NOTES

WEALTH-BASED EQUAL PROCESS AND CASH BAIL

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Though indigency is not a suspect class, the Supreme Court has repeatedly applied heightened scrutiny to laws that deprive low-income people of certain rights they can't afford. It has done this through a makeshift doctrine that combines the principles of Equal Protection and Due Process. But the absence of a generalizable rule behind what this Note refers to as "wealth-based equal process" leaves the Court's few constitutional protections for low-income people vulnerable to erosion by conservative Justices. This threat looms especially large as recent litigation draws on that doctrine to challenge the unfair treatment of indigent people in the criminal justice system. This Note attempts to shore up wealth-based equal process doctrine by proposing a general principle: Courts must apply heightened scrutiny when the government, by putting a price on a fundamental right that only the government can fulfill, entirely deprives an indigent person of that right. The Note then applies this principle to cash bail, revealing that the pretrial detention of indigent defendants lies at the heart of this doctrine and requires heightened scrutiny.

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INTRODUCTION

The typical story one learns about the constitutional status of economic class begins in the 1950s and ends in the 1960s.[1] Over that span, the Supreme Court under Chief Justice Warren played an unprecedented role in addressing class disparity.[2] In cases involving criminal procedure and voting, the Warren Court held that the state could not erect financial barriers to rights it deemed sufficiently fundamental[3] and referred to the guiding principle of "equal justice for poor and rich."[4] Commentators at the time wrote of the "growing influence of egalitarianism,"[5] a "judicial 'equality' explosion,"[6] and even an "egalitarian revolution."[7]

But the Court's attempts to craft "a Fourteenth Amendment jurisprudence of class"[8] were met with criticism, including among relatively liberal scholars.[9] After Richard Nixon was elected in 1968, the project seemed all but doomed.[10] The Supreme Court in the 1970s, led by Chief Justice Burger and three other Nixon appointees, issued a

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[1] *See, e.g.*, Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1242 (2007) ("Not long ago, poverty law issues held a vibrant, if not central, place in many constitutional law classes, and even elite law journals . . . . Yet . . . [i]t seems that each year the major constitutional law casebooks devote fewer pages and less attention to the constitutional status of poverty and economic inequality.").

[2] *See* MICHAEL J. GRAETZ & LINDA GREENHOUSE, THE BURGER COURT AND THE RISE OF THE JUDICIAL RIGHT 2 (2016) ("The Warren Court's overarching theme was equality."); *see also* Archibald Cox, *The Supreme Court, 1965 Term—Foreword: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91, 91 (1966) ("For a decade and a half the Supreme Court has been broadening and deepening the constitutional significance of our national commitment to Equality.").

[3] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12 (1956) (holding that Illinois had violated the Due Process and Equal Protection Clauses by requiring defendants to pay for a full trial transcript in order to appeal their criminal convictions); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966) (holding that Virginia's poll tax violated the Due Process and Equal Protection Clauses).

[4] *See Griffin*, 351 U.S. at 16.

[5] Cox, *supra* note 2, at 92.

[6] Frank I. Michelman, *The Supreme Court, 1968 Term—Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 9 (1969).

[7] Philip B. Kurland, *The Supreme Court, 1963 Term—Foreword: "Equal in Origin and Equal in Title to the Legislative and Executive Branches of the Government*," 78 HARV. L. REV. 143, 144 (1964).

[8] Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 5 (2018).

[9] Archibald Cox, for instance, wrote with some concern about the development of "new concepts of equal protection"; he felt that the Court's opinions lacked a "rational standard, or even points of reference, by which to judge what differentiations are permitted and when equality is required." *See* Cox, *supra* note 2, at 95.

[10] *See, e.g.*, Erwin Chemerinsky, *Lost Opportunity: The Burger Court and the Failure to Achieve Equal Educational Opportunity*, 45 MERCER L. REV. 999, 1008 (1994) (noting that "the failure to achieve more equality in educational opportunity [could] be linked to the election of Richard Nixon as President in 1968").

number of decisions that limited the impact of the Warren Court's precedents.[11] These cases established that the Court would not treat economic inequality, on its own, as a constitutional issue.

That's not the full story, though. These rulings established that economic disparity alone does not violate the Equal Protection Clause. But the Warren Court's decisions in certain areas, like criminal procedure and electoral matters—decisions seen as radically egalitarian at the time—remain good law and have been reaffirmed, including by the conservative Burger Court.[12] The Supreme Court has repeatedly held that it will closely scrutinize laws that impose financial barriers on a person's ability to run for office[13] or remain out of prison,[14] and it has applied this doctrine in other contexts too, like divorce proceedings,[15] parental termination decrees,[16] and marriage licenses.[17]

The problem is that the Court has done this through a kind of makeshift doctrine that combines the principles of Equal Protection and Due Process,[18] with no clear rule for when it will strike down laws

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[11] *See* Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 21 (2005) ("These appointees proved decisive to a series of extraordinary decisions, issued in rapid succession, limiting the reach of Warren Court decisions, and eventually making clear that social and economic rights do not have constitutional status outside of certain restricted domains."). The Burger Court cases that did most of this work were *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which established that wealth was not a suspect classification for purposes of the Equal Protection Clause, and *Washington v. Davis*, 426 U.S. 229 (1976), which held that disparate impact alone would not be sufficient to prove an Equal Protection violation.

[12] *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 241–42 (1970) (citing *Griffin v. Illinois*, 351 U.S. 12 (1956), to support a ruling that indigent defendants could not be confined beyond the maximum term solely because of a failure to satisfy monetary provisions).

[13] *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972) (holding that Texas's primary election system, which required candidates to pay a filing fee, violated the Equal Protection Clause); Lubin v. Panish, 415 U.S. 709, 718 (1974) (holding that "in the absence of reasonable alternative means of ballot access, a State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay").

[14] *See, e.g.*, Tate v. Short, 401 U.S. 395 (1971) (finding a violation of the Fourteenth Amendment when Texas imprisoned only those who could not pay a fine); Bearden v. Georgia, 461 U.S. 660 (1983) (holding that automatically revoking probation when petitioner could not pay a fine, absent an inquiry into the petitioner's circumstances, violated the Fourteenth Amendment).

[15] *See* Boddie v. Connecticut, 401 U.S. 371, 374 (1971) (holding that it violated the Due Process Clause to require potential divorcees to pay a fee).

[16] *See* M.L.B. v. S.L.J., 519 U.S. 102 (1996) (holding that it violated the Equal Protection and Due Process Clauses to require parents to pay a fee in order to appeal a decree terminating their parental rights).

[17] *See* Zablocki v. Redhail, 434 U.S. 374 (1978) (holding that it violated the Equal Protection Clause to only provide marriage licenses to noncustodial parents who had fully paid their child support).

[18] *See infra* note 84 and accompanying text.

that deprive low-income people of rights they can't afford. This Note will refer to that doctrine as "wealth-based equal process."[19] Its fuzziness is likely to inspire the same criticisms that were lodged against the Warren Court,[20] leaving it vulnerable to erosion by what one scholar has referred to as a "new form of judicial class blindness considerably more extreme than any doctrine wrought by the Burger Court."[21]

This threat looms as litigation pushes states to treat low-income people in the criminal justice system more fairly. Cases have been lodged against the widespread use of fines and fees and their consequences for people who cannot afford them, including on their ability to drive,[22] vote,[23] and be released from jail.[24] This fight has been waged with special vigor against "cash bail"—the practice of requiring defendants to pay the court money that they will get back if they show up for trial. Though intended to incentivize appearance, its effect is often to lock up defendants who cannot afford even modest sums.[25] While wealth-based equal process is only one of many tools in the fight against cash bail,[26] it crucially forces courts to confront the justice system's failure to afford equal treatment to those without money.

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[19] The term "equal process" builds from a law review article that describes and advocates for the prevalence of Equal Protection/Due Process claims. *See* Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, 61 WM. & MARY L. REV. 397, 397 (2019). I have added "wealth-based" since indigency is only one area where the Court has combined Due Process and Equal Protection analyses. *See, e.g.*, Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 749–50 (2011) (describing a variety of contexts in which the Court has recognized "dignity claims" that combine the two principles).

[20] *See supra* note 9 and accompanying text.

[21] Franklin, *supra* note 8, at 7–8, 7 n.12, 8 n.13 (showing how certain conservative judges and Justices have denied the existence of any class-related concerns in constitutional abortion, criminal procedure, and voting doctrines).

[22] *See* William E. Crozier & Brandon L. Garrett, *Driven to Failure: An Empirical Analysis of Driver's License Suspension in North Carolina*, 69 DUKE L.J. 1585, 1590–92 (2020) (citing to recent Supreme Court litigation).

[23] *See generally* Jones v. Gov. of Fla., 975 F.3d 1016 (11th Cir. 2020) (denying constitutional relief to formerly incarcerated people who were prevented from voting for a failure to pay their outstanding financial obligations).

[24] *See* Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018) (upholding a law that kept low-income defendants, who could not afford bail, in jail); ODonnell v. Harris Cnty., 892 F.3d 147 (5th Cir. 2018) (striking down a similar law).

[25] The only national data on pretrial detention, from 2009, shows that thirty-four percent of criminal defendants were held before trial simply because they were unable to afford bail. *See* Bernadette Rabuy and Daniel Kopf, *Detaining the Poor: How Money Bail Perpetuates an Endless Cycle of Poverty and Jail Time*, PRISON POL'Y INITIATIVE (May 10, 2016), https://www.prisonpolicy.org/reports/incomejails.html; *see also* Kellen Funk, *The Present Crisis in American Bail*, 128 YALE L.J.F. 1098, 1100 (2019) (finding that "the vast majority of pretrial detainees in the United States are confined because they cannot afford to post a bail amount set according to a schedule or after a perfunctory hearing").

[26] In addition to significant legislative reforms in many states, *see The State of Bail Reform*, MARSHALL PROJECT (Oct. 30, 2020), https://www.themarshallproject.org/2020/10/

What is needed to shore up essential protections for low-income people is a principle behind wealth-based equal process.[27] This Note proposes one that accounts for the Court's jurisprudence: Heightened scrutiny applies when the government, by putting a price on a fundamental right that only the government can fulfill, entirely deprives an indigent person of that right. This principle can help bring clarity, coherence, and flexibility to this otherwise-murky area of law.

