dormant potential remains for using even the existing unequal constitutional framework to benefit poor people. First, the Supreme Court has formally conceded that constitutional limitations do apply to regulation of poverty.[162] Of course, the challenge remains to get the courts actually to conduct at least meaningful rationality review,[163] rather than engage in categorical exclusion and reflexive rationality review that repeats the most deferential mantras[164] followed in quick succession by the conclusion that the regulation must be presumed to be rational and therefore, must be upheld.

> $100,000 a year—collected 48.5 percent, also a share last seen before the Great Depression.

Id.; David Cay Johnston, *Income Gap Is Widening, Data Shows*, N.Y. TIMES, Mar. 29, 2007, at C1. The income inequality not only continues, but at a furious pace, according to recent research by economists Thomas Piketty and Emmanuel Saez. *See also* Daniel Gross, *Income Inequality, Writ Larger*, N.Y. TIMES, June 10, 2007, at C7 ("the share of gross personal income of the top 1 percent of American earners rose to 17.4 percent in 2005 from 8.2 percent in 1980."). The reporter summarized an explanation provided by economists Frank Levy and Peter Temin:

> Professor Levy and Professor Temin divide the second half of the 20th century into two periods. In the first, 1955 to 1980, a grand bargain between labor and corporate America involving New Deal-era protections for workers and high marginal tax rates (the top rate was 90 percent in the 1950s) led to what economists have called the Great Moderation. The middle class grew dramatically, income inequality decreased, and corporations generally enjoyed labor peace. Since 1980, they argue, it's been a different story, thanks in part to a shifting political environment. Unions have weakened, the minimum wage hasn't come close to keeping up with inflation, and marginal income tax rates have been cut—the top marginal rate is now 36 percent, down from 70 percent in 1980. A result has been declining bargaining power for workers and the rise of a winner-take-all environment.

Id.

162. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 469-70 (1977) ("The Constitution imposes no obligation on the States to pay the pregnancy-related medical expenses of indigent women, or indeed to pay any of the medical expenses of . . . indigents. But when a State decides to alleviate some of the hardships of poverty by providing medical care, the manner in which it dispenses benefits is subject to constitutional limitations.").

163. *See* Hershkoff, *supra* note 10, at 1153 ("The prevalent understanding of rationality review—and its most potent criticism—posits that rationality review is not review at all, but rather the withholding of review, indicating a refusal to expend resources on issues that the judiciary locates outside the constitutional domain.").

164. *See* Heller v. Doe, 509 U.S. 312, 319 (1993) (reiterating that rational-basis review in equal protection analysis "'is not a license for courts to judge the wisdom, fairness, or logic of legislative choices.'" (quoting FCC v. Beach Communications, Inc., 508 U.S. 307, 313 (1993)).

Second, perhaps because poverty has not been treated as a suspect classification, the government has made little to no effort to hide its intent to target poor people for differential treatment, thus leaving poverty classifications rather plainly apparent in many social or economic regulations. In other words, the singling out of poor people frequently happens on the face of the law. When the singling out of a group is facial, there is no need for plaintiffs to prove that the regulation has any disparate impact or for the courts to check for a discriminatory intent behind the regulation.[165]

Third, because the courts have subjected classifications relating to poverty only to rationality review, any classification designed to *benefit* people based on their poverty would receive rationality review as well.[166] In other words, affirmative action based on class would be upheld much more easily than affirmative action based on race (which is subjected to strict scrutiny)[167] or based on sex (which is subjected to intermediate scrutiny).[168]

Finally, another possibility is to use state constitutions to build gradual momentum that the Supreme Court will notice and consider when interpreting the United States Constitution.[169] Some

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165. Of course, poor people most likely will get rationality review regardless whether the method of discrimination is based on facial classification or disparate impact because all types of disparate impact receive only rationality review unless the plaintiffs can prove that the discrimination was intentional. *See, e.g.*, Washington v. Davis, 426 U.S. 229 (1976) (applying rationality review, rather than strict scrutiny, for disparate racial impact without proof of intent); Personnel Adm'r of Massachusetts v. Feeney, 442 U.S. 256 (1979) (applying rationality review, rather than intermediate scrutiny, for disparate gender impact without proof of intent) Nonetheless, the general persuasion process seems somewhat less arduous for obvious facial classifications.

166. *See, e.g.*, Adarand Constructors, Inc. v. Pena, Sec'y of Transp., 515 U.S. 200, 226 (1995) (subjecting benign racial classifications, for example, affirmative action, to the same strict scrutiny used for harmful racial classifications (citing Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, 298 (1978)).

167. *Id.*

168. *See, e.g.*, Califano v. Webster, 430 U.S. 313, 317 (1977) (subjecting benign sex or gender classifications, for example, affirmative action, to the same intermediate scrutiny used for harmful sex or gender classifications).

169. State constitutions contain a variety of types of provisions that could protect social welfare rights, including directly establishing a government duty of aid to poor people, designating a government entity to provide such aid, and articulating an aspiration of eliminating poverty and assuring economic justice. *See, e.g.*, AL. CONST. art. I, § 88 ("It shall be the duty of the legislature to require the several counties of this state to make adequate provision for the maintenance of the poor."); IL. CONST. pmbl. ("We, the People of the State of Illinois . . . in order to . . . eliminate poverty and inequality; assure legal, social and economic justice . . . do ordain and establish this Constitution for the State of Illinois."); N.C. CONST. art. XI, § 4 ("Beneficent provision for the poor, the unfortunate, and the orphan is one of the first duties of a civilized and a Christian state. Therefore the General Assembly shall provide for and define the duties of a board of public welfare."); N.Y. CONST. art. XVII, § 1 ("The aid,

scholars have argued that state constitutions include language that is directly, or at least indirectly, protective of social welfare.[170] The Supreme Court has taken notice of the success of other social movements in accomplishing a changed interpretation of state constitutions and then relied on such "emerging awareness" in changing its interpretation of the United States Constitution.[171] The school finance movement, for example, appears to be following this approach on behalf of poor people with some success at the state level.

