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POVERTY, DEMOCRACY AND CONSTITUTIONAL LAW

STEPHEN LOFFREDO†

I guess it's all right to say to a man that he should lift himself by his own bootstraps. But it's a cruel jest to say to a bootless man that he should lift himself by his own bootstrap.

—Martin Luther King, Jr.¹

INTRODUCTION

In the winter of 1987, M. A., a homeless man in poor health, challenged the constitutionality of a federal law that barred him from receiving food stamps because he slept in a city-run shelter.² The shelter did not provide Mr. A. with the meals that his medical condition required and it often ran out of food altogether so that he frequently went hungry.³ After repeated hospitalizations, Mr. A. died of renal failure brought on by malnourishment and dehydration.⁴ A federal district court subsequently found nothing irrational about a legislative classification that withheld food assistance from a starving man.⁵

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¹ Martin Luther King, Jr., *The Future of Integration*, Address at Kansas State University, Manhattan, Kansas (Jan. 19, 1968) (transcript available at The King Center, Library and Archive, Atlanta, GA).

² See *Chavis v. Lyng*, No. 87 Civ. 1500 (S.D.N.Y. 1987) (unreported decision). Mr. A. was a member of a class composed of approximately 10,000 men and women who resided in municipal shelters in New York City.

³ See Affidavit of M. A. ¶ 8, *Chavis* (No. 87 Civ. 1500).

⁴ See Plaintiffs' Brief in Further Support of Motions for Class Certification and Preliminary Injunction at 1-2, *Chavis* (No. 87 Civ. 1500). A temporary restraining order had been obtained for Mr. A. at the outset of the lawsuit, but the provision of food stamps at that juncture could not reverse the damage inflicted by months of malnourishment. *Id.*

⁵ See Case notes on preliminary injunction hearing, *Chavis* (No. 87 Civ. 1500) (on file with the author).

Two decades ago, the Supreme Court held that the constitutional claims of poor people would be assessed under so-called rationality review.⁶ The judiciary must broadly defer to political outcomes in the area of "economics and social welfare," the Court declared, even when they deny "the most basic economic needs of impoverished human beings."⁷ The reasoning that led to this result is by now familiar. First, since the Constitution does not expressly guarantee material subsistence,⁸ the claims of people like Mr. A. implicate no fundamental right or interest that commands special judicial protection. Second, since the Court does not regard poverty as a suspect classification, even explicit legislative discrimination against poor people does not trigger heightened judicial scrutiny.⁹ Rather, the Court will tolerate even inhumane treatment of poor people because "[u]nder our structure of government" courts ought to defer to democratic decisionmaking, especially on ordinary distributional matters.¹⁰ By justifying its poverty cases in this manner, the Court places considerable weight on a bare assumption that poor people have fair access to the political process. Yet the Court has never paused to consider whether the political process is in fact "democratic" with respect to the poor. For the millions like Mr. A., though, having their claims remitted to "the democratic process" usually means no process at all.

This Article examines the Supreme Court's use of the rationality standard in areas that affect poor people, and argues that the political powerlessness of the poor requires some form of enhanced judicial protection. The Court's nearly limitless deference to legislation that disadvantages poor people ignores the central role that wealth plays in American politics.¹¹ Although the poor are

⁶ See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (holding that the constitutionality of social welfare legislation must be assessed under the same deferential form of rationality review applicable to commercial regulations).

⁷ *Id.* at 485.

⁸ The Supreme Court has held that the Constitution does not include a right to minimum subsistence. See *id.* at 485-87 (holding that a state regulation fixing maximum public assistance grant levels without regard to family size does not violate equal protection).

⁹ See, e.g., *Maher v. Roe*, 432 U.S. 464, 471 (1977) ("[T]his Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."). See generally William H. Clune III, *The Supreme Court's Treatment of Wealth Discriminations Under the Fourteenth Amendment*, 1975 SUP. CT. REV. 289, 327-36 (discussing "whether poverty shall even be recognized as a suspect classification").

¹⁰ *Bowen v. Gilliard*, 483 U.S. 587, 596-97 (1987).

¹¹ See, e.g., MICHAEL WALZER, *SPHERES OF JUSTICE* 310 (1983) ("The most common form of powerlessness in the United States today derives from the dominance of

generally recognized as a politically powerless minority,¹² the Court's poverty discourse nevertheless treats society's most marginalized members as though they were the fully empowered equals of the more affluent.¹³ By contrast, commentators from across the ideological spectrum recognize the realpolitik of money and its dominance in the political sphere.¹⁴ As Kevin Phillips puts it, "it's hard to overstate the importance of American politics to American wealth—and vice versa."¹⁵ Indeed, the inordinate role that wealth plays in American politics—and the political debilitation caused by poverty—has been characterized as the most pressing threat to American democracy today.¹⁶

money in the sphere of politics."); David Adamany, *PAC's and the Democratic Financing of Politics*, 22 ARIZ. L. REV. 569, 571 (1980) (contending that inequalities of wealth result in "differential participation by presumably equal citizens"); see also LARRY L. BERG ET AL., CORRUPTION IN THE AMERICAN POLITICAL SYSTEM 43-46 (1976) (explaining that those with access to wealth enjoy "weighted votes" in their ability to exercise disproportionate political influence).

¹² See RALPH DOLGOFF & DONALD FELDSTEIN, UNDERSTANDING SOCIAL WELFARE 155 (2d ed. 1984) (defining poverty as a lack of "command over resources" which include power, access, and influence); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 2 (1987) (discussing "the poor's continuing political powerlessness"); Cass R. Sunstein, *Neutrality in Constitutional Law (with Special Reference to Pornography, Abortion, and Surrogacy)*, 92 COLUM. L. REV. 1, 9 (1992) (discussing the uneven distribution of wealth and power in American society); *supra* note 11. Commentators have most recently noted that the poor are politically powerless to alter environmental policies that have had a disproportionately adverse impact on low-income communities. See H.R. REP. NO. 101-428, 101st Cong., 2d Sess. 41-42 (1990) (discussing the poor's lack of political power over environmental pollution); Regina Austin & Michael Schill, *Black, Brown, Poor & Poisoned: Minority Grassroots Environmentalism and the Quest for Eco-Justice*, 1 KAN. J.L. & PUB. POL'Y 69, 70 (1991) ("[C]ommunities comprised of low-income and working class people with no more than a high school education are not as effective at marshalling [political] opposition as communities of middle or upper income people."); Dick Russell, *Environmental Racism: Minority Communities and Their Battle Against Toxics*, AMICUS J., Spring 1989, at 22, 25 (discussing the "functional link between . . . poverty and powerlessness") (quoting Barry Commoner, Director for the Center for Biology of Natural Systems, Queens College).

¹³ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 49-59 (1973) (suggesting that poor families dissatisfied with their community's educational system can move to a different location or vote to achieve change).

¹⁴ See, e.g., ELIZABETH DREW, POLITICS AND MONEY vii (1983) (explaining that money makes a "qualitative change in the way the [political] system work[s]"); AMITAI ETZIONI, CAPITAL CORRUPTION: THE NEW ATTACK ON AMERICAN DEMOCRACY 3 (1988) (focusing on the ways in which economically powerful interest groups undercut American government); LARRY J. SABATO, PAC POWER 75 (1983) (stating that political action committees (PACs) contributed a total of \$79.2 million to congressional candidates in 1982); Comment, *One Dollar, One Vote*, THE NEW YORKER, Oct. 5, 1992, at 4, 6 (referring to the "superior political clout of the rich"); see also *infra* note 424.

¹⁵ KEVIN PHILLIPS, THE POLITICS OF RICH AND POOR xix (1990).

¹⁶ See MICKEY KAUS, THE END OF EQUALITY (1992) (contending that the central

The tension between democracy and wealth is not a recent development in American society.¹⁷ It is familiar history that James Madison and his Federalist colleagues viewed political democracy as a threat to property, fearing that the impecunious masses would vote themselves economic equality in a fully democratic republic.¹⁸ The Anti-Federalists and their Jacksonian successors

democratic problem is the inordinate role that money plays in the public, noncommercial sphere of civil society); WALZER, *supra* note 11, at 310 ("Citizens without money come to share a profound conviction that politics offers them no hope at all."); Charles R. Beitz, *Political Finances in the United States: A Survey of Research*, 95 ETHICS 129, 143-46 (1984) (noting the threat that disparate wealth poses to democratic government); Ray Marshall, *Undemocratic America*, SOUTHERN CHANGES, Spring, 1992, at 8, 10 ("Inequality as extreme as ours destroys democratic institutions." (quoting former U.S. Secretary of Labor)); cf. Ronald Dworkin, *What Is Equality? Part 4: Political Equality*, 22 U.S.F. L. REV. 1, 12 (1987) (describing "a serious complaint against American democracy most people accept to some degree: that some private citizens have disproportionately more political power than others, because they are richer or control media or for some similar reason").

¹⁷ From the founding of the republic, the democratic order has confronted difficult questions of economic inequality. See ROBERT H. JACKSON, *THE STRUGGLE FOR JUDICIAL SUPREMACY* xii (1941) ("Two kinds of power seem always in competition in our democracy: there is political power, which is the power of the voters, and there is the economic power of property, which is the power of its owners."); see also ROBERT DAHL, *DEMOCRACY AND ITS CRITICS* 333 (1989) ("From ancient times to the present day . . . virtually all thoughtful advocates of democratic and republican government have strongly emphasized how democracy is threatened by inequalities in economic resources."). See generally STAUGHTON LYND, *INTELLECTUAL ORIGINS OF AMERICAN RADICALISM* 67-68 (1968) (explaining the difficulty in reconciling property rights with a fully democratic government).

¹⁸ During closed deliberations at the Constitutional Convention, Madison bluntly stated: "In future times a great majority of the people will not only be without landed, but any other sort of property. These [may] combine under the influence of their common situation; in which case the rights of property . . . will not be secure in their hands." 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, at 203-04 (Max Farrand ed., 1966); see also *THE FEDERALIST* No. 10, at 79, 84 (Alexander Hamilton) (Clinton Rossiter ed., 1961) (expressing Madison's view that "the most common and durable source of factions has been the various [sic] and unequal distribution of property," and decrying the popular "rage for paper money, for an abolition of debts, for an equal division of property, [and] . . . other improper or wicked project[s]"); ANDREW HACKER, *CONGRESSIONAL DISTRICTING* 7-8 (1963) (stating that the assemblage at the Constitutional Convention was "by no means committed to popular government," and that most of the delegates "interpreted democracy as mob rule and assumed that equality of representation would permit the spokesmen for the common man to outvote the beleaguered deputies of the uncommon man"); Pope McCorkle, *The Historian as Intellectual: Charles Beard and the Constitution Reconsidered*, 28 AM. J. LEGAL HIST. 314, 318-19 (1984) (defending Beard's thesis that the founders sought to promote the economic interests of the propertied classes).

Popular agitation in the post-Revolutionary period for legislation that promoted wealth redistribution, together with more direct challenges to existing economic arrangements (Shay's Rebellion, for example), supplied reasonable bases for

also acknowledged the tension between American economic and political arrangements, but regarded sharp economic inequalities as the evil that threatened popular sovereignty.¹⁹

The polarity between democratic ideal and economic elitism has intensified in the second half of the twentieth century as constitutional doctrine has drifted, at least superficially, toward egalitarian values,²⁰ while a radical maldistribution of wealth has profoundly influenced political affairs.²¹ The poor have been the principal victims of this dichotomy.²² While the convergence of political

Madison's fear that the democratization of America had produced a citizenry unlikely to accept elite property and privilege. See DANIEL A. FARBER & SUZANNA SHERRY, *A HISTORY OF THE AMERICAN CONSTITUTION*, 15-19 (1990) (noting that democratic and egalitarian sentiments had become common among large segments of the public following the Revolution and led to various legislative and popular assaults upon economic inequalities); see also GORDON S. WOOD, *THE RADICALISM OF THE AMERICAN REVOLUTION* 229-43 (1991) (contending that "[e]quality was . . . the most radical and most powerful ideological force let loose in the Revolution").

¹⁹ See, e.g., *Letters of Centinal*, in 2 *THE COMPLETE ANTI-FEDERALIST* 139 (Herbert J. Storing ed., 1981) ("A republican, or free government, can only exist . . . where property is pretty equally divided."); cf. Cass R. Sunstein, *Interest Groups in American Public Law*, 38 *STAN. L. REV.* 29, 35-38 (1985) (describing a Republican ideal in which rough material equality forms the basis for effective democratic participation by all citizens).

²⁰ See, e.g., *Baker v. Carr*, 369 U.S. 186, 197-98 (1962) (establishing the principle of one-person, one-vote in the state electoral context); *Brown v. Board of Educ.*, 347 U.S. 483, 495 (1954) (rejecting provision of "separate but equal" public schools for white students and African-American students). See generally LOUIS LUSKY, *BY WHAT RIGHT? 211-71* (1975) (tracing the rise of equality as a constitutional value in the latter portion of the twentieth century); Kenneth L. Karst, *The Supreme Court, 1976 Term—Foreword: Equal Citizenship Under the Fourteenth Amendment*, 91 *HARV. L. REV.* 1, 21-38 (1977) (tracing the development of the Fourteenth Amendment's equal protection doctrine from a "guarantee of racial equality" to a broader constitutional "principle of equal citizenship"). But see DERRICK BELL, *AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL JUSTICE* 162 (1987) (describing the declining importance of the Fourteenth Amendment in protection of African-American rights); Arthur S. Miller, *Social Justice and the Warren Court: A Preliminary Examination*, 11 *PEPP. L. REV.* 473, 489 (1984) (arguing that the Warren Court's civil rights and civil liberties decisions affecting poor people worked to preserve the status of "those highest in the social pecking order"); Mark Tushnet, ". . . And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court, 1972 Term, 1974 *WIS. L. REV.* 177 (contending that the Court has applied equal protection doctrine differentially to safeguard the interests of the affluent while tolerating legislation harmful to the poor).

²¹ See Mark Tushnet, *Corporations and Free Speech*, in *THE POLITICS OF LAW* 253, 259-60 (David Kairys ed., 1982) (discussing the "advantages of wealth" in the political sphere).

²² See WALZER, *supra* note 11, at 310. African-Americans and other racial minorities are disproportionately victimized by poverty in the United States. See STAFF OF HOUSE COMM. ON WAYS AND MEANS, 102D CONG., 2D SESS., *OVERVIEW OF ENTITLEMENT PROGRAMS: 1992 GREEN BOOK, BACKGROUND MATERIAL AND DATA ON*

and economic power marginalizes the poor from democratic processes, the myth of political equality simultaneously serves as a justification for denying them the heightened judicial protection that constitutional doctrine has elsewhere accorded politically powerless minorities and other suspect classes.²³

This paradox has not gone unnoticed. Throughout the 1960s and 1970s, courts and commentators debated whether poverty should be considered a suspect classification for purposes of equal protection analysis, and whether a right to subsistence inheres in the Constitution.²⁴ At least some commentators believed that the Court would and should assume a special role in the protection of the poor against disfavorable majoritarian outcomes.²⁵ But by the

PROGRAMS WITHIN THE JURISDICTION OF THE COMMITTEE ON WAYS AND MEANS 1273 (Comm. Print 1992) [hereinafter 1992 GREEN BOOK]; see also Richard Delgado, *Pep Talks for the Poor: A Reply and Remonstrance on the Evils of Scapegoating*, 71 B.U. L. REV. 525, 541 (1991) (discussing the subordinated position of the poor and minorities); Charles V. Hamilton & Dona C. Hamilton, *Social Policies, Civil Rights, and Poverty*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T 287, 306-11 (Sheldon H. Danziger & Daniel H. Weinberg eds., 1986) ("[R]ace . . . has always been fused with class in the political struggle to obtain equitable policies to alleviate poverty."); Rosemary L. Bray, *So How Did I Get Here?*, N.Y. TIMES, Nov. 8, 1992, § 6 (Magazine), at 34, 35 (stating that the "welfare question" is inextricably linked to race). Moreover, the feminization of poverty continues to progress. See, e.g., RUTH SIDEL, *WOMEN AND CHILDREN LAST: THE PLIGHT OF POOR WOMEN IN AFFLUENT AMERICA* xvii (1992) (describing the "ever-increasing numbers of women [who] have been living in poverty"); Mary J. Bane, *Household Composition and Poverty*, in FIGHTING POVERTY: WHAT WORKS AND WHAT DOESN'T, *supra*, at 209, 216-20 (examining the dramatic increase in the percentage of the poor who are members of female-headed and single-person households); Barbara Ehrenreich & Karin Stallard, *The Nouveau Poor*, Ms., July/Aug. 1982, at 217, 217 (stating that two-thirds of the adults who fall within the federal definition of poverty are women). See generally MIMI ABRAMOVITZ, *REGULATING THE LIVES OF WOMEN: SOCIAL WELFARE POLICIES FROM COLONIAL TIMES TO THE PRESENT* 13-40 (1988) (providing a feminist perspective on the welfare state).

²³ The incapacity of a liberal "rights" approach, which depends on the premise of formal equality, to protect the poor and minorities against subjugation has been an important theme of critical race theory, feminist legal theory, and critical legal studies. For the critical race approach, see Derrick Bell, *Racial Realism*, 24 CONN. L. REV. 363 (1992); Alan D. Freeman, *Legitimizing Racial Discrimination Through Antidiscrimination Law: A Critical Review of Supreme Court Doctrine*, 62 MINN. L. REV. 1049 (1978). For the feminist critique, see CATHARINE A. MACKINNON, *TOWARD A FEMINIST THEORY OF THE STATE* (1989); CAROL PATEMAN, *THE SEXUAL CONTRACT* (1988). For the critical legal studies approach, see William H. Simon, *Rights and Redistribution in the Welfare System*, 38 STAN. L. REV. 1431 (1986). See generally Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1363-64 (1984) (criticizing the liberal theory of rights as unstable, indeterminate, abstract, and destructive).

²⁴ See, e.g., ARYEH NEIER, *ONLY JUDGMENT: THE LIMITS OF LITIGATION IN SOCIAL CHANGE* 127-40 (1982) (discussing efforts by poor peoples' lawyers in the 1960s and 1970s to establish a constitutional right to subsistence and heightened constitutional protection for the poor).

²⁵ See, e.g., Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On*

early 1970s, the Burger Court, in a swift series of cases affecting welfare,²⁶ housing,²⁷ and education,²⁸ essentially announced a principle of judicial noninterference with political determinations regarding the poor.²⁹ Formally, the Court set down a rule that claims by poor persons would be evaluated under minimum rationality review. Functionally, however, the Court erected what appears to be an insurmountable presumption that political decisions concerning social welfare issues are constitutional.³⁰ Indeed, in the nearly twenty years that this rule has been in effect, the Court has not invalidated a single poverty classification or social welfare restriction.³¹ To appreciate how extraordinary this record

Protecting the Poor Through the Fourteenth Amendment, 83 HARV. L. REV. 7, 38-39 (1969) (setting forth what is now the classic argument in favor of heightened protection of the poor).

²⁶ See *Dandridge v. Williams*, 397 U.S. 471, 486-87 (1970) (imposing minimum rationality standard on equal protection claims affecting subsistence benefits).

²⁷ See *James v. Valtierra*, 402 U.S. 137, 141-43 (1971) (imposing minimum rationality standard on equal protection claims affecting housing).

²⁸ See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40-44 (1973) (imposing minimum rationality standard on equal protection claims affecting public education issues).

²⁹ The Court's poverty discourse thus diverged from that of international human rights law. The right to minimum subsistence, and, indeed, to an adequate standard of living, is universally recognized as basic to the inherent dignity of every individual. Cf. Mary A. Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 526-32 (1992) (suggesting an appropriate role for affirmative welfare rights in liberal democracies). Compare *International Bill of Human Rights*, G.A. Res. 217A, U.N. GAOR, 3d Sess., 183d mtg. at 76, U.N. Doc. A/810 (1948) ("Everyone has the right to a standard of living adequate for the health and well-being of himself and of his family . . .") with *Deshaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) (stating that the Due Process Clause of the Constitution generally "confer[s] no affirmative right to governmental aid, even where such aid may be necessary to secure life").

³⁰ Justice Marshall's dissent in *Dandridge* was prescient on this point. The majority, Justice Marshall objected, had "emasculat[ed] the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration." *Dandridge*, 397 U.S. at 508 (1970) (Marshall, J., dissenting). Lower courts, constrained by the rationality standard, have questioned the legitimacy of the Court's approach. See, e.g., *Price v. Cohen*, 715 F.2d 87, 93-94 (3d Cir. 1983), cert. denied, 465 U.S. 1032 (1984) (upholding Pennsylvania's three-month limit on welfare benefits to indigents between the ages of 18 and 45, but stating "[w]ere this a matter of first impression, we might conclude that subsistence is impliedly protected by the Constitution, because it is of basic human importance and fundamental to the meaningful exercise of all other rights").

³¹ The Court last struck down welfare classifications in 1973. See *United States Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (invalidating provision of the Food Stamp Act that denied benefits to any household with an individual who had been claimed as a dependent by an ineligible individual living outside the household); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (invalidating

is, one need only juxtapose it with the Court's treatment of other social and economic measures, where the Court has routinely declared legislation unconstitutional even on a rationality standard.³²

The Court's willingness to endorse, in the name of democracy, any legislative burden imposed on the poor has handed the elected branches a carte blanche to deal with a politically dispossessed minority. The only true solution to this problem—an inclusive and democratic politics that fully enfranchises all citizens regardless of economic station—would require fundamental social and political transformations that seem unlikely in the foreseeable future.³³ In

provision of the Food Stamp Act that denied benefits to any household comprised of unrelated individuals); *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619, 621 (1973) (invalidating New Jersey regulation under the AFDC program that denied subsistence benefits to families with children born out of wedlock); *see also Williams v. Wohlgemuth*, 366 F. Supp. 541 (W.D. Pa. 1973), *aff'd mem.*, 416 U.S. 901 (1974) (invalidating a Pennsylvania regulation that denied general assistance to unemancipated minors living with unrelated persons not eligible for assistance).

During this same twenty-year period, state courts have charted an independent course from the federal system and have invalidated social welfare classifications under state constitutions that presumably would have been upheld under the federal test. *See generally* Robert A. Sedler, *The State Constitutions and the Supplemental Protection of Individual Rights*, 16 U. TOL. L. REV. 465 (1985) (discussing state constitutional decisions invalidating state social and economic regulations that presumably would have been sustained under federal equal protection analysis).

³² The Court's application of the minimum rationality test to the area of taxation deserves special mention. It is well settled that "in taxation, even more than in other fields, legislatures possess the greatest freedom in classification." *Regan v. Taxation with Representation*, 461 U.S. 540, 547 (1983) (quoting *Madden v. Kentucky*, 309 U.S. 83, 88 (1940)). Nevertheless, the Court has regularly declared state tax legislation unconstitutional under the Equal Protection Clause using the rationality test. *See, e.g., Allegheny Pittsburgh Coal Co. v. Webster County*, 488 U.S. 336, 342-43 (1989); *Hooper v. Bernalillo County Assessor*, 472 U.S. 612, 622-24 (1985); *Williams v. Vermont*, 472 U.S. 14, 23-27 (1985); *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869, 878-80 (1985); *cf. Zobel v. Williams*, 457 U.S. 55, 65 (1982) (invalidating, on equal protection grounds, Alaska's use of residence as a criterion for distribution of state surplus oil wealth). The distinction between the welfare and tax areas is not that welfare classifications have been more considered and constitutionally "rational" than tax measures. Rather, it appears that the Court has adopted an especially relaxed form of rationality review in cases affecting the poor. *See infra* text accompanying notes 124-55.

³³ *See, e.g., DAHL, supra* note 17, at 106-31 (arguing that functional political equality within a democratic framework is "feasibl[e]," but would require the adoption of "measures well beyond those that even most democratic states have hitherto brought about"); ROBERT A. DAHL, *DEMOCRACY IN THE UNITED STATES: PROMISE AND PERFORMANCE* 489 (3rd ed. 1976) (arguing that genuine democratization of political processes cannot occur in the United States without "reducing the amount of inequality among Americans in their access to political resources"); *cf. Richard D. Parker, The Past of Constitutional Theory—And Its Future*, 42 OHIO ST. L.J. 223, 242-59

the meantime, the Court's laissez-faire jurisprudence poses a dangerous dilemma: the political process provides little security for even the most basic interests of the poor, while the absence of a judicial check on that process has encouraged political discourse and decisionmaking to degenerate into a virtual free-fire zone with respect to the rights and lives of poor people.³⁴ The lack of serious judicial review, and the resulting legislative failure to engage in reasoned deliberation, has produced a politics marked by scapegoating, stereotyping, and stigmatization.³⁵

Although the Court's use of rationality review has exercised a stranglehold on the rights of poor persons for the last two decades, the legal and factual underpinnings of this jurisprudence have recently come under challenge from an unlikely source: the Rehnquist Court. In *Austin v. Michigan Chamber of Commerce*,³⁶ the Court squarely acknowledged—for the first time in constitutional discourse—that inequalities of private economic power tend to reproduce themselves in the political sphere and displace legitimate democratic governance. Concentrated wealth exerts so “corrosive and distorting” an effect on political processes, the *Austin* Court held, that states have a “compelling” interest in regulating its deployment, even at the expense of significant First Amendment rights.³⁷

The news here is not that disparities of wealth lead to domination and disempowerment in the political sphere. That much has been long understood by politicians, social scientists, and ordinary folk. Rather, the landmark in *Austin* is that the Court has explicitly acknowledged economic capture of the political process as a matter of such constitutional significance as to be termed “compelling” and to override the fundamental rights asserted. Given the determined silence of post-*Lochner*³⁸ jurisprudence on this phenomenon,

(1981) (arguing that the American political process falls far short of democratic norms).

³⁴ See *infra* text accompanying notes 169-235, 269-84.

³⁵ See Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L.J. 1499, 1499-1502 (1991) (discussing rhetorical stigmatization of the poor); Sunstein, *supra* note 19, at 72-73 (discussing the use of stereotyping in poverty law); Robin Toner, *New Politics of Welfare Focuses on Its Flaws*, N.Y. TIMES, July 5, 1992, at 1, 16 (quoting Marian Wright Edelman, President of the Children's Defense Fund, that “bashing welfare” has become a “fourth generation code phrase, perhaps more powerful than busing, quotas or Willie Horton”).

³⁶ 494 U.S. 652 (1990).

³⁷ *Id.* at 660.

³⁸ *Lochner v. New York*, 198 U.S. 45 (1905).

Austin's acknowledgment of the structural role that money plays in American politics would seem to open many areas of constitutional doctrine to serious question.

This Article examines the implications that the Court's newly articulated analysis of wealth and democracy has for the treatment of poverty in constitutional law. Reduced to its simplest form, the Article's argument runs as follows: a pervasive theme in constitutional theory holds that judicial deference to political outcomes (the type of deference that is reflected in rationality review) presupposes some baseline legitimacy in the political process, which this Article will call "democratic legitimacy." Whether this democratic premise is satisfied in any particular context turns on empirical judgments about how the political process is actually functioning, and on legal-normative judgments about what counts as a democratically legitimate process that merits deferential review. On the first question, *Austin* implicitly recognizes that poor people, although formally enfranchised, suffer severe marginalization from the processes of self-government because of their economic incapacity. On the second, *Austin* teaches that wealth-based distribution of political power is a democratically illegitimate phenomenon of considerable constitutional import. This Article argues that the Court's unremitting deference to political outcomes in the social welfare area, without regard to the disequilibrating effect of wealth on the political process, cannot be squared with *Austin's* central insight into the active tension between economic inequalities and democratic legitimacy.

The Article proceeds in three parts. Part I explores the democratic justification that the Court offers for the presumption of constitutionality afforded to governmental policies affecting the poor. It discusses the idea that the Court's deference to political outcomes presupposes some quality of democratic integrity in the underlying political process, and argues that the Court has sketched the nature of that quality in a variety of doctrinal contexts, including, but not limited to, the *Carolene Products* footnote.³⁹ The conception of democracy that emerges from these doctrinal areas is broadly egalitarian and implicitly recognizes that political marginalization due to poverty is an undemocratic phenomenon

³⁹ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938), discussed *infra* notes 80-90 and accompanying text.

that ought to negate or at least undermine the usual presumption of constitutionality.

Part II analyzes the Court's failure to redeem the promise of this constitutional framework in cases seeking judicial protection for the poor. It recounts the Court's abrupt relegation of poor people's claims to the graveyard of rationality review, and focuses on the Court's refusal to consider seriously whether the poor are members of a politically powerless "out-group[],"⁴⁰ deserving heightened judicial solicitude. It then analyzes scholarly efforts to explain the Court's persistent attachment to rationality review, examining the major libertarian, process-oriented, and liberal apologies for the Court's poverty discourse. Although these explanations proceed from widely divergent premises, they all assume that the Court's poverty cases are a faithful application of doctrine. This Part contends that none of the major justifications for the Court's poverty jurisprudence offers a coherent theory, and it develops alternative explanations for the Court's treatment of the poor. Part II concludes by suggesting that the Court's poverty discourse reflects an ideology of elitism that has seriously skewed the Court's conception of democracy and has blinded it to wealth-induced deviations from democratic principle.

Part III contends that the Court's recently articulated analysis of wealth and democracy in *Austin* is radically at odds with its treatment of poverty in constitutional law. This Part argues that wealth-induced distortions of the democratic process, recognized by *Austin* as constitutionally significant, systematically disadvantage and disenfranchise the poor as a group; that no theory of pluralist interest-group or virtual representation adequately resolves the problem; and that the self-replicating nature of the defect makes it resistant to correction through politics. Part III concludes that wealth-based distortions of the political process present a compelling case for more searching judicial inquiry in claims of discrimination against the poor, that the normal presumptions of constitutionality and judicial deference should not obtain in such cases, and that the Court has a constitutional duty to control, if not the concentration of wealth, then at least the concentration of power that wealth affords.⁴¹

⁴⁰ Louis Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1, 2 (1942) (stating that "[t]he minorities problem springs from the existence of fairly well defined 'out-groups' disliked by those who control the political and other organs of power in society").

⁴¹ Questions of how searching such review should be and what should count as

A word about method: the Article proceeds by internal, legal argument, seeking to analyze the integrity of the rationality standard within the doctrinal limits that the Court itself has developed.⁴² Absent from the argument is an appeal to exogenous value systems that may be available to legitimate the existence of certain social welfare rights not yet recognized by the Court.⁴³ In addition, the

discrimination against the poor are beyond the scope of this Article. See Michelman, *supra* note 25, *passim* (developing a "minimum welfare" model of equal protection for the poor that responds not to "discrimination" but to severe deprivation, and that does not command judicially enforced material equality, but does require state fulfillment of "just wants"); Malcolm E. Wheeler, *In Defense of Economic Equal Protection*, 22 KAN. L. REV. 1, 2 (1973) (offering a model of equal protection for the poor in which the Court ensures that "no substantial differences in access" to certain public goods or services "arise primarily from differences in wealth") (emphasis omitted). This Article aims only to demonstrate that the current regime of consigning virtually any constitutional claim by the poor to minimum rationality review is indefensible. It may well be that the precise contours of a replacement regime will be difficult to design and implement. Judges and commentators have argued that only a theory assigning substantive constitutional value to certain core subsistence needs or interests will allow the Court's poverty discourse to navigate between a radical transformation of society and the danger of insignificance to the poor. See, e.g., *Dandridge v. Williams*, 397 U.S. 471, 520-22 (1970) (Marshall, J., dissenting) (suggesting criteria including "the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive"); JOHN H. ELY, *DEMOCRACY AND DISTRUST* 160-62 (1980) (arguing that "[a] theory of suspicious classification [would] be of only occasional assistance to the poor, since their problems are not often problems of classification to begin with"); Michelman, *supra* note 25, at 22-33 (suggesting that since all payment requirements "discriminate" against those unable to pay, a rule subjecting such requirements to heightened scrutiny would have a sweeping impact). This criticism is substantial. But it overlooks the salutary consequences that a demand for more reasoned analysis might have on political outcomes. A regime that merely insists on a fairer, more rational and less stereotypic treatment of the poor within the framework of existing state interventions would positively foster human dignity and equal respect, and could mitigate some of the worst deprivations of poverty by requiring public officials to confront and justify, in more than a *pro forma* fashion, the oppressive and irrational elements of their policies. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1075 n.4 (2d ed. 1988) (stating that minority participation in the political process has the capacity to alter the quality of public debate, even if it does not always immediately alter political outcomes); Sunstein, *supra* note 19, at 57-59, 72-79 (examining heightened scrutiny as a demand for reasoned analysis). But see Michael A. Fitts, *Look Before You Leap: Some Cautionary Notes on Civic Republicanism*, 97 YALE L.J. 1651, 1652 (1988) (contending that "reasoned dialogue . . . may have the potential for undermining public political participation, especially among poorer groups").

⁴² Cf. David A. J. Richards, *Book Review—Beyond Accommodation: Ethical Feminism, Deconstruction, and the Law*, 19 N.Y.U. REV. L. & SOC. CHANGE 247, 247 (1991-92) (book review) (explaining the distinction between internal and external criticism).

⁴³ See, e.g., Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 U. PA. L. REV. 962, 1004-15 (1973) (constructing a

Article shares a certain common ground with process-based analyses of constitutional review in its identification of undemocratic politics as one, though by no means the exclusive, basis for close judicial oversight of political outcomes.⁴⁴ Unlike process-based constitutional theories, however, the argument developed here does not designate democratic integrity as the sole nontextual guide for constitutional adjudication and in no way tethers constitutional interpretation to a "process-perfection" goal.⁴⁵ Nevertheless, the method of analysis that the Article pursues might be criticized as submerging substantive value conflicts that ought to be more directly confronted.⁴⁶ From this critical perspective, a reconstitution of poverty doctrine could occur, as some commentators have argued, only outside the paradigmatic framework of the Court's own jurisprudence.⁴⁷ Whatever the merits of such criticism, the Article nevertheless assumes that there is an independent value in analyzing the internal coherence of constitutional doctrine in the social welfare area. The demasking of poverty doctrine has the capacity to call into question the institutional legitimacy of the Court's jurisprudence in ways that the more thoroughgoing, external critique cannot.⁴⁸ Moreover, by offering an affirmative analysis of the way in which poverty law can be positively reconstructed, the

constitutional theory of affirmative welfare rights from John Rawls's theory of just society).

⁴⁴ See ELY, *supra* note 41, at 101-04 (setting forth the leading explanation of a process-based approach to the counter-majoritarian problem); see also MARK KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 189-92 (1987) (setting forth major criticisms to process-based approaches to constitutional review).

⁴⁵ For a discussion and critical appraisal of process-based constitutional theories, see *Symposium on Democracy and Distrust: Ten Years Later*, 77 VA. L. REV. 631 (1991).

⁴⁶ Cf. Laurence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L.J. 1063, 1065 (1980) (arguing that process-perfecting theories merely "banish divisive controversies over substantive values from the realm of constitutional discourse . . . to the unruly world of power").

⁴⁷ See, e.g., Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713, 737-40 (1985) (arguing that it is impossible to identify a group for protection against prejudice without making substantive value choices); Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1092-95 (1981) (same).

⁴⁸ For illustrations of the strengths and limits of internal critiques, see, e.g., Erwin Chemerinsky, *The Supreme Court, 1988 Term—Foreword: The Vanishing Constitution*, 103 HARV. L. REV. 43 (1989) (offering a critical account of the Rehnquist Court's constitutional jurisprudence from within the majoritarian paradigm that the Court professes); Mari J. Matsuda, *Voices of America: Accent, Antidiscrimination Law, and a Jurisprudence for the Last Reconstruction*, 100 YALE L.J. 1329, 1331 (1991) (developing a "dualis[ti]c" account of accent discrimination "from and against the traditions of legal analysis").

hope is that this Article can engage a dialogue about "a different kind of practice" that is supportive of movements for social justice.⁴⁹

I. THE DEMOCRATIC PREMISE OF RATIONALITY REVIEW

Whenever one finds paeans to democracy in *United States Reports*, there is a fair chance that the Court has just dispatched a poor person's claim of constitutional right.⁵⁰ In such cases, the Court might allow that the policies sustained against constitutional attack are neither "wise," "just," nor "humane," and that they may even threaten the physical survival of our most powerless and vulnerable citizens.⁵¹ But judicial noninterference with these

⁴⁹ Ed Sparer, *Fundamental Human Rights, Legal Entitlements, and the Social Struggle: A Friendly Critique of the Critical Legal Studies Movement*, 36 STAN. L. REV. 509, 567-74 (1984) (arguing that law professors should "demonstrate concern and ways of working—doing legal work—that at the very least are helpful to some oppressed human beings"); see Peter B. Edelman, *Mandated Minimum Income, Judge Posner, and the Destruction of the Rule of Law*, 55 ALB. L. REV. 633, 641 (1992) (stressing the need to keep alive arguments in favor of a right to minimum income on the view that "the Supreme Court will not always be composed as it is at the present time"); Howard Lesnick, *Being a Teacher, of Lawyers: Discerning the Theory of My Practice*, 43 HASTINGS L.J. 1095 (1992) (discussing ways in which academic lawyers might engage in productive dialogue with practitioners for the subordinated).

⁵⁰ See, e.g., *Bowen v. Gilliard*, 483 U.S. 587, 596-97 (1987) (rejecting Fifth Amendment challenge to eligibility restrictions on Aid to Families with Dependent Children benefits); *Schweiker v. Wilson*, 450 U.S. 221, 230 (1981) (rejecting equal protection challenge to restrictions on Supplemental Security Income benefits); *Harris v. McRae*, 448 U.S. 297, 326 (1980) (rejecting equal protection challenge to ban on use of medicaid benefits for abortions); *Maher v. Roe*, 432 U.S. 464, 479 (1977) (rejecting equal protection challenge to ban on use of state-funded medical assistance for nontherapeutic abortions). Nearly 40% of all postwar cases that invoke the term "presumption of constitutionality" to uphold legislation involve the Court's denial of a poor person's claim. See *Schweiker v. Hogan*, 457 U.S. 569, 591 (1982); *Schweiker v. Wilson*, 450 U.S. 221, 238 (1981); *Califano v. Aznavorian*, 439 U.S. 170, 175 (1978); *Califano v. Torres*, 435 U.S. 1, 5 (1978); *Mathews v. De Castro*, 429 U.S. 181, 185 (1976); *San Antonio Indep. School Dist. v. Rodriguez*, 411 U.S. 1, 44 (1973); *Flemming v. Nestor*, 363 U.S. 636 (1960).

