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UNEQUAL INEQUALITIES? POVERTY, SEXUAL ORIENTATION, AND THE DYNAMICS OF CONSTITUTIONAL LAW

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As we think about the future role the judicial branch will play in our governance, we might consider one important function of the courts: addressing claims of constitutional inequality. In this Article, I explore this question by juxtaposing two claims of inequality that have been pressed by advocates—one concerning sexual orientation, the other concerning poverty. These two contexts are undoubtedly different in ways both numerous and significant. The lesbian, gay, bisexual, and transgender (LGBT) rights movement is today, while the constitutional movement for the rights of the poor was yesterday.[1] The LGBT movement has won major Supreme Court victories in its biggest cases of the last generation—*Romer v. Evans*,[2] *Lawrence v. Texas*,[3] and, most recently, *United States v. Windsor*,[4] and it seems to be on a constitutional roll of sorts. The constitutional movement for the poor, by contrast, won some significant Supreme Court victories in the 1960s and early 1970s in cases like *Harper v. Virginia Board of Elections*,[5] *Shapiro v. Thompson*,[6] and *Goldberg v. Kelly*,[7] but then lost its most ambitious claims in *Dandridge v. Williams*[8] and *San Antonio Independent School*

 William Nelson Cromwell Professor of Law, Stanford Law School. I owe special thanks to Juliet Brodie, who is deeply knowledgeable and wise about law and poverty and has helped me think through many of the issues addressed here. I also thank Lydia Gray and Matt Higgins for excellent research assistance. I benefited greatly from the lively discussions at the symposium and from a faculty workshop at Stanford Law School.

[1] Issues of "income inequality" have been on the more recent public agenda, but these questions have typically been framed in terms of disparities between and among those in different economic strata, as opposed to a concern for the poorest among us. *See generally, e.g.*, JOSEPH E. STIGLITZ, THE PRICE OF INEQUALITY (2013) (arguing that the American economic system creates inequality and threatens democracy).

[2] 517 U.S. 620 (1996) (striking down a broadly drawn anti-gay-rights initiative).

[3] 539 U.S. 558 (2003) (striking down a ban on consensual same-sex sodomy).

[4] 133 S. Ct. 2675 (2013) (striking down a portion of the federal Defense of Marriage Act).

[5] 383 U.S. 663 (1966) (striking down a state poll tax).

[6] 394 U.S. 618 (1969) (striking down a one-year waiting period for welfare benefits imposed on new state residents).

[7] 397 U.S. 254 (1970) (treating the receipt of welfare benefits as a property interest and requiring a hearing before termination of those benefits).

[8] 397 U.S. 471 (1970) (upholding a state cap on welfare benefits to families over a certain size, even though larger families received fewer benefits).

District v. Rodriguez.[9] It never really recovered. Indeed, it is not uncommon to hear laments like the one sounded in Justice Marshall's dissent in *James v. Valtierra*,[10] which excoriated the majority for the toothless standard of review it applied and suggested that equal-protection claims made on behalf of poor people receive "no scrutiny whatsoever."[11]

The differences between these two movements, moreover, go well beyond matters of timing and win-loss record. One difference pertains to the claims themselves. Any ambitious equality-based challenge in the realm of poverty poses a fundamental challenge to the liberal state and the market. By contrast, the constitutional movement for LGBT rights has largely concerned formal equality and can, at least as framed by some, coexist easily with a libertarian agenda.[12] Another core difference relates to the line between "affirmative rights" and "negative liberties."[13] This line is not as bright as it is sometimes made out to be. Some opponents of marriage equality, for example, argue that according a right to same-sex marriage is a far cry from invalidating laws criminalizing same-sex intimacy and unjustifiably crosses a line into "affirmative recognition."[14] Even granting that there is some malleability in the affirmative/negative distinction, poverty- and sexual-orientation-based equality claims do seem to straddle a line of that sort, with robust constitutional protections against poverty more consistent with the kind of affirmative, social democratic norms that have never had much uptake in this country.

There are also important distinctions involving what courts might be called upon to do in order to remedy these two kinds of inequality. While the institutional legitimacy of courts invalidating bans on same-sex marriage and same-sex sodomy has been contested, the remedy for those constitutional violations is time limited

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[9] 411 U.S. 1 (1973) (rejecting a challenge to a state education funding formula that disadvantaged the poorest districts).

[10] 402 U.S. 137 (1971) (Marshall, J., dissenting).

[11] *Id.* at 145 (Marshall, J., dissenting); *see also* Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, and Dialogic Default*, 35 FORDHAM URB. L.J. 629 (2008) (arguing that the Supreme Court has failed to apply meaningful constitutional protections to the poor).

[12] *See, e.g.*, Dale Carpenter, *Is* Lawrence *Libertarian?*, 88 MINN. L. REV. 1140, 1140–41 (2004) (noting that many libertarians view *Lawrence* as "a libertarian revolution").

[13] *See generally* Helen Hershkoff, *"Just Words": Common Law and the Enforcement of State Constitutional Social and Economic Rights*, 62 STAN L. REV. 1521, 1522 (2010) (exploring basis for "so-called positive rights [that] embrace guarantees to goods and services such as public schooling, health care, and a clean environment); Robin West, *Unenumerated Duties*, 9 U. PA. J. CONST. L. 221, 221 (2006) (contrasting "negative duties to restrain from acting" with "positive, affirmative duties to pass laws so as to achieve various welfarist ends").

[14] These arguments are addressed, for example, in David D. Meyer, *A Privacy Right to Public Recognition of Family Relationships? The Cases of Marriage and Adoption*, 51 VILL. L. REV. 891, 892 (2006) and Cass R. Sunstein, *Liberty After* Lawrence, 65 OHIO ST. L.J. 1059, 1073–75 (2004).

and discrete,[15] and there are not nearly the layers of remedial complexity that go along with attempts, in the name of constitutional principle, to equalize school funding or guarantee minimum provision. When combined with what some view as the illegitimate, "zero sum" aspect of redistributive efforts by governmental actors, the particular resistance that courts might encounter in more aggressively addressing poverty comes clearly into view.

All of these differences are readily apparent and significant. They suggest some important reasons why the Supreme Court has done far less to address inequality that is based on wealth compared to that which is based on sexual orientation. Nevertheless, despite—or perhaps because of—these differences, I suggest that we can draw some larger insights about the dynamics of courts and constitutional inequality claims by thinking about these sets of constitutional claims in relation to one another. After reviewing the history, I will suggest that the contrast underscores, and gives some shape and texture, to three such dynamics: the different ways that politics and public opinion can shape judicial decision making, the increasingly significant role of state courts in forging constitutional norms, and both the failures and the fading of the traditional tiers of equal-protection scrutiny.

I. HISTORY OF THE CONSTITUTIONAL CLAIMS

The history of the constitutional movement for LGBT equality is a fairly recent one that continues to unfold. For our purposes, the trajectory can be traced fairly quickly.[16] That is far less true for the history of poverty-related claims, and I will accordingly lay out the history of that movement, and the key Supreme Court decisions, in more detail.

A. Sexual Orientation and Constitutional Equality

The first major Supreme Court decision on LGBT equality came some seventeen years after the Stonewall uprising in New York, an event often taken to have inaugurated an organized national movement for LGBT equality. That first case was *Bowers v. Hardwick*,[17] which turned on liberty, not equal protection. But as has long been true in the realm of sexual orientation, liberty and equality claims

[15] This was somewhat less true when civil unions were a more prominent option than they seem to be today. *See* Baker v. State, 744 A.2d 864 (Vt. 1999) (finding a state constitutional violation in restricting marriage to opposite-sex couples, but allowing the legislature to remedy the violation by enacting comprehensive civil unions); *see also* Lewis v. Harris, 908 A.2d 196 (N.J. 2006) (holding the same as *Baker*).

[16] More detailed histories can be found in MICHAEL J. KLARMAN, FROM THE CLOSET TO THE ALTAR: COURTS, BACKLASH, AND THE STRUGGLE FOR SAME-SEX MARRIAGE, at x–xii (2013); Jane S. Schacter, *Courts and the Politics of Backlash: Marriage Equality Litigation, Then and Now*, 82 SO. CAL. L. REV. 1153 (2009).

[17] 478 U.S. 186 (1986).

are intertwined in many ways. Certainly *Bowers*, upholding the constitutionality of a Georgia law criminalizing sodomy, powerfully implicated the equality of gay people and was criticized for the inequality it seemed to accept.[18]

Bowers was followed by a pair of cases that bore on gay equality in a different way. These were cases reversing the decision of a state court holding that a state or local antidiscrimination law protected the right of gay persons to participate in a Boston St. Patrick's Day parade or the Boy Scouts. First in *Hurley v. Irish-American Gay, Lesbian & Bisexual Group of Boston*,[19] then in *Boy Scouts of America v. Dale*,[20] the Supreme Court upheld claims that those who wished to exclude gay participants were protected by the First Amendment. In between these cases, however, the constitutional tide began to turn. In *Romer v. Evans*, the Court struck down a Colorado constitutional amendment that banned any non-discrimination protection for lesbian, gay, and bisexual persons in that state.[21] The decision was doctrinally cryptic. It appeared to apply a highly unorthodox—and unexplained—version of rational-basis review, and it was silent on the continuing fate of *Bowers*. Nevertheless, it reflected the first application of the Equal Protection Clause to protect LGBT persons.

Seven years after *Romer*, *Lawrence v. Texas* expressly overruled *Bowers* and wove into its due-process analysis ideas traditionally associated with equality—ideas about dignity, respect, and the injustice of stigma.[22] When *Lawrence* was decided in 2003, a heated debate about same-sex marriage was well underway in the country, having started a decade earlier when the Hawaii Supreme Court issued an unexpected decision signaling an openness to a right of same-sex couples to marry under that state's constitution.[23] In its language, however, *Lawrence* attempted to steer clear of the marriage issue and limit its focus to laws banning consensual adult sodomy.[24] Ten years after Lawrence, the Court squarely addressed same-sex marriage for the first time.[25] By this time, several states had legalized same-sex marriage, and public opinion had steadily grown to be significantly more supportive of marriage equality than it was when *Lawrence* was decided.[26] In *United States v. Windsor*,[27] the Court struck down the portion of the federal Defense of Marriage Act (DOMA) that barred the federal government from

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[18] *See generally, e.g.*, Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 HARV. C.R.-C.L. L. REV. 103 (2000).

