PRECEDENTIAL SOCIAL FACTS AND THE DISAPPEARANCE OF POVERTY FROM CONSTITUTIONAL ANALYSIS

JULIE NOVKOV[1]

ABSTRACT

Ronald Kahn has rightfully drawn our attention to the social constructive process that underlies constitutional development. This article examines this process as it has contributed to the near elimination of economic inequality from constitutional scrutiny. Although rational-basis review has led to rights advances in other areas, some of the clearly irrational outcomes created by legislation affecting the poor and near poor currently remain nearly unchallenged. Precedential social construction has contributed heavily to this situation, but it might also hint at some ways forward——if the judges and justices can be found to accept the invitation.

KEYWORDS: *poverty, equal protection, family, legal history, rational-basis review*

Ronald Kahn has helped to change the way that American scholars understand the work of judges, particularly Supreme Court justices, by insisting that any good analysis of law and courts has to recognize that judging is simultaneously legal and political. This insight and its corollary, that ignoring either piece or overlooking the ways that law and politics relate in judging weakens the analysis, have enabled

1. Collins Fellow and Professor of Political Science and Women's, Gender, and Sexuality Studies, University at Albany, SUNY.

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scholars to explain the courts' unique role in American politics. Through Kahn's work, we better understand why historical analysis matters: it both untangles the relationship between law and politics because that relationship evolves over time, and it recognizes the enduring institutional significance of the courts' work, which incorporates justices' personalities, ideologies, and judging philosophies, but cannot be reduced to them.

Nowhere are these insights more visible and valued than in Kahn's analysis of the social constructive process that underlies major Court precedents like *Roe v. Wade* (1973) and *Bowers v. Hardwick* (1986), enabling him to explain why conservative Courts staffed primarily by Republican appointees have nonetheless advanced the rights of same-sex couples and continued to uphold a right to choose abortion.[2] These issues, as Kahn has argued, do not boil down readily either to purely legal understandings about the significance of precedent and the kinds of major justifications required for overturning a landmark or to purely political understandings of justices' ideologies. Rather, he shows, the Supreme Court has engaged in a social constructive process around privacy and due process in the Fourteenth Amendment that enabled the justices to integrate both normative and empirical imperatives as well as legal doctrine and external social realities (Kahn 1996).

Kahn argues that analyses of the Court that frame it either as entirely reactive to the broader political world outside its doors or impervious to it miss the mark. Rather, the Court emerges as a complex political institutional actor that both influences and is influenced by the political, economic, and social world it inhabits (e.g., see Kahn 2015). Its connection to what Kahn terms the external world is through the medium of the cases it reviews, and here, too, the Court exercises significant agency in shaping the boundaries of its political engagement but does not have complete control.

Rather than distinguishing between law and politics or between internally and externally driven decision-making, Kahn identifies two types of principles, polity and rights, that the Court constructs (Kahn 2013). These types of principles incorporate formal legal categories, but shape them in response to economic, social, and political factors. This creates coherent and stable constructions that can prevail without drastic change over the course of partisan shifts in appointment practices and generational changes in Court membership. As he explains, "these polity and rights principles only gain meaning through economic and social construction of how individuals act in the real world as members of a wider social and economic system" (Kahn 2013, 187). The identification of these principles enables a clearer

2. *Roe v. Wade*, 410 U.S. 113 (1973); *Bowers v. Hardwick*, 478 U.S. 186 (1986).

understanding of the ground on which constitutional debate takes place, delineating the analytical and empirical disagreements that divide the justices both in reasoning and in the outcomes they reach.

Kahn describes this approach, distinguishing it from other dominant modes of theorizing about Supreme Court decision-making, by emphasizing its bidirectional nature. Scholars must both "understand the factors internal to the Court decision-making process and . . . see how the Court brings the social, economic, and political world into its decision making" (Kahn 2014, 1308). The bidirectionality he identifies takes place both in the formalism inherent in decision making itself and in the Court's acknowledgment of the concrete social, political, and economic world outside its doors (Kahn 2014). The Court's successful navigation of this process, Kahn illustrates, produces stable legal constructs that can endure through significant changes in the membership of the Court, even when the party of the appointing president is taken into account.

Kahn's analysis helps to explain why the Court's power—its capacity to act—is different from its companion peak institutions. Its power rests entirely in its discursive acts, as opposed to the enforcement authority that the executive branch and its administrative agencies wield and the power of the purse exercised by Congress. As a host of legal and social science scholars have discussed, the Court's authority does not rest in any direct coercive force that it possesses, but rather in the power of its use of words, which simultaneously function as acts. This peculiarity of the Court is part of what renders its participation in the social constructive process so important, extending beyond simple determinations of what the law is. If the Court's pronouncements are to be effective, it can rest only on the legitimacy its discursive acts can muster; it has no other tools available to it aside from residual respect for its institutional position. Kahn's approach enables us to capture how this process works and why it matters. Because his focus is on the polity-building and -sustaining nature of rights, this rendering situates him optimistically with regard to the Court's capacity to serve a powerful and unique function of democratic preservation.

Kahn's theory incorporates the recognition that the Court does not engage in this work alone. It must have means to access and integrate nuanced information about the social, economic, and political phenomena that it incorporates in its social constructive process. I, however, see the Court's specific functioning a shade differently than Kahn; the constructive process he identifies appears to me to be a coconstructive process that is driven in large part by the actions of the broader legal community. Here, it may be useful to turn to another renowned analyst of legal discourse: Robert Cover.