Part I reviews the history of wealth-based equal process jurisprudence. It describes how the Warren Court was on the verge of recognizing indigency as a protected class, how the Burger Court put the brakes on that effort, and what remains of the doctrine. Part II paves a path out of the murk by proposing a principle that can explain and justify these cases.

Finally, Part III puts this principle to work, applying it to the contested topic of pretrial detention. First, it will describe the fissures that arose out of a 2018 split between the Fifth and Eleventh Circuits on the constitutionality of cash bail.[28] The Fifth Circuit struck down a law that kept indigent defendants in jail if they could not afford bail,[29] while the Eleventh Circuit upheld a similar one.[30] Both decisions relied on the Court's wealth-based equal process cases but interpreted differently what this precedent demanded and when it applied.[31] Then, after reviewing this circuit split, Part III will briefly consider another one, between the Eleventh and Ninth Circuits, about whether there is a fundamental right to pretrial liberty.[32] It will conclude by applying the principle developed in Part II, resolving these conflicts

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30/the-state-of-bail-reform, constitutional challenges have also been brought under procedural due process as well as the Eighth Amendment, *see* Funk, *supra* note 25, at 1108–10 (describing challenges brought under procedural due process and the Eighth Amendment).

27 This follows from a law review article that describes and advocates for the rise of Equal Protection/Due Process claims and refers to this line of cases as "equal process." *See* Garrett, *supra* note 19, at 397.

28 *See ODonnell*, 892 F.3d 147 (holding that the bail system violates both the Due Process and Equal Protection Clauses); *Walker*, 901 F.3d at 1266 ("[I]ndigency determinations for purposes of setting bail are presumptively constitutional if made within 48 hours of arrest.").

29 *See ODonnell*, 892 F.3d 147.

30 *See Walker*, 901 F.3d 1245.

31 *See infra* Part III (providing an overview of the Eleventh and Fifth Circuit cases, and where they diverged). While the Supreme Court declined to grant certiorari on this issue in 2019, *see* Walker v. City of Calhoun, 139 S. Ct. 1446 (2019) (mem.), the uncertainty and messiness of the doctrine makes it likely that the Justices will have another chance to weigh in. If they do, it will be even more essential to shore up the wealth-based equal process doctrine—otherwise, the conservative Court might make use of the doctrine's lack of clarity to strip away protections for low-income defendants.

32 *See infra* Section III.B.

along the way, and ultimately showing that the pretrial detention of indigent defendants demands heightened scrutiny.[33]

I
ORIGINS

A. The Warren Court's Forays

Understanding how the contours of wealth-based equal process developed is crucial to understanding how it has been applied in the cash bail context, how it ought to be applied, and how the Supreme Court will perceive future attempts to expand it. The current status of the doctrine is like a project cut short, more defined by political shifts than by a clear sense of its direction and purpose.

Our story begins in the 1950s, when the Supreme Court under Chief Justice Warren began extending constitutional protection to indigent defendants. In *Griffin v. Illinois*, the Court struck down a state law that required defendants to buy a transcript of the trial proceedings before they could appeal their convictions.[34] Though the Constitution did not guarantee appellate review, the Court found that the state could not provide it "in a way that discriminates against some convicted defendants on account of their poverty."[35] The Court expounded: "There can be no equal justice where the kind of trial a man gets depends on the amount of money he has. Destitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[36] The majority went so far as to say that in "criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color."[37]

Seven years later, in *Douglas v. California*, the Warren Court expanded on *Griffin*.[38] The case involved a California policy under which the appellate court only provided counsel to indigent defendants whose cases seemed, from the court's perspective, to warrant appeal.[39] The Court held that indigent defendants whose cases were deemed unworthy could not be denied access to counsel on appeal.[40] It explained: "Absolute equality is not required . . . . But where the merits of the one and only appeal an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line

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[33] *See infra* Section III.C.
[34] 351 U.S. 12 (1956).
[35] *Id.* at 18.
[36] *Id.* at 18–19.
[37] *Id.* at 17.
[38] 372 U.S. 353 (1963).
[39] *Id.* at 354–55.
[40] *Id.* at 357.

has been drawn between rich and poor."[41] In another case, the Court stripped away financial restrictions on voting in Virginia, reasoning that "wealth or fee paying" had, in the Court's view, "no relation to voting qualifications" and that "the right to vote [was] too precious, too fundamental to be so burdened or conditioned."[42]

To appreciate how atypical these decisions were, they must be seen against the background of ordinary Equal Protection and Due Process analysis. Under the Equal Protection Clause, only laws that make "suspect classifications"—race, national origin, ethnicity, religion—trigger heightened scrutiny.[43] That treatment is reserved, under substantive due process, only for laws that implicate "fundamental rights"—rights "deeply rooted" in American history and tradition.[44] If a law does not invoke a suspect classification or infringe upon a fundamental right, courts will review it for a "rational basis," which requires only a legitimate government interest and essentially guarantees that the law will be upheld.[45] Before the 1960s, economic status was not a suspect class and economic rights were not fundamental—yet the Warren Court in *Griffin* and *Douglas* seemed to be applying more than rational basis review to laws that discriminated on the basis of wealth.

Constitutional law scholars in this period speculated about what these decisions spelled for the Fourteenth Amendment going forward.[46] Frank Michelman, writing in the year that Chief Justice Warren retired, described the general impression among observers that the Court was poised to recognize indigency as a suspect classifi-

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[41] *Id.*

[42] *See* Harper v. Va. State Bd. of Elections, 383 U.S. 663, 670 (1966).

[43] *See* City of Cleburne v. Cleburne Living Ctr., 473 U.S. 432, 440 (1985) ("[W]hen a statute classifies by race, alienage, or national origin . . . these laws are subjected to strict scrutiny.").

[44] *See* Lawrence v. Texas, 539 U.S. 558, 593 (2003) (finding that it was unconstitutional for Texas to criminalize same-sex sexual conduct, on the grounds that it violated the fundamental right to privacy).

[45] *See, e.g.*, Romer v. Evans, 517 U.S. 620, 631 (1996) ("[I]f a law neither burdens a fundamental right nor targets a suspect class, we will uphold the legislative classification so long as it bears a rational relation to some legitimate end."). For the deferential nature of rational basis review, see Bertrall L. Ross II, *The State as Witness:* Windsor*,* Shelby County*, and Judicial Distrust of the Legislative Record*, 89 N.Y.U. L. REV. 2027, 2070 n.203 (2014) (noting that traditional rational basis review "has nearly always resulted in the Court upholding the statute").

[46] *See supra* notes 5–7 and accompanying text.

cation.[47] Michelman himself interpreted the Court to be on its way toward establishing a constitutional right to welfare.[48]

B. Concerns with Expansion

But the Court's attempts to extend Fourteenth Amendment protection to indigent defendants were met with skepticism from dissenting Justices, conservative politicians, and even liberal academics. These concerns ranged from the practical to the theoretical, taking off from views about the correct role of the Court, the institutional limitations of governments, and Constitutional interpretation.

Some critics worried that the principle advanced in *Griffin* and *Douglas* might lead courts to strike down too many laws. This concern was expressed most clearly in Justice Harlan's dissent in *Douglas*. "Every financial exaction which the State imposes on a uniform basis is more easily satisfied by the well-to-do than by the indigent," he wrote.[49] And yet, he went on, "no one would dispute the constitutional power of the State to levy a uniform sales tax, to charge tuition at a state university, to fix rates for the purchase of water from a municipal corporation, [or] to impose a standard fine for criminal violations."[50] In other words, we typically accept that the government has power to impose fees, taxes, and prices without tailoring them to the payer's solvency—a power threatened by the holdings of *Griffin* and *Douglas*. A "logical expansion of *Griffin*'s wealth discrimination rationale," wrote Professor Michael Klarman, "could have justified invalidation of all government fee requirements."[51]

Another criticism of the Warren Court's decisions was that they were unconstitutional. It is typically accepted that the Constitution only delineates *negative* rights—rights that the government cannot encumber.[52] It would be inappropriate, in other words, for the Court

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[47] *See* Michelman, *supra* note 6, at 19 (describing the general impression among commentators at the time that "relative impecuniousness appears to be joining race and national ancestry to compose a complex of traits which, if detectible as a basis of officially sanctioned disadvantage, render such disadvantage 'invidious' or 'suspect'").

[48] *See id.* at 9 (proposing that the Warren Court decisions are best understood not so much as promoting a value of equality, but rather "a quite different sort of value or claim which might better be called 'minimum welfare'").

[49] Douglas v. California, 372 U.S. 353, 361 (1963) (Harlan, J., dissenting).

[50] *Id.* at 361–62.

[51] Michael Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 265 (1991).

[52] *See* Helen Hershkoff, *Positive Rights and State Constitutions: The Limits of Federal Rationality Review*, 112 HARV. L. REV. 1131, 1132–33 (1999) (describing the Court as "[e]ndorsing a view of the Federal Constitution as a 'charter of negative rather than positive liberties'" (quoting Jackson v. City of Joliet, 715 F.2d 1200, 1203 (7th Cir. 1983))); *see also* Sunstein, *supra* note 11, at 5–6 ("On this view, negative guarantees are both time-

to impose on governments an "affirmative duty of care" for their citizens,[53] since doing so would impair the independent discretion of legislatures.[54]

The concern with *Griffin* and *Douglas*, then, was that by finding that the government had unconstitutionally deprived indigent people of certain benefits, the Court was obliging governments to provide those benefits—in *Douglas*, for instance, appellate counsel—free of charge. To some commentators, this looked exactly like the kind of affirmative obligation that the Court had long been forbidden from imposing. In his dissent, Justice Harlan insisted that the Court's holding in *Douglas* was wrong because "the Equal Protection Clause does not impose on the States 'an affirmative duty to lift the handicaps flowing from differences in economic circumstances.'"[55]

A final concern, related to these others, was that the Court was going beyond its circumscribed judicial function. To some critics, the Court's decisions in *Griffin* and *Douglas* lacked a coherent rationale and were liable to be extended in any direction the Court saw fit.[56] This fear echoed a general skepticism of the Warren Court among conservatives. Richard Nixon, during his presidential campaign, told one Southern audience: "I think some of our judges have gone too far in assuming unto themselves a mandate which is not there, and that is, to put their social and economic ideas into their decisions."[57]

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honored and consistent with the (classical) liberal tradition."); Cox, *supra* note 2, at 93 ("The original Bill of Rights was essentially negative. It marked off a world of the spirit in which government should have no jurisdiction.").