⁵¹ See, e.g., *DeShaney v. Winnebago County Dep't of Social Servs.*, 489 U.S. 189, 196 (1989) (rejecting substantive due process claim to government aid "even where such aid may be necessary to secure life"); *Gilliard*, 483 U.S. at 596-97 (upholding welfare classification even though it would inflict "tragic" suffering on "needy families"); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 59 (1973) (Stewart, J., concurring) (characterizing Texas system of public school financing as "chaotic and unjust," but upholding its constitutionality); *Dandridge v. Williams*, 397 U.S. 471, 485 (1970) (deferring to welfare regulations that deny "the most basic economic needs of impoverished human beings"); see also *Bean v. Southwestern Waste Mgt. Corp.*, 482 F. Supp. 673, 679-80 (S.D. Tex. 1979), *aff'd*, 782 F.2d 1038 (5th Cir. 1986) (upholding decision to site solid waste facility near a high school attended primarily by poor

unjust and inhumane policies is warranted, we are told, because ours is a democratic system in which authority over such matters properly resides with the people's representatives, not with an unelected judiciary.⁵² For good measure, the Court may conclude by solemnly raising the *Lochner*⁵³ bogey and forswearing any backslide toward the anti-democratic judicial adventurism of that era.⁵⁴

This well-worn script descends from the constitutional paradigm laid down by the New Deal Court in *West Coast Hotel Co. v. Parrish*⁵⁵ and *United States v. Carolene Products Co.*⁵⁶ Through these cases, the Court installed a regime of judicial review that generally accords a strong presumption of constitutionality to the outcomes of democratic political processes, at least in the context of "legislation affecting ordinary commercial transactions" that are said to implicate no preferred or personal rights.⁵⁷ The Burger

African-Americans as rational even though "illogical").

⁵² A recent exposition of this idea appears in a case where the Court upheld the reduction of subsistence benefits to destitute families with young children:

The District Court was undoubtedly correct in its perception that a number of needy families have suffered, and will suffer, as a result of the [challenged statute]. Such suffering is frequently the tragic byproduct of a decision to reduce or to modify benefits to a class of needy recipients. Under our system of government, however, it is the function of Congress—not the courts—to determine whether the savings realized . . . are significant enough to justify the costs to the individuals affected by such reductions. . . . [I]nequities created by such decisions must be remedied by the democratic processes.

Gilliard, 483 U.S. at 596-97.

⁵³ *Lochner v. New York*, 198 U.S. 45, 64 (1905) (invalidating state labor legislation on substantive due process grounds).

⁵⁴ See *Dandridge*, 397 U.S. at 484 (commenting unfavorably on earlier Court practices of invalidating state economic and social regulation, and arguing that the Court should not have the power to strike down legislation that it thinks "unwise, improvident, or out of harmony with a particular school of thought" (quoting *Williamson v. Lee Optical Co.*, 384 U.S. 483, 488 (1955))).

⁵⁵ 300 U.S. 379, 398-400 (1937) (upholding minimum wage legislation).

⁵⁶ 304 U.S. 144, 154 (1938) (upholding constitutionality of federal Filled Milk Act).

⁵⁷ *Carolene Prods.*, 304 U.S. at 152 & n.4 (1938). The general principle that legislation bears a presumption of constitutionality and is entitled to judicial deference has been an abiding feature of American constitutional jurisprudence from the start. See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 143-52 (1893). James Wilson, a delegate to the Constitutional Convention and later a Supreme Court justice, expressed one version of this idea, commenting that under the proposed Constitution, even "dangerous" or "destructive" laws may "yet not be so unconstitutional as to justify the Judges in refusing to give them effect." 2 RECORDS OF THE FEDERAL CONVENTION OF 1789, *supra* note 18, at 73.

and Rehnquist Courts eagerly embraced this noninterventionist principle, extending the presumption of constitutionality from commercial regulation to matters "involv[ing] the most basic economic needs of impoverished human beings" with an absence of analysis that can only be described as breathtaking.⁵⁸

Needless to say, when courts broadly defer to political outcomes involving the most basic needs of impoverished human beings, the consequences may be tragic. Whether by design or default, our political system routinely condemns even infants and children to painful and desperate lives of hunger, homelessness, and disease amidst the greatest wealth and abundance in human history.⁵⁹ These effects of the Court's poverty jurisprudence are sadly apparent. Far less apparent, however, are the benefits of the Court's approach. The rote insistence that any judicial interference with distributional decisions would be undemocratic or antithetical to our system of government⁶⁰ rings hollow in the poverty context.⁶¹ Whatever solace the malnourished child might take if her suffering safeguarded so great an ideal as "democracy," commitment to democratic values can hardly be served by consigning the economically dispossessed to a political system in which they are nonplayers and "perpetual losers."⁶²

If the rationale for denying judicial protection to the poor is deference to democratic process,⁶³ then some fundamental questions demand answers: What quality of political process merits

⁵⁸ *Dandridge*, 397 U.S. at 485; see *infra* text accompanying notes 124-55.

⁵⁹ See *infra* text accompanying notes 164-227.

⁶⁰ See cases collected *supra* notes 50-51.

⁶¹ From the perspective of political or moral theory, one might accept a less "democratic" process in return for substantively "just" outcomes, or unwise outcomes in return for a more "democratic" process, but the Court's poverty jurisprudence does not convincingly fit into either of these models. See Susan Rose-Ackerman, *Judicial Review and the Power of the Purse*, 12 INT'L REV. L. & ECON. 191 (1992) (contending that a "misplaced" trust in the political process consigns "thousands or millions" to "harm[]" caused by democratic decisions); Dworkin, *supra* note 16, at 4 (describing potential aspirations of democracy as "results of the right sort" and governing processes that are fully participatory); *infra* text accompanying notes 124-55; cf. Chemerinsky, *supra* note 48, at 74 (critiquing the Rehnquist Court's nearly indiscriminate deference to majoritarian decisionmaking).

⁶² See Robert M. Cover, *The Origins of Judicial Activism in the Protection of Minorities*, 91 YALE L.J. 1287, 1296 (1982) ("Discrete and insular" minorities are not simply losers in the political arena, they are perpetual losers.).

⁶³ For consideration of the related issue of whether more generalized separation of powers or institutional competence concerns justify near absolute deference to social welfare legislation, see *infra* notes 135 & 235, and 332-40 and accompanying text.

this thoroughgoing solicitude from the Court? What are the implications for constitutional theory and adjudication if that quality is lacking in a particular context? And to what extent does the functional exclusion of the poor deprive the political process of a valid claim to broad judicial deference? If the intensity of judicial review is fundamentally related to the democratic legitimacy of the underlying political process, then a reorientation of the Court's poverty jurisprudence requires no restructuring of the basic theory of constitutional review. Rather, working within the Court's doctrinal framework, it can be argued that a standard of review more protective of poor people is compelled if political marginalization on account of wealth is considered a constitutionally significant departure from democratic norms.⁶⁴

*A. The Relationship Between Judicial Deference and
Democratically Legitimate Politics*

Over the last half century, the Court and a broad array of commentators have acknowledged that the presumption of constitutionality normally accorded legislative decisions presupposes some antecedent quality of political process.⁶⁵ In this sense, judicial deference to political outcomes is contingent—at least at the level of doctrinal construction and justification, if not always in practice—upon some baseline characteristic of the political process that will here be referred to as “democratic legitimacy.” Where the political order deviates from the structural norm, the Court may closely scrutinize governmental decisions for unconstitutionality, and impose a higher burden of justification on the state. Deferential review, the converse would run, is inappropriate when the democratic premise is missing.

One of the clearest statements of the democratic premise idea appears in *Kramer v. Union Free School Dist.*,⁶⁶ where the Court

⁶⁴ *But see* Ackerman, *supra* note 47, at 723, 745-46 (arguing that constitutional protection for politically powerless poor people must await a reorientation and restructuring of current doctrine); *infra* text accompanying notes 288-330.

⁶⁵ *See, e.g.*, ELY, *supra* note 41. Even this basic precept has its critics. The classic argument remains that of Justice Frankfurter that any judicial inquiry into the integrity of political institutions requires selection “among competing theories of political philosophy” and is outside the appropriate scope of judicial competence. *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting). *See generally* ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH* 183-98 (1962) (warning against judicial assessment of political institutions for conformity with democratic principles).

⁶⁶ 395 U.S. 621 (1969). *Kramer* involved a challenge to a New York statute that

justified "close scrutiny"⁶⁷ of a voter-qualification statute on the theory that rationality review presupposes that state political processes are structured fairly:

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based upon an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality.⁶⁸

Kramer is significant because the Court expressly linked the method of judicial review to the integrity of the political process that generated the challenged legislation. The *Kramer* Court did not justify its use of heightened scrutiny simply on the existence of the franchise as a preferred or fundamental right. Rather, the Court looked more generally to the structure of government and to notions of fair, democratic representation.⁶⁹

limited the franchise in school board elections to property owners, renters and parents of children enrolled in the district's public schools.

⁶⁷ *Id.* at 626.

⁶⁸ *Id.* at 628 (footnote omitted). The *Kramer* dissent did not question the soundness of the proposition that rationality review presumes democratically legitimate politics, but disputed whether that democratic baseline had been breached on the facts presented. *Id.* at 639-40 (Stewart, J., joined by Black, J., and Harlan, J., dissenting).

⁶⁹ *Cf. Reynolds v. Sims*, 377 U.S. 533, 561 (1964) ("[S]ince the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized."). The contingency of judicial deference on democratic politics is also implicit in the widely held notion that judicial review gives rise to a "counter-majoritarian difficulty": namely, a tension between the fundamental ideal of democratic, majoritarian rule and the power of nonelected, life-tenured judges to nullify laws that have been duly enacted by the people's representatives. See generally BICKEL, *supra* note 65, at 16-23; ELY, *supra* note 41, 73-104. Regard for this perceived tension implies a deferential form of judicial review, but to the extent that the political process does not fulfill basic democratic criteria, the central rationale for such deference collapses. *Cf. Chemerinsky, supra* note 48, at 74-98 (critiquing "counter-majoritarian difficulty" idea). Moreover, on a view of democracy that looks beyond formal rights, certain enhancements of the relative power of the courts—as the public institution to which the most disenfranchised citizens have the surest (though still inadequate) access—might be regarded as advancing democratic values by mitigating illegitimate disparities in political influence and power. *Cf. Frank I. Michelman, The Supreme Court 1985 Term—Foreword: Traces of Self-Government*, 100 HARV. L. REV. 4, 74 (1986) (constructing a conception of the Supreme Court as "the modeling of active self-government that citizens find practically beyond reach"). But see Paul Brest, *Who Decides?*, 58 S. CAL. L. REV. 661, 664, 670 (1985) (noting that federal judges are "overwhelmingly Anglo, male, well-educated and upper or upper

The constitutional theorem articulated in *Kramer* springs from deep wells. At bottom, the contingency of rationality review on the integrity of the political process ("fair representation of all the people") expresses the convergence of two foundational tenets: first, that all just powers of the state derive from the consent of the governed;⁷⁰ and second, that the judiciary's essential duty is to function as the "intermediate body between the people and the legislature" that guarantees "just," constitutional government.⁷¹

A crude form of this theorem entered constitutional doctrine through early federalism decisions beginning with *McCulloch v. Maryland*.⁷² These cases postulated that democratic decision-making merits judicial trust because it provides structural security against official abuse; but by the same token, no judicial confidence is warranted where political outcomes disadvantage excluded or unrepresented interests.⁷³ In the latter situation, a more vigorous judicial role is warranted because the check provided by political accountability does not operate.⁷⁴ The modern federalism cases share this analytical framework. On the assumption that Congress

middle class," and arguing that the net effect of judicial review "is to systematically exclude citizens and their representatives from some of the most fundamental decisions of the polity").

⁷⁰ See THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776); Board of Educ. v. Barnette, 319 U.S. 624, 655 (1943) (Frankfurter, J., dissenting) (positing as a foundational principle that the legitimacy of government rests upon "the consent that comes from sharing in the process of making and unmaking laws"); JOHN LOCKE, THE SECOND TREATISE OF GOVERNMENT AND A LETTER CONCERNING TOLERATION 49 (J.W. Gough ed., Basil Blackwell 1976) (1690); ALEXANDER MEIKLEJOHN, POLITICAL FREEDOM 15 (1965) ("[I]f the Declaration of Independence means what it says, if we mean what it says, then no man is called upon to obey a law unless he himself, equally with his fellows, has shared in making it.").

⁷¹ THE FEDERALIST NO. 78, at 467 (Alexander Hamilton), (Clinton Rossiter ed., 1961).

⁷² 17 U.S. (4 Wheat.) 316, 435-36 (1819) (invalidating a state law that imposed special tax burdens on a nationally chartered bank); see Louis Lusky, *Footnote Redux: A Carolene Products Reminiscence*, 82 COLUM. L. REV. 1093, 1104 (1982) (tracing the intellectual lineage of *Carolene* footnote four, paragraph 3, to Chief Justice Marshall's opinion in *McCulloch*).

⁷³ See *McCulloch*, 17 U.S. at 435-36; see also Thomas K. Auson & P. M. Schekkan, *Federalism, the Dormant Commerce Clause, and State-Owned Resources*, 59 TEX. L. REV. 71, 79 (1980) (setting forth a structural explanation for the Supreme Court's authority to review state legislation).

⁷⁴ For a critique of *McCulloch*'s theory, see MARK TUSHNET, RED, WHITE AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 72-83 (1988) (arguing that the *McCulloch* theory is both underinclusive and overinclusive because even formally represented groups may be politically powerless in fact, while groups without formal representation (e.g., large corporations) may nevertheless exercise quite substantial influence over political decisionmaking).

adequately represents state interests, the Court accords federal legislation a strong presumption of constitutionality against claims that state sovereignty has been encroached.⁷⁵ Only if a state can demonstrate a democratic failure that leaves it "politically isolated and powerless" will the Court entertain an activist role in enforcing the allocation of state-federal power against the national government.⁷⁶ Conversely, the Court has assumed a strongly interventionist posture in policing the allocation of governmental powers against the states on the theory that state legislative processes are inherently less inclusive than their federal counterparts and so are unable to safeguard the interests of political outsiders.⁷⁷ However

⁷⁵ See *South Carolina v. Baker*, 485 U.S. 505, 513 (1988) (holding that states must look to the national political process, not the federal courts, for protection against federal overreaching, unless that process leaves a state "politically isolated and powerless"). The Court has allowed Congress an exceedingly wide berth within which to define its own affirmative powers and has generally declined to review federal legislation for inconsistency with the Tenth Amendment. See *id.* at 523. But see *New York v. United States*, 112 S. Ct. 2408, 2428-29 (1992) (holding that federal law requiring states to accept ownership of radioactive waste exceeded Congress' affirmative constitutional authority). See generally Robert F. Nagel, *Federalism as a Fundamental Value: National League of Cities in Perspective*, 1981 SUP. CT. REV. 81 (arguing that the Court's Commerce Clause analysis in *National League of Cities* reflected a concern that the states' "influence on the national political process [be preserved as] a major protection for state sovereignty"); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 HARV. L. REV. 1065, 1069-70 (1977) (criticizing the Court's federalism jurisprudence).

⁷⁶ *South Carolina*, 485 U.S. at 513; see also *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 550-52 (holding that states must look to the political process, not the federal courts, for protection of their rights and interests); cf. Martha A. Field, Comment, *Garcia v. San Antonio Metropolitan Transit Authority: The Demise of a Misguided Doctrine*, 99 HARV. L. REV. 84, 106-10 (1985) (discussing the idea that the national political process adequately represents state interests). But see *New York v. United States*, 112 S. Ct. at 2408 (reviving the theory that the Court should safeguard a core sphere of state sovereignty against national incursion, even when state interests are fully represented and accounted for in the national political process). The concept of democratic failure expressed in the contemporary federalism cases as "political[] isolat[i]on and powerless[ness]," *Baker*, 485 U.S. at 513, reflects the structural concerns that have been expressed in the Court's equal protection doctrine. See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973) (stating that the Court has a special duty to groups "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process").

⁷⁷ The Court's main doctrinal tool has been the Commerce Clause in its "negative" or "dormant" aspect. See U.S. CONST. art. I, § 8 (assigning to Congress the power "[t]o regulate Commerce . . . among the several States"). See generally Julian N. Eule, *Laying the Dormant Commerce Clause to Rest*, 91 YALE L.J. 425, 435 (1982); Robert A. Sedler, *The Negative Commerce Clause as a Restriction on State Regulation and Taxation: An Analysis in Terms of Constitutional Structure*, 31 WAYNE L. REV. 885, 894

one assesses the model of politics assumed by these federalism cases,⁷⁸ the pertinent observation is that the Court has grounded important areas of constitutional doctrine on the principle that the intensity of judicial review should vary inversely with the integrity of the underlying political process.⁷⁹

A cognate of this democratic theorem became a fundamental mediating principle of modern constitutional law as a result of the Court's renowned *Carolene Products* decision.⁸⁰ *Carolene's* point of

(1985); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125, 165. The earliest modern case to deploy the Commerce Clause on a theory of fair representation is *South Carolina State Highway Dep't v. Barnwell Bros.*, 303 U.S. 177 (1938). In *Barnwell*, the Court stated:

[u]nderlying the stated rule has been the thought, often expressed in judicial opinion, that when the regulation is of such a character that its burden falls principally on those without the state, legislative action is not likely to be subjected to those political restraints which are normally exerted on legislation where it affects adversely some interests within the state.

Id. at 184 n.2. See also *Southern Pacific Co. v. Arizona ex rel. Sullivan*, 325 U.S. 761, 767 (1945). A similar theme is present in the Court's privileges and immunities doctrine. See U.S. CONST. art. IV, § 2 ("The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States."); see also *Austin v. New Hampshire*, 420 U.S. 656, 662 (1975) ("[S]ince nonresidents are not represented in the taxing State's legislative halls . . . [the Court should not acquiesce] in taxation schemes that burden them particularly"). See generally Gary J. Simson, *Discrimination Against Nonresidents and the Privileges and Immunities Clause of Article IV*, 128 U. PA. L. REV. 379, 384-85 (1979) (contending that laws disadvantaging nonresidents conflict with "the framers' deep commitment to representative government" and arguing that "in placing constraints on states' freedom to discriminate against nonresidents [through the Privileges and Immunities Clause of Article IV], the framers were moved in part by democratic ideals").

⁷⁸ See, e.g., Tushnet, *supra* note 74, at 72-83 (contending that the process-based approach taken by the Court in federalism cases rests upon simplistic and inaccurate assumptions about the way American politics operate).

⁷⁹ See *TRIBE*, *supra* note 41, at 411 (describing the dormant Commerce Clause doctrine as resting upon the twin premises that "unaccountable power is to be carefully scrutinized and that legislators are accountable only to those who have the power to vote them out of office.").

⁸⁰ *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). See generally Ackerman, *supra* note 47, at 713-17 (noting that *Carolene's* democracy-centered theory of judicial review occupies a key position in modern constitutional doctrine); Lea Brilmayer, *Carolene, Conflicts, and the Fate of the Insider-Outsider*, 134 U. PA. L. REV. 1291, 1291-98 (1986) (same). Footnote four of the *Carolene* decision states:

There may be narrower scope for operation of the presumption of constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution

It is unnecessary to consider now whether legislation which restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation, is to be subjected to more exacting judicial scrutiny under the general prohibitions of the Fourteenth Amendment than

departure was the nascent post-*Lochner* ideology of judicial faith in and deference to democratic decisionmaking.⁸¹ The generative aspect of *Carolene*, though, was its intimation that this new judicial faith would not be a blind faith; that judicial deference was justified by, and so might be conditioned upon, some quality of public-regarding politics, the outlines of which the Court only began to sketch.⁸² As a "starting point for debate,"⁸³ the *Carolene* Court proposed what have become two broad and familiar categories of political failure that might negate, or at least undermine, the usual presumption of constitutionality. First, "legislation . . . restrict[ing] political processes"⁸⁴—broadly conceived to include the franchise, the free communication of ideas, and concerted political activities—could trigger heightened review. Second, and more daringly, the *functional* marginalization of certain out-groups—so-called "discrete and insular minorities"⁸⁵—might warrant judicial adjustment or negation of majoritarian outcomes, even absent any formal restriction on political participation.⁸⁶

Carolene thus extended the democratic premise beyond the federalism context and laid the groundwork for its elaboration in

are most other types of legislation . . .

Nor need we enquire whether similar considerations enter into the review of statutes directed at particular religious, . . . or national, . . . or racial minorities . . . whether 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 more searching judicial inquiry.

Carolene Prods., 304 U.S. at 152 n.4.

⁸¹ See, e.g., J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275, 283 (1989) (discussing judicial deference to majoritarian outcomes and the *Carolene* footnote).

⁸² See, e.g., Lusky, *supra* note 20, at 108-09 (asserting that footnote four of *Carolene* was designed to advance "two national objectives—government by the people, and government for the whole people—and focus attention on the Court's special ability to effectuate them"); Cover, *supra* note 62, at 1291-92 (reading *Carolene* as accepting the "counter-majoritarian difficulty," but being consonant with it by looking to the integrity of the political process as determining the degree of judicial review).

⁸³ Lusky, *supra* note 72, at 1098.

⁸⁴ *Carolene Prods.*, 304 U.S. at 152 n.4.

⁸⁵ *Id.* at 153 n.4.

⁸⁶ See Lusky, *supra* note 72, at app. (letter from Justice Stone to the Chief Justice (April 19, 1938)). Paragraph one of the *Carolene* footnote suggests that the Constitution places textually committed rights beyond the reach of political majorities, making inappropriate the presumption of constitutionality. Paragraphs two and three suggest, on an altogether different theory, that certain species of democratic failure might dissolve the premise for judicial deference and justify more searching review by the Court.

other areas of constitutional doctrine. After a period of dormancy, *Carolene's* intellectual framework became an influential dynamic in judicial theory.⁸⁷ It is widely viewed as the progenitor of the Court's political rights jurisprudence,⁸⁸ and it has spawned a major branch of equal protection doctrine.⁸⁹ The theme that unifies these two strains of doctrine is the Court's implicit identification of political malfunction as a warrant for rigorous judicial scrutiny. In this sense, the Court intervenes on behalf of disempowered majorities in legislative districting cases for the same reason that it professes to protect politically powerless minorities in the equal protection context. The *Kramer* Court neatly expressed this synthesis of *Carolene's* two process-regarding branches with the precept that deferential, rationality review presupposes an inclusive and democratic politics.⁹⁰

B. *The Court's Elaboration of the Democratic Norm*

The critical question for the poor, therefore, is how the Court determines whether the requisite quality of political process—what this Article calls “democratic legitimacy”—is present in any particular case. The Court has never articulated a comprehensive theory of democratic governance. The Court has also never made explicit the value commitments that it believes are embedded in the democratic

⁸⁷ See, e.g., Lusky, *supra* note 20, at 108-14, 312-14 (describing the *Carolene* footnote's influence on modern constitutional doctrine); John E. Nowak, *Foreword: Evaluating the Work of the New Libertarian Supreme Court*, 7 HASTINGS CONST. L. Q. 263, 272-73 (1980) (discussing the lasting influence of the *Carolene* framework on constitutional theory); Lewis F. Powell, Jr., *Carolene Products Revisited*, 82 COLUM. L. REV. 1087, 1087 (1982) (characterizing *Carolene's* footnote four as the “most celebrated footnote in constitutional law”).

⁸⁸ See, e.g., TRIBE, *supra* note 41, at 582, 1452-54 (stating that *Carolene's* “famous footnote 4 would later support increased judicial intervention in non-economic affairs,” and tracing the Court's political rights cases to *Carolene's* political process approach to judicial review).

⁸⁹ See, e.g., GERALD GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 474 (11th ed. 1985) (referring to the “pervasive influence” of footnote four on equal protection doctrine); Powell, *supra* note 87, at 1088 (stating that the *Carolene* footnote “now is recognized as a primary source of ‘strict scrutiny’ judicial review”).

⁹⁰ See *Kramer v. Union Free Sch. Dist.*, 395 U.S. 621 (1969). The interrelationship between the intensity of judicial review and the integrity of political processes admittedly presents far more subtle and more intricate issues than the foregoing survey allows. Moreover, any suggestion that the Court claims constitutional authority to adjust legislative outcomes whenever the underlying process strikes it as imperfect would be vastly overstated. The point here is simply that the Court has, in a variety of doctrinal contexts, suggested that judicial deference presupposes some baseline integrity or trustworthiness in the underlying political process.

norm. Commentators elsewhere have elaborated on the "conceptions of democracy" that abound in the Court's work, although many are only implicit and relatively unrefined.⁹¹

Perhaps the most direct and sustained exposition of the Court's understanding of democracy appears in the political rights cases decided by the Warren and Burger Courts. These cases attacked a broad range of exclusionary and inegalitarian political practices, striking down poll taxes,⁹² durational residence requirements,⁹³ and other franchise restrictions;⁹⁴ voiding limitations on ballot access;⁹⁵ and invalidating congressional and state legislative districting schemes that deviated from the Court's newly minted one-person, one-vote principle.⁹⁶

The constitutional warrant for this judicial restructuring of political processes was said to be the equal protection guarantee of the Fourteenth Amendment and the Article I, Section 2 command that federal representatives be chosen "by the people." But the absence of a purely textual anchor for the Court's holdings was palpable.⁹⁷ Indeed, the Court candidly admitted that extratextual

⁹¹ See, e.g., Frank I. Michelman, *Conceptions of Democracy in American Constitutional Argument: Voting Rights*, 41 FLA. L. REV. 443 (1989) (elaborating on the conceptions of democracy that are "latent" in the voting rights cases).

⁹² See *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 670 (1966) (invalidating a state poll tax of \$1.50).

⁹³ See *Dunn v. Blumstein*, 405 U.S. 330, 360 (1972) (invalidating a one-year residence requirement for voting in general elections).

⁹⁴ See, e.g., *City of Phoenix v. Kolodziejski*, 399 U.S. 204, 213 (1970) (invalidating a restriction of the franchise to property owners in referenda on proposed issuance of general obligation bonds); *Kramer*, 395 U.S. at 633 (invalidating a restriction of the franchise in school board elections to property owners, renters, and parents of school children); *Cipriano v. City of Houma*, 395 U.S. 701, 701 (1969) (invalidating a restriction of the franchise to property owners in referenda on proposed issuance of public bonds for local improvements); *Carrington v. Rash*, 380 U.S. 89, 96 (1965) (invalidating a denial of the franchise to members of armed forces).

⁹⁵ See *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (invalidating a filing fee requirement that effectively denied ballot access to indigent candidates); *Bullock v. Carter*, 405 U.S. 134, 149 (1972) (same).

⁹⁶ See *White v. Weiser*, 412 U.S. 783 (1973); *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969); *Swann v. Adams*, 385 U.S. 440 (1967); *Lucas v. Forty-Fourth Colorado Gen. Assembly*, 377 U.S. 713 (1964); *Maryland Comm. for Fair Representation v. Tawes*, 377 U.S. 656 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964); *Wesberry v. Sanders*, 376 U.S. 1 (1964).

⁹⁷ The Court nominally relied on the Fourteenth Amendment to invalidate franchise restrictions, ballot access requirements, and unequal districting of state legislative seats, see, e.g., *Reynolds*, 377 U.S. at 566-67, and on art. I, § 2 to strike down population disparities between a state's congressional districts, see, e.g., *Wesberry*, 376 U.S. at 7-8. Whatever the doctrinal difference between these two strands of the political rights cases, commentators have noted that they share certain

values informed its interpretation,⁹⁸ and it openly drew upon a substantive vision of democracy that declared "[t]he conception of political equality from the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments" to be a "fundamental principle of representative government."⁹⁹

In *Harper v. Virginia Board of Elections*,¹⁰⁰ for example, the Court held that the Equal Protection Clause prohibits states from conditioning the franchise on a citizen's payment of a poll tax. The Court seemed to apply some form of close scrutiny to invalidate the poll tax, but even under rationality review such a tax could not survive the Court's central conclusion: "wealth or fee paying has . . . no relation to voting qualifications."¹⁰¹ That conclusion, of course, is not empirical, but normative, and reflects external value judgments about the nature and goals of democratic government.¹⁰² The Fourteenth Amendment may have provided the analytical framework, but its bare text does not disclose whether concentrating public authority in affluent citizens or discouraging political participation by impecunious ones constitutes a "legiti-

thematic approaches, namely, the fundamental principle of representative government and equal representation for equal numbers. See generally Gerhard Casper, *Apportionment and the Right to Vote: Standards of Judicial Scrutiny*, 1973 SUP. CT. REV. 1, 6-32 (tracing the Court's approach in apportionment cases).

⁹⁸ See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966) ("Notions of what constitutes equal treatment for purposes of the Equal Protection Clause *do change*").

⁹⁹ *Reynolds*, 377 U.S. at 533, 558, 560. The Court suggested, not without basis, that its conception of democracy paralleled the constitutional evolution toward universal suffrage and a more inclusionary politics. See U.S. CONST. amend. XV (extending franchise to males regardless of race); *id.* amend. XVII (mandating popular election of Senate); *id.* amend. XIX (extending franchise to women); *id.* amend. XXIII (extending franchise in presidential elections to residents of the District of Columbia); *id.* amend. XXIV (prohibiting poll taxes in federal elections); *id.* amend. XXI (extending franchise to 18-year-olds).

¹⁰⁰ 383 U.S. 663 (1966).

¹⁰¹ *Id.* at 670.

¹⁰² On this basis, Justice Harlan objected in his *Harper* dissent that the political rights decisions were more a product of the Court's "egalitarian notions of how a modern democracy should be organized," than of the Constitution's text, and suggested that equally respectable conceptions of democracy could allow for wealth-based hierarchy in the distribution of political power. *Harper*, 383 U.S. at 686 (Harlan, J., dissenting); see also *Kirkpatrick v. Preisler*, 394 U.S. 526, 549 (1959) (Harlan, J., dissenting). Indeed, as Frank Michelman has noted, prior to the political rights cases of the 1960s, the Court had left states at liberty to choose "virtual representation" over equal representation as a model of government. Michelman, *supra* note 91, at 453.

mate" (or "substantial" or "compelling") state interest, or is "rationally related" to (or necessary to achieve) some other, concededly proper, governmental end. Justice Frankfurter had it right when he predicted that judicial definition and enforcement of political rights would ultimately require the Court to choose "among competing . . . theories of political philosophy."¹⁰³

The salient point here is that the political rights cases went beyond mechanical enforcement of specific and disconnected constitutional commands and elaborated a conception of democracy grounded in principles of "political equality" and "fair representation." The Court offered little explication of these open-ended phrases that it claimed to enforce against majoritarian preference.¹⁰⁴ But it consistently invoked a vocabulary of egalitarian ideals that sought to disperse power and influence among political actors standing on a level playing field. "To say that a vote is worth more in one district than in another," the Court declared in *Wesberry v. Sanders*, would "run counter to our fundamental ideas of democratic government."¹⁰⁵ And in *Reynolds v. Sims*, the Court proclaimed that "each and every citizen has an inalienable right to full and effective participation in the political processes" because "representative government is in essence self-government."¹⁰⁶

The conception of democracy animating in these cases falls short of a fully developed theory. But the Court's core normative conclusion is unmistakable: democracy entails some irreducible quantum of political equality.¹⁰⁷ While the Court never fully articulated the content of that term, it acted on the assumption that the political order, to be structured fairly, needed to allow "we the people"¹⁰⁸ an equal chance both to participate in the processes

¹⁰³ *Baker v. Carr*, 369 U.S. 186, 300 (1962) (Frankfurter, J., dissenting).

¹⁰⁴ Cf. Casper, *supra* note 97, at 22-23 (questioning whether fair representation means "descriptive representation ('an exact portrait, in miniature, of the people at large') or . . . a concept of 'acting for,' rather than 'standing for.'" (quoting HANNA F. PITKIN, *THE CONCEPT OF REPRESENTATION* 60 (1962))).

¹⁰⁵ *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964).

¹⁰⁶ *Reynolds v. Sims*, 377 U.S. 533, 566 (1964).

¹⁰⁷ The egalitarian conception of democracy found in the voting rights cases resonates with the democratic governance value that has been associated with the First Amendment and is most closely identified with the thinking of Alexander Meiklejohn. See ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 24 (1965) (describing the democratic order as a town meeting in which people "meet as political equals"). But see C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 151-60 (1989) (contending that the equality principle of the First Amendment embraces broader notions of political and expressive rights than those associated with the electoral model).

¹⁰⁸ *Reynolds*, 377 U.S. at 558 (quoting *Gray v. Sanders*, 372 U.S. 368, 379-80

of self-government and to influence the political market of ideas.¹⁰⁹

Significantly, the Court made clear that the political order could not constitutionally disable or exclude citizens because of a lack of wealth.¹¹⁰ The idea that wealth ought not be an influential determinant of political power emerged in the early legislative districting cases. In *Reynolds v. Sims*, for instance, the Court deemed "fundamental" the principle of "equal representation for equal numbers of people, without regard to race, sex, economic status, or place of residence within a State."¹¹¹ The view that the Court should intervene to prevent or correct the wealth-based distributions of public power appeared as well in other apportionment and legislative districting cases.¹¹²

The same normative judgment animated the Court's condemnation of poll taxes, property qualifications for the franchise, and ballot access fees.¹¹³ In *Harper*, the Court reasoned that state poll taxes violated equal protection because "[t]he principle that denies the State the right to dilute a citizen's vote on account of his economic status . . . by analogy bars a system which excludes those unable to pay a fee to vote."¹¹⁴ Further, in *Bullock v. Carter*, the Court voided statutory fee requirements for ballot access because such statutes discriminate against candidates "lacking both personal wealth and affluent backers," create a "disparity in voting power based on wealth," and skew political influence in favor of the rich

(1963)).

¹⁰⁹ See DAHL, *supra* note 17, at 325 ("In the democratic vision, opportunities to exercise power over the state, or more concretely over the decisions of the government of the state, are, or at any rate ought to be, distributed equally among all citizens. That citizens ought to be political equals is . . . a crucial axiom in the moral perspective of democracy."); see also Peter Bachrach, *Interest, Participation, and Democratic Theory*, in NOMOS XVI: PARTICIPATION IN POLITICS 39, 41 (J. Roland Pennock & John W. Chapman eds., 1975) ("Democratic participation . . . is a process in which persons formulate, discuss, and decide public issues that are important to them and directly affect their lives.").

¹¹⁰ On this view, wealth is irrelevant to the distribution of power because it is outside the political order and external to concerns about self-governance. Compare Dworkin, *supra* note 16, at 12-17 (discussing the role that wealth ought to play in the distribution of power in a democracy) with HANNAH ARENDT, *THE HUMAN CONDITION* 31 (1958) (stating that in ancient Greece the slaves could not be members of the *polis* because they lacked the necessities of life).

¹¹¹ 377 U.S. 533, 560-61 (1964).

¹¹² See, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964); *Gray v. Sanders*, 372 U.S. 368, 374-75 (1963).

¹¹³ See *supra* notes 92-95 and accompanying text.

¹¹⁴ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

at the expense of the poor.¹¹⁵ The Court stated: "[W]e would ignore reality were we not to recognize that this system falls with unequal weight on voters, as well as candidates, according to their economic status."¹¹⁶

The essential theme of the political rights cases is that political inequalities attributable to disparities in wealth, like other "irrelevant" factors, are inconsistent with fundamental principles of representative government. On this view, the fencing out of a minority on the basis of economic status ought to be considered democratically illegitimate and at odds with the concept of fair representation. Indeed, the Court found such departures from its conception of democracy sufficiently severe to warrant not only close scrutiny, but also a vigorous and controversial judicial reordering of state political processes, a realm previously thought to be cloaked by legislative prerogative.

The doctrinal stage was thus set for according greater judicial protection for the poor. The Warren Court had begun to speak generally of poverty as a "suspect" classification,¹¹⁷ one that is "traditionally disfavored" in our democracy.¹¹⁸ Perhaps more importantly, the basic insight that the poor suffer structural exclusion from the political order in a way that is incompatible with democratic self-government had appeared in a variety of contexts.¹¹⁹ And the basic empirical point that wealth is a potent

¹¹⁵ *Bullock v. Carter*, 405 U.S. 134, 143-44 (1972).

¹¹⁶ *Id.* at 144.

¹¹⁷ See, e.g., *McDonald v. Board of Election Comm'rs of Chicago*, 394 U.S. 802, 807 (1969) (dictum) ("[A] careful examination on our part is especially warranted where lines are drawn on the basis of wealth . . . which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny.").

¹¹⁸ *Harper*, 383 U.S. at 668 ("Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored.").

¹¹⁹ See, e.g., *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970) (finding that the poor lack access to "opportunities that are available to others to participate meaningfully in the life of the community"); *Douglas v. California*, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting) (stating that "[t]he States, of course, are prohibited by the Equal Protection Clause from discriminating between 'rich' and 'poor' as such in the formulation and application of their laws"); *Kovacs v. Cooper*, 336 U.S. 77, 102 (1949) (Black, J., dissenting) (stating that the poor "do not have enough money to own or control publishing plants, newspapers, radios, moving picture studios, or chains of show places"); *Edwards v. California*, 314 U.S. 160, 184 (1941) (Jackson, J., concurring) (declaring that "[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").

determinant of political power held widespread consensus among social commentators.¹²⁰

II. RATIONALITY REVIEW AND THE COURT'S TREATMENT OF THE POOR

By the early 1970s, then, the Court possessed the analytical tools to fashion, without great leaps of theory, a jurisprudence that would have offered the poor some modicum of protection from majoritarian political processes. Orthodox constitutional theory recognized the contingency of deferential judicial review on the democratic legitimacy of the political process. And the political rights cases set forth an egalitarian conception of democracy that could not easily be reconciled with wealth-based disparities of political access, influence, or representation. Arranging these propositions into a simple syllogism yields the conclusion that the "democratic premise" of rationality review does not obtain where unresourced citizens are politically marginalized:

- (i) Courts need not defer to political outcomes where the "democratic legitimacy" of the underlying political process has been called into question;
- (ii) Significant wealth-based inequalities of political access, influence, or representation seriously undermine the "democratic legitimacy" of a political process;
- (iii) Courts need not defer to political outcomes traceable to significant wealth-based inequalities of political access, influence, or representation.