Cover conceives of legal discourse as a medium of both creation and destruction (Cover 1983). The creative part of the process, which he understands as jurisgenesis, incorporates a legal community extending beyond those who sit on the bench. Through discursive creativity, lawyers, litigants, academics, and other members of the community who speak the language of law build possible worlds. They present these worlds to courts, who may choose to engage with them and validate the genesis of these worlds, transforming them from ideas into legitimized and possibly realized state word and deeds. In doing so, judges may simply accept the proffered concept or may transform it themselves; one need look no further than to Justice Anthony Kennedy's evolving conception of dignity as an example. Cover, however, notes that judges' authority incorporates a destructive capacity as well. When they select an argumentative strand to prioritize and develop, they reject others, engaging in what Cover describes as jurispathic activity. These roads not taken may be abandoned silently or specifically discussed and rejected in judicial opinions, but once they are eschewed, they become difficult to revive.

As Kahn emphasizes, the social constructive process in which judges engage generates not only legal rules and principles that govern future cases, but also broader polity and rights principles that shape the course of political proceedings beyond the formal reaches of the law. As Cover envisions this process, the specific workings of the process incorporate a dialogue between judges and the legal community. This dialogue does not end with the rendering of a decision, and part of what makes judicial discourse a social (and not merely legal) construction is its passage from the pages of the U.S. Supreme Court Reporter into public understandings of the law. These public understandings are as much, if not more, political than legal in a doctrinal sense. They shape the discursive field in ways that may be unpredictable even to the judges who have produced them. Nonetheless, jurispathic behavior has real consequences. If a court, especially the Supreme Court, closes a line of constitutional development, the legal community pressing arguments in favor of preferred outcomes eventually will abandon attempts to use the foreclosed path to achieve that outcome. This type of behavior can produce a shadow type of precedential social fact in the form of an absence.

The dynamism of this process undermines the capacity for any judicial decision to have a single, unified meaning. A Supreme Court decision produces an outcome with winners and losers, to be sure, but a decision may have multiple meanings for different portions of the legal community and the broader public. Moreover, these meanings can shift over time, as Mark Graber explains, with a decision functioning in a political or perhaps strategic manner in one era, but looking more like a

purely doctrinal landmark encouraging stare decisis in later years (Graber 1996). This dynamic can shift not only how scholars can understand the functioning of an opinion (as a legal or doctrinal development, as an expression of ideology, or as a regime-defending or -attacking event), but also, on another level, the meaning of the doctrine itself can shift as the legal community generates new jurisprudential understandings around it.

Kahn's analysis provides a satisfying developmental narrative explaining both the Court's reluctance to abandon *Roe v. Wade* (1973), reinforced most recently by *Whole Woman's Health v. Hellerstadt* (2016),[3] and its willingness to advance equality rights for same-sex couples by extending marriage, continuing the repudiation of *Bowers v. Hardwick* (1986). It raises, however, an interesting set of questions about longstanding efforts to get the courts to attend to poverty and the structural, social, and economic problems that come with extreme inequality of wealth in a democracy. Without understanding this process, a sharp observer might note the Court's creation of a rational basis review with some real bite, which it has now utilized repeatedly to invalidate statutes discriminating against gays, lesbians, and same-sex couples, and find its genesis in Justice Thurgood Marshall's dissent in *San Antonio Independent School District v. Rodriguez* (1973).[4] That same observer, however, if she looked across categories of potential equal protection claims, could be forgiven for wondering how the Court could possibly have rendered a decision in *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012), which predictably led some states to provide *less* health-care coverage for some individuals who have income levels above the base federal threshold for Medicaid coverage but *below* the level at which full federal coverage kicks in even in states that opted not to expand Medicaid.[5] Surely, if rationality is at all meaningful, it ought to prevent the federal government and the states from creating a gap in insurance coverage for individuals who are sandwiched between two income levels who have coverage. Part of the reason for this, as Kahn's mode of analysis enables us to see, is that the Court's successive readings of *Rodriguez* over the years separated and erased poverty from equal protection analysis, while freeing some other rights for more searching consideration under rational basis review.

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3. While the ruling did not directly address *Roe's* continued vitality, the Court's analysis of undue burden underlined its willingness to disapprove some regulations of abortion as inappropriately burdensome. *Whole Woman's Health v. Hellerstadt*, 136 S. Ct. 2292 (2016).

4. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

5. *National Federation of Independent Business v. Sebelius*, 567 U.S. 519 (2012).

I. SAN ANTONIO V. RODRIGUEZ AND ITS PROGENY

Most contemporary analyses of poverty in Supreme Court jurisprudence begin and end with the same case: *San Antonio Independent School District v. Rodriguez* (1973), in which the Court ruled that poverty could not be considered a suspect classification.[6] The case addressed a claim on the behalf of schoolchildren in San Antonio that the system of funding based on property taxes, which had produced drastic inequalities in both per student funding and concrete educational factors, did not violate the Equal Protection Clause. Analyzing the case through rational basis review, the Court found the financing system to be a reasonable means of achieving the state's overall educational intent.[7] Although the Court had hinted in earlier jurisprudence that it was moving toward a more robust recognition of the rights deprivations and differential access to rights entwined with poverty, *Rodriguez* was widely perceived as closing that door. The closure, as Justice Marshall highlighted in a passionate dissent, rejected both direct claims about the inequalities produced by poverty and claims that depended on the relationship between poverty and race (the plaintiffs were predominantly Mexican Americans).[8]

