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EXPLORING A SUBSTANTIVE APPROACH TO EQUAL JUSTICE UNDER LAW

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> Equal justice under law is not merely a caption on the facade of the Supreme Court building. It is perhaps the most inspiring ideal of our society. . . . It is fundamental that justice should be the same, in substance and availability, without regard to economic status.[1]

Our legal system is based on the premise that people are to be treated equally under the law. The concept of "equal justice under law" is a foundation of our system that dates back to early Western philosophy.[2] Yet "equal justice under law" has very different meanings depending on whether it is defined as a substantive or procedural concept. As I define it, equal justice as a substantive concept mandates that substantive resources, particularly economic resources, be distributed equitably.[3] The focus of a substantive approach to equal justice is on the equality of the ends achieved by that approach. On the other hand, equal justice as a procedural concept mandates only the fairness of the means by which justice is administered, and implies at most that people should be treated equally in the *process* regardless of their substantive, economic resources. The latter, procedural approach to equal justice predominates in the current Supreme Court's treatment of the economic rights of poor people.[4]

The Court's procedural approach to equal justice perpetuates an unequal, unfair status quo because it does nothing to address inequity in the underlying economic and social system.[5] Yet the Court has consistently refused to find substantive economic rights in the Constitution, and has instead relegated the determination of those rights to the legislative process.[6] The relegation of the economic rights of the poor to the political process creates a "Catch 22" for the poor, because the ability of poor people to affect the political process is limited by their lack of economic resources. A substantive approach to equal justice is needed to facilitate the equal participation of the poor in the political process. In order to achieve equality of

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1. Justice Lewis F. Powell Jr., as quoted by Francis J. Larkin, *The Legal Services Corporation Must Be Saved*, 34 JUDGES' J. Winter 1995, at 1.

2. For example, The Letter of James in the New Testament of THE BIBLE emphasizes the importance of equality in the judging process.

> My brethren, show no partiality as you hold the faith of our Lord Jesus Christ . . . For if a man with golden rings and in fine clothing comes into your assembly, and a poor man in shabby clothing also comes in, and you pay attention to the one who wears the fine clothing and say, "Have a seat here, please," while you say to the poor man, "Stand there," or, "Sit at my feet," have you not made distinctions among yourselves, and become judges with evil thoughts?

James 2:1-4 (Revised Standard Version).

3. *See infra* Part V.

4. *Compare* Goldberg v. Kelly, 397 U.S. 254, 264-65 (1970) (finding a due process right to pre-termination hearings for welfare recipients) *and* Sniadach v. Family Fin. Co., 395 U.S. 337, 341-42 (1970) (striking down Wisconsin prejudgment garnishment statute) *with* United States v. Kras, 409 U.S. 434, 450 (1973) (upholding federal government's refusal to waive bankruptcy filing fees) *and* Ortwein v. Schwab, 410 U.S. 656, 659-60 (1973) (upholding Oregon law requiring filing fees for administrative review of welfare benefit appeals).

5. *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 165 (1989).

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

participation, the poor must have the substantive means to enable them to participate. Therefore, a procedural approach to equal justice alone cannot succeed even on its own terms.

Two Warren Court cases, decided during the same Court term, illustrate well the Court's substantively neutral approach to equal justice under law. In *Goldberg v. Kelly*,[7] the Court found that welfare beneficiaries had a right to a hearing prior to the termination of their benefits under the due process clause of the Fourteenth Amendment.[8] In *Dandridge v. Williams*,[9] on the other hand, the Court found that welfare beneficiaries did not have a substantive constitutional right to their benefits, and relegated the determination of those rights to the political process.[10] As a result of the Court's ruling in *Dandridge*, the poor remain vulnerable to having their benefits simply terminated by the legislature. Moreover, under *Goldberg* and the Court's subsequent procedural rulings, the Court will not find procedural rights for the poor unless they protect a benefit that the legislature has determined to be an entitlement.[11] Recently, Congress has taken *Dandridge* to its logical conclusion, eliminating the statutory entitlement to welfare benefits[12] and placing a five year life-time limit on the receipt of those benefits.[13] The lack of entitlement status to benefits under the Welfare Reform Act undercuts the constitutional right to process which the Court established in *Goldberg*.[14] Since welfare benefits are no longer a statutory entitlement, welfare recipients may no longer be constitutionally entitled to the pre-termination hearings required by the Court in *Goldberg*.[15]

The Court decided *Dandridge* in the wake of President Johnson's Great Society programs, and at a time of unprecedented political activism on the part of the poor, including a strong welfare rights movement.[16] However, in recent years the poor have become increasingly disenfranchised. Since *Dandridge*, the problems of the poorest of the poor in our society have gotten considerably worse. Although the numbers of people living below the poverty line have declined since 1959,[17] the concentration of poverty in blighted urban areas has increased significantly.[18] Moreover, the poor are getting poorer. In 1984, nearly two out of five (37.9%)

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7. 397 U.S. 254 (1970).
8. *See id.* at 264-65.
9. 397 U.S. 471 (1970).
10. *See id.* at 487.
11. *See, e.g.*, Board Of Regents of State College v. Roth, 408 U.S. 564, 574 (1972).
12. *See* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a)(1) (amending Part A, § 401(b) of title IV of the Social Security Act), 110 Stat. 2105, 2113.
13. *See id.* § 103(a)(1) (amending Part A, § 408(a)(7) of title IV of the Social Security Act), 110 Stat. at 2137.
14. *See* Rebecca E. Zietlow, *Two Wrongs Don't Add Up To Rights: The Importance of Preserving Due Process In Light Of Recent Welfare Reform Measures*, 45 AM. U. L. REV. 1111, 1114-21 (1996) [hereinafter Zietlow, *Two Wrongs*]; Rebecca E. Zietlow, *Giving Substance to Process: Countering the Due Process Counterrevolution*, 75 DENV. U. L. REV. 1, 32-38 (1997) [hereinafter Zietlow, *Giving Substance to Process*].
15. *See* Zietlow, *Two Wrongs*, *supra* note 14, at 1129; Zietlow, *Giving Substance to Process*, *supra* note 14, at 36.
16. For an excellent description of the welfare rights movement and its legal strategy, *See* MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT (1993).
17. For example, in 1959, 22.4% of Americans lived below the poverty line, while in 1985 only 14% of Americans were officially "poor." *See* Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 8-12 (1987).
18. *See id.*

persons lived in families with incomes below half of the poverty line, compared to a third in 1980 and less than 30% in 1975.[19] As a result of the recent welfare reforms, the poorest of the poor are being left to "sink or swim" on the job market, with those who fail facing the prospect of dependence on the uncertain base of private charity.[20] Finally, wealth and income are almost immutable because "[c]lass prejudice and class conflict are as old, deeply rooted, and intense as racial and ethnic prejudice and conflict."[21] Because the Court is reluctant to recognize that struggle, it is likely that if it continues its current approach, it will continue to fail to meet the needs of the poor.

The Court's procedural approach to equal justice under law is rooted in a neutral paradigm of constitutional analysis under which procedural rights, but not substantive rights, are protected by the constitution. Many scholars have debated the issue of whether the neutral paradigm is really an accurate portrayal of the Court's constitutional analysis.[22] In this article, I will argue that the Court follows this paradigm of neutrality towards the substantive economic rights of the poor, but not towards the property rights of the more affluent in our society. Perhaps the Court is reluctant to intervene in the political process and find economic rights in the Constitution because it is protecting the capitalist economy on which our society is based. Congress will never create meaningful economic rights for the poor, who are politically unpopular and politically ineffective. However, these political explanations do not go far enough because our society is more complex than such explanations indicate. At different points in our history, Congress has been willing to take responsibility for caring for the poor,[23] and the welfare state which characterizes our society is far from a pure capitalist state.[24]

Many scholars have debated the role of judicial review in a democratic system. Some, such as John Hart Ely, argue that the Court must use judicial review sparingly so as to limit the Court's impact on the democratic process.[25] Others, such as Ronald Dworkin, argue that the Court's primary role is to protect the rights of minorities against the majority.[26] In this article, I argue that the Court must take on

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19. *See id.* at 12.

20. *See* Jason DeParle, *Success, and Frustration, as Welfare Rules Change*, N.Y. TIMES, December 30, 1997 at A1.

21. Douglas Laycock, *Taking Constitutions Seriously: A Theory of Judicial Review*, 59 TEX. L. REV. 343, 390 (1981) (reviewing JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980)).

22. *See, e.g.*, Lawrence H. Tribe, *The Puzzling Persistence of Process-Based Constitutional Theories*, 89 YALE L. J. 1063 (1980); James E. Fleming, *A Critique of John Hart Ely's Quest for the Ultimate Constitutional Interpretation of Representative Democracy*, 80 MICH. L. REV. 634 (1982); Laycock, *supra* note 21; Archibald Cox, *Democracy and Distrust: A Theory of Judicial Review*, 94 HARV. L. REV. 700 (1981); Samuel Estreicher, *Platonic Guardians of Democracy: John Hart Ely's Role for the Supreme Court in the Constitution's Open Texture*, 56 N.Y.U. L. REV. 547 (1981); Mark Tushnet, *Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory*, 89 YALE L.J. 1037 (1980); Bruce A. Ackerman, *Beyond Carolene Products*, 98 HARV. L. REV. 713 (1985).

23. For example, in 1934, Congress passed the Social Security Act which created both the Social Security system and Aid to Families with Dependent children, both public benefits programs designed to help the needy in our society.

24. For example, the system of taxation of income also redistributes wealth based on social policies.

25. *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW (1980).

26. *See generally* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1978).

a protective role to protect the rights of the poor against the majority, and that it may do so in a manner that is completely consistent with the Constitution.

Under a substantive approach to equal justice, the Court would find substantive economic rights for the poor in the Constitution, and take a more protective stance towards the needs of the poor. In the past, the Court has followed two lines of jurisprudence to find substantive rights in the Constitution. One line is to find a fundamental right (for example, a substantive right to economic justice) based on notions of substantive due process.[27] Another line is to find a class of people (for example, the poor) to be a protected class who merit heightened scrutiny under the Equal Protection Clause.[28] Although the Court has flirted with both approaches to the economic rights of the poor, it has consistently refused to adopt them. Either line of reasoning would require the Court to interfere with the legislative process on behalf of the poor, and this the Court has refused to do, ostensibly because to do so would be to violate the neutral paradigm.

In this article, I will argue that the Court's refusal to take a substantive approach to equal justice is in fact not a neutral approach because the Court simply is not neutral in its determination of property rights. Rather, the Court's approach is rooted in a particular view of the nature of property rights in our society, under which property rights are defined by the right to pre-existing ownership of property rather than by the right to distribution of property in an equitable fashion.[29] I will suggest that some distribution rights are essential to forming a community in which there is equality of participation. Such distribution rights are the basis of a communitarian approach to property, under which property is understood as a means to enhancing the well being of the community as a whole. My approach values the participation of the community as the means towards a more democratic system.

Property rights are not defined as ownership rights in the constitution, which does not even expressly provide for a right to private property,[30] and the intent of the framers with regard to establishing property rights is far from clear. The Court is not precluded from redefining its conception of property rights towards a more communitarian manner that would mandate judicial intervention on behalf of the poor. In recent cases, the Court has taken an interventionist stance towards the legislature when finding property rights for the more affluent members of society, however abstract those property rights may be.[31] The recent welfare reform act indicates that the poor are in need of similar judicial intervention in the political process if "equal justice under law" is to have any meaning at all in our society. Based on a communitarian approach to property, we may begin to imagine what a substantive approach to equal justice under law would look like in our society. Such an approach would attempt to alleviate the impact of poverty on one's right to

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27. *See infra* Part II.A.

28. *See infra* Part II.B.

29. *See generally* Frank I. Michelman, *Possession vs. Distribution in the Constitutional Idea of Property*, 72 IOWA L. REV. 1319 (1987).

30. *See* Frank I. Michelman, *Commentary, Process and Property in Constitutional Theory*, 30 CLEVELAND ST. L. REV. 577, 588 (1982).

31. *See infra* notes 151-61 and accompanying text.

participate in important life decisions and the political process as a whole. It would combine principles of equality and procedural rights to enhance the citizenship rights of poor people in our democratic system.

In Part I of this article, I will describe the two approaches to equal justice which were available to the Court in the cases of *Goldberg v. Kelly*[32] and *Dandridge v. Williams*.[33] In *Goldberg*, the Court adopted a procedural approach to equal justice and in *Dandridge* it explicitly rejected a more substantive approach.[34] In Part II of the article, I will describe the paradigm of the neutral state on which the Court's jurisprudence is based. Under that paradigm, the Constitution is considered to be substantively neutral with regard to economic rights and protects only procedural rights. I critically analyze the paradigm and point out its theoretical failings and functional inaccuracies. The Court is not really neutral in its treatment of economic rights but in fact has recently taken an activist stance towards the property rights of the more affluent people in our society. In Part III, I argue that the Court's reasoning is based on assumptions about the nature of property interests in our society that favor a possessory view of property over a distributional view. I point out that because neither view is expressed in the Constitution itself, the Court's decision to favor one view over the other is based on ideological, not neutral principles. In Part IV of the article, I explore the possibility of the Court's recognizing a communitarian notion of property, in which property is recognized as a source of procedural rights, and argue that some property rights for the poor are essential to the functioning of a true democracy.

I. TWO APPROACHES TO EQUAL JUSTICE—*GOLDBERG* AND *DANDRIDGE*

The Court's procedural approach to equal justice is embodied in its ruling in the case of *Goldberg v. Kelly*.[35] In *Goldberg*, the Court found that welfare beneficiaries have the right, under the due process clause of the Fourteenth Amendment, to hearings before their benefits are terminated, based on the constitutional mandate that people should be treated equally procedurally regardless of their economic resources.[36] Although the Court's opinion hinted that the Court was receptive to notions of substantive economic justice,[37] the impact of the Court's decision was purely procedural.[38] As a result of the Court's opinion in *Goldberg*, poor people enjoyed a constitutional guarantee that the public benefits on which they depended would be administered with a certain amount of fairness. Most significantly, the

32. 397 U.S. 254 (1970).

33. 397 U.S. 471 (1970).

34. *Compare Goldberg*, 397 U.S. at 264-65, *with Dandridge*, 397 U.S. at 487.

35. 397 U.S. 254 (1970).

36. *See Goldberg*, 397 U.S. at 265 (stating that pre-termination hearings are essential "to foster the dignity and well-being of all persons within [this nation's] borders").

37. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 75.