[53] *See* Hershkoff, *supra* note 52, at 1133 (noting that the "Court has rejected constitutional claims to housing, to public education, and to medical services, on the view that the government does not owe its citizens any affirmative duty of care").

[54] *See id.* at 1133–35 (noting that commentators "generally agree that a federal constitutional welfare right, even if recognized, would not be judicially enforceable because of concerns about federalism, separation of powers, and institutional competence").

[55] Douglas v. California, 372 U.S. 353, 362 (1963) (Harlan, J., dissenting) (quoting Griffin v. Illinois, 351 U.S. 12, 34 (1956) (Harlan, J., dissenting)) ("To so construe it would be to read into the Constitution a philosophy of leveling that would be foreign to many of our basic concepts of the proper relations between government and society." (internal citations omitted)); *see also* Cox, *supra* note 2, at 91 (warning that the "decisions implementing the equal protection clause set new constitutional goals for the states and the Congress, which lie substantially beyond accepted practices and whose achievement requires affirmative governmental action").

[56] *See* Cox, *supra* note 2, at 95 (worrying that the "new concepts of equal protection" espoused in *Griffin* and *Douglas* seemed to rely upon "largely subjective judgments" and were "notably unsuccessful in elaborating a rational standard, or even points of reference, by which to judge what differentiations are permitted and when equality is required").

[57] GRAETZ & GREENHOUSE, *supra* note 2, at 4.

C. The Burger Court's Contraction

Under Chief Justice Burger, who had been appointed by President Nixon, the Supreme Court in the 1970s issued a variety of decisions that limited the holdings of *Griffin* and *Douglas*.[58] These decisions signaled that the Court would no longer treat economic inequality, on its own, as a constitutional issue.[59] But none of them overturned the Warren Court's decisions.

The opinion that most clearly signified the Burger Court's attitude was *San Antonio Independent School District v. Rodriguez*, a case involving a school-financing system that distributed money to public schools partly on the basis of local property taxes.[60] The plaintiffs in *Rodriguez* argued that the disparity between the funding of their schools and those in wealthier neighborhoods violated the Equal Protection Clause.[61] The Court refused to apply heightened scrutiny, on the ground that "wealth discrimination alone" had never provided "an adequate basis for invoking strict scrutiny."[62]

The decision seemed to signal that the Court would no longer extend special constitutional protection to those without money, as it had in *Griffin* and *Douglas*. But it did not undo everything the Warren Court had accomplished. Instead, the Court in *Rodriguez* distinguished from precedent, noting two features of *Griffin* and *Douglas* that were missing in *Rodriguez*: The plaintiffs in those cases had been *completely* unable to pay for some desired benefit and, as a result, they were *absolutely* deprived of it.[63] In *Rodriguez*, by contrast, there was no obvious way to define the "category of 'poor' people" that the financing system allegedly harmed, and the harm did not

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[58] *See infra* notes 60–73 (discussing these decisions).

[59] *See* Sunstein, *supra* note 11, at 21 ("These appointees proved decisive to a series of extraordinary decisions, issued in rapid succession, limiting the reach of Warren Court decisions, and eventually making clear that social and economic rights do not have constitutional status outside of certain restricted domains."). The Burger Court cases that did most of this work were *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973), which established that wealth was not a suspect classification for purposes of the Equal Protection Clause, and *Washington v. Davis*, 426 U.S. 229 (1976), which held that disparate impact alone would not be sufficient to prove an Equal Protection violation.

[60] 411 U.S. at 4–14 (describing how the system operated); *see also* Sunstein, *supra* note 11, at 22 ("*Rodriguez* was effectively the death knell for social and economic rights in the United States.").

[61] *See* 411 U.S. at 4–6.

[62] *Id.* at 28–29. The Court also considered whether heightened scrutiny should be applied on the grounds that the system amounted to a violation of the Due Process Clause but found that education was not a fundamental right whose deprivation required heightened scrutiny. *See id.* at 33–35.

[63] *See id.* at 20 ("[B]ecause of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit.").

amount to an "absolute deprivation" of education.[64] Even children in the lowest-income districts were still getting some schooling.[65]

The other case perceived as marking the end of the Warren Court's project was *Washington v. Davis*.[66] That case held that a neutral law that disparately impacts a protected class does not, on its own, violate the Equal Protection Clause.[67] Discriminatory purpose would have to be shown.[68] The Court refused to apply heightened scrutiny to a police department's qualifying test even though a substantially higher percentage of Black applicants failed the test than white applicants.[69] The requirement of discriminatory intent seemed to further undermine *Griffin* and *Douglas*: What those cases had recognized as "discrimination" were neutral laws that, because of existing class disparity, merely affected low-income people differently—just like the neutrally formulated test in *Davis* that disadvantaged Black applicants.[70]

Finally, a series of cases reaffirmed that the Constitution only offers protection against government interference, rather than a promise of affirmative benefits. In 1970, the Court in *Dandridge v. Williams* declined to recognize a right to public welfare on the grounds that it would raise "intractable economic, social, and even philosophical problems."[71] Two years later, the Court rejected a fundamental right to housing.[72] In 1980, it held that, though abortions

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64 *See id.* at 25.

65 *See id.* at 23 ("The argument here is not that the children in districts having relatively low assessable property values are receiving no public education; rather, it is that they are receiving a poorer quality education than that available to children in districts having more assessable wealth.").

66 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law or other official act, without regard to whether it reflects a racially discriminatory purpose, is unconstitutional *solely* because it has a racially disproportionate impact.").

67 *Id.* at 245–48.

68 *See id.* at 240 (describing the "basic equal protection principle that the invidious quality of a law claimed to be racially discriminatory must ultimately be traced to a racially discriminatory purpose").

69 *See id.* at 235, 237, 242 (finding that Black applicants were four times more likely to fail the test than white applicants).

70 *See id.* at 246 (finding that the disproportionate impact of the test did not warrant the conclusion that it infringed on the rights of Black applicants).

71 397 U.S. 471, 485, 487 (1970).

72 *See* Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . . Absent constitutional mandate, the assurance of adequate housing and the definition of landlord-tenant relationships are legislative, not judicial, functions.").

could not be banned, governments were not required to provide them to those who could not pay.[73]

D. What Remains

Though these cases—*Rodriguez*, *Davis*, and *Dandridge*—truncated the Warren Court's innovations, they did not do away with them. The Burger Court left intact a free-standing doctrine according to which people cannot be deprived of adequate access to certain rights simply because they lack the funds.

In two different cases, *Williams v. Illinois*[74] and *Tate v. Short*,[75] the Burger Court reaffirmed *Griffin*, holding that the Equal Protection Clause was violated when states imprisoned criminal defendants just because they could not pay a punitive fine. Later, in *Bearden v. Georgia*, the Court relied on *Griffin*, *Douglas*, *Williams*, and *Tate* to hold that Georgia could not revoke probation from indigent defendants who failed to make payments.[76] In the context of voting, too, the Burger Court affirmed the Warren Court's egalitarian principles. In *Lubin v. Panish*, for example, it struck down a California statute that had required candidates for the position of County Supervisor to pay a filing fee to get on the ballot.[77] It referred, with implicit acceptance, to the "gradual enlargement of the Fourteenth Amendment's equal protection provision in the area of voting rights."[78] The scholar Michael Klarman observed, on the basis of this case and others, that the "voting rights aspect of the Warren Court's egalitarian revolution has become reasonably uncontroversial."[79] When indigent parties were entirely deprived of access to certain voting-related rights or benefits, that is, the Court was willing to step in.

In the years since, the Court has occasionally applied this narrow constitutional protection of indigency to other contexts involving criminal procedure, access to the court, and family legal proceedings.

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[73] *See* Harris v. McRae, 448 U.S. 297, 316 (1980) ("[A]lthough government may not place obstacles in the path of a woman's exercise of her freedom of choice, it need not remove those not of its own creation. Indigency falls in the latter category.").

[74] *See* Williams v. Illinois, 399 U.S. 235, 243–44 (1970) (holding that indigent defendants could not be confined, due to an inability to pay the monetary provisions of their sentence, for longer than the maximum sentence).

[75] *See* Tate v. Short, 401 U.S. 395, 397–98 (1971) (holding that it was a violation of Equal Protection to convert a fine to a term of imprisonment for those unable to pay, while those who were not indigent only had to pay the fine).

[76] 461 U.S. 660, 664–74 (1983).

[77] 415 U.S. 709, 718–19 (1974).

[78] *Id.* at 713.

[79] Klarman, *supra* note 51, at 263.

In *M.L.B. v. S.L.J.*, for instance, the Court extended the logic of *Griffin* and *Bearden* to an indigent plaintiff who lacked the funds to appeal a decree that terminated her parental rights.[80] It found that the state could not, under the Equal Protection Clause, deny the appeal solely for lack of payment, and it reached this conclusion by underscoring the importance of the right to parenthood.[81] The civil appeal in question, it reasoned, was similar enough to a criminal appeal to warrant the same special treatment.[82] In 2005, the Court also held that the Due Process and Equal Protection Clauses required the state to appoint counsel to indigent defendants who were convicted on pleas and were seeking access to a first appeal.[83]

As the Supreme Court recognized in *Bearden v. Georgia*, "[d]ue process and equal protection principles converge in the Court's analysis in these cases."[84] But the nature of this convergence is hardly clear. In several of the opinions discussed above, including *Bearden*, *Griffin*, and *M.L.B.*, the Court cited both the Equal Protection and Due Process Clauses and conducted a sort of joint analysis.[85] This feature of the decisions attracted dissent.[86] Justice Harlan, for instance,

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[80] *See* 519 U.S. 102, 106–07 (1996).