How, though, did this come to be the case, and why do we perceive this door as so firmly shut? One way to answer this question is to consider how the Court itself constructed the case in the first years after it was decided, and to use Kahn's approach to understand what the Court was constructing. By the mid-1990s, its jurisprudential identity was set; for instance, Chief Justice John Roberts cited it in a dissent in *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015) to support the proposition that "[o]ur cases have consistently refused to allow litigants to convert the shield provided by constitutional liberties into a sword to demand positive entitlements from the State" (2620). The dissenters in *Parents Involved v. Seattle* (2007) invoked it for the proposition that local control over schools was a longstanding principle in constitutional law.[9] Other cases addressing rights controversies in the late 1990s and 2000s cited *Rodriguez* as an expression of the limits on due process and equal protection with no real analysis; it had, by that time, become a byword and not a frequently invoked one.[10] The analysis to follow will illustrate how the Court engineered this transformation, which provided grounding for increased legislative tinkering with

6. *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

7. Id. at 50–55.

8. Id., Marshall, J., dissenting. Although Marshall did not address the racial aspect directly, he tied it in through reference to *Sweatt v. Painter*, 339 U.S. 629 (1950).

9. *Parents Involved v. Seattle Schools*, 551 U.S. 701, 849 (2007).

10. See, e.g., *Vacco v. Quill*, 521 U.S. 793 (1997); *Washington v. Glucksberg*, 521 U.S. 702 (1997); *Kimel v. Florida Bd. of Regents*, 528 U.S. 62 (2000).

policies that had direct impacts on the core liberties and autonomy of the poor, underlining the state's authority to use benefits to shape the supposedly free choices of poor individuals. The evacuation of poverty from equal protection analysis opened the door for freeing rational basis review to operate more strongly without posing any risk to state decisions affecting the poor that could readily be understood as irrational, even when viewed through a narrow filter of cost effectiveness.

The earlier history of the case's use shows significantly more nuance and variation. Between 1973 and the end of 1979, the case was cited forty-two times in majority opinions, concurrences, and dissents, with the citations invoking both the majority opinion and, from time to time, Marshall's dissent. The majority cited the case in its landmark ruling in *Lemon v. Kurtzman* (1973) ruling that public funding for nonpublic, nonsecular schools constituted a violation of the Establishment Clause, relying on Stewart's concurrence for the proposition that statutes were presumed to be constitutional.[11] Douglas relied on it in a dissent to outline the operation of strict scrutiny.[12] From the beginning, however, citation of the majority opinion for a restrictive interpretation of equal protection was a significant part of the picture. The Court relied on it to allow the denial of GI Bill benefits to conscientious objectors, because this class of individuals, in the *Rodriguez* Court's words had no political or historical disabilities sufficient to "command extraordinary protection from the majoritarian political process."[13]

Marshall's endorsement of a more flexible due process standard received early attention; the majority almost immediately cited it in a case invalidating a very strict policy preventing any challenges to an initial finding that a student was not eligible for in-state tuition.[14] But as time passed, the readings of the case became increasingly limited. The understandings of it that stuck were its expression of the limits of equal protection,[15] the proposition that wealth disparities did not trigger more searching review,[16] and the importance of local control in education.[17]

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11. *Lemon v. Kurtzman*, 403 U.S. 602, 608 (1973).

12. *B.P.O.E. Lodge No. 2043 v. Ingraham*, 411 U.S. 924, 928 (1973).

13. *Norwood v. Harrison*, 413 U.S. 455, 462 (1973).

14. *Vlandis v. Kline*, 412 U.S. 441, (1973). Justice Burger responded in dissent by citing the *Rodriguez* majority. See *Vlandis* at 461.

15. See, e.g., *United States v. Lopez*, 514 U.S. 549, 581 (1995).

16. See, e.g., Justice Thomas's citation of the case in his concurrence in *Lewis v. Casey*, which ruled that prisoners need not be provided with access to law libraries and legal services as a part of their right to access to courts. Thomas cited *Rodriguez* to reject the claim that the prisoners' impoverishment rendered them particularly vulnerable. *Lewis v. Casey*, 518 U.S. 343, 374 (1996).

17. See, e.g., *Board of Education v. Dowell* 498 U.S. 237, 248 (1991).

The case's interpretive life in the hands of the Supreme Court reveals a different kind of social constructive process than the support for embedded rights that Kahn describes. *San Antonio*, like *Roe*, indeed became a cornerstone, but a cornerstone for the naturalization of poverty as the outcome of individual choice, leading to the acceptance of the use of state power to structure and manage the lives of the poor. Associated with this was an increasingly strong commitment to the principle that the issuing or withholding of government largess was a legitimate tool for social design, as long as it was exercised to shape and mold a population with few choices other than to rely on it. The case's endorsement of lax rational basis review as a general matter contributed to the removal of poverty entirely as a matter of discussion, as the justices increasingly centered other kinds of rights to achieve wins on the ground. As the Court defined rationality increasingly downward for wealth distinctions, the legal interpretive community responded, facilitating its disappearance from constitutional discourse and opening the door for regulation that had no need to concern itself with even the most basic principles of equality. Meanwhile, the evacuation of poverty allowed space for the reconsideration of rational basis review, ironically reviving Justice Marshall's losing argument articulated in his *Rodriguez* dissent for a more flexible standard. The Court, by reflecting and shaping both cultural beliefs and policy dynamics, contributed to the development of an interpretive world in which the strong right of free family formation endorsed in the same-sex marriage cases is largely absent, aside from a few stale precedents, when poverty is brought into the picture.