¹²⁰ See, e.g., DAHL, *supra* note 17, at 114-15 (noting the "familiar fact" that political power is a function of access to money and related resources that are unequally distributed); ANTHONY DOWNS, *AN ECONOMIC THEORY OF DEMOCRACY* 200-01 (1957) (observing that "voters with the highest incomes [normally] have the most political power" and that this phenomenon creates a "counterforce" to the "natural 'Robin Hood'" tendency of a democratic government" and encourages "rational government" to "redistribute income from the poor to the rich"); PHILLIPS, *supra* note 15, at xvii (noting that "money politics" is evolving as the political theme for the 1990s); Beitz, *supra* note 16, at 138 (noting correlation between private wealth and public power in the American political system). Compare RALPH K. WINTER, JR., *CAMPAIGN FINANCING AND POLITICAL FREEDOM* 27 (1973) (recognizing the plutocratic vices of American politics, but asserting that a cure would be worse than the disease) with MICHAEL HARRINGTON, *THE OTHER AMERICA: POVERTY IN THE UNITED STATES* 13-17 (1962) (condemning the domination of wealth in the political sphere).

As a matter of doctrine, the precondition for deferential judicial review should have been found lacking in poverty cases because low-income citizens are politically marginalized on account of their economic station. The poor deserve judicial protection not because they are "outvoted," but rather because they find themselves "denied access to the political system" for a democratically illegitimate reason.¹²¹ The case law reviewed in Part I strongly suggested that political outcomes do not merit the judicial trust that rationality review encompasses when they significantly disadvantage a group marginalized because of poverty.

The Court's actual poverty discourse, however, broke sharply with this doctrinal trend. The Burger Court declined even to address the idea that poor people might comprise a politically powerless group undemocratically denied a fair share of influence in the processes of public decisionmaking. Instead the Court summarily consigned the constitutional claims of the poor to the feeblest form of rationality review. Under this regime, the Court mechanically attaches the usual presumption of constitutionality to classifications that affect the poor, without inquiring into the democratic legitimacy of the underlying process. Rather, and ironically, the Court periodically warns that any judicial intrusion into allocative decisions, expressive as they are of majoritarian preference, would harm the foundations of democracy itself.¹²²

A. *An Analysis of the Court's Poverty Jurisprudence*

The rise and demise of poverty law have been critically reviewed elsewhere.¹²³ It is useful, however, to revisit two of the landmark cases to examine the quality of argument that the Court offered to justify its rejection of heightened scrutiny. The key inquiry here is whether the Court jettisoned the doctrinal framework that linked

¹²¹ *Whitcomb v. Chavis*, 403 U.S. 124, 154-55 (1971).

¹²² See *supra* notes 50-58 and accompanying text; cf. W.H. AUDEN, *Shorts*, in COLLECTED POEMS 231, 233 (Edward Mendelson ed., 1976) ("Base words are uttered only by the base/And can for such at once be understood,/But noble platitudes:-ah, there's a case/Where the most careful scrutiny is needed . . .").

¹²³ See, e.g., TRIBE, *supra* note 41, at 1627-72 (analyzing the evolution of the Supreme Court's poverty jurisprudence and the "decline of judicial intervention on behalf of the poor"); Robert W. Bennett, *The Burger Court and the Poor*, in THE BURGER COURT: THE COUNTER-REVOLUTION THAT WASN'T 46-52 (Vincent Blasi ed., 1983) (same). For an optimistic reading of the cases, see Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 WASH. U. L.Q. 659, 663 ("[A] thinly fictionalized report" of Supreme Court cases from 1969 to 1974).

deferential review to democratic legitimacy, or instead, determined that deference was warranted because it regarded the political status of the poor in America as untroubling. In fact, the Court did neither. At no point has the Court ever considered whether the disempowerment of the poor deprives certain political outcomes of their basic democratic integrity. The poverty cases are thus remarkable less for the questions the Court answers than for the issues it declines to address.

Typical of the Court's approach is *Dandridge v. Williams*,¹²⁴ which announced by mere ipse dixit that laws affecting social welfare issues would henceforth receive the extreme deference accorded commercial classifications. *Dandridge* involved a Maryland public assistance regulation that capped the amount of aid that an eligible family could receive to the benefit payment for a family of five.¹²⁵ The regulation responded in punitive fashion to the abiding myth that welfare mothers bear children casually in order to draw state support.¹²⁶ As a result of the regulation, families with more than four children received assistance that by any economic measure relegated them to less than a subsistence level. In effect, the youngest children of large families received no assistance at all.

The state initially attempted to justify the regulation as a "legitimate way of allocating the State's limited resources available

¹²⁴ 397 U.S. 471 (1970).

¹²⁵ Benefits were provided under the Aid to Families with Dependent Children (AFDC) program, see 42 U.S.C. §§ 601-17 (1988), a program of cooperative federalism in which the federal government reimburses participating states for costs associated with the provision of cash assistance and services to eligible applicants. The statute mandated that aid "shall be furnished with reasonable promptness to all eligible individuals." *Dandridge*, 397 U.S. at 480 (citing 42 U.S.C. § 602(a)(10) (1964 & Supp.IV) (current version at 42 U.S.C. § 602(a)(10)(A) (1988)). In the determination of aid levels, the AFDC program grants the states broad authority to calculate a "standard of need" that defines basic subsistence costs, and to fix benefit levels as a percentage of that standard. See *Rosado v. Wyman*, 397 U.S. 397, 419 (1970) (description of state authority to determine standard of need under the AFDC statute). At the time *Dandridge* was decided, a majority of the states paid less than their standards of need. See *Dandridge*, 397 U.S. at 481 n.13 (citing a 1967 HEW Report). A benefit cap such as Maryland's forced payment levels for larger families even farther below the minimum needed for subsistence.

¹²⁶ But cf. COBBETT'S PARLIAMENTARY DEBATES 32:709-10 (Feb. 12, 1796) (quoting William Pitt), quoted in GERTRUDE HIMMELFARB, *THE IDEA OF POVERTY: ENGLAND IN THE EARLY INDUSTRIAL AGE* 74 (1983) (arguing that England should "make relief in cases where there are a number of children, a matter of right and an honour, instead of a ground for opprobrium and contempt. This will make a large family a blessing, and not a curse").

for AFDC assistance.”¹²⁷ Precedent made clear, however, that “[t]he saving of welfare costs cannot justify an otherwise invidious classification,”¹²⁸ and the district court rejected the state’s explanation on a rationality standard. Indeed, the United States in analogous litigation had disapproved the maximum grant practice as “‘arbitrary,’ oppressive of large families, as resulting in ‘patently different treatment of individuals,’ and having received, at least inferentially, the disfavor of Congress.”¹²⁹ In post-trial proceedings, the state shifted ground and attempted to justify the benefit cap as an employment incentive.¹³⁰

Upholding the regulation against both statutory and constitutional challenge, the Court delivered a sweeping decision on the standard to be applied in cases affecting the poor. The Court allowed that the administration of social welfare programs raises “dramatically real factual difference[s]” from “state regulation of business or industry,” since they involve “the most basic economic needs of impoverished human beings.”¹³¹ But those differences were of no constitutional distinction: the Court could “find no basis for applying a different constitutional standard” to the claims of the poor than to those of optometrists who assert that an economic classification is “imperfect.”¹³² The Court’s reasoning was succinct: the regulation raised no interest that warranted close scrutiny. First, it implicated no enumerated right under the Bill of Rights, and second, it did not involve racial discrimination. For good measure, the *Dandridge* Court invoked the specter of *Lochner*:

For this Court to approve the invalidation of state economic or social regulation . . . would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to

¹²⁷ *Dandridge*, 397 U.S. at 523 (Marshall, J., dissenting) (quoting the State’s Motion to Dismiss).

¹²⁸ *Id.* at 524 (quoting *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969)).

¹²⁹ *Id.* at 515 n.8 (quoting various briefs submitted in analogous litigation). In *Rosado*, 397 U.S. at 422-23, decided the same day as *Dandridge*, the Court stated that the view of the United States should be sought in cases involving administration of the AFDC program, but the *Dandridge* Court declined to follow this procedure. See *Dandridge*, 397 U.S. at 515 (Marshall, J., dissenting) (stating that HEW was not invited to submit a brief on the propriety of maximum-grant practice).

¹³⁰ *Id.* at 524 (Marshall, J., dissenting) (noting the majority’s acceptance of the state’s arguments that the “imposition of the maximum serves as an incentive for welfare recipients to find and maintain employment”).

¹³¹ *Id.* at 485.

¹³² *Id.*; see *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 491 (1955) (upholding law restricting the practice of optometry).

strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought."¹³³

The Court did not pause to consider whether the poor are a politically subordinated out-group that might require special judicial protection. The *Dandridge* Court simply ignored this doctrinal inquiry, assuming instead that the poor were political "insiders"¹³⁴ who could properly be bound by majoritarian preference. On this basis, the Court applied a rationality test so extreme that deference would be given to any conceivable relationship between any imaginable state policy and the challenged classification.¹³⁵

¹³³ *Dandridge*, 397 U.S. at 484 (quoting *Williamson*, 348 U.S. at 488).

¹³⁴ See Brilmayer, *supra* note 80, at 1293 (defining the "insider-outsider" as someone "who is subject to the state's power and yet, at the same time, is excluded from the community to an extent that makes discriminatory treatment suspect"). The irony of extending the deferential approach of *Carolene Products* and *West Coast Hotel* to reject the constitutional claims of impoverished children, who are thoroughly lacking in democratic voice, was nowhere apparent in the *Dandridge* decision. See *West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399 (1937) (rejecting the *Lochner* paradigm and upholding a minimum wage law for women, in part on the ground that the unregulated labor market provided "a subsidy for unconscionable employers"); see also TRIBE, *supra* note 41, at 585 (noting that *West Coast Hotel* serves as a source of liberty rights under the Due Process Clause available "to combat economic subjugation and human domination"); Cass R. Sunstein, *Lochner's Legacy*, 87 COLUM. L. REV. 873, 911 (1987) (discussing the possibility of using *West Coast Hotel* as a "sword" against social structures that subordinate the poor).

¹³⁵ Justice Marshall made this point in his dissent:

More important . . . is the Court's emasculation of the Equal Protection Clause as a constitutional principle applicable to the area of social welfare administration. The Court holds today that regardless of the arbitrariness of a classification it must be sustained if any state goal can be imagined that is arguably furthered by its effects. This is so even though the classification's underinclusiveness or overinclusiveness clearly demonstrates that its actual basis is something other than that asserted by the State, and even though the relationship between the classification and the state interests which it purports to serve is so tenuous that it could not seriously be maintained that the classification tends to accomplish the ascribed goals.

Dandridge, 397 U.S. at 508 (Marshall, J., dissenting). The Court also declared that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court," and that the "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." *Id.* at 487. Most charitably, the Court's statements might be viewed as suggesting a relative institutional competence basis for steering clear of any substantive review in welfare cases. Yet this same logic would apply to many other areas—state taxation, for instance—where the Court has *not* abdicated responsibility for meaningful judicial review. See *supra* note 32 and accompanying text. Thus, the declaration that social welfare issues "are not the business of this Court" does less to explain the Court's position than to serve notice that it had washed its hands of poor people's rights in the welfare context.

The second defining poverty decision of the Burger Court, *James v. Valtierra*,¹³⁶ raised even more acutely the problem of democratic legitimacy and its implications for judicial review. *Valtierra* involved an amendment to the California Constitution that barred the construction of low-income housing without prior approval by local referendum.¹³⁷ No other form of housing construction was subject to this restriction.¹³⁸ Thus, unlike the welfare measure in *Dandridge*—which might be understood as distributing a fixed resource *among* the poor or drawing lines within that population¹³⁹—the California law sustained in *Valtierra* unambiguously classified on the basis of wealth and directly discriminated against the poor as a group.¹⁴⁰ The “special burdens” this classification

¹³⁶ 402 U.S. 137 (1971).

¹³⁷ The California Constitution reserves for the people the referendum power to approve or reject legislative acts of local government bodies. See CAL. CONST. art. IV, § 1. In 1950, the California Supreme Court determined that local decisions to seek federal financial assistance for local public housing projects were nonlegislative and therefore not subject to referendum. See *Housing Auth. v. Superior Court*, 219 P.2d 457, 460-61 (Cal. 1950) (holding that decisions by a local authority to seek federal housing aid were executive and administrative, not legislative). California subsequently adopted an amendment to its constitution that subjected local public housing decisions to referendum approval. See *Valtierra*, 402 U.S. at 138-39 (setting forth the history of the state constitutional amendment).

¹³⁸ The amendment on its face singles out low-income people for different political treatment. Low-income people in this context were defined as individuals “who lack the amount of income which is necessary . . . to enable them, without financial assistance, to live in decent, safe and sanitary dwellings, without overcrowding.” CAL. CONST. art. XXXIV, § 1 (quoted in *Valtierra*, 402 U.S. at 144 n.2).

¹³⁹ The classification upheld in *Dandridge* has been characterized as one that distinguished among categories of the poor, rather than between the poor and the rich. See Michelman, *supra* note 123, at 688 (explaining that in *Dandridge*, assistance was given to all families defined as “needy,” but nevertheless provided fewer benefits per capita to larger families). That characterization, however, ignores the political context of the maximum grant regulation challenged in *Dandridge*. That regulation was precipitated by the Maryland legislature’s failure to appropriate sufficient funds to meet the subsistence needs of all indigent families within the state. Fiscal resources were not available to meet these needs because of *de jure* political decisions reached by the state legislature. See generally PHILLIPS, *supra* note 15, at xviii (demonstrating government’s pervasive role in directing and distributing societal resources among and between classes of citizens). The state withheld support from large poor families while extending analogous support to more affluent families through tax exemptions, mortgage deductions, and other allowances. Viewed from this baseline, the challenged regulation disfavored the poor as a group in order to provide greater support through other dispensations of public money for the more affluent. See Ralph K. Winter, Jr., *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 SUP. CT. REV. 41, 57 (contending that Justices Marshall and Brennan, dissenting in *Dandridge*, “were less concerned over distinctions among the poor than between the poor and the rest of society”).

¹⁴⁰ See *Valtierra*, 402 U.S. at 144 (Marshall, J., dissenting) (“[The challenged

placed on the poor¹⁴¹ were known to have effectively barred low-income housing from communities throughout the state.¹⁴²

Only two years before *Valtierra*, the Court had invalidated a similar referendum requirement from Akron, Ohio.¹⁴³ The Akron provision prohibited the adoption of any fair housing ordinance absent approval by public referendum. Treating this restriction as a race-based classification, the Court subjected it to "the most rigid scrutiny."¹⁴⁴ On the authority of that holding alone, as one commentator has noted, *Valtierra* should have been an "open and shut case."¹⁴⁵ The political rights cases had equated legislative classifications based on race and wealth as presumptive evidence of political malfunction that warranted closer judicial scrutiny; *Valtierra* presented a classic example of a majority unfairly manipulating the public decisionmaking process to disadvantage an already weak and unpopular minority. Nevertheless, the Court upheld the California referendum requirement. The Court first denied that the state law provision discriminated against the poor.¹⁴⁶ Second, even if the provision did discriminate against the poor, the Court believed it permissible because it did not

provision] is neither 'a law of general applicability that may affect the poor more harshly than it does the rich,' nor an 'effort to redress economic imbalances.' It is rather an explicit classification on the basis of poverty . . .") (quoting *Douglas v. California*, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting)).

¹⁴¹ *Id.* at 140 (quoting *Hunter v. Erickson*, 393 U.S. 385, 391 (1969)).

¹⁴² See *Valtierra v. Housing Auth.*, 313 F. Supp. 1, 3 (N.D. Cal. 1970) (citing evidence that the referendum requirement has blocked low-income housing in other California counties).

¹⁴³ See *Hunter v. Erickson*, 393 U.S. 385, 393 (1969).

¹⁴⁴ *Id.* (holding that § 137 of the Akron City Charter constituted "a real, substantial, and invidious denial of the equal protection of the laws").

¹⁴⁵ *TRIBE*, *supra* note 41, at 1666.

¹⁴⁶ The Court did this in two ways. First, it asserted that the referendum requirement disadvantaged not the poor, but rather "persons advocating low-income housing." *Valtierra*, 402 U.S. at 142. Next, the Court insisted that California had not "singled out" poor people for "mandatory referendums while no other group must face that obstacle." *Id.* at 142. After all, the Court stated, referendum approval was required for all state constitutional amendments and the alienation of public parks. The Court ignored, however, that within the relevant universe, California had burdened only low-income housing with the referendum requirement. By the Court's logic, California could defend a law making traffic violations *by poor people* a capital offense on the ground that state law also imposes the death penalty on murderers regardless of economic status. In addition, the general nature of the other items California subjected to mandatory referenda, none of which singled out the interests of particular groups, further confirmed that poor people were the only discernable group upon which the state placed "special burdens . . . within the governmental process." *Id.* at 140 (quoting *Hunter*, 393 U.S. at 391).

implicate race. Lastly, the Court extolled the referendum requirement as evidence of the state's "devotion to democracy, not to bias, discrimination, or prejudice."¹⁴⁷

Valtierra is remarkable for its apparent conclusion that even express de jure discrimination against poor people should be reviewed only under the most indulgent and deferential standard. The Court never explicitly stated that poverty was no longer to be regarded "like race, creed, or color"¹⁴⁸ as "a capricious or irrelevant factor"¹⁴⁹ warranting special judicial attention. But it implicitly rejected earlier doctrinal insights that the Equal Protection Clause prohibits the states "from discriminating between 'rich' and 'poor' as such,"¹⁵⁰ a prohibition that the California measure quite clearly breached. *Valtierra* has been criticized for the Court's pretense of writing on "a clean slate," despite contrary precedent that required reconciliation.¹⁵¹ The Court never explained its refusal to subject overt discrimination against the "'poor' as such" to any meaningful level of review.¹⁵² The Court was silent on why wealth would no longer be considered a marker of democratic malfunction. And the Court left unarticulated the premises and assumptions that drove its decision.

¹⁴⁷ *Valtierra*, 402 U.S. at 141. The Court's glorification of the referendum process as evidence of "devotion to democracy," elides the fact that the selective importation of more cumbersome forms of governance can indeed reflect "bias, discrimination, [and] prejudice," if used to hamstring disfavored minorities. *Id.*; cf. *News in Brief*, EDUC. WK., Sept. 30, 1992, at 19 (discussing a California ballot initiative that would cut welfare benefits, to the detriment of infant children). Indeed, the referendum in *Valtierra* facilitated the exclusion and isolation of the poor from the politically and economically dominant segments of the polity by preventing construction of low-income housing outside of lower class and racially segregated ghettos. The referendum, because it stigmatized the poor by keeping them outside the favored community's "bond of . . . kinship," presented not a political process representing the whole people, but rather one that functioned to marginalize an already disempowered "out-group." See Lusky, *supra* note 72, at 1105 n.72 (citing Louis Lusky, *Peace . . . the Presence of Justice*, 17 HUMANIST 195, 201-02 (1957)).

¹⁴⁸ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

¹⁴⁹ *Id.*; see also *Griffin v. Illinois*, 351 U.S. 12, 17 (1956) ("In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.").

¹⁵⁰ *Douglas v. California*, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting).

¹⁵¹ *TRIBE*, *supra* note 41, at 1666.

¹⁵² A notable feature of the Court's opinion was its refusal even to recognize the poor as a discernible group. While tolerating a blatant form of "we-they" discrimination that clearly arose from social perceptions of poor people as distinct and undesirable, the Court refused to see the poor as a disempowered group: rather, by the Court's lights the poor were merely one of a number of "diverse and shifting groups" without special constitutional significance. *Valtierra*, 402 U.S. at 142.

The Court's subsequent poverty discourse adds nothing to the shockingly deficient reasoning and analysis of *Dandridge* and *Valtierra*.¹⁵³ Indeed, later cases avoid any discussion whatsoever of judicial method, and simply recite the standard litany that poverty is not a suspect classification,¹⁵⁴ and that classifications "in the area of economics and social welfare" will be upheld if any conceivably rational basis to support them can be imagined.¹⁵⁵ In no case has the Court even considered whether wealth and political power intersect in such a way as to mandate more intense judicial review of legislation disadvantaging the poor. In sum, while the Court has made clear its refusal to extend special judicial protection to poor people, it has never adequately defended this position nor addressed the constitutional implications of a political system that functionally excludes a large segment of the nation's citizenry on account of poverty.

B. *Academic Justifications for the Court's Poverty Jurisprudence*

The Court's failure to articulate a credible theory for its poverty jurisprudence invites skepticism, but it does not necessarily follow that no plausible basis for its work can be imagined. To the contrary, legal scholars from across the spectrum have stepped into the breach to justify the Court's relegation of poor people's constitutional claims to rationality review. Although the academic apologies proceed from widely divergent premises, they all absolve the Court's poverty jurisprudence as the faithful application of received (though perhaps unworthy) doctrine. On examination, however, none of these explanations fills the missing theoretical gap.

¹⁵³ See, e.g., *Lyng v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 485 U.S. 360 (1988); *Bowen v. Gilliard*, 483 U.S. 587 (1987); *Lyng v. Castillo*, 477 U.S. 635 (1986); *Schweiker v. Hogan*, 457 U.S. 569 (1982) (per curiam); *Schweiker v. Wilson*, 450 U.S. 221 (1981); *Harris v. McRae*, 448 U.S. 297 (1980); *Califano v. Boles*, 443 U.S. 282 (1979); *Califano v. Aznavorian*, 439 U.S. 170 (1978); *Califano v. Torres*, 435 U.S. 1 (1978) (per curiam); *Maher v. Roe*, 432 U.S. 464 (1977); *Mathews v. De Castro*, 429 U.S. 181 (1976); *Lavine v. Milne*, 424 U.S. 577 (1976); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973); *Ortwein v. Schwab*, 410 U.S. 656 (1973) (per curiam); *United States v. Kras*, 409 U.S. 434 (1973); *Jefferson v. Hackney*, 406 U.S. 535 (1972); *Richardson v. Belcher*, 404 U.S. 78 (1971).

¹⁵⁴ See, e.g., *Harris*, 448 U.S. at 323 (declaring, on the strength of *Dandridge* and *Valtierra*, that "poverty, standing alone, is not a suspect classification").

¹⁵⁵ *Kras*, 409 U.S. at 446 (declaring, on the strength of *Dandridge*, that legislation "in the area of economics and social welfare" must be upheld upon any "rational justification").

1. Conservative Apology

A number of libertarian arguments have been developed to justify the Court's deference to majoritarian outcomes that affect the poor. The leading exponents are Robert Bork and Ralph K. Winter, Jr.¹⁵⁶ Their articles focus, for the most part, on why the Constitution does not support the enforcement of substantive welfare rights by the Court. That part of their argument, significant as it is, is not relevant to the purposes of this Article. More to the point is their insistence that poor people do not need special protection from the Court because the results generated by American politics and free market economics have been exceedingly favorable to the poor. According to this view, the premise that the poor are "underrepresented politically is quite dubious" because the "poor . . . have had access to the political process and have done very well through it."¹⁵⁷ Bork thus invokes what he terms "an explosion of welfare legislation" and the "massive income redistributions" of the 1960s and 1970s (neither of which he documents or even describes) in support of this proposition.¹⁵⁸ Similarly, Winter alludes to an "enormous amount" of unspecified legislation "intended . . . to help the poor," and argues from this premise that poor people require no judicial protection from majoritarian political processes.¹⁵⁹ The idea that the poor are outside "the life of the community"¹⁶⁰ or that they are "the most ineffective participants in the political process"¹⁶¹ is dismissed as mere "liberal shibboleth."¹⁶² Indeed, the entire history of the nation is described as witness to the great political success "of virtually all of its people bettering themselves economically."¹⁶³ Since the interests of the poor are already generously accounted for in the preferences of the majority, the Bork-Winter thesis runs, there is no conceivable justification for the displacement of democratic decisionmaking that a more protective poverty jurisprudence would entail.

¹⁵⁶ See Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695; Winter, *supra* note 139 *passim*.

¹⁵⁷ Bork, *supra* note 156, at 701.

¹⁵⁸ *Id.*

¹⁵⁹ Winter, *supra* note 139, at 98.

¹⁶⁰ *Goldberg v. Kelly*, 397 U.S. 254, 265 (1970).

¹⁶¹ *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 37 (1973).

¹⁶² Bork, *supra* note 156, at 701.

¹⁶³ Winter, *supra* note 139, at 98.

The statement that the poor "have done very well"¹⁶⁴ invites the question, "in comparison to what?" Neither Bork nor Winter identifies his reference point, though it appears that the "free market," laissez-faire baseline common to libertarian critiques is what each has in mind.¹⁶⁵ Judicial activism, they contend, interferes with the natural ordering of economic arrangements and the resulting distribution of wealth. From this perspective, the poor have done well politically because legislation has spared them (at least some of them) the Bleak House conditions that would prevail under an unregulated, common-law regime.

If one chooses a different reference point, however, the conservative argument collapses. It is hard to say that the poor have done well when one looks at the conditions of their subsistence and the increase in their absolute numbers over the last decade.¹⁶⁶ Severe cutbacks in social programs, unchecked by the Court, have contributed to broad and unremitting deprivation on the part of free market "losers."¹⁶⁷ Contrary to the conservative assumption, "rising tides" have lifted the yachts but left the rowboats and life rafts behind.¹⁶⁸

¹⁶⁴ Bork, *supra* note 156, at 701.

¹⁶⁵ Cf. Sunstein, *supra* note 134, at 875 (criticizing the notion that government neutrality means "preservation of the existing distribution of wealth and entitlements [made] under the baseline of the common law"); Laurence H. Tribe, *The Curvature of Constitutional Space: What Lawyers Can Learn From Modern Physics*, 103 HARV. L. REV. 1, 15-16 & n.61, 24-25 (1989) (noting that New Deal reformers identified common law baseline as neither "natural" nor "neutral" nor "prepolitical").

¹⁶⁶ See Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 8 (1987) (citing "a visible and measurable increase in the number of people who are so poor that they have great difficulty in obtaining basic necessities"). The following discussion focuses on recent social statistics and legislative developments, but it is not meant to suggest that the political and material plights of the poor are in any sense new phenomena. See PHILLIPS, *supra* note 15, at 8-14 (noting the relative stability in the depressed economic position of the lower quintile of households over the past four decades).

¹⁶⁷ See Bob Greenstein & Art Jaeger, *Number in Poverty Hits 20-Year High as Recession Adds 2 Million More Poor, Analysis Finds* (Center on Budget and Policy Priorities, Washington, D.C.), Sept. 8, 1992, at 8 ("A second factor pushing poverty rates up over the past decade has been declines in government assistance programs, especially those for the poor and the unemployed."). But see Gary Burtless, *Public Spending on the Poor: Historical Trends and Economic Limits 2* (May 28-30, 1992) (unpublished paper prepared for the University of Wisconsin-Madison conference entitled "Poverty and Public Policy: What Do We Know? What Should We Do?," on file with author) (contending that a "significant liberalization of poverty programs was underway by the early 1990s").

¹⁶⁸ See Sheldon Danziger & Peter Gottschalk, *Do Rising Tides Lift All Boats? The Impact of Secular and Cyclical Changes on Poverty*, 76 AM. ECON. REV. (PAPERS &

In the few years since the conservative apologists optimistically consigned the poor to the political arena, impoverishment has claimed more victims than at any time since 1964, when the nation declared war on poverty.¹⁶⁹ Over the last decade, the number of individuals with incomes below the federal poverty threshold¹⁷⁰ increased both in absolute numbers and as a percentage of the total population. In 1990 alone, 2.1 million individuals joined the ranks of the poor, increasing the total percentage of persons below the poverty line to 13.5%.¹⁷¹ More than one fifth of the nation's children, 21.8%, live in poverty.¹⁷² These children suffer severe material deprivation: they frequently are of low birthweight and are later hungry;¹⁷³ they are ill-housed, if at all;¹⁷⁴ they lack health

PROCEEDINGS) 405, 410 (1986) (arguing that improved economic conditions have limited anti-poverty effects).

¹⁶⁹ See, e.g., 1992 GREEN BOOK, *supra* note 22, at 1274-75 (citing overall poverty rates from 1959 through 1990); Deborah L. Cohen, *Child Poverty Rose Steadily in '80's, City-by-City Count by C.D.F. Shows*, EDUC. WK., Sept. 9, 1992, at 20 (citing data); Robert Pear, *Ranks of U.S. Poor Reach 35.7 Million, the Most Since '64*, N.Y. TIMES, Sept. 4, 1992, at A1, A14 (citing national statistics).

¹⁷⁰ The federal poverty line is not intended as a relative measure of poverty, but rather as an absolute measure of subsistence. See MOLLIE ORSHANSKY, U.S. DEP'T OF HEALTH, EDUCATION, AND WELFARE, THE MEASURE OF POVERTY: TECHNICAL PAPER I, DOCUMENTATION OF BACKGROUND INFORMATION AND RATIONALE FOR CURRENT POVERTY MATRIX 233-83 (1977) (documenting the development of federal poverty guidelines). The measure has been criticized as failing to serve that purpose. See JOHN E. SCHWARZ & THOMAS J. VOLGY, THE FORGOTTEN AMERICANS 61-63 (1992) (arguing that the federal poverty guidelines greatly understate the number of Americans who cannot afford basic necessities such as food, clothing, and shelter); Kathryn A. Lavin & Kathryn H. Porter, *Enough to Live On: Setting an Appropriate AFDC Need Standard* (Center on Budget and Policy Priorities, Washington, D.C.), Oct. 1992, at ix (discussing the relation between the federal poverty level and subsistence levels). See generally 1992 GREEN BOOK, *supra* note 22, at 1270-72 (explaining the historical beginnings of the calculation of the poverty threshold); DANIEL H. WEINBERG, U.S. DEP'T OF HEALTH AND HUM. SERVS., MEASURING POVERTY 4 (1984) (arguing for an absolute rather than a relative standard).

¹⁷¹ See Jason DeParle, *Number of People in Poverty Shows Rise in U.S.*, N.Y. TIMES, Sept. 27, 1991, at A1, B5 (setting forth statistics). Among full-time, year-round workers, the number of individuals who earned incomes below the poverty level increased from 12.1% in 1979 to 18% in 1990. The number of individuals with a year or more of college who fell into poverty rose from 6.2% in 1979 to 10.5% in 1990. See Jason DeParle, *Report, Delayed Months, Says Lowest Income Group Grew*, N.Y. TIMES, May 12, 1992, at A15. Two political scientists have estimated that the number of functionally poor Americans—those who cannot secure living necessities—exceeds federal estimates by almost 100%. See SCHWARZ & VOLGY, *supra* note 170, at 61 (estimating that in 1989, 56 million Americans, about one in four, were functionally in poverty).

¹⁷² See Pear, *supra* note 169, at A14. For anecdotal accounts of the lives of children in urban poverty, see ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE: THE STORY OF TWO BOYS GROWING UP IN THE OTHER AMERICA (1991).

¹⁷³ See FOOD RESEARCH AND ACTION CENTER, COMMUNITY CHILDHOOD HUNGER

care;¹⁷⁵ and they receive inferior public schooling.¹⁷⁶ Every

IDENTIFICATION PROJECT: A SURVEY OF CHILDHOOD HUNGER IN THE UNITED STATES 16 (1991) (reporting that 5.5 million children under the age of 12, or one out of every eight children, are hungry) [hereinafter FRAC, COMMUNITY CHILDHOOD HUNGER IDENTIFICATION PROJECT]; FOOD RESEARCH AND ACTION CENTER, POOR INFANTS/POOR CHANCES: A LONGITUDINAL STUDY OF PROGRESS TOWARD REDUCING LOW BIRTH WEIGHT AND INFANT MORTALITY IN THE UNITED STATES AND ITS LARGEST CITIES, 1979-1984, at 11 (1987) (stating that low income financial problems during pregnancy increase the risk of delivery of a low birthweight baby by seven times); FOOD RESEARCH AND ACTION CENTER, FEEDING THE OTHER HALF: MOTHERS AND CHILDREN LEFT OUT OF WIC at iv (1989) (stating that substantial numbers of children from poor households are "at special risk with respect to their physical and mental health by reason of inadequate nutrition") [hereinafter FRAC, FEEDING THE OTHER HALF]; see also Marian W. Edelman, *Children and the Nation's Conscience*, N.Y.S. B.J., May/June 1992, at 14 (noting that every 117 seconds, an infant in America is born too small to be healthy).

¹⁷⁴ It is estimated that as many as 500,000 children are currently homeless in America. See 1992 GREEN BOOK, *supra* note 22, at 1184 (calculation of the National Coalition for the Homeless). In August 1992, more than 1000 families with children entered the homeless shelter system in New York City alone. See NEW YORK CITY HUMAN RESOURCES ADMIN., EMERGENCY HOUSING SERVICES FOR HOMELESS FAMILIES MONTHLY REPORT, AUGUST 1992, at 2 (1992). Shamal Jackson was an eight-month-old boy who died of the health consequences of poverty and homelessness, "complicated by low birthweight, poor nutrition, viral infection, and sleeping in shelters, welfare hotels, and the subway." In his entire life he had never slept in an apartment or a house. CHILDREN'S DEFENSE FUND, A CHILDREN'S DEFENSE BUDGET: FY 1989, AN ANALYSIS OF OUR NATION'S INVESTMENT IN CHILDREN iii, xvi-xvii (1989) [hereinafter CDF, A CHILDREN'S DEFENSE BUDGET]; see also Daan Braveman, *Children, Poverty and State Constitutions*, 38 EMORY L.J. 577, 579 (1989) (citing Jackson's story as one of the "human tragedies" behind the statistics in this article). At the outset of the war on poverty, New York City had 6,763 construction starts of public housing. In 1989, the New York City Housing Authority reported only one new construction start. See PATRICIA SIMPSON, COMMUNITY SERV. SOC'Y OF N.Y., LIVING ON POVERTY: COPING ON THE WELFARE GRANT 13 (1990) (citing figures provided by the Office of Research and Policy Development, New York City Housing Authority).

¹⁷⁵ See Julie Johnson, *Children's Health Seen as Declining*, N.Y. TIMES, Mar. 2, 1989, at A21 ("[O]ur social and political negligence is creating generations of medically homeless children." (quoting William H. Considine, head of the Children's Hospital Medical Center in Akron, Ohio)); Meg Sommerfeld, *Survey Charts Rise in Health Problems Among Pupils*, EDUC. WK., Sept. 23, 1992, at 8 (citing survey results that show increases in health problems among poor children). Thirty-seven million Americans, including children, are uninsured and ineligible for Medicaid, and less than half of all poor families are covered by Medicaid. See Jean Bandy, *Medicaid: A Poor Program for Poor People*, in PREVENTING NEED: A LONG WAY TO GO 27, 30 (Elizabeth Wickenden ed., n.d.). Only four out of ten eligible women receive benefits for their children under the Women, Infants and Children program, and a smaller percentage of children were fully immunized in 1987 than in 1980. See Winifred Bell, *High Risk Children: Can Their Odds Be Improved?*, in PREVENTING NEED: A LONG WAY TO GO, *supra*, at 17, 23; see also Elisabeth Rosenthal, *Health Problems of Inner City Poor Reach Crisis Point*, N.Y. TIMES, Dec. 24, 1990, at A1 ("While Americans elsewhere are living longer, healthier lives, residents of the inner cities inhabit islands of illness, epidemics and premature death.").

¹⁷⁶ See generally JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S

fifty-three minutes poverty kills an American child.¹⁷⁷ The United States loses more children to poverty every five years than it lost soldiers to battle during the entire Vietnam War.¹⁷⁸ For those whose lives are perched at the margin of survival, the idea that the poor "have done very well" would be astounding.¹⁷⁹

Government cutbacks to social programs contributed heavily to the increased impoverishment of the poor during this period. Because poor people lack political clout commensurate with their numbers, the political arena, unchecked by judicial constraints, has converted the war on poverty into a war on the poor.¹⁸⁰ The poor subsist in an underclass, dehumanized and demonized in the public's mind.¹⁸¹ Viewing social welfare programs as the source of all the nation's ills,¹⁸² government has instituted a systematic

SCHOOLS 83-132 (1992) (discussing disparities between public schools in low and high income neighborhoods across the country, including New York City); Mark Pitsch, *Income Gap in College Participation Persists, Democratic Study Concludes*, EDUC. WK., Sept. 9, 1992, at 17 (discussing low college participation rates of children from low-income families).

¹⁷⁷ See CDF, A CHILDREN'S DEFENSE BUDGET, *supra* note 174, at xvii.

¹⁷⁸ See *id.*

¹⁷⁹ One tragic illustration of this point appears in a recent Boston study that documented widespread malnourishment and disease among poor children during the winter months due to the inability of poor families to afford both food and heating fuel. See *Study of Poor Children Shows Painful Choice: Heat Over Food*, N.Y. TIMES, Sept. 9, 1992, at A17.

¹⁸⁰ See Martha F. Davis, *War on Poverty, War on Women*, N.Y. TIMES, Aug. 3, 1991, at A19 (suggesting that the war on poverty has "turned into a war on poor women"). Governor Mario Cuomo of New York noted an increase in what he termed "welfare scapegoating": "The poor people don't have any power . . . That's why welfare's such a terrific issue. Who's going to march against you, a 15-year-old girl with a baby? She doesn't even get to the polls." Kevin Sack, *The New, Volatile Politics of Welfare*, N.Y. TIMES, Mar. 15, 1992, at A24 (quoting Governor Mario Cuomo). And when Massachusetts State Senator Michael C. Creedon characterized welfare recipients as "people who are urinating on the floor in the bus station," he said he "was not concerned how his comments would be received, . . . because welfare recipients do not vote." *Id.* (quoting Senator Michael Creedon).