Perhaps this is a particularly good time to re-imagine a society with constitutional protection for poor people. Might we now challenge the dual rules of law as unconstitutional? Might we insist on inclusion of poor people in our constitutional and political dialogues?[172] Might we insist on equal protection from discrimination and equal enforcement of established constitutional rights for poor people? The poverty context itself makes deciding the question of

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care and support of the needy are public concerns and shall be provided by the state and by such of its subdivisions, and in such manner and by such means, as the legislature may from time to time determine."); W.V. CONST. art. IX, § 2 ("Coroners, overseers of the poor and surveyors of roads, shall be appointed by the county court.").

170. *See* Karen Syma Czapanskiy, *Why Does It Matter Where I Live? Welfare Reform, Equal Protection, and the Maryland Constitution*, 63 MD. L. REV. 655, 662 (2004) (arguing Maryland's "rational basis with bite" standard should apply to that state's double devolution of welfare policy and concluding that allowing county governments to set different welfare policies would violate the state's equal protection clause by treating residents differently based solely on where they reside); Hershkoff, *supra* note 10, at 1143 ("state constitutional welfare clauses, of which New York's Article XVII is an illustrative example, require state governments to achieve prescribed social goals that the state judiciaries must enforce."); Randal S. Jeffrey, *Equal Protection in State Courts: The New Economic Equality Rights*, 17 LAW & INEQ. 239, 356 (1999) (arguing that "recognition by state courts of economic equality rights in school financing and abortion funding cases can potentially expand into other substantive areas of economic equality rights. Such areas include those in which the federal Supreme Court has declined to guarantee equality, including welfare, housing, and employment."); Burt Neuborne, *State Constitutions and the Evolution of Positive Rights*, 20 RUTGERS L.J. 881 (1989) (exploring the potential of state constitutional poverty protection).

171. *See, e.g.*, Lawrence v. Texas, 539 U.S. 558, 571-72 (2003).

172. Might we also insist on dialogue about the fair treatment of wage income as compared to investment income in the tax code? *See* Editorial, *The Tax Debate That Isn't*, N.Y. TIMES, Dec. 13, 2007, at A40; *see also* Dorothy A. Brown, *Race and Class Matters in Tax Policy*, 107 COLUM. L. REV. 790 (2007). Maybe even revisit the social welfare rights question, at least in the guise of discussing the negative income tax? *See, e.g.*, Robert H. Frank, *The Other Milton Friedman: A Conservative With a Social Welfare Program*, N.Y. TIMES, Nov. 23, 2006, at C3 (explaining Milton Friedman's proposal that existing welfare programs should be replaced with single cash transfers to eligible citizens).

whether to pursue a potentially generative rights strategy or to avoid the serious risks such a strategy would entail an easy call precisely because poor people have everything to gain both constitutionally and politically, and, unfortunately, very little to lose.

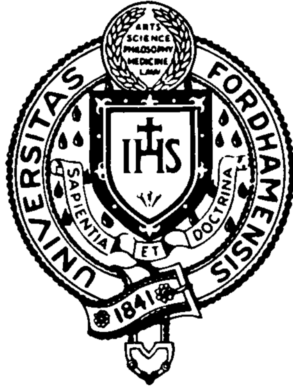
CONCLUSION

While the Constitution currently offers no hope for protection of social welfare rights, the lack of social welfare rights is only the most obvious of the constitutional injuries poor people suffer. This Article has traced how the Supreme Court otherwise has deconstitutionalized Poverty Law by four departures from normal constitutional doctrine: first, by categorical immunization of "social or economic legislation" from any likelihood of invalidation; second, by circumvention of suspect class or classification analysis; third, by application of rationality review in a reflexive manner to uphold governmental regulation; and fourth, by reversal of heightened scrutiny normally used for protection of established fundamental rights.

Not only are poor people denied equal constitutional protection, but also they lack the financial clout necessary to achieve political protection. This exclusion of poor people from both constitutional and political protection has contributed to the construction and perpetuation of dual rules of law, one superior set of rules for the economic haves and an inferior set of rules for the economic have-nots. As a practical matter, this constitutional impoverishment leaves Poverty Law itself as a frontier where government roams free from accountability, experimenting with the work and family lives of poor people as a means to the greater goal of reducing the welfare state, and meanwhile ensuring the availability of labor at a rate that is relatively reduced and continuously decreasing.

Constitutional theory and social movement mobilization scholarship, taken together, explain that the dialogic default on the question of economic justice both causes and reflects this lack of constitutional rights for poor people. Without inclusion in the public dialogue, little hope can be mustered toward establishing the constitutional inclusion of poor people. It is precisely the mutually reinforcing power of mobilizing political support and claiming legal rights that together can produce traction toward achieving constitutional inclusion. As the efforts to organize and advocate for poor people in the political sphere continue, the time has come to

harness the hope embedded in our constitutional ideals to re-imagine and realize a unitary rule of law that gives equal constitutional protection to both the haves and the have-nots.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