II. POVERTY, POLICY DESIGN, AND THE CONSTITUTIONALIZATION OF FAMILY MANAGEMENT

At first, it appeared that the Court might be interested in expanding the *Rodriguez* framework modestly to accommodate equal protection claims based on poverty when they touched on other rights. This trajectory would have followed the development of doctrine established in the 1960s that had given the *Rodriguez* litigants the original hope that the Court might allow for a more searching review for wealth classifications in that case. In 1974, an almost united Court struck down an Arizona statute that required indigents to be residents of their respective counties for the preceding twelve months to be eligible for free nonemergency medical care.[18] Although the primary right invoked was the right to travel (in line with the

18. *Memorial Hospital v. Maricopa County*, 415 U.S. 250 (1974).

earlier case of *Shapiro v. Thompson* [1969]),[19] the Court found that the durational requirement constituted a denial of a basic necessity of life. Because "privileges or benefits necessary to basic sustenance have often been viewed as being of greater constitutional significance than less essential forms of governmental entitlements," this provision, even though it dealt with nonemergency medical care, constituted a particularly cruel penalty, "falling as it does on indigents who are often without the means to obtain alternative treatment" (*Shapiro v. Thompson*, 394 U.S. 618 [1969], 260, 261). The Court rejected the provision after analyzing the supposed state interests for it and determining that none of these objectives were compelling. Justice William Douglas saw the equal protection issue as relating more directly to poverty, reading the provision as a means of "fenc[ing] the poor out of the metropolitan counties . . . by use of a durational residence requirement" (394 U.S. 618 [1969], 260, 271). Only Justice William Rehnquist dissented.

A majority of seven members of the Court also allowed a welfare rights lawsuit to proceed in 1974 under equal protection and supremacy clause concerns. In this case, the petitioners challenged a New York regulation that allowed the state "to recoup prior unscheduled payments for rent from subsequent grants under the AFDC program" (*Hagans v. Lavine*, 415 U.S. 528, 530 [1974]). In this case, the Second Circuit, following the Court's more restrictive 1970 ruling in *Dandridge*, had declined to recognize jurisdiction, but the Supreme Court found to the contrary that any substantial question about equal protection would be enough to open the federal courts' doors to challenges of state policies.[20] After substantial additional litigation, however, the second circuit found that the contested regulation was indeed serving the purpose of the Social Security Act to "help maintain and strengthen family life and to help such parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection" (*Hagans v. Berger*, 536 F.2d 525, 528 [2nd Cir. 1975]). The cautious path opened by the Supreme Court was ultimately a dead end.

Claims touching on poverty but related to other established civic rights began to produce mixed results. In *Lubin v. Panish* (1974), the Court held that California could not exclude an indigent person from seeking nomination on a primary ballot because he was unable to pay a filing fee for the office he sought.[21] At the same time,

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19. *Shapiro v. Thompson*, 394 U.S. 618 (1969).

20. *Hagans v. Lavine*, 415 U.S. 528, 530 (1974).

21. 415 U.S. 709 (1974). Again Justice Douglas concurred, endorsing a more direct reliance on the state's lack of a compelling interest in excluding individuals on the basis of wealth.

the Court declined to mandate that indigent criminal defendants were entitled to counsel for appeals after their first postconviction challenge.[22] In the *Ross v. Moffitt*, 417 U.S. 600 (1974) case, the majority cited the *Rodriguez* decision to justify allowing a system that did not create "absolute equality" or "precisely equal advantages" (352) for the poor, even when key interests or rights were at stake.

Sosna v. Iowa, decided in 1975, appears to be a minor development in the right-to-travel line of cases, but it laid the groundwork both for state management of familial configurations and for the use of residency requirements to condition access to rights. Iowa law provided that individuals seeking divorces in the state establish in-state residency for one year before seeking a divorce. Petitioner Sosna, suing on her own behalf and those similarly situated, claimed that the durational residency requirement violated equal protection by discriminating against those who had recently exercised their right to travel and that it denied short-term residents any opportunity to show bona fide residency, thereby denying "such residents access to the only method of legally dissolving their marriage" (*Sosna v. Iowa*, 419 U.S. 393, 405 [1975]). The majority confirmed that prior decisions had invalidated residency requirements for welfare payments, voting, and medical care, but declined to extend the principle in this case because those seeking divorces were not "irretrievably foreclosed from obtaining some part of what [they] sought" (*Sosna v. Iowa*, 419 U.S. 393, 405 [1975], 406). Although total deprivation of access to divorce, like that worked by the requirement to pay a filing fee, would be unacceptable, a policy accomplishing "only delay" was permissible given the states' traditional responsibility for managing divorce (*Sosna v. Iowa*, 419 U.S. 393, 405 [1975], 563). The majority's analysis did not address poverty, but rather it underlined the idea that personal circumstances and choices that erected barriers to access to rights were not the responsibility of the state to redress. In dissent, Justice Marshall objected to the use of a lenient equal protection standard and advocated the nuanced balancing he had introduced in his *Rodriguez* dissent (*Sosna v. Iowa*, 419 U.S. 393, 405 [1975], 420–21).