38. In saying this, I do not mean to imply that the Court's ruling in *Goldberg* and fair hearings for recipients of public benefits have not been significant to poor people. In fact, I have argued that procedural fairness, and Goldberg style hearings, are essential and must be maintained in any system of public benefits. *See* Zietlow, *Two Wrongs*, *supra* note 14. Rather, I mean to point out that process alone cannot achieve economic justice for poor people, and that attempting to achieve economic justice through process alone will never be successful.

right to pre-termination hearings gave welfare beneficiaries a chance to prove that their only source of livelihood, their welfare benefits, were wrongly terminated before they were taken away from them. However, the *Goldberg* Court sidestepped the issue of whether poor people had a substantive right to those government benefits in the first place.[39] Instead, the *Goldberg* Court deferred to Congress' definition of welfare benefits as entitlements, which, the Court found, created enough of a property interest to trigger procedural protections.[40]

In *Dandridge v. Williams*, on the other hand, the Court addressed head on the question of whether poor people had a constitutional right to welfare benefits under the theories of substantive due process and equal protection. The Court's treatment of the plaintiffs' claims illustrates its reluctance to find economic rights in the Constitution under two predominant approaches where the Court has recognized substantive rights. First, the plaintiffs in *Dandridge* had argued that a Maryland state law which placed a cap on the amount of money which a family could receive, even if more children were born into that family, was unconstitutional because it infringed on a fundamental right to those benefits.[41] The Court rejected that substantive due process argument, and found that there was no fundamental right to welfare benefits and consequently no constitutional requirement for the state of Maryland to provide economic support for indigent families.[42] Second, Plaintiffs had argued that the Maryland regulations resulted in a smaller per capita grant to larger families, and thus violated their right to equal protection.[43] Plaintiffs argued that welfare recipients, as a class of people, were entitled to heightened scrutiny of legislation that harmed their interests. The Court refused to apply a heightened standard of review to legislation regulating welfare benefits based on the economic need of the recipients of the benefits. Instead, the Court found that regulations governing welfare benefits should be treated with the same amount of deference as any other economic legislation—that is, rational basis review.

By choosing this path in *Dandridge*, the Court firmly delegated the determination of the substantive rights of the poor to the legislative process, leaving them completely vulnerable, to the extent that the legislature could terminate any and all substantive benefits. *Dandridge* has been overshadowed by its popular cousin, *Goldberg v. Kelly*, and many poverty law scholars have downplayed the impact of *Dandridge* while extolling the virtues of *Goldberg*.[44] However, in retrospect,

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39. *See Goldberg*, 397 U.S. at 261-62 & n.8.

40. *See id.* n.8 (stating that welfare entitlements look more like property than a gratuity).

41. *See Dandridge*, 397 U.S. at 520-21 n.14 (Marshall, J., dissenting).

42. *See id.* at 484 ("For here we deal with state regulation in the social and economic field, not affecting freedoms guaranteed by the Bill of Rights . . . ."); *See also* Wyman v. James, 400 U.S. 309 (1971) (analogizing welfare benefits to private charity in finding that welfare recipients had no right to refuse access to case workers investigating their homes).

43. *See* Dandridge, 397 U.S. at 474-75.

44. For example, in BRUTAL NEED, her excellent book about the welfare rights movement of the 1960s and its litigation strategy, Martha Davis spends 38 pages discussing *Goldberg* and only 8 pages discussing *Dandridge* and its companion case, *Rosado v. Wyman*, 397 U.S. 413 (1970). Davis, *supra* note 10, at 81-118, 124-32. This is particularly ironic since Davis points out that *Dandridge* and *Rosado* "raised the central issue in the welfare rights movement: the inadequacy of benefits." *Id.* at 118. Similarly, in an article advocating for the Court to take an activist approach to protect welfare recipients, Peter Edelman mentions *Dandridge* only in passing. *See* Edelman, *supra* note 17, at 38.

Dandridge, the substantive partner to *Goldberg*, has had the most significant impact on the fortunes of the poor in this country.

The most obvious implication of the Court's decision in *Dandridge* is that it enabled Congress to reduce or abolish welfare benefits because there is no constitutional entitlement to those benefits. *Dandridge* made possible the recent welfare reform statute enacted by Congress, which ended the entitlement status of welfare benefits and included significant cutbacks on both the substantive and procedural rights of the poor. The Act abolished the New Deal program of Aid to Families with Dependent Children (AFDC) and created a new program, Temporary Assistance for Needy Families (TANF). Under the TANF program, welfare benefits are no longer statutory entitlements, and there are strict limits on both eligibility for benefits, and the length of time that a person can receive them.[45] While recipients of AFDC were entitled to benefits as long as they met the criteria for eligibility, TANF imposes a five year lifetime limit on the receipt of benefits in that program.[46]

The Welfare Reform Act of 1996 could not have been enacted if the Court had found a constitutional entitlement to welfare benefits in *Dandridge*. When Congress abolished AFDC, the principle economic gain that poor people had achieved through the political process, Congress took *Dandridge* to its logical extreme. Moreover, any legal challenge to Congress' decision to end the entitlement to benefits is likely to fail because under *Dandridge*, that decision would only be subjected to rational basis scrutiny. As the five year time period begins to expire for many welfare recipients in the next few years, it will become clear that poor people have suffered from having their substantive rights hinge on their inability to affect the political process.

The Court's relegation of substantive benefits to the political process also has an impact on the level of procedural protections to which the recipients of those benefits are entitled. For example, in the case of *Atkins v. Parker*, the Court found that food stamp recipients, whose benefits were reduced without prior notice due to a legislative change, could not state a claim under *Goldberg* because they had received all of the process that they were due in the legislative decision-making process.[47] In *Atkins*, the Court cut back on the procedural rights of the recipients of public benefits, limiting the impact of *Goldberg* and consigning the poor to the legislative realm to vindicate their procedural rights. Arguably, *Atkins* would not have been possible without *Dandridge*. Delegating the right to public benefits to the legislature for determination opened the door for the legislature to place restrictions, including procedural restrictions, on those benefits.[48]

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45. *See generally* Personal Responsibility and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, § 103(a), 110 Stat. 2105, 2113 (1996).

46. *Id.* at 2137 (amending title IV, part A of the Social Security Act by adding section 408(a)(7)). Receipt of food stamp benefits is limited to three months in a 36 month period unless the recipient participates in a work program or is exempt from the work requirement. *See id.* § 824(a) at 2323 (amending section 6 of the Food Stamp Act by adding subsection (o)(2)).

47. Atkins v. Parker, 472 U.S. 115, 130 (1985). *See also* Shvartsman v. Apfel, 138 F.3d 1196 (7th Cir. 1997) (resident alien food stamp recipients who applied for citizenship but had not become citizens by recertification deadline due to INS delays were not entitled to individual hearings when Congress terminated their benefits).

48. The logical extreme of this approach is that the legislature may place whatever procedural restrictions

Moreover, the lack of entitlement status for benefits under the Welfare Reform Act of 1996 brings into doubt the continuing validity of the right to pre-termination hearings under *Goldberg*.[49] The Court hinged the right to pre-termination hearings on the statutory entitlement status of the welfare benefits. In subsequent rulings, the Court has made it clear that property is not protected by the due process clause unless the person seeking procedural protections is entitled to that property.[50] Lacking entitlement status, TANF benefits therefore may not trigger due process protections. Acting pursuant to TANF regulations, the state of Wisconsin has already curtailed the due process rights of welfare recipients.[51] Thus, almost thirty years later, another consequence of *Dandridge* may be the abandonment of the practical effect of *Goldberg*, putting a clear end to what was once called the "due process revolution" and undercutting the Court's procedural approach to equal justice under law.

II. ECONOMIC RIGHTS OF THE POOR

As the Court's rulings in *Goldberg* and *Dandridge* illustrate, the Court has been willing to find procedural rights for the poor in the Constitution, but the Court has been extremely reluctant to do the same with the substantive rights of the poor. Instead, the Court has relegated the substantive economic rights of poor people to the legislative branch, and has applied minimal scrutiny to legislative decisions delineating those rights. Thus, the Court has refused to find a substantive due process right to economic security, and has been reluctant to extend heightened equal protection scrutiny to economic rights, because of the connotations of substantive reform. That is, the Court has shied away from finding any equality based right which might mandate, however subtly, the redistribution of wealth. Therefore, those wishing to establish rights to equal justice in the economic realm have been relegated to the procedural protections of the due process clause. This is the essence of the Court's solely procedural acknowledgment of the notion of "equal justice under law."

A. Substantive Due Process

Although the Court has been willing to find substantive economic rights in the Constitution in the past, it has never done so on behalf of the poor. During the *Lochner* era, the Court acted as an agent of the wealthy when it relied on substantive due process to strike down legislation that benefited working class people. Ironically, the Court now refuses to find substantive due process rights for

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is wishes on the benefits that it creates. This approach, nicknamed the "bitter with the sweet," has been advocated by Chief Justice Rehnquist, and by some scholars. *See* Richard J. Pierce, Jr., *The Due Process Counterrevolution of the 1990s?*, 96 COLUM. L. REV. 1973 (1996). The Court rejected this approach in its opinion in *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 538-41 (1985).

49. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 43-47; Zietlow, *Two Wrongs*, *supra* note 14, at 1139.

50. *See* Board of Regents of State College v. Roth, 408 U.S. 564, 577 (1972).

51. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 37-38. The Governor of the state of Michigan had also proposed regulations curtailing due process rights, *see id.* at 38 & nn.199-201, but those restrictions were rejected by the state legislature.

poor people because of its subsequent repudiation of substantive due process in the economic realm.[52]

In *Lochner v. New York*,[53] the Court struck down a New York state statute which limited the number of hours that a baker could work to 60 per week, as violating the substantive due process right of the owners of the bakeries to contract with their employees.[54] Subsequently, in *Adkins v. Children's Hospital*, the Court declared a District of Columbia statute enacting a minimum wage to be unconstitutional because it violated the substantive due process rights of employers.[55] The Court's rulings in these cases have been widely criticized as the Court's applying its own normative political and economic views in the guise of Constitutional doctrine.[56] However, *Lochner* and *Adkins* are most interesting in their illustration of how economic rights played out in the political realm prior to the Court's interference. In both cases, workers had prevailed in the legislative realm and succeeded in enacting legislation that was beneficial to the working class. Nonetheless, the Court was willing to intervene and overturn that legislation on behalf of their more affluent employers. The Court relied on substantive due process to protect the rights of the more affluent when they were directly pitted against the rights of the working class, and recognized economic rights in the constitution when those rights benefited the more affluent.

The Court began to repudiate its *Lochner* era rulings during the era of the Great Depression. In one of its early cases repudiating *Lochnerian* doctrine, the Court upheld a state minimum wage statute in the case of *West Coast Hotel Co. v. Parrish*,[57] expressly overruling its earlier decision in *Adkins*.[58] The Court's ruling in *West Coast Hotel* is an example of how lower income people can benefit from a doctrine of neutrality with regard to their economic rights when they are able to prevail in the political process.[59] Perhaps the Court's ruling in *West Coast Hotel* was due to the economic circumstances of the Depression era, which opened the Court's eyes to the plight of the working class and enabled the Court to acknowledge the inequality of bargaining power between worker and employer.[60] If so, this illustrates once again how dependent the rights of the poor are on social and political factors, or at least on how the Court interprets those factors. In today's political climate, in which increasing disenfranchisement of the poor reduces their ability to participate in the political process, the Court's deference to the legislative process is harmful to the interests of poor people. Within the past 35 years, the Court has revived the doctrine of substantive due process in rulings finding non-economic rights in the

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52. However, the Court arguably is returning to substantive due process in the economic realm through its doctrine of regulatory takings. *See infra* notes 151-61 and accompanying text.

53. 198 U.S. 45 (1905).

54. *See id.* at 64.

55. *See* Adkins v. Children's Hospital, 261 U.S. 525, 560-62 (1923).

56. *See* ELY, *supra* note 25, at 14-15.

57. 300 U.S. 379 (1937).

58. *See id.* at 400.

59. In a recent conversation, Phil Closius argues that a majoritarian approach to economic rights was effective for the poor in the 1930s because at that time, people who suffered from difficult economic circumstances during the Depression *were* in the majority.

60. *See* Dennis D. Hirsch, *The Right to Economic Opportunity: Making Sense of the Supreme Court's Welfare Rights Decisions*, 58 U. PITT. L. REV. 109, 119-20 (1996).

Constitution,[61] but it has consistently refused to find any economic rights based on that reasoning. For example, in *Griswold v. Connecticut*,[62] the Court struck down a Connecticut statute that imposed criminal penalties on married couples using birth control. The Court found that the statute violated a "right to privacy" which can be found in the "penumbra" of the First, Third, Fourth, Fifth and Ninth Amendments to the Constitution. In *Roe v. Wade*,[63] the Court extended its *Griswold* reasoning when it found that a woman has the right to choose to have an abortion based on a right to privacy rooted in the Ninth and Fourteenth Amendments.[64] The Court has relied on similar reasoning in subsequent rulings regarding abortion rights.[65] The Court also has issued rulings protecting family relations under a "right to privacy" oriented substantive due process, invalidating a Cleveland zoning ordinance which limited occupants of a dwelling to members of a single "family"[66] and striking down a Wisconsin statute that forbade residents who were obligated to pay child support by court order from re-marrying without obtaining court approval.[67]

All of the Court's recent rulings based on substantive due process have been in the realm of intimate relationships and express the view that those relationships belong in the private realm and should not be disturbed by the government.[68] However, the Court expressly has refused to extend a substantive due process reasoning to economic rights since its repudiation of *Lochner* in *West Coast Hotel*. For example, in *Dandridge v. Williams*,[69] the Court refused to find a substantive due process right to a minimum income for welfare recipients.[70] Instead, the Court has made it clear that the government does not have an obligation to provide access to even fundamental rights. In *Maher v. Roe*,[71] the Court sustained a Connecticut regulation that granted Medicaid benefits to fund childbirth related expenses, but

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61. *See* Edelman, *supra* note 17, at 6 (pointing out that the Court did not foreclose a *Lochnerian* approach to the recognition of non-economic fundamental rights); Hirsch, *supra* note 43 at 116 (arguing that the Court did not entirely repudiate the Court's *Lochnerian* substantive due process reasoning but simply came out with different results).

62. 381 U.S. 479 (1965).

63. 410 U.S. 113 (1973).

64. *See id.* at 164.

65. *See, e.g.*, Akron v. Center for Reproductive Health, Inc., 462 U.S. 416 (1983) (striking down abortion regulations enacted by the city of Akron and upholding Roe's trimester approach); Thornburgh v. American College of Obstetricians & Gynecologists, 476 U.S. 747 (1986) (striking down provisions of Pennsylvania law that limited the right to an abortion); Webster v. Reproductive Health Servs., 492 U.S. 490 (1989) (upholding several provision of Missouri law regulating abortions but endorsing Roe reasoning in plurality opinion); Planned Parenthood v. Casey, 505 U.S. 833 (1992) (upholding constitutional analysis of Roe Court).