[19] 515 U.S. 557 (1995).

[20] 530 U.S. 640 (2000).

[21] 517 U.S. 620, 635 (1995).

[22] 539 U.S. 558, 578 (2002).

[23] KLARMAN, *supra* note 16, at xi, 48, 75.

[24] 539 U.S. at 578 (noting that the case did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter").

[25] *Windsor*, 133 S. Ct. at 2693 (striking down the federal Defense of Marriage Act).

[26] *See generally* Jane S. Schacter, *Making Sense of the Marriage Debate*, 91 TEX. L. REV. 1185 (2013).

[27] 133 S. Ct. 2675 (2013).

recognizing any same-sex marriages. The opinion relied on the Equal Protection Clause and used the doctrine of federalism as a piece of supporting evidence for its belief that DOMA violated constitutional equality norms.[28] Noting that the federal government had historically accepted a state's definition of marriage, the Court found that the government's decision to abandon that practice in this single context supported an inference of discrimination.[29] At the same time the Court decided *Windsor*, it declined to rule on the merits of *Hollingsworth v. Perry*,[30] a challenge to California's Proposition 8 ("Prop 8"). The state's voters approved Prop 8 in 2008, and the measure wiped out a state supreme court decision in favor of marriage equality.[31] Prop 8 was struck down in the federal district court, but the Supreme Court found that because the governor and the attorney general refused to appeal the district court's decision, the petitioners did not have standing.[32] Thus, the decision of the district court stood.

Since *Windsor* and *Perry* came down in June 2013, many more states have legalized same-sex marriage, and many more judges all over the country have struck down state laws denying marriage equality.[33] Given the sheer number of cases all over the country now challenging restrictive marriage laws, it seems inevitable that another case on same-sex marriage will be back in the Supreme Court before too long.

B. Poverty and Constitutional Claims

If the discussion is framed in terms of the *movements* for LGBT and poor peoples' rights, a reader could be forgiven for asking about the latter: what movement? While there are active national movements today in some areas that I will discuss—the adequacy of school funding being perhaps the most salient[34]—one is hard-pressed to identify any ongoing, overarching social movement seeking equality for the poor as a class, much less one with an active constitutional

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[28] *Id.* at 2692–93.

[29] *See id.* at 2693.

[30] 133 S. Ct. 2652 (2013).

[31] *Id.* at 2659.

[32] *Id.* at 2668.

[33] Masuma Ahuja et al., *The Changing Landscape on Same-Sex Marriage*, WASH. POST, http://www.washingtonpost.com/wp-srv/special/politics/same-sex-marriage/ (last updated May 15, 2014); Richard Socarides, *The Growing Impact of the Supreme Court's Gay-Marriage Ruling*, THE NEW YORKER (Jan. 27, 2014), http://www.newyorker.com/online/blogs/newsdesk/2014/01/the-widening-impact-of-the-supreme-courts-gay-marriage-ruling.html.

[34] Another example is the national "Civil Gideon" movement seeking improved access to justice for the poor in the context of civil claims. For background on both, see JULIET M. BRODIE ET AL., POVERTY LAW: POLICY AND PRACTICE (2014).

docket.[35] This is clearest in the context of the federal courts.[36] Over the last few decades, while an array of cases relating to LGBT inequality have regularly commanded the headlines,[37] there have been precious few Supreme Court rulings on constitutional inequality claims pressed by poor persons qua poor persons, and none that got much national attention or were connected to an ongoing social movement. Any number of major decisions over that time period may, of course, be said to have powerful implications for low-income persons in contexts like voting rights,[38] criminal law,[39] immigration,[40] and congressional power,[41] to name

[35] For an insightful analysis on the decline of constitutional advocacy on behalf of poor people, see Julie A. Nice, *Whither the Canaries: On the Exclusion of Poor People from Equal Constitutional Protection*, 60 DRAKE L. REV. 1023, 1029–33 (2012), and Nice, *supra* note 11, at 629–36.

[36] For a discussion of constitutional claims in state courts, see *infra* Part II.B.

[37] In the last twenty years, for example, the Court has heard and decided eight major cases focusing on a constitutional issue related to LGBT equality—either a constitutional claim protecting LGBT's or a constitutional claim seeking to limit the nondiscrimination protection afforded to LGBT's: Hollingsworth v. Perry, 133 S. Ct. 2652 (2013); United States v. Windsor, 133 S. Ct. 2675 (2013); Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971 (2010); Rumsfeld v. Forum for Academic & Institutional Rights, Inc. 547 U.S. 47 (2006); Lawrence v. Texas, 539 U.S. 558 (2003); Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000); Romer v. Evans, 517 U.S. 620 (1996); Hurley v. Irish-Am. Gay, Lesbian, & Bisexual Grp. of Boston, Inc., 515 U.S. 557 (1995).

[38] *See generally, e.g.*, Shelby Cnty. v. Holder, 133 S. Ct. 2612 (2013) (striking down section 4 of the Voting Rights Act); Crawford v. Marion Cnty. Election Bd., 553 U.S. 181 (2008) (upholding a state law requiring registered voters to present a valid government-issued photo ID before casting a ballot).

[39] *See generally, e.g.*, Salinas v. Texas, 133 S. Ct. 2174 (2013) (holding that a state may use silence in response to questioning as evidence of guilt in a criminal trial if the defendant fails to expressly invoke his Fifth Amendment privilege); Stephen B. Bright, *Neither Equal nor Just: The Rationing and Denial of Legal Services to the Poor When Life and Liberty Are at Stake*, 1997 ANN. SURV. AM. L. 783, 816 (1997) (arguing that Supreme Court cases subsequent to *Gideon* have "[made] a mockery of the right to counsel"); Richard Klein, *The Emperor* Gideon *Has No Clothes: The Empty Promise of the Constitutional Right to Effective Assistance of Counsel*, 13 HASTINGS CONST. L.Q. 625, 640–41 (1986) (discussing Supreme Court decisions that have limited claims based on ineffective assistance of counsel).

[40] *See generally, e.g.*, Arizona v. United States, 132 S. Ct. 2492 (2012) (invalidating a state law that authorized local law enforcement officers to enforce national immigration laws); Plyler v. Doe, 457 U.S. 202 (1982) (striking down a state law denying education funding for undocumented immigrant children).

[41] *See generally, e.g.*, Nat'l Fed. of Indep. Bus. v. Sebelius, 132 S. Ct. 2566, 2608 (2012) (holding that Commerce Clause did not give Congress authority to pass the Affordable Care Act under the Commerce Clause, and that Spending Clause did not authorize expansion of Medicaid in that Act)); United States v. Morrison, 529 U.S. 598 (2000) (striking down a key provision of the Violence Against Women Act).

a few. But I can count only two Supreme Court rulings that have squarely presented constitutional equality claims focused on poverty.[42]

It was not ever thus. In the unlikely event that I conceived of this paper topic in 1967, the "what constitutional movement" question would have been lodged in the opposite direction. The Stonewall riots did not even kick off the modern gay rights movement until 1969, and the Supreme Court's most recent pronouncement on homosexuality, in a statutory interpretation case, gave no hint that change was on the judicial or political agenda. In *Boutilier v. INS*,[43] the Court upheld the INS's deportation of a gay man under a statutory provision barring entry to all immigrants "afflicted with psychopathic personality."[44] The agency interpreted that language to include all "homosexuals and sex perverts."[45] Ignoring affidavits from psychiatrists who knew Clive Boutilier and attested to the fact that he was well adjusted, the Court's opinion concluded that "Congress used the phrase 'psychopathic personality' not in the clinical sense, but to effectuate its purpose to exclude from entry all homosexuals and other sex perverts."[46]

By contrast, 1967 was a time of great activity, and seemed like one of great promise, for a movement asserting the rights of the poor. Michael Harrington's *Other America* was published a few years earlier, in 1962. President Lyndon Johnson had declared the War on Poverty in his State of the Union address in 1964, and this was followed by enactment of a number of significant pieces of federal antipoverty legislation in rapid succession. In the two years following President Johnson's address, he aggressively supported, and Congress passed, for example, the Economic Opportunity Act of 1964,[47] which created an Office of Economic Opportunity and led to creation of programs such as VISTA, the Job Corps, the predecessor to the Legal Services Corporation, Head Start, and many others; the Social Security Amendments of 1965,[48] creating Medicaid and Medicare; the Elementary and Secondary Education Act of 1965,[49] funding primary and secondary education and addressing educational access; and legislation creating the Department of Housing and Urban Development,[50] among others. And, in an arresting contrast to the legislative politics of today, all this (and

[42] *See generally* Saenz v. Roe, 526 U.S. 489 (1999) (invalidating a state law where the welfare benefits received by new residents were limited for one year to the level paid in the former state of residence); M.L.B. v. S.L.J., 519 U.S. 102 (1996) (guaranteeing a trial transcript without fee in appeal on the termination of parental rights).

[43] 387 U.S. 118 (1967).

[44] *Id.* at 118.

[45] *Id.* at 121.

[46] *Id.* at 122.

[47] Pub. L. No. 88-452, 78 Stat. 508.

[48] Pub. L. No. 89-97, 79 Stat. 375.

[49] Pub. L. No. 89-10, 79 Stat. 27.

[50] Housing and Urban Development Act of 1965, Pub. L. No. 89-117, 79 Stat. 451.

more) was done at the same time Congress was enacting the landmark Civil Rights Act of 1964[51] and Voting Rights Act of 1965.[52]

Organized movements involving poverty activists, and various political strategies seeking fundamental change, were in full swing.[53] Both lawyers and law professors were actively engaged with these issues in this time frame. Welfare rights lawyers worked in coordinated (if not always smooth) advocacy for what lawyer Edward Sparer called a "right to live"—that is, guaranteed minimum benefits.[54] Charles Reich's *The New Property* appeared in the *Yale Law Journal* in 1964.[55] Well known for laying the groundwork for an expanded conception of property that triggered due-process protections, it also contained arguments that could be marshaled in support of an affirmative entitlement to subsistence benefits.[56] Frank Michelman devoted his 1969 foreword to the *Harvard Law Review*'s Supreme Court issue to detailing the case for a minimum right of subsistence, grounded in the Constitution.[57] He set out a theory that focused on deprivation and minimal provision rather than equality per se, but his focus was squarely on meaningfully addressing the plight of poor people.