The Court's retreat from searching equal protection analysis in cases involving poverty continued in 1976, when a majority ruled against a federal prisoner's claim that he should be entitled to a free trial transcript to seek vacation of his sentence on grounds of ineffective assistance of counsel. The majority reasoned that the Fifth Amendment's Due Process Clause established neither an absolute right to appeal nor "any right to collaterally attack a final judgment of conviction" (*United States v. Maccollom*, 426 U.S. 317, 323 [1976]). They acknowledged that the

22. *Ross v. Moffitt*, 417 U.S. 600 (1974).

relevant congressional statutes did place indigents in a worse position than individuals with resources, but concluded, based on *Rodriguez*, that the constitution did not "guarantee[] 'absolute equality or precisely equal advantages.'" (*United States v. Maccollom*, 426 U.S. 317, 323 [1976], 324, citing *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 [1973], 24). Although Justice Harry Blackmun advised for a narrow reading of the Court's position, he nonetheless concurred in the outcome.

These developments were extended in 1976 when the Court considered the operation of survivorship benefits for illegitimate children under the Social Security Act. The Secretary of Health, Education, and Welfare determined that a wage-earner's two children born out of wedlock had not adequately demonstrated their dependency and thus were not eligible to receive benefits when the wage-earner died. Legitimate children under age of eighteen, and students under the age of twenty-two, did not have to submit any proof of dependence but were simply presumed to be dependents. For illegitimate children to collect, they had to meet one of a set of specific conditions establishing dependency in the face of a marriage-like relationship or a traditional parental living relationship between the illegitimate child and the deceased wage-earner.[23]

Much of the majority's analysis concerned applying the appropriate standard of review; but in the end, the Court determined that Congress's purpose in creating statutory assumptions about dependence that cut one way for marital children and in the opposite direction for nonmarital children was simply administrative convenience.[24] Differentiating this case from other circumstances in which provisions limiting illegitimate children's rights were invalidated, the Court upheld the provision because it simply involved a presumption about illegitimate children's lack of dependence on their fathers. In their view, marriage created a dependent relationship, and a father's failure to marry (or to act as if he had married) implied a lack of support for the child. Justice John Stevens in dissent interpreted the state's path, rather than reflecting administrative convenience as "probably the product of a tradition of thinking of illegitimates as less deserving persons than legitimates" (*Mathews v. Lucas*, 427 U.S. 495 [1976], 522). The use of this permissive standard hardened the Court's commitment to weak rational basis review and allowed economic motivations to serve as a legitimate basis to drive policies regarding family recognition.

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23. *Mathews v. Lucas*, 427 U.S. 495 (1976). In the case in question, Robert Cuffee's children had lived with him and their mother since their respective births in 1953 and 1960. Cuffee died in 1968 after separating from the children's mother in 1966. Id. at 497.

24. Id. at 509.

In some regards, the Burger Court remained committed to rights principles, but the late 1970s saw further troubling developments stemming back to the *Rodriguez* framework. These developments supported the Court's efforts to generate boundaries around celebrated rights decisions concerning race and abortion, and they did so in part by disaggregating the effect of poverty from the exercise of the core rights protected in landmark cases.

The Court underlined its bifurcation between race and poverty analysis in *Village of Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). The case, decided in 1977, involved a challenge to Arlington Heights's decision to deny a rezoning request that would have permitted the development of low-income housing in the village. The housing would have benefited primarily black indigent tenants, and village decision-makers argued that allowing the housing to be built would have damaged property values and altered the character of the community, which was based around single-family homes. The case is probably best known for determining, following *Washington v. Davis*, 426 U.S. 229 (1976), that "official action will not be held unconstitutional solely because it results in a racially disproportionate impact" (429 U.S. 252, 265 [1977]). Although the Court cautioned that determining whether discriminatory purpose lurked in the background of state action required "a sensitive inquiry into such circumstantial and direct evidence of intent as may be available," the majority readily concluded that the history of the debate contained no smoking guns and that the primary concern seemed to be that the village was "undeniably committed to single-family homes as its dominant residential use" (429 U.S. 252, 265 [1977], 269–70). This reasoning disaggregated race from poverty and, by denying any racial motivation, allowed an analysis in which the village simply had to articulate a rational explanation. The justices cited *Rodriguez* in determining that a more stringent review was unnecessary.[25]

This harsh ruling was tempered a bit by *Moore v. City of East Cleveland* (1977), decided later in the same term, in which the Court invalidated a city ordinance that limited occupancy in "single-family units" to members of narrowly defined nuclear families. The ordinance, as enforced, led to the criminal conviction of a grandmother for cohabiting with her two grandsons. Relying on earlier case law allowing localities to regulate occupancy by unrelated individuals, East Cleveland argued that it need only show the rationality of the ordinance and cited overcrowding, traffic and parking congestion, and undue burden on East Cleveland's schools as legitimate reasons for the regulation.[26] The Court, however, found that this "intrusive

25. Id. at 259.

26. *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), 499–500.

regulation of family" demanded something more than "judicial deference" (431 U.S. 494 [1977], 499). Families, explained the majority, are an institution deeply rooted in history and tradition, and "it is through the family that we inculcate and pass down many of our most cherished values, moral and cultural" (431 U.S. 494 [1977], 503). Although the Court declined to provide a firm definition of the extent of the family circle it would recognize, it mentioned "uncles, aunts, cousins, and especially grandparents" and the history of "extended family households" and "close relatives" who would "draw together and participate in the duties and the satisfactions of a common house" (431 U.S. 494 [1977], 501–505). Relatives' choice to live together had to be taken seriously by the state, and the Court found that "the Constitution prevents East Cleveland from standardizing its children—and its adults—by forcing all to live in certain narrowly defined family patterns" (431 U.S. 494 [1977], 506).