¹⁸¹ The term "underclass" was first used by Gunnar Myrdal and others in the 1940s. See JAMES T. PATTERSON, *AMERICA'S STRUGGLE AGAINST POVERTY 1900-1985*, at 215 (1986). Originally a shorthand for "the chronically unemployed, underemployed, and unemployables," Herbert Gans, *Deconstructing the Underclass: The Term's Dangers as a Planning Concept*, AM. PLANNING ASS'N J., Summer 1990, at 271, it has "acquired lurid connotations, suggesting something monstrous and even subhuman," KAUS, *supra* note 16, at 105.

¹⁸² Throughout the 1980s, Charles Murray was the leading spokesperson for the view that welfare enables a culture of poverty to perpetuate itself by facilitating dependence on government assistance programs that discourage work and promote wanton and illegitimate births. See CHARLES A. MURRAY, *LOSING GROUND: AMERICAN SOCIAL POLICY, 1950-1980* at 154-91 (1984); see also Susan J. Popkin, *Welfare: Views*

rollback on its commitment to alleviate poverty.¹⁸³ Punitive eligibility requirements have been imposed¹⁸⁴ without any evidence of their effectiveness in dealing with the poverty crisis.¹⁸⁵ The myth has reemerged that the poor are "lazy and shiftless,"¹⁸⁶ rather than victims of an economic system that generates systematic unemployment and underemployment at low wages.¹⁸⁷

from the Bottom, 37 SOC. PROBS. 64, 77 (1990) (stating that "long-term use of public assistance reduces recipients' beliefs in their own abilities"); cf. HUMAN RESOURCES DIV., U.S. GEN. ACCOUNTING OFF., GAO/HRD-87-51BR, WELFARE: ISSUES TO CONSIDER IN ASSESSING PROPOSALS FOR REFORM 23 (1987), reprinted in part in *Poverty and Welfare: The GAO Report*, 4 CONST. COMMENTARY 227, 227 (1987) (stating that "some work demonstration projects had encouraging results" but that research did not "clearly support" dependence theory and long term effects remain unclear). But see Kathryn Edin, *Surviving the Welfare System: How AFDC Recipients Make Ends Meet in Chicago*, 38 SOC. PROBS. 462, 472 (1991) (arguing that welfare "actually prohibits dependency by paying too little").

¹⁸³ In 1992, the median AFDC grant in the United States was fixed at 39% of the federal poverty line. See CENTER FOR BUDGET AND POLICY PRIORITIES ET AL., *Welfare Rolls Rising Due to the Recession*, in SELECTED BACKGROUND MATERIAL ON WELFARE PROGRAMS 1, 3 (1992). Total spending for AFDC in constant 1990 dollars dropped from \$20.7 billion in 1973 to \$16.7 billion in 1989, despite an increase in the number of poor people. See Jason DeParle, *Fed by More Than Slump, Welfare Caseload Soars*, N.Y. TIMES, Jan. 10, 1992, at A1, A16; see also Bell, *supra* note 175, at 23 (stating that social welfare programs for the poor were cut from 15% of the federal budget in 1980 to 10% in 1985, with a real loss of \$10 billion); Jason DeParle, *California Plan to Cut Welfare May Prompt Others to Follow*, N.Y. TIMES, Dec. 18, 1991, at A1, D21 (stating that many states slashed welfare costs by as much as 9.5% in 1990). Moreover, in 1991, one-third of the AFDC caseload or 2.9 million children and parents or guardians, suffered severe cuts in their benefits. At the same time, three-fifths of 5.2 million poor people watched their welfare benefits get "eaten up" by inflation as 33 states held 1991 rates at 1990 or earlier levels. See CENTER ON SOCIAL WELFARE POLICY AND LAW, PUB. NO. 165, 1991: THE POOR GOT POORER AS WELFARE PROGRAMS WERE SLASHED at i (1992) (describing the effect of 1991 welfare cuts).

¹⁸⁴ A number of welfare "reforms" have been put forward as purported incentives for work and family responsibility. New Jersey, for example, proposed to deny additional benefits to families if a single mother has additional children while on welfare. See Jason DeParle, *Workfare, Learnfare, Wedfare: Why Marginal Changes Don't Rescue the Welfare System*, N.Y. TIMES, Mar. 1, 1992, § 4, at 3 (summarizing recent welfare proposals).

¹⁸⁵ See Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719, 726-41 (1992) (critiquing the effectiveness of behavior modification welfare restrictions and demonstrating factual inaccuracies in their underlying assumptions).

¹⁸⁶ *Blaming the Victims in New York*, N.Y. TIMES, Oct. 26, 1991, at A18 (quoting New York City Patrolmen's Benevolent Association position calling for increased police pay at the expense of welfare benefits on grounds that the poor are "lazy and shiftless").

¹⁸⁷ Peter T. Kilborn, *Lives of Unexpected Poverty in Center of a Land of Plenty*, N.Y. TIMES, July 7, 1992, at A1 (contending that the persistence of poverty in Marshalltown, Iowa is linked to "the nation's proliferation of low-wage jobs and two decades

The conservative defense of the Court's hands-off approach fails for another reason as well: the argument's focus on supposed success stories of the poor conflates democratic legitimacy with "favorable" political outcomes.¹⁸⁸ But to claim that any legislative attention to the plight of the lower classes signifies a democratically inclusive politics is to ignore the obvious fact that social welfare measures have abounded even in societies that formally exclude the poor from the processes of government.¹⁸⁹ Indeed, history documents that superficially "favorable" treatment of the poor often reflects a politics of subordination.¹⁹⁰

Finally, even if sporadic political success could serve as a democracy surrogate that somehow cures or constitutionally neutralizes the otherwise illegitimate exclusion of poor people from democratic processes, the question of baseline reemerges: does the observed outcome resemble the distribution of surplus that one might expect a constituency the size of the poor to achieve under

of falling wages, especially for the least skilled").

¹⁸⁸ Just as process-based theories may camouflage substantive value choices, so substantive outcomes, however favorable, may merely provide protective coverage for exclusionary or irregular political decisionmaking processes. See, e.g., RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 180 (1977) (distinguishing procedural aspects of Rawls's concept of "equal concern and respect" from the substantive outcomes that may be understood to reflect equality of treatment).

¹⁸⁹ See, e.g., BARRINGTON MOORE, JR., *SOCIAL ORIGINS OF DICTATORSHIP AND DEMOCRACY: LORD AND PEASANT IN THE MAKING OF THE MODERN WORLD* 215-17 (1966) (describing Chinese Imperial Minister Tseng Kuo-fan's use of peasant relief measures to overcome the Nien rebellion in the nineteenth century); FRANCES F. PIVEN & RICHARD A. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE* 3-41 (1971) (describing the early rise of poor relief in Europe and the United States as a social control measure).

¹⁹⁰ See FERNAND BRAUDEL, *CAPITALISM AND MATERIAL LIFE, 1400-1800*, at 40 (Miriam Kochan trans., Harper & Row 1973) (1967) (contending that the Elizabethan Poor Laws were "laws against the poor"); PIVEN & CLOWARD, *supra* note 189, at 17-23 (contending that social welfare programs are designed to regulate the lives of the poor and to avoid social upheaval); cf. THOMAS PAINE, *THE RIGHTS OF MAN* 262-70 (Henry Collins ed., Penguin Books 1961) (1791-92) (describing the provision of "practical relief" that would result in "[t]he poor, as well as the rich, . . . [being] interested in the support of government, and the cause and apprehension of riots and tumults . . . ceas[ing]"); Derrick Bell, *The Supreme Court, 1984 Term—Foreword: The Civil Rights Chronicles*, 99 HARV. L. REV. 4, 19 (1985) (referring to social welfare "crumbs" from the "tables" of the "upper classes" that forestall the "true reform" of society). But see HIMMELFARB, *supra* note 126, at 40-41 (criticizing the "social control" theory of public welfare). See generally Jeffrey S. Lehman, *To Conceptualize, to Criticize, to Defend, to Improve: Understanding America's Welfare State*, 101 YALE L.J. 685, 704 & n.74 (1991) (book review) (discussing and citing the "substantial literature in which social scientists debate the historical motives of political actors" responsible for welfare state expansion).

a political regime "structured . . . fairly"¹⁹¹ to reflect all relevant interests?¹⁹² Without pretending to any scientific resolution, one might nevertheless seek rough answers by comparing our society's material capability to relieve the privations suffered by our most destitute citizens with the efforts actually made, and by juxtaposing the American political response to poverty with the social welfare measures of other "industrialized democracies." On both counts, the comparisons suggest anything but a fully enfranchised, fairly represented, or politically successful American lower class.

First, the widespread persistence of malnutrition, homelessness, and other absolute privations in a nation with the surpassing wealth and abundance of the United States is itself starkly inconsistent with the Bork-Winter premise.¹⁹³ Consider the example of childhood hunger.¹⁹⁴ In the United States today, an estimated 5.5 million children under the age of twelve suffer hunger and malnourishment, but the federal government systematically fails to appropriate sufficient funds to deal with the problem.¹⁹⁵ It is further estimated that the most egregious aspects of inadequate nutrition, in terms of abject deprivation, could be eliminated through an appropriation of less than ten billion dollars, an amount equal to a fraction of one percent of the federal budget for fiscal year 1993 and an even smaller fraction of the gross national product.¹⁹⁶ On the other

¹⁹¹ *Supra* text accompanying note 68.

¹⁹² This is not to suggest that the democratic integrity of a political process can "be determined simply by looking to see who ended up with what." ELY, *supra* note 41, at 136. But the pattern of distribution can provide relevant evidence in this regard.

¹⁹³ See PHYSICIAN TASK FORCE ON HUNGER IN AMERICA, HARVARD SCHOOL OF PUBLIC HEALTH, INCREASING HUNGER AND DECLINING HELP: BARRIERS TO PARTICIPATION IN THE FOOD STAMP PROGRAM 6 (1986) (finding that over 20 million citizens "suffer from hunger at least some days each month," characterizing domestic hunger as a "national health epidemic," and observing that "[a]s hunger has increased federal food programs designed to feed the hungry have been weakened").

¹⁹⁴ See generally FRAC, COMMUNITY CHILDHOOD HUNGER IDENTIFICATION PROJECT, *supra* note 173 (describing the results of a nationwide survey of childhood hunger).

¹⁹⁵ See generally FOOD RESEARCH AND ACTION CENTER, ANALYSIS OF THE BUSH ADMINISTRATION'S FY 1993 BUDGET PROPOSALS REGARDING NUTRITION PROGRAMS (1992) (examining proposed funding for childhood hunger programs and concluding that small increases are paid for by reductions in other food programs). By way of comparison, the federal government spends nine dollars for a congressional representative's lunch, three dollars for a prisoner's lunch, and 59 cents for a child's school lunch. See *Out to Lunch*, HUNGER ACTION FORUM (The Hunger Project, Wash., D.C.), Feb. 1991, at 3.

¹⁹⁶ See FOOD RESEARCH AND ACTION CENTER, DETAILS ON MEDFORD COST ESTIMATES 1 (1992). The Medford Declaration to End Hunger in the United States calls for full funding and utilization of existing food programs followed by new

side of the ledger, sufficient food is as fundamental and imperative an interest as a group or individual might assert.¹⁹⁷ Indeed, adequate nutrition in early years is vital to the healthy development of a child; its absence often results in disease, stunted growth, brain damage, mental retardation, and death.¹⁹⁸

In assessing whether the poor "have done well" on the legislative score, we might engage in a simple balancing test comparing the intensity of interest that the poor have in the elimination of childhood hunger, for example, to the relatively modest cost that would be required to achieve that goal. On a pluralist model, the size of the constituency, the intensity of its interest, and the force of countervailing factors ought to tell us a lot about the chance of political outcomes. Here the constituency is fifteen percent of the population, a larger proportion of the nation than many ethnic minorities that have acquired significant voice in the political life of the country. The intensity of the interest is keen,¹⁹⁹ and the countervailing factors, in terms of social expenditures, relatively weak. So why does childhood hunger nevertheless persist? Given the marked imbalance between the critical, inelastic interest of the poor in adequate food, and the puny social effort required to satisfy that interest, it is highly unlikely that outright hunger would be as prevalent in the United States if poor people commanded anything approaching the political power one would expect a fairly represented constituency of such size to wield. Nor, in a pluralist model, would one expect the government to refuse to fund even cost-saving poverty prevention programs—like WIC²⁰⁰ and Head Start²⁰¹—

legislative initiatives to eradicate remaining hunger and malnutrition. *See id.* at 2.

¹⁹⁷ *See generally* JEAN DRÉZE & AMARTYA SEN, *HUNGER AND PUBLIC ACTION* vii, 3-4 (1989) (discussing the debilitating and potentially deadly effects of inadequate nutrition and arguing that "the persistence of chronic hunger [is] morally outrageous and politically unacceptable" given modern society's clear capacity to "guarantee adequate food for all").

¹⁹⁸ *See, e.g.*, FRAC, *FEEDING THE OTHER HALF*, *supra* note 173, at 14-17 (surveying medical effects of inadequate nutrition; NATIONAL EDUC. ASS'N, *THE RELATIONSHIP BETWEEN NUTRITION AND LEARNING* 8 (1989) (discussing undernutrition and its effects on the mental, social, and motor skills of children)).

¹⁹⁹ *See* T. Berry Brazelton, *Why Is America Failing Its Children?*, N.Y. TIMES, Sept. 9, 1990, § 6 (Magazine), at 40, 50 (contrasting lack of popular support for needed nutrition and poverty programs with pediatrician's personal experience of individual care and concern); *U.S. Panel Warns on Children Poverty: 'Staggering National Tragedy' Seen as Threatening the Future of the Young*, N.Y. TIMES, Apr. 27, 1990, at A22 (describing the poverty facing American children and noting that malnutrition affects nearly half a million children, a factor which "threatens America's future").

²⁰⁰ The Special Supplemental Food Program for Women, Infants and Children,

that demonstrably reduce public outlays over the short to medium term.²⁰² Only the marked absence of political access, voice and

Child Nutrition Act of 1966, 42 U.S.C. § 1786 (1988 & Supp. II 1990), commonly known as "WIC," is a federally funded nutrition assistance program that provides supplemental foods, nutrition education, and access to health services to pregnant and post-partum women and their children to age five. WIC was created in response to medical evidence of the increased health and developmental risks that accompany low birth weight. See generally FOOD RESEARCH AND ACTION CENTER, WIC FACTS: NATIONAL AND STATE PROFILES OF THE SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (1988) (describing the WIC program). Forty thousand infants die each year in the United States because of complications due to low birth weight. See John Kitzhaber, M.D., *Uncompensated Care—The Threat and the Challenge*, W.J. MED., June 1988, reprinted in 135 CONG. REC. S5082, S5083 (daily ed. May 10, 1989).

²⁰¹ The Head Start Act of 1981, 42 U.S.C. § 9831-9852 (1988 & Supp. II 1990), provides developmental, educational, and health services to economically disadvantaged preschoolers. See generally GARY NATRIELLO ET AL., SCHOOLING DISADVANTAGED CHILDREN: RACING AGAINST CATASTROPHE 45-70 (1990) (reviewing longitudinal studies on the effects of Head Start and other preschool programs on child development).

²⁰² Every dollar spent on WIC benefits for prenatal care saves up to three dollars in short-term hospital costs for neonates and their mothers. See 134 CONG. REC. S4977 (daily ed. Apr. 27, 1988) (statement of Sen. Simon). Participation in the WIC program has been shown to produce positive outcomes in reducing low-birth weight, reducing infant mortality, and improving health status of women and children. See generally DAVID RUSH, FOOD AND NUTRITION SERV., U.S. DEP'T OF AGRIC., EVALUATION OF THE SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS, AND CHILDREN (WIC) 1-3 (1986) (describing the National WIC Evaluation, a study that assessed the health and nutritive impacts of the WIC program); FOOD RESEARCH AND ACTION CENTER, WIC: A SUCCESS STORY: THE SPECIAL SUPPLEMENTAL FOOD PROGRAM FOR WOMEN, INFANTS AND CHILDREN 3-11 (1983) (describing the success of the WIC program in improving the health status of low-income women and children at nutritional risk). The U.S. health system saves between \$14,000 and \$30,000 in hospitalization and long-term care for every case in which low birth weight is prevented through nutritional and medical intervention at the prenatal phase. See 134 CONG. REC. E864, E865 (daily ed. Mar. 29, 1988) (statement of Rep. Miller). In 1989, the General Accounting Office revealed that the federal government had attempted to suppress the scientific data that confirmed WIC's effectiveness. See RESOURCES, COMMUNITY, AND ECONOMIC DEV. DIV., U.S. GEN. ACCOUNTING OFFICE, GAO/RCED-90-3, FOOD ASSISTANCE, THE NATIONAL WIC EVALUATION: REPORTING AND FOLLOW-UP ISSUES 16-19 (1989).

Every dollar spent on Head Start saves \$4.75 because of reduced costs for additional education and public assistance. See CDF, A CHILDREN'S DEFENSE BUDGET, *supra* note 174, at 8. Participation in the Head Start program has been demonstrated to improve long-term school and employment prospects of preschoolers. See CDF, A CHILDREN'S DEFENSE BUDGET, *supra* note 174, at 9; Mary K. Stein et al., *Instructional Issues for Teaching Students at Risk*, in EFFECTIVE PROGRAMS FOR STUDENTS AT RISK 145, 149-50 (Robert E. Slavin et al. eds., 1989).

Neither WIC nor Head Start is sufficiently funded to allow all poor children who require benefits to participate. See CDF, A CHILDREN'S DEFENSE BUDGET, *supra* note 174, at 8 (discussing Head Start appropriations covering less than 20% of disadvantaged); *Legislative Update*, THE WIC NEWSLETTER (Center on Budget and Policy

representation can reasonably explain the inability of poor people to obtain public commitments to protect them against the most serious privations, especially where those commitments simultaneously reduce public expenditures and tax burdens.²⁰³

Recent economic analyses confirm that "America has high poverty rates not because it must, but because it chooses to."²⁰⁴ International comparisons indicate that the United States commits a smaller percentage of its national income to redistributive welfare programs and tolerates more income inequality than other advanced industrialized nations.²⁰⁵ The poverty rate for every significant age group is higher in America than in other industrialized nations.²⁰⁶ Among six industrialized countries studied, the

Priorities, Washington, D.C.), July 8, 1992, at 1 (discussing shortfall in WIC funding). Many other examples of under-funded yet cost-efficient social welfare programs can be cited. For example, the medical community has long asserted the need to fund treatment for tuberculosis, a preventable illness that has reached epidemic proportions among poor communities in urban centers. See Michael Specter, *Neglected for Years, TB is Back with Strains That Are Deadlier*, N.Y. TIMES, Oct. 11, 1992, at A1, A44 ("We have turned a disease that was completely preventable and curable into one that is neither." (quoting Dr. Lee B. Reichman, President of the American Lung Association)).

²⁰³ Cf. Garry Wills, *The Born-Again Republicans*, 34 N.Y. REV. BOOKS, Sept. 24, 1992, at 9 (quoting statement by Pat Buchanan at the 1992 Republican National Convention referring to "the Vandals and Visigoths who are pillaging your cities by expanding the Head Start and food stamp programs").

²⁰⁴ Jason DeParle, *In Debate on U.S. Poverty, 2 Studies Fuel an Argument on Who Is to Blame*, N.Y. TIMES, Oct. 29, 1991, at A20. See 1992 GREEN BOOK, *supra* note 22, at 1288-1300 (citing international poverty and social spending comparisons); Maria J. Hanratty & Rebecca M. Blank, *Down and Out in North America: Recent Trends in Poverty Rates in the United States and Canada*, 107 Q.J. ECON. 233, 251-52 (1992) (citing retrenchment in assistance levels as a possible explanation for the persistence of poverty in the United States while Canadian poverty declined by 60%); Timothy M. Smeeding, *Why the U.S. Antipoverty System Doesn't Work Very Well*, CHALLENGE, Jan.-Feb. 1992, at 30, 33 (analyzing data from the Luxembourg Income Study and concluding that other nations' tax and transfer systems are better suited to fighting poverty); Rebecca M. Blank & Maria J. Hanratty, *Responding to Need: A Comparison of Social Safety Nets in the United States and Canada* 1-21 (1991) (unpublished manuscript, on file with author) (explaining differences in the social welfare systems in the United States and Canada, and estimating that adoption of the Canadian system in the United States would reduce poverty rates for single-parent households from 43% to between 2% and 16%).

²⁰⁵ See HOWARD OXLEY & JOHN P. MARTIN, ORGANIZATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT ECONOMIC STUDIES, NO. 17, CONTROLLING GOVERNMENT SPENDING AND DEFICITS: TRENDS IN THE 1980S AND PROSPECTS FOR THE 1990S 145-89 (Autumn 1991) (citing international comparisons); PETER SAUNDERS, ORGANISATION FOR ECONOMIC CO-OPERATION AND DEVELOPMENT, NO. 11, EVIDENCE ON INCOME REDISTRIBUTION BY GOVERNMENTS (Paris, France 1984); Burtless, *supra* note 167, at 28-29 (same).

²⁰⁶ See Burtless, *supra* note 167, at 29 (stating that in the United States, poverty

United States and Australia had the highest percentage of children living in poverty, (approximately 17%), and the highest rates among families with children (15% and 14% respectively).²⁰⁷ Ranked against other industrialized nations, infant mortality in the United States went from sixth best in 1950 to the worst rate in 1985.²⁰⁸ Moreover, no other industrialized nation has such extremes of relative inequality as measured by the income gap between rich and poor or the "distance between what CEOs and line workers earn."²⁰⁹

is three times more prevalent among children and twice as prevalent among the elderly than in other industrialized nations).

²⁰⁷ See HOUSE SELECT COMM. ON CHILDREN, YOUTH, AND FAMILIES, 101ST CONG., 2D SESS., CHILDREN'S WELL-BEING: AN INTERNATIONAL COMPARISON 40-41 (Comm. Print 1990) [hereinafter CHILDREN'S WELL-BEING] (comparing poverty rates among children in the United States and six industrialized nations).

²⁰⁸ See Jean Bandler, *Medicaid: A Poor Program for Poor People*, in PREVENTING NEED: A LONG WAY TO GO, *supra* note 175, at 27, 28.

²⁰⁹ Bell, *supra* note 175, at 18; see also PHILLIPS, *supra* note 15, at 8 (stating that "[b]y several measurements, the United States in the late twentieth century led all other major industrial countries in the gap dividing the upper fifth of the population from the lower—in the disparity between top and bottom"). Relative inequality increased precipitously in the United States as the gap in income between rich and poor widened. Without capital gains income, the percentage of income received by the lowest three fifths of the American population in 1985 was the smallest since 1947, the year such information collection began. See Jerry Kloby, *The Growing Divide: Class Polarization in the 1980s*, MONTHLY REV., Sept. 1987, at 1, 2-3. The average family in the highest quintile of income had more than nine times as much yearly income as a family in the lowest quintile. See *id.* The average household in the upper one-half of one percent of the population had approximately 223.6 times more wealth than the average household in the lower 90%. See DEMOCRATIC STAFF OF THE JOINT ECONOMIC COMMITTEE OF THE U.S. CONGRESS, THE CONCENTRATION OF WEALTH IN THE UNITED STATES 24 (1987). By the end of the Reagan years, the disparity had grown still wider. The richest 1% percent received nearly as much income after taxes as the bottom 40% combined. See Robert Greenstein & Scott Barancik, *Drifting Apart: New Findings on Growing Income Disparities Between the Rich, the Poor, and the Middle Class* (Center on Budget and Policy Priorities, Washington, D.C.), July 1990, at 1; see also SCOTT BARANCIK & ISAAC SHAPIRO, CENTER ON BUDGET AND POLICY PRIORITIES, WHERE HAVE ALL THE DOLLARS GONE? A STATE-BY-STATE ANALYSIS OF INCOME DISPARITIES OVER THE 1980S, at ix-x (1992) (analyzing national income on a state-by-state basis). Although the average family income of the poorest fifth of the nation declined by 10.9% from 1976 to 1986, the average family income of the richest fifth increased by 13.8%. See Leonard Silk, *Now, to Figure Why the Poor Get Poorer*, N.Y. TIMES, Dec. 18, 1988, § 4, at 1. Michael Milken's 1987 salary of \$550 million equaled the yearly salary of almost 79,000 individuals working a 40-hour work week at the minimum wage of \$3.35. See *Hard Times*, THE NATION, Apr. 24, 1989, at 544 (citing statistics). The gap in income translates into a gap in essential services to broad categories of Americans. For the impact on the elderly, see PROGRAM EVALUATION AND METHODOLOGY DIVISION, U.S. GEN. ACCOUNTING OFFICE, GAO/PEMD-92-29, ELDERLY AMERICANS: HEALTH, HOUSING, AND NUTRITION GAPS BETWEEN THE POOR AND THE NONPOOR 2-7 (1992) (finding that 19% of the elderly population were poor or near poor, with the increased likelihood of inadequate

International comparisons further confirm the role that government plays in fostering or eliminating poverty from the social order. Any capitalist society will always have a bottom fifth that enjoys less relative wealth. But the more important question is how we regulate markets to avoid absolute privation among significant segments of the population. Recent studies conclude that "with comparable patterns of economic growth, other nations reduced poverty to a far greater extent. The difference . . . is that other countries have more generous and effective social policies."²¹⁰ Moreover, industrialized nations that spent twice what the United States did on social welfare programs saw their economies grow "at least as fast as the United States or faster."²¹¹

Other industrialized nations provide greater assistance than the United States to individuals in need,²¹² and they provide it in a less stigmatizing, punitive fashion.²¹³ Poor people have not "done well politically" in the United States when measured against the achievements of lower classes in comparable and even less affluent democracies. Extreme forms of deprivation that are prevalent here are not plausible or acceptable political results in other industrialized countries.²¹⁴ This too supports the conclusion that poor people in the United States do not exercise a fair, "democratic" share of political power.

A conservative response might emphasize that the poor have a relatively low participation rate in the political arena.²¹⁵ The

nutrition, housing, and health care).

²¹⁰ DeParle, *supra* note 204, at A20. The number of households with family income less than forty percent of the country's median income "has an almost perfect inverse correlation with the level of social welfare spending." Burtless, *supra* note 167, at 29.

²¹¹ Burtless, *supra* note 167, at 28.

²¹² Ninety-nine percent of poor families in the developed countries that were studied received government assistance, as compared to 73% in the United States. See CHILDREN'S WELL-BEING, *supra* note 207, at 43 (citing data).

²¹³ Some European countries provide annual vacations to single parents on welfare. See Nancy Amidei, *Welfare*, in PREVENTING NEED: A LONG WAY TO GO, *supra* note 175, at 7.

²¹⁴ Cf. Richard J. Lazarus, *Pursuing "Environmental Justice": The Distributional Effects of Environmental Protection*, 87 NW. U. L. REV. (forthcoming Mar. 1993) (contending that nonenforcement of the Clean Air Act would not have been tolerated for 13 years if toxic emissions had been of comparable concern to the white affluent majority as to the poor black minority).

²¹⁵ Cf. FRANCES F. PIVEN & RICHARD A. CLOWARD, *WHY AMERICANS DON'T VOTE* 10-21 (1989) (discussing several causes for the correlation between income levels and nonvoting in the United States). The Legal Services Corporation Act prohibits federally funded attorneys for the poor from engaging in voter registration activity

poor do not vote, this argument goes, and you cannot be a winner if you do not play the game. The argument is ironic coming from conservatives, who have consistently endeavored to block political participation by poor people.²¹⁶ Moreover, the fact of nonparticipation cannot be dismissed as merely a bad political choice by the poor.²¹⁷ As one commentator notes, "[p]eople who are literally struggling to find enough to eat are highly unlikely to participate in the political process."²¹⁸ The failure to vote corresponds to other indicators of political powerlessness, including poor people's inability to amplify their voice through financial resources, the creation of organizational structures, or the building of coalitions with more affluent groups.²¹⁹ The "politically quiescent" attitude of the poor, therefore, is less a matter of free choice,²²⁰ than of the mutually reinforcing effects of "low resources," weak political

as part of their employment. See 42 U.S.C. § 2996f(a)(6)(c) (1988).

²¹⁶ A recent instance of the conservative effort to minimize political participation by the poor was a 1993 filibuster by Senate Republicans that stripped proposed voting legislation of a provision making registration services available in welfare centers. See 139 CONG. REC. S2988-3009 (daily ed. March 17, 1993). The bill as passed by the Senate requires states to provide voter registration forms to persons who apply for or renew a driver's license, but not to persons who seek assistance from a state unemployment or welfare office. See *id.* at S3004 (quoting the National Voter Registration Act of 1993, § 4(a)(1)). Senate Majority Leader George Mitchell explained:

In order to pass this bill, we have compromised with our Republican colleagues. We had to modify a provision . . . so that public assistance and unemployment compensation offices do not have to provide voter registration forms to those citizens they serve. . . .

I regret that we had to make this change [because it] . . . prevents the most vulnerable, the most economically disadvantaged portion of our people from having easier access to voter registration. I think it is sad that many took that position.

Id. at S3007-08.

²¹⁷ To say that the poor "choose" not to vote is like saying the poor "choose" to be poor. Cf. Lou Cannon, *Reagan Cites "Choice" by Homeless*, WASH. POST, Dec. 23, 1988, at A8 (discussing statements by President Reagan that homeless people "make it their own choice" not to seek shelters that are available to them).

²¹⁸ Edelman, *supra* note 166, at 34.

²¹⁹ See, e.g., Irene J. Dabrowski et al., *An Exchange Approach to Community Politics: A Case Study of White Ethnic Activism in Staten Island, New York*, in THE EGALITARIAN CITY: ISSUES OF RIGHTS, DISTRIBUTION, ACCESS, AND POWER 110 (Janet K. Boles ed., 1986) (discussing a case study of organizational barriers faced by poor communities); Scott E. Masten et al., *The Costs of Organization*, 7 J.L. ECON. & ORGANIZATION 1, 5-8 (1991) (discussing the role of internal organization costs and transaction cost differentials).

²²⁰ Parker, *supra* note 33, at 242.

incentives, and "inadequate skills" that trap the poor in what democratic theorist Robert Dahl has termed a "cycle of defeat."²²¹

The political outcast status of the poor also reflects deep-rooted stereotypes harbored by the more affluent; stereotypes that contribute to a politics of irrationality and exclusion.²²² Myths abound about the poor: they spread a "moral pestilence"²²³ more treacherous in the public mind than the diseases that more often afflict the poor than the rich.²²⁴ Unable to quarantine the poor,²²⁵ the rich have instead "sece[ded]" from any notion of a shared life with the less affluent.²²⁶ This secession expresses itself

²²¹ DAHL, *supra* note 33, at 488. According to Dahl, social scientists have identified "differences in social and economic status [as] the most important" causal factors producing "differences in political participation." *Id.* at 450-51. Dahl notes that "weak political incentives" and "inadequate skills" are in theory independent of "low resources," but reports that they "tend to run together in the United States" more so than in any democracy other than India. *Id.* at 488.

²²² See, e.g., BARBARA LEYSER ET AL., CENTER ON SOCIAL WELFARE POLICY AND LAW, *BEYOND THE MYTHS: THE FAMILIES HELPED BY THE AFDC PROGRAM* iii (2d ed. 1985) (providing facts to dispel common myths about welfare recipients).

²²³ *Mayor of New York v. Miln*, 36 U.S. (11 Pet.) 102, 142-43 (1837) (stating that it is "as necessary for a state to provide precautionary measures against the moral pestilence of paupers, vagabonds, and possibly convicts; as it is to guard against the physical pestilence, which may arise from unsound and infectious articles imported"); cf. Susan Sontag, *Illness as Metaphor*, in *ILLNESS AS METAPHOR AND AIDS AND ITS METAPHORS* 3-4 (1990) (discussing the phenomenon of cultures attaching stigma to diseases and their victims).

²²⁴ See, e.g., Philip J. Hilts, *Victory Over TB Seen as Thwarted by Budget Unit*, N.Y. TIMES, Feb. 28, 1990, at A24; *Poverty Blamed for Blacks' High Cancer Rate*, N.Y. TIMES, Apr. 17, 1991, at A16 (discussing the link between the incidence of cancer and socioeconomic status).

²²⁵ Tight patterns of residential segregation based on race and class are a form of social quarantine. See William W. Goldsmith, *Poverty, Isolation, and Urban Politics*, 21 REV. RADICAL POL. ECON. 91, 92 (1989) (discussing the use of market forces to insulate members of the more affluent classes from the "daily drudgery of the poor and the working class"); Gary Orfield, *Separate Societies: Have the Kerner Warnings Come True?*, in *QUIET RIOTS: RACE AND POVERTY IN THE UNITED STATES* 100, 110-12 (Fred R. Harris & Roger W. Wilkins eds., 1988) (discussing the consequences of residential segregation). On the use of asylums and poorhouses to "quarantine" the poor, see JUNE AXINN & HERMAN LEVIN, *SOCIAL WELFARE: A HISTORY OF THE AMERICAN RESPONSE TO NEED* 13 (1975); MICHAEL B. KATZ, *IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA* 3-35 (1986); DAVID ROTHMAN, *THE DISCOVERY OF THE ASYLUM: SOCIAL ORDER AND DISORDER IN THE NEW REPUBLIC* 161-65 (1971).

²²⁶ Robert B. Reich has explained the secession of the affluent as follows:

The secession is taking several forms. In many cities and towns, the wealthy have in effect withdrawn their dollars from the support of public spaces and institutions shared by all and dedicated the savings to their own private services. As public parks and playgrounds deteriorate, there is a proliferation of private health clubs, golf clubs, tennis clubs, skating clubs

politically as a withdrawal of support from even those social welfare programs that would result in shared benefits to society at large.²²⁷

Finally, the conservative defense ignores the predominant role that nonelectoral activity has played in the erstwhile success of the poor. Historically, the threat of social disorder has dramatically influenced progressive responses. The New Deal reforms were enacted under the pressure of mass popular mobilization during the Great Depression.²²⁸ And the War on Poverty during the 1960s represented, at least in part, a response to the civil rights movement and the direct "political action" that erupted in Watts and elsewhere.²²⁹

Commentators have offered various theories for why these reforms occurred. One school argues that mass agitation forces political concessions in the form of social welfare legislation.²³⁰ A parallel thesis holds that governing elites undertake social welfare reforms at times of perceived danger in an effort to purchase social peace and lower-class docility at the least possible cost.²³¹ More specific explanations obtain for particular historical moments; some

and every other type of recreational association in which costs are shared among members.

Robert B. Reich, *Secession of the Successful*, N.Y. TIMES, Jan. 20, 1991, § 6 (Magazine), at 16, 42.

²²⁷ See, e.g., Warren E. Leary, *Free Flu Shots Halted, Leaving Many at Risk*, N.Y. TIMES, Sept. 24, 1992, at A16.

²²⁸ See generally JAMES O'CONNOR, *THE FISCAL CRISIS OF THE STATE* (1973); Barton J. Bernstein, *The New Deal: Conservative Achievements of Liberal Reform*, in *TOWARDS A NEW PAST* (Barton J. Bernstein ed., 1970); Miller, *supra* note 20, at 496 ("[T]he sheer need of governments to allay working-class discontents that were dangerous to the stability of the state' was obviously central to the New Deal ethos." (quoting C.B. MACPHERSON, *THE REAL WORLD OF DEMOCRACY* 14 (1966))).

²²⁹ See generally FRANCES F. PIVEN & RICHARD A. CLOWARD, *POOR PEOPLE'S MOVEMENTS: WHY THEY SUCCEED, HOW THEY FAIL* 272-73 (1977) (tracing the Kerner Commission's call for "a massive and sustained commitment to action' to end poverty and racial discrimination" to the "mass rioting throughout the nation between 1964 and 1968").

²³⁰ See, e.g., PIVEN & CLOWARD, *supra* note 189, at 45-199, 222-340.

²³¹ See, e.g., JOEL F. HANDLER & YEHESEKEL HASENFELD, *THE MORAL CONSTRUCTION OF POVERTY: WELFARE REFORM IN AMERICA* 95 (1991) (discussing cuts in New Deal public employment programs "once the threat of social disorder subsided"). A variant of this theory attributes progressive legislation during the New Deal period to extraordinary social and economic circumstances that diminished the legitimacy of established institutions and enabled an enlightened governing faction to carry out reforms from above. See generally CHARLES E. LINDBLOM, *POLITICS AND MARKETS: THE WORLD'S POLITICAL-ECONOMIC SYSTEMS* (1977).

conservatives, for example, attribute the Great Society initiatives to "white guilt."²³²

The constant across all of these explanations, however, is a lower class disconnected from the normal channels and processes of politics and able to influence political outcomes only through threats of social disorder.²³³ The most recent example of this phenomenon is the Los Angeles "uprising" that occurred in May 1992 and the political response that it quickly elicited from the federal administration.²³⁴ Even if one accepts, against all evidence, the poor person's success story told by the conservative apology, the "success" results not from a democratically inclusive politics, but rather from a convulsive mass politics of the dispossessed.²³⁵

²³² MURRAY, *supra* note 182, at 33 (stating that "[w]hite America owed black America; it had a conscience to clear").

²³³ See generally FRED C. PAMPEL & JOHN B. WILLIAMSON, *AGE, CLASS, POLITICS, AND THE WELFARE STATE* 34-44 (1989) (discussing the social democratic and interest group politics theories of the welfare state).