The Supreme Court had entered the arena as well. Building on a few key prior cases addressing the rights of indigent people in the context of interstate migration[58] and access to the courts,[59] a six-justice majority of the Supreme Court

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[51] Pub. L. No. 88-352, 78 Stat. 244.

[52] Pub. L. No. 89-110, 79 Stat. 445.

[53] *See generally* Nat'l Welfare Rights Org. v. Wyman, 304 F. Supp. 134 (E.D.N.Y. 1969) (challenging a state law that substantially reduced welfare benefits); RICHARD A. CLOWARD & FRANCES FOX PIVEN, POOR PEOPLE'S MOVEMENTS (1977); RICHARD A. CLOWARD & FRANCES FOX PIVEN, REGULATING THE POOR: THE FUNCTIONS OF PUBLIC WELFARE (1971); Richard A. Cloward & Frances Fox Piven, *The Weight of the Poor: A Strategy To End Poverty*, THE NATION, May 2, 1966, at 510 (articulating the "flood the system" strategy, which sought to hasten social and economic change by overwhelming the government bureaucracy with impossible demands).

[54] Edward V. Sparer, *The Right to Welfare*, *in* THE RIGHTS OF AMERICANS: WHAT THEY ARE—WHAT THEY SHOULD BE 65**,** 83–84 (Norman Dorsen ed., 1971) (arguing that constitutional "ground rules" guarantee a "right to live"). This movement is chronicled at length in MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960–1973 (1993); *see also* Edward S. & Jean C. Cahn, *The War on Poverty: A Civilian Perspective*, 73 YALE L.J. 1317 (1964) (calling for neighborhood lawyers to play an active role in the war on poverty).

[55] 73 YALE L.J. 733 (1964).

[56] *See* ELIZABETH BUSSIERE, (DIS)ENTITLING THE POOR: THE WARREN COURT, WELFARE RIGHTS, AND THE AMERICAN POLITICAL TRADITION 97 n.29 (1997).

[57] *See generally* Frank I. Michelman, *Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969). For a contemporary reflection on, and reframing of, Michelman's thesis, see generally Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 STAN. L. REV. 203 (2008).

[58] *See generally* Edwards v. California, 314 U.S. 160 (1941) (striking down a law criminalizing the transportation of indigents into California).

in 1966 struck down Virginia's poll tax and used language strongly suggesting that it was poised to hold wealth a suspect classification, as it had done for race. In *Harper v. Virginia Board of Elections*,[60] the Court said:

> It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. *Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored.*[61]

Despite this language, *Harper*'s other shoe never dropped. The Court did not go on to hold wealth a suspect classification. It did, however, take further steps toward according significant constitutional protection to the poor with two important decisions, both written by Justice Brennan.

One was *Shapiro v. Thompson*,[62] decided in 1969, which held that Connecticut's one-year residency requirement for welfare benefits violated the Equal Protection Clause because it interfered with the "fundamental right of interstate movement" and could not be justified by its apparent goal to discourage indigent persons from moving to the state.[63] Although the doctrinal focus of the case was the interest in interstate mobility, the reasoning emphasized the "creat[ion of] two classes of needy resident families indistinguishable from each other except that one is composed of residents who have resided [in the state] a year or more, and the second of residents who have resided [in the state] less than a year."[64] The Court further held that this was no basis for denying "welfare aid upon which may depend the ability of the families to obtain the very means to subsist—food, shelter, and other necessities of life."[65]

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[59] *See generally* Griffin v. California, 380 U.S. 609 (1965) (striking down a law preventing indigent criminal defendants from acquiring transcripts for appeal); Douglas v. California, 372 U.S. 353 (1963) (striking down a law denying court-appointed counsel on appeal from conviction). The "Griffin-Douglas" doctrine has spawned a jurisprudence of its own, permitting the government to require some fees, while invalidating others. It is grounded in a blend of equal-protection and due-process norms. The 1963 decision in *Gideon* was not cited by the Court in *Harper* and was not relevant as a doctrinal matter, but it was as important in terms of impact on poor people as anything else that happened in this time period.

[60] 383 U.S. 663 (1966).

[61] *Id.* at 668 (emphasis added) (citations omitted).

[62] 394 U.S. 618 (1969).

[63] *Id.* at 638.

[64] *Id.* at 627.

[65] *Id.*

Welfare rights advocates who were actively pursuing the goal of a "right to live" closely watched *Shapiro*.[66] The case had been set for reargument in 1968 after the Court found itself deadlocked. Archibald Cox was recruited to take over the case from the young welfare rights attorneys who had litigated it and argued it the first time. The decision generated a "euphoric reception"[67] from welfare lawyers because it brought the concept of fundamental rights, and the strict scrutiny triggered by such rights, to the realm of poverty law. Welfare lawyers thought it might be a key first step on the way to the core right to subsistence. In this sense, *Shapiro* suggested themes that Michelman would press in his foreword, and, in fact, he found support for his argument in that opinion.[68]

The other major victory came the next year when the Court decided *Goldberg v. Kelly*,[69] a canonical case holding welfare benefits to be property interests for purposes of the Due Process Clause, and requiring welfare agencies to provide a hearing of some kind before terminating benefits. Though a procedural and not substantive case, the idea of benefits as a property interest, along with some of the language in *Goldberg*, provided further encouragement to the welfare rights movement that it was on its way to more substantive constitutional protection. Consider some of the language in Justice Brennan's opinion about poverty—language virtually unthinkable today:

> From its founding, the Nation's basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. This perception, against the background of our traditions, has significantly influenced the development of the contemporary public assistance system. Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. At the same time, welfare guards against the societal malaise that may flow from a widespread sense of unjustified frustration and insecurity. Public assistance, then, is not mere charity, but a means to "promote the general Welfare, and secure the Blessings of Liberty to ourselves and our Posterity." The same governmental interests that counsel the provision of welfare, counsel as well its uninterrupted provision to those eligible to receive it; pre-termination evidentiary hearings are indispensable to that end.[70]

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[66] *See supra* note 54 and accompanying text.
[67] DAVIS, *supra* note 54, at 80.
[68] Michelman, *supra* note 57, at 40–47.
[69] 397 U.S. 254 (1970).
[70] *Id.* at 264–65 (citations omitted).

Soon after *Goldberg*, however, the air seemed to go out of the balloon. Two subsequent cases best capture what might now be seen as the turning point.[71] The first, *Dandridge v. Williams*,[72] was decided literally weeks after *Goldberg* and rejected a challenge to a state's maximum family benefit—a ceiling imposed irrespective of the number of dependent children in the family. The second, *San Antonio Independent School District v. Rodriguez*,[73] was decided in 1973 and rejected a constitutional challenge to the Texas school-funding scheme in which poorer districts received a fraction of the funding provided to more affluent ones.

Both decisions came down during a time of change for the Court. Four appointees of President Richard Nixon took their seats between 1969 and 1971. The first—Justice Burger, replacing Justice Warren—was on the Court for both *Dandridge* and *Rodriguez* and voted with the majority in both cases. The remaining three—Justice Blackmun (replacing Justice Fortas), Justice Powell (replacing Justice Black), and Justice Rehnquist (replacing Justice Harlan)—were on the Court for *Rodriguez*. All voted to reject the constitutional claim, and Justice Powell wrote the majority opinion in *Rodriguez*. It is an open question how their predecessors would have voted in these cases, but there is little doubt that these appointments moved the Court in a more conservative direction, and that the rulings were broadly in sync with the judicial views pressed by President Nixon in his campaigns.

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[71] For a fuller set of relevant cases before and after this time, see generally Plyler v. Doe, 457 U.S. 202 (1982) (striking down a state statute that denied public education to undocumented immigrant children); Lassiter v. Dep't. of Soc. Serv., 452 U.S. 18 (1981) (holding that states are not required to provide appointment of counsel for indigent parents in every parental-status termination proceeding); Mem'l Hosp. v. Maricopa Cnty., 415 U.S. 250 (1974) (striking down a state law requiring one year of residence as a condition of receiving nonemergency hospitalization or medical care at the county's expense); Ross v. Moffitt, 417 U.S. 600 (1974) (holding that the rule requiring appointment of counsel for indigent state defendants on their first appeal would not be extended to discretionary state appeals); United States v. Kras, 409 U.S. 434 (1973) (upholding a statute that required petitioners in bankruptcy proceedings to pay court fees); Ortwein v. Schwab, 410 U.S. 656 (1973) (upholding a court filing fee levied on poor persons seeking review of decisions by the state welfare division reducing their welfare payments); Lindsey v. Normet, 405 U.S. 56 (1972) (rejecting due process challenge to a state procedure for eviction proceedings, while striking down a double bond requirement under equal protection); Jefferson v. Hackney, 406 U.S. 535 (1972) (upholding state's differential methods for funding in different benefit programs); Boddie v. Connecticut, 401 U.S. 371 (1971) (holding due process prohibits a state from denying access to courts for marriage dissolution solely due to an inability to pay court fees); James v. Valtierra, 402 U.S. 137 (1971) (upholding a state law requiring voter approval for housing projects); King v. Smith, 392 U.S. 309 (1968) (holding that aid dispersed under the Aid to Families with Dependent Children could not be withheld because a "substitute father" visited the family on weekends).

[72] 397 U.S. 471 (1970).

[73] 411 U.S. 1 (1973).

Whereas *Goldberg* was about welfare procedures, *Dandridge* was about substantive benefits, and it was clear from the *Dandridge* opinion that the Court saw the two issues quite differently. The brief filed on behalf of the welfare recipients in *Dandridge* sought strict scrutiny, citing cases involving both fundamental rights and suspect classifications.[74] Justice Stewart's majority opinion in *Dandridge* emphatically rejected that idea. Although there was no analysis of the factors in footnote four of *United States v. Carolene Products*[75] that have come to be part of heightened-scrutiny doctrine,[76] Justice Stewart underscored that equal protection claims involving welfare policy would receive the lowest form of scrutiny. Noting that "the intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court,"[77] the opinion said that:

> the invalidation of state economic or social regulation as "overreaching" would be far too reminiscent of an era when the Court thought the Fourteenth Amendment gave it power to strike down state laws "because they may be unwise, improvident, or out of harmony with a particular school of thought."[78]

The reference to the *Lochner* era was clear, and in case there remained any doubt, the Court made its bottom line on standard of review explicit:

> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard.[79]

The lawyers working for the welfare rights movement had hoped that *Dandridge* would build on *Shapiro* and provide another meaningful step toward the "right to

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[74] Brief for Appellees, Dandridge v. Williams, 397 U.S. 471 (1970) (No. 131), 1969 WL 119896, at *44.