[81] *See id.* at 116–17 ("M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required when a family association so undeniably important is at stake.").

[82] *See id.* at 119–20 (announcing that it would treat M.L.B.'s parental termination appeal as the Court had treated petty offense appeals); *see also id.* at 123–24 (describing the judicial process in question as "quasi criminal in nature" and therefore as belonging within an exception to the general rule that rational basis review is sufficient for fee requirements (quoting Mayer v. City of Chicago, 404 U.S. 189, 196 (1971))).

[83] *See* Halbert v. Michigan, 545 U.S. 605, 616–24 (2005) (observing that "[a]pproximately 70% of indigent defendants represented by appointed counsel plead guilty, and 70% of those convicted are incarcerated" (quoting Kowalski v. Tesmer, 543 U.S. 125, 140 (2004) (Ginsburg, J., dissenting))).

[84] 461 U.S. 660, 665 (1983) (citing Griffin v. Illinois, 351 U.S. 12, 17 (1956)).

[85] *See id.* at 665–68 (describing the questions asked by each clause, but then stating that "[w]hether analyzed in terms of equal protection or due process, the issue cannot be resolved by resort to easy slogans or pigeonhole analysis"); *Griffin*, 351 U.S. at 17 ("Both equal protection and due process emphasize the central aim of our entire judicial system—all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.'" (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940))); *see also M.L.B.*, 519 U.S. at 120 (observing that "the Court's decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns" and then proceeding to analyze the law at issue "within the framework established by our past decisions in this area").

[86] *See, e.g.*, *M.L.B.*, 519 U.S. at 130 (Thomas, J., dissenting) ("[T]he majority does not specify the source of the relief it grants. . . . If neither Clause affords petitioner the right to a free, civil-appeal transcript, I assume that no amalgam of the two does.").

consistently argued that Due Process alone was the proper home for such claims.[87]

The Equal Protection Clause supports these cases' concern with equalizing the rich and low-income,[88] while the Due Process Clause supports their ban on the deprivation of certain liberties.[89] But while both clauses are grounding, it would be a fool's errand to slot wealth-based equal process into either one. It should be seen, instead, for what it is: a free-standing doctrine that draws on Fourteenth Amendment principles but does not import much else of the jurisprudence that has developed under each of its clauses.[90]

In recent years, the Supreme Court has proven open to merging Equal Protection and Due Process analyses in other contexts.[91] In *Obergefell v. Hodges*, for instance, the Court held that same-sex couples could not be denied the fundamental right to marry.[92] Justice Kennedy, writing for the majority, held forth on the "profound" connection between the two clauses of the Fourteenth Amendment, declaring that each "may be instructive as to the meaning and reach of the other."[93] He explained that, in some cases, "the two Clauses may converge in the identification and definition of the right" and even went so far as to declare that the "interrelation of the two principles furthers our understanding of what freedom is and must become."[94]

But there are reasons to fear that the current Court, if confronted with the issue, might look for ways to chip away at the use of a merged

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87 *See, e.g.*, Williams v. Illinois, 399 U.S. 235, 259 (1970) (Harlan, J., concurring) ("I, for one, would prefer to judge the legislation before us in this case in terms of due process, that is to determine whether it arbitrarily infringes a constitutionally protected interest of this appellant."); *Griffin*, 351 U.S. at 36 (Harlan, J., dissenting) ("I see no reason to import new substance into the concept of equal protection to dispose of the case, especially when to do so gives rise to the all-too-easy opportunity to ignore the real issue and solve the problem simply by labeling the Illinois practice as invidious 'discrimination.'").

88 U.S. CONST. amend. XIV, § 1 (requiring that each person receive "equal protection of the laws").

89 *Id.* (forbidding deprivation of "life, liberty, or property, without due process of law").

90 *See, e.g.*, Garrett, *supra* note 19, at 397 (arguing for an "intersectional 'equal process' approach" to cases involving "ways in which the indigent face both unfair process and disparate burdens"); Yoshino, *supra* note 19, at 749 (proposing the term "'dignity' claims" to describe "hybrid equality/liberty claims").

91 *See* Garrett, *supra* note 19, at 400 ("Increasingly, constitutional litigation challenging wealth inequality focuses on the intersection of the Equal Protection and Due Process Clauses.").

92 576 U.S. 644, 675–76 (2015) ("[T]he right to marry is a fundamental right inherent in the liberty of the person, and under the Due Process and Equal Protection Clauses of the Fourteenth Amendment couples of the same-sex may not be deprived of that right and that liberty.").

93 *Id.* at 672.

94 *Id.*

Equal Protection-Due Process analysis in the context of economic inequality. Over the last five years, the Court has lost Justice Ginsburg, who helped champion the development of wealth-based equal process,[95] and gained three conservative Justices. Now in the Court's majority are Justices Clarence Thomas and Samuel Alito—both of whom have embraced what Professor Cary Franklin refers to as "the new class blindness," voicing acute skepticism of wealth-based equal process.[96]

In *Crawford v. Marion County Election Board*, a case challenging a voter identification law, Justices Thomas and Alito joined with Justice Scalia to argue that the law's effect on financially disadvantaged voters was "irrelevant" to determining its constitutionality.[97] This position, if accepted by a majority of the Court, would undermine the entire premise of wealth-based equal process, which necessarily looks at how laws affect indigent people. In another case, Justice Thomas was even clearer about his opposition, stating that he did "not think that the equal protection theory underlying the *Griffin* line of cases remain[ed] viable."[98] He announced that if a case before him "squarely presented the question, [he] would be inclined to vote to overrule *Griffin* and its progeny."[99]

While the Supreme Court has so far resisted these suggestions, it has, in Franklin's view, "said very little about why class-based protections persist under due process, what function they serve, and what is wrong with the historical and doctrinal accounts being offered by proponents of the new class blindness."[100] Franklin worries that this silence leaves the doctrine vulnerable to those who want to eliminate it. Adding to this vulnerability is the absence of a driving legal principle behind what exists of wealth-based equal process.[101]

These worries are not in vain. The muddled reasoning in the circuit court cases on the constitutionality of cash bail are symptoms of

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[95] Ginsburg's majority opinion in *M.L.B.* confidently expanded the doctrine to cover a noncriminal case. *See infra* notes 111–13 and accompanying text.

[96] *See* Franklin, *supra* note 8, at 2 (noting that today, "[a]n increasing number of conservative judges—including a number of Supreme Court Justices—have begun to argue that class-related concerns have no place under the Fourteenth Amendment").

[97] 553 U.S. 181, 204 (2008) (Scalia, J., concurring); *see also* Franklin, *supra* note 8, at 86–87 (analyzing Justice Scalia's concurrence in *Crawford* and identifying that the concurring Justices "took issue with the fact that the Court had inquired into the law's effects on financially disadvantaged voters at all").

[98] M.L.B. v. S.L.J., 519 U.S. 102, 133, 135–37 (1996) (Thomas, J., dissenting) (arguing specifically that *Washington v. Davis* had undermined the *Griffin* line of cases).

[99] *Id.* at 139. For further discussion of Justice Thomas's position, see Franklin, *supra* note 8, at 92–93.

[100] Franklin, *supra* note 8, at 16.

[101] *Id.*

this lack of clarity.[102] Parts of the Eleventh Circuit's decision not to apply heightened scrutiny to a cash bail regime, for instance, exactly echo Justice Harlan's critique of the *Douglas* decision from nearly sixty years ago. Dissenting in *Douglas*, Justice Harlan feared that expanding Equal Protection to economic disparity would threaten countless government programs that imposed financial demands on citizens.[103] The Eleventh Circuit identically suggests that, if it adopted the defendant's rule, "courts would be flooded with litigation" and "[i]nnumerable government programs—heretofore considered entirely benign—would be in grave constitutional danger."[104] As examples of potentially endangered government programs, the court names the tuition charged at the University of Georgia and the fee charged by the Postal Service for express service.[105]

With no clear test for what makes certain financial requirements unconstitutional, courts are invited to spin out the same old fears that the Warren Court's decisions inspired.[106] Seeing no clear limit to the doctrine, courts may refrain, as the Eleventh Circuit did, from applying it at all.

The project of defining a general rule is therefore essential to preserving these protections. Especially as wealth-based equal process is applied to new contexts, and especially as Justices Thomas and Alito have been joined by three new Justices who are likely to share their predilections, this task has become increasingly important. In order to safeguard what remains, a clearer judicial principle is needed.

II
The Principle Behind the Precedent

This Part will sketch out a general rule of wealth-based equal process at a level of generality that can, ideally, account for the Court's past precedent. I am not starting this task from scratch. Several of the Court's opinions, and some other scholarship, have contributed guidance for how and when to apply wealth-based equal process.[107] This Part will introduce each of those possible unifying principles, before

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[102] *See infra* Part III (describing the specific points of tension between the Fifth and Eleventh Circuits' approaches).

[103] *See* Douglas v. California, 372 U.S. 353, 361–62 (1963) (Harlan, J., dissenting); *see also supra* notes 49–50 and accompanying text.

[104] Walker v. City of Calhoun, 901 F.3d 1245, 1262 (11th Cir. 2018).

[105] *See id.*

[106] *See supra* notes 49–51 and accompanying text.

[107] One of the most sustained attempts to find a limiting principle for the Court's wealth-based equal process doctrine comes in Section II.C.1 of Michael Klarman's article, *An Interpretive History of Modern Equal Protection*, *supra* note 51, at 264–69. As discussed *infra* note 130, however, Klarman gave up on this project too quickly.

landing on the one that best captures the state of the law. While the task is ultimately a descriptive one, it is motivated by the stakes introduced in the preceding Part. A unifying principle is needed to shore up protections for those who cannot buy their rights.[108]

A. Deprivation

The best place to start is with a formulation introduced by the Court itself: the line that *Rodriguez* drew between deprivations that were permissibly partial and those that were impermissibly absolute.[109] This line helped *Rodriguez* distinguish between the plaintiffs before it, who complained of a relative lack of school funding, and those in cases like *Griffin* and *Douglas* who had been completely denied some liberty or benefit. Complete deprivation provided a way of identifying the class against whom discrimination was alleged.