²³⁴ Los Angeles experienced intensive rioting and arson in May, 1992 following the jury acquittal of four policemen for the brutal beating of an African-American motorist, Rodney King. The beating had been videotaped by a bystander and played repeatedly on nationwide television. In the days that followed the verdict, many people died, and the beating of a white motorist by African-American youths was again videotaped by a bystander and broadcast repeatedly. Within days of the Los Angeles uprising, Congress issued a lightning-fast appropriation of two billion dollars to assist the urban area, as a committee of the House of Representatives reported that "[t]he rioting in Los Angeles ha[d] focused attention on new solutions to inner-city poverty." *Urban Fury Fuels Welfare Debate*, HUNGER REP. (House Select Comm. on Hunger, Wash., D.C.), Summer 1992, at 1; see also Toner, *supra* note 35, at A16 (commenting that after "the riots in Los Angeles, [President] Bush ha[d] changed his tone, speaking more sympathetically about the plight of families on welfare"). Too often it seems that the violence of the street is the only tool the poor have to contest the "violence of institutions." See Ronald Steel, *The Bobby Gap*, NEW REPUBLIC, May 25, 1992, at 16, 17 ("There is another kind of violence . . . This is the violence of institutions; indifference and inaction and slow decay. This is the violence that afflicts the poor . . . This is the slow destruction of a child by hunger, and schools without books and homes without heat in the winter." (quoting Robert F. Kennedy, Jr.)).

²³⁵ In addition to the foregoing apology, Winter also advances an "institutional competence" defense of the Court's poverty cases, Winter, *supra* note 139, at 100, but this argument fails for a similar reason. Winter posits that distributional questions (a category into which he lumps all social welfare matters) are "classic issue[s] calling for the resolution of the claims of competing groups," and that "[o]ne area in which legislatures seem institutionally superior to other branches of government is in the representation of interest groups." *Id.* But even granting that courts should not meddle with ordinary distributional choices if the political system is functioning on the pluralist model that Winter presumes, the proposition does not hold where a group is undemocratically excluded or disabled from competing for government attention and largesse. Indeed, this is a central point of *Carolene's* footnote four.

2. Centrist Apology

A second theoretical justification for the Court's poverty discourse derives from John Hart Ely's process-oriented approach to judicial review.²³⁶ This approach, also known as a "representation-reinforcing" model, has long dominated constitutional theory and its contours are quite familiar.²³⁷ Ely's theory assigns the Court the task of "[p]olicing the [p]rocess of [r]epresentation"²³⁸ in order to protect against democratic "malfunction."²³⁹ The key question is "whether the opportunity to participate either in the political processes by which values are appropriately identified and accommodated, or in the accommodation those processes have reached, has been unduly constricted."²⁴⁰ This role of dismantling roadblocks in the political process²⁴¹ is said to protect against democratic breakdown.

See supra notes 80-86 and accompanying text. In a similar vein, Winter rationalizes the Court's placement of welfare laws affecting "the most basic needs of impoverished human beings" into the same constitutional category as ordinary commercial legislation, *Dandridge v. Williams*, 397 U.S. 471, 485 (1970), by asserting that both species of legislation "involve[] the allocation of scarce resources and the distribution of income." Winter, *supra* note 139, at 101. The argument proves far too much, since, as other adherents to the law and economics school tirelessly remind us, the enforcement (or nonenforcement) of virtually any "law"—constitutional, legislative or judicial—has measurable allocational impacts. *See e.g.*, RICHARD A. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972). On Winter's theory, all laws would be constitutionally indistinguishable.

²³⁶ *See generally* ELY, *supra* note 41, at 73-104.

²³⁷ Ely's book, *DEMOCRACY AND DISTRUST*, *supra* note 41, has been called "the most important effort to develop footnote four's larger implications for the practice of judicial review." Ackerman, *supra* note 47, at 716 n.6. Ely does not have a monopoly on process-oriented theories, but as the leading proponent, this section focuses exclusively on his arguments with respect to treatment of the poor.

²³⁸ ELY, *supra* note 41, at 73.

²³⁹ *Id.* at 103. In close parallel with the second and third paragraphs of *Carolene* footnote four, Ely describes two categories of "systematic malfunction" that call for judicial intervention:

Malfunction occurs when the *process* is undeserving of trust, when (1) the ins are choking off the channels of political change to ensure they stay in and the outs will stay out, or (2) though no one is actually denied a voice or a vote, representatives beholden to an effective majority are systematically disadvantaging some minority out of simple hostility or a prejudiced refusal to recognize commonalities of interest, and thereby denying that minority the protection afforded other groups by a representative system.

Id. (citations omitted).

²⁴⁰ *Id.* at 77.

²⁴¹ *See id.* at 136.

Ely's argument about the poor is located in his broader discussion of the Court's role in protecting minorities. Ely argues that the Court's function is not limited to perfecting the processes of public decisionmaking directly.²⁴² Rather, its role extends to adjusting political outcomes for groups that are *undemocratically* disabled from safeguarding their interests through normal political channels, groups that, in Ely's words, are "barred from the pluralist's bazaar, and thus keep[] finding [themselves] on the wrong end of [legislative] classifications, for reasons that in some sense are discreditable."²⁴³ Ely attends to the *reasons* for a minority's political exclusion or ineffectiveness, on the theory that many perfectly valid and democratic factors—such as group size or merit of claim—might fully explain a minority's perennial losses in the political sphere.²⁴⁴ The critical question, then, is what constitutes a "discreditable"—and therefore, constitutionally suspect—reason for minority powerlessness. Ely's response, harking back to *Carolene*, is "prejudice," and he identifies two variants.²⁴⁵ "First degree" prejudice, the most virulent, is marked by the majority's desire to impair a group, not for the sake of some overriding social good, but largely to disadvantage the group's members.²⁴⁶ First degree prejudice manifests itself as a majority's irrational failure to apprehend its common bonds and interests with a disfavored group and its concomitant refusal to deal pluralistically with that group. A second, more subtle form of prejudice is reflected in legislative resort to generalizations founded upon majority "self-flattering" stereotypes.²⁴⁷ Ely enlists a variety of social-psychological principles to argue that such generalizations are especially prone to inaccuracy and therefore "distort" the legislative process. This

²⁴² See *id.* at 135.

²⁴³ *Id.* at 152 (emphasis added).

²⁴⁴ But cf. Tribe, *supra* note 46, at 1072-77 (arguing that Ely and other process theorists cannot distinguish democratic from undemocratic reasons for a minority's political status without first identifying "fundamental substantive rights," and that once one develops a theory of substantive rights, the *raison d'être* of process-based theories dissolves).

²⁴⁵ See ELY, *supra* note 41, at 153-57

²⁴⁶ *Id.* at 157.

²⁴⁷ *Id.* at 158. Ely provides several examples of such generalizations, including "generalizations to the effect . . . that whites in general are smarter or more industrious than blacks, men more stable emotionally than women, or native-born Americans more patriotic than Americans born elsewhere . . ." *Id.* at 159. Such stereotypes, Ely observes, "go down pretty easily" with the "flattered" groups, "whose demography is that of the typical American legislature." *Id.*

second variety of prejudice manifests itself in "erroneous" or unreasoned legislative decisionmaking that denies the minority's right to "equal concern and respect" by obviously undervaluing its welfare.²⁴⁸

Ely's treatment of the Court's poverty discourse is short and pointed.²⁴⁹ He refers to the Warren Court's effort to expand "the set of suspect classifications beyond the core case of race" as so "adventurous" that it included "even poor people."²⁵⁰ With the transition to the Burger Court, "the retreat from the once glittering crusade to extend special constitutional protection to the poor had turned into a rout."²⁵¹ Ely explains that the "unusual conceptual problems with that campaign . . . were never satisfactorily worked out," and the suggestion is that he is glad to bury the entire episode.²⁵²

Ely's theoretical framework allows the poor no better than standing room in the Constitution's inner circle of special protection. Ely recognizes that the poor, despite their formal possession of the franchise, are in fact politically marginal.²⁵³ Any representation they command deserves little judicial trust because those who govern can be expected to lack "empathy," that is, the ability to discern and respect the interests of those who are different from the ruling groups.²⁵⁴ Legislators are not, for the most part, drawn

²⁴⁸ *Id.* at 157; see also *supra* note 188 and accompanying text. This category of prejudice also includes legislation that tangibly benefits people who resemble those in power at the expense of others.

²⁴⁹ Interestingly, some commentators have derived from the theory of representation-reinforcement a constitutional right to subsistence. With characteristic irony, Frank Michelman finds in the process-oriented approach support for a welfare rights thesis that each individual may claim from the state an income sufficient to facilitate meaningful participation in the political process. See Michelman, *supra* note 123, at 677. Robert Dahl similarly argues that a social guarantee of "rights and goods external to the [democratic] process, but necessary to it," including the material wherewithal for survival and political participation, is among the essential "criteria" for a democratic system. DAHL, *supra* note 17, at 167-82. This Article does not address these implications of Ely's argument for the Court's treatment of the poor.

²⁵⁰ ELY, *supra* note 41, at 148.

²⁵¹ *Id.* at 148. Although Ely states that the retreat began at the end of the Warren era, the cases that he cites for that view, *Dandridge* and *Vallierra*, see *id.* at 149 n.50, were decided after Justice Rehnquist had joined the Court and Justice Burger had become Chief Justice. But see HERMAN SCHWARTZ, *THE BURGER YEARS* xii (1987) (stating that "the Burger Court was discernably more conservative than the Warren Court, even though by 1968 the latter was moving to the right along with the nation, in reaction to riots, assassinations, and the Vietnam War").

²⁵² *Id.* at 148-49.

²⁵³ See *id.* at 162.

²⁵⁴ *Id.* at 160-61.

from the lower strata of society, and in any event, they may be expected to share a broad-based "[h]ostility" that has been historically directed toward poor people.²⁵⁵ Finally, Ely explains, the "social intercourse" between majority and minorities that ordinarily operates to mitigate "exaggerated stereotyping" of outgroups does not exist between the haves and have-nots;²⁵⁶ a sufficiently significant form of "prejudice" therefore persists to warrant judicial concern about legislation that disadvantages the poor.²⁵⁷

Oddly, however, Ely concludes that such judicial concern ought only extend to "laws that actually classify on the basis of wealth, drawing on some comparative generalization about the relative characteristics of the poor on the one hand and those who more nearly resemble the legislators on the other."²⁵⁸ All other forms of political outcome injurious to the poor are of no constitutional moment because, as Ely views it, they merely involve "failures on the part of the government . . . to alleviate . . . poverty by providing one or another good or service."²⁵⁹ Ely concedes that heightened judicial review may be warranted even when a law does not "discriminate explicitly against a disfavored group," but contends that indirect legislative discrimination against the poor and so-called "they-they" classifications that discriminate among the poor are not troubling because they are not motivated by either form of constitutionally significant prejudice. He writes:

[F]ailures to provide the poor with one or another good or service, insensitive as they may often seem to some of us, do not generally result from a sadistic desire to keep the miserable in their state of misery, or a stereotypical generalization about their characteristics, but rather from a reluctance to raise the taxes needed to support such expenditures—and at all events they will be susceptible to immediate translation into such constitutionally innocent terms.²⁶⁰

Under Ely's analysis, therefore, the Court erred by refusing close scrutiny of the de jure anti-poor discrimination in *Valtierra*, but it appropriately applied only a minimum rationality standard to uphold the social welfare laws in *Dandridge* and its progeny.

²⁵⁵ *Id.* at 161.

²⁵⁶ *Id.* at 161-62.

²⁵⁷ *Id.* Ely makes these observations initially about "aliens" and then asserts that "a similar analysis seems to apply to the poor."

²⁵⁸ *Id.* at 162.

²⁵⁹ *Id.*

²⁶⁰ *Id.*

Ely's analysis of poverty suffers from three decisive flaws, each related to his single-minded focus on the subjective motivation of the politically dominant group.²⁶¹ First, let us take Ely at his word that the poor are not subject to prejudice when the majority reaches distributional decisions that are unfavorable to the less affluent. Why should the absence of prejudice end the inquiry into democratic malfunction?²⁶² If, as Ely claims, majoritarian decisions are illegitimate whenever a group lacks a meaningful opportunity to participate in the process "by which values are appropriately identified" or in the process of the "accommodation" of those values, then the Court ought to give classifications close scrutiny whenever evidence suggests "blocked access" to the pluralist bazaar.²⁶³ Prejudice is thus one indication of democratic malfunction; but it is not the only one.

Indeed, Ely acknowledges that the poor lack meaningful political access. The source of their "blockage" is the wealth-induced disparity of political influence that accords them less weight and respect in the political process than a constituency of their magnitude would seem to deserve.²⁶⁴ The concept that wealth is a

²⁶¹ For general objections to Ely's use of motivation analysis, see Daniel R. Ortiz, *Pursuing a Perfect Politics: The Allure and Failure of Process Theory*, 77 VA. L. REV. 721, 735-41 (1991).

²⁶² Earlier in his argument, Ely distinguishes between objectively inadequate political access and subjective prejudice, and describes each as an independent basis for ratcheting up judicial review. The concept of prejudice in this regard extends Ely's theory of judicial intervention to groups that possess their democratic share of voice and vote but nevertheless find themselves undemocratically excluded from their commensurate share of power and influence:

Political access is surely important, but (so long as it falls short of majority control) it cannot alone protect a group against the first type of prejudice we examined, out-and-out hostility, nor will it even serve effectively to correct the subtler self-aggrandizing biases of the majority. If voices and votes are all we're talking about, prejudices can easily survive (and even on occasion be exacerbated): other groups may just continue to refuse to deal

....

ELY, *supra* note 41, at 161 (citations omitted). This refinement enabled Ely to encompass African-Americans—whom he regards as amply possessed of voice and vote—in his process-oriented interpretation. See *id.* at 151-53. By Ely's analysis, it may be that prejudice renders certain political outcomes constitutionally suspect even if the disadvantaged group has voice and vote. But the absence of prejudice should not necessarily remove all constitutional doubt concerning legislation that disadvantages groups politically marginalized for other democratically "discreditable" reasons.

²⁶³ See *supra* text accompanying notes 239-43.

²⁶⁴ See, e.g., Ackerman, *supra* note 47, at 723 (discussing social science literature that expresses "a pervasive anxiety over the way in which inequalities of wealth distort the operation of a democratic process formally based upon egalitarian principles");

"discreditable" basis for allocating public power is the basic insight of the political rights cases,²⁶⁵ and is consistent with the process-oriented approach that no group should lack a fair chance to stake out the values that are at the heart of the community's distributive choices.

Moreover, Ely himself professes that even the allocation of "benefits that are not themselves constitutionally required" should be carefully scrutinized if "the way the distribution was arrived at" is procedurally suspect (or, "discreditable," or reflective of a "systematic malfunction").²⁶⁶ Ely never explains, though, why the distributional choices that reflect the government's failure to alleviate poverty by providing "one or another good or service"²⁶⁷ should be excluded from the more general category of "constitutionally gratuitous" benefits—"goods, rights, exemptions, or whatever"—the dispensation of which the Court has an obligation to review.²⁶⁸

Ely's discussion of the poor fails for a second reason which becomes apparent when one examines the function that prejudice performs in his analysis. Ely focuses on prejudice not for its own sake, but rather as evidence of distortion, defect, or lack of trustworthiness in the political process. According to Ely, first degree prejudice perverts pluralist politics because it "distorts reality" and "blinds" politically ascendant groups to the common and overlapping interests that they share with disfavored groups. The more subtle form of prejudice that he describes—majority "self-flattering generalizations"—is also dangerous because it "distorts" political decisionmaking by displacing reasoned (or at least informed) deliberation with stereotype, causing legislatures to act on "erroneous assumptions" and "misapprehensions."

If the functional marginalization of the poor produces the same quality of legislative distortion that Ely describes as resulting from "prejudice," then the judicial response ought to be the same regardless of the ruling elite's subjective motivation.²⁶⁹ And

see also Beitz, *supra* note 16, at 132-41 (commenting on the ability of the wealthy to exert disproportionate political influence through campaign contributions).

²⁶⁵ See *supra* notes 100-18 and accompanying text.

²⁶⁶ ELY, *supra* note 41, at 145.

²⁶⁷ *Id.* at 162.

²⁶⁸ *Id.* at 136.

²⁶⁹ Cf. Kenneth L. Karst, *The Supreme Court 1976 Term—Forward: Equal Citizenship Under the Fourteenth Amendment*, 91 HARV. L. REV. 1, 51 (1977) ("One who is stumbled over often enough may, understandably, notice that those cumulative impacts bear

indeed, distortion in each of the senses that Ely associates with prejudice is caused by the political debilitation of the poor. Politicians readily admit that programs for the poor are "easy targets" that can be decimated without worrying too much about getting facts straight, assessing consequences, or developing coherent policy—because poor people are politically powerless.²⁷⁰ Welfare, one politician explains, is "the domestic equivalent of Middle East politics, . . . wrapped in prejudice and attitudes."²⁷¹ Moreover, the more affluent, lacking empathy for the poor, have all but abandoned the goal of constructing "a healthy and nourishing community life for all citizens."²⁷² Having exercised their exit option²⁷³ and resorted to the privatization of public services,²⁷⁴ they increasingly view all social welfare programs as simply handouts to the poor. The idea that social welfare programs are a long-term social investment for the good of all²⁷⁵ is dismissed by those who dispute that poverty even exists.²⁷⁶

In addition, the usual mix of political incentives that imposes some, however feeble, discipline on legislative decisionmaking is absent in the case of the poor because they are unable to hold politicians accountable through traditional political channels.²⁷⁷

a certain functional resemblance to kicks.").

²⁷⁰ See *supra* note 180 and accompanying text; see also Kevin Sack, *New York Medicaid Strained by Newly Poor*, N.Y. TIMES, Mar. 22, 1992, § 4, at 16 (quoting Michael J. Dowling, Director of Health, Education and Human Services for New York, that it is politically easier "to deal with issues that are just perceived as welfare").

²⁷¹ Toner, *supra* note 35, at A16 (quoting Rep. Thomas J. Downey, and characterizing current welfare policies as a way of "penalizing the powerless").

²⁷² Patricia M. Wald, *Becoming a Player: A Credo for Young Lawyers in the 1990s*, 51 MD. L. REV. 422, 423 (1992).

²⁷³ See generally ALBERT O. HIRSCHMAN, EXIT, VOICE, AND LOYALTY: RESPONSES TO DECLINE IN FIRMS, ORGANIZATIONS, AND STATES (1970).

²⁷⁴ See, e.g., JOHN E. CHUBB & TERRY M. MOE, POLITICS, MARKETS AND AMERICA'S SCHOOLS (1990) (proposing a market-based approach to provision of educational services).

²⁷⁵ See, e.g., Symposium, *Investing in Our Children's Future: School Finance Reform in the '90s*, 28 HARV. J. ON LEGIS. 293 (1991) (discussing the need to improve public education through school finance reform); CDF, A CHILDREN'S DEFENSE BUDGET, *supra*, note 174, at 7 (stating that investment in children's programs "are investments in America's future"). But see Mark Kelman, *On Democracy-Bashing: A Skeptical Look at the Theoretical and "Empirical" Practice of the Public Choice Movement*, 74 VA. L. REV. 199, 272 (1988) (describing passage of rent control ordinance in East Palo Alto, Cal. that sought to "protect large numbers of long-term citizens against . . . dispersion").

²⁷⁶ See Jonathan Fuerbringer, *Homeless Are Not Duty of U.S., Reagan Aide Says*, N.Y. TIMES, Feb. 19, 1986, at A18 (reporting a 1983 statement by Edwin Meese, then Counselor to the President, contending that people go to soup kitchens not because they are poor but "because the food is free and that's easier than paying for it").

²⁷⁷ Cf. *New York v. United States*, 112 S. Ct. 2408, 2424 (1992) (suggesting a

This is not by any means a recent or transient phenomenon. Twenty years ago, Justice Marshall observed that the political powerlessness of poor people would frequently allow legislative processes to deteriorate in precisely the manner that Ely identifies under his "prejudice" rubric as warranting judicial intervention: "Because the recipients of public assistance generally lack substantial political influence," Justice Marshall noted, "state legislators may find it expedient to accede to pressures generated by misconceptions."²⁷⁸

Moreover, as a structural matter, the absence of an out-group voice reduces the likelihood of careful and informed decision-making with respect to the interests of the excluded group. In the case of the poor, it has too often allowed political discourse to degenerate into mindless scapegoating and dehumanizing stereotypes.²⁷⁹ Poor children have become America's untouchables,²⁸⁰ and poor mothers are "lumped together with drug addicts, criminals, and other socially-defined 'degenerates' in the newly-coined category of 'underclass.'"²⁸¹ It seems more than clear that the virulent and dehumanizing anti-poor rhetoric that has become the currency of recent public discourse would not be politically practicable if poor people were fully enfranchised. That this lack of political access—and the correspondingly diminished quality of public discourse on poverty issues—has "blinded" the majority to its overlapping interests with poor people and deprived the poor of "equal concern and respect"²⁸² is amply demonstrated by governmental failure to fund preventive programs that would

model of constitutional governance centered on the principle of political accountability).

²⁷⁸ *New York State Dep't of Social Servs. v. Dublino*, 413 U.S. 405, 432 (1973) (Marshall, J., dissenting); cf. *Jefferson v. Hackney*, 406 U.S. 535, 575 (Marshall, J., dissenting) (discussing the evidence that legislatures underfund the AFDC program because AFDC recipients are stigmatized and "frowned upon by the community," thereby making the program itself "politically unpopular").

²⁷⁹ See Amidei, *supra* note 213, at 9 (stating that the welfare system "reflects a view of poor people as unwilling to work unless forced, dishonest, incompetent, and irresponsible toward family and community alike. They're people no politician would eagerly help, people to be screened out at almost any cost"); Herbert J. Gans, *Fighting the Biases in Social Concepts of the Poor*, POVERTY & RACE RESEARCH ACTION COUNCIL, May 1992, at 1 (stating that "policy makers avoid dealing with poverty" by labeling "some of the poor as morally deficient or undeserving").

²⁸⁰ See Jonathan Kozol, *Outside the Dream*, SAFETY NET, Oct. 1991, at 3.

²⁸¹ Martha L. Fineman, *Images of Mothers in Poverty Discourses*, 1991 DUKE L.J. 274, 283.

²⁸² *Supra* note 188 and accompanying text.

simultaneously reduce public expenditures and relieve some of the privations presently endured by society's most vulnerable citizens.²⁸³ By Ely's own lights, then, it is difficult to see how democratic breakdown due to avarice is any less troubling, or less in need of judicial correction, than breakdown due to prejudice.²⁸⁴

Finally, Ely's distinction between de jure discrimination on the basis of wealth and distributional outcomes that "incidentally" injure poor people makes no sense in view of his statement that prejudice against the poor pervades the political process. Much of the function of modern government concerns the allocation and distribution of resources.²⁸⁵ If prejudice against a particular group infects the governance process, then there is no reason to suppose that it will steer clear of key distributional decisions.²⁸⁶ Under these circumstances, to say that allocational outcomes unfavorable to the poor are disconnected from prejudice because they might save public money is to ignore political reality. As a constitutional matter, it should make no difference if prejudice manifests itself as a single statute that employs an explicit wealth-based classification, or instead as an overall legislative program that, because of an unworthy decision-making process, denies "equal concern and respect" by channeling resources into programs for the more affluent at the expense of the poor.

Similarly, discrimination between categories of the poor ought to be suspect for such classifications frequently emerge from a

²⁸³ See *supra* notes 200-02 and accompanying text. Poverty advocates are familiar with this phenomenon. A common argument against agency construction of a social welfare statute, or against the constitutionality of the statute itself, is that the measure as applied not only inflicts injury but is also cost-ineffective. See, e.g., *Lewis v. Grinker*, 794 F. Supp. 1193, 1200-01 (E.D.N.Y. 1991), *aff'd* 965 F.2d 1206 (2d Cir. 1992).

²⁸⁴ See ELY, *supra* note 41, at 148-53 (arguing that prejudicial animus should be the key element in defining protected classes under the Equal Protection Clause). In a somewhat different context, even Madison identified avarice (expressed through conflicts between various economic interests) as the root cause of "factionalism" that posed the most serious threat to representative government. THE FEDERALIST No. 10, *supra* note 18, at 77.

²⁸⁵ See Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964).

²⁸⁶ Cf. T. Alexander Aleinikoff, *The Constitution in Context: The Continuing Significance of Racism*, 63 U. COLO. L. REV. 325, 331-50 (1992) (discussing the pervasive nature of racism in decision-making processes); Kenneth L. Karst, *The Costs of Motive-Centered Inquiry*, 15 SAN DIEGO L. REV. 1163, 1165 (1978) (contending that "racial attitudes often operate at the margin of consciousness"). See generally Charles R. Lawrence III, *The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism*, 39 STAN. L. REV. 317 (1987) (arguing that racism is often a subconscious phenomenon).

decision-making process that Ely would regard as defective: either the process relies on majority "self-flattering generalizations" by favoring "we-like" poor over "they-like" poor,²⁸⁷ or it is devoid of equal concern and respect in that the lines that are drawn are less the product of considered policy than they are of an inflammatory politics played out at the expense of a socially isolated out-group.

3. Liberal Apology

Finally, we examine the liberal apology for the Court's poverty discourse. The most comprehensive and insightful explanation appears in the work of Bruce A. Ackerman.²⁸⁸ Ackerman argues that the judiciary *ought* to intervene when groups are undemocratically fenced out or denied their "fair share of political influence," and he urges that poor people are such a group. Ackerman contends, however, that current constitutional theory recognizes only certain varieties of undemocratic, exclusionary politics as warranting heightened judicial concern, namely, politics that result from "prejudice against discrete and insular minorities" as described in footnote four of *Carolene Products*.²⁸⁹ Proceeding on

²⁸⁷ For example, the "we" that Ely identifies—white, male, upper-middle class legislators—are not African-Americans, *see* *Jefferson v. Hackney*, 406 U.S. 535, 549-50 (1972) (upholding funding disparities that favored social programs with predominantly white participants at the expense of a similar program with predominantly minority race participants), do not have multiple children out-of-wedlock, *see* *Dandridge v. Williams*, 397 U.S. 471, 486 (1970) (upholding cap on benefits payable to welfare families, regardless of the number of eligible children), and do not participate in labor strikes, *see* *Lyng v. International Union, United Auto., Aerospace & Agric. Implement Workers*, 485 U.S. 360, 373 (1988) (upholding provision making households ineligible to participate in the food stamp program while any of its members is on strike). But "we" (or "our" children) are likely to attend college, live in nontraditional domestic arrangements, and be claimed as a tax deduction. *See* *United States Dep't of Agric. v. Murry*, 413 U.S. 508, 514 (1973) (invalidating a Food Stamp Act provision that, in response to concerns about abuse by college students, barred participation by households with a member 18 years or older who was claimed as a tax dependent of another household); *United States Dep't of Agric. v. Moreno*, 413 U.S. 528, 538 (1973) (invalidating a Food Stamp Act provision that barred participation by any household containing an individual unrelated to any other household member).

²⁸⁸ *See* Ackerman, *supra* note 47.

²⁸⁹ *Id.* at 740 (quoting *United States v. Carolene Products, Co.*, 304 U.S. 144, 153 n.4 (1938)). The "discrete and insular" formulation appears in the third paragraph of the *Carolene* footnote. Ackerman also observes that direct interference with political rights, of the type described in the second paragraph of the footnote, qualifies for heightened scrutiny under current constitutional theory. *See* Ackerman, *supra* note 47, at 741.

the premise that *Carolene Products* and modern constitutional doctrine are coterminous in all relevant respects, Ackerman unleashes a withering social science analysis on the terms "prejudice," "discrete," "insular," and "minority," and concludes that the structure of modern constitutional doctrine fails to protect some of the most frequent and systematic victims of undemocratic politics.²⁹⁰ Of particular import, Ackerman criticizes *Carolene's* "discrete and insular minorities" formulation as neglecting the poor, despite widespread recognition that their political marginalization is one of the most pervasive and troubling anti-democratic features of modern American government.²⁹¹ On Ackerman's view of it, the Court's poverty cases are normatively wrong and the product of "bad political science," but they fit squarely within the confines of received doctrine.²⁹²

There is no doubt that Ackerman's critique is apt at the descriptive level. The Court has indeed failed to correct, or even seriously acknowledge, many of the most exclusionary defects of American politics, defects that are often generated by wealth-based inequalities of access and influence. But by blaming the *Carolene* decision for this state of affairs, Ackerman conflates the question of framework with that of application. The question of framework asks whether current doctrine encompasses the general principle that the intensity of judicial review rests upon the premise of democratic legitimacy. The question of application asks whether the Court has disregarded the general principle in particular instances or adopted

²⁹⁰ Ackerman asserts that racial and religious minorities have been sufficiently incorporated into the normal political process so that discreteness and insularity are no longer political impediments at all, but to the contrary, tend to *enhance* a group's prospects and effectiveness in the pluralist bazaar. *See id.* at 723-24, 744-45. The modern danger of unfair disadvantage in the political process, says Ackerman, falls upon "anonymous and diffuse groups," which by their nature face a variety of obstacles to effective organization and participation in interest-group politics. *See id.* at 724. Of course, Ackerman's "anonymous and diffuse" formulation facially comprehends single-issue groups and factions—gun control opponents, for example—whose performance in politics is not likely to implicate any sympathetic constitutional concern. Ackerman does not suggest a theory for determining which anonymous or diffuse groups should receive special constitutional protection, but urges the development of "paradigms that detail the systematic disadvantages that undermine our system's legitimacy in dealing with the grievances of these diffuse or anonymous groups." *Id.* at 742.

²⁹¹ *See id.* at 723.

²⁹² *See id.* at 743.

a concept of "democratic legitimacy"²⁹³ so cramped as to improperly confine the principle's reach.²⁹⁴

The distinction is in no way trivial; it determines the nature of the argument for a more protective poverty jurisprudence and speaks to the integrity *vel non* of the Court's existing discourse. If the premise for judicial deference to political outcomes is democratic politics—if accepted constitutional theory recognizes a fundamental linkage between the intensity of judicial review and the democratic legitimacy of the political process—then a critique of the Court's poverty cases might profitably focus on the Court's conception of democracy and empirical view of politics in the United States. On this theory, a jurisprudence more protective of the poor requires no restructuring of the basic theory of constitutional review. Rather, the existing framework would compel a kinder, gentler jurisprudence if the social and political marginalization of poor people were regarded as a constitutionally significant departure from democratic norms. Ackerman, however, sees no such linkage outside the *Carolene* footnote in current constitutional doctrine.

The focus of Ackerman's analysis is the language of *Carolene*'s renowned footnote four. The last paragraph of that footnote asks "whether 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 more searching judicial inquiry."²⁹⁵ According to Ackerman, the core project of judicial review under *Carolene* (beyond enforcement of specific constitutional prohibitions), is to "accord special protection to those who ha[ve] been deprived of their fair share of political influence."²⁹⁶ The *Carolene* Court, Ackerman observes, "sketched [this] new mission in exceptionally broad strokes" that suggested "an

²⁹³ See introductory discussion *supra* following note 38.

²⁹⁴ For example, in *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973), the Court recognized the general principle that groups "relegated to . . . a position of political powerlessness" should receive "extraordinary protection from the majoritarian political process," but declined to extend such protection to the residents of property-poor school districts who sought equalization of public school financing under the Equal Protection Clause.

²⁹⁵ *Carolene Prods.*, 304 U.S. at 153 n.4.

²⁹⁶ Ackerman, *supra* note 47, at 715. *Carolene Products'* theory of judicial review, says Ackerman, "promises relief" from the counter-majoritarian difficulty by "seiz[ing] the high ground of democratic theory and establish[ing] that the challenged legislation was produced by a profoundly defective process." *Id.*

enduring role for the judiciary" as the guardian of democratic government.²⁹⁷

One phenomenon that profoundly frustrates this democratic-pluralist goal, Ackerman states, is the disproportionate influence of wealth on politics.²⁹⁸ The appropriate judicial response under the *Carolene* framework, it would seem, would be to extend heightened protection to groups that are marginalized from politics because of the distorting effects of maldistributed wealth. The Court, of course, has accorded no such protection, and one waits from Ackerman for an explanation of the Court's failure.

Ackerman, however, pursues a different analytical path altogether, one that implicitly validates the Court's current poverty jurisprudence as the faithful application of precedent. Ackerman concludes that since *Carolene* "does not assert that prejudice against 'impoverished and uneducated minorities' may call for a more searching judicial inquiry," a poverty jurisprudence more protective of the poor can be achieved only through construction of a new, reoriented or adapted theory of judicial review.²⁹⁹

Ackerman's conclusion rests on at least two unarticulated assumptions. The first is that *Carolene* defines a closed universe of constitutionally significant democratic breakdowns and restricts that universe to breakdowns caused by "prejudice against discrete and insular minorities."³⁰⁰ But the *Carolene* footnote does no such thing. Although Ackerman and others critique the three-sentence footnote as though it were a fully articulated theory of constitutional adjudication,³⁰¹ the footnote more modestly sets forth a bare framework upon which a new constitutional regime might progressively be built. As Professor Louis Lusky has emphasized, *Carolene's* footnote "did not even pretend to cover the entire field" or "purport to *decide* anything; it merely made some suggestions for future consideration."³⁰²

²⁹⁷ *Id.* at 715 & n.4.

²⁹⁸ Other commentators have reached this same conclusion on an explicit substantive-oriented theory that identifies an anti-subjugation principle in the Equal Protection Clause. See, e.g., TRIBE, *supra* note 41, at 1514-21.

²⁹⁹ Ackerman, *supra* note 47, at 723, 745-46.

³⁰⁰ *Carolene Prods.*, 304 U.S. at 153 n.4.

³⁰¹ See, e.g., Balkin, *supra* note 81; Brilmayer, *supra* note 80.

³⁰² Lusky, *supra* note 72, at 1098 (quoting Louis Lusky, *Public Trial and Public Right: The Missing Bottom Line*, 8 HOFSTRA L. REV. 273, 305 (1980)); see also Powell, *supra* note 87, at 1090 (stating that footnote four "is not a developed theory in itself," but rather "a fertile starting place for constitutional theory"). Professor Lusky was Justice Stone's law clerk during the term in which *Carolene* was decided. See Lusky,

Even if one were to regard the *Carolene* footnote as positing a fully developed theory of judicial review, Ackerman's reading of it is far too narrow. The footnote expresses concern over "prejudice against discrete and insular minorities" not principally for its inherent malevolence or as an evil in itself, but rather for its propensity to derail democratic politics.³⁰³ Prejudice of this kind is constitutionally troubling, the footnote observes, because it may be a "special condition" that subverts the "political processes ordinarily to be relied upon to protect minorities."³⁰⁴ Reflecting on this notion of political breakdown as the more fundamental justification for judicial intervention, the Court in later years has explained that "where legislation affects discrete and insular minorities, the presumption of constitutionality fades *because* traditional political processes may have broken down."³⁰⁵ This effect of prejudice, the broader category of democratic failure, is the framework-defining element that *Carolene* placed on the table and left for progressive elaboration.³⁰⁶

supra note 72, at 1093.

³⁰³ On various occasions, Ackerman seems to embrace this point, but, for reasons unexplained, proceeds to analyze *Carolene* as though it had forbidden judicial intervention outside of the discrete and insular category. See Ackerman, *supra* note 47, at 718-31.

³⁰⁴ *Carolene Prods.*, 304 U.S. at 153 n.4. This language is consistent with Professor Lusky's broad understanding of the footnote's theory that judicial review is not limited to "procedural and structural interventions," but rather extends to ensuring "government by the people and government for the whole people." Lusky, *supra* note 72, at 1096; see also ELY, *supra* note 41, at 77 (contending that the *Carolene* theory focuses upon "whether the opportunity to participate . . . in the political processes . . . has been unduly restricted"); Sunstein, *supra* note 19, at 34 & n.22 (stating that *Carolene* responds to the pluralist problem of faction by protecting "certain groups [that] are effectively 'fenced out' of the pluralist process").

³⁰⁵ *Johnson v. Robison*, 415 U.S. 361, 375 n.14 (1974) (emphasis added) (quoting *Robison v. Johnson*, 352 F. Supp. 848, 855 (D. Mass. 1973)).

³⁰⁶ For the same reason, the problem is not—as Professor Balkin suggests—the failure of the *Carolene* footnote to list economic domination as another "special condition" that might undermine the democratic process and warrant heightened scrutiny. See Balkin, *supra* note 81, at 309-11 (contending that *Carolene*'s failure to list wealth-based disparities of political power as a cause of democratic breakdown was purposive and is the "source" of the modern Court's refusal to accord heightened judicial protection to the poor); see also Owen M. Fiss, *The Supreme Court, 1978 Term—Forward: The Forms of Justice*, 93 HARV. L. REV. 1, 7 (1979) (contending that *Carolene*'s footnote four does not recognize poverty "as a category of legislative failure," and that to do so "would undermine the premise of majoritarianism itself"). As Lusky and Ackerman point out, the *Carolene* Court conceptualized the judiciary's new mission in expansive terms, and gave no reason to suggest that its theory of constitutional review was any less concerned with economically-based distortions of the political process than with prejudice-driven ones, especially if the result is equally destructive

Leaving aside this difficulty, Ackerman's rationalization of the poverty cases fails for a more important reason. Even if one were to accept the closed reading of *Carolene* that Ackerman proposes, the Court has never espoused such an interpretation nor justified a denial of heightened protection on that basis.³⁰⁷ Indeed, and this appears decisive on the point, while the Court has denied poor people heightened protection in at least two dozen cases since 1970, on no occasion did it even refer to *Carolene*'s "discrete and insular" formulation, much less rely upon that concept as the basis for its decision.³⁰⁸ Of course, the Court frequently neglects to articulate the doctrinal origins of a ruling, but if the *Carolene* formula were the theoretical basis on which the poverty cases stand, the Court has certainly passed up a lot of opportunities to say so.

Nor has the *Carolene* formula functioned as a restriction on the Court's general theory of judicial review, as Ackerman suggests. To be sure, the Court sporadically recites the "discrete and insular" terminology, but in no case has it ever suggested that special judicial protection would be limited to the categories of "out-groups" encompassed by that phrase.³⁰⁹ Rather, the Court has repeatedly

of fair democratic processes and outcomes.

The *Carolene* Court's selection of the discrete and insular formulation has been traced historically to the Court's revulsion toward the political use of racial and religious scapegoating to displace European democracies with dictatorships. See Cover, *supra* note 62, at 1293-94 & n.17. At the same time, the contemporary domestic situation during the New Deal was characterized by a low ebb of the economic elite's influence over government, a governing coalition whose main constituencies were drawn from the relatively impecunious and perhaps the most popular-regarding politics in American history. The Court was therefore left with little reason to be immediately concerned about wealth-based disempowerment. See generally JOHN K. GALBRAITH, *THE AFFLUENT SOCIETY* (1984); LINDBLOM, *supra*, note 231. The present day poor, however, have not only become a numerical minority; they are also now associated with racial minorities and women, and subjected to the kind of scapegoating that initially inspired the *Carolene* footnote. See *supra* notes 180-81, 186-87.