[75] 304 U.S. 144, 152 n.4 (1938).

[76] *See* Jane S. Schacter, *Ely at the Altar: Political Process Theory Through the Lens of the Marriage Debate*, 109 MICH. L. REV. 1363, 1373 (2011) (noting that Graham v. Richardson in 1971 was the first time the Court expressly linked strict scrutiny to footnote four).

[77] *Dandridge*, 397 U.S. at 487.

[78] *Id.* at 484 (quoting Williamson v. Lee Optical of Oklahoma, Inc., 348 U.S. 483, 488 (1955)).

[79] *Id.* at 485.

live" they had set as their goal. Instead, they were handed what they took to be an "unmitigated loss,"[80] one that decisively undercut these hopes.

The second major defeat came in 1973, when the Court, in *Rodriguez*, rejected a challenge to the Texas school financing system. That system relied heavily on local property taxes to fund education. The funding plan produced large interdistrict disparities in per-pupil educational spending, and there was a large gap between property-rich school districts and the property-poor school districts in which the Mexican American plaintiffs lived. The plaintiffs asserted two claims, each inspired to some degree by *Harper*. The first was that the system amounted to unconstitutional wealth discrimination and should be struck down, using strict scrutiny, as an impermissible classification based on wealth.[81] The second was that it deprived students of their fundamental right to an education[82]—a right that, like the right to vote protected in *Harper*, could be seen as "preservative of other basic civil and political rights."[83]

When the *Rodriguez* case was filed in 1968, the idea of challenging school-funding schemes was still relatively new. An influential article authored by three law professors—John Coons, William Clune, and Stephen Sugarman—appeared the next year and argued for a principle of wealth neutrality in state educational finance systems.[84] Their proposed principle was designed in anticipation of institutional objections to judicial involvement in this sphere. It proposed to bar as unconstitutionally discriminatory the use of local school-district wealth as a basis for funding, while leaving states to determine another way to structure their school-finance plans.

When the *Rodriguez* litigation began, lawsuits were also initiated in California and Illinois. The California litigation produced a major victory when the California Supreme Court, in the first of many chapters of *Serrano v. Priest*,[85] struck down California's school funding system. Applying both the Equal Protection Clause in the Fourteenth Amendment and the analogous state constitutional provision, the court found wealth a suspect classification and also identified a fundamental interest in education that independently triggered strict scrutiny.[86] The decision attracted national attention and inspired new constitutional litigation in state courts around the country. And, only a few months after *Serrano*, the three-judge court in

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[80] DAVIS, *supra* note 54, at 132.

[81] Brief for Appellees at 8, 37–39, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) (No. 71-1332).

[82] *Id.*

[83] Harper v. Va. Bd. of Elections, 383 U.S. 663, 667 (1966).

[84] John E. Coons et al., *Educational Opportunity: A Workable Constitutional Test for State Financial Structures*, 57 CALIF. L. REV. 305, 419–20 (1969).

[85] 487 P.2d 1241 (1971).

[86] *Id.* at 1250, 1258.

Rodriguez v. San Antonio Independent School District[87] followed the California Supreme Court's blueprint in striking down the Texas system.[88]

These claims, however, were all rejected by the Supreme Court.[89] *Rodriguez* is often cited for the proposition that wealth is not a suspect classification, but that is not quite what Justice Powell's opinion said.[90] The Court found that the Texas system did not classify based on wealth at all, because of the possibility that poorer citizens could live in districts with richer tax bases (such as districts with industrial property).[91] Still, it is clear enough from Justice Powell's papers that he had the larger issue in mind. His notes include this provocative reference: "In a free enterprise society . . . we could hardly hold that wealth is *suspect*. This is communist doctrine but is not even accepted (except in a limited sense) in socialist countries."[92]

Justice Powell, who had served on local and state boards of education in Virginia, also rejected the idea that there is any federal constitutional right to education and appealed to the localist tradition in education.[93] He also emphasized that the Texas funding system, in any event, did not absolutely deprive any student of access to school.[94] In this way, the *Rodriguez* ruling was a powerful repudiation of core arguments in the constitutional movement to address poverty.

II. WHAT THE CONTRASTING HISTORIES SUGGEST ABOUT THE DYNAMICS OF CONSTITUTIONAL EQUALITY CLAIMS

A. Politics, Public Opinion, and Constitutional Law

Normative disputes about constitutional interpretation aside, it is relatively uncontroversial to say that the Supreme Court has often moved in sync with public opinion. This is not true for all constitutional issues, but it can be seen in the realm

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[87] 337 F. Supp. 280 (W.D. Tex. 1971).

[88] *Id.* at 285–86.

[89] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29, 37 (1973).

[90] For a careful tracing of how the Court's failure to endorse the proffered wealth-as-a-suspect-classification claim morphed, over time, into the erroneous idea that the Court had considered and explicitly *rejected* that claim, see Nice, *supra* note 35, at 1029–49.

[91] *Rodriguez*, 411 U.S. at 23 ("[T]here is reason to believe that the poorest families are not necessarily clustered in the poorest property districts.").

[92] Richard Schragger, San Antonio v. Rodriguez *and the Legal Geography of School Finance Reform*, *in* CIV. RTS. STORIES 85, 99 (Myriam E. Gilles & Risa L. Goluboff eds., 2008).

[93] *Rodriguez*, 411 U.S. at 40 ("We are asked to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests. In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences . . . .").

[94] Deprivation of access to school was absolute in the later decision of Plyler v. Doe, 457 U.S. 202 (1982).

of various debates about inequality.[95] This is not a new or revolutionary idea—certainly not to political scientists[96]—but it has become more mainstream in legal scholarship over time.[97] It becomes far more controversial when stated in terms of the causal effect of public opinion on the Court, or vice versa, but the descriptive alignment on many issues is there to be seen.

To be sure, there will always be controversies about what polls measure and how to conceive of the relevant public opinion. Nevertheless, there is evidence of alignment between public attitudes and the Supreme Court's major decisions on LGBT issues. If one consulted surveys of opinion on the issues decided in *Romer* in 1996 (banning antidiscrimination protections for LGBTs),[98] *Lawrence* in 2003 (criminalizing sodomy),[99] and *Windsor* in 2013 (same-sex marriage),[100] one would

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[95] For an issue-by-issue breakdown that shows different patterns of public opinion support for constitutional decisions in different contexts, see Nathaniel Persily, *Introduction*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 3, 5–7 (Nathaniel Persily et al. eds., 2008).

[96] *See generally* Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court as a National Policy-Maker*, 6 J. PUB. L. 279 (1957) (explaining widely held view among political scientists that the Supreme Court is a national policy maker).

[97] *See, e.g.*, BARRY FRIEDMAN, THE WILL OF THE PEOPLE: HOW PUBLIC OPINION HAS INFLUENCED THE SUPREME COURT AND SHAPED THE MEANING OF THE CONSTITUTION 381 (2009) ("The justices in *Brown v. Board of Education* argued they were protecting constitutional rights, but once again it was evolving national views that supported the Court's judgment and enabled its enforcement."); Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 67 (1996) ("By the time *Roe* was decided in 1973, public opinion on the abortion issue had already been dramatically transformed . . . . Seventeen states had recently passed legislation liberalizing their abortion regulations."). *Cf.* Robert Post & Reva Siegel, Roe *Rage: Democratic Constitutionalism and Backlash*, 42 HARV. C.R.-C.L. L. REV. 373, 391 (2007) (discussing the theory that "the Court broadly reflects society, so its chief tendency is 'to constitutionalize consensus and suppress outliers'" (quoting MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 449 (2004))); Gerald N. Rosenberg, *The 1964 Civil Rights Act: The Crucial Role of Social Movements in the Enactment and Implementation of Anti-Discrimination Law*, 49 ST. LOUIS U. L.J. 1147, 1147–49 (2004) (rebutting the "conventional story" that "the 1964 Civil Rights was largely a result of the 1954 *Brown* decision").

[98] *See, e.g.*, *Gay and Lesbian Rights*, GALLUP (Mar. 31, 2014, 3:45 PM), http://www.gallup.com/poll/1651/gay-lesbian-rights.aspx#3 (reflecting that Gallup polling on "equal rights in terms of job opportunities" for gay people showed a rise from 56% support in 1977 to 84% in November 1996, a few months after *Romer* was decided). The anti-gay-rights initiative invalidated in *Romer* went beyond the realm of employment, and there are questions about how people would have understood this poll question. Nevertheless, there was strong support for "equal rights" in one of the main arenas affected by Amendment 2.

[99] *See, e.g.*, Patrick J. Egan et al., *Gay Rights*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 235, 241 (Jack Citrin et al. eds., 2008). The authors also addressed the reverse question—the effect of *Lawrence* on subsequent public opinion—

find rising public support for the rights at issue in those cases. This general theme has been stressed in scholarship on LGBT issues, with the rise over time of public support for LGBT equality.[101] This rise in support was especially pronounced during the first fifteen years or so of the modern same-sex-marriage movement—roughly from 1993 to 2008. During this period, many observers lamented the policy backlash triggered by litigation to secure marriage equality and cited it as the inevitable byproduct of courts—in that case, *state* courts—getting too far ahead of the public.[102] The current state of public opinion on same-sex marriage, in which polls now commonly register majority support for marriage equality, has likewise been a regular part of analysis of *Windsor*.[103] Lurking underneath statements of this kind is often an implicit kind of progressive historical triumphalism—that is, the idea that courts will catch up to the public and then take their place on the slow but steady road of progress toward meaningful equality. That may or may not prove true in the context of LGBT rights, but it has by no means proven universally true.[104] One needs to look no further than the recent *Shelby County v. Holder*[105] decision to see some evidence to the contrary.