The "absolute deprivation" standard may seem, at first glance, to provide a usefully clear metric. After all, it is surely easier for the court to decide whether a low-income student is receiving no education at all than how much worse his schooling must be. But the *Rodriguez* framework provides little guidance for higher-order questions that must be answered before it is applied.

Most basically, there is the question of *what* deprivation has occurred. Constitutional rights are certainly not violated every time someone is completely deprived of something they cannot afford. Many Americans cannot buy a home, a meal, or a college education; as a result, they are homeless, hungry, and lack a bachelor's degree. But none of these people could successfully argue that they had suffered a constitutional injury.[110]

Despite its lack of direction on this first-order question, though, the total deprivation standard gets at something indispensable about wealth-based equal process. It would not have been a constitutional violation in *Douglas*, for instance, if indigent defendants merely got a *worse* lawyer on appeal than they would if they could pay. That kind of inequality is constitutionally tolerable; finding otherwise would require judicial intrusion into almost every aspect of life. The line must be drawn somewhere, and the one that *Rodriguez* proposes is as good as any.

So, the *Rodriguez* standard leaves us with this formulation of wealth-based equal process: Heightened scrutiny applies when an

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[108] *See supra* notes 100–06 and accompanying text (describing the necessity of a unifying principle and worries about the possible erosion of constitutional protections).

[109] *See supra* notes 60–64 and accompanying text.

[110] *See supra* notes 52–54 and accompanying text.

indigent person cannot afford to pay some amount and, because of that failure, suffers a total deprivation of something. But what kinds of rights or benefits must be totally deprived?

B. Fundamental Rights

One possible answer came in *M.L.B. v. S.L.J.*, where the Court found it unlawful to terminate the rights of parents who could not pay for a hearing.[111] The dissent had expressed concern about expanding the *Griffin* framework to a noncriminal case.[112] But Justice Ginsburg responded that the Court had "repeatedly noticed what sets parental status termination decrees apart from mine run civil actions, even from other domestic relations matters such as divorce, paternity, and child custody. . . . To recapitulate, termination decrees 'wor[k] a unique kind of deprivation.'"[113] What justified the protection of the low-income plaintiff in this case was that she risked suffering a particular *kind* of total deprivation. But what other deprivations are similarly important or "unique," as Justice Ginsburg would have it?

In the background of Ginsburg's reasoning is the patent and undeniable importance of parental rights—an importance made concrete by the Supreme Court's substantive due process jurisprudence. The Court has long protected a "private realm of family life which the state cannot enter," especially when it comes to the rights of parents over their children's development.[114] Despite the vagueness of her assertion, then, few would question Justice Ginsburg's impression that the termination of parental rights was a special devastation that should not be imposed lightly.

So *M.L.B.* proposes another characterization of what cannot be deprived from low-income people: rights enumerated in the Constitution, or identified as "fundamental" in the Court's substantive due process jurisprudence. This characterization accounts for many of the Court's wealth-based equal process cases. *Williams*, *Tate*, and

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111 *See* 519 U.S. 102, 124–28 (1996); *see also supra* notes 80–82 and accompanying text.

112 *See M.L.B.*, 519 U.S. at 144 (Thomas, J., dissenting) ("In brushing aside the distinction between criminal and civil cases—the distinction that has constrained *Griffin* for 40 years—the Court has eliminated the last meaningful limit on the free-floating right to appellate assistance.").

113 *Id.* at 127 (quoting Lassiter v. Dep't of Soc. Servs., 452 U.S. 18, 27 (1981)).

114 Moore v. City of East Cleveland, 431 U.S. 494, 499 (1977) (quoting Prince v. Massachusetts, 321 U.S. 158, 166 (1944)); *see, e.g.*, Meyer v. Nebraska, 262 U.S. 390, 399–401 (1923) (protecting the right of parents to control the education of their children); Pierce v. Soc'y of Sisters, 268 U.S. 510, 532 (1925) (protecting the right of parents to control their children's religious education); *see also* Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 639–40 (1974) ("This Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment.").

Bearden, for instance, all invalidated laws that infringed upon the fundamental right of liberty from confinement.[115] *Lubin v. Panish* and *Bullock v. Carter* both struck down statutes that made people pay to run for office[116]—a right that has been protected as an extension of the First Amendment.[117] *Zablocki v. Redhail* invalidated a law that imposed criminal penalties for failing to buy a license before marriage—another right that has been protected under substantive due process.[118]

But this theory—that heightened scrutiny for indigent plaintiffs is triggered by the presence of a fundamental right—would expand, rather than consolidate, the Court's wealth-based equal process jurisprudence. What exists of the doctrine is already on fragile footing.[119] The goal should be to shore up what exists rather than extend it in ways that will make it vulnerable to further erosion. And even a relatively conservative principle can help combat urgent inequalities.

The Court, moreover, has already indicated that it does not think that fundamental rights always trigger heightened scrutiny for indigent plaintiffs who cannot afford them. In *Maher v. Roe*, for instance, the Burger Court found that it was not unconstitutional for a state to limit Medicaid benefits to only "medically necessary" first-trimester abortions.[120] It reached this conclusion even though the right to abortion is protected by the fundamental right to privacy,[121] and even

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115 *See* Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. Rev. 781, 787 (1994) ("The Supreme Court has long recognized that liberty from confinement is a fundamental right."); *see also, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 80 (1992) ("Freedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action. . . . We have always been careful not to 'minimize the importance and fundamental nature' of the individual's right to liberty." (citation omitted) (quoting United States v. Salerno, 481 U.S. 739, 750 (1987))).

116 *See* Lubin v. Panish, 415 U.S. 709, 718 (1974) (holding that a "State may not, consistent with constitutional standards, require from an indigent candidate filing fees he cannot pay"); Bullock v. Carter, 405 U.S. 134, 149 (1972) (finding constitutionally invalid a law that "require[d] candidates to shoulder the costs of conducting primary elections through filing fees and [provided] no reasonable alternative means of access to the ballot").

117 *See* Clements v. Fashing, 457 U.S. 957, 977 n.2 (1982) (Brennan, J., dissenting) ("Although we have never defined candidacy as a fundamental right, we have clearly recognized that restrictions on candidacy impinge on First Amendment rights of candidates and voters.").

118 *See* 434 U.S. 374, 381–82 (1978); *see also* Loving v. Virginia, 388 U.S. 1, 12 (1967) (describing the freedom to marry as a "fundamental freedom").

119 *See supra* notes 93–97 and accompanying text.

120 432 U.S. 464, 479–80 (1977) (concluding that it was constitutional for the state not to fund nontherapeutic abortions).

121 *See* Roe v. Wade, 410 U.S. 113, 153 (1973) ("This right of privacy . . . is broad enough to encompass a woman's decision whether or not to terminate her pregnancy.").

though this policy would deprive some indigent women of the ability to exercise that right. The Court reasoned that "financial need alone" did not create a "suspect class for purposes of equal protection analysis," and that the fundamental right recognized in *Roe v. Wade* merely protected against interference with a person's "freedom to decide whether to terminate her pregnancy."[122] In other words, it declined to bring abortion, a fundamental right, into the folds of wealth-based equal process.

C. Government Monopoly

The *Maher v. Roe* decision distinguished itself from cases like *Griffin* and *Douglas* by invoking yet another distinguishing characteristic: *Griffin* and *Douglas*, the Court writes, were "grounded in the criminal justice system, a governmental monopoly in which participation is compelled."[123] While the government has a monopoly on criminal punishment, the idea went, it had no equivalent claim to control over abortions, which were performed in privately run hospitals. Could this be the foundation of a general principle—the state cannot deprive people of fundamental rights only it can fulfill?

Other cases support this proposal. A similar argument was made in *Kadrmas v. Dickinson Public Schools*, for instance, in which the Court declined to extend heightened scrutiny to a school bus fee because the state did not have a "legal or a practical monopoly on the means of transporting children to school."[124] Conversely, drawing on the state's monopoly over divorce proceedings, the Court in *Boddie v. Connecticut* held that it could not deny divorce from those who failed to pay court fees.[125]

A review of the core wealth-based equal process cases further validates this theory. Only the state can administer elections (*Bullock*),[126] parental termination hearings (*M.L.B.*),[127] marriages (*Zablocki*),[128] and criminal punishment (*Griffin*).[129] In his 1991

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122 *Maher*, 432 U.S. at 471, 473–74.

123 *See id.* at 471 n.6; *supra* notes 34–41 and accompanying text (introducing *Griffin* and *Douglas*).

124 487 U.S. 450, 460–61 (1988).

125 *See* 401 U.S. 371, 374 (1971) (holding that due process proscribes a state from restricting access to courts "solely because of inability to pay" for those seeking divorce, highlighting "the basic position of the marriage relationship in this society's hierarchy of values and the concomitant state monopolization of the means for legally dissolving this relationship").

126 *See supra* note 13 and accompanying text.

127 *See supra* notes 16, 80–81 and accompanying text.

128 *See supra* notes 17, 118 and accompanying text.

129 *See supra* notes 34–37 and accompanying text.

article, Professor Michael Klarman identified the "monopolization limitation" as a potentially "fruitful limiting rationale."[130]

We are left, then, with this proposal: Wealth-based equal process applies when an indigent person cannot afford to pay some amount and, because of that failure, is totally deprived of something to which they have a fundamental right and which only the government can provide. In addition to making sense of the Court's precedent, this proposal has another advantage. It helps explain why the Court in this area of doctrine has relaxed some of its principles—specifically that the Constitution does not guarantee positive rights. Requiring that the fundamental right in question be tied to a government monopoly preserves the negative role of constitutional rights, since wealth-based equal process merely prevents the government from depriving people of rights only it can fulfill. As Justice Ginsburg wrote in *M.L.B.*, these cases do not feature low-income people seeking "state aid to subsidize their privately initiated action or to alleviate the consequences of differences in economic circumstances that existed apart from state action."[131]

D. A Caveat?

While this proposal accounts for many of the cases in which the Court has extended constitutional protection to poverty, there is one that it struggles to accommodate. In nearly all of the cases described above, a failure to pay *immediately* and *directly* triggered the deprivation of the specified right. But that is not as clearly true of cases preserving the right to a criminal appeal.