³⁰⁷ See, e.g., *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1 (1973).

³⁰⁸ See, e.g., *James v. Valtierra*, 402 U.S. 137 (1971); *Dandridge v. Williams*, 397 U.S. 471 (1970); *supra* note 153 (collected cases).

³⁰⁹ As Justice Marshall has noted, "[n]o single talisman can define those groups likely to be the target of classifications offensive to the Fourteenth Amendment and therefore warranting heightened or strict scrutiny." *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 472 n.24 (1985) (Marshall, J., dissenting). Justice Powell made a similar observation several years earlier, remarking that the Court had never "held that discreteness and insularity constitute necessary preconditions to a holding that a particular classification is invidious. These characteristics may be relevant in deciding whether or not to add new types of classifications to the list of 'suspect' categories or whether a particular classification survives close examination." *Regents*

described its duty to intervene in broader functional terms that ask whether the group has been undemocratically disabled from effective political participation:

[T]he Fourteenth Amendment also reaches "a political structure that treats all individuals as equals," yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation. . . .

. . . .

. . . [T]his implicates the judiciary's special role in safeguarding the interests of those groups that are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."³¹⁰

On this view, the terms prejudice, discrete, and insular are neither necessary nor sufficient to accord heightened judicial review, but are merely evidence of democratic malfunction.³¹¹ One could make a convincing case that the Court has not consistently applied (nor fully elaborated) the general principle of extending heightened protection to certain "politically powerless" out-groups. But the persistence of this more expansive, democracy-focused theory refutes Ackerman's assumption that current doctrine extends only as far as his cabined reading of footnote four's text.

of the Univ. of Cal. v. Bakke, 438 U.S. 265, 290 (1978) (citations omitted).

³¹⁰ Washington v. Seattle Sch. Dist. No. 1, 458 U.S. 457, 467, 486 (1982) (citation omitted) (quoting *Mobile v. Bolden*, 446 U.S. 55, 84 (1980) (Stevens, J., concurring in the judgment), and *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); see also *Plyler v. Doe*, 457 U.S. 202, 216-17 n.14 (1982) (including in the category of suspect classes entitled to special judicial protection those groups "relegated to . . . a position of political powerlessness"); *New York City Transit Auth. v. Beazer*, 440 U.S. 568, 609 n.15 (1979) (White, J., dissenting) (suggesting that the court reviewing a challenged rule should consider the political powerlessness of the group whose interests are adversely affected by the rule); *Mathews v. Lucas*, 427 U.S. 495, 506 n. 13 (1976) (same); *Johnson v. Robinson*, 415 U.S. 361, 375 n.14 (1974) (same); *Frontiero v. Richardson*, 411 U.S. 677 (1973) (considering political powerlessness as one factor in determining suspect classes). See generally Thomas W. Simon, *Suspect Class Democracy: A Social Theory*, 45 U. MIAMI L. REV. 107 (1990) (noting that the Court has described suspect classes to include politically powerless minorities, and not simply discrete and insular minorities).

³¹¹ Majority decisions have used the phrase "discrete and insular" on 14 occasions since the *Carolene* decision. See Search of LEXIS Genfed library, US file (March 19, 1993) (on file with author). The closest the Court came to relying on the language of the footnote itself to deny heightened scrutiny was in *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976) (applying rationality review to a mandatory retirement statute on the ground that the elderly do not comprise a "suspect class," defined by the Court both in terms of "political powerlessness" and "discrete and insular" groups).

Ackerman's second unspoken premise is that the poor are "anonymous and diffuse" and so fall outside *Carolene's* "discrete and insular" paradigm. Ackerman considers a group "discrete" if "its members are marked out in ways that make it relatively easy for others to identify them."³¹² He places gender and race in this category, but excludes sexual orientation and poverty. "Insular," according to Ackerman, refers both to spatial proximity and "sociological bonds."³¹³ He views gays, lesbians and minority racial and religious groups as insular, but women and poor people as "diffuse."³¹⁴ Hence, as Ackerman sees it, poor people sit at the bottom of *Carolene's* constitutional priority list, being neither discrete nor insular.³¹⁵

All of this may seem very neat and plausible, but it misinterprets the *Carolene* footnote and severely misapprehends the status of poor people in America today. To begin with, Ackerman's method of interpretation—the vivisection of *Carolene's* discrete and insular minority concept, followed by a rigid definitional analysis of the parts—seems ill-applied to a text that, by Ackerman's own reckoning, attempted to "sketch" in "exceptionally broad strokes" a grand democratic mission for the judiciary.³¹⁶ Lost in Ackerman's definition-bound translation is the *Carolene* Court's own understanding that the discrete and insular formulation broadly encompassed "any socially isolated minority group"³¹⁷ or a group that is "not embraced within the bond of community kinship, but . . . held at

³¹² Ackerman, *supra* note 47, at 729.

³¹³ *Id.* at 727 n.4.

³¹⁴ *Id.* at 724. In addition to this definitional argument, Ackerman also reasons that the poor are not a discrete and insular minority because "although modern courts regularly express concern about the bargaining position of discrete and insular minorities, they often react skeptically to the very idea that legislatures may constitutionally attempt to curb the influence of wealth over formally democratic processes." *Id.* at 723. But this argument misses the point that it may be perfectly consistent for a court to prohibit, on First Amendment grounds, restrictions on the private use of wealth for political expression, yet view the impact of such wealth as sufficiently undemocratic or distorting to warrant heightened scrutiny. See *infra* text accompanying notes 432-81. Thus, to take an example from a related context, few would contend that government may, practically or constitutionally, legislate an end to private, social prejudices against religious minorities; yet it is undisputed that courts may nevertheless regard the political impact of such prejudices as constitutionally significant and in need of judicial amelioration.

³¹⁵ See Ackerman, *supra* note 47, at 722-31.

³¹⁶ *Id.* at 715.

³¹⁷ LUSKY, *supra* note 20, at 364.

arm's length by the group or groups that possess dominant political and economic power."³¹⁸

Not surprisingly, Ackerman's interpretation of discrete and insular minority diverges significantly from the general understanding of that concept.³¹⁹ Although uniqueness itself might not be grounds to reject that interpretation, even on its own merits, Ackerman's definitional approach seems too idiosyncratic. Recall that to be "discrete" within Ackerman's understanding, one must be "marked out" in ways that make for easy identification. Thus, gays are an "anonymous" rather than a "discrete" minority, not because they are not distinct, but, according to Ackerman, because one cannot always identify the sexual orientation of men one passes on the street. Why Ackerman believes that a member of a group must be *visually* distinct under *Carolene* is not clear. Beyond the logical and linguistic difficulties with this definition, lies the further complication that the *Carolene* Court could not have intended it. *Carolene* indisputably embraced religious minorities in its concept of discrete and insular groups, and while certain religious groups are "marked out"—the Amish, for example, or Hasidic Jews—by and large it is no easier to discern the religious beliefs of passersby than their sexual orientation or economic status.

Moreover, Ackerman ignores the extent to which today's poor fit well within the *Carolene* Court's understanding of a discrete and insular minority as "any socially isolated minority group."³²⁰ The poor share many characteristics of groups, such as aliens, that the modern Court has placed within the protection of the footnote.³²¹ Indeed, it was precisely because the phrase "discrete and insular" is so broad that Justice Rehnquist railed against its use as a constitutional standard, warning that lawyers would have little difficulty finding discrete and insular minorities "at every turn in the road."³²²

³¹⁸ Lusky, *supra* note 72, at 1105 n.72.

³¹⁹ See, e.g., TRIBE, *supra* note 41, at 1545 (stating that *Carolene* embraces the "politically underrepresent[ed]"); Brilmayer, *supra* note 80, at 1292 (claiming that *Carolene*'s "logic" is expansive and not restrictive).

³²⁰ LUSKY, *supra* note 20, at 364.

³²¹ See, e.g., *Graham v. Richardson*, 403 U.S. 365, 371-72 (1971) ("Aliens as a class are a prime example of a 'discreet and insular minority.'"). As the vast majority of poor people are formal members of the polity (*unlike* aliens), it is even more appropriate to consider the poor as within the *Carolene* paradigm. Cf. ELY, *supra* note 41, at 161-62 (noting that a similar constitutional analysis applies to both aliens and the poor); Brilmayer, *supra* note 80, at 1293 (discussing the "insider-outsider" who "is inside the scope of state power but outside the process of political participation" as the core *Carolene* concern).

³²² *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973) (Rehnquist, J., dissenting).

Finally, even if one accepted Ackerman's definitions, his assertion that poor people are diffuse and anonymous is contrary to the facts. Social reality amply documents that the poor are not spatially proximate to other groups; rather, commentators note that the poor are subject to "spatial stigma," often consigned to "inner-city areas with extremely high concentrations of poverty."³²³ Economic segregation is as American as apple pie; the wrong side of the tracks has long been a pervasive feature of American society.³²⁴ Over the last twenty years, sociologists and others have documented "the growing concentration and isolation of the poor" and the creation of an underclass that is geographically separated from mainstream America.³²⁵ Government policies have height-

Justice Rehnquist ultimately succeeded in sealing off the universe of suspect classes, but this was accomplished through fiat and not by tightening the definitions of "discrete and insular." See *TRIBE*, *supra* note 41, at 1610 (discussing the lack of "cand[or]" in the Court's development of equal protection doctrine). For Justice Rehnquist, "discrete and insular" connotes some characteristic that is "immutable" in the sense of being out of the individual's control to alter immediately or in relatively short order. *Nyquist v. Mauclet*, 432 U.S. 1, 20 (1977) (Rehnquist, J., dissenting). Thus, as Rehnquist viewed it, permanent resident aliens who had yet to satisfy the five year requirement to be eligible for citizenship suffer an "immutable" characteristic: they do not have the means *immediately* to alter their status, although they will be able to escape the disfavored class after some period of time. *Id.* at 17-20. For the overwhelming majority of the poor, poverty is at least as "immutable," if not more so, in this sense. See FRED BLOCK ET AL., *THE MEAN SEASON: THE ATTACK ON THE WELFARE STATE* 62-84 (1987) (noting that "exogenous economic forces," including the national occupational structure and sub-poverty minimum wage rates, pose insuperable barriers to many individuals attempting to escape impoverishment); JOHN KEANE, *PUBLIC LIFE AND LATE CAPITALISM* 3 (1984) (discussing structural economic and political defects that fail to take account of the disadvantaged); Marta Elliott & Lauren J. Krivo, *Structural Determinants of Homelessness in the United States*, 38 SOC. PROBS. 113, 114 (1991) (contending that homelessness is not the result of personal fault but rather of economic factors); John E. Schwarz & Thomas J. Volgy, *Above the Poverty Line-But Poor: One Fourth of a Nation*, *THE NATION*, Feb. 15, 1993, at 191, 191-92 (observing that one in every six full-time jobs in the United States in 1989 "paid less than it took to lift even a family of three . . . out of poverty").

³²³ Helen Hershkoff & Adam S. Cohen, *Begging to Differ: The First Amendment and the Right to Beg*, 104 HARV. L. REV. 896, 911 & nn.108 & 109 (1991).

³²⁴ See, e.g., CHARLES M. HAAR & DANIEL W. FESSLER, *THE WRONG SIDE OF THE TRACKS* 30 (1986) (discussing the ways in which Southern towns relegated African-Americans to the "wrong side of the tracks" and denied them basic municipal services); INNER-CITY POVERTY IN THE UNITED STATES 3 (Lawrence E. Lynn, Jr. & Michael G.H. McGeary eds., 1990) (noting that "federal policies and programs have had the effect of concentrating poverty in certain areas"); Gar Smith, *Freeways, Community and Environmental Racism*, *RACE, POVERTY & THE ENV'T*, Apr. 1990, at 7 (describing the use of freeways to segregate rich from poor, white from black, and environmental safety from harm).

³²⁵ See, e.g., WILLIAM J. WILSON, *THE TRULY DISADVANTAGED* 8 (1987) (noting the emergence of an underclass that has "become increasingly isolated socially from

ened the physical isolation of the poor through tax abatements, exclusionary zoning policies, and subsidies that confine the poor within an "invisible wall."³²⁶

Moreover, the poor are disconnected from the more affluent and suffer the social isolation that Ackerman points to as a defining characteristic of a discrete and insular minority. The absence of kinship between the haves and have-nots is manifest in the exit of the upper and middle classes from a shared community life³²⁷ and in ongoing assault on the notion of social welfare programs and recipients.³²⁸ The New Deal conception of poor people as the hapless economic casualties of market forces beyond their control has given way to a mean season in which the poor are seen not as "victims entitled to protection," but rather as people "who could be self-reliant but are exploiting society."³²⁹ Ackerman's benign assessment of the social status of the poor is simply insupportable.

Here as well, the supposed connection between *Carolene* and the Court's poverty jurisprudence falls flat. At bottom, then, one can readily agree that the Court's application of the *Carolene* framework has been disappointing, underinclusive, and not entirely rational or consistent, but these shortcomings have little or nothing to do with the *Carolene* footnote's dicta nor indeed with any general principle of constitutional law.³³⁰

mainstream patterns" after the "exodus of the more stable working- and middle-class segments"); Loïc J.D. Wacquant & William J. Wilson, *The Cost of Racial and Class Exclusion in the Inner City*, 501 ANNALS AM. ACAD. POL. & SOC. SCI. 8, 9 (1989) (describing the poor as "[s]evered from . . . society").

³²⁶ See, e.g., Eric J. Brannan et al., *Measuring the Invisible Wall: Land Use Control and Residential Patterns of the Poor*, 82 YALE L.J. 483, 484-85 (1973) (stating that the "invisible wall" occurs as a result of public controls, private restrictive covenants, and market forces); Gerald D. Lloyd, *American Middle Class Values and Land Use: The Exportation of Prejudice*, 8 URB. L. & POL'Y 357 (1987) ("Zoning became the guarantor of the exclusive suburb."); *Uptown Eco Blues*, CITY SUN (NEW YORK), June 5-11, 1992, at A2, A4 (noting the difference in mortality rates between Harlem and the rest of the United States).

³²⁷ See *supra* notes 225-27 and accompanying text.

³²⁸ See, e.g., Jason DeParle, *The Sorrows, and Surprises, After a Welfare Plan Ends*, N.Y. TIMES, Apr. 14, 1992, at A1 (noting an "increasingly strident attack on the very idea of welfare").

³²⁹ Kevin Sack, *The New, Volatile Politics of Welfare*, N.Y. TIMES, Mar. 15, 1992, at 24 (National ed.) (quoting Professor Lawrence M. Mead on social perceptions of the poor).

³³⁰ A more thoroughgoing liberal apology for the Court's poverty jurisprudence is offered by Owen Fiss, who contends that the poor should not be accorded special constitutional protection because "absence of wealth is so pervasive a handicap, it is experienced . . . even by the majority itself[;] . . . to recognize it as a category of legislative failure would stand the *Carolene Products* footnote on its head—it would

C. *Alternative Explanations for the Court's
Poverty Jurisprudence*

The foregoing review of academic justifications for the Court's poverty jurisprudence indicates that while the Court has refused to regard poverty as a suspect classification, or to intervene on behalf of the poor, no coherent or defensible analysis has been articulated to justify its approach. Nor has any convincing response been made to the argument that poor people have been undemocratically marginalized from the processes of representative self-government and should therefore receive some heightened form of judicial protection. But one need not justify the Court's treatment of poverty in order to account for it, and several animating factors, not all of them principled, appear plausible. This section looks to three possible explanations for the Court's treatment of the poor.

1. Radical Consequences

One explanation for the Court's poverty jurisprudence is a fear that "radical," "far reaching" consequences would ensue if the Court were to recognize the poor as an unfairly disempowered out-group.³³¹ Given the extent to which wealth-related inequalities pervade American politics, the recognition of poverty as a suspect

undermine the premise of majoritarianism itself." Fiss, *supra* note 306, at 7. Fiss does not say what he means by "absence of wealth," but since "poverty," as that term is generally understood, is not "experienced by the majority" in the United States, *see, e.g.,* GALBRAITH, *supra* note 306, at 245, his reference must be to some broader category of ordinary folks. It is unclear, though, how the fact that a majority is not "wealthy" leads to the conclusion that courts should not shield the most impoverished and marginalized citizens from at least some especially untoward political outcomes. Fiss seems to argue that the political powerlessness of the poor raises no constitutional difficulty because most people ("the majority") similarly lack the economic wherewithal to exert significant influence on politics. One problem, of course, is that such an argument ignores the real differences between the political circumstances of the middle classes and the rather less attractive political situation of the abjectly poor. More importantly, even if one regarded the nonwealthy as a single, undifferentiated mass denied its fair share of political power, affording that group *Carolene* protection only "undermines the premise of majoritarianism" as an empirical proposition (by acting on objective proof that "majority rule" does not accurately describe American politics), not as a normative one. This does not "stand *Carolene* on its head," but, to the contrary, seeks to vindicate the democratic aspirations of *Carolene* against erroneous preconceptions about the workings of American politics. *See* Parker, *supra* note 33, at 242.

³³¹ *See* Wheeler, *supra* note 41, at 14 (stating that courts are reluctant to call wealth a suspect classification because "to do so would open up monstrous problems that would not be readily limited and solved").

category might well jeopardize the judicial assumption that our political processes ordinarily work well. The risk presents itself that the general rule of deference to majoritarian outcomes could be swallowed up by the exception of heightened scrutiny to correct for political malfunction.³³²

Institutional concerns, embedded in the separation-of-powers doctrine, no doubt form a part of this fear. It has been the easiest anxiety for the Court to articulate. In *Valtierra*, for example, the Court was plainly concerned that striking down California's referendum provision on the theory advanced by plaintiffs would install the judiciary as a democratic ombudsman, with no readily discernible limits to its oversight of political structures.³³³ But something else is going on as well, and for a clue we might turn to the Court's Fourteenth Amendment jurisprudence where apprehension about "far reaching" consequences has led to the Court to restrict the reach of the Equal Protection Clause to state action motivated by discriminatory intent:

A rule that a statute designed to serve neutral ends is nevertheless invalid, absent compelling justification, if in practice it benefits or burdens one race more than another would be far reaching and would raise serious questions about, and perhaps invalidate, 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.³³⁴

This passage yields several relevant insights into the nature of the Court's fear. To begin, the Court displays a keen awareness that legislation across a variety of subjects frequently disadvantages the poor, and that the disadvantage is systemic and structural, facilitating to a profound degree the projection of economic inequalities into most, if not all, spheres of social life. Moving from the empirical to the normative, the Court accepts as self-evident that a constitutional rule mandating judicial modification of these political

³³² See Fiss, *supra* note 306, at 7 (stating that recognition of poverty as a category of democratic failure would "undermine the premise of majoritarianism itself"); cf. Dworkin, *supra* note 16, at 15 (arguing that "accepting equality of influence as an ideal" could conflict with other important democratic goals).

³³³ See *James v. Valtierra*, 402 U.S. 137, 142 (1971) (stating that interference with California's referendum requirement would require the Court in the next case "to analyze governmental structures to determine whether a gubernatorial veto provision or a filibuster rule is likely to 'disadvantage' any of the diverse and shifting groups that make up the American people").

³³⁴ *Washington v. Davis*, 426 U.S. 229, 248 (1976).

outcomes is to be avoided at all costs. The implication seems to be that the sheer magnitude of the enterprise is reason enough to devise new and different legal rules.

But the prospect of displacing legislation on a grand scale has not always deterred the Court from embarking on—or hewing to—a particular constitutional path.³³⁵ The Court's reluctance in the poverty context produces considerable irony: the justification for scaling back constitutional protection is that affording broader rights might entail the extensive revamping of legislation that favors "more affluent white[s]." ³³⁶ But the reason so many laws would be jeopardized is that the preferred group has thoroughly succeeded in securing political advantages (or in politically safeguarding privately acquired privilege) at the expense of "the poor and . . . the average black."³³⁷ Either way, the prospect of radical consequences is itself the function of untoward political marginalization. It exists by virtue of the prodigious body of purportedly neutral laws that invariably disadvantage lower class and minority citizens. On a principled approach, the expectation of far reaching consequences should militate in favor of heightened judicial intervention, not against it.

Finally, institutional concerns cannot possibly explain the comatose form of rationality review that currently operates. Movement to a more invigorated form of review would result in the invalidation of some statutes currently upheld, but would certainly not threaten anything approaching the kind of judicial overreaching that is said to engender separation of powers difficulties or institutional competence concerns.³³⁸ The specter of real judicial review might, however, have a salutary effect on public discussion and the quality of legislative deliberation that affects the poor.

The Court's poverty discourse suggests that its fear of far reaching consequences has at least as much to do with the substance of the consequences that would result as with any institutional issues. Since the same institutional concerns are implicated any time that the Court tackles the counter-majoritarian problem, something more must underlie the Court's choice of when to take

³³⁵ A recent example is *INS v. Chadha*, 462 U.S. 919 (1983), in which the Court's invalidation of the "legislative veto" immediately placed several hundred federal statutes at constitutional risk.

³³⁶ *Davis*, 426 U.S. at 248.

³³⁷ *Id.*

³³⁸ See *supra* note 41.

the plunge and when to demur. In the poverty context, one may glimpse that "something more" in the Court's use of the term "neutral" to describe a body of "tax, welfare, public service and regulatory statutes" that is consistently "more burdensome" to the poor than to the affluent.³³⁹ The Court's characterization of legislation that is systematically skewed in favor of more affluent whites as "neutral" is intelligible only as the creature of an assumption that economic and social inequalities are a pre-political and substantively desirable feature of American life.³⁴⁰ On this view, legislative programs that leave private economic inequalities undisturbed or even amplify their import (for instance through price systems and user fees) do not raise the specter of a politically subordinated lower class unable to secure a fairer distributive share, but merely represent constitutionally benign measures of general applicability.

2. Formal-Functional Dichotomy

A second explanation for the Court's poverty cases might draw on the familiar dichotomy between formal and functional rights. The thesis is that the Court distinguishes between wealth-based distribution of formal political rights—which it condemns—and wealth-based distribution of actual political power—which it ignores or tolerates. The Court nowhere expressly articulates such a theory,³⁴¹ but as explained below, it appears to be the only rea-

³³⁹ The Court has expressed the same idea of neutrality in the abortion-funding context, viewing as untroubling laws that place constitutionally protected medical choices and information beyond the reach of poor women. *See, e.g., Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1992) (upholding federal regulations that prohibit abortion counselling in publicly funded health clinics for low income women).

³⁴⁰ *See* Sunstein, *supra*, note 134, at 874; *supra* notes 164-65 and accompanying text. Professor Tribe has suggested that the Court's poverty cases can be understood as a substantive commitment to protection of existing distributions of wealth by safeguarding the "category of desirable goods which wealth can purchase." *TRIBE, supra* note 41, at 1669-71. On this view, *Valtierra* guaranteed that money could continue to buy a residence in a neighborhood that excludes the poor, and *Rodriguez* ensured that wealth could continue to purchase a higher quality "public" school education. *See* *San Antonio Ind. School Dist. v. Rodriguez*, 411 U.S. 1 (1973); *James v. Valtierra*, 402 U.S. 137 (1971). These cases illustrate "passive" judicial endorsement of political determinations that favor the economically privileged.

³⁴¹ Some commentators view the formal-functional dichotomy in terms of institutional competence, contending that the Court lacks the expertise to assess the interrelationship between wealth and politics, and therefore should not venture a constitutional response to wealth-skewed misallocations of power. *See, e.g., Einer R. Elhauge, Does Interest Group Theory Justify More Intrusive Judicial Review*, 101 *YALE L.J.*

sonable basis for reconciling political rights cases such as *Harper v. Virginia Board of Elections*³⁴² and *Bullock v. Carter*³⁴³, with later campaign finance cases such as *Buckley v. Valeo*.³⁴⁴ On this theory, the functional disempowerment of poor people does not trigger heightened scrutiny because formal rights of access to the ballot and franchise are not officially restricted.

The evidence that the Court's poverty jurisprudence follows a formal-functional divide is straightforward. It centers on the apparent conflict between the Court's broad egalitarian pronouncements in the political rights cases of the 1960s and 1970s, and its blunt refutation of political equality as a constitutional value in subsequent campaign finance decisions, where the Court voided legislative efforts to contain the influence of wealth over the electoral process. Recall that the Court's political rights decisions restructured the processes of representative government by invalidating poll taxes, voiding property qualifications, striking ballot access requirements, and reshaping malapportioned legislative districts.³⁴⁵ In the process, the Court, at least rhetorically, elevated political equality to a core constitutional ideal, one that promised all citizens, regardless of economic status, a roughly equal opportunity to influence political decisions. Wealth was one of a very few factors that these cases singled out as a democratically illegitimate determinant of political outcomes. The conception of democracy advanced by the political rights cases forcefully rejects not only political arrangements that exclude the poor from the ballot box, but also those that debase their influence in the political order.

This egalitarian conception of democracy was eclipsed several years later by a competing vision advanced in *Buckley v. Valeo*.³⁴⁶ The *Buckley* Court confronted a First Amendment challenge to the Federal Election Campaign Act of 1971 (FECA). Congress adopted FECA to mitigate what it found to be the corrosive impact of concentrated wealth on elections and, by extension, on the

31, 66-68 (1991) (arguing that courts may lack competence to address the issue of wealth and politics, and that the political process is a better forum for its resolution). The problem with that justification, however, is that it does not explain the Court's rejection of *legislative* judgments about the impact of wealth on the democratic process. See *Buckley v. Valeo*, 424 U.S. 1, 257 (1976) (White, J., concurring in part and dissenting in part).

³⁴² 383 U.S. 663 (1966).

³⁴³ 405 U.S. 134 (1972).

³⁴⁴ 424 U.S. 1 (1976) (per curiam); see *infra* text accompanying notes 347-61.

³⁴⁵ See *supra* text accompanying notes 92-120.

³⁴⁶ 424 U.S. at 1.

processes of government generally. Among the regulations were provisions that restricted individual and group expenditures "relative to a clearly identified candidate" to \$1000,³⁴⁷ restricted a candidate's expenditures "from his personal funds" to between \$25,000 and \$50,000,³⁴⁸ and set various overall ceilings on campaign spending.³⁴⁹ The aim of these provisions was two-fold: to counteract both the fact and the perception that "the outcome of elections is primarily a function of money," and to promote "equal[] access to the political arena, encouraging the less wealthy, unable to bankroll their own campaigns, to run for political office."³⁵⁰ These governmental interests strongly recalled and resonated with the constitutional principles that the Court had itself established in the poll tax and ballot access cases: principles that proscribed the "dilut[ion of] a citizen's vote on account of his economic status,"³⁵¹ denounced any "disparity in voting power based on wealth,"³⁵² and proclaimed equalization of political access across economic classes as a constitutional value.³⁵³

Despite this congeniality of legislative purpose and constitutional principle, the *Buckley* Court struck down FECA's spending restriction as violative of the First Amendment. The major premise of the Court's holding was its controversial assertion that the deployment of wealth to influence political outcomes—short of outright bribery—is "political expression 'at the core of . . . the First Amendment freedoms.'"³⁵⁴ Many commentators criticized *Buckley*'s facile equation of spending and speech as elevating the aphorism "money talks" to a constitutional principle.³⁵⁵ But neither this premise, nor indeed the Court's ultimate ruling, definitively set *Buckley* in opposition to the political rights cases. To the contrary, the Court could reasonably have reaffirmed its commitment to political equality and the corresponding interest in curtailing the political sway of wealth, and yet, on balance, conclud-

³⁴⁷ *Id.* at 39.

³⁴⁸ *Id.* at 51.

³⁴⁹ *See id.* at 54-55.

³⁵⁰ *Id.* at 266 (White, J., concurring in part and dissenting in part).

³⁵¹ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966).

³⁵² *Bullock v. Carter*, 405 U.S. 134, 144 (1972).

³⁵³ *See id.*; *see also* *Lubin v. Panish*, 415 U.S. 709, 718 (1974) (striking down a state candidate filing fee requirement where an alternative means of access to indigent candidates was not provided).

³⁵⁴ *Buckley*, 424 U.S. at 39.

³⁵⁵ *See* Tushnet, *supra* note 21, at 259; J. Skelly Wright, *Politics and the Constitution: Is Money Speech?*, 85 YALE L.J. 1001, 1005 (1976).

ed that the particular First Amendment interests at stake weighed more heavily in the scales.

In fact, however, the Court selected a more extreme path. Rather than acknowledging a need to balance the private interest in unlimited political expenditures against a competing interest in political equality, the Court summarily rejected as illegitimate any "governmental interest in equalizing the relative ability of [rich and poor] individuals and groups to influence the outcome of elections."³⁵⁶ This is where the conflict with the political rights cases resides: *Buckley's* categorical approach broke decisively with the egalitarian conception of democracy that guided the Court's earlier decisions. In this regard, *Buckley* transformed the constitutional landscape from one where reducing wealth-based disparities of political power was required to one where interference with the disproportionate political power of the affluent had been all but prohibited.³⁵⁷

The *Buckley* Court claimed not to be in conflict with the earlier political rights cases and casually dismissed that doctrinal line as irrelevant to the issues before it:

Cases invalidating governmentally imposed wealth restrictions on the right to vote or file as a candidate for public office rest on the conclusion that wealth "is not germane to one's ability to participate intelligently in the electoral process" and is therefore an insufficient basis on which to restrict a citizen's fundamental right to vote. These voting cases and the reapportionment decisions serve to assure that citizens are accorded an equal right to vote for their representatives regardless of factors of wealth or geography. But the principles that underlie invalidation of governmentally imposed restrictions on the franchise do not justify governmentally imposed restrictions on political expression.³⁵⁸

The Court did not explicitly acknowledge that its account of the political rights cases seriously constricted the conception of democracy elaborated in those decisions. Nevertheless, *Buckley*

³⁵⁶ *Buckley*, 424 U.S. at 48. *But cf.* Wright, *supra* note 355, at 1005 ("Nothing bars us from choosing . . . to move closer to . . . a process wherein ideas and candidates prevail because of their inherent worth, not because prestigious or wealthy people line up in favor . . . [N]othing in the First Amendment commits us to the dogma that money is speech.").

³⁵⁷ *Cf.* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319, 1349 (1987) (offering explanations for the Court's categorical stance against legislative efforts to redress the "plain inequality of political voice [that] stem[s] from inequality of resources among individuals").

³⁵⁸ *Buckley*, 424 U.S. at 49 n.55 (citations omitted).

effectively reduced *Harper* and its progeny from potentially expansive charters of political equality to narrow decisions concerning only the technical right to cast a vote or to place one's name on the ballot.³⁵⁹ The more broadly conceived right to "full and effective participation in the political processes"³⁶⁰ was diluted to a decontextualized "equal right to vote for . . . representatives" in *Buckley's* revisionist order.³⁶¹

Thus sanitized, the political rights cases fit comfortably with *Buckley* into a unified constitutional theory: equality of formal rights are to be scrupulously maintained—even to the point of rejecting legislative districting plans with less than one percent deviation from perfect equality³⁶²—but the immeasurably greater political inequalities that flow from private wealth through less

³⁵⁹ This is not to suggest that *Buckley's* interpretation of the political rights cases is completely baseless. A respectable argument can be made that the theory underlying the political rights cases, at least as it relates to judicially enforceable constitutional norms, speaks only to *formal* political equality or departures from political equality directly attributable to state action. Cf. CHARLES R. BEITZ, *POLITICAL EQUALITY* 14 (1989) (noting the continued dispute between the view that "the scope of political equality is limited to the distribution of political liberties themselves—that is, to institutionally defined (or procedural) opportunities to influence outcomes" (e.g., the right to vote), and the view that permitting external inequalities to penetrate the political arena violates the principle of political equality). But see DAHL, *supra* note 17, at 175 (arguing that "the right to democratic process is not 'merely formal,' because in order to exercise this right all the resources and institutions necessary to it must exist," and that inequalities in material resources can defeat democratic government); WALZER, *supra* note 11, at 79. After all, this argument goes, the political rights cases almost uniformly concern state-imposed restrictions on the franchise or ballot. Even the one-person, one-vote cases, although closer to the functional line with their emphasis on "an equally effective voice," stayed within the sphere of state-created political processes. *Reynolds v. Sims*, 377 U.S. 533, 565 (1964). On this view, the political rights cases tell us nothing about how the Court viewed the relation between democracy and the projection of economic inequalities into the political sphere. The difficulty with this interpretation is that it ignores the Court's fundamental justification for safeguarding the franchise and ballot. These interests receive special constitutional solicitude not principally because they are formal symbols or a means of self-expression, but rather because they are the citizen's practical instrument for exerting political influence and securing fair representation. See *Burdick v. Takushi*, 112 S. Ct. 2059, 2067 (1992) (rejecting the notion that the franchise serves any more generalized expressive function beyond the selection of candidates). The Court has repeatedly explained that "the right of suffrage is a fundamental matter in a free and democratic society" and commands vigorous judicial protection *because* it is "preservative of other basic civil and political rights." *Reynolds*, 377 U.S. at 561-62 (relying on *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886)).

³⁶⁰ *Reynolds*, 377 U.S. at 565.

³⁶¹ *Buckley*, 424 U.S. at 49 n.55.

³⁶² See *Karcher v. Daggett*, 462 U.S. 725, 744 (1983).

visible and more ad hoc processes may not be disturbed.³⁶³ Corporations and wealthy individuals may wield disproportionate power at the expense of the less affluent, but so long as the richest CEO and the most destitute homeless woman each cast only a single ballot,³⁶⁴ this version of democratic equality is satisfied.

It is easy to see how the formal-functional dichotomy neatly accommodates the Court's refusal to intervene on behalf of poor people. Most of the classifications that the poor challenge do not implicate formal political rights, but rather the allocation of societal resources by a political process from which they are functionally excluded. One must question, however, whether a theory that relegates the most crucial and troubling dynamic in American politics to constitutional insignificance actually operates as a basis for adjudication or merely describes results that the Court has arrived at on other, submerged, grounds.

One cause for suspicion is that the Court does not typically subscribe to the formal-functional dichotomy in cases dealing with nonwealth-based disparities of political power. To the contrary, the Court has generally refused to limit the Constitution's concern with political equality to purely formal rights, and has been attentive, at least rhetorically, to the practical disempowerment of outgroups.³⁶⁵ Hence, a major part of the *Carolene* framework calls for judicial intervention where social factors combine to deny a formally enfranchised minority its "fair share of political influence" because of prejudice.³⁶⁶ The reapportionment cases also take a

³⁶³ A similar dichotomy seems to operate with respect to a number of substantive constitutional rights. The abortion funding cases amply illustrate this point. *See, e.g.*, *Rust v. Sullivan*, 111 S. Ct. 1759 (1991); *Harris v. McRae*, 448 U.S. 297 (1980); *Maher v. Roe*, 432 U.S. 464 (1977). In *Rust*, for example, the Court reaffirmed that the Fifth Amendment guarantees a woman's right to reproductive choice, but it upheld federal regulations prohibiting federally subsidized health clinics from even discussing abortion with patients or referring them elsewhere for counselling. Since, as a practical matter, publicly-funded clinics provide the only health care available to many poor women, the regulations effectively abridged the formal constitutional guarantee. The Court rejected arguments that this functional deprivation of Fifth Amendment rights violated the Constitution, asserting that the barriers to "an indigent woman's ability to enjoy the full range of constitutionally protected freedom of choice are not the product of governmental restrictions on access to abortion, but rather of her indigency." *Rust*, 111 S. Ct. at 1778 (quoting *Harris*, 448 U.S. at 316).

³⁶⁴ *But see* Edward J. Smith, *Disenfranchisement of Homeless Persons*, 31 WASH. U. J. URB. & CONTEMP. L. 225, 226 (1987) (estimating that "[t]he requirement of a traditional home . . . effectively disenfranchises an estimated three million American citizens who are homeless").

³⁶⁵ *See supra* text accompanying notes 309-10.

³⁶⁶ Ackerman, *supra* note 47, at 715.

functional approach by recognizing and protecting "a right to full and effective participation in the political process."³⁶⁷ And the Court has recently opened gerrymandered districts to substantive judicial review on the theory, in part, that the Court's protection of political participation extends beyond the formal casting of a ballot to the actual capacity of individuals and groups to exert "influence on the political process as a whole."³⁶⁸ Finally, in a series of cases involving political processes said to be skewed against the interests of African-Americans, the Court declared as a general proposition that the Constitution "reaches 'a political structure that treats all individuals as equals,' yet more subtly distorts governmental processes in such a way as to place special burdens on the ability of minority groups to achieve beneficial legislation."³⁶⁹ The Court recognized that "if a class cannot participate effectively in the process by which those rights and remedies that order society are created, that class necessarily will be 'relegated, by state fiat, in a most basic way to second-class status.'"³⁷⁰ Why this general concern for "effective" political participation and functional equality should end where the interests of the poor begin is nowhere made clear.³⁷¹

³⁶⁷ *Reynolds v. Sims*, 377 U.S. 533, 565 (1964); see, e.g., *Wesberry v. Sanders*, 376 U.S. 1, 14 (1964) (striking down apportionment that favored voters in thinly populated districts because it effectively gave "some voters a greater voice in choosing a Congressman than others"); *Gray v. Sanders*, 372 U.S. 368, 381 (1963) (rejecting a county-unit system for tabulating votes in a primary because it effectively weighted the votes of some individuals more heavily than others). See generally Casper, *supra* note 97, at 24-29 (discussing apportionment decisions of the Burger Court).