The trajectory of the constitutional movement pressing the rights of the poor plainly supports no triumphalist narrative—quite the contrary. Indeed, at first blush, rather than reflecting an area in which the Supreme Court moved after public opinion and the political process moved, it might seem a bit of the reverse. After all, the political process was actively engaged in the War on Poverty in the mid-1960s. The President was highly vocal, and large congressional majorities were passing, at a brisk pace, ambitious federal antipoverty legislation.[106] This was all taking place at about the time *Harper* was decided (1965) and only a few years before *Shapiro* (1969). This quality and quantity of activity might seem to evidence political and public support for a robust public response to poverty.

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and, interestingly, found that the *Lawrence* decision temporarily "disrupted the upward trend in public opinion." *Id.*

[100] *See, e.g.*, *Gay Marriage: Key Data Points from Pew Research*, PEW RES. CTR. (June 11, 2013), http://www.pewresearch.org/key-data-points/gay-marriage-key-data-points-from-pew-research (finding that in 2013, 50% of Americans supported gay marriage while 43% opposed it); Jeffrey M. Jones, *Same-Sex Marriage Support Solidifies Above 50% in U.S.*, GALLUP POL. (May 13, 2013), http://www.gallup.com/poll/162398/sex-marriage-support-solidifies-above.aspx (showing that 53% of Americans believe the law should recognize same-sex marriages).

[101] *See* KLARMAN, *supra* note 16, at 211; Egan et al., *supra* note 99, at 237–41; Schacter, *supra* note 76, at 1388–89.

[102] *See* GERALD N. ROSENBERG, THE HOLLOW HOPE: CAN COURTS BRING ABOUT SOCIAL CHANGE? 339–54 (2d ed. 2008); Michael J. Klarman, Brown *and* Lawrence (*and* Goodridge), 104 MICH. L. REV. 431, 475 (2005).

[103] *See* Schacter, *supra* note 26, at 1199.

[104] *See generally* PERSILY, *supra* note 95 (exploring public opinion in different constitutional contexts).

[105] 133 S. Ct. 2612 (2013) (striking down section 4 of the Voting Rights Act).

[106] *See supra* notes 47–52 and accompanying text.

In other words, there are reasons to believe that the Court would not have been manifestly far ahead of the public or political process by deciding *Dandridge* differently or at least in building in some affirmative way on *Harper* or *Shapiro*. True, President Johnson was out of office when *Dandridge* was decided in 1970, and the "war" on poverty, as such, was over. But the presidential Commission on Income Maintenance Programs issued a report in 1969 supporting a "negative income tax."[107] That proposal competed with other plans in a thoroughly mainstream discussion about guaranteed income support. Some 1,300 economists from 150 different institutions had petitioned Congress in 1969 in support of a "national system of income guarantees and supplements."[108] These developments might well have been thought sufficient to create a judicial audience more sympathetic to robust protections for the poor.

There are any number of potential ways to explain *Dandridge* and *Rodriguez* in terms of doctrine. The language in *Harper* that seemed on the edge of formally declaring wealth as a suspect classification could be limited by the context of voting, one that is arguably *sui generis*. And, striking down a poll tax in the context of voting is a long way from mandating subsistence payments or equalizing education finding. Similarly, despite their rhetorical flourishes, neither *Shapiro* nor *Goldberg* created an entitlement to benefits, standing alone. *Shapiro* addressed only withholding from new-residents benefits the state had already elected to give existing residents, and *Goldberg* concerned only hearing rights once an entitlement had been created by state law. And, perhaps the daunting institutional implications of constitutionalizing education funding or further constitutionalizing welfare benefits put a brake on any momentum that seemed to have taken hold with *Harper* and *Shapiro*. In short, both *Dandridge* and *Rodriguez* might simply have been more of a doctrinal stretch than they appeared to the plaintiffs' lawyers—although it is worth noting that both cases had only five-vote majorities, so the lawyers' aspirations were hardly fanciful.[109]

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[107] On the negative income tax and associated proposals, see Felicia Kornbluh, *Is Work the Only Thing that Pays? The Guaranteed Income and Other Alternative Anti-Poverty Policies in Historical Perspective*, 4 NW. J.L. & SOC. POL'Y 61, 66–68, 76–82 (2009). On the difference between negative income tax and the earned income tax credit, see Jesse Rothstein, *Is the EITC as Good as an NIT? Conditional Cash Transfers and Tax Incidence*, 2 AM. ECON. J.: ECON. POL'Y 177, 177–78 (2010).

[108] Richard K. Caputo, *United States of America: GAI Almost in the 1970s but Downhill Thereafter*, *in* BASIC INCOME GUARANTEE AND POLITICS: INTERNATIONAL EXPERIENCES AND PERSPECTIVES ON THE VIABILITY OF INCOME GUARANTEE 265, 266 (Richard K. Caputo ed., 2012) (quoting *Economists Urge Assured Income*, N.Y. TIMES, May 28, 1968, at 1). The larger discussion included even Milton Friedman, who authored a proposal of this kind in 1962. *See* MILTON FRIEDMAN, CAPITALISM AND FREEDOM 190–96 (1962).

[109] Decided April 6, 1970, *Dandridge* was only 5-3, not 5-4, because Justice Blackmun had not yet been sworn in. *Harry A. Blackmun*, THE OYEZ PROJECT AT IIT CHICAGO-KENT C. OF L., http://www.oyez.org/justices/harry_a_blackmun (last visited May 6, 2014).

The more important point I would like to press is that, examined more closely, the poverty cases *are* consistent with the idea that courts often move in sync with the political process and public opinion. There are, at the threshold, some grounds to question whether President Johnson's War on Poverty had solid political and public support even at the time it was being waged.[110] And, as race tensions began to rise in the mid-1960s, opposition began to consolidate and crystallize.[111]

A few specific points about the links between race and poverty deserve emphasis. The first relates to welfare policy. There is a longstanding fault line in public opinion about antipoverty programs that is consistent with *Dandridge* and would, in fact, predict the decision's result. Polling over time shows majorities consistently supportive of the idea that government should do more to assist the poor but quite hostile to welfare programs.[112] One way to reconcile this apparent inconsistency is to interpret it as reflecting public support for spending more public funds to help individual poor persons find jobs but hostility for categorical income support.[113] Another is to map these attitudes onto a longstanding conceptual distinction in public understanding of poverty that separates the "deserving" from the "undeserving" poor. Michele Landis Dauber's work about New Deal constitutionalism shows this distinction at work in the context of disaster relief,[114] and Joel Handler examines it in the context of Aid to Families with Dependent Children and its predecessor programs.[115] Relatedly, there is evidence that public attitudes about welfare have been profoundly shaped by race, or beliefs about race. Public reaction to the rise in antipoverty programs unfolded against a history of large-scale migration of blacks from the south to the urban north, and it became particularly salient in the mid-1960s, as race riots began to erupt and controversies over spending funds from the War on Poverty increasingly appeared in the media.[116] In *The Color of Welfare*, sociologist Jill Quadagno traces the entwinement of race and welfare policy over time and argues that the War on Poverty was itself conceived, in part, with race in mind, and then thwarted by

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[110] Amitai Etzioni, *Consensus and Reforms in the "Great Society"*, 40 SOC. INQUIRY 113, 113 (1970) ("Great Society slogans aroused aspirations and hopes which previously were either dormant or nonexistent. And, most power groups were aligned against most of the specific programs, while few were mobilized in their favor.") (emphasis omitted).

[111] *See id.* at 115.

[112] MARTIN GILENS, WHY AMERICANS HATE WELFARE: RACE, MEDIA, AND THE POLITICS OF ANTIPOVERTY POLICY 29–39 (1999); Hazel Erskine, *The Polls: Government Role in Welfare*, 39 PUB. OPINION Q. 257, 257 (1975).

[113] *See id.* at 31–39.

[114] MICHELE LANDIS DAUBER, THE SYMPATHETIC STATE: DISASTER RELIEF AND THE ORIGINS OF THE AMERICAN WELFARE STATE 13–16 (2013).

[115] *See* JOEL F. HANDLER, REFORMING THE POOR: WELFARE POLICY, FEDERALISM, AND MORALITY 1–4 (1972); JOEL F. HANDLER & ELLEN JANE HOLLINGSWORTH, THE "DESERVING POOR": A STUDY OF WELFARE ADMINISTRATION 1–11 (1971).

[116] GILENS, *supra* note 112, at 116–21.

racial dynamics in the country.[117] In his 1999 book *Why Americans Hate Welfare*, political scientist Martin Gilens finds that perceptions of poverty became increasingly racialized starting in the mid-1960s.[118] Based on comprehensive analysis of public-opinion data, and content analysis of media coverage of poverty over time, Gilens shows that media photographs in the many stories about poor people during this time increasingly featured blacks.[119] This coincided with more and more Americans seeing poverty as essentially a black problem, and with rising opposition to welfare as an unwise subsidy to the undeserving poor.[120] Gilens likewise mines polling data and finds strong support for the conclusion that stereotypical negative attitudes about blacks, and an associated belief that welfare beneficiaries were not deserving, reflected "central elements in generating public opposition to welfare."[121]

Looking at public opinion with all of these complex undercurrents in mind, then, *Dandridge* does not look at all out of sync with public attitudes. Indeed, it might be the willingness of the Court in *Shapiro* to hold as it did that seems more the anomaly.[122]

Moving from welfare to school finance, there are reasons to think that racial dynamics may also have helped shape public attitudes in that context. Here, however, the historical evidence of public opinion is limited, so this remains more hypothesis than argument. I have been unable to find much on public attitudes toward inequality in school finance at or around the time of *Rodriguez*. But there are two suggestive studies in later time periods, though neither involved a large sample. One 1991 study of attitudes surrounding school finance reform in Texas, for example, found that attitudes about race played a significant role in shaping survey respondents' views about school-finance reform, irrespective of whether the

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[117] JILL S. QUADAGNO, THE COLOR OF WELFARE: HOW RACISM UNDERMINED THE WAR ON POVERTY 3–5 (1994).

[118] GILENS, *supra* note 112, at 114–32.

[119] *Id.*

[120] *Id.*

[121] *Id.* at 92.