66. *See* Moore v. East Cleveland, 431 U.S. 494, 503-06 (1977) (plurality opinion of Powell, J.).

67. *See* Zablocki v. Redhail, 434 U.S. 374, 388-90 (1978). *But see* Bowers v. Hardwick, 478 U.S. 186 (1986) (refusing to find a fundamental right to engage in homosexual relations as an extension of the right to privacy).

68. *But see* Youngberg v. Romeo, 457 U.S. 307 (1982), where the Court found some substantive due process rights for the mentally retarded who were involuntarily committed to a state institution. The Court found that the plaintiff, who had been injured in the institution to which he was involuntarily committed, had substantive due process rights to safe conditions of confinement and freedom from bodily restraint. However, the Court found no substantive due process right to "training" or "habilitation."

69. 397 U.S. 471 (1970).

70. *See id.* at 487. *See also* Wyman v. James, 400 U.S. 309, 319 (1971) (analogizing welfare benefits to private charity in holding that welfare recipients had no right to refuse access to case workers investigating their homes unless they forfeited their benefits).

71. 432 U.S. 464 (1977).

denied them for non-therapeutic, medically unnecessary abortions.[72] Similarly, in *Harris v. McRae*,[73] the Court rejected constitutional challenges to federal funding limitations which barred payments for most medically necessary abortions.[74] The challenge had been based on substantive due process. Under *Maher* and *Harris*, the Court made it clear that the State does not have the responsibility to fund even a fundamental constitutional right, even if the State's refusal to do so effectively denied poor people access to that right.[75] The right to have an abortion is still effectively denied to many poor women who simply cannot afford to exercise that right. Thus, *Maher* and *Harris* aptly illustrate the Court's refusal to extend its substantive due process reasoning to protect economic rights for poor people.[76]

B. Equal Protection—"Discrete and insular minority"

Pursuant to its paradigm of the neutral state, the Court is also reluctant to establish new categories of people who belong to a "discrete and insular minority" because to do so would be to mandate more scrutiny of the legislative branch. The Court has found that members of racial minorities belong to a suspect class which merits heightened scrutiny of legislative action,[77] and that women belong to a classification that merits intermediate scrutiny of legislative action.[78] However, the Court has refused to expressly recognize poverty as a suspect class.

Under the Court's current doctrine, it subjects economic based substantive classifications to a standard of review which is extremely deferential to the legislative process.[79] The Court applies a "rational basis" review, under which economic based classifications pass equal protection analysis if they are rationally related to a legitimate governmental purpose.[80] The Court applies the same level of review regardless of the income level of those affected by the economic classification.

In *Dandridge*, the Court applied the same level of review to a Maryland law, capping the level of welfare benefits to recipients who had additional children while they were on welfare, as it would have to a state's regulation of business interests.[81]

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72. *See id.* at 480.

73. 448 U.S. 297 (1980).

74. *See id.* at 326-27.

75. *But see* Plyler v. Doe, 457 U.S. 202, 220-24 (1982) (striking down a Texas state law that denied children of illegal immigrants access to public education even though the Court had found education not to be a fundamental right).

76. The Court's rulings in *Maher* and *Harris* may have been a response to conservative criticism to the reproductive rights that it found in the cases of *Griswold* and *Roe*. If so, it is yet another example of poor people becoming lost in political backlash because of their political vulnerability.

77. *See* Korematsu v. United States, 323 U.S. 214, 216 (1944).

78. *See* Craig v. Boren, 429 U.S. 190, 197 (1976). *See also* United States v. Virginia, 518 U.S. 515, 531-33(1996) (applying intermediate scrutiny to state supported college which denied admission to women).

79. *See* Williams v. Lee Optical of Okla., Inc., 348 U.S. 483, 487-88 (1955) (upholding an Oklahoma statute, under rational basis review, that made it unlawful for any person not a licensed optometrist or opthamologist to fit lenses, or replace or duplicate lenses).

80. *See id.*

81. *See* Dandridge, 397 U.S. 471, 485 (1970). *But see id.* at 520, 522 (Marshall, J., dissenting) (pointing out that the case involved "the literally vital interests of a powerless minority—poor families without breadwinners . . . . It is the individual interests here at stake that . . . most clearly distinguish this case from the 'business regulation' equal protection cases.") *Id.* at 522 (Marshall, J., dissenting). *See also* San Antonio Indep. Sch. Dist.

In *San Antonio v. Rodriguez*,[82] the plaintiffs, Mexican-American parents of children in a poor school district, sued the state on behalf of their children, arguing that the system of funding schools based on property taxes discriminated against children in poor districts and therefore violated their rights under the Equal Protection Clause. The plaintiffs argued that the funding laws should be subject to strict scrutiny because of their impact on a protected class, that of poor children. The Court expressly rejected the notion of poverty as a suspect class, stating:

> [t]he system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.[83]

Thus, in *Rodriguez*, the Court firmly rejected the argument that poor people belong to a "discrete and insular minority." In *Dandridge* and *Rodriguez*, the Court ruled that poor people do not need more protection from legislative action than the business interests that usually seek review of economic based classifications.[84] The Court's implicit assumption is that poor people have as much access to the political process as corporations and business interests that can afford to spend thousands of dollars on lobbyists and campaign contributions.

The Court has repeatedly turned a blind eye to the economic realities of our political system in the name of doctrinal neutrality. For example, in the case of *Buckley v. Valeo*,[85] the Court applied a doctrinally neutral approach to campaign funding when it struck down limitations on campaign spending as violative of the First Amendment.[86] In that case, the Court expressly rejected Congress' attempt to "level the playing field" regarding access to the legislative process.[87] In doing so, the Court ignored the impact of money in the political process and its attendant impact on the ability of the poor to influence the process in both its Equal Protection and First Amendment doctrine. This choice is consistent with the Court's refusal to take a protective approach mandating increased scrutiny of legislative action affecting the poor. Unfortunately for the poor, the recent passage of the

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v. Rodriguez, 411 U.S. 1, 26 (1973) (questioning without deciding whether the poor could ever constitute a suspect class).

82. 411 U.S. 1 (1973).

83. *Id.* at 28. In *Rodriguez*, the class of students did include some who were not necessarily poor themselves, but who lived in poor school districts. Because the entire class was not poor, *Rodriguez* may leave the door open for a argument that a class of people that are all poor by definition, such as welfare recipients, should be protected. However, the Court's ruling in *Dandridge* seems to foreclose that argument.

84. Moreover, in at least one case, *James v. Valtierra*, 402 U.S. 137 (1971), the Court upheld legislation that expressly discriminated against people on the basis of their income. The Court upheld a California law that required a referendum in any community approving construction of low income housing before it could be constructed in that community. *See id.* at 142-43. The statute contained no such requirement for other types of publicly subsidized housing, such as housing for veterans or for the elderly, and the lower courts had therefore struck the statute down as violative of the equal protection rights of the low income residents. *See id.* at 144 (Marshall, J., dissenting).

85. 424 U.S. 1 (1976).

86. *See id.* at 58-59.

87. *See* Owen M. Fiss, *Money and Politics*, 97 COLUMB. L. REV. 2470, 2475 (1997) (arguing that Congress had the democratic impulse of aiding the voices of the less affluent when it passed the campaign reform legislation invalidated by the Court in *Buckley*).

welfare reform act indicates that poor people do need more protection from the legislative process precisely because they are politically ineffective.[88] Under a substantive approach to equal justice, the Court would acknowledge the impact of economic disparities in the legislative process and subject legislation affecting poor people to heightened scrutiny as a means of ameliorating that impact.

Today, the poor easily could be determined to be a group which merits the protection of heightened scrutiny. Poor people are effectively disenfranchised by their inability to participate in a political process in which money plays a primary role in determining substantive values.[89] It has been argued that poor people cannot be considered a discrete and insular minority because little legislation actually discriminates against poor people.[90] This is simply not so. Legislators may be motivated to cut governmental benefits programs and restrict eligibility for those programs by prejudice against those recipients based on their race, class and gender when they equate poverty with those other immutable characteristics.[91]

State policies may serve to disadvantage poor people in ways that are not openly discriminatory, such as by reducing their access to the process by which decisions that affect their lives are made.[92] In fact, one could argue that in a capitalist society, the poor will always be a discrete and insular minority, especially if we start from the premise that private property and entitlements *are* different from each other. That is, the lack of ownership of private property itself serves to isolate poor people and make them politically vulnerable. Process alone will not be enough to address that isolation.[93] That the Court has refused to treat the poor as a discrete and insular minority subjects some of the most politically unpopular people in our society to the whims of the political process.

When the Court decided the cases of *Dandridge* and *Rodriguez*, it was acting at a time of unprecedented organized political activism on the part of poor people.[94] As part of President Johnson's War on Poverty, Congress created numerous social programs and benefits for poor people. At the same time, the welfare rights movement was organized and politically active. Thus it is not surprising that the Court might find that poor people were not excluded from the political realm. Since then, however, the War on Poverty has been dismantled and the welfare rights movement has become mostly defunct. Moreover, the Court has facilitated the increase in the impact of money on the process through its ruling in *Buckley v.*

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88. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 36. Thus, extreme poverty may qualify a person as a member of a "discrete and insular minority" who merits heightened review of legislative classifications. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938); ELY, *supra* note 25, at 148-49, 151-53. Professor Ackerman argues that the "discrete and insular" approach is flawed, and that the people who need the most protection are members of "anonymous and diffuse" groups. *See* Ackerman, *supra* note 22, at 724. Poor people would also merit protection under Ackerman's approach. *See infra* notes 160-63 and accompanying text.

89. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 42-46.

90. Ely points out that the Court actually upheld legislation which discriminated against poor people in *James v. Valtierra*, 402 U.S. 137 (1971). *See* ELY, *supra* note 25, at 162.

91. That is because legislators often make decisions that hurt poor people because they equate poverty with racial minority status and are prejudiced against racial minorities. *See* Lucy Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L. J. 719 (1992); Martha Fineman, *The Nature of Dependencies and Welfare "Reform,"* 36 SANTA CLARA L. REV. 287 (1996).

92. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 32-33, 46-47.

93. *See id.* at 26.

94. *See generally* DAVIS, *supra* note 16.

Valeo.[95] Therefore, the Court should be willing to revisit its view that the poor do not belong to a group which merits heightened Constitutional scrutiny.

C. *Hybrid approach*

In the few cases where the Court arguably has found economic rights based in the Constitution, it has applied a hybrid approach combining elements of equal protection and due process to address economic barriers that the Court has found to be unfair.[96] The Court has occasionally struck down economic barriers to participation in the political and litigation processes. However, these cases remain consistent with the Court's procedural approach to equal justice because they involve economic barriers to procedural rights. The Court also has subjected legislative classifications to an informally heightened level of scrutiny when it appeared that the legislature was motivated by animosity towards groups of people who happened to be poor. In those cases, the Court has gone one step beyond a procedural approach to equal justice by implicitly acknowledging that the political process did not work for the plaintiffs in those cases. However, in those instances, the Court has used hybrid reasoning to avoid expressly finding substantive rights for the economically disadvantaged plaintiffs.

In *Harper v. Virginia Board of Elections*[97] and *Cipriano v. Houma*,[98] the Court struck down poll taxes imposed by the State of Virginia, which plaintiffs alleged were being used to disenfranchise poor and African American voters,[99] and a Louisiana law which restricted to "property owners" the rights to vote in some municipal elections.[100] These cases illustrate the value which the Court places on participation on the political process, which is essential to being a citizen in this country.[101] The Court also has struck down some economic barriers which limit the access of poor people to the courts in criminal cases, and in some family law

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95. 424 U.S. 1 (1976).

96. *See especially* M.L.B. v. S.L.J., 519 U.S. 102, 117 S. Ct. 555 (1996) (note debate between majority and concurrence in M.L.B. v. S.L.J. over whether the case is really about equal protection or due process principles), Boddie v. Connecticut, 401 U.S. 371 (1971).

97. 383 U.S. 663 (1966).

98. 395 U.S. 701 (1969).

99. *See Harper*, 383 U.S. at 665. Subsequent to *Harper*, the 24th Amendment to the Constitution, which prohibits states from imposing poll taxes, was ratified. Arguably, the 24th Amendment is one place where the Constitution expressly creates a substantive economic right, the right to vote without any economic barriers. *But see* ELY, *supra* note 25, at 99 (arguing that the purpose of abolishing the poll tax is a purely procedural goal—extending the franchise).

100. *See Cipriano*, 395 U.S. at 706. *See also* Dunn v. Blumstein, 405 U.S. 330 (1972)(invalidating Tennessee's durational residence requirements for voters); Bullock v. Carter, 405 U.S. 143 (1972) (striking down Texas system of financing primaries whereby candidates themselves were required to pay their own filing fees); Reynolds v. Sims, 377 U.S. 533 (1964) (striking down as discriminatory the State of Alabama's legislative apportionment schemes). However, the Court itself has created more intangible, but no less real, barriers to the poor participating in the political process. For example, in *Buckley v. Valeo*, 424 U.S. 1 (1976), the Court invalidated spending limits in federal campaign finance laws, causing the price of campaigns to skyrocket and increasing the importance of money in the political process. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 44-45.

101. *See* ELY, *supra* note 25, at 100-01 (arguing that protecting political participation is the ultimate goal of the Constitution). However, the Court has been unwilling to strike down more attenuated financial barriers to political participation. For example, in the case of *Buckley v. Valeo*, the Court specifically rejected the notion that limits on political spending furthered the goal of reducing the impact of money on the political process and thus enhancing the voices of those who did not have any money to influence that process. *See* Zietlow, *Giving Substance to Process*, *supra* note 14 at 44-45.

cases.[102] For example, in *Griffin v. Illinois*,[103] the Court found a constitutional right to a state procedure for waiver of fees in connection with criminal appeals, and in *Mayer v. Chicago*,[104] the Court extended the *Griffin* ruling to cover appeals of criminal misdemeanors. In *Boddie v. Connecticut*,[105] the Court found a constitutional rights of indigents to waiver of filing fees in divorce cases, and in the recent case of *M.L.B. v. S.L.J.*,[106] the Court found a constitutional right of indigents to the waiver of fees required to appeal a lower court's decision to terminate the petitioner's parental rights.