Take *Griffin*, where the Court struck down a law that required convicted defendants to pay for a trial transcript in order to appeal

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[130] *See* Klarman, *supra* note 51, at 267. Klarman went on to suggest that the Warren Court appeared to leave the monopoly limitation by the wayside in *Shapiro v. Thompson*, 394 U.S. 618 (1969), in which it cited both the Equal Protection Clause and the fundamental right to travel in striking down a one-year residency requirement for welfare. Klarman, *supra* note 51, at 267–68. The government, Klarman noted, did not have a monopoly over either its citizens' subsistence or their ability to travel interstate, and yet the Court found that the government could not deprive low-income people of access to either. *Id.* The fact that *Shapiro* falls outside of the monopoly limitation, though, should not make us question the limitation. Instead, *Shapiro* lacks other characteristics that define the Court's wealth-based equal process jurisprudence: the low-income plaintiffs there were not directly deprived of the right to travel *because* they could not afford to pay some government-imposed price, but only because it might affect their ability to receive government benefits. *See id.* at 268–69. Rather than allowing *Shapiro* to take down the ship, then, we can cast it off the side.

[131] *See* 519 U.S. 102, 125 (1996); *see also supra* notes 80–82 and accompanying text (introducing *M.L.B.*).

their case.[132] The Court there pointed out that denying "adequate review" to low-income people would mean that "many of them may lose their life, liberty or property because of unjust convictions which appellate courts would set aside."[133] *Griffin* therefore struck down a law according to which a failure to pay *may* cause a total deprivation of liberty. It was enough, in other words, for a total deprivation to be at stake, even if not directly caused by a person's indigency.

On first glance, then, our working principle appears underinclusive; *Griffin* falls out. One solution to this problem would be to revise the principle to allow for a looser relationship between the failure to pay and the relevant deprivation. But that would likely make the principle *over*inclusive, since it is not at all clear that the Court would tolerate a mere probability of deprivation in other contexts.

Something else seems to be driving the Court's willingness to extend the doctrine to criminal appeals: The low-income defendants in *Griffin* were not just likelier to suffer the total deprivation of their liberty. They were totally deprived of a bulwark against that deprivation—the right to appeal. *That* right alone could not trigger wealth-based equal process, because it has not been recognized as fundamental. But the Court was likely influenced by the fact that the probabilistic deprivation of the fundamental right (liberty) was itself triggered by an immediate deprivation of another right (appeals) that only the government could provide. This might be made into a generalizable, if wordy, principle; but it might also just explain why criminal appeals are among those things that the Court has decided can't be denied to indigent people. Without other examples, it is too hard to know whether this reasoning could be applied to other contexts.

What we are left with is an account of the circumstances where the Court has extended heightened scrutiny: when the government, by putting a price on a fundamental right that only it can fulfill, entirely deprives an indigent person of that right. Now, added to this core circumstance, is another: when an indigent defendant's failure to pay totally deprives him of the ability to appeal his conviction.

If this standard is not pretty or sleek, it's because it is trying to account for decades of jurisprudence created by a Court that has tried to obey conflicting commands—allegiance to the precedent established by the Warren Court, fealty to the Burger Court's limitations, and a sense that there are simply some things whose supply can't be vulnerable to the whims of inequality.

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[132] *See* 351 U.S. 12, 19–20 (1956); *supra* notes 34–37 (introducing *Griffin*).

[133] 351 U.S. at 19.

III
Applying the Principle to Cash Bail

In the last few years, litigants, theorists, and some courts have attempted to apply the Court's wealth-based equal process jurisprudence to new contexts, including criminal fines and fees, the revocation of driver's licenses, and voter disenfranchisement.[134] One of the areas where this fight has played out, and where wealth-based equal process has been invoked with particular confusion and some success, is in cash bail.[135] This Part will bring clarity to that fight. First, it will introduce the circuit split between the Fifth and Eleventh Circuits on the constitutionality of cash bail. Then, it will briefly introduce another conflict, between the Eleventh and the Ninth Circuits, on whether pretrial liberty is a fundamental right. Finally, it will resolve both of these conflicts and show how the principle developed in Part II, properly understood, applies to the pretrial detention of indigent defendants.

A. Circuit Split: Total Deprivation?

Before showing where the Fifth and the Eleventh Circuits part from one another, it is worth looking at two points of common ground. First, both courts agreed that the questions before them were properly answered by the wealth-based equal process line of cases.[136] Their certainty on this point owed, in part, to precedent. The courts were bound by a case from the former Fifth Circuit, *Pugh v. Rainwater*, which drew on *Williams* and *Tate*, where the Burger Court applied *Griffin* to the length of prison sentences.[137] The *Rainwater* decision committed the Fifth Circuit, later divided into the Fifth and

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[134] *See* Garrett, *supra* note 19, at 397 (analyzing, under the "equal process connection," the "constitutionality of fines, fees, and costs; detention of immigrants and criminal defendants for inability to pay cash bail; loss of voting rights; and a host of other ways in which the indigent face both unfair process and disparate burdens"); *see also, e.g.*, Brandon Buskey & Lauren Sudeall Lucas, *Keeping* Gideon*'s Promise: Using Equal Protection to Address the Denial of Counsel in Misdemeanor Cases*, 85 Fordham L. Rev. 2299 (2017) (proposing to apply the wealth-based equal process line of cases to guarantee the right to a misdemeanor attorney).

[135] For a discussion of jurisprudential inconsistencies related to cash bail, see *infra* notes 142–60 and accompanying text.

[136] ODonnell v. Harris Cnty., 892 F.3d 147, 161 (5th Cir. 2018) (citing *Griffin*, 351 U.S. at 18); Walker v. City of Calhoun, 901 F.3d 1245, 1259 & n.8 (11th Cir. 2018) (first citing *Griffin*, 351 U.S. at 12; then citing Williams v. Illinois, 399 U.S. 235, 244 (1970); and then citing Tate v. Short, 401 U.S. 395, 398 (1971)); *id.* at 1260.

[137] *See* Pugh v. Rainwater, 572 F.2d 1053, 1056 (5th Cir. 1978) (finding that a bail statute was not facially unconstitutional because it could be interpreted to incorporate a necessary presumption against money bail); *supra* note 74–75 and accompanying text (describing the Court's decisions in *Williams* and *Tate*).

Eleventh Circuits,[138] to "the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible."[139]

Next, both courts accepted *Rodriguez*'s definition of successful Equal Protection cases, described above, as a framework for the Court's wealth-based equal process doctrine.[140] That is, they more or less agreed that indigent parties receive heightened scrutiny if two conditions are met: 1) "because of their impecunity, they [are] completely unable to pay for some desired benefit," and 2) "as a consequence, they sustain[] an absolute deprivation of a meaningful opportunity to enjoy that benefit."[141] That is where the similarities stop.

According to the bail regime on the books in Harris County, Texas, after a misdemeanor defendant was arrested, the prosecutor submitted a bond amount according to a set schedule.[142] Local judges and hearing officers were then supposed to review the amount and weigh various factors, including the defendant's ability to pay, in arriving at the final number.[143] In practice, though, defendants were often prevented from submitting evidence of their financial situation, and bail amounts from the fixed schedule were imposed around ninety percent of the time.[144] Many defendants had to wait days before they received a hearing, and officers still demanded bail even from defendants who had proven their indigence.[145] Maranda Lynn ODonnell, Robert Ryan Ford, and Loetha Shanta McGruder sued the county for these practices while they were detained in the local jail on misdemeanor charges.[146] After they won at the district court, the county

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138 *See U.S. Court of Appeals for the Fifth Circuit – Brief History*, U.S. COURT OF APPEALS FOR THE FIFTH CIRCUIT, https://www.ca5.uscourts.gov/about-the-court/circuit-history/brief-history (explaining the history of the Former Fifth Circuit and its subsequent division into the current Fifth and Eleventh Circuits).

139 *Pugh*, 572 F.2d at 1056.

140 *See Walker*, 901 F.3d at 1261 (following the "line drawn in *Rodriguez* between mere diminishment of some benefit and total deprivation based solely on wealth" (citing San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973))); *ODonnell*, 892 F.3d at 162 (finding that "[b]oth aspects of the *Rodriguez* analysis apply" to the case before the court (citing *Rodriguez*, 411 U.S. at 20)). For a discussion of the significance, and interpretation, of the Court's decision in *Rodriguez*, see *supra* notes 60–64 and accompanying text.

141 *Rodriguez*, 411 U.S. at 20.

142 *See ODonnell*, 892 F.3d at 153. Bail schedules typically assign dollar amounts to specific kinds of offenses. *See* CRIM. JUST. POL'Y PROGRAM, HARV. L. SCH., MOVING BEYOND MONEY: A PRIMER ON BAIL REFORM 11 (2016).

143 *ODonnell*, 892 F.3d at 153.

144 *Id.* at 153–54.

145 *Id.*

146 *See id.* at 147.

appealed.[147] In response to the defendants' Equal Protection claim, the Fifth Circuit held that the district court properly reviewed the county's procedures under heightened scrutiny.[148] It reasoned that the county's procedures, like the laws struck down in *Tate*[149] and *Williams*,[150] detained low-income defendants on account of their poverty.[151]

Eight hundred miles northeast of Harris County, the City of Calhoun, Georgia was also using a set schedule of bond amounts corresponding to the fine the arrestee would pay if found guilty.[152] Defendants who did not post bail would stay in jail until they got a bail hearing; if proven indigent, they would immediately be let go on a recognizance bond.[153] Maurice Walker had been unemployed, with a mental health disability, when he was arrested for walking on a roadway under the influence of alcohol.[154] Because he could not pay the "standard $160 cash bond" required for his offense, he stayed in jail for six days, awaiting his indigence hearing.[155] He sued the city.[156] While his case was pending, the city changed the policy to require a bail hearing within forty-eight hours of arrest.[157] Walker argued, and the district court agreed, that even this policy violated the Equal Protection and Due Process Clauses because only those who could not afford bail were jailed for up to two days.[158] After the district court granted a preliminary injunction, the city appealed.[159] Splitting off from the Fifth Circuit's approach, the Eleventh Circuit found that the

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147 *See id.* at 152.