[122] And, in a sense, that anomaly persists beyond *Shapiro* and *Dandridge*. In 1999, at a time when welfare had long been under siege and had been fundamentally changed on the federal level with welfare reform, the Supreme Court decided *Saenz v. Roe*, 526 U.S. 489 (1999). In *Saenz*, the Court both reframed the *Shapiro* right (by moving it from the Equal Protection Clause to the Privileges or Immunities Clause of the Fourteenth Amendment) and expanded it (by barring a California state law that did not deny benefits to new residents but did limit them to their former state's benefit level for the first year of residence). *Id.* at 500–11. The *Saenz* ruling was surprising, largely because it seemed to revive a clause of the Fourteenth Amendment that had been dead since the Slaughterhouse Cases in 1873. *See id.* at 511–13 (Rehnquist, C.J., dissenting). It might also be seen as surprising in light of the trajectory of public policy toward welfare and public attitudes toward welfare programs. As with *Shapiro*, though, *Saenz* was a limited ruling and did not approach any free-standing entitlement to benefits.

reform would financially help or hurt the respondent's own district.[123] This same study, along with another survey done in New Jersey in 1990,[124] also found that whites had an exaggerated view of the extent to which school finance reform would benefit blacks, in particular.[125]

Moreover, it is quite plausible to think that ideas about race would play a role in shaping public opinion in this area because issues about race and schools were very much in the air, principally in disputes about busing and desegregation. The link becomes apparent if we restate the *Rodriguez* issue at a higher level of generality—whether, say, courts ought to disturb the relative autonomy of suburban schools because of concerns about urban schools. If understood in those terms, we can easily see why public opinion about school finance in 1973 might be intertwined with, or affected by, attitudes about desegregation and busing. In 1972, busing was registering only 20% support among all respondents in a poll—and this was up from 14% in 1970.[126] President Nixon had made opposition to busing a signature part of his election appeals in 1968 and 1972.[127] By 1973, with four Nixon appointees seated, the Court was in the midst of a transition in its busing jurisprudence. It was moving away from the broad remedial discretion approved in the 1971 decision, *Swann v. Charlotte-Mecklenburg Board of Election*.[128] The 1973 decision in *Keyes v. School District No. 1*[129] emphasized the centrality of the de jure-de facto distinction, and the 1974 decision in *Milliken v. Bradley*[130] barred interdistrict remedies in the absence of proof of an interdistrict violation. Against this background, and with the limited evidence available in mind, there are reasons to suspect that *Rodriguez* was reasonably consistent with public opinion.

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[123] *See* Kent L. Tedin, *Self-Interest, Symbolic Values, and the Financial Equalization of the Public Schools*, 56 J. POL. 628, 640 (1994).

[124] *See* Douglas S. Reed, *Twenty-Five Years After* Rodriguez*: School Finance Litigation and the Impact of the New Judicial Federalism*, 32 L. & SOC'Y REV. 175, 209–12 (1998); Tedin, *supra* note 123, at 634 & n.18.

[125] In Texas, for example, many more Hispanics would have benefited. Tedin, *supra* note 123, at 634–39. In general, minority districts are not always the most underfunded. James E. Ryan, *The Influence of Race in School Finance Litigation*, 98 MICH. L. REV. 432, 433–36 (1999).

[126] Michael Murakami, *Desegregation*, *in* PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 18, 35–36 (Jack Citron et al. eds., 2008). Murakami noted that support increased substantially over time but that it still stood well below majority—at 38%—in 1996. *Id.*

[127] *See* KEVIN J. MCMAHON, NIXON'S COURT 232–40 (2011) (arguing that opposition to busing and Warren Court criminal procedure decisions were President Nixon's major priorities for the Supreme Court).

[128] 401 U.S. 1 (1971).

[129] 413 U.S. 189 (1973).

[130] 418 U.S. 717 (1974).

B. The Significant Role of State Courts

I have been focusing here on the role of the U.S. Supreme Court, but neither constitutional movement can be fully understood without accounting for the role of state courts, applying state constitutions. There are some notable temporal distinctions in the two contexts, but they do not negate the main point that state courts have been a force to be reckoned with in relation to these constitutional movements. In the context of LGBT and at least some poverty-related rights, the "parity" debate that was once triggered by Justice Brennan's call for a more robust state constitutionalism[131] seems to have been answered in the affirmative by examples of state courts acting where federal courts have not—or have not *yet*.

In the LGBT context, the most vivid example of state courts outpacing their federal counterparts is in the marriage domain. It was the Hawaii Supreme Court that was the first to act on a claim of marriage equality in the early 1990s. For the next fifteen years, constitutional marriage equality litigation was, by design, filed only in state courts.[132] Between 1993, when Hawaii decided *Baehr v. Lewin*,[133] and 2013, when the Supreme Court decided *Windsor* and *Perry*,[134] a number of state supreme courts decided state constitutional marriage-equality claims, with more of them ruling in favor of marriage equality or mandating civil unions than rejecting the claims.[135] The deliberate decision to confine marriage litigation to state courts largely held until the Olson-Boies team went to federal court in 2009—over the objection of LGBT rights groups—to challenge Prop 8.[136] The motivation for avoiding the federal courts was not a subtle one; the fear was of going to the Supreme Court too early and risking an adverse precedent.[137]

The role of the state courts is clearest in the marriage context, but it began before that. Between the time when *Bowers* upheld the Georgia sodomy law (1986)[138] and *Lawrence* struck down the Texas ban (2003),[139] four state supreme

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[131] William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489, 491 (1977); Burt Neuborne, *The Myth of Parity*, 90 HARV. L. REV. 1105, 1105–06 (1977). For more contemporary perspectives on what some call the new judicial federalism, see generally JAMES A. GARDNER, INTERPRETING STATE CONSTITUTIONS: A JURISPRUDENCE OF FUNCTION IN A FEDERAL SYSTEM 24–25 (2005) (commenting on Justice Brennan's call for more robust state constitutionalism) and ROBERT F. WILLIAMS, THE LAW OF AMERICAN STATE CONSTITUTIONS (2009) (same).

[132] Schacter, *supra* note 26, at 1199.

[133] 852 P.2d 44 (Haw. 1993).

[134] 133 S. Ct. 2652 (2013).

[135] *See generally* KLARMAN, *supra* note 16 (tracing gay marriage litigation through 2012); Schacter, *supra* note 16, at 1164–74, 1189 (tracing same-sex marriage cases through 2009).

[136] *See* KLARMAN, *supra* note 16, at 138.

[137] Gabriel Arana, *Gay on Trial: After State-Level Defeats, Lawyers Are Taking the Case for Gay Rights to Federal Court*, THE AM. PROSPECT (Nov. 20, 2009), http://prospect.org/article/gay-trial.

[138] *Id.* at 195–96.

courts struck down criminal sodomy bans under their state's constitution. Improbably enough, these were the supreme courts of Kentucky, Arkansas, Montana, and Georgia itself.[140] These courts joined the state supreme courts that had already overturned sodomy laws before *Bowers*.[141]

The area where state courts have played the most active role in the realm of poverty is with respect to educational funding. Unlike in the case of same-sex marriage, this role was *not* a proactive strategy to avoid the Supreme Court. Indeed, the landmark California state court litigation in *Serrano* was filed the same year that *Rodriguez* was filed in federal court, and the sweeping *Serrano* opinion provided a blueprint for the federal district court decision in *Rodriguez* that ruled Texas's system unconstitutional. Interestingly, while *Serrano* was big national news and inspired some other state cases to be filed around the country, it did not have the same rapid-fire nationalizing effect as the Hawaii Supreme Court's 1993 decision portending imminent legalization of same-sex marriage for the first time.[142] Some of this may be explained by the fact that there was (in *Rodriguez*) already a federal case in the pipeline and thus a foreseeable date when the U.S. Supreme Court might rule on the school-finance question. In addition, the Burger Court's halt of the Warren Court's trajectory was still young and coming into view, so the very idea of strategic avoidance of the Supreme Court was not yet part of the left's litigation calculus.

There are, moreover, many factors specific to marriage equality that can explain why same-sex marriage so quickly became a national issue. One is the issue of interstate marriage recognition, which made the actions of one state potentially relevant to the remaining forty-nine. Another is that the supporters and opponents of gay rights were already fully mobilized and active by 1993, so the Hawaii decision was a little like throwing something highly flammable into an active fire.[143] By contrast, it would appear that supporters and opponents of equalizing state school-finance systems got somewhat organized and mobilized *because of* rulings like *Serrano* and *Rodriguez*, rather than having been so before them. The same-sex marriage issue also had a pronounced partisan divide from the outset. This is somewhat true of school finance cases, but less so. To the extent that school finance lawsuits might generally be associated with racial integration of the schools and especially busing, that issue had a partisan skew that was made

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[139] Lawrence v. Texas, 539 U.S. 558, 578–79 (2003).

[140] *See generally* Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002); Powell v. State, 510 S.E.2d 18 (Ga. 1998); Gryczan v. State, 942 P.2d 112 (Mont. 1997); Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992). During this period, one state court upheld a sodomy ban, see State v. Smith, 766 So.2d 501 (La. 2000).

[141] People v. Onofre, 415 N.E.2d 936, 943 (N.Y. 1980); Commonwealth v. Bonadio, 415 A.2d 47, 51–52 (Pa. 1980).

[142] The rapid nationalization of the same-sex marriage movement is reviewed in Schacter, *supra* note 16, at 109.

[143] *Id.* at 1212–16, 1165–66.

apparent in the 1968 and 1972 elections.[144] But still, there was not, in 1973, the same fully elaborated structure of political conflict on education finance as there was about busing and the aggressive pursuit of school desegregation.

In any event, the state courts ultimately emerged as the principal venue for educational-finance litigation. But the emergence came *after Rodriguez*, not—as in the case of marriage—before the Supreme Court ever ruled. Only one other *Serrano*-type case was filed before *Rodriguez*—in New Jersey, and it produced a victory for the plaintiffs in the state.[145] After *Rodriguez*, though, litigation was filed in several additional states. This litigation came in waves. Between 1973 and 1989, with the coordination of a national "equity network" funded by the Ford Foundation and others, lawsuits focusing on equality in school finance were filed in nineteen additional states.[146] Six were victorious for plaintiffs, but thirteen were not.[147] In 1989, however, a landmark ruling in Kentucky, *Rose v. Council for Better Education, Inc.*,[148] brought a new kind of educational finance case—one focusing on educational adequacy rather than equality, and involving more innovation in remedies.[149] Overall, educational finance lawsuits have reached the high courts of forty-three states and have produced twenty-six victories and seventeen losses for plaintiffs.[150] How to define "victory" and "defeat" in this context is not as simple as it may sound, and there are debates ongoing about precisely what impact these victories will have on educational outcomes for children.[151] Unquestionably, however, since 1989, there has been a post-*Rodriguez* national constitutional movement that has targeted state courts, relied on education clauses in state constitutions, and secured relief in roughly two-thirds of the cases.