In all of these cases, the Court relied on a hybrid reasoning which combined principles of due process and equal protection, without determining which clause was the deciding principle.[107] However, the Court did not decide those cases based on economic issued alone, but instead emphasized the fundamental nature of the underlying substantive rights at stake. In *Griffin* and *Mayer*, the Court emphasized the underlying liberty interest, while in *Boddie* and *MLB*, the Court emphasized the fundamental nature of the family interests at stake.[108]

In contrast, the Court has refused to find a constitutional right to waiver of fees when the Court viewed the indigent litigant's interests as purely economic. Thus, the Court found no constitutional right to waiver of civil fees for bankruptcy petitioners in the case of *United States v. Kras*,[109] and ruled against a welfare recipient who sought to prove a constitutional right to waiver of filing fees to appeal the reduction of his welfare benefits in the case of *Ortwein v. Schwab*.[110] The Court's rulings in *Kras* and *Ortwein* illustrate the Court's reluctance to find any substantive economic rights as it downplayed the economic interests at stake. In both *Kras* and *Ortwein*, the Court made it clear that it did not view the economic interests of the petitioners to be fundamental. This reasoning is particularly ironic

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102. *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (holding that a state must provide a process for waiver of transcript fees connected to a criminal appeal as of right); Mayer v. Chicago, 404 U.S. 189 (1971); Boddie v. Connecticut 401 U.S. 371 (1971) (holding that a state must provide a process for waiver of filing fees in divorce actions); M.L.B. v. S.L.J., 519 U.S. 102, ___, 117 S. Ct. 555, 570 (1996) (holding that a state must provide a process for waiver of filing fees to appeal the termination of parental rights).

103. 351 U.S. 12 (1956).

104. 404 U.S. 189 (1971).

105. 401 U.S. 371 (1971).

106. 519 U.S. 102, 117 S. Ct. 555 (1996).

107. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 56-57.

108. *See Boddie*, 401 U.S. at 375-76 (holding unconstitutional a state law conditioning judicial decree of divorce upon claimant's ability to pay fees and costs); *M.L.B.*, 519 U.S. at ___, 117 S. Ct. at 570 (finding unconstitutional the State of Mississippi's refusal to waive court fees related to petitioner's appeal of a trial court decision terminating her parental rights). In *M.L.B. v. S.L.J.*, the Court emphasized the unique nature of the parent-child relationship which is irrevocably severed in parental rights termination cases. *See id.*, 519 U.S. at ___, 117 S. Ct. at 569 ("[W]e have repeatedly noted what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matter such as divorce, paternity and child custody.").

109. *See* 409 U.S. 434, 450 (1972) (court's refusal to waive bankruptcy filing fees did not violate due process or equal protection principles).

110. *See* 410 U.S. 656, 659-60 (court's refusal to waive filing fees in administrative review actions to appeal reduction of welfare benefits did not violate Constitution). The Court distinguished both cases from its ruling in *Boddie*, on the basis that *Boddie* implicated family interests rather than solely economic interests. *See Kras*, 409 U.S. at 443-44; *Ortwein*, 410 U.S. at 659 (stating that appellant's interest in increased welfare benefits, "like that in Kras, has far less constitutional significance than the interests of the *Boddie* applicants.").

in the case of *Ortwein*, where the plaintiff was a welfare recipient who sought to appeal the reduction of the benefits that were his only means of livelihood.[111]

Finally, the Court has occasionally applied an informally heightened review of some legislatively created classifications that implicate substantive economic rights when the legislative purpose behind the classifications appeared to be animated by prejudice. For example, in *Department of Agriculture v.Moreno*,[112] the Court struck down a food stamp statute that differentiated between households with related and unrelated members in it.[113] The plaintiffs were members of low-income households that would otherwise have been eligible for food stamps. In that case, the Court noted that the legislative history behind the statute indicated that Congress was motivated by animus against a certain group, hippies, to pass the statute.[114] In *Plyler v. Doe*,[115] the Court struck down a Texas state statute that denied access to public education to children of illegal immigrants. Although the ability of the children to pay for private education was a factor that influenced the Court, the illegal immigrant status of the children clearly influenced the Court and may have been the reason for the Court's heightened standard of review.[116]

III. THE PARADIGM OF THE NEUTRAL STATE

The Court's jurisprudence with regard to the economic rights of the poor is based on the paradigm of the neutral state, under which some procedural rights are constitutionally protected even though the underlying substantive benefits lack that protection.[117] The Court has refused to find the poor to be a protected class that merits heightened judicial scrutiny. This is so even though the poor are a class of people for whom the democratic process has clearly failed. In recent years, poor people have become increasingly isolated from mainstream society. Many live in crowded urban neighborhoods plagued with violence and drugs.[118] Others live in isolated rural areas without adequate means of transportation or communication.[119] The isolation of the poor is heightened by the increasing importance of expensive computer technology in the fields of communication and education. Poor people are also increasingly disenfranchised in the political realm because of the increased importance of money as a means to influence elected officials.[120] Finally, poor people are losing the ability to influence even the most basic decisions about their

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111. Perhaps the Court might have ruled differently in *Ortwein* if the plaintiff's benefits had been terminated by the state administrative agency, rather than simply reduced. Despite its downplaying of economic interests, the Court would be hard pressed to find no fundamental interest in the sole means of one's livelihood. *See* Zietlow, *Two Wrongs*, *supra* note 14, at 1146-48. Of course, that is the underlying issue which I am addressing in this article.

112. 413 U.S. 528 (1973).

113. *See id.* at 534.

114. Moreno, 413 U.S. at 534.

115. 457 U.S. 202, 220-24 (1982).

116. *See* ELY, *supra* note 25, at 148-50 (discussing characteristics of classifications other than race that justify their inclusion in the set of suspect classifications).

117. *See generally* ELY, *supra* note 25.

118. *See* ALEX KOTLOWITZ, THERE ARE NO CHILDREN HERE (1991); NICHOLAS LEMANN, THE PROMISED LAND: THE GREAT BLACK MIGRATION AND HOW IT CHANGED AMERICA (1991).

119. *See, e.g.*, Craig Anthony Arnold, *Ignoring the Rural Underclass: The Biases of Federal Housing Policy*, 1 STAN. L. & POL'Y REV. 19 (1990).

120. *See* Fiss, *supra* note 87, at 2470, 2475.

lives because of a decline in their procedural rights, and in their access to lawyers to help them vindicate the few substantive rights that they enjoy.[121] For all of these reasons, protecting the needs of the poor is an appropriate use of judicial review. Nevertheless, the Court has bowed to the will of the majority and the political process in all matters regarding the substantive economic rights of the poor even though the poor are consistent losers in that political process.

Scholars have debated the question of whether the neutral paradigm is really mandated by the Constitution, and whether it is an appropriate description of the role of judicial review.[122] Most significant for the purposes of this article is the criticism that process does not exist without substance. That is, process is meaningless unless it is protecting substantive values that have meaning. Advocates of the neutral paradigm argue that in order for judicial review to be consistent with a democratic system judges must shy away from determining substantive values. The problem with this argument is that because judges simply cannot make decisions without basing them on some substantive values,[123] and even advocates of the neutral paradigm admit that judicial intervention is appropriate to protect some people.[124] The neutral paradigm, by its very nature, fails to provide a model for determining which substantive values must be protected by the procedural measures, and for determining which people merit heightened judicial protection. The neutral paradigm is an attempt to make judicial review consistent with the will of the majority. Yet a primary function of judicial review, that of protecting the rights of minorities, is inherently anti-democratic because Courts must sometimes go against the will of the majority in order to protect the interests of minorities. A model of judicial review which incorporates some substantive values is necessary to truly protect those interests.

Finally, the neutral paradigm does not even accurately describe the Court's approach to procedural rights because the willingness of the Court to find procedural rights to protect property interests varies in accordance with its determination of the value of the underlying property interest. Although the Court has steadfastly refused to find substantive economic rights for the poor, it has recently taken an activist stance towards those of the more affluent in our society through its regulatory takings doctrine. Pursuant to that doctrine, in the past decade the Court has greatly expanded the rights of owners of real property to compensation when state government regulations limit the owners' use of that land. In contrast to its jurisprudence with regard to the economic rights of the poor, the Court has assumed the existence of property rights of the owners of private property and taken an activist stance to protect it procedurally. As a result, the poor do not even enjoy equal justice in the procedural realm. Therefore, the neutral paradigm is not only flawed on a theoretical basis. In practice, it has failed to provide any kind of equal justice for the poor.

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121. *See generally* Zietlow, *Giving Substance to Process*, *supra* note 14.

122. *See infra* Part III.B.

123. *See* DWORKIN, *supra* note 26, at 136 (judges must refer to their idea of what is moral when interpreting the Constitution).

124. *See* ELY, *supra* note 25, at 103.

A. *The Constitution As A Neutral Document*

The neutral paradigm for judicial review is perhaps best described by Professor John Hart Ely in his book, *Democracy and Distrust.*[125] Ely describes the Constitution as a substantively neutral document, designed solely to establish a procedurally fair system by which to make substantive decisions and mostly devoid of substantive values, distinguished by "a process of government, not a governing ideology."[126] Because substantive decisions are by their very nature political, Ely argues, they should be relegated to the legislative branch. One of the principles of the neutral paradigm is that courts should refrain from interfering in the legislative process.[127] Under the neutral paradigm, judicial review of legislative action is appropriate only to insure that the legislative process operates fairly.[128] Therefore, courts should only intervene in the legislative process when the political process has clearly failed people in certain groups, that is, members of "discrete and insular minorities."[129] Ely identifies members of "discrete and insular minorities" as those people who lack political access, and suffer from popular prejudice.[130] Ely's neutral paradigm would preclude the Court from intervening in the legislative process on behalf of the poor because the Court has refused to find that the poor are a "discrete and insular minority."[131]

The neutral paradigm reflects a doctrine of liberal neutrality, under which the state does not provide substantive benefits for individuals, but is designed solely to protect individuals from interference with their rights.[132] The liberal state acts as a negative, protective force—rather than creating rights, it protects the rights that individuals already possess. For example, under Ronald Dworkin's theory of the liberal state, the role of the judiciary is to protect those pre-existing rights from interference by the state.[133] The state "is designed to protect individual citizens and groups against certain decisions that a majority of citizens might make."[134] Dworkin's theory differs from that of Ely because it envisions a more activist role of the Court in protecting individual rights, and because of his emphasis on those rights. However, like the model of the state envisioned by Ely, Dworkin's model is not helpful to the poor because Dworkin's state also does not create substantive

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125. ELY, *supra* note 25.

126. *Id.* at 101.

127. *See id.* at 102 (arguing that the Constitution "recognizes the unacceptability of the claim that appointed and life-tenured judges are better reflectors of conventional values that elected representatives.").

128. *See id.* at 103.

129. *Id.* at 76 (citing Justice Stone's famous footnote in United States v. Carolene Prods. Co., 304 U.S. 144, 153 n.4 (1938)).

130. *See* ELY, *supra* note 25, at 152 ("the minority in question [should] be one that is barred from the pluralist's bazaar, and thus keeps finding itself on the wrong end of the legislature's classifications, for reasons that in some sense are discreditable.")

131. *But see id.* at 162 (admitting that the poor are often functionally excluded from the political process but arguing that laws that actually classify on the basis of wealth are rare, and that the legislature is not motivated by prejudice against poor people).

132. *See* Peter B. Edelman, *supra* note 17, at 25 ("Our constitutional rights are primarily negative, involving protection against state action rather than any state obligation to provide."); MACKINNON, *supra* note 5, at 164 (there is a presumption of a "negative state" which is doctrinally neutral throughout constitutional law). For another description of the state as protecting "negative" values, *see* DWORKIN, *supra* note 26, at xi.

133. *See* DWORKIN, *supra* note 26, at 133.

134. *Id.*

benefits, it simply preserves the status quo. The right to be free from state interference in one's property is meaningless when one has no property to begin with.

B. The Neutral Paradigm Critiqued

Many scholars who have commented on Ely's description of the neutral paradigm have criticized the paradigm's false dichotomy between substance and process.[135] A neutral paradigm that purports to be substantively neutral does not provide a satisfactory means for determining which substantive values are important. However, critics note, the Constitution contains open ended provisions, such as the 9th Amendment, which require judicial interpretation, and judges need some substantive guidance. Judges also need substantive guidance in determining who should be protected by judicial review—an issue that is particularly important for people, such as the poor, who may seek that added protection. The decision not to intervene on behalf of some people, including the poor, is not a neutral position—rather, it is an endorsement of the status quo in which people who belong to that minority group will continue to lose. Understanding the fundamental premise that judicial review may be necessary to oppose the will of the majority, and to change the status quo, is essential to determining why the neutral paradigm fails to meet the needs of the poor people in our society.

The neutral paradigm is flawed because it rests on the premise that procedural values can be separated from substantive values. In fact, process does not exist without substance because every process protects some substantive value.[136] For example, the right to vote may be a procedural right, but the determination of who gets to vote is a substantive determination.[137] Because no judicial determination can be substantively neutral, any adequate paradigm must provide guidance for determining which substantive values are important. The neutral paradigm either fails altogether to provide that guidance, or it suffers from the same subjectivity as any other method of judicial review, including that based on substantive due process.[138] The false neutrality of Ely's paradigm is especially dangerous for those, such as the poor, whom the courts have failed to protect under the pretense of neutrality. Therefore, it is important to recognize that there is no such thing as substantively neutral procedure.

The Court's determination of how much procedure is constitutionally required hinges on its determination of the importance of the substantive interest at stake.[139] That is, the Court tends to find that more procedure is constitutionally required when it views the underlying substantive interest, protected by that procedure, as

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135. *See* sources cited *supra* note 22 and accompanying text.

136. *See* Tribe, *supra* note 22, at 1070-71 ("Process itself, therefore, becomes substantive.").

137. *See id.* at 1071. *See also* Estreicher, *supra* note 22, at 565 (Ely's "participational values" embody substantive choices, such as "one man—one vote").

138. *See* Estreicher, *supra* note 22, at 550-51 (arguing that although Ely purports to reject substantive due process, his approach employs the same methodology—"inferring a preferred set of values from wholly open ended provisions").

139. For an in-depth analysis of this issue, *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 28-30.

more valuable.[140] For example, in its doctrine of regulatory takings, the Court has found heightened procedural protections for the owners of valuable property.[141] In contrast, the Court uses a two pronged approach when analyzing the extent of procedural protections to which less affluent people are entitled under procedural due process. Under the first prong, the Court must determine whether the plaintiff has any property or liberty interest at stake.[142] This determination is made by examining state law and other sources.[143] If the law does not establish such an interest, then that person has no procedural rights whatsoever. Prong one of the test hinges on the legislative determination of the importance of the interest at stake because the Courts look to the legislature in determining the nature of the substantive interest at stake.[144] Under the second prong of the test, the Court applies a balancing test under which it balances the state's interest against that of the individual seeking procedural protections.[145] When the individual's property interest that is at stake is small, which will always be the case when that individual is poor, the balancing test weighs against that individual's right to procedural protections.[146]

The neutral paradigm is also flawed because it does not provide a satisfactory model for interpreting the open ended provisions of the Constitution, or adequate guidance for determining who merits the special protection of increased judicial scrutiny. Many scholars have argued that there are open ended provisions in the Constitution which must be interpreted by judges for them to have any meaning.[147] In order to interpret those provisions, the Courts must refer to some "fundamental rights" which exists outside of the Constitution.[148] Any adequate method of judicial review will contain some guidance of how to interpret those fundamental rights.[149] To deny that judges must face the issue is simply to avoid the difficult decisions that must be made in determining those substantive values.