Justices William Brennan and Marshall took this reasoning an additional step by highlighting the normative and racialized nature of the nuclear family; while acknowledging that the East Cleveland ordinance did not have any other animus, they nonetheless pressed for visions of family that incorporated broader kin networks.[27] They concluded that this practical reality further underlined the unconstitutionality of abridging "the freedom of personal choice of related members of a family to live together" (431 U.S. 494 [1977], 512). Despite their recognition of the racial undercurrents, however, neither they nor the majority acknowledged the significance of poverty in the case, apparently being unwilling to open a jurisprudential avenue to consider how zoning ordinances were rationally and intentionally designed to produce a certain class mix of residents.

The freedom to choose family configurations embraced in *Moore*, however, was sharply curbed in the policy arena of abortion through the Court's reshaping of the right at stake by relying on the established *Rodriguez* trajectory. Here, despite *Roe*'s identification of abortion choice as an important right and despite *Moore*'s language about family choice, the Court issued a series of rulings in the late 1970s that allowed the practical limitation of poor women's access to abortion services by denying that the right to choose abortion implied a right to make that choice a reality. The lead case, *Maher v. Roe*, 477 U.S. 635 (1986), considered a challenge to Connecticut's policy of limiting payment through Medicaid for abortion services for indigent women. Connecticut's policy required women seeking Medicaid funding for abortions to show that desired first trimester abortions were medically necessary, which the women challenged under *Roe*'s identification of abortion as incorporated

27. Id. at 510.

within privacy as a fundamental right. The Court, led by Justice Lewis Powell, found that the state was not required to "accord equal treatment to both abortion and childbirth" once it had set out to subsidize childbirth because, under *Rodriguez*, the prior question was whether either a suspect class was disadvantaged or a fundamental right was burdened (432 U.S. 464 [1977], 470). The justices reasoned, "In a sense, every denial of welfare to an indigent creates a wealth classification as compared to nonindigents who are able to pay for the desired goods or services. But this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis" (432 U.S. 464 [1977], 471, citing *San Antonio Independent School District v. Rodriguez*). The Court then complicated its own abortion analysis, characterizing the right at stake in earlier rulings as "a constitutionally protected interest 'in making certain kinds of important decisions' free from governmental compulsion" and stating that this right protected women only from "unduly burdensome interference with her freedom to decide whether to terminate her pregnancy" (432 U.S. 464 [1977], 472–73). Characterized in this way, the right was easily severed from any responsibility on the part of the state to ensure access to it, and the Court even allowed the state to adopt policies that disfavored its exercise.

Two companion cases further clarified the scope of this ruling. *Beal v. Doe* (1977) considered Title XIX's language, determining that Congress did not intend to require Medicaid funding to subsidize any abortion that was legal under the relevant state's law.[28] And in *Poelker v. Doe* (1977), the Court found that a city could constitutionally choose to fund hospital services for childbirth while denying funding for nontherapeutic abortions.[29] Neither case saw the differential access to abortion based on wealth that these rulings enforced as problematic on statutory or constitutional grounds, nor did they note any issues with the open influence of state policy on intimate decisions related to family configuration. *Roe* itself was not questioned or threatened directly in any of these rulings; rather it was carefully detached from the question at hand, and the rights principle was consciously and overtly separated from the question of wealth. This development had significant political repercussions, heartening the religious right in its effort to chip away at abortion access by promoting limits, a strategy that would soon pay off through the rise of informed consent rules.

A year later, the Court issued a major ruling in the area of marriage law that further shifted its equal protection jurisprudence. Wisconsin prohibited the issuance of marriage licenses to individuals who were behind on child support obligations

28. 432 U.S. 438 (1977).

29. 432 U.S. 519 (1977).

or if the state judged that the children they supported were likely to become public charges. The state sought to justify the statute as a measure for protecting children, but the Court was highly skeptical and struck down the law.[30] Although the law clearly targeted the poor, in writing for the majority, Justice Marshall took the cautious path of resting his analysis on the identification of the right to marry as fundamental, looking to *Loving v. Virginia* for support and emphasizing the right's grounding in privacy.[31] While reasonable regulations that did not "interfere directly and substantially with the right to marry" would be permissible, Wisconsin's law crossed the line by directly barring access (*Zablocki v. Redhail*, 434 U.S. 374 [1978], 387). To get a majority for this outcome, however, Marshall could not embrace a robust analysis of the differential effect of the legislation on the poor, and even the limited equal protection analysis he crafted garnered a vigorous objection from Justice Potter Stewart, who saw the case as turning exclusively on the freedom to marry because of *Rodriguez*'s limits on class analysis.[32] Marshall's tactic won the day for the plaintiffs denied access to marriage, but the cost was further entrenching the practice of separating the significance of poverty as a limiting factor on the exercise of rights from any meaningful contribution to equal protection analysis. Marriage's status as a right also linked more firmly to privacy and choice, a move that had repercussions for other privacy rights, especially abortion.