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[144] MCMAHON, *supra* note 127, at 233–40; David O. Sears et al., *Whites' Opposition to "Busing": Self-Interest or Symbolic Politics?*, 73 AM. POL. SCI. REV. 369, 378–80 (1979).

[145] *See generally* Robinson v. Cahill, 303 A.2d 273 (N.J. 1973). The original complaint in *Cahill* was filed in 1970. *See* Robert Hanley, *Spirit of '76: Byrne's School Parity Battle Still Reverberates*, N.Y. TIMES, Nov. 17, 1996, http://www.nytimes.com/1996/11/17/nyregion/spirit-of-76-byrne-s-school-parity-battle-still-reverberates.html.

[146] MICHAEL PARIS, FRAMING EQUAL OPPORTUNITY: LAW AND THE POLITICS OF SCHOOL FINANCE REFORM 45 (2010).

[147] *Id.*; *see also* Michael A. Rebell, *Educational Adequacy, Democracy, and the Courts*, *in* ACHIEVING HIGH EDUCATIONAL STANDARDS FOR ALL: CONFERENCE SUMMARY 218, 227 (Timothy Ready et al. eds., 2002) (noting that the majority of state supreme courts denied relief to the plaintiffs).

[148] 790 S.W.2d 186 (Ky. 1989).

[149] *See* PARIS, *supra* note 146, at 45–46; William S. Koski, *The Evolving Role of the Courts in School Reform Twenty Years After* Rose, 98 KY. L.J. 789, 789–91 (2010); Rebell, *supra* note 147, at 228–36.

[150] PARIS, *supra* note 146, at 46.

[151] William S. Koski, *Courthouses vs. Statehouses?*, 109 MICH. L. REV. 923, 927, 930–38 (2011).

C. The Limits of the Traditional Tiers of Scrutiny

Finally, tracking the Supreme Court's experience with poverty and sexual orientation reflects both significant transitions in—and problems with—the tiers of scrutiny, and again reveals some important dynamics in contemporary constitutional approaches to inequality.

The Court's doctrinal approach to major equal-protection debates about race and gender has, in both cases, been heavily bound up with the traditional three tiers of scrutiny. In the case of race, the sharpest doctrinal disputes have concerned how to apply the tiers of scrutiny to plans crafted to benefit racial minorities, like affirmative action[152] or school desegregation plans.[153] In the context of gender, the disputes have focused on what constitutes a "real difference" that justifies differential treatment of the sexes,[154] along with different understandings about how rigorous the prescribed level of scrutiny for gender distinctions is supposed to be.[155]

Language in many of the Court's equality cases continues to refer to tiers of scrutiny—said to encompass strict, intermediate, and rational basis—and law students must dutifully learn the framework. But the Court has not designated a new class or classification for formally heightened scrutiny in decades, and the tiers have broken down in any number of ways.[156] At the time of *Dandridge* (1970) and *Rodriguez* (1973), equal protection was generally viewed in terms of two tiers—strict scrutiny or rational basis. What we now call intermediate scrutiny (principally used in gender cases) did not emerge formally until 1976 with *Craig v. Boren*.[157] The criteria for strict scrutiny that are now regularly cited as part of the doctrine were still emerging when *Dandridge* was decided. In fact, it was another welfare case, this one involving the denial of welfare benefits to legally resident aliens,[158] that helped to sharpen these doctrinal criteria by first linking them to the

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[152] *See, e.g.*, Fisher v. Univ. of Tx., 133 S. Ct. 2411 (2013); Gratz v. Bollinger, 539 U.S. 244 (2003); Grutter v. Bollinger, 539 U.S. 306 (2003); Adarand Constructors, Inc. v. Peña, 515 U.S. 200 (1995); Metro Broad., Inc. v. FCC, 497 U.S. 547 (1990); City of Richmond v. J.A. Croson Co., 488 U.S. 469 (1989); Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).

[153] *See, e.g.*, Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1, 551 U.S. 701 (2007).

[154] *See, e.g.*, Michael M. v. Superior Court of Sonoma Cnty., 450 U.S. 464 (1981); Geduldig v. Aiello, 417 U.S. 484 (1974).

[155] *Compare* Nguyen v. INS, 533 U.S. 53, 61 (2001) (upholding a statute that imposed a higher standard for U.S. citizenship to be assigned to a child born abroad out of wedlock to an American parent if that parent was the child's father, rather than mother), *with* United States v. Virginia, 518 U.S. 515, 519 (1996) (striking down the Virginia Military Institute's male-only admission policy).

[156] *See generally* Suzanne B. Goldberg, *Equality Without Tiers*, 77 SO. CAL. L REV. 481 (2004).

[157] 429 U.S. 190, 197 (1976).

[158] *See* Graham v. Richardson, 403 U.S. 365, 367–68, 372 (1971).

canonical idea of "discrete and insular minorities" contained in footnote four of *United States v. Carolene Products Co.*[159] The doctrine continued to be consolidated and refined and appeared as a tidy black letter list in *Rodriguez*, where the Court characterized the "traditional indicia of suspectness" as whether the affected class is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[160] A few weeks after *Rodriguez*, Justice Brennan wrote a plurality in *Frontiero v. Richardson*[161] in which he argued that gender distinctions should be subjected to strict scrutiny.[162] He fell a vote short of a majority.[163] In that opinion, he included immutability as a relevant criterion.[164] While it has never been formally required by the Court, it sometimes appears on the list of requirements.

In some ways, poverty and sexual orientation have posed similar conceptual problems for the standard approach to heightened scrutiny, but in others the two categories of cases have diverged. Let me begin with the divergence, which underscores a major change over time in the court's approach to equal protection. Recall that in *Dandridge*, the court was operating in a context in which scrutiny was more like an on-off switch. Either strict scrutiny was triggered or the court defaulted to the relaxed and highly deferential rationality review employed in ordinary cases of economic regulation.[165] The Court chose the latter, quite explicitly. One might say about *Dandridge*—as Professor Julie Nice has lucidly emphasized—that, instead of focusing on the abject political powerlessness of poor people along every dimension, and assimilating poverty cases to footnote four of *Carolene Products*, the court instead assimilated poverty to the *Lochner* era and the problems raised by close scrutiny of matters economic in nature.[166] There was no apparent consideration in *Dandridge* of either a formal level of scrutiny in between strict scrutiny and rational basis, nor of the idea that rationality review itself might be calibrated differently for the case. This was true in *Rodriguez*, as well, although there the inquiry was clouded by whether the classification of districts was one based on individual wealth at all.[167] But here again, there was no exploration of a different version of rational basis.

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[159] 304 U.S. 144, 152 n.4 (1938).

[160] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973).

[161] 411 U.S. 677 (1973).

[162] *See id.* at 688.

[163] *See id.* at 678.

[164] *See id.* at 686.

[165] *See, e.g.*, Williamson v. Lee Optical Co., 348 U.S. 483, 485, 491 (1955).

[166] *See* Nice, *supra* note 11, at 640–44.

[167] *See supra* note 91 and accompanying text. *Rodriguez* also declined to apply strict scrutiny based on a fundamental right to education, a right the Court rejected. *Rodriguez*, 411 U.S. at 16–29, 35.

The contrast with the major gay-rights cases is sharp. Parties or amici in the major gay-rights cases pressed for formally heightened scrutiny, but in none did the Court take up, let alone clearly resolve, the level of scrutiny issue. *Romer* and *Windsor* use the language of rational basis but do not employ it in its traditional form and never mention the arguments for heightened scrutiny.[168] *Lawrence* could have been decided as either an equal-protection or due-process case, and it was decided under due process.[169] It, too, seemed to use rational basis, though lower courts have divided about what level of scrutiny was applied in the case.[170] All three opinions were written by Justice Kennedy. They have a strong family resemblance to one another and are marked by a pronounced doctrinal quirkiness that has left a trail of questions. *Romer* was curiously silent on *Bowers*, which was still good law. *Lawrence* made no effort to reconcile its version of substantive due process with the more restrictive one adopted in *Washington v. Glucksberg*.[171] *Windsor* said it was limited to the federal Defense of Marriage Act, even though its rationale about the dignity of same-sex couples and the harm to their children of denying recognition to their marriages would seem to apply with equal or even greater force to state laws barring same-sex marriage.

The key difference, then, is that the LGBT cases seem to have been decided in a post-tiers world, where the nominal application of rational basis is not outcome-determinative. By contrast, the poverty cases were decided in a context in which the level of scrutiny virtually foretold the outcome. This is somewhat ironic in at least one sense. *Romer* has often been linked to two other decisions famous as "rational basis plus" cases. The three are sometimes called the "*Moreno-Cleburne-Romer* trilogy."[172] *Cleburne v. Cleburne Living Center, Inc.*[173] used the rational-basis standard to strike down a requirement that group homes for people with mental retardation secure a special permit.[174] *Department of Agriculture v. Moreno*[175] is the more relevant one for thinking about poverty. It was a case about a federal regulation, and its underlying statute, denying food stamps to households of unrelated persons.[176] It, too, applied a more muscular rational-basis standard, finding the exclusion unrelated to the proffered purpose to avoid fraud in the

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[168] *See* United States v. Windsor, 133 S. Ct. 2675, 2696 (2013); Romer v. Evans, 517 U.S. 620, 632 (1996).

[169] *See* Lawrence v. Texas, 539 U.S. 558, 572–79 (2003).

[170] The disparate rulings are reviewed in WILLIAM B. RUBENSTEIN ET AL., CASES AND MATERIALS ON SEXUAL ORIENTATION AND THE LAW 297–315 (5th ed. 2014).

[171] 521 U.S. 702, 728 (1997) (holding that the Due Process Clause does not guarantee a right to assisted suicide).