³⁶⁸ *Davis v. Bandemer*, 478 U.S. 109, 132-33 (1986) (holding that the issue raised by gerrymandered election districts is "whether a particular group has been unconstitutionally denied its chance to effectively influence the political process"). See generally Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket At Last*, 7 SUP. CT. REV. 175, 256-57 (1986) (suggesting that *Bandemer's* opening of gerrymandered districts to judicial review has revived "the identity of 'fair and effective representation' as the constitutional goal in this area"). Justice O'Connor disagreed with the *Bandemer* majority regarding the justiciability of political gerrymandering claims, on the explicit ground that political rights are limited to the individual right to a nondiluted vote in the sense of a vote within an equally apportioned district. Her theory was that this formal token of equal citizenship is a political good in itself, and not an instrument to exercise political power. See *Bandemer*, 478 U.S. at 149-50 (O'Connor, J., concurring in the judgment).

³⁶⁹ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 467 (1982) (citation omitted).

³⁷⁰ *Crawford v. Board of Educ.*, 458 U.S. 527, 546 (1982) (Blackmun, J., concurring) (quoting *Plyler v. Doe*, 457 U.S. 202, 233 (1982) (Blackmun, J., concurring)).

³⁷¹ Even within the category of political arrangements that disempower racial

The Court's position might be assisted if we were to recast the formal-functional dichotomy as a distinction between political inequalities for which the state is directly responsible and those that are said to arise from purely private activities. The *Buckley* Court surely had this distinction in mind when it stressed that the political rights cases attacked "governmentally imposed" political inequalities, whereas the wealth-based disparities of political power attacked by FECA were said to implicate no state action at all.³⁷² This public-private distinction, well known to legal theory,³⁷³ may account more clearly for the Court's approach, but others have explained why the wealth-based distribution of public power does indeed implicate state action.³⁷⁴ Although the excuse of state action might reconcile *Buckley* and the political rights cases, it does not account for the Court's failure to regard poor people as a politically powerless minority for purposes of calibrating judicial review. From the inception of the suspect classification doctrine, it has been understood that unofficial, social, or privately initiated marginalization of out-groups might call for enhanced judicial intervention.³⁷⁵ Thus, while the Court may deny that the

minorities, the prospect of confronting the interrelationship of wealth and political power, or acknowledging social stratification along economic lines, causes the Court to retreat from a functional view of equality to a more rigid formalist approach. Thus, in *Whitcomb v. Chavis*, 403 U.S. 124 (1971), the Court upheld a multimember districting scheme that resulted in poor, inner-city African-Americans having virtually no influence in the State legislature, on the narrow formalist view that it had "discovered nothing in the record or in the court's findings indicating that poor Negroes were not allowed to register or vote, to choose the political party they desired to support, to participate in its affairs or to be equally represented on those occasions when legislative candidates were chosen." *Id.* at 149. The constitutional concern with "political structures that . . . subtly distort[]" the ability of minorities to exert political influence and reduce their political effectiveness dissolved once the issue of wealth arose. *Seattle Sch. Dist.*, 458 U.S. at 467.

³⁷² See *Buckley v. Valeo*, 424 U.S. 1, 49 n.55 (1976).

³⁷³ See generally Duncan Kennedy, *The Stages of the Decline of the Public/Private Distinction*, 130 U. PA. L. REV. 1349, 1350 (1982) (critically reviewing the history of the waxing and waning of the public/private distinction in liberal thought).

³⁷⁴ See, e.g., Erwin Chemerinsky, *Rethinking State Action*, 80 NW. U. L. REV. 503, 510-11 (1985) (contending that concentrations of wealth and power have resulted in certain "private" actions becoming functionally indistinguishable from governmental conduct); see also *infra* notes 460-65.

³⁷⁵ See, e.g., LUSKY, *supra* note 72, at 1105, n.72 (describing the special judicial protection envisioned by *Carolene* as extending to "groups that are not embraced within the bond of community kinship but are held at arm's length by the group or groups that possess dominant political and economic power"); see also Akhil R. Amar & Daniel Widawsky, *Child Abuse as Slavery: A Thirteenth Amendment Response to DeShaney*, 105 HARV. L. REV. 1359, 1379 & n.85 (stating that the concern of the

government has any valid interest in equalizing the actual distribution of political power at the expense of countervailing First Amendment rights, it hardly follows that privately initiated political inequalities do not distort democratic processes in ways that are constitutionally significant for determining the degree of judicial protection an out-group deserves.

3. Elite Conception of Democracy

A third and final explanation³⁷⁶ of the Court's poverty jurisprudence traces it to an unarticulated ideology of democratic elitism that accommodates or even favors the distancing of less affluent citizens from political power.³⁷⁷ By this account, the Court might accept that undemocratic "defects" in the political process warrant enhanced judicial intervention, and that the lower classes are functionally marginalized from politics, yet deny special constitutional protection to poor people because their political out-status strikes the Justices as a natural and appropriate feature of American government, rather than an undemocratic aberration or malfunction.³⁷⁸

This would not be the first era in which a class-based conception of self-government held sway on the Court. To the contrary, elite perspectives have long claimed judicial adherents, beginning with the first Chief Justice, whose view it was that "those who own the

Thirteenth and Fourteenth Amendments is with the "de facto abuse of power"; cf. Cover, *supra* note 62, at 1297-1300 (arguing that the source for defining "minorities" in regard to the *Carolene* footnote is not the particular experience of the group in question, but rather the factors shared by all "minorities").

³⁷⁶ The three explanations offered are of course not mutually exclusive. At the descriptive level, the Court's attachment to an egalitarian conception of democracy moves along a continuum in which the attachment is most intense at the juncture of formal political rights, and steadily less intense as one moves to functional participation and to privately initiated political inequalities the Court attributes to private activities.

³⁷⁷ See generally PETER BACHRACH, *THE THEORY OF DEMOCRATIC ELITISM: A CRITIQUE* 9, 32 (1967) (critiquing theories of democratic elitism under which "the common man, not the elite . . . is chiefly suspected of endangering freedom and . . . the elite, not the common man . . . is looked upon as the chief guardian of the system"); Jack L. Walker, *A Critique of the Elitist Theory of Democracy*, 60 AM. POL. SCI. REV. 285, 286 (1966) (describing and critiquing "elitist" theories of democracy that would concentrate political authority in the hands of elites at the expense of broad political participation by the "lower classes").

³⁷⁸ Cf. H.L. MENCKEN, *THE AMERICAN SCENE: A READER* 533 (Huntington Cairnes ed., 1965) ("Democracy is the theory that the common people know what they want, and deserve to get it good and hard.").

country ought to govern it."³⁷⁹ John Jay's sentiments simply conveyed the ascendant federalist notion that while the franchise perhaps ought be distributed without much regard for wealth,³⁸⁰ the nonpropertied masses had to be viewed as a threat and denied meaningful access to state power.³⁸¹ One would like to believe that the social, cultural, and legal upheavals of the past two centuries, including the sustained crusade across six constitutional amendments to achieve universal suffrage and an open political process, have cleansed this elite perspective from the judicial mentality. But it appears that this perspective may simply have been driven underground.³⁸² To be sure, one rarely hears express appeals to class status as an appropriate determinant of public power. A generation has passed since Justice Harlan endorsed the idea that propertied classes are "more worthy of confidence than those without means, and that the community and [n]ation would be better managed if the franchise were restricted to such citizens."³⁸³ But the disappearance of these sentiments from modern judicial discourse teaches little: the Court's silence might simply reflect the legal system's aura of neutrality, which would be sorely tested if the Court confessed to a "democratic" theory that openly favored the affluent.³⁸⁴

³⁷⁹ RUSSELL GALLOWAY, *THE RICH AND THE POOR IN SUPREME COURT HISTORY* 26 (1982).

³⁸⁰ See *THE FEDERALIST* NO. 57, at 351 (James Madison) (Clinton Rossiter ed., 1961) ("Who are to be the electors of the federal representatives? Not the rich, more than the poor . . ."). Qualifications were nevertheless left to the States, many of which restricted the franchise to property holders. See KIRK H. PORTER, *A HISTORY OF SUFFRAGE IN THE UNITED STATES* 7-14 (1971).

³⁸¹ See *supra* note 18. Indeed, it is not quite apt to speak of Madison's conception of democracy, since the federalist drafters of the Constitution intended to establish a "republican" form of government that deliberately isolated public power from the people. Democracy, understood as equal power for equal numbers or direct government by the people, was an idea that the federalists tended to equate with "mob rule," and sought to avoid at all costs. See HACKER, *supra* note 18, at 7-8.

³⁸² Cf. 1 ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 49 (J.P. Mayer ed., 1969) ("The surface of American society is covered with a layer of democratic paint, but from time to time one can see the old aristocratic colors breaking through.").

³⁸³ *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 685 (1966) (Harlan, J., dissenting); cf. *Young v. New York City Transit Auth.*, 903 F.2d 146, 154 (2d Cir.), *cert. denied*, 111 S. Ct. 516 (1990) (refusing to extend First Amendment protection to begging on the ground, in part, that begging is unlike "'Keats' poems or Dunne's sermons'" (quoting *Cohen v. California*, 403 U.S. 15, 26 (1971) (quoting *Winters v. New York*, 333 U.S. 507, 528 (1948) (Frankfurter, J., dissenting))).

³⁸⁴ Cf. GORE VIDAL, *Robert Graves and the Twelve Caesars*, in *THE OXFORD BOOK OF ESSAYS* 634, 635-36 (John Gross ed., 1991) (referring to remark of Alfred Whitehead that "one got the essence of a culture not by those things which were said at the time

Moreover, once one turns to the Court's actual treatment of political participation over the past three decades, an asymmetric pattern strongly suggestive of class emerges.³⁸⁵ On the one hand, the Court has displayed exceptional sensitivity toward elite communicative modes³⁸⁶ such as corporate campaign financing,³⁸⁷ corporate speech,³⁸⁸ large scale political expenditures,³⁸⁹ and, to a lesser extent, prerogatives of the mass media.³⁹⁰ These the Court has preferred even against countervailing interests as weighty as the integrity of the democratic process.³⁹¹ By contrast, the Court has been markedly inhospitable toward distinctively plebeian modes of political expression and participation, like the public display of posters,³⁹² picketing,³⁹³ residential distribution of

but by those things which were *not* said, the underlying assumptions of the society, too obvious to be stated") (alteration in original). Influential voices on the right continue to advocate elite control of American society. See, e.g., SAMUEL P. HUNTINGTON, *The United States, in THE CRISIS OF DEMOCRACY* 59, 59-62, 113-15 (Michael Crozier et al. eds., 1975) (warning that the "excess of democracy" associated with the "highly educated, mobilized, participant society" in the United States poses a threat to "governability," and advocating centralized governing authority and limits on popular political participation); see also Philip Green, *A Few Kind Words for Liberalism*, *THE NATION*, Sept. 28, 1992, at 309, 324 (arguing that "conservatism . . . is actively hostile to democracy" and that "conservatives have had to make peace with democratic values, but that has rarely been from conviction, only from opportunism").

³⁸⁵ Commentators have identified a similar tilt in favor of elite interests in the Court's elaboration of fundamental rights. See, e.g., John H. Ely, *Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 37-38 (1978) (noting that "the values judges are likely to single out as fundamental . . . [are] the values of 'first rate lawyers'"); Karst, *supra* note 269, at 59 (stating that the reproductive rights cases "stop at the boundary of [the judges'] own social class"); Tushnet, *supra* note 20, at 180 (asserting that the 1972 Supreme Court's decisions "[made] the equal protection clause meaningful for the well-off and meaningless for the poor").

³⁸⁶ But see *infra* text accompanying notes 410-23 (discussing *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652 (1990)).

³⁸⁷ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765 (1978).

³⁸⁸ See *Pacific Gas & Elec. Co. v. Public Util. Comm'n*, 475 U.S. 1 (1986); *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980).

³⁸⁹ See *Meyer v. Grant*, 486 U.S. 414 (1988) (per curiam) (invalidating a Colorado statute that barred the use of paid personnel to circulate petitions for referendum); *Buckley v. Valeo*, 424 U.S. 1 (1976) (per curiam).

³⁹⁰ See generally C. Edwin Baker, *Press Rights and Government Power to Structure the Press*, 34 U. MIAMI L. REV. 819 (1980) (exploring the argument for special press rights beyond those advocated by a liberal theory of free speech).

³⁹¹ See, e.g., *Buckley*, 424 U.S. at 1; *Bellotti v. First Nat'l Bank*, 435 U.S. 765, 788-95 (1978) (holding that a statute forbidding certain expenditures by banks and business corporations for the purpose of influencing the vote on referendum proposals abridges freedom of speech, and violates the First and Fourteenth Amendments).

³⁹² See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984) (upholding a ban on the posting of signs on public property).

³⁹³ See *Frisby v. Schultz*, 487 U.S. 474, 488 (1988) (upholding a ban on residential

handbills,³⁹⁴ and demonstrations in public parks.³⁹⁵ These the Court has subordinated to less impressive (though better pedigreed) interests like "esthetics" and avoidance of "visual blight."³⁹⁶ Although this pattern may not be perfect,³⁹⁷ and plausible doctrinal accounts of the cases could undoubtedly be constructed, still the evidence of an underlying elitism is too strong to ignore.³⁹⁸

A full-fledged analysis of the Court's First Amendment jurisprudence is beyond the scope of this Article. But the cases across a broad range of expressive activities reflect a bias in favor of the privileged and against even the relatively disadvantaged.³⁹⁹ Thus, as the Court would have it, the government may condition public funding for poor women's doctors on the surrender of their First

picketing).

³⁹⁴ See *United States Postal Serv. v. Greenburgh Civic Ass'n*, 453 U.S. 114, 133 (1981) (upholding a ban on distribution of unstamped "mailable matter" through mailboxes).

³⁹⁵ See *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 289 (1984) (upholding a national park regulation that forbade sleeping in the park as applied to homeless persons seeking to use sleep-expression as protest against poverty); see also *United States v. Kokinda*, 497 U.S. 720, 720 (1990) (upholding criminal sanctions for political solicitation on a sidewalk adjoining a post office).

³⁹⁶ *Taxpayers for Vincent*, 466 U.S. at 808-10 (upholding a proscription against posting signs on public property as supporting "esthetic" interest in avoiding "visual blight"); see also *Frisby*, 487 U.S. at 484 (upholding a ban on targeted residential picketing as supporting government interest in maintaining the "tranquil" atmosphere of residential neighborhoods); *Clark*, 468 U.S. at 296-98 (upholding a ban on tent city demonstration in a national park as supporting government interest in maintaining the "attractive[ness]" of public parks).

³⁹⁷ See *Lee v. International Soc'y for Krishna Consciousness*, 112 S. Ct. 2709, 2710 (1992) (invalidating a ban on distribution of literature at airport terminal); *U.S. v. Eichman*, 110 S. Ct. 2404, 2406 (1990) (invalidating a statute that criminalized flag burning).

³⁹⁸ Cf. Mark Tushnet, *An Essay on Rights*, 62 TEX. L. REV. 1363, 1387 (1984) (arguing that "[t]he first amendment has replaced the due process clause as the primary guarantor of the privileged").

³⁹⁹ See *TRIBE*, *supra* note 41, at 979 (noting that the Court has abandoned an earlier sensitivity to the expressive rights of the lower classes). See generally Robert C. Hunter, *The Value of the Little People—A Lost Value in Commercial Speech Analysis*, 16 VT. L. REV. 901 (1992) (criticizing the Court's First Amendment doctrine for "ignoring the lack of money and power as a factor" and thereby narrowing available speech alternatives for the "little people"); Michelman, *supra* note 357, at 1343-50 (examining the Court's resistance to any interference with individuals' prerogatives to transfer wealth into political power). In a related vein, the Court has recently restricted access to its own process by poor persons—but not by others—deemed to have raised "frivolous" claims. See *In re Amendment to Rule 39*, 111 S. Ct. 1572, 1572 (1991) (holding that the court may deny leave to proceed *in forma pauperis* if petition is deemed frivolous); *In re Demos*, 111 S. Ct. 1569, 1569 (1991) (barring future *in forma pauperis* filings by Demos).

Amendment right to discuss reproductive choices,⁴⁰⁰ but it may not condition state conferral of the corporate form on the corporation's forbearance from expending funds to influence public referenda.⁴⁰¹ The government may prohibit citizens from displaying political posters on public telephone polls, even though the prohibition leaves the impecunious with little effective means for public communication,⁴⁰² but the state may not prohibit a utility monopoly from using publicly-subsidized billing envelopes to expound political views to a captive audience, even where the company has ample resources and opportunity to express its ideas by other means.⁴⁰³ The government may restrict the volume of a political sound truck,⁴⁰⁴ but may not set limits on the volume of money that the wealthy may spend in the political process.⁴⁰⁵ As Justice Marshall aptly put it:

[J]udicial administration of the First Amendment, in conjunction with a social order marked by large disparities in wealth and other sources of power, tends systematically to discriminate against

⁴⁰⁰ See *Rust v. Sullivan*, 111 S. Ct. 1759, 1778 (1991).

⁴⁰¹ See *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 767 (1978).

⁴⁰² See *City Council v. Taxpayers for Vincent*, 466 U.S. 789, 807 (1984).

⁴⁰³ Compare *Consolidated Edison Co. v. Public Serv. Comm'n*, 447 U.S. 530 (1980) with *Lehman v. Shaker Heights*, 418 U.S. 298 (1974).

⁴⁰⁴ See *Kovacs v. Cooper*, 336 U.S. 77, 88-89 (1949) (holding that ordinances forbidding sound trucks on public streets does not infringe right of free speech).

⁴⁰⁵ See *Buckley v. Valeo*, 424 U.S. 1, 57-59 (1976) (per curiam) (upholding federal regulation of direct contributions to candidates but invalidating limitations on "independent" political expenditures). The *Buckley* Court sought to distinguish *Kovacs* on the basis that "[a] restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached." *Id.* at 18-19 & n.17 (footnote omitted). But surely a regulation that limits the decibel level and operating hours of a sound truck "reduces the quantity of expression" at least as much as a cap on campaign expenditures for the affected speaker. Ironically, the Court drew on this very analogy in a subsequent case that voided expenditure caps for certain presidential election contributions. See *Federal Election Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 491, 493 (1985) (stating that "allowing the presentation of views [on a presidential election] while forbidding the expenditure of more than \$1000 to present them is much like allowing a speaker in a public hall to express his views while denying him the use of an amplifying system."). But see Lillian R. BeVier, *Money and Politics: A Perspective on the First Amendment and Campaign Finance Reform*, 73 CAL. L. REV. 1045, 1059 n.72 (1985) (distinguishing *Buckley* and *Kovacs* on the ground that "the evil created by too much sound is noise in a strictly physical sense, whereas that thought to be created by too many dollars is noise only in a normative sense—namely that, in the view of the person drawing the analogy, too many dollars permit certain messages to be heard").

efforts by the relatively disadvantaged to convey their political ideas.⁴⁰⁶

An unarticulated ideology of elitism may not be the principal engine driving these decisions, but it explains the Court's differential enforcement of values through the First Amendment. A myriad of substantive judgments must be made in order to perform the standard First Amendment analysis. At minimum, the court must classify the expressive activity and the governmental regulation, determine whether a content-neutral regulation preserves adequate, alternative means of expression, and assess the state interest. None of these judgments can be made without resort to external values. The pattern of choices that emerges from the Court's work reveals a sensibility that prefers elite political participation, and accepts, if not welcomes, the political isolation of the poor. The Court's poverty discourse appears to rest upon a similar world view.

III. AUSTIN AND THE POVERTY OF RATIONALITY REVIEW

The previous Parts have shown that the Court's poverty jurisprudence fails to deal seriously with the political marginalization of poor people. No coherent theory yet exists to justify the Court's indiscriminate application of the rationality standard in this context. What appears to be certain, however, is that the Court's treatment of the poor rests upon a benign or at least neutral view of a political system in which inequalities of wealth play an influential if not determinative role. For if the converse were true—if it were constitutionally suspect to distribute public power and influence on the basis of private wealth—then poor people would comprise precisely the type of politically powerless minority that the Court has deemed worthy of "extraordinary protection from the majoritarian political process."⁴⁰⁷ And in that circumstance, the current regime of extreme deference to legislative outcomes affecting the poor would be internally indefensible.

That is why *Austin v. Michigan Chamber of Commerce*⁴⁰⁸ holds such potent significance for the poor. By acknowledging that a wealth-driven politics (even in the context of formal political

⁴⁰⁶ *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 314 n.14 (1984) (Marshall, J., dissenting).

⁴⁰⁷ *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (quoting *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973)); see also *supra* text accompanying notes 310, 407.

⁴⁰⁸ 494 U.S. 652 (1990).

equality) "distorts" and "corrupts" the democratic process, *Austin* shatters a core premise of the Court's poverty jurisprudence.⁴⁰⁹ This Part contends that the Court's assumption of democratic legitimacy in the poverty cases cannot be squared with *Austin*'s insight into the structural role that wealth plays in the American political order. This structural role works to the systematic disadvantage of the lower classes and warrants heightened constitutional protection on their behalf.

A. *The Austin Decision*

Austin represents the high-water mark in a line of recent campaign finance decisions that have increasingly acknowledged the tension between the democratic aspirations of American constitutional governance and the disparities of private power that prevail in the economic sphere.⁴¹⁰ At issue in *Austin* was a provision of the Michigan Campaign Finance Act that prohibits corporations from using general funds to make independent expenditures in state elections.⁴¹¹ Under the Act, corporations may make such expenditures only out of "segregated funds"

⁴⁰⁹ Cf. *TRIBE*, *supra* note 41, at 1136 (noting that before *Austin* was decided, the Court had never "accepted as legitimate any asserted interest in preventing actual or perceived corruption of the electoral system itself caused by large disparities [of wealth]").

⁴¹⁰ The starting point of this doctrinal evolution was *Buckley v. Valeo*, 424 U.S. 1, 48-49 (1976) (per curiam), where the Court dismissed the idea that concentrated wealth might pose any measurable danger to the democratic process beyond the threat of individual corruption. Six years later, the Court moved modestly, although perceptibly, to a recognition that "substantial aggregations of wealth" could threaten the "integrity of our electoral process" through the creation of "political debts." *Federal Election Comm'n v. National Right to Work Comm.*, 459 U.S. 197, 207-08 (1982). Four years after that, the Court appeared to break qualitatively from *Buckley* in *Federal Elections Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257 (1986), where the Court acknowledged that "resources amassed in the economic marketplace may be used to provide an unfair advantage in the political marketplace," but refused to uphold campaign finance restrictions as applied to a not-for-profit corporation. Finally, in *Austin*, the Court accepted the idea that aggregated wealth *does* exert "corrosive and distorting effects" on the political process itself and held that states have a legitimate and compelling interest in combating such effects. *Austin*, 494 U.S. at 659-60, 668-69.

⁴¹¹ See *Austin*, 494 U.S. at 654-55. The Michigan Campaign Finance Act also prohibits corporations from using general funds to make campaign contributions, but that aspect of the statute was not challenged in *Austin*. *Buckley* had earlier recognized that regulation of campaign contributions served the compelling state interest of avoiding corruption or the appearance of corruption. See *Buckley*, 424 U.S. at 27-28.

accumulated from individual contributions.⁴¹² Violation of this restriction is punishable as a felony. The Michigan Chamber of Commerce, a nonprofit corporation, initiated a constitutional challenge, asserting that it wished to expend general funds to purchase a local newspaper advertisement in support of a candidate for the Michigan legislature.⁴¹³ Relying on earlier campaign-finance cases that were highly solicitous of corporate political expenditures,⁴¹⁴ the Chamber of Commerce attacked Michigan's restriction as violative of the First Amendment.

The Court, with three justices dissenting, sustained the Michigan law. Structurally, the Court's approach to the First Amendment issue was unremarkable. The analysis began with a reaffirmance of *Bellotti's* holding that corporate political speech is entitled to constitutional protection and of *Buckley's* principle that independent campaign expenditures constitute "political expression 'at the core of our electoral process and of the First Amendment freedoms.'"⁴¹⁵ From these accepted propositions, the Court reasoned that Michigan's statute imposed a significant burden on political expression and had to serve a compelling state interest to survive.

At this point the analysis got interesting. Until *Austin*, the Court had identified only one governmental interest sufficiently compelling to justify legislative restrictions on campaign expenditures: "avoid[ing] corruption or the appearance of corruption."⁴¹⁶ "Corruption" in this context was understood narrowly, as the "financial quid pro quo" corruption of particular officials.⁴¹⁷ In *Austin*, however, the Court transcended this narrow framework and recognized that projection of concentrated economic power into the political sphere corrupts *the democratic process itself* in ways that are constitutionally significant.⁴¹⁸ Michigan's campaign-finance

⁴¹² *Austin*, 494 U.S. at 654-55.

⁴¹³ *See id.* at 656.

⁴¹⁴ *See Buckley*, 424 U.S. at 27-28; *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 768, 792 (1978).

⁴¹⁵ *Austin*, 494 U.S. at 657 (quoting *Buckley*, 424 U.S. at 39 (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968))).

⁴¹⁶ *Austin*, 494 U.S. at 658 (citing *Federal Elections Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 496-97 (1985)).

⁴¹⁷ *Austin*, 494 U.S. at 659, 702 (Kennedy, J., dissenting).

⁴¹⁸ Earlier cases, including *Buckley*, distinguished independent campaign expenditures from direct contributions to candidates on the theory that only the latter posed any appreciable threat of "financial quid pro quo corruption." *Austin's* holding that the state has a compelling interest in restricting even independent contributions in order to prevent wealth-based allocation of power (at least in the context of state-created corporations) leaves little force to *Buckley's* contribution/

restriction, the Court held, served the compelling state interest of counteracting this "different type of corruption in the political arena: the corrosive and distorting effects of immense aggregations of wealth that are accumulated with the help of the corporate form and that have little or no correlation to the public's support for the corporation's political ideas."⁴¹⁹

Austin's logic rests on the essential polarity between political influence that reflects "public support" and political influence that reflects nothing more than control over aggregated wealth. As the Court viewed it, popular support forms the legitimate basis for the process of generating public choices in a democratic majoritarian regime. Interference with the political process that "corrupt[s]" or "distort[s]" it from this popular support paradigm undermines democratic integrity. Concentrated wealth threatens just this type of corrosive interference because it facilitates exercises of political power that are grossly disproportionate to the quantity and intensity of individual beliefs and preferences.⁴²⁰ On this analysis, any substantial disparity of economic power—whether or not mediated through the corporate form—threatens "corrosi[on] and distorti[on]" of the political process because it tends to deflect public decision-making from a popular support mode.

Interpreting the *Austin* decision in just this sense, the three dissenters bitterly objected that the Court had discarded *Buckley's* signal principle: that "the government has [no] legitimate interest in equalizing the relative influence of speakers."⁴²¹ The majority's response was curt and, at least at first glance, somewhat enigmatic. The Michigan act did *not* seek to equalize political influence, the Court explained, but merely sought to ensure that corporate

expenditure distinction. See generally David Cole, *First Amendment Antitrust: The End of Laissez-Faire in Campaign Finance*, 9 YALE L. & POL'Y REV. 236, 237 (1991) (stating that *Austin's* departure from *Buckley* indicates that the Court has "potentially begun a new era of campaign finance jurisprudence, for the Court's recognition of systemic corruption collapses all the distinctions that guided its prior jurisprudence in this area").

⁴¹⁹ *Austin*, 494 U.S. at 660. The Court alternatively described the justification for Michigan's statute as "the compelling state interest of eliminating from the political process the corrosive effect of political 'war chests' amassed with the aid of the legal advantages given to corporations." *Id.* at 666.

⁴²⁰ This analysis assumes that "public" or "popular" support as used in *Austin* refers in some way to the aggregation of individual preferences. There has not been universal agreement on this point. See *infra* notes 436-49 and accompanying text.

⁴²¹ *Id.* at 704 (Kennedy, J., dissenting).

political expenditures reflected "actual public support."⁴²² Moreover, the Court emphasized, not all wealth was implicated, but only wealth secured through "the unique state-conferred corporate structure that facilitates the amassing of large treasuries."⁴²³

Though far from transparent, *Austin* is exceptionally rich and potentially far reaching. Implicit in its condensed reasoning are empirical judgments about the operation of unequal wealth on the political process, normative judgments about the nature of democracy, and doctrinal judgments about the constitutional significance of wealth-driven politics. Each holds importance for the Court's continued use of rationality review in cases affecting the poor.

B. *Austin's Empirical Aspect: Wealth and Politics*

At the empirical level, *Austin* is a landmark for its recognition that private wealth readily translates into public political power, far beyond the prospect of financial quid pro quo corruption.⁴²⁴ Inherent in the Court's assertion that unequal wealth affords an "unfair" political advantage that tends to "distort[]" the democratic process is the premise that money exerts a structural effect.⁴²⁵ Money does not merely increase the amount of political speech. And it does not merely threaten the occasional corruption of particular officials. Rather, it draws political power systematically toward itself at the expense of "the (less affluent) public."⁴²⁶

⁴²² *Id.* at 660.

⁴²³ *Id.*; see also *infra* text accompanying notes 450-69.

⁴²⁴ That wealth exerts such influence in American politics is so apparent and widely accepted as to be beyond reasonable dispute. See, e.g., Ray Forrester, *The New Constitutional Right to Buy Elections*, 69 A.B.A.J. 1078, 1078 (1983) (stating that money has always been a major factor in American politics); Christine Gorman, *The Price of Power*, TIME, Oct. 31, 1988, at 44, 45 (noting the escalating cost of congressional election campaigns, the "heav[y] dependen[cy]" of candidates on business donations, and the political access and influence that such donations purchase); Robert Sherrill, *The Looting Decade: S & Ls, Big Banks and Other Triumphs of Capitalism*, THE NATION, Nov. 19, 1990, at 589 (arguing that "uncontrolled money" rules the "world of politics" in the United States); *Calling Speaker Foley*, N.Y. TIMES, Apr. 29, 1991, at A16 (advocating campaign finance reform to stop the "distortion of democracy caused by the unchecked flow of favor-seeking money to the nation's top lawmakers"); *supra* notes 14-16. But see *infra* note 426 (discussing Justice Scalia's view).

⁴²⁵ The Court's incorporation of this fact into its campaign finance analysis evolved from earlier cases in which the Court more narrowly acknowledged that corporate wealth is "not an indication of popular support for the corporation's political ideas." *Federal Elections Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 258 (1986).

⁴²⁶ Paul G. Chevigny, *Review Essay: The Paradox of Campaign Finance*, 56 N.Y.U. L. REV. 206, 220-21 (1981) (reviewing GARY C. JACOBSON, *MONEY IN CONGRESSIONAL*

Austin's assertion that concentrated wealth can distort political processes from a "popular support" norm necessarily embraces an empirical conclusion that the control of material resources strongly determines the distribution of public power.

ELECTIONS (1980)). The view that wealth distorts the democratic process by overbearing the popular will is claimed by some to be in tension with the traditional notion that ideas are best discussed and developed in an unregulated "marketplace" of speech. Justice Scalia, for example, believes that infusions of wealth in the political process (bribery and illegal influence peddling aside) simply increase the information and viewpoints that are available to an engaged and deliberative electorate that ultimately exercises its sovereign authority free from undue or unfair influence. No matter how packaged, warped or one-sided the information that reaches the people, all is purified in the end, Scalia believes, because governance issues are ultimately up to the people to decide at the ballot box. See *Austin*, 494 U.S. at 694-95 (Scalia, J., dissenting). This somewhat romanticized vision of the political marketplace also appears in *Bellotti*, where the Court proclaimed that "the people in our democracy are entrusted with the responsibility for judging and evaluating the relative merits of conflicting arguments." *Bellotti*, 435 U.S. at 791. Such an assessment of American politics recalls the old adage, "let the people know the facts and the country will be safe." That may have been sound wisdom in Abraham Lincoln's time, but the American political system certainly does not operate on that model today. Instead, an industry of Pavlovian engineers has arisen, which, at the direction of the highest bidder, employs sophisticated polling techniques, focus-group models, psychological studies, and media campaigns not to "let the people know the facts," but to market candidates and issues in ways calculated to produce reflexive and unconscious responses from the electorate. See, e.g., ARTHUR S. MILLER, *POLITICS, DEMOCRACY AND THE SUPREME COURT* 290-93 (1985) (stating that Huxley's revolution of mind manipulation has begun, and that "[man] is increasingly seen as . . . manipulable as such") (quoting Aldous Huxley in ALAN W. SCHEFLIN & EDWARD M. OPTON, *THE MIND MANIPULATORS* 10 (1978)); Forrester, *supra* note 424; Daniel Goleman, *Voters Assailed By Unfair Persuasion*, N.Y. TIMES, Oct. 27, 1992, at C1 (surveying persuasion techniques used upon voters). A recent report on politicians' use of focus groups concluded that this technology has "very little to do with democracy . . . [It] grow[s] out of the assumption that Americans . . . don't completely understand their own political interests and that their opinions are easier to manipulate than to enlighten." Elizabeth Kolbert, *Test-Marketing a President: How Focus Groups Pervade Campaign Politics*, N.Y. TIMES, Aug. 30, 1992, § 6 (Magazine), at 18, 72. Said one prominent political poll taker at the conclusion of a focus session: "You have that sense of innocence lost. You have that twinge of knowledge that they're the guinea pigs allowing us to exploit the electorate." *Id.*

Moreover, Justice Scalia's notion that campaign expenditures have only a speech effect, and not a power distributive effect ignores the influence that such expenditures exert long after the elections have ended. This is a particularly glaring omission in an age in which many contributors fund *both* major party candidates for a particular office and—in Senate minority leader Robert Dole's words—"expect something in return other than good government." Robert Sherrill, *Deep Pockets*, THE NATION, Aug. 27/Sept. 3, 1988, at 170, 170 (reviewing PHILIP M. STERN, *THE BEST CONGRESS MONEY CAN BUY* (1988)); see Richard L. Berke, *Pragmatism Guides Political Gifts, a Study Shows*, N.Y. TIMES, Sept. 16, 1990, § 1, at 26 (noting a study showing that PAC contributions are not based on ideological or geographical factors, but on whether "the recipient sits on a Congressional committee that can help them").

The observation that private economic inequalities reproduce themselves as political inequalities that warp the processes of self-government may seem mundane. For years, democratic theorists, a majority of Congress, and most ordinary citizens have acknowledged this dynamic and criticized it as perhaps the most potent internal threat to democratic government.⁴²⁷ Nevertheless, the Court for years managed to "shut [its] mind" to this prominent aspect of American political economy that "[a]ll others can see and understand."⁴²⁸ The significance of *Austin*, then, is that it breaks the long judicial silence and introduces the fact of wealth-determined politics into constitutional jurisprudence. Since political power is a zero-sum game,⁴²⁹ the obvious corollary to the proposition that wealth purchases political power is that unresourced citizens are denied their fair share of political influence. In American politics, one must pay to play;⁴³⁰ but as Senator Dole candidly put it, "[t]here aren't any Poor PACs or Food Stamp PACs or Nutrition PACs or Medicare PACs."⁴³¹ Implicit in *Austin* is the recognition that as money has become the currency of political

⁴²⁷ See *supra* notes 14-16 and accompanying text; *supra* note 424; see also Dworkin, *supra* note 16, at 13 (noting the popular view that "it is unfair that some private citizens have much more influence in politics than others just because they are much richer").

⁴²⁸ *Bailey v. Drexel Furniture Co.*, 259 U.S. 20, 37 (1922) (finding that the federal child labor tax had a "palpable" effect on child employment, and stating: "All others can see and understand this. How can we properly shut our minds to it?"); see also *Harris v. McRae*, 448 U.S. 297, 348-49 (1980) (Blackmun, J., dissenting) ("[T]here truly is 'another world "out there," the existence of which the Court, I suspect, either chooses to ignore or fears to recognize" (quoting *Beal v. Doe*, 432 U.S. 438, 463 (1977) (Blackmun, J. dissenting))).

⁴²⁹ See cases collected at *supra* note 96.

⁴³⁰ See *supra* notes 14-16 (collecting authorities documenting the pervasive influence of wealth on American politics). The data make clear that the poor have insufficient resources to make campaign donations or expenditures. Indeed, those who fall below the poverty line (welfare recipients on average receive assistance at rates between 20% and 50% below the federal poverty guidelines) by definition have insufficient income for brutal necessities, let alone for playing politics. See 1992 GREEN BOOK, *supra* note 22, at 1301-14; see also *supra* note 170 (authorities criticizing federal poverty guidelines as an unrealistically low estimate of income required to afford even the most basic necessities).

⁴³¹ ETZIONI, *supra* note 14, at 39 (quoting Senator Robert Dole). Senator Dole earned the title of "undisputed champion" in the U.S. Senate at raising PAC money by collecting nearly \$3.4 million between 1968 and 1986. Sherrill, *supra* note 426, at 170; see also Dennis Pfaff, *Pollution and the Poor*, DET. NEWS, Nov. 26, 1989, at A1 (quoting Alex Sagady, an environmental specialist with the Michigan American Lung Association, that the "[p]oor don't have a PAC" to deal with poverty-related issues of pollution).

power—the measure of a citizen's share in self-government—the system, unless regulated, can effectively strip those without economic resources of their political resources as well.

C. *Austin's Normative Aspect: Conception of Democracy*

The *Austin* decision is also vital at the normative level. *Austin* advances a conception of democratic governance grounded on the principle of "popular support," and so regards wealth-based allocations of political power as fundamentally illegitimate. As ideology or political theory, this proposition is unexceptional; it merely ratifies the popular vision of democracy that has been expressed from "the Declaration of Independence, to Lincoln's Gettysburg Address, to the Fifteenth, Seventeenth, and Nineteenth Amendments."⁴³² As jurisprudence, though, *Austin's* democratic vision holds remarkable generative potential. Given the extent to which economic inequalities pervade the political process, *Austin* could draw into question myriad aspects of the current democratic order. It may be argued, however, that *Austin's* reach is subject to at least two significant limitations. The first would confine *Austin's* theory to aggregations of wealth that result from the "state-conferred" corporate form; inequitable distributions of political influence attributable to inequalities of individual wealth would continue to be constitutionally irrelevant. The second would treat corporate expenditures as a special case for purposes of First Amendment analysis either on the assumption that states have an especially strong interest in protecting nonconsenting shareholders against corporations' use of their money for speech, or on the theory that corporate political speech merits substantially less constitutional protection than large campaign expenditures by wealthy individuals.