This became clear in *Harris v. McRae*, 448 U.S. 297 (1980), which upheld Congress's authority to bar the use of Medicaid funding for most abortion services.[33] The Court then interpreted "the normal operation of Title XIX" to allow states to deny coverage for even medically necessary abortions for poor women unless the states opted to shoulder the financial burden on their own (448 U.S. 297 [1980], 310–11). Plaintiffs challenged the Hyde Amendment under the Due Process Clause, Establishment Clause, and Fifth Amendment equal protection claims, but the Court rejected all of these gambits. Congress, the Court found, was entitled to encourage childbirth over pregnancy because the limits that poor women faced upon their "ability to enjoy the full range of constitutionally protected freedom of choice" were the product of their poverty, not of governmental restrictions on

30. *Zablocki v. Redhail*, 434 U.S. 374 (1978).

31. Id. at 383–84.

32. Id. at 391.

33. 448 U.S. 297 (1980). The provision in question, the Hyde Amendment, barred the expenditure of funds for abortions "except where the life of the mother would be endangered if the fetus were carried to term; or except for such medical procedures necessary for the victims of rape or incest when such rape or incest has been reported promptly to a law enforcement agency or public health service." Id. at 302.

access (448 U.S. 297 [1980], 316). The Court quickly stripped the amendment of its religious justifications, characterizing the stance on abortion as simply traditionalist thinking that happened to coincide with Catholicism.[34] On equal protection, the Court reinforced its insistence that *Rodriguez* disallowed any recognition of poverty as a suspect classification and determined that fetal protection constituted a legitimate government interest.[35] Although Justice Marshall identified the measure as a straightforward "effort to deny to the poor the constitutional right recognized in *Roe v. Wade*" (448 U.S. 297 [1980], 337–38), he could not dismantle the developing infrastructure of equal protection that separated poverty analysis strictly from other questions of rights and equality.[36]

This ruling opened the door to further conditioning benefits for the poor. In the same year as the ruling in *Harris v. McRae* (1980), the Court considered Congress's decision to deny Supplemental Security Income (SSI) benefits to otherwise eligible individuals because they were hospitalized in public mental institutions that did not receive Medicaid funding to support their care. Individuals in public institutions that did receive Medicaid funding were eligible for a small stipend. The Court expressed the *Rodriguez* rule as a hard limit on its capacity to intervene in the case:

> Unless a statute employs a classification that is inherently invidious or that impinges on fundamental rights, areas in which the judiciary then has a duty to intervene in the democratic process, this Court properly exercises only a limited review power over Congress, the appropriate representative body through which the public makes democratic choices among alternative solutions to social and economic problems. (*Schweiker v. Wilson*, 450 U.S. 221 [1980], 230)

The Court then found against the plaintiffs by finding that the statute did not distinguish based on mental health, but rather had "an indirect impact upon the mentally ill as a subset of publicly institutionalized persons" (450 U.S. 221 [1980], 233). Justice Powell, joined by Justices Brennan, Marshall, and Stevens, would have found the provision to be thoughtless and irrational, rejecting a general reliance on cost saving, but their argument fell on deaf ears.[37]

These rulings anticipated the political earthquake of Ronald Reagan's election in 1980. Although cultural conservatives had made a resurgence in politics and

34. Id. at 321.

35. Id. at 323–24.

36. Marshall, J. dissenting.

37. *Schweiker v. Wilson*, 450 U.S. 221 (1980), 244–45.

Reagan had run in 1976, his victory, capturing forty-four states, ushered in twelve years of Republican control of the executive branch, following a Carter presidency that saw no opportunities to fill vacancies on the Supreme Court. Republicans also regained control of the Senate, ending 26 years of Democratic dominance in both houses of Congress. In his campaign, Reagan promoted drastic budget reductions for social welfare programs but advocated for military buildup. He also embraced many key planks of social conservatism, including opposition to abortion. Although his policies and accomplishments in office did not fully satisfy the most ideological members of the right, his election marked a shift in American politics, and this shift resonated powerfully with the Court's trajectory on poverty issues.

As constitutional development increasingly moved toward allowing discretion for policymakers to limit support for the poor, the foundations of the litigation campaign to press for rights for the poor were shaken by the Reagan administration's efforts to defund the Legal Services Corporation (LSC). Since 1966, federally funded legal aid programs and the LSC had been the premier sponsor of major campaigns to try to engineer constitutional protections for the poor, and the resurgent political right subjected the program to increasingly strident attacks (Lawrence 2014; Decker 2016). Although Democrats in Congress were able to save the program, which funds access to attorneys for assistance with private litigation, the preservation came at the cost of significant new limits. No longer would LSC be permitted to engage in class action litigation, greatly impeding its capacity to advance constitutional claims.

Furthermore, conservatives (at times working in coalition with other actors) targeted the infrastructure that had supported the rights revolution of the 1960s and early 1970s in other ways. Joining with advocates of more efficient and speedier judicial process, they worked to promote alternative dispute resolution, limit judicial checks on administrative discretion, curtail class-action litigation, and cut back on the types of suits for which plaintiffs could recover attorneys' fees (Staszak 2015). In particular, opponents of liberal civil rights litigation have targeted the mechanisms through which private citizens have been able to use the legal system to enforce access to rights. Much of this has taken place by sharply limiting access to court under section 1983, the federal statute that allows aggrieved individuals to file suit against state actors who endanger their rights (Dodd 2018).