148 *See id.* at 161–62 (finding that heightened scrutiny of the county's policy was appropriate).

149 401 U.S. 395 (1971) (striking down a law that allowed defendants to be imprisoned for failing to pay fines); *see supra* note 75 and accompanying text (introducing *Tate v. Short*).

150 399 U.S. 235 (1970) (striking down a law that required defendants who could not pay fines to remain imprisoned beyond their maximum sentence); *see supra* note 74 and accompanying text (introducing *Williams v. Illinois*).

151 *See ODonnell*, 892 F.3d at 161 (first citing *Tate*, 401 U.S. at 397–99; and then citing *Williams*, 399 U.S. at 241–42).

152 *See* Walker v. City of Calhoun, 901 F.3d 1245, 1252 (11th Cir. 2018) (describing the bail schedule).

153 *See id.* at 1252–53.

154 *Id.* at 1251.

155 *See id.* at 1251–52 (noting that Walker filed his lawsuit five days after his arrest, and was released the day after he filed).

156 *Id.*

157 *See id.* at 1252.

158 *Id.* at 1253, 1258–59.

159 *Id.* at 1254.

Calhoun bail policy did not require heightened scrutiny under the Equal Protection or Due Process Clause.[160]

The main divergence between the cases arose in their differing applications of the *Rodriguez* standard.[161] They split ways in identifying the "desired benefit" deprived by pretrial detention, and therefore disagreed about whether it was absolutely deprived, as required to trigger heightened scrutiny under *Rodriguez*.

The Fifth Circuit characterized the relevant "benefit" as "freedom from incarceration."[162] Of this interest the court found that the arrestees "sustain[ed] an absolute deprivation," just like the victorious plaintiffs in *Griffin* and *Douglas*; it therefore applied heightened scrutiny to the Equal Protection claim.[163] The Eleventh Circuit, on the other hand, identified the right at stake as "pretrial release."[164] Of this, the court found that the "indigents suffer[ed] no 'absolute deprivation'" since they "merely [had to] wait some appropriate amount of time to receive the same benefit as the more affluent"; it therefore applied only rational basis review.[165]

One dissenting judge in the Eleventh Circuit criticized the court's framing as "word play," and insisted that the benefit was properly identified, as it was by the Fifth Circuit, as liberty or freedom from incarceration.[166] In the dissent's view, "an incarcerated person suffers a complete deprivation of [this] liberty . . . whether their jail time lasts two days or two years."[167] But the majority retorted with its own accusations of word play, accusing the dissent of redefining the interest at stake in order to reach its desired conclusion[168] and warning that "[a]ny government benefit or dispensation can be framed in artificially narrow fashion to transform a diminishment into total deprivation."[169] It suggested that, on the dissent's theory, the plaintiffs in *Rodriguez* would have won the case if only they had challenged their complete deprivation of "something smaller and less important," like "special-

160 *See id.* at 1265 (finding that the lower court "was wrong to apply heightened scrutiny from traditional equal protection analysis").

161 *See supra* notes 140–41 and accompanying text.

162 *See* ODonnell v. Harris Cnty., 892 F.3d 147, 162 (5th Cir. 2018).

163 *See id.*

164 *Walker*, 901 F.3d at 1261.

165 *Id.* at 1261–62.

166 *See id.* at 1274 (Martin, J., dissenting).

167 *See id.*

168 *See id.* at 1264 (majority opinion) (arguing that the dissent had taken the interest in *Rainwater*—"right to bail before trial"—and instead narrowed it to "the right not to be held a moment longer than a person who can satisfy a bail schedule" (quoting Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978))).

169 *Id.*

ized art classes" rather than "overall disparities in school budgets"—a conclusion the majority evidently saw as ridiculous.[170]

B. Circuit Split: Fundamental Right?

While the Fifth Circuit rested its holding on Equal Protection grounds and did not decide whether the cash bail regime violated substantive due process,[171] the Eleventh Circuit did, thereby creating another circuit split between it and the Ninth Circuit.[172] The Eleventh Circuit in *Walker* found that there was no fundamental right to liberty before trial,[173] while the Ninth Circuit, in a case involving the pretrial detention of undocumented immigrants accused of felonies, found that there was.[174]

Uncertainty on the point comes from a 1987 case, *United States v. Salerno*.[175] The Supreme Court heard a challenge to the then recently passed Federal Bail Reform Act, which allowed courts to deny bail to people accused of sufficiently serious crimes.[176] Challengers of the law argued that the Act violated substantive due process,[177] but the Court upheld it, determining that the government's "legitimate and compelling" interest in preventing crime outweighed "the individual's strong interest in liberty."[178]

The Ninth Circuit, in *Lopez-Valenzuela*, read *Salerno* to recognize a fundamental right to liberty, requiring heightened scrutiny under substantive due process.[179] The court cited language in *Salerno* describing "the individual's strong interest in liberty" and the "*fundamental* nature of this right,"[180] as well as later Supreme Court cases

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170 *Id.*

171 *See* Funk, *supra* note 25, at 1110 n.66 (pointing out that "the Fifth Circuit did not consider the requirements of substantive due process").

172 *See id.* at 1117 (introducing this circuit split).

173 *See Walker*, 901 F.3d at 1264 (concluding that *Salerno* called for less than heightened scrutiny to the deprivation of pretrial liberty).

174 *See* Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 775, 780 (9th Cir. 2014) (en banc) (describing the law at issue and finding that it "infringe[d] a 'fundamental' right" (quoting United States v. Salerno, 481 U.S. 739, 750 (1987))).

175 *Salerno*, 481 U.S. at 739; *see also* Funk, *supra* note 25, at 1105 (noting that it was the "only Supreme Court decision on bail since the 1980s").

176 *See Salerno*, 481 U.S. at 742–43 (describing the law under review). The Bail Reform Act allowed federal courts to detain defendants awaiting trial if the government established by clear and convincing evidence that no conditions of release would reasonably assure the public's safety. *See id.*

177 *Id.* at 744. They also argued that it violated the Eighth Amendment's "proscription against excessive bail," *id.* at 746, but that argument is not relevant for purposes of this Note.

178 *See id.* at 749–50.

179 *See Lopez-Valenzuela*, 770 F.3d at 780–81.

180 *See id.* at 780 (citing *Salerno*, 481 U.S. at 750).

that seemed to confirm this interpretation. Those later cases include *Reno v. Flores*, where the Court found that "institutionalization of an adult by the government triggers heightened, substantive due process scrutiny,"[181] and *Foucha v. Louisiana*, which drew on *Salerno* to find that "[f]reedom from bodily restraint has always been at the core of the liberty protected by the Due Process Clause from arbitrary governmental action."[182]

The Eleventh Circuit, on the other hand, found that *Salerno* did not recognize a fundamental right to liberty.[183] It reached this conclusion by working backwards from the level of scrutiny it interpreted *Salerno* to be applying: "Rather than asking if preventative detention of dangerous defendants served a compelling or important State interest and then demanding relatively narrow tailoring, the Court employed a general due process balancing test between the State's interest and the detainee's."[184] Since the Eleventh Circuit did not see *Salerno* as applying heightened scrutiny, it concluded that pretrial detention did not infringe on any substantive due process rights.[185]

C. Resolving the Conflicts and Applying the Principle

These conflicts reveal the deep uncertainty that surrounds the constitutional treatment of cash bail and pretrial detention. This Section will show how the higher-order principle provided in Part II would apply to this area of legal murk. A reminder of that principle: Heightened scrutiny applies when the government, by putting a price on a fundamental right that only it can fulfill, entirely deprives an indigent person of that right.[186] To determine whether wealth-based equal process would require the pretrial detention of indigent defendants to be reviewed under heightened scrutiny, we first need to resolve the conflicts introduced in the last two Sections: *Is* there a fundamental right to liberty before trial? And does pretrial detention entirely deprive indigent defendants of that right?

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181 *See id.* at 781 (quoting Reno v. Flores, 507 U.S. 292, 316 (1993) (O'Connor, J., concurring)).

182 *See id.* (quoting Foucha v. Louisiana, 504 U.S. 71, 80 (1992)); *see also id.* ("Freedom from imprisonment—from government custody, detention, or other forms of physical restraint—lies at the heart of the liberty that [the Due Process] Clause protects." (quoting Zadvydas v. Davis, 533 U.S. 678, 690 (2001))).

183 *See* Walker v. City of Calhoun, 901 F.3d 1245, 1262 (11th Cir. 2018).

184 *See id.* (citing *Salerno*, 481 U.S. at 746–51).

185 *See id.*; *id.* at 1264–65 (accusing the dissent of trying to "avoid the Supreme Court's holding [in *Salerno*] by smuggling a substantive due process claim into the Equal Protection Clause").

186 *See supra* Section II.D.

A close reading of the Court's opinion in *Salerno* shows that the Ninth Circuit was right to say that pretrial detention deprives defendants of a fundamental right. A proper analysis of this point could take up a full Note, but some brief reflections will suffice. In addition to the opinion's overt references to the "importance and fundamental nature" of liberty,[187] the analysis in *Salerno* is best characterized as strict scrutiny, which requires courts to strike down laws impinging on fundamental rights unless they are narrowly tailored to a compelling government interest.[188] The Court in *Salerno* took care to find that the government's interest was "both legitimate and *compelling*" and that the Act "*narrowly* focuses on a particularly acute problem in which the Government interests are overwhelming."[189] It went on to conclude that "Congress'[s] careful delineation of the circumstances under which detention will be permitted satisfies this standard."[190] The later Supreme Court cases the Ninth Circuit cites strongly suggest that the Court itself views *Salerno* as a fundamental rights case.[191] And many academics and practitioners have accepted this position as fact.[192]

This means the reason that *Salerno* permitted the imposition of bail was not because it found that there was no fundamental right to liberty from imprisonment before trial. Instead, it found that the government's interests—in ensuring a defendant's presence at trial and in public safety—were sufficiently substantial to justify an infringement

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[187] *Salerno*, 481 U.S. at 750.