Each of these limiting principles has potential importance for First Amendment theory. But neither detracts from *Austin's* fundamental insight that wealth, regardless of source, can displace democratic politics—and it is precisely this kind of political breakdown that should call forth a more searching judicial review of political outcomes. For if, as *Austin* posits, the essence of democracy is government by the people according to a principle of "popular support," and if, as *Austin* further supposes, democratic processes

⁴³² *Reynolds v. Sims*, 377 U.S. 533, 558 (1964) (quoting *Gray v. Sanders*, 372 U.S. 368, 381 (1963)).

are debased and political outcomes tainted by large injections of wealth that bear no relationship to "public support," then the source of the money is beside the point, as is the "consent" of the owner, or indeed, the role of the state in permitting the aggregation of the wealth. It hardly matters, *for purposes of the Court's formulation of democratic legitimacy*, whether the process is captured by corporate managers using other people's money, the owners of closely-held corporations using general treasury funds, or by a few multi-millionaires drawing on their personal fortunes. Under any of these scenarios, politics faces the threat of being driven not by the strength of ideas or the desires of the people, but rather by a raw economic force that can be expected to promote its own reproduction and continued dominance over the common good.

1. *Austin's* Core Democratic Principle

At the heart of *Austin* is the proposition that certain forms of concentrated wealth tend to distort the processes of democratic self-government. This charge of distortion, like all such charges, necessarily carries a notion of an ideal or norm that has been denatured.⁴³³ In *Austin*, the normative baseline against which distortion is detected is a conception of democracy under which the public, and not the purse, rules. As the *Austin* Court viewed it, unrestrained corporate expenditures afford "an unfair advantage in the political marketplace" because "[t]he resources in the treasury of a business corporation" do not indicate commensurate popular support.⁴³⁴ And "immense aggregations" of corporate wealth have "distorting effects" on the political process because the power they exert bears "little or no correlation to the public's support for the corporation's political ideas."⁴³⁵ The core normative principle of *Austin*, then, designates "public" or "popular" support as the presumptive, democratically legitimate determinant of political outcomes and, with potential exceptions discussed below, rejects deviations from that principle that would distribute political power on other bases.

⁴³³ See BeVier, *supra* note 405, at 1073-74 (implying that the idea of a constitutional distortion presupposes some concept of constitutional norms).

⁴³⁴ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 257, 258 (1986)).

⁴³⁵ *Id.* at 660.

This raises the question of what *Austin* meant by "popular support." Neither the majority opinion nor the concurrences expressly define the term, and several interpretations seem at least superficially plausible. By one account, "popular support" simply refers to any aggregation of impacts upon the political process by natural persons (as opposed to corporations), even if wealthy people wield influence vastly disproportionate to their numbers while masses of less affluent people are left with virtually no political influence at all.⁴³⁶ Conversely, *Austin*'s "popular support" concept might be understood as an inflexible principle of majoritarian governance that guarantees each individual a mathematically equal quantum of influence on every political issue. This is the interpretation implied by Justice Scalia's charge that the *Austin* majority had constructed an "illiberal . . . 'one man one minute'" regime.⁴³⁷ On the former interpretation, *Austin* implicitly overruled *First National Bank of Boston v. Bellotti*,⁴³⁸ on the latter, it implicitly overruled *Buckley v. Valeo*.⁴³⁹

A third interpretation of *Austin*'s "popular support" concept avoids any irreconcilable conflict with *Buckley* or *Bellotti*,⁴⁴⁰ and, more importantly, seems to be most consistent with the sense and reasoning of the *Austin* decision itself. This third interpretation assumes that when the Court uses ordinary words, and places no special definition upon them, it intends their ordinary meanings. Reasonable people may differ on the precise "ordinary meaning" of "popular support," but the term plainly does not encompass a system of governance by which those with the most money command the greatest political power and influence. Rather, as commonly understood, the phrase "public" or "popular" support

⁴³⁶ At least one prominent constitutional scholar has advanced this view. See Letter from C. Edwin Baker to Stephen Loffredo 1 (Nov. 11, 1992) (on file with author) (suggesting that *Austin*'s "public support" concept merely "refers to who counts as part of the public for political purposes—individuals, people, do count, corporations do not").

⁴³⁷ *Austin*, 494 U.S. at 684.

⁴³⁸ 435 U.S. 765 (1978). An all-or-nothing distinction between corporate political speech and individual political speech contradicts *Bellotti*'s holding that corporate political speech is entitled to full First Amendment protections.

⁴³⁹ 424 U.S. 1 (1976) (per curiam). A "one man, one minute" concept of "popular support" enforceable by government, *Austin*, 494 U.S. at 684, patently violates *Buckley*'s categorical ban on campaign finance restrictions designed to equalize citizens' political influence. .

⁴⁴⁰ *Austin* professed adherence to *Buckley* and *Bellotti*, 494 U.S. at 657-60, a fact that may not be dispositive but is at least relevant to the interpretation of the Court's decision.

refers to the relative quantity, and perhaps intensity, of individual beliefs and preferences.⁴⁴¹ Viewed in this light, the distinction the Court draws between “equalizing the relative ability of individuals and groups to influence the outcome of elections”⁴⁴² (which it did not endorse) and “ensur[ing] that [political] expenditures ‘reflect actual public support’”⁴⁴³ (which it did endorse), becomes intelligible. This distinction, though derided as artificial,⁴⁴⁴ describes a theory of popular democratic governance that

⁴⁴¹ Webster’s Dictionary defines “popular” as “of or relating to the general public; . . . suited to the financial means of the majority; INEXPENSIVE . . . commonly liked . . . approved.” WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 1766 (1981). “Public,” as an adjective is defined as “of relating to, or affecting the people as an organized community;” and as a noun, “public” is defined as “the people as a whole.” *Id.* at 1836. The Court’s various contextual uses of the phrase “popular” or “public” support all point to this common understanding. For instance, in *Massachusetts Citizens For Life*, the Court asserted that the “relative availability of funds is . . . a rough barometer of public support.” *FEC v. Massachusetts Citizens for Life*, 479 U.S. 238, 258 (1986). If “public support” simply referred to the existence of *any* noncorporate human backing, the statement would make no sense. It becomes coherent only if “public support” refers to the number of people and intensity of interest favoring or opposing a particular issue or candidate. In *Austin*, as elsewhere, the Court associates “public support” with the “power . . . of ideas” and perceives a natural correlation between the two. *Austin*, 494 U.S. at 659-60. All would agree that an idea is “powerful” if it attracts many people to its cause. But few would accept that an idea is “powerful” in this sense merely because a wealthy individual advances it. Here as well, the Court’s usage makes sense only if “public support” refers to relative numbers and intensity of individual views. The Court has also spoken in terms of the “corrosive and distorting effects of immense aggregations of [corporate] wealth . . . that have little or no correlation to the public’s support for the corporation’s political ideas.” *Austin*, 494 U.S. at 660 (emphasis added). It is a strained interpretation indeed that would equate “the public” in this context with a few billionaires—or even a few thousand millionaires. Finally, the immediate doctrinal forbear of *Austin* and *FEC v. Massachusetts Citizens For Life* implicitly rejected the idea that democracy is safe so long as wealth that captures political processes is directed by its natural-person owners. “Regulation of corporate political activity,” the Court declared, “reflect[s] concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes.” *Id.* at 259 (emphasis added).

⁴⁴² *Austin*, 494 U.S. at 684-85 (Scalia, J., dissenting) (quoting *Buckley v. Valeo*, 424 U.S. 1, 48 (1976)).

⁴⁴³ *Id.* at 685 (Scalia, J., dissenting) (quoting the majority opinion, *id.* at 660).

⁴⁴⁴ The criticism is a curious one coming from Justice Scalia, who joined the majority in *Massachusetts Citizens for Life*, a case which relied on precisely this distinction:

Political “free trade” does not necessarily require that all who participate in the political marketplace do so with exactly equal resources. Relative availability of funds is after all a rough barometer of public support. The resources in the treasury of a business corporation, however, are not an indication of popular support for the corporation’s political ideas.

allows for certain benign departures from equal or proportionate political influence but singles out *wealth-based* departures as illegitimate.⁴⁴⁵ *Austin's* conception of democracy tolerates inequalities of influence based on numerical strength of an active coalition, or the intensity of its supporters, but not such inequalities that attach to the perquisites of affluence. Since "equalizing voices" is not required on any given question, *Austin* allows members of a minority to pool individual resources, financial or personal, in order to project a political voice that is disproportionate to simple numerical strength.⁴⁴⁶ The minority could participate in an issue of special concern with more than an equal voice, but its influence would reflect the aggregation of intense, individual support, not the unfair advantage conferred by unequal wealth. The intensity of a minority's interest in a particular matter might occasionally prevail over the superior numbers of a relatively apathetic majority. But any number of democratic, pluralist, and interest group theories accept such results as consistent with popular governance and democratic principle.⁴⁴⁷

Massachusetts Citizens for Life, 479 U.S. at 257-58 (citations omitted).

⁴⁴⁵ Cf. Dworkin, *supra* note 16 (discussing the relation between unequal wealth and the possibility of equality of political influence).

⁴⁴⁶ Understood in this way, *Austin* does not "calibrat[e] political speech to the degree of public opinion that supports it," as Justice Scalia charged in *Austin*. *Austin*, 494 U.S. at 693 (Scalia, J., dissenting). Scalia is correct that if one reads *Austin* in the manner he proposes and if campaign expenditures are "political speech," then *Austin's* principle that such expenditures ought to reflect popular support ignores a core value of the First Amendment: that speech promotes political enlightenment by allowing new and unpopular ideas to be introduced into public debate. As Judge Learned Hand put it, the public is more likely to reach the right conclusions "out of a multitude of tongues, than through any kind of authoritative selection." *United States v. Associated Press*, 52 F. Supp. 362, 372 (S.D.N.Y. 1943). A rule limiting political speech to those ideas that already claim public support could foreclose debate and disadvantage unpopular or minority positions. The interpretation put forward in the text, however, does not require strict proportionality of speech to numerical support on any given issue, but would tend to open the political process to the unpopular views of indigent minorities, whose interests are otherwise likely to be submerged in a political process driven by unregulated wealth. At the same time, corporations and wealthy individuals remain at liberty to popularize their ideas through private institutions and the media.

⁴⁴⁷ Political theorists and others have long suggested that democratic values are not fully served by a pure and unbending principle of majority rule. Rather, it is said, an inclusive democratic politics requires that the intensity of a minority's interest in an issue should at least occasionally prevail over the superior numbers of a relatively apathetic majority. See ROBERT A. DAHL, A PREFACE TO DEMOCRATIC THEORY 48-50, 90-119 (1956); BEITZ, *supra* note 359, at 66-67.

Finally, *Austin's* conception of democracy does not require that all political viewpoints be advanced with exactly equal resources. Rather, so long as inequalities appear to be "a rough barometer of public support"⁴⁴⁸ and not simply a reflection of the political preferences of those who control vast wealth, they are consistent with the baseline of democratic legitimacy. The "equality" demanded by *Austin's* democratic vision, at bottom, is an equality that seeks to mitigate the political impact of maldistributed wealth and level the field for rich and poor.

Austin's designation of "popular support" as the guiding principle of democratic governance and its identification of economic status as an illegitimate determinant of political influence tracks the theory laid down in the political rights cases of the 1960s.⁴⁴⁹ *Austin's* innovation is that it explicitly extends this idea from formal voting parity to functional political effectiveness, and from political inequalities imposed directly by the state to those that result from the domination of private economic power. On this view, the political marginalization of poor people ought to be recognized as a fundamentally undemocratic phenomenon that demands judicial attention.

2. Putative Limiting Principle: State Facilitation of Corporate Capital Accumulation

Perhaps the easiest way to confine *Austin's* significance would be to regard the decision as concerned only with the political inequalities that result from the accumulation of *corporate* (but not individual) capital. The *Austin* Court did "emphasize" that the compelling interest supporting Michigan's campaign restriction arose not from "the mere fact that corporations may accumulate large amounts of wealth," but rather, from the fact that government "facilitates the amassing of large treasuries" by attaching special advantages, both legal and economic, to the corporate form.⁴⁵⁰ Although the Court did not elaborate on the precise significance of state responsibility, several explanations are possible.

First, the state may have a compelling interest in regulating the political power of corporate wealth on the theory that the corporation is a creature of the state, and therefore, subject to state

⁴⁴⁸ *Massachusetts Citizens for Life*, 479 U.S. at 258.

⁴⁴⁹ See *supra* notes 92-115 and accompanying text.

⁴⁵⁰ *Austin*, 494 U.S. at 660.

definition of its powers and duties.⁴⁵¹ This view, a variant on the logical argument that the greater power includes the lesser, would permit any state-created, nonconstitutional benefit to be conditioned on the restrictions and limitations that the state chooses to impose.⁴⁵² It has long been held, however, that the state may not directly condition the receipt of a government benefit on the forfeiture of a fundamental right,⁴⁵³ and Justice Marshall, author of the *Austin* decision, was a leading proponent of the unconstitutional conditions doctrine.⁴⁵⁴ Moreover, this explanation would effectively overrule *Bellotti*, which the *Austin* Court declined to do.⁴⁵⁵

⁴⁵¹ Courts and commentators have long debated the status of the corporation as a private actor. See *Trustees of Dartmouth College v. Woodward*, 17 U.S. (4 Wheat.) 518 (1819) (holding that a corporation established for purposes of general charity is not per se a public corporation). See generally ARTHUR MILLER, *THE MODERN CORPORATE STATE: PRIVATE GOVERNMENTS AND THE AMERICAN CONSTITUTION* 4-5 (1976) (acknowledging the existence of the corporate state in America and detailing how that state developed without formal amendment to the Constitution).

⁴⁵² See *McAuliffe v. New Bedford*, 29 N.E. 517, 517 (Mass. 1892) (Holmes, J.) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.").

⁴⁵³ See, e.g., *Pickering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (holding that a teacher may not be dismissed for criticizing the school board in a letter published by a local newspaper). For an informative discussion of the unconstitutional conditions doctrine, see Seth F. Kreimer, *Allocational Sanctions: The Problem of Negative Rights in a Positive State*, 132 U. PA. L. REV. 1293 (1984).

⁴⁵⁴ See, e.g., *Memorial Hosp. v. Maricopa County*, 415 U.S. 250 (1974) (adopting impact analysis in unconstitutional conditions doctrine); *Dunn v. Blumstein*, 405 U.S. 330 (1972) (holding that a classification which serves to penalize a fundamental right triggers the compelling state interest requirement); *Pickering*, 391 U.S. at 574 (supporting the unconstitutional conditions doctrine by holding that a teacher's exercise of his First Amendment right to speak about public issues, without proof of knowingly or recklessly made false statements, will not result in his dismissal from public employment). See generally Kreimer, *supra* note 453, at 1345 (discussing Marshall's role in unconstitutional conditions jurisprudence). Justice Scalia sharply criticized the *Austin* majority for allowing states to condition corporate status on the relinquishment of First Amendment rights. *Austin*, 424 U.S. at 680 (Scalia, J., dissenting). In other cases, however, Scalia has heartily endorsed state action that conditions important governmental benefits upon *individuals'* forfeiture of First Amendment rights. See, e.g., *Rust v. Sullivan*, 111 S. Ct. 1759 (1991) (upholding a federal regulation that conditions federal medical benefits on the forfeiture of reproductive choice and free expression); *Employment Div., Dep't of Human Resources v. Smith*, 494 U.S. 872 (1990) (upholding a state law that effectively conditions unemployment benefits on the forfeiture of free exercise rights).

⁴⁵⁵ In *Bellotti*, the Court explicitly rejected the argument that since states are under no constitutional obligation to make any corporate structure available, they may create a corporate form with limited powers that exclude the right to make political expenditures. See *Bellotti*, 435 U.S. at 779 n.14; *id.* at 823-24 (Rehnquist, J., dissenting).

The second explanation is related to the first. Government regulation designed to prevent *corporate*, but not other, wealth from distorting the political process might be justified on the theory that the state, having created the corporate form, is also responsible for the adverse consequences that the corporate form might produce. Corporate consequences thus fall on the side of the ledger attributable to governmentally imposed harms, as distinguished from those ills that are privately initiated. This explanation, however, ignores the powerful role that the state plays in facilitating individual, noncorporate wealth, through the law of property, contract, taxation, and other forms of economic regulation.⁴⁵⁶ Indeed, Justice Scalia's *Austin* dissent recognizes that the economic power of individuals and noncorporate associations is largely attributable to "all sorts of special advantages that the State need not confer."⁴⁵⁷ Management salaries, dividends, and capital gains are all varieties of wealth that owe their accumulative properties to state conferred benefits, no different in kind from the "state-conferred advantages of the corporate structure"⁴⁵⁸ singled out in the *Austin* decision. Hence, once one concludes that the state is responsible for regulating the untoward political consequences of corporate capital accumulation, the same reasoning ought to apply to resources gathered through other government-sponsored market mechanisms and legal arrangements.⁴⁵⁹

Both of the explanations offered so far follow the fault-line of the familiar public-private distinction.⁴⁶⁰ But there is no reason that the state's duty to ensure democratic legitimacy ought to be

⁴⁵⁶ See *Right to Choose v. Byrne*, 450 A.2d 925, 946 (N.J. 1982) (Pashman, J., concurring in part and dissenting in part) (rejecting the position that government bears no responsibility for the unequal distribution of private wealth and noting that "[t]he state defines and enforces property rights, creates the economic climate in which private enterprise operates, and in myriads of ways effects the economy of the state and the wealth or poverty of its citizens"); Sunstein, *supra* note 134, at 885 (contending that common law distributions cannot meaningfully be distinguished from positive law distributions); cf. *Scott v. Sandford*, 60 U.S. 393, 615 (1856) (Curtis, J., dissenting) (asserting that "[w]ithout government and social order, there can be no property; for without law, its ownership, its use, and the power of disposing of it, cease to exist").

⁴⁵⁷ *Austin*, 494 U.S. at 680 (Scalia, J., dissenting).

⁴⁵⁸ *Id.* at 665.

⁴⁵⁹ See Jill E. Fisch, *Frankenstein's Monster Hits the Campaign Trail: An Approach to Regulation of Corporate Political Expenditures*, 32 WM. & MARY L. REV. 587, 632 (1991) (contending that the corporate form does not confer significantly greater economic advantages than many other legal constructs and arrangements).

⁴⁶⁰ See *supra* text accompanying notes 373-75.

limited to situations in which it is directly responsible for democratic illegitimacy, and such has never been the law. For in an ultimate sense, the state is responsible for any deviation from democratic norms; it alone has established and maintains the monopoly of state power that is exercised, coercively if necessary, over all citizens in the political order. This is the quintessence of state action, and it carries a correlative duty to guarantee the democratic dispensation of government authority against all threats, whether public or private.⁴⁶¹ Thus, the one-person, one-vote cases allude to a citizen's right to have his or her vote counted free from private ballot fraud.⁴⁶² And the "white primary cases," although formally decided at the outer boundaries of state action theory, involve the protection of the political process against privately initiated distortions.⁴⁶³ Indeed, the political distortion attacked in *Baker v. Carr* resulted from private behavior—population shifts that incidentally placed public power in a minority's hands—for which the state did not bear direct responsibility.⁴⁶⁴ The lesson is that it should make no constitutional difference whether the processes that allocate political power are corrupted by private actions or by government policies.⁴⁶⁵

⁴⁶¹ Cf. THE FEDERALIST NO. 51, at 323 (James Madison) (Clinton Rossiter ed., 1961) ("It is of great importance in a republic not only to guard the society against the oppression of its rulers, but to guard one part of the society against the injustice of the other part.").

⁴⁶² See *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (citing, among others, *United States v. Saylor*, 322 U.S. 385 (1944) (ballot stuffing)). See generally Chemerinsky, *supra* note 374 (arguing that courts ought to protect constitutional values against private encroachment); Alexander H. Perkelis, *Private Governments and the Federal Constitution*, in LAW AND SOCIAL ACTION 91, 113-14 (Milton R. Konvitz ed., 1970) (proposing a theory of state action in which private economic influence over the political system could be unconstitutional if it were found to "control in fact the political processes of a given society").

⁴⁶³ See *Terry v. Adams*, 345 U.S. 461 (1953) (finding a political party's actions in violation of the Fifteenth Amendment); *Smith v. Allwright*, 321 U.S. 649 (1944) (same); *Nixon v. Condon*, 286 U.S. 73 (1932) (finding a political party's actions in violation of the Fourteenth Amendment); *Nixon v. Herdon*, 273 U.S. 536 (1927) (same).

⁴⁶⁴ See *Baker v. Carr*, 369 U.S. 186 (1962). The principle that private conduct acquires the status of state action when it is expressed through or significantly alters the processes of government is also reflected in a recent line of cases holding that private litigants' race-based use of peremptory challenges constitutes state action for purposes of the Fifth and Fourteenth Amendments. See *Georgia v. McCollum*, 112 S. Ct. 2348 (1992) (criminal case); *Edmonson v. Leesville Concrete Co., Inc.*, 111 S. Ct. 2077 (1991) (civil case).

⁴⁶⁵ Nor does the public-private distinction in this context have the virtue of greater enforceability. To the contrary, it is far from clear that any coherent line can

Moreover, even if the putative distinction between state-facilitated corporate wealth and privately acquired individual wealth holds force in the First Amendment context, it is wholly irrelevant to the issue of democratic legitimacy.⁴⁶⁶ *Austin's* conception of democracy is reflected in its judgment, both normative and empirical, that vast concentrations of corporate wealth distort democratic processes because those "resources . . . are not an indication of popular support for the corporation's political ideas."⁴⁶⁷ From the democratic perspective, what matters is neither the source of wealth nor the state's enabling role in its accumulation. The troubling phenomenon is the discontinuity between wealth and popular support and the threat that concentrated economic power will negate any possibility of self government by politically equal citizens.⁴⁶⁸ In this sense, a billionaire's personal fortune carries no greater "indication of popular support" than the swollen treasury of a large corporation. To the extent that either variety of economic power translates into political power, it has the capacity to deform the democratic process away from a public support norm.⁴⁶⁹ In sum, the distinction between "state-facilitat-

be drawn between privately and governmentally caused distortions of the political process. For example, one might argue that the barriers to political participation invalidated in *Bullock v. Carter*, 405 U.S. 134, 135-36 (1972) (ballot-access fee that could reach several thousand dollars), and *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 664 n.1 (1966) (\$1.50 poll tax), had a class-based impact only because of disparities in private wealth for which the state bore no responsibility. Cf. *Griffin v. Illinois*, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting) (arguing that the Constitution imposes no "affirmative duty to lift the handicaps flowing from differences in economic circumstances").

⁴⁶⁶ As Judge Skelly Wright explained in an analogous context:

When barriers to equality are imposed not by state action, but by circumstances or economic resources or private persons, the equal protection clause might no longer provide protection. Nevertheless, the bounds imposed by the state action requirement do not limit the fundamental ideal of political equality that underpins our democratic system of government.

J. Skelly Wright, *Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?*, 82 COLUM. L. REV. 609, 629 (1982).

⁴⁶⁷ *Austin v. Michigan Chamber of Commerce*, 494 U.S. 652, 659 (1990) (quoting *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 258 (1986)).

⁴⁶⁸ See *supra* notes 14-22 and accompanying text (discussing the tensions between economic inequality and political democracy).

⁴⁶⁹ See *Austin*, 494 U.S. at 685 (Scalia, J., dissenting) (arguing that, by the majority's reasoning, concentrated wealth may distort the political process whether the wealth is held by a corporation or by an individual). At least one commentator has argued that the *Austin* Court regards individual wealth as incapable of exerting "undue influence" over the democratic process, citing as evidence the fact that the

ed" corporate wealth and other wealth fails to cabin *Austin*'s core conception of democracy.

3. Putative Limiting Principle: Other People's Money

One might also attempt to limit *Austin* by confining it to the special situation in which corporate resources are injected into politics without the consent of the shareholders.⁴⁷⁰ One way of interpreting *Austin*'s attention to this factor is that the Court viewed owner consent as a means of anchoring corporate political expenditures to "popular support." The aggregation of many individuals' financial resources under a corporate umbrella might thus be "democratically" deployed for political purposes so long as the resources were a "rough barometer of public support" for the favored candidate, program, or idea.⁴⁷¹ This approach distinguishes between the "concentrated wealth" of a billionaire's personal fortune, which bears no more relation to public support than does a business corporation's treasury, and the concentrated wealth of a consumer PAC funded by millions of ten-dollar contributions, which does.⁴⁷²

Court did not accept "equalization of voices" as a compelling state interest for campaign finance restrictions. Prescott M. Lassman, *Breaching the Fortress Walls: Corporate Political Speech and Austin v. Michigan Chamber of Commerce*, 78 VA. L. REV. 759, 790 & n.210 (1992). As discussed above, however, the Court's rejection of pure egalitarianism in favor of a popular-support model in fact reinforces the notion that disparate influence flowing from any source of wealth threatens to displace democratic politics. See *supra* notes 433-49 and accompanying text. Moreover, limiting *Austin* to corporate wealth on this basis would require the Court to reject its prior insight that "[r]egulation of corporate political activity . . . reflect[s] concern not about use of the corporate form *per se*, but about the potential for unfair deployment of wealth for political purposes." *Massachusetts Citizens for Life*, 479 U.S. at 259 (footnote omitted). Nothing in *Austin* even hints at such a change in fundamental thinking.

⁴⁷⁰ See *Austin*, 494 U.S. at 660-66. Justice Brennan, who joined the *Austin* majority, issued a special concurrence that emphasized the state's interest in protecting shareholders against the unauthorized "political" use of their money. See *id.* at 669-78. See generally Victor Brudney, *Business Corporations and Stockholders' Rights Under the First Amendment*, 91 YALE L.J. 235, 235-95 (1981) (tracing the history of state interest in protecting shareholders against use of corporate resources for unauthorized political purposes).

⁴⁷¹ See *Massachusetts Citizens for Life*, 479 U.S. at 257-58.

⁴⁷² For this reason, the *Austin* Court could view corporate political expenditures from segregated funds accumulated through individual contributions as benign: contributors "understand that their money will be used solely for political purposes," and therefore "the speech generated accurately reflects contributors' support for the corporation's political views." *Austin*, 494 U.S. at 660-61. The Supreme Court has acknowledged that in some instances PACs serve as "mechanisms by which large

An alternative, narrowing reading of *Austin* is that the Court regards corporate political expenditures as troublesome not because they lack public support, but only because they represent the political use of financial assets without the permission of the owners. On this view, it is not the inequality of private economic power that gives rise to political distortion, but only the deployment of wealth without proprietary consent. This reading of *Austin* does not command much support from the language of the decision itself,⁴⁷³ nor does it square with the conception of democracy that animates the Court's reasoning. If the political process is distorted whenever large sums of money are marshalled into politics in ways that "have little or no correlation to the public's support for the [spender's] political ideas,"⁴⁷⁴ then the circumstance that the money is used with the consent of the owner (or by the owner herself) is quite irrelevant to preservation of democratic norms. The baseline is popular support, not proprietary support, and not shareholder support. The basic unit of democratic currency for the *Austin* Court is the person, not the dollar.

For this reason, capture of the political process by corporate managers is no more or less troubling than capture by a billionaire cowboy who speaks only for himself. The evil identified by *Austin* is that control over unequally distributed resources enables some individuals to exert influence over the political process vastly out of proportion to their numbers or to the "popular support" for the outcomes they seek. Requiring nothing beyond owner consent for the political use of money simply does not address the "distortion" *Austin* identifies. Such a restriction could only protect against the skewing of the process away from a public-regarding, popular-

numbers of individuals of modest means can join together in organizations" to pool their resources and "amplify their voices." *Federal Elections Comm'n v. National Conservative Political Action Comm.*, 470 U.S. 480, 494, 495 (1985). In *Federal Elections Comm'n*, the Court noted that over 100,000 individuals had contributed an average of \$25 each to the Fund for a Conservative Majority, *see id.* at 494, and concluded that to forbid this type of joint political activity "would subordinate . . . those of modest means as opposed to those sufficiently wealthy to be able to buy expensive media ads with their own resources," *id.* at 495.

⁴⁷³ The *Austin* Court describes democratic distortion not as a discontinuity between corporate political *ideas* and *shareholder* support, but rather as a lack of correlation between corporate *wealth* and *popular* support for the corporation's political ideas. *See Austin*, 494 U.S. at 659-60. That *Austin* upheld the Michigan restriction as applied to closely-held corporations further evidences that the Court's central concern is unequal economic power, and not the nonconsensual use of other people's money.

⁴⁷⁴ *Austin*, 494 U.S. at 660.

support model if wealth were distributed in a roughly equal manner. Then, "voting with dollars" might work as a model and the amount of cash flowing into the political system might correlate significantly with the breadth and intensity of citizen support. But the distribution of wealth in the United States is more unequal than in any other industrialized nation.⁴⁷⁵ The problem of other people's money is no doubt important for First Amendment reasons,⁴⁷⁶ but it does not provide a principled basis upon which to narrow *Austin's* core teaching on democratic legitimacy.

A final argument that seeks to limit *Austin's* significance rests on another supposed distinction between wealth directed into politics by individuals and wealth directed into politics by corporations. The contention is that *Austin* regards corporate wealth as uniquely capable of distorting democracy because corporate speech is "not generated or characterized by individual participation."⁴⁷⁷ Political expenditures of unequal individual wealth, by contrast, do not suffer this deficiency and therefore pose no threat of "undue influence" over democratic processes.⁴⁷⁸ This argument mimics almost perfectly a theory advanced by C. Edwin Baker. Professor Baker posits liberty, self-determination, and self-realization as the First Amendment's central values, and therefore regards corporate speech as unworthy of protection because it is market-dictated, not motivated by individual choice or free-will.⁴⁷⁹ However one evaluates Professor Baker's theory on its own merits, though, it does not describe *Austin*. The *Austin* decision, far from accepting a First Amendment distinction between corporate and individual speech, expressly reaffirmed *Bellotti's* holdings that corporate political speech deserves constitutional protection on a listener value

⁴⁷⁵ See, e.g., PHILLIPS, *supra* note 15, at 8 (noting that the distribution of wealth in the United States is more unequal than in any other major industrial country); see also PHILLIP MATERA, PROSPERITY LOST 23 (1991) (citing Federal Reserve financial asset surveys and concluding that American "financial assets [are] overwhelmingly concentrated among a tiny minority of families"); *supra* text accompanying notes 205-08.

⁴⁷⁶ Professor Brudney, for example, argues that the First Amendment does not protect compelled, nonconsensual use of shareholder funds. See Brudney, *supra* note 470, at 294. Brudney's argument would require the Court to overrule *Bellotti*, a step that the *Austin* Court declined to take. Cf. *Aboud v. Detroit Bd. of Educ.*, 431 U.S. 209, 232-37 (1977) (holding that a state law permitting a public employees' union to require dues payments for political speech violated the First Amendment).

⁴⁷⁷ Lassman, *supra* note 469, at 790.

⁴⁷⁸ *Id.*

⁴⁷⁹ See BAKER, *supra* note 107, at 194-224; C. Edwin Baker, *Realizing Self-Realization: Corporate Political Expenditures and Redish's The Value of Free Speech*, 130 U. PA. L. REV. 646, 652-55 (1982).

theory⁴⁸⁰ and that corporate political expenditures constitute "political expression 'at the core of our electoral process and of the First Amendment freedoms.'"⁴⁸¹ *Austin* upheld Michigan's campaign law not because the Court loved corporate speech less, as Baker would prefer, but because it distrusted wealth-driven politics more.

A more important reason for concluding that *Austin* does not track Professor Baker's theory relates to the Court's assessment of the "other peoples' money" problem. The Court has consistently noted that shareholders consent to their investments being employed for economic ends (Baker's "market-dictated" speech), but not for political purposes.⁴⁸² To the extent that *Austin* regarded the political use of shareholder money as a special evil, it was precisely because the Court viewed that type of "corporate speech" as *beyond* the economically motivated, market-driven decisions authorized by stockholders.⁴⁸³ At least in this context, then, the absence of "market-dictated" activity, which for Baker is a reason to afford First Amendment protection, was for the Court a reason to allow greater state regulation. On this count as well, *Austin's* holding and Baker's thesis collide. What remains at *Austin's* center,

⁴⁸⁰ See *Austin*, 494 U.S. at 657 (citing *First Nat'l Bank v. Bellotti*, 435 U.S. 765, 777 (1978) ("The inherent worth of the speech in terms of its capacity for informing the public does not depend upon the identity of its source, whether corporation, association, union or individual."))

⁴⁸¹ *Id.* (quoting *Buckley v. Valeo*, 424 U.S. 1, 39 (1976) (per curiam) (quoting *Williams v. Rhodes*, 393 U.S. 23, 32 (1968))).

⁴⁸² See *Federal Election Comm'n v. Massachusetts Citizens for Life*, 479 U.S. 238, 260 (1986) (stating that stockholders "contribute investment funds or union dues for economic gain, and do not necessarily authorize the use of their money for political ends"); *Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 414 (1972) (noting the importance of segregating political and general funds in order to protect the politically "dissenting stockholder or union member"); see also *Austin*, 494 U.S. at 670 (Brennan, J., concurring) (stating that corporate finances "are not an indication of popular support for the corporation's political ideas," but rather "reflect the economically motivated decisions of investors and customers") (quoting *Massachusetts Citizens for Life*, 479 U.S. at 258).

⁴⁸³ See *Austin*, 494 U.S. at 670-71 (Brennan, J., concurring). If the Court's concern about shareholder consent extended even to "market-dictated" political expenditures—expenditures calculated to maximize the return on shareholders' investments—it would logically apply to other business decisions with which a shareholder might harbor a "political" disagreement, and would constitutionalize much of the general law of corporate governance. *But cf.* Brudney, *supra* note 470, at 274 (stating that "it is far from self-evident that the First Amendment requires the same consensual arrangements among stockholders for corporate commercial speech that it permits, and indeed supports, for corporate political speech").

then, is a conception of democracy that rules out the wealth-based allocation of political power.

D. *Poverty Jurisprudence Revisited*

Austin's implications for the Court's treatment of poverty should by now be obvious. *Austin* recognizes that states have a compelling interest in mitigating the effects of concentrated wealth in the political sphere. The existence of this compelling state interest does not necessarily imply a correlative constitutional duty,⁴⁸⁴ but it does point to a democratic defect that is of utmost importance to the Court in its acceptance—or rejection—of political decisionmaking. The Court's poverty discourse ignores the power that money wields in the political sphere and mistakenly ascribes to the poor a political potency that those without economic resources simply lack. *Austin* makes clear that the Court's poverty cases rest on a misguided assessment of how well the democratic system works for the poor. *Austin's* structural understanding of the role of money in American politics pierces the myth of democratic legitimacy that stands at the core of the poverty cases and their use of rationality review.

This myth of democratic legitimacy is harmful in at least two interconnected respects. First, the Court's use of rationality review, despite the political marginalization of the poor, facilitates a politics of scapegoating and sensationalism in which stereotype masquerades as fact and stigma displaces deliberation.⁴⁸⁵ This lack of reasoned decisionmaking is an extreme example of a broader democratic defect⁴⁸⁶ that the courts must correct through heightened review. But the damage wrought by the democratic myth in the Court's poverty discourse is more personal and more tragic. When the poor

⁴⁸⁴ See Stephen E. Gottlieb, *Compelling Governmental Interests and Constitutional Discourse*, 55 ALB. L. REV. 549, 554 (1992) (contending that "whatever arguments support compelling public purposes will also support fundamental rights," but noting that under current doctrine, such compelling interests do not ordinarily give rise to constitutional duties).

⁴⁸⁵ See, e.g., Kevin Sack, *New York Medicaid Strained by Newly Poor*, N.Y. TIMES, Mar. 22, 1992, § 4, at 16 (quoting Michael J. Dowling, Director of health, education and human services in New York, that "[i]t is often much easier from a political point of view to deal with issues that are just perceived as welfare" because regulators need not deal meaningfully with the affected client population).

⁴⁸⁶ See, e.g., Cass R. Sunstein, *Democratizing America Through Law*, 25 SUFFOLK U. L. REV. 949, 949 (1991) (noting that "the contemporary American system of public law" is characterized by a lack of "[d]emocratic deliberation").

and homeless bring their constitutional claims to court, the stakes are very high if concern and empathy are denied.⁴⁸⁷ For someone in Mr. A.'s condition, the court's deliberative indifference may mean the difference between life and death itself. *Austin* should make clear that the Court's broad deference to majoritarian outcomes that condemn poor people to starvation or worse cannot be justified where the political order is "distorted and corroded" by economic inequalities.

The Court abdicates its fundamental responsibility to dispense justice when it stands passively in the face of democratic failure caused by disparities of wealth in the political sphere. Twenty years ago, the Court was unable to find any distinction between laws that affect the most basic of human wants and mere commercial restrictions. It found nothing troubling about having "the starving man or woman accept the majority's vote on whether he or she shall live or not."⁴⁸⁸ *Austin's* important insight into the relation between democracy and wealth compels the Court to reassess its treatment of a politically powerless minority and to offer protection against a polity that claims to possess a government of and for the community, and yet would allow its members to perish when there are resources available to provide for them.⁴⁸⁹ Extending some kind of heightened protection to the poor may not seem like much where hardship is so great.⁴⁹⁰ But the modest hope is that it will reorient social policies in a more humane and caring direction.

⁴⁸⁷ See Martha Minow, *When Difference Has Its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 HARV. C.R.-C.L. L. REV. 111, 132 (1987) (discussing the need for "proximity, empathy and imagination" in determining how a class burdened by a governmental classification experiences such treatment).

⁴⁸⁸ Edward V. Sparer, *The Right to Welfare*, in THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 65, 83 (Norman Dorsen ed., 1971).

⁴⁸⁹ See WALZER, *supra* note 11, at 79 ("No community can allow its members to starve to death when there is food available to feed them . . . not if it claims to be a government of or by or for the community.").

⁴⁹⁰ Cf. W.H. AUDEN & LOUIS KRONENBERGER, THE VIKING BOOK OF APHORISMS: A PERSONAL SELECTION 368 (Dorset Press 1981) (1962) ("Grub, first, then ethics." (quoting Bertolt Brecht's THE THREE PENNY OPERA (Act II, Finale))).