The Court's decision of whether to intervene in the legislative process is itself a political judgment, because a judge makes a value judgment when she determines

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140. *See id.*

141. *See infra*, notes 177-81 and accompanying text.

142. This prong of the test was firmly established by the Court in the case of *Board of Regents v. Roth*, 408 U.S. 564 (1974), when the Court found that a person has an identifiable interest, meriting due process protection, only if she has a "legitimate claim or entitlement" to it. *Id.* at 577. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 28.

143. *See Roth*, 408 U.S. at 577.

144. The Court has established some limits on the ability of the legislature to mandate the extent of procedural protections. *See* Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 538-41 (1985) (rejecting the argument that state legislatures have unlimited power to link substantive benefits with procedural protections). Nevertheless, the Court's approach remains highly deferential to the legislative process.

145. *See* Matthews v. Eldridge, 424 U.S. 319 (1976).

146. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 30.

147. *See, e.g.*, Fleming, *supra* note 22, at 643; Laycock, *supra* note 21, at 347-49; Tushnet, *supra* note 22, at 1044; CHARLES BLACK, A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 5-10 (1997).

148. *See* Fleming, *supra* note 22, at 643 (to interpret the Privileges and Immunities Clause of the 14th Amendment, courts must enforce whatever "fundamental rights" a constitutional democracy established); Laycock, *supra* note 21, at 347 (though only some framers were committed to the concept of natural law, the influence of natural law theories may explain the inclusion of open-ended clauses of the 9th Amendment and the Privileges and Immunities Clause of the 14th Amendment).

149. Mark Tushnet has argued that the only real question is, who is more competent to determine fundamental rights, judges or legislators? *See* Tushnet, *supra* note 22, at 1044.

whether a fundamental right is implicated in any particular case.[150] Thus, the theory of the state as a neutral body does not explain the Court's failure to adopt a substantive approach to equal justice under law. In reality, the Court is unwilling to find substantive rights for the poor in the Constitution, not because it could not under our Constitutional rubric, but because it is reluctant to disrupt the status quo and be seen as an activist Court. Following the argument that changes in the status quo must be made through the political process to its logical conclusion means that the status quo will never be changed unless the political process is changed. However, repeated efforts to change the process, and reduce the influence of money in that process through campaign finance reform, have consistently failed.[151] Moreover, in evaluating the democratic process, we must begin by considering the disproportionate impact that wealth has on that process, since the democratic system is formally based on egalitarian principles.[152] A system that continually fails the poorest of the poor and contributes to their total disenfranchisement is not living up to our democratic ideals.

The neutral paradigm either assumes that society would be equal were it not for governmental intervention, and that equality therefore underlies governmental neutrality,[153] or it assumes that government should not intervene to ameliorate conditions of inequality. Both assumptions are flawed. First, although judicial restraint assumes that people who wish to achieve change must do so through the legislative process, judicial restraint is at least as activist as judicial "activism" because it is based on the value judgment that the status quo does not need to be changed.[154] The underlying assumption of judicial neutrality is that the status quo is preferable to judicial intervention.[155] This reasoning creates a "Catch 22" because people who suffer from inequality in our society do so, to at least some extent, because of their inability to impact on the political process. The Court cannot possibly believe that economic equality already exists in our society. Rather, it has decided that it should not intervene for some other reason. Nevertheless, there is a commitment in our Constitution to equality in the Equal Protection clauses of the Fifth and Fourteenth Amendments. Moreover, the Court has intervened in order to foster equality in some areas, including race and gender discrimination. That reason for the Court's refusal to intervene in the political process on behalf of the poor is a substantive one—the Court's view of the economic interests at stake when poor people seek the Court's intervention.

The neutral paradigm is also flawed because it does not provide a satisfactory means for determining whom should be protected by judicial review. Ely maintains that categories that affect groups of people are suspect when people in those groups are consistent losers in the political process, because the process is flawed due to prejudice on the part of legislators.[156] The problem with that approach is that some

150. Michelman, *supra* note 30, at 580.
151. *See* Fiss, *supra* note 87, at 2470.
152. *See* Ackerman, *supra* note 22, at 722.
153. *See* MACKINNON, *supra* note 5, at 163-64.
154. *See id.* at 166.
155. *See id.* at 167.
156. *See* ELY, *supra* note 25, at 103, 153-54.

people are consistent losers in the political process even when the legislature is not actually animated by prejudice against them. Rather, the reason may be the failure of people in those groups to impact on the political process in a positive fashion. For example, the reason why Congress recently passed an extremely punitive welfare reform act may be in part because of prejudice against poor people, but it may also be due to the fact that the voices of poor people were simple not heard in the debate surrounding the act. Lawrence Tribe has argued that the crux of determining whether a law unjustly discriminates against a group is not that the law emerges from a flawed process, "but that the law is part of a pattern that denied those subject to it a meaningful opportunity to realize their humanity."[157] This description, which arguably describes the situation of the poor in our country, requires a more substantive analysis into the reasons why the procedure may have failed a group. The neutral paradigm simply does not account for this analysis.

Because the Court does not recognize economic class as needing protection under the neutral paradigm, the "discrete and insular" approach has contributed significantly to a doctrinal framework justifying a double standard, deference in the economic sphere and activism in the personal rights sphere.[158] I have earlier argued that the poor should be considered to be a discrete and insular minority.[159] Bruce Ackerman has made an alternative argument—that the "discrete and insular" approach is no longer appropriate in today's society because of the pluralism of our democratic system, in which interest groups bargain with each other for mutual support.[160] Ackerman maintains that people in discrete and insular minority groups can have an impact in our pluralist system because the coherence of their groups means that they will be able to bargain for political gains.[161] The people who really need protection are members of "anonymous and diffuse" groups because they are harder to organize and have less of a sense of community.[162] Because poor people are members of anonymous and diffuse, rather than discrete and insular groups, and because of the impact of wealth on the democratic system, the poor would merit increased protection under Ackerman's proposal. To the extent that courts focus on prejudice alone, they are misguided because that focus is based on an inaccurate view of the political system.[163]

The premise in the neutral paradigm that courts should not interfere with the legislative process is based on the view that judicial review must be consistent with democracy.[164] This is so only if our system is one of a representative, not constitutional democracy.[165] However, our system is one of a constitutional democracy in which judicial need not be consistent with majority rule—it may be

157. Tribe, *supra* note 22, at 1077.
158. *See infra* notes 171-202 and accompanying text.
159. *See supra* notes 77-95 and accompanying text.
160. *See* Ackerman, *supra* note 22, at 719.
161. *See id.* at 718-19.
162. *Id.* at 724.
163. *See id.* at 738-39 (The question is whether purely processual prejudice is, in fact, more characteristic in treatment of discrete and insular minorities than other groups. For example, middle class legislators may be motivated by prejudice against the poor).
164. *See* Tribe, *supra* note 22, at 1063.
165. *See* Fleming, *supra* note 22, at 635.

only corollary.[166] The very reason to have a judicial branch interpreting the Constitution is to put constraints on the will of the majority so that the majority will not tyrannize minorities.[167] "Rights, since they place limitations upon the majority, cannot in fairness be determined by the majority itself . ."[168] Facilitating the representation of minorities is even less consistent with majority rule when it is a response to perpetual defeat at the ballot, which is what the neutral paradigm requires for judicial protection.[169] Once we recognize the importance of the judiciary to protect individual rights, then the constraints of the neutral paradigm need not bind the Courts from recognizing those rights in the Constitution.[170] Because the constraints of the neutral paradigm are not mandated by the Constitution, courts are free to recognize more substantive Constitutional rights.

C. The Inconsistency in the Paradigm Exposed

Finally, the neutral paradigm has failed poor people because it is not an accurate description of the Court's approach to economic rights. Although the Court has been very reluctant to recognize substantive economic rights for poor people in the Constitution, it has taken an activist approach to protect the property of the more affluent members of society. For example, during the *Lochner* era, the Court struck down legislation that benefited the poor and the working class because it found economic rights for their employers in the Constitution based on substantive due process.[171] Although the Court has since repudiated its *Lochner* era approach to economic rights,[172] it has continued to implicitly recognize the economic rights of those more privileged in our society in various areas, including in its doctrine of regulatory takings and its interpretation of the impact of the First Amendment on campaign finance law. Moreover, the Court's rulings in two cases from the its most recent term, *Eastern Enterprises v. Apfel*[173] and *Phillips v. Washington Legal Foundation*,[174] which arguably pitted the property rights of the poor and the working class against those of the more affluent business interests, indicate that the Court will continue to take an activist approach and rule in favor of property rights for the more affluent parties.

The Takings Clause of the Fifth Amendment states that "private property" shall not "be taken for public use, without just compensation."[175] Although the Court has not stated so specifically, it generally has applied the takings clause solely to government interference in the ownership of real property.[176] In recent years, the

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166. *See* Tribe, *supra* note 22, at 1080; DWORKIN, *supra* note 26, at vii, 142.

167. *See* Tribe, *supra* note 22, at 1080; Fleming, *supra* note 22, at 639-45; DWORKIN, *supra* note 26, at 142.

168. Fleming, *supra* note 22, at 640. *See also* DWORKIN, *supra* note 26, at 142 (constitutionalism says that the majority must be restrained to protect individual rights).

169. *See* Estreicher, *supra* note 22, at 575.

170. *See* Tribe, *supra* note 22, at 1080 (arguing that judges will be less constrained if they see the exercise of their judicial review as a corollary of democracy).

171. *See supra* notes 52-56 and accompanying text.

172. *See supra* notes 57-60 and accompanying text.

173. 118 S. Ct. 2131 (1998).

174. 118 S. Ct. 1925 (1998).

175. U.S. CONST. amend. V. The Court applied the Takings Clause to state governments in Chicago, Burlington & Quincy R.R. Co. v. Chicago, 166 U.S. 226, 239 (1897).

176. *See* Lucas. *But see Eastern Enters.*, 118 S. Ct. at 2131 (applying the takings clause to money which had

Court has interpreted the nature of the property rights of the owner of the real estate expansively, finding that the owners of private property are entitled to use their property in virtually any way that they wish to use it.[177] For example, the Court found a taking of property without just compensation when a cable line was placed on a building,[178] when the owner of a beach front house in California was unable to demolish it and build a larger house due to zoning regulations because he refused to provide access to the public as a condition of the construction project,[179] and when the owner of a beach front lot in South Carolina was forbidden to develop that lot by a state statute enacted in the wake of major hurricane damage to the coast of that state.[180]

In all of the regulatory takings cases, the Court found broad constitutional rights for the owners of private property and virtually disregarded the impact that the owner's proposed use of the private property would have on other members of his or her community. The underlying assumption in the Court's decisions is that the owner of property has virtually unlimited rights that cannot be infringed upon by the government. The Court's treatment of those ownership rights is reminiscent of its *Lochner* era treatment of the right of employers to contract with workers, and it is based on similarly amorphous constitutional reasoning. For that reason, the Court has been criticized for returning to *Lochnerian* substantive due process in its regulatory takings doctrine.[181] Once again, the Court relies on substantive due process to foster the property rights of the more affluent members of society.

Like its regulatory takings doctrine, the Court's approach to election finance law evinces a respect for the rights of people who own property at the expense of the interests of the community at large. In *Buckley v. Valeo*, the Court struck down election finance reform legislation that limited spending by candidates on political campaigns because it found those expenditures to be political speech, protected by the First Amendment.[182] The Court's ruling in *Buckley* has severely limited the

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been paid by the coal company to an employee's health benefit plan) and *Phillips* (applying the takings clause to interest income that was not accessible to the "owner" of that interest). *See also* Denise C. Morgan, *What Is Left to Argue in Desegregation Law?: The Right to Minimally Adequate Education*, 8 HARV. BLACKLETTER J. 99, 119-24 (1991) (arguing that there is a property right to a minimally adequate education that is protected by the Takings Clause). This recognition does not resolve all issues of the extent of the reach of the takings clause by any means. For example, it is unclear whether the takings clause would apply to a leasehold, such as a public housing tenant's lease for an apartment that is torn down by the government, or whether it would only apply to a private landlord who might own a building that was similarly threatened by demolition. As Frank Michelman points out, one's answer to this question will depend on how one determines a person's interest in real property. If possession is a significant interest that merits constitutional recognition, and ownership of title is not required, then the public housing tenant would have a claim. Michelman's theory suggests that the tenant would have a legally cognizable interest. *See* Frank I. Michelman, *Property as a Constitutional Right*, 38 WASH. & LEE L. REV. 1097, 1113-14 (1981). Similarly, welfare reform could be seen as a taking of property to balance the budget.

177. *See* Zietlow, "Giving Substance to Process," *supra* note 14, at 47-48.

178. Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419 (1982).

179. *See* Nollan v. California Coastal Comm'n, 483 U.S. 825, 841-42 (1987).

180. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1009 (1992).

181. *See Lucas*, 505 U.S. at 1069 (Stevens, J., dissenting). *See also* Zietlow, *Giving Substance to Process*, *supra* note 14, at 67. Significantly, in Justice Kennedy's concurrence to *Eastern* he argued that the Court's reasoning should have been based on substantive due process rather than on the regulatory takings doctrine. *See* Eastern Enters. v. Apfel, 118 S. Ct. 2131, 2154 (1998) (Kennedy, J., concurring).

182. Buckley v. Valeo, 424 U.S. 1 (1976). Relying on similar logic, the Court also has struck down restrictions on the amount of money that corporations could spend on public initiative campaigns. *See* Citizens

ability of reformers to enact meaningful legislation to limit the impact of money on the political process.[183] The Court's reasoning places the ownership interest of those with money to spend over the interests of the community in limiting the impact of money, and its resultant dangers—influence peddling and corruption—on our political process. Again, such deference to money is not apparent in the language of the Constitution but was imputed by the Court. Ironically, even as the Court has relegated the substantive interests of the poor to the political process, it has limited the impact of the poor on that process with its expansion of the rights of people with economic resources in its First Amendment doctrine.[184]

In its most recent term, the Court had two opportunities to address head on the question of the extent of property rights for businesses when those property rights were threatened by the interests of the poor and the working class. In *Phillips v. Washington Legal Foundation*,[185] the Court ruled on the constitutionality of Texas' Interest on Lawyers Trust Account (IOLTA) program, a program under which interest from client funds deposited by attorneys in separate accounts is used to fund legal services programs for the poor in the state of Texas. The Court found that the IOLTA program amounted to a taking of the client's property, even though federal law prohibits for-profit corporations from earning interest on demand deposit accounts such as those at issue in this case.[186] The Court ruled that "regardless of whether the owner of the principal has a constitutionally cognizable interest in the *anticipated* generation of interest by his funds, any interest that *does* accrue attaches as a property right incident to the ownership of the underlying principal."[187] The Court remanded the case for determination of whether the property had been "taken" by the state of Texas.[188] The property right recognized by the Court in *Phillips* is ephemeral, and may well have no economic value for the owner of that right.[189] In contrast, the Court's decision jeopardized a very real interest of the poor throughout the country—that of access to an attorney—by placing in doubt the constitutional validity of the Texas IOLTA program, as well similar programs to fund legal services in 48 other states and the District of Columbia.[190]

Against Rent Control v. City of Berkeley, 454 U.S. 290 (1981) (striking down city of Berkeley ordinance); First Nat'l Bank of Boston v. Bellotti, 435 U.S. 765 (1978) (striking down Massachusetts statute).