[172] *See* CASS R. SUNSTEIN, ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT 146–48 (2001).

[173] 473 U.S. 432 (1985).

[174] *Id.* at 448.

[175] 413 U.S. 528 (1973).

[176] *Id.* at 529.

program.[177] But the Court also emphasized the "bare congressional desire to harm" that was suggested by comments in the legislative history reflecting Congress's desire to deny food stamps to "hippies" and "hippie communes."[178] Because of this element, the case has become known more as an equal-protection case about lifestyle than poverty. But that was not inevitable. Given that it was decided only a few years after *Dandridge*, and the same year as *Rodriguez*, *Moreno* might have been the vehicle that led poverty—along with mental disability and sexual orientation—to be a context in which some meaningful constitutional protections were provided by way of careful analysis of a law using a turbocharged form of rational-basis review. This might have included some valuable unpacking of, and elaborating on, the meaning of the concept of animus that ran through *Moreno*, *Cleburne*, and *Romer*.[179]

We have seen, then, how poverty and sexual orientation claims have divergent histories with respect to standard of review. There is, however, also an interesting point of convergence. Both poverty and sexual orientation pose definitional challenges for traditional, class- or classification-based equal protection review.

The definitional problem associated with poverty is made a centerpiece of the Court's analysis in *Rodriguez*, which discussed at some length the reasons that the Texas funding system did not map cleanly onto individual wealth or even, necessarily, the property tax wealth of each district. The Court was unwilling to accept various alternative ways to understand how the system disadvantaged children in districts with the lowest property wealth and held that the system discriminated against "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[180]

The larger issue that hovers over *Rodriguez* is the daunting question of how to define the poor. Because the Court did not see the system as flatly discriminating against the poor, it did not have to reach this more difficult definitional question. How would the class be defined? By some specified percentage of chosen measure of income? If so, what percentage and what measure? By lack of access to certain minimum goods? If so, which goods and by what metric of access? By other criteria? It is not that there are no definitions, only that there are many plausible ones. It is worth noting that the path from *Moreno* to more nuanced, contextual analysis of individual cases could allow judicial review of programs without the

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[177] The Court noted in its discussion that the restriction harms "*not* those persons who are 'likely to abuse the program' but, rather, *only* those persons who are so desperately in need of aid that they cannot even afford to alter their living arrangements so as to retain their eligibility." *Id.* at 538.

[178] *Id.* at 534.

[179] *See* Cass R. Sunstein, *The Supreme Court, 1995 Term—Foreword: Leaving Things Undecided*, 110 HARV. L. REV. 4, 59–64 (1996) (exploring animus and this trilogy of cases).

[180] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28–29 (1973).

need to answer difficult questions like these. As we have seen, however, that path was not pursued either.

This challenge of judicially identifying a definition of who is poor may shed at least some light on an apparent puzzle: Why, even in the twenty-three states that have some specific textual language in their constitution about the government's duty or power to provide for basic welfare,[181] have most courts done nothing with them?[182] An equally significant factor is likely political and cultural resistance to a tradition of affirmative rights—a resistance shaped by some of the public attitudes and perceptions about poverty and welfare discussed earlier.

Notably, there is also a set of definitional challenges in the context of sexual orientation, albeit different ones. Debates about LGBT rights have featured, from an early period, a debate about the origins of sexual orientation within individuals. This has basically been a question about immutability. Political opponents of LGBT rights have argued that sexual identity is a matter of choice and conduct (and thus undeserving of legal protection), while many political proponents have retorted that sexual identity is given, not chosen, and runs deeper than sexual conduct alone (and is thus deserving of protection).[183] It is not clear that the origins of individual sexual orientation ought to be relevant to the issue of legislative or constitutional protection,[184] nor is it clear that the categories "nature" and "nurture" separate as cleanly as the debate assumes.[185] Nevertheless, the immutability

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[181] These clauses are sometimes phrased in terms of a duty to care for the poor or needy.

[182] William C. Rava, *State Constitutional Protections for the Poor*, 71 TEMP. L. REV. 543, 567 (1998) ("[S]tate legislatures [have] wide latitude and almost unfettered discretion to define the state constitutionally-mandated terms of state public assistance without meaningful judicial review.").

[183] This debate has, of course, gone beyond political debate. For scholarly accounts, see, for example, Kenji Yoshino, *The Epistemic Contract of Bisexual Erasure*, 52 STAN. L. REV. 353, 406–07 (2000) and Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 507–16 (1994).

[184] *See* Jane S. Schacter, *The Gay Civil Rights Debate in the States: Decoding the Discourse of Equivalents*, 29 HARV. C.R.-C.L. L. REV. 283, 309–11 (1994).

[185] The same can be said in the context of poverty. *See, e.g.*, Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 122 (2009) (discussing the link between immutability and poverty and arguing "the extent of class mobility is far less than is generally assumed"); Kaled Sarsour et al., *Family Socioeconomic Status and Child Executive Functions: The Roles of Language, Home Environment, and Single Parenthood*, 17 J. INT'L NEUROPSYCHOL. SOC'Y 120, 120–29 (2011) (discussing a study demonstrating that socioeconomic inequalities are associated with disparities in child cognitive development and executive functions); Margaret A. Sheridan et al., *The Impact of Social Disparity on Prefrontal Function in Childhood*, PLOS ONE, Apr. 2012, at 1–2, *available at* http://www.plosone.org/article/fetchObject.action?uri=info%3Adoi%2F10.1371%2Fjournal.pone.0035744&representation=PDF (discussing ways in which neural development in children differs

question continues to motivate scientific research of various forms,[186] and a version of the question has recently arisen in a debate with First Amendment implications about banning "conversion therapy" for young people who identify as LGBT.[187]

There is a separate set of issues relevant to defining the class of LGBT persons that focuses not on the origins of sexual attraction in the individual, but on the origin of the social categories used to classify people according to their sexual object choice. These issues flow from an extensive academic literature on the social construction of sexual identity that calls into question categories like homosexual, heterosexual, bisexual, and others.[188] Much of this literature flows from the work of Michel Foucault,[189] but lest it seem entirely unconnected to the Court, consider Justice Kennedy's downright Foucauldian reference in *Lawrence*. In the course of carrying out a historical analysis of sodomy regulation for purposes of substantive due process review, Kennedy wrote:

> The absence of legal prohibitions focusing on homosexual conduct may be explained in part by noting that according to some scholars the concept of the homosexual as a distinct category of person did not emerge until the late 19th century. Thus early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally. This does not suggest approval of homosexual conduct. It does tend to show that this particular form of conduct was not thought of as a separate category from like conduct between heterosexual persons.[190]

Despite the reference, Kennedy's constitutional jurisprudence of LGBT rights has not resisted the concept of the gay or lesbian person. To the contrary, he has argued the centrality of sexual identity to personhood in ways at odds with the

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across social classes and theorizing that the disparity is related to the more sophisticated language structures that children in affluent families are more often exposed to and a heightened level of stress that children in less affluent classes experience).

[186] *See, e.g.*, JACQUES BALTHAZART, THE BIOLOGY OF HOMOSEXUALITY 12–26 (2012); J. Michael Bailey, *Biological Perspectives on Sexual Orientation*, *in* PSYCHOLOGICAL PERSPECTIVES ON LESBIAN, GAY, AND BISEXUAL EXPERIENCES 50 (Linda D. Garnets & Douglas C. Kimmel eds., 2d ed. 2003) (outlining the current research on the biological and genetic basis of sexual orientation).

[187] CAL. BUS. & PROF. CODE §§ 865, 865.1-2 (Supp. II 2014) (codifying Senate Bill 1172, which banned certain therapies administered by mental health professionals to alter sexual orientation); Pickup v. Brown, 728 F.3d 1042, 1048, 1061 (9th Cir. 2013) (upholding the law against a First Amendment challenge).

[188] Leading contributions are reviewed in RUBENSTEIN ET AL., *supra* note 170, at 1–97.

[189] *See generally* 1 MICHEL FOUCAULT, THE HISTORY OF SEXUALITY: AN INTRODUCTION (Robert Hurley trans., 1990).

[190] Lawrence v. Texas, 539 U.S. 558, 568–69 (2003) (citations omitted).

category critique.[191] By contrast, Justice Scalia has emphasized the distinction between status and conduct in his dissents in the area.[192] These arguments reveal ways in which the basic definition and conceptual place of sexual orientation in an equal-protection jurisprudence that was developed largely to address race remain a matter of dispute on the Court.

Some of these definitional problems might be mitigated if the focus were shifted from class (the LGBT community, whomever that might describe) to classification (individual sexual orientation, defined or described in the way an individual chooses). Interestingly, however, the move from focusing on a class (poor people as the object of protection) to classification (any lines drawn based on income level) might instead *aggravate* in the context of poverty problems of the sort reviewed here. The idea that judges must afford skeptical scrutiny whenever a policy uses income as a line would seem to invite Justice Powell's sort of "whither capitalism" response to *Rodriguez*. It might also produce perverse outcomes if conceptually deployed to question programs that may benefit those with lower incomes, such as the progressive income tax.

CONCLUSION

To start where we began, there are many differences that distinguish these two movements. The point is decidedly not to flatten these differences or to treat them as more alike than they are. Instead, the fact that some broad themes link even these disparate cases suggests that there are institutional insights here that can help us think critically about the role of courts going forward. Perhaps the clearest takeaway is that courts rarely act in a vacuum. They act in the context of other actors (other courts, political bodies, public opinion), and their decisions are given meaning, in part, by how these other actors, along with social movements, react. For this reason, thinking about the role of courts in 2020 means thinking about the interacting roles of these other actors, as well.

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[191] *See id.* at 575 ("When homosexual conduct is made criminal by the law of the State, that declaration in and of itself is an invitation to subject homosexual persons to discrimination both in the public and the private spheres. . . . Its continuance as precedent demeans the lives of homosexual persons.").

[192] *See id.* at 602 (Scalia, J., dissenting) ("Today's opinion . . . eliminate[s] the moral opprobrium that has traditionally [been] attached to homosexual conduct."); Romer v. Evans, 517 U.S. 620, 644 (1996) (Scalia, J., dissenting) ("Coloradans are, as I say, *entitled* to be hostile toward homosexual conduct . . . .").