[188] *See, e.g.*, Roe v. Wade, 410 U.S. 113, 155 (1973) ("Where certain 'fundamental rights' are involved, the Court has held that regulation limiting these rights may be justified only by a 'compelling state interest' . . . and that legislative enactments must be narrowly drawn to express only the legitimate state interests at stake." (first citing Kramer v. Union Free Sch. Dist. No. 15, 395 U.S. 621, 627 (1969); then citing Shapiro v. Thompson, 394 U.S. 618, 634 (1969); then citing Sherbert v. Verner, 374 U.S. 398, 406 (1963); then citing Griswold v. Connecticut, 381 U.S. 479, 485 (1965); then citing Aptheker v. Sec'y of State, 378 U.S. 500, 508 (1964); then citing Cantwell v. Connecticut, 310 U.S. 296, 307–08 (1940); and then citing Eisenstadt v. Baird, 405 U.S. 438, 460, 463–64 (1972) (White, J., concurring in result))).

[189] *Salerno*, 481 U.S. at 749–50 (emphases added).

[190] *Id.* at 751.

[191] *See, e.g.*, Foucha v. Louisiana, 504 U.S. 71, 81 (1992) (holding that detaining defendants who were not guilty by reason of insanity violated substantive due process and comparing that scheme of detention to the "sharply focused scheme at issue in *Salerno*").

[192] *See, e.g.*, Penelope B. Farmer, Comment, United States v. Salerno*: Is Pretrial Detention of the Dangerous a Deprivation of Liberty Without Due Process of Law?*, 10 CRIM. JUST. J. 121, 136 (1987) (referring to the "presumed-innocent defendant's fundamental right to liberty"); *see also* Application for Leave to File Brief Amici Curiae and Proposed Brief of Amici Curiae National Law Professors of Criminal, Procedural, and Constitutional Law in Support of Respondent at 25, *In re* Humphrey, 482 P.3d 1008 (Cal. 2021) (No. S247278), 2018 WL 5465210, at *25 ("The Supreme Court has recognized that the right to pretrial liberty is 'fundamental.'" (quoting *Salerno*, 481 U.S. at 750)).

upon "the individual's strong interest in liberty."[193] Some courts, including the Tenth Circuit, have attempted to define the right curtailed by pretrial detention as a freestanding *right to pretrial liberty* and then find that this narrower right was not fundamental.[194] But this is the wrong approach. *Salerno* guides us: The fundamental right at issue is the "interest in liberty."[195] If someone is accused of committing a crime, the government may impose limits on that right, but its fundamental nature does not dim.

This brings us to the next question: Does pretrial detention entirely deprive indigent defendants of their right to liberty? Recall that the conflict between the Fifth and Eleventh Circuits involved their analysis of the *Rodriguez* framework. The courts parted ways because they defined the relevant benefit differently—the Fifth Circuit as liberty, and the Eleventh as *pretrial* liberty.[196]

The principle developed in Part II helps put the *Rodriguez* framework in its place. The requirement of total deprivation *Rodriguez* imposes is not an exhaustive rule that accounts for every case of heightened scrutiny. Instead, it provides just one kind of limiting principle that helps the court avoid difficult questions of degrees. In addition to placing too much stock in it, the Eleventh Circuit also offered an unprecedented interpretation of *Rodriguez*'s framework: A person is not totally deprived of their pretrial liberty, in the court's view, so long as they are released for some period before trial.[197] The court, that is, imported a temporal meaning to the distinction between partial and total deprivations. But then the same could be said of freedom from incarceration—the liberty whose deprivation triggered heightened scrutiny in *Griffin*, *Williams*, and their kin: So long as someone is released from prison at some point, they are not *totally* deprived of their freedom from incarceration.

There will always be a way of redefining the right at stake to argue that a total deprivation has or has not occurred. The Fifth and Eleventh Circuits were right to accuse one another of word play. What the rationale developed in Part II provides is a higher-order principle. The task is not to identify the benefit or liberty at risk, frame it in a

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193 *See Salerno*, 481 U.S. at 750.

194 *See, e.g.*, Dawson v. Bd. of Cnty. Comm'rs, 732 F. App'x 624, 632 (10th Cir. 2018) (finding that the defendant's "right to be free from pretrial detention" was "not a fundamental right").

195 *See Salerno*, 481 U.S. at 750.

196 *See supra* notes 162–65 and accompanying text.

197 *See supra* note 165 and accompanying text (explaining the view of the Eleventh Circuit that defendants "merely [had to] wait some appropriate amount of time to receive the same benefit" (quoting Walker v. City of Calhoun, 901 F.3d 1245, 1261 (11th Cir. 2018))).

certain way, and then decide whether that framing, under the Court's precedent, fits into the Court's wealth-based equal process jurisprudence. Instead, the task is to look for the presence of fundamental rights that only the government can provide and consider whether indigent people are being totally deprived of those rights. That task of course presents challenges of its own—as the previous Section makes clear—but the hard work will take place in *locating* the right, not in deciding whether it is entirely deprived. In this case, after the work of determining that there is a fundamental right to physical liberty, it's easy to see that a jail cell completely deprives defendants of it.

We now have all the pieces to fill in the principle: a fundamental right (the interest in liberty) that only the government can fulfill (in the sense that only the government can lawfully take it away), a state action that puts a price (bail) on that right, and indigent people (criminal defendants) who are thereby entirely deprived of it. Cash bail regimes that lock up low-income defendants before trial must, therefore, be examined under heightened scrutiny.

This Note does not try to reevaluate the records in front of the Eleventh and Fifth Circuits and show exactly how each court ought to have decided in each case under the principle developed in Part II. But the district court opinion that the Fifth Circuit affirmed can be recommended to judges—the court there conducts the careful inquiry that heightened scrutiny demands.

A curious reader may wonder: Does this mean that even the bail regime before the Eleventh Circuit, where indigent defendants had to remain in jail for forty-eight hours before an indigency determination, should be struck down? Some initial points can be made. Under the framework this Note proposes, the fact that the deprivation is "only" forty-eight hours does not itself change the level of scrutiny required—it does not, as the Eleventh Circuit tried to argue, turn this into a merely partial deprivation that does not trigger heightened scrutiny. But the fact remains significant, because it suggests that the policy is already tailored to the government's purpose of ensuring defendants' presence at trial. A court may be justified, then, in holding that such a law passes heightened scrutiny by looking at the tailoring of the law to that interest. But the longer that waiting period is extended, the less tailored it becomes.

Conclusion

In reviewing wealth-based equal process jurisprudence, a core principle emerges: The Supreme Court will apply heightened scrutiny when an indigent person who cannot afford to pay some amount is

directly deprived of a fundamental right that only the government can fulfill. This principle promises to make sense of a doctrine that originated with the Warren Court, has been whittled down, and is under threat today by conservative Justices. As applied to cash bail, it mandates courts to closely scrutinize any law that deprives an indigent person of their pretrial liberty simply because they cannot afford bail.

This requirement would be enormously important for defendants who cannot afford bail. In addition to forcing them into a cell, pretrial detention threatens jobs, child custody arrangements, housing security, and future employment.[198] It has also been proven to affect case outcomes, by incentivizing defendants to accept plea deals and making it harder for them to prepare for trial.[199] Research suggests that all of these adverse consequences attach after only two or three days of pretrial detention,[200] and some studies have suggested that bail is not even necessary to ensure a defendant's presence at trial.[201]

The importance of applying heightened scrutiny to the pretrial detention of indigent defendants is that all of these facts will come into the record and be taken seriously by the court.[202] The effects of pretrial deprivation will help substantiate the liberty interests at stake,

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198 *See* Megan Stevenson & Sandra G. Mayson, *Pretrial Detention and Bail* ("At the individual level, pretrial detention can result in the loss of employment, housing or child custody, in addition to the loss of freedom."), *in* 3 REFORMING CRIMINAL JUSTICE: A REPORT BY THE ACADEMY FOR JUSTICE 21, 22 (Erik Luna, ed., 2017); *see also* Nick Pinto, *The Bail Trap*, N.Y. TIMES MAG. (Aug. 13, 2015), https://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html (describing how pretrial detention places defendants who work in service level positions at risk of losing their jobs); Will Dobbie, Jacob Goldin & Crystal S. Yang, *The Effects of Pretrial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 204 (2018) (showing how pretrial release increased the likelihood of later formal sector employment and the receipt of government benefits).

199 *See* Paul Heaton, Sandra G. Mayson & Megan Stevenson, *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 746 (2017) (concluding, from a statistical study of pretrial detention in Harris County, Texas, that "pretrial detention remains a sizeable predictor of outcomes").

200 *See* Dobbie et al., *supra* note 198, at 212–13 (noting arguments that the "adverse effects of pretrial detention start as early as three days"); CHRISTOPHER T. LOWENKAMP, MARIE VANNOSTRAND & ALEXANDER HOLSINGER, LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 11, 19–20 (2013) (showing that defendants detained even two to three days were less likely to show up for court dates and more likely to engage in new criminal activity).

201 *See, e.g.*, Jason Tashea, *Text-Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, A.B.A. J. (July 17, 2018, 7:10 AM), https://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail (suggesting that text message reminders might do just as well at ensuring a defendant's presence at trial).

202 For a more spelled-out version of this argument, see Funk, *supra* note 25 at 1114 ("[This] is the fundamental crisis of bail: If these studies make their way into the factual record of a federal court applying a searching level of review, the most common American bail systems, which casually impose detention for failure to put up secured money, are almost certain to fall.").

and the existence of alternatives to cash bail bear on how narrowly tailored the law is. While wealth-based equal process is not the only tool available in the fight against cash bail, it is a crucial one. The doctrine brings with it a reminder of the Court's longstanding commitment to equal justice and places cash bail at its heart.