183. *See* Fiss, *supra* note 87, at 2472; John C. Bonifaz, *Whose Speech is Protected?*, N.Y. TIMES, July 31, 1997 at A17.

184. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 55-57.

185. 18 S. Ct. 1925 (1998).

186. *See* 12 U.S.C. § 1832(a)(2) (1994), cited by *Phillips*, 118 S. Ct. at 1928.

187. *Phillips*, 118 S. Ct. at 1932.

188. *See id.* at 1934.

189. *See id.*, 118 S. Ct. at 1933 ("We have never held that a physical item is not 'property' simply because it lacks a positive economic or market value. . . . While the interest income at issue here may have no economically realizable value to its owner, possession, control, and disposition are nonetheless valuable rights that inhere in the property.").

190. *See id.*, 118 S. Ct. at 1927 n.1. Indiana is the only state that has not implemented an IOLTA program. *Id.* The ability of poor people to obtain an attorney has already been jeopardized by Congress's cuts in funding, and restrictions on the operations, of the Legal Services Corporation, the principle source of funding for legal services attorneys. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 39-40.

In another recent case, *Eastern Enterprises v. Apfel*,[191] the Court ruled that the Coal Industry Retiree Health Benefit Act of 1992,[192] (the Coal Act) as applied to the coal company, Eastern Enterprises, effected an unconstitutional taking. Congress enacted the Coal Act as an attempt to maintain solvent a fund that had been established to pay for health benefits of miners and their dependants. That fund was the result of numerous agreements reached between the United Mine Workers and the coal industry, with some agreements being reached after contentious strikes.[193] Petitioner Eastern Enterprises was a coal company that employed many miners, and was a signatory to every agreement until it officially ceased to operate in 1965, when it transferred its operations to a subsidiary, Eastern Associated Coal Corporation (EACC). Eastern retained its stock interest in EACC until 1987, when it sold its interest to Peabody Holding Company, Inc.[194]

Prior to 1965, when Eastern formally ceased operating, none of the agreements between the coal industry and the miners guaranteed benefits to the miners and their survivors.[195] The first agreement guaranteeing benefits was entered into after 1974 because of the mandate of the Employee Retirement Income Security Act of 1974.[196] Moreover, following the 1974 and 1978 agreements, a number of employers withdrew from the agreement, either to continue with non union employees or to leave the coal business altogether.[197] By 1990, the benefit plans had incurred a deficit of about $110 million.[198] The 1992 Coal Act was an attempt by Congress to save the solvency of the benefit plans so that retired coal miners could continue to receive health benefits. That Act required Eastern to continue to pay into the retirement and health benefit fund as the result of a complex formula based on its years of participation and the fact that over 1000 retired miners who benefited from the plan had worked for Eastern before it officially ceased operation.[199] Eastern sued, arguing that the Coal Act violated its substantive due process rights, and that it constituted a taking without just compensation.

A plurality of the Court found that the Coal Act was an unconstitutional taking because it required Eastern to continue its obligation to pay for the health benefits for its retired employers, even though Eastern itself had never guaranteed its benefits, and because the Act was so retroactive in nature.[200] Justice Kennedy concurred in the judgment but dissented on its rationale, arguing that no taking had occurred because no specific property was at stake.[201] However, Justice Kennedy agreed that the statute was unconstitutional because its extreme retroactivity violated Eastern's substantive due process rights.[202]

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191. 118 S. Ct. 2131 (1998).
192. 26 U.S.C. §§ 9701-9722 (1994 ed. and Supp. II).
193. *See Eastern Enters.*, 118 S. Ct. at 2140-42.
194. *See id.* at 2142-43.
195. *See id.* at 2150.
196. *See id.* at 2139.
197. *See id.* at 2140.
198. *See id.*
199. *See id.* at 2143.
200. *See id.* at 2151, 2153.
201. *See id.* at 2154-60 (Kennedy, J. concurring).
202. *See id.* at 2159 ("The case before us represents one of the rare instances where the Legislature has exceeded the limits imposed by due process.").

The Court's rulings in *Phillips* and *Eastern* illustrate the fact that the Court has abandoned the neutral paradigm with regard to economic rights. The Court's activism in protecting the ephemeral property rights of the affluent parties in *Phillips* and *Eastern* is evidenced by the fact that in *Phillips*, as in other takings cases, the Court was eager to find the property interest even though its decision may have been procedurally premature.[203] Now that the Court has returned to substantive due process type reasoning in the realm of economic rights, there is no principled reason why the Court cannot apply that reasoning to favor the interests of poor people in our society. Whether or not the Court is willing to do so remains to be seen. If the Court is intellectually honest, however, it will at least be willing to hear arguments, in favor of economic rights for the poor, based on substantive due process.

IV. THE COURT'S APPROACH TO PROPERTY

The Court's procedural approach to equal justice under law, premised on the paradigm of the neutral state, has been harmful to the interests of poor people in this country because it leaves the poor vulnerable to having their substantive rights taken away from them by the legislature.[204] As Frank Michelman has stated, "assurance of a hearing at which to contest the legality of governmental encroachments on one's property cannot protect property against legal redefinition to the point of extinction."[205] This statement is sadly prophetic for welfare beneficiaries today, who have seen their substantive benefits virtually terminated, accompanied by reduced procedural rights.[206]

Why has the Court refused to restrain the will of the majority in order to protect those people who arguably are in the most need of protection because they are so disenfranchised in our society? The only possible explanation to the Court's reasoning is a substantive one—that is, the view of property rights that underlies all of the Court's decisions regarding economic issues. If the conclusion that any substantive rights for poor people must be created by the legislature was truly mandated by the Constitution, my inquiry would end with the conclusion that in a capitalist country such as the United States, poor people are always likely to lose. However, a closer examination of the Court's jurisprudence shows that the Court's

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203. In his dissent to *Phillips*, Justice Souter criticized the Court for determining the issue of whether the interest was property in isolation, and argued that the Court should have first remanded the case to the Fifth Circuit to complete the other two prongs of the takings analysis, that of determining whether the property had been taken, and whether the owner had been provided just compensation. *See* Phillips v. Washington Legal Found., 118 S. Ct. 1925, 1934 (1998) (Souter, J., dissenting). The Court's eagerness in *Phillips* is similar to its haste in *Lucas*, where it granted certiorari on an issue that was arguably not ripe for review. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003, 1061-62. (Stevens, J., dissenting). Prior to the ruling of the South Carolina court finding no compensable taking, the South Carolina legislature passed a statute which allowed property owners such as Lucas to apply for special permits which would exempt them from the coastal preservation regulations. *See id.* at 1010-11. Lucas had not even applied for such a permit at the time that the Court agreed to hear the case. *See id.* at 1042 (Blackmun, J., dissenting).

204. *See* Edelman, *supra* note 17, at 7 (arguing that judicial intervention to *permit* legislative intervention to help working class and poor people has not been adequately protective of their interests).

205. Michelman, *supra* note 176, at 1110.

206. *See* Zietlow, *Two Wrongs*, *supra* note 14, at 1129-37; Zietlow *Giving Substance to Process*, *supra* note 14, at 32-33.

refusal to find substantive rights is not mandated by the Constitution, but is instead based on underlying assumptions about the nature of property in our society that lack a clear Constitutional basis.

A. Property as a Process Right

The difference in the Court's approach to the economic rights (both procedural and substantive) of the poor and the more affluent stems from its view of the nature of the property protected by those constitutional provisions. The Court assumes that a private ownership interest is fundamentally different than a state created entitlement to state created benefits.[207] Yet the Constitution does not contain any substantive guarantee to ownership of private property in general, and it certainly does not explicitly guarantee the right to ownership of real property.[208] Perhaps the difference in the Court's treatment of the two types of property stems from the ownership of the property in the takings clause cases.[209] If so, the Court's reasoning is circular. For, who is to determine whether a welfare recipient owns his or her benefits? There is no reason why a Court could not find an ownership interest in those benefits. In fact, under a substantive approach to economic rights, the Court probably would find an ownership interest in public benefits in the constitution, because the Court would find a fundamental right to those benefits.

The legal definition of "property" depends on the relationship between or among different people regarding the right to own, possess and use an economic resource. For example, in the "regulatory takings" cases, the Court resolves conflicts between private owners of real estate and governmental entities that wish to regulate the use of that real estate on behalf of the public good.[210] The dichotomy in the Court's view of substantive property rights also influences the Court's treatment of those rights in the procedural realm. The level of process to which a person is constitutionally entitled is contingent on the nature of the substantive rights that are being protected by that process.[211] Conversely, substantive rights themselves have a procedural element because they affect the person's ability to participate effectively in society.[212] Because they are bound up together, process rights themselves are not intrinsically more objective than substantive rights.[213] Both depend on the Court's evaluation of the underlying property interests at stake, and the manner in which the Court weighs those interests. Therefore, in order to

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207. Charles Pierce would certainly argue that. In fact, he argues that a state may create whatever limitations on procedural protections that it wishes in the process of creating a benefit. *See* Pierce, *supra* note 48, at 1973. Justice Rehnquist advocates such an approach, but he has done so unsuccessfully. The Court rejected that approach in *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), indicating that to some extent, at least, there is a kernel of constitutional limitation on the legislature's discretion to which the Court generally defers.

208. *See* Michelman, *Process and Property*, *supra* note 30, at 588.

209. The word "private" in the takings clause does indicate some kind of private ownership of property.

210. Similarly, during the "Lochner" era, the Court mediated between the rights of workers who had succeeded in lobbying for protective legislation (protecting their right to their labor) and the right of their employers to make a profit from requiring those workers to work long hours at low wages (protecting their right to exploit the labor).

211. *See supra* notes 145-56 and accompanying text.

212. *See* Michelman, *Process and Property*, *supra* note 30, at 577 (property as a process right); Zietlow, *Giving Substance to Process*, *supra* note 14, at 42.

213. *See* Tribe, *supra* note 22, at 1063.

understand whether any form of equal justice is possible, we must closely examine the Court's evaluation of the property rights underlying its procedural rulings.

Examining property as a process right explains the marked difference in the Court's interpretation of the Due Process Clause and the Takings Clause of the Constitution. To the extent that the Constitution protects the property rights of poor people, those protections are rooted in the due process clause.[214] Because the Court has relegated the substantive rights of poor people to the political process, a good deal of the court's energy in determining the level of procedure that is constitutionally required to protect those substantive rights, goes into analysis of the state or federal law that created the government benefit to determine whether that law created an entitlement that would trigger the protections of the clause.[215] Moreover, as illustrated by the recent welfare reform act, the legislative process is integrally connected with the extent of procedural rights that poor people enjoy, as well as the level of substantive rights.[216] The Court's relegation of this determination to the legislature, in and of itself, indicates that the Court does not recognize the property interests to be as important as those protected by the Takings Clause.

Like the due process clause, the takings clause places limits on government interference in the ownership of property. Yet the Court's interpretation of the takings clause, which has been construed primarily to protect the interests of the owners of real estate,[217] differs markedly from that of its poorer cousin, the Due Process Clause. In *Lucas*, the Court found that whenever a government regulation, which furthered the health and safety of its citizens, incidentally deprived the property owner of the value of his property, it was a categorical taking regardless of the nature of the government regulation.[218] This ruling was a marked turnaround from almost a century of precedent in which the Court deferred to the state's discretion in the use of its police powers to protect the public's health and safety. It differs significantly from the Court's due process jurisprudence, in which the Court undertakes a three pronged analysis to determine the level of procedural protections to which the parties are entitled.[219]

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214. It is not immediately self-evident why only the due process clause applies to the rights of poor people. However, in *Goldberg v. Kelly*, 397 U.S. 254 (1970), the Court found that welfare benefits, as government entitlements, were property that were protected by the Due Process Clause. In the later case of *Board of Regents v. Roth*, 408 U.S. 564 (1974), the Court further clarified the meaning of "government entitlements," stating that one was entitled to a government benefit only if the individual could establish a "legitimate claim of entitlement" to the legislatively created benefit. Board of Regents v. Roth, 408 U.S. at 577.

215. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 31-33. *See, e.g.*, Goldberg v. Kelly, 397 U.S. at 264; Roth, 408 U.S. at 577.

216. Once the Court has determined that a claimant has an entitlement which triggers due process protection, the Court will then apply the balancing test of *Mathews v. Eldridge*, 424 U.S. 319 (1976). Under that test, the Court balances the individual's interest in fair process against the interests of the state in preserving its resources. Under Mathews, therefore, the Court may find that a very limited level of procedural protection is mandated by the constitution, even after a property right has been established. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 33-35.

217. *See supra* notes 175-76 and accompanying text.

218. *See* Lucas v. South Carolina Coastal Council, 505 U.S. 1003 (1992).

219. *See* Mathews v. Eldridge, 424 U.S. 319 (1976); Zietlow, *Giving Substance to Process*, *supra* note 14, at 28.

The fact that the Court's determination of property rights is always political helps to explain the distinction that the Court makes between property that is protected by the due process clause, and property that is protected by the takings clause, because there is no constitutional distinction between the different forms of property.[220] That is, the Constitution does not make a distinction between a possessory and distributional view of property.[221] Yet, the ideology of a possessory view permeates the Court's decisions regarding property and the fifth amendment. When a property rights claim looks like a possessory, or ownership claim, the Court treats it as an inherent natural right without addressing the right's origin. The Court reads the right into the Constitution as a substantive right. On the other hand, when the Court sees a property rights claim as a distributional claim (that is, a claim asking for the government to re-distribute wealth), the Court fails to find it in the Constitution and relegates it to the political process. Moreover, in two recent cases, the Court has struck down even the meager gains that the poor and the working class have achieved through the political process.

The Court's rulings in *Phillips*[222] and *Eastern Enterprises*[223] aptly illustrate the contrast of the Court's treatment of the property rights of the poor and the more affluent members of society. In *Phillips*, the Court bent over backwards to find an ownership interest for affluent business clients, ruling that interest in IOLTA accounts was the property of those clients even though they were prohibited by law from receiving that interest. In contrast, the Court did not even address the interest of the poor people who had benefited from the free legal services financed by the IOLTA funds. In *Eastern*, which involved a health benefits fund that had been set up as the result of prolonged struggle between the mine workers union and the coal industry, and repeated bargaining between their representatives,[224] the Court could have found that the miners and their dependents had an ownership interest in the benefits that were funded by the Coal Act. As Justice Breyer points out in his dissent, the miners had good reason to feel entitled to those benefits based on their years of bargaining, assurances by their employers, and repeated intervention by the

220. The Takings Clause does refer to "private" property, while the Due Process Clause contains no such limitation. However, the meaning of "private" is not defined.

221. Nor is the definition of property rights as clear cut as it may first appear. Michelman gives the example of a landlord who owns a building that is subject to rent control laws that are being phased out, and his long term tenants who are protected from rent increases by a "grandfather" clause in the legislation which prohibits the landlord from raising the rent of long time residents. *See* Frank I. Michelman, *Proceedings of the Conference on Takings of property and the Constitution*, 41 U. MIAMI L. REV. 49, 155-92 (1986). The landlord wishes to evict those long-term tenants, but is also prohibited from doing that by the legislation. So, the landlord claims that his property is being taken without just compensation by the legislation. Michelman points out that the landlord can only win if the Court ignores the property right of the tenant to live in the apartment, and defines the property interest narrowly to encompass only the landlord's ownership interest. There is no principled reason for such an approach, and to do so would ignore the "bundle of rights" notion of property rights in the Court's jurisprudence. Similarly, in a conversation, W. David Koeninger has suggested that there is no principled reason why a public housing tenant, who has what amounts to a lifelong lease in his apartment, could not claim a taking without just compensation when the apartment building is demolished and the tenant is given only a Section 8 certificate to replace the unit for which he had the lifetime lease.

222. Phillips v. Washington Legal Found., 118 S. Ct. 1925 (1998).

223. Eastern Enters. v. Apfel, 118 S. Ct. 2131 (1998).

224. *See id.* at 2137-40; *id.* at 2165 (Breyer, J., dissenting) ("By the late 1940's, health care and pension rights had become the issue for miners, a central demand in collective bargaining, and a rallying cry for those who urged a nationwide coal strike.").

Federal government to protect those benefits.[225] Moreover, the Coal Act was reasonable because it only required Eastern to pay for the benefits of their former employees.[226] Yet the Court disregarded the very real property interest of the miners and ruled in favor of the more ephemeral property interest of the Coal Company.[227] The Court found that the Coal Act had effected a taking of property, as an unreasonable interference with Eastern's investment backed expectations, because although the company agreed to pay the health benefits of its retirees, it was not mandated to do so until after it ceased operations in 1965.[228] In its ruling, the Court relied on the legal fiction that Eastern had ceased operations in 1965, even though it had continued to profit from the industry through its *wholly owned* subsidiary until it sold that subsidiary in 1987.[229] Relying on legal fictions and disingenuous expectations, the Court disregarded the very real need of the miners and their dependents for health benefits.[230]

The Court's rulings in *Phillips* and *Eastern* are particularly ironic because in both cases, the poor and the working class had prevailed in the political process and had succeeded in obtaining some substantive protections through that process. Yet the Court struck down those gains in the name of the abstract property interests of the affluent petitioners. In fact, no case could provide a clearer example of the Court's favoring private ownership over a distributional view of property than *Eastern*. As the First Circuit Court of Appeals pointed out in the opinion below, the Coal Act merely "adjust(ed) the benefits and burdens of economic life to promote the common good."[231] That the Court struck that act down shows that the poor sometimes lose even when they prevail in the political process, because of the Court's own political view of property interests.

B. The Political Nature of Property

As the above examples illustrate, the dichotomy between substance and procedure, on which the neutral paradigm is based, is a false dichotomy because the extent to which one has a property right is inherently political.[232] That is, the legal definition of property centers on the relationship between the person claiming the property right and the person, or government, that wishes to take away, or reduce that right.[233] Property does not exist outside the political realm. Even judicial determinations of property rights are political by nature because they involve

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225. *See id.* at 2165-68 (Breyer, J., dissenting).

226. *See id.* at 2164 (Breyer , J. dissenting).

227. *See id.* at 2154 (Kennedy, J., concurring) (arguing that there was no taking because the property interest was too ephemeral).

228. *See id.* at 2151.

229. *See id.* at 2161 (Breyer, J., dissenting).

230. That this issue came up in the context of the coal industry is particularly ironic since no industry is harder on the health of its workers than the coal mining industry. That is why health benefits were so important to the miners, and why that issue was the source of so much conflict between the miners and their employers. Although the Court details that history in its opinion, *See id.* at 2137-40, it seems to disregard the historical context in its reasoning.

231. Eastern Enters. v. Chater, 110 F.3d 150, 161 (1st Cir. 1997).

232. Michelman, *supra* note 30, at 577.

233. *See* Michelman, *supra* note 176, at 1112.

evaluating conflicting claims of rights.[234] Property is not a right in and of itself—it is only a right to the extent that it is recognized to be so as a result of the political or judicial process. However, the Court often does not acknowledge the political battle which underlies the determination of property rights. Instead, the Court often acts as if property rights are "pre-ordained"—they either inherently exist, as they do for owners of private property, or they do not exist without being created by the legislature, as in the property rights of the poor.

Choosing to relegate some property rights, and not others, to the legislative process is itself a political act. Why is the property of some given special constitutional protection, and not that of others? The answer is not readily available from a reading of the constitution. Rather, it can be explained if substantive rights are by their nature more political, and if a distributional view of property is not politically popular. That is, the Court relegates distributional property rights to the political process not out of respect for the political process, but precisely *because* economic rights for the poor are not politically popular, or out of its own fear of the political process. If there is something fundamentally more political about the nature of distributional rights, it is that creating them or finding them in the Constitution is more likely to disrupt the status quo because it will implicate some level of redistribution of wealth. This is a political (ends based) reason rather than a neutral process (means based) reason.[235] The alternative approach, to find politically unpopular property rights in the Constitution, would be criticized as judicial activism, a criticism which the Court fears in this allegedly "post-Lochner" era. Yet, as mentioned above, the Court's refusal to take an activist stance in this arena itself has political connotations, which are harmful to those who lack economic, and, as a result, political resources in our society.

Property has always had a political significance in our government. In the early days of the republic, the franchise was restricted to property owners. On the other hand, the Warren Court sought to eradicate such restrictions in its decisions striking down economic and racial barriers to voting rights.[236] A republican system of government can have two types of general responses to the political significance of property, inclusionary or exclusionary.[237] The Constitution, as it has been construed, rules out an exclusionary strategy of restricting participation to the wealthy, but does not expressly provide for an inclusionary view of property under which the government might provide property to people to enhance their ability to participate.[238] The framers did not expressly address this issue, which was not as pressing in the early economy of the country since most people were farmers or artisans whose livelihood rested on their ownership of their property.[239] As a result, the framers allowed for the postponement of the problem of property distribution

234. Michelman, *supra* note 30, at 577.

235. I am not opposed in principle to ends based reasons for Court's rulings. However, what I do criticize is the Court making politically based decisions under the false guise of politically neutral reasoning.

236. *See supra* notes 98-100 and accompanying text.

237. Michelman, *supra* note 29, at 1330. Akhil Amar, *Forty Acres and a Mule: A Republican Theory of Minimal Entitlements*, 13 HARV. J.L. & PUB. POL'Y 37, 38-39 (1990).

238. Michelman, *supra* note 29, at 1330.

239. *Id.* at 1332.

as it related to the democratic process.[240] The primacy of ownership over distribution in the Court's jurisprudence does not come from the language of the constitution, which says little, if anything about the nature of property rights.[241] Rather, the Court's assumptions about property have an ideological basis because judges can define property only by attributing some political theory to the Constitution.[242] Moreover, an examination of the premises behind the Court's ideology shows that political theory is not inherent in our legal system.

The Court's view of property rights seems to recognize real property as superior because people actually possess real property, for which it is believed that they or their ancestors paid some monetary price. In contrast, government benefits are viewed as discretionary grants given to the recipients of those benefits. Of course, this view is somewhat ironic since ownership of much of the land in the Western plains states, for example, is based on the United States government seizing it from Native Americans and giving it away to white settlers.[243] Furthermore, the real problem with this line of argument is that it is circular. Why don't welfare recipients own their government benefits? The Court could have found that recipients did own their benefits, and it was encouraged to do so by the plaintiffs in *Dandridge*.[244] Some governments do establish constitutional possessory rights to government benefits.[245] In fact, of two principle International law treatises, one guarantees the right to economic benefits to all citizens.[246] Accordingly, the procedural view of equal justice also is not mandated by universal principles of ownership and property.

The framers did not expressly address the issue of substantive property rights in the Constitution due to a significant difference of opinion regarding property rights among the colonies prior to the Revolutionary War.[247] The framers' view of "property" was incoherent and contradictory, owing to two conflicting visions of property rights which prevailed in the colonies, one of hierarchy and the other of

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240. *Id. But see* Edelman, *supra* note 17, at 5 (framers did not contemplate the right to redistribution).

241. Michelman, *supra* note 30, at 588. *But see* Tribe, *supra* note 22, at 1067 (1980) ("the minority rights the federal system would protect were, for the most part, rights of property and contract.").

242. Michelman, *supra* note 176, at 1099.

243. Recognition of this historical fact makes it particularly ironic that currently many proponents of the right to own property without government interference are ranchers who live in those very western states.

244. The minimum income movement, which was generally contemporaneous with Dandridge, urged this position. *See* DAVIS, *supra* note 16.

245. For example, the right to shelter is recognized in the constitutions of 51 countries throughout the world. *See* Janet Ellen Stearns, *Voluntary Bonds: The Impact of Habitat II on U.S. Housing Policy*, 16 ST. LOUIS PUB. L. REV. 419, 443 (1997). The European Social Charter, adopted by the Council of Europe in 1965, binds signatory states to accept at least five of seven fundamental human rights, including the "right to work," the "right to social security," the "right to social and medical assistance" and the "right to family benefits." *See* TIMOTHY BAINBRIDGE & ANTHONY TEASDALE, THE PENGUIN COMPANION TO EUROPEAN UNION 224 (1996), *cited in* John P. Flaherty & Maureen E. Lally-Green, *Fundamental Rights in the European Union*, 36 DUQ. L. REV. 249, 280 (1998).

246. *See* Barbara Stark, *Economic Rights in the United States and International Human Rights Law: Toward an "Entirely New Strategy"*, 44 HASTINGS L.J. 79 (1992). The United Nations' Universal Declaration of Human Rights also provides for certain economic rights, including the right to a subsistence income. *See Universal Declaration of Human Rights*, *in* BASIC DOCUMENTS ON HUMAN RIGHTS 26 (I. Brownlie ed. 1981) ("Everyone has the right to a standard of living adequate for health and well-being of himself and of his family, including food, clothing, housing and medical care and necessary social services . . . .").

247. *See generally* Elizabeth V. Mensch, *The Colonial Origins of Liberal Property Rights*, 31 BUFF. L. REV. 635 (1982), *reprinted in* CRITICAL LEGAL STUDIES 163 (James Boyle ed., 1992).

volunteerism.[248] Under the hierarchical view of property, prevalent among members of the Whig party, property rights originated in the sovereignty, and were centered there.[249] Under the contrasting "volunteerist" model, property was distributed equally and title was secured by occupancy.[250] Land was distributed to families according to their ability to cultivate it.[251] The volunteerist system was a communitarian system because the health of the community, rather than individual rights, was its primary value. The volunteerist model, with its emphasis on the participation of the entire community reflects a more democratic tradition than the hierarchical view. The two systems of property rights were inherently contradictory and led to clashes over property issues in colonial New York.[252] For example, the law of title in colonial New York in the 1760s shows that the contradictions were not resolved.[253] As a result, that law, essential to determining property relationships, was virtually unintelligible.[254]

This analysis of property rights under the colonial system illustrates that the framers did not have a clear view of property rights when they drafted the Fifth Amendment to the Constitution. Perhaps the two clauses reflect the two different views. Or, perhaps after the Revolution, the link between property and liberty was asserted in favor of hierarchical power relations, with the notion of "sovereignty of the people," describing property as a sphere of autonomy and freedom, remaining as a solely rhetorical concept.[255] However, the volunteerist notions of self reliance and community values still have strong resonance in our republican ideology.[256] Interestingly, the communities characterized by the volunteerist model of land distribution had political systems characterized by "the most direct forms of participatory democracy"—decision making by citizens assembled at a town meeting.[257] That is, the more the system of property rights emphasized the needs of the community as a whole, the more the members of that community valued the ability to participate in the decision making process. This suggests that if the Court were to adopt a more communitarian notion of substantive rights, it might see the

248. *See id.*

249. *See id.* at 170. The hierarchical view of property is identified with economic development based on secured consideration of resources and accumulation of capital. *See id.* at 173.

250. *See id.* at 172-73. The volunteerist system of property rights, which was popular among Long Island townships, is identified with economic development based on the self reliance of settlers. *See id.* at 172.

251. *See id.* at 174. Similarly, the City of Detroit allows people to obtain title to abandoned property by restoring that property.

252. The volunteerist model was popular but feared because of its latent anti-authoritarianism. *See id.* at 180. Moreover, the volunteerist model threatened the concentration of wealth, which supporters of the hierarchical model felt was necessary for the economic development of the colonies. *See id.* at 184.

253. Under the New York law, title was simultaneously said to derive from occupancy and labor (reflecting volunteerist themes), and to derive exclusively from crown grant (reflecting hierarchical themes). *See id.* at 188.

254. *See id.*

255. *See id.* at 190-91. This view supports the notion that the 5th Amendment was meant solely to protect owners from having their property taken away from them.

256. *See* Michelman, *supra* note 29, at 1320 ("a distributive concern regarding property rights is plainly detectable in American constitutional origins and historic constitutional vision . . . .").

257. *See* Mensch, *supra* note 247, at 178.

value in a more expansive notion of procedural rights.[258] In turn, those rights might inspire more Americans to become involved in their political system.

The communitarian model of property remains as a viable option to strengthen participatory democracy and create a community that provides for the less fortunate. In a system of property rights incorporating even minor communitarian notions, the Court would adopt a substantive model of equal justice under law because it would not shy away from whatever redistributive implications that model entailed. John Rawls has argued that people in their "original position" would choose an equal distribution of goods.[259] Yet this argument, based on classic liberal principles,[260] entails a recognition that possessory rights are at least somewhat arbitrary because much of what we "own" comes to us as a result of the advantages that we inherited at birth, without any effort of our own.[261] Rawls' theory requires a strong theory of community.[262] That theory requires going beyond the pure individualism of neutral principles and recognizing that the good of the community as a whole is in everyone's individual interest.[263]

I am not arguing that the Court should undertake to redistribute the wealth in our society in order to achieve a flat equality among all. For the Court to do so is obviously not politically feasible, nor is it advisable. Rather, I am arguing that nothing in the Constitution *prevents* the Court from adopting a substantive approach to equal justice. The Court's fear of the redistributive implications, however minor, of a substantive approach to equal justice is based on ideological premises, not on a hard and fast neutral paradigm which is mandated by the Constitution. There is a need for at least some equalizing of substantive rights in order to improve our democratic system.[264] Recognizing the possibility of a communitarian view of property, we can explore the ways in which the Court could move towards a substantive approach to equal justice.

V. A SUBSTANTIVE APPROACH TO EQUAL JUSTICE UNDER LAW

The Court's approach to equal justice under law would be more realistic if it recognized the political impact of property on the ability of people to participate in our democracy. In our democratic system, if one has no political clout, one will be unable to obtain substantive rights through the political system. Because the impact of money is so prevalent in our system, poor people have very little political

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258. *See generally* Zietlow, *Giving Substance to Process*, *supra* note 14, at 59 (arguing that the rights of the poor to participate in society have diminished significantly even as the Court has taken a more conservative view of the substantive rights of poor people).

259. JOHN RAWLS, A THEORY OF JUSTICE 19, 141-42 (1971).

260. John Locke, one of the philosophical predecessors to the Constitutional framers, stated that he approved of appropriation of property through investment of one's labor, but only so long as there be "enough, and as good, left in common for others." John Locke, *Concerning Civil Government, Second Essay*, ch. V, Sec. 26 at 30, *in* 35 GREAT BOOKS OF THE WESTERN WORLD 54 (R. Hutchins ed. 1952).

261. *See* RAWLS, *supra* note 259, at 101-02. Rawls also argues that the characteristics that I posses are not "me," only what I "have." *See id.* at 58-59, 61 (cited in MICHAEL SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE, 84-85 (1982)).

262. *See* Sandel, *supra* note 261, at 149.

263. *See id.* at 80 (for Rawls' principles to avoid using some as a means to others' ends, that can only be true when "we" means the same as "I"—community in a constitutive sense).

264. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 68-80.

clout.[265] Without substantive economic resources, their ability to participate in the political process is severely limited. Yet the Court has relegated the substantive rights of the poor to the political process, virtually guaranteeing the disenfranchisement of a significant portion of our population.[266] In order to address the needs of the people who are arguably most vulnerable in our society, the Court must reassess its view of property and recognize the possibility of a communitarian approach to property under which both the substantive right to survival, and the more procedural right to participate as a full citizen in our society are valued as a means to strengthen the community in which all of us live.

In his seminal work, *The New Property*,[267] Charles Reich recognized the link between property rights and the rights of citizenship in our country when he pointed out that the larger the role that government has in creating wealth, such as welfare benefits, the more intrusive it becomes in administering that wealth.[268] Reich recognized the importance of being treated with dignity when he argued in favor of procedural protections to insure the fairness of the state's administration of the wealth that it created.[269] The Court adopted Reich's reasoning when it extended the procedural protections advocated by Reich to welfare beneficiaries in *Goldberg v. Kelly*,[270] the archetypal case of the procedural approach to equal justice under law. Yet Charles Reich had argued for more than procedure. He had argued that government-created benefits should be considered to be property, the "new property" described in his article, and had argued that the procedural protections should be triggered *because* a property interest was involved. I have explained throughout this article why the Court's adoption of only the procedural aspects of Reich's argument has been insufficient to achieve equal justice.[271] It is time for the Court to recognize the direct link between the lack of economic resources and the lack of political power in our society. In order for poor people to truly benefit from the procedural rights promised by the Constitution, they must benefit from substantive economic rights. Under a communitarian view of property, the Court would recognize those substantive economic rights as essential to obtaining the procedural fairness that all would agree is mandated by the Constitution. A substantive approach to equal justice under law is essential to avoid a society in which an entire group of people is disenfranchised due to their lack of economic resources.

A communal notion of property rights recognizes the influence of property rights on the ability of the community to function as a whole. In the process, the community would also be more likely to recognize its obligation to care for those who are less privileged in our society. My point is that both drastic inequalities of

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265. *See* Fiss, *supra* note 87, at 2478-80.
266. *See generally* Zietlow, *Giving Substance to Process*, *supra* note 14.
267. Charles A. Reich, *The New Property*, 73 YALE L.J. 733 (1964).
268. *See id.* at 739.
269. *See id.* at 780-83.
270. 397 U.S. 254, 261-63 (1970).
271. Based on his later writings, I believe that Professor Reich would agree with me. *See, e.g.*, Charles A. Reich, *Beyond the New Property: An Ecological View of Due Process*, 56 BROOK. L. REV. 731, 737 (1990) (arguing that once the attention of reformers was focused solely on procedure, they became preoccupied with the cost of procedure and overlooked the substantive question of economic need).

wealth (substantive injustice) and the disenfranchisement of the poor (procedural injustice) hurt the body politic, and everyone who is a member of that body politic. A communal approach to economic rights would allow the Court to address this problem gradually by altering existing doctrines to take a more protective stance towards the interests and needs of the poor. This approach would have three interrelated prongs. First, it would incorporate equality principles into decisions determining the procedural rights of poor people. Procedural rights would be viewed as a means to minimize the impact of economic resources on people's ability to participate. In order to foster real equality, there would be a presumption that people with fewer economic resources would have more procedural rights than those with more economic assets. Second, the approach would focus on improving the political process by reducing the impact of money on that process. Because the Court's ruling in *Buckley v. Valeo*[272] precludes meaningful campaign finance reform, the Court should be urged to overrule that precedent. Finally and most importantly, this approach would mandate constitutional rights to some substantive economic benefits. At the very least, there should be a right to survival for the poorest of the poor in our society.

In establishing procedural economic rights for the poor, the Court already has taken a hybrid approach, incorporating both procedural fairness and substantive equality.[273] The Court should more openly recognize the link between substantive and procedural rights, incorporating equal protection into its procedural analysis.[274] The Court has already done this in some cases. For example, in the recent case of *M.L.B. v. S.L.J.*, the Court relied primarily on Equal Protection principles when it upheld a constitutional right for an indigent mother to have the court fees waived in her appeal of the termination of parental rights.[275] The Court's emphasis on equality principles indicates at least some receptiveness to equality of economic resources, perhaps leaving room for a more expansive view of the economic rights of the poor.[276] Thus, in the area of procedural rights, the Court has recently implicitly recognized some substantive aspects of equal justice under law. That is, to at least some extent the Court has recognized the value of process to the functioning of the community, and the impact of economic inequality on the functioning of that community.

Principles of equal protection and due process should also be combined in addressing other procedural rights for the beneficiaries of government programs. For example, I have earlier argued that the equal protection clause mandates that welfare beneficiaries should have at least as many procedural rights as the holders of drivers licenses, and that therefore they should be found to have the right to pre-

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272. 424 U.S. 1 (1976).

273. *See supra* Part II.C.

274. *See* Zietlow, *Giving Substance to Process*, *supra* note 14, at 74-80.

275. *See* M.L.B. v. S.L.J., 519 U.S. 102, __, 117 S. Ct. 555, 566 (1996) ("'most decisions in this area,' we have recognized, 'rest on an equal protection framework' . . . for, as we earlier observed . . . due process does not independently require that the State provide a right to appeal" (citing Ross v. Moffitt, 417 U.S. 600, 665 (1974)). However, in his concurrence, Justice Kennedy downplayed the equality principles in the Court's decision, stating that "due process is quite a sufficient basis for our holding." *M.L.B.*, 519 U.S. at __, 117 S. Ct. at 570 (Kennedy, J., concurring).

276. I owe this particular insight to a conversation with Professor Lloyd Anderson.

termination hearings even if their benefits are no longer entitlements.[277] Given that a welfare beneficiary's means of livelihood is at stake when his or her benefits are terminated, he or she should be entitled to more procedural protections than the holder of the driver's license.[278] What I am suggesting here is the inverse of the Court's approach under *Mathews v. Eldridge*, which implicitly provides fewer procedural protections for people who have fewer resources.[279] The Court should add a component to the balancing test and find more procedural rights if the person seeking those rights suffers from economic need.

Second, the Court should reduce the impact of money on the political realm to level the playing field so that less affluent people can have some impact on the actions of the legislature. In order to allow for meaningful campaign finance reform, the Court must overturn its ruling in *Buckley v. Valeo* that campaign spending is political speech, protected by the First Amendment. In doing so, the Court will not weaken the democratic process by diminishing speech. To the contrary, it will strengthen the democratic process by allowing more voices to be heard as part of that process.[280] Under a communitarian approach, the Court would combine principles of equality and procedural rights, that is, the right to participate in the political process, to uphold campaign finance legislation that limits the amount that individuals can spend on political campaigns.[281]

Finally, the Court is most unlikely to find a fundamental right to a subsistence income for poor people because to do so would obviously entail some redistribution of wealth. Any such ruling would mandate increased governmental expenditures and tax increases. It also would involve a major policy decision that most people would agree is clearly suited to the political, and not the judicial process.[282] Nevertheless, the Court may soon be faced with this question. In a few years, the welfare benefits of many of the poorest of the poor in our society will be permanently terminated in accordance with the TANF statute. Many of the people affected live in areas of concentrations of poverty where no jobs are available.[283] Moreover, 4 million people had their food stamps terminated within the past year. There will undoubtedly be a number of legal challenges to these terminations, some of which will argue that there is a fundamental right to a subsistence income.[284] The

277. *See* Zietlow, *Two Wrongs*, *supra* note 14, at 1143-48.

278. There would be an exception to my approach if that holder needs the driver's license to commute to and from employment.

279. *See supra* notes 96-111 and accompanying text.

280. *See* Fiss, *supra* note 87, at 2475 (arguing that one can see the democratic impulses behind the legislation invalidated by the Court in *Buckley*—that of reducing the burden of fund raising and "ensuring that the voices of the less affluent are not drowned out"); *id.* at 2479-80 (arguing that the regulations struck down by the Court in *Buckley* were justified).

281. The Court turned down a chance to revisit *Buckley* when it denied certiorari in *Kruse v. City of Cincinnati*, 142 F.3d 907 (6th Cir.), *cert. denied*, 119 S. Ct. 511 (1998), in which the appellate Court struck down a Cincinnati ordinance that limits the spending of candidates for city council on their campaigns. In its petition, the city of Cincinnati argued that *Buckley* should be overturned.

282. *But see* Edelman, *supra* note 17, at 7 ("The next step is judicial intervention to *require* legislative intervention.").

283. *See* Jason DeParle, *Success, and Frustration, as Welfare Rules Change*, N.Y. TIMES, Dec. 30, 1997, at A1.

284. The Court currently has the opportunity to address this issue in the case of *Anderson v. Roe, cert. granted*, 119 S. Ct. 31 (U.S. Sep. 29, 1998) (No. 98-97), in which the Court will examine the constitutionality of

Court thus will be confronted with the issue of whether the Constitution contains any right to a subsistence income at its most basic level.

Under a substantive approach to equal justice under law, the Court would find a right to basic subsistence as essential to the citizenship of people in our country. Without a right to subsistence in the form of public benefits, some people who lose their welfare benefits will lose their homes and all of their property, and will be required to spend all day, every day, fighting to survive because they are unable to obtain employment. It is extremely unlikely that those people will become politically involved because they will not have the time, the will or the energy. Moreover, many will be forced to turn to crime in order to obtain food and other basic necessities, taking them outside the bounds of civil society. The right to public benefits could be limited to situations where people are living in areas which are so economically blighted as to preclude the possibility of finding any employment. Doctrinally, it would be rooted in substantive due process principles similar to those invoked by the Court in recent takings cases.[285] For example, poor people certainly have as strong an interest in the right to survive as clients have to controlling the interest in their accounts which they can never receive under law. Because the right to subsistence is essential to citizenship, it is also rooted in the privileges and immunities clause of the Fourteenth Amendment.[286]

Nothing in the Constitution prevents the Court from adopting a substantive approach to equal justice under law. And, given the precarious position of the poorest of the poor in our society today due in large part to recent action by Congress, the Court may soon have an opportunity to do so. Any time that the Court finds substantive economic rights in the Constitution, the decision will have redistributional implications. When the Court finds a virtually absolute right of ownership in the doctrine of regulatory takings, those rulings mean that society as a whole pays so that the owner can use his or her property as he or she wishes. Similarly, the Court could find substantive economic rights for poor people based on the communitarian notion of property rights, which is equally legitimate and falls within our democratic tradition.

CONCLUSION

Equal Justice under law is a mantra to which our legal system aspires, and which is essential to the functioning of our democracy. As a solely procedural concept, it

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welfare reform measures enacted by the State of California that limit AFDC and TANF benefits in the first year of the recipients' residency. The lower court preliminarily enjoined the requirements as violative of the Equal Protection Clause. *See* Roe v. Anderson, 134 F.3d 1400 (9th Cir. 1998). In *Anderson,* the lower court found that the regulation was likely to violate the right to travel. However, the case provides the Supreme Court the opportunity to address both the issue of whether there is a fundamental right to benefits, and the level of review to be applied.

285. *See supra* Part III.C.

286. Although the Court emasculated that clause in *The Slaughterhouse Cases,* 83 U.S. (16 Wall.) 36 (1873), that ruling has been heavily criticized. *See, e.g.,* BLACK, *supra* note 147, at 31 (arguing that the Declaration of Independence, Ninth Amendment, and privileges and immunities clause of the Fourteenth Amendment are a source of basic human rights in this country); Fleming, *supra* note 22, at 643 (arguing that to interpret the privilege and immunities clause, the Court must enforce whatever fundamental rights a constitutional democracy established). Recently, at least one scholar has called for the Court to overrule *The Slaughterhouse Cases* and recognize basic human rights under the privileges and immunities clause. *See* BLACK, *supra* note 147, at 31.

is meaningless because procedural rights alone cannot achieve justice for the poor people in our country. Absent a more substantive view of equal justice, poor people will become increasingly disenfranchised as economic inequality increases in our society. At the end of this millennium, it is essential that wealth not be required for a person's citizenship rights to have any meaning. A substantive approach to equal justice would take into account the impact of economic disparity on those citizenship rights, and make an attempt to rectify the inequity which results from a purely procedural approach. Moreover, recent developments in the Court's approach towards property rights indicate a return to substantive due process approach, which predominated at the beginning of this century, which allows the Court a doctrinal basis for combining principles of equality and procedural rights and finding substantive economic rights for the poor. Given the plight of the very poor in our country now, this may be the time for the Court to "decree a new relationship between the individual and the state in the area of economics and poverty . . . . to ensure that membership in society is not demeaned by abject poverty."[287]

287. Edelman, *supra* note 17, at 29.