These trends followed hand in hand with jurisprudential development. In 1986, the Court stepped back from the principle established in *Moore* of embracing kin relationships and families of choice as legitimate families. *Lyng v. Castillo*, 477 U.S. 635 (1986) addressed policy under the Federal Food Stamp Act that allocated benefits on a household basis, defining a household as parents, children, and siblings

who cohabited, whether or not they considered themselves to be a unified family. The policy presumed separate household recognition for "more distant relatives, or groups of unrelated persons who live together, as a single household unless they also customarily purchase food and prepare meals together" (477 U.S. 635 [1986], 636). The policy, which was part of a series of amendments to the Food Stamp Act in 1981 and 1982, eliminated benefits for some families and reduced them for others. Although the district court found the cost-saving rationale proffered to be based in rationality, it invalidated the provision because it embraced a higher standard of review given the politically unpopular status of the individuals affected. The Supreme Court reversed, identifying the disadvantaged groups is "parents, children, and siblings," which "as a historical matter . . . have not been subjected to discrimination; they do not exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; and they are not a minority or politically powerless" (477 U.S. 635 [1986], 638). The majority then inferred rationality in the regulations based on presumptions about conventional family relationships and household practices of food preparation. The state interests defined as acceptable were the limiting of waste and fraud and the efficiencies gained by not requiring case-by-case verification of family structures for kin groups living under the same roof.[38]

The dissenters protested that the statute's operation was not in fact rational, and Justice Marshall criticized

> the Court's rigid, bipolar approach, which purports to apply rational-basis scrutiny unless a suspect classification is involved or the exercise of a fundamental right is impeded, put[ting] legislative classifications impinging upon sensitive issues of family structure and survival on the same plane as a refusal to let a merchant hawk his wares on a particular street corner. (477 U.S. 635 [1986], 344)[39]

Marshall's attempt to bring in the importance of familial autonomy and privacy and his recognition that the government's conditional extension of benefits would have a coercive effect upon the poor went unheard by the majority. There was no constitutional ground left on which to stand that would enable the Court to recognize as coercive or unequal most state or federal practices creating or implementing differential benefit structures.

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38. 477 U.S. 635, 636 (1986), 639–40.

39. Marshall, J. dissenting.

Perhaps the bitterest fruit of this line of reasoning came in the well known case of *DeShaney v. Winnebago County Department of Social Services*, 812 F.2d 298 (1987). By 1989, the transformation in equal protection analysis was complete, rendering the significance of poverty in the case almost invisible. After a failed series of interventions on the part of social service authorities in Winnebago County, Wisconsin, Joshua DeShaney was severely beaten by his father and left permanently disabled. Joshua's mother attempted to take advantage of a recently developed line of cases that were using federal legislation to sue when a state that had a special relationship with an individual in its custody had failed to fulfill its basic protective duties toward that individual (Curry 2007; Dodd 2007). The logic developed in preceding cases reached its full extent with the Court's declaration that its previous precedents established that "the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the government itself may not deprive the individual" (489 U.S. 189 [1989], 196). Simply put, the injury to Joshua inflicted by his father was not one that the state had assumed the constitutional duty to prevent. Justice Brennan's dissent would have expanded the scope of state responsibility by finding that, "if a State cuts off private sources of aid and then refuses aid itself, it cannot wash its hands of the harm that results from its inaction" (489 U.S. 189 [1989], 207), an argument only strengthened by noting that the DeShaney family's poverty brought Joshua even further within the zone of state protection and nurturance than Brennan acknowledged.[40] Although the ruling remained controversial because of its reading of the limits of private litigation to enforce civil rights, its impact on litigation brought specifically on the behalf of poor clients did not, for the most part, raise eyebrows.

A final case decided in 1993 and relying on the *Rodriguez* framework addressed a straightforward question of equal protection. *Heller v. Doe* (1993) involved a case in which involuntarily committed developmentally disabled individuals[41] challenged Kentucky's use of differential standards for commitment for the developmentally disabled and the mentally ill. Developmentally disabled individuals could be civilly committed based on a showing of clear and convincing evidence in favor of commitment, whereas involuntary commitment of the mentally ill had to meet

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40. Brennan, J. dissenting. The seventh circuit ruling that the Supreme Court upheld noted that caseworkers had recommended that Joshua be enrolled in a local Headstart program. See *DeShaney v. Winnebago County*, 812 F.2d 298, 299 (1987).

41. Throughout the opinion, the Court referred to these individuals as mentally retarded, a phrase I have chosen not to use.

the more rigorous reasonable doubt standard. Furthermore, family members and guardians were permitted to participate as parties in commitment proceedings for developmentally disabled individuals but not for those who were mentally ill. Advocates for developmentally disabled individuals challenged this different standard and achieved victory in the district and circuit courts. The Supreme Court reversed, relying again on a highly deferential form of equal protection analysis that accepted Kentucky's various justifications for this differential treatment. In the course of upholding the statute, the majority noted approvingly that Anglo-American common law had long distinguished between "idiots" and "lunatics," and characterized the different frameworks of confinement as based in habilitation or treatment (*Heller v. Doe*, 509 U.S. 312 [1993], 325).

These developments circumscribed the debate over welfare reform during the Clinton years. Rights claims were difficult to advance, and basing broad cultural arguments in equality had no constitutional basis that could resonate out into the political sphere. Advocates for the poor were limited to pushing back against the racialized discursive frameworks that advanced welfare reform, pointing out circumstances in which work requirements were unreasonable, invoking compassion, and trying to reframe the poor as deserving of government largesse. The more powerful leverage that privacy provided with respect to abortion or the first glimmerings of the notion that blocking lesbians' and gays' access to the legislative protection through ordinary political processes were not within the reasonable scope of jurisgenerative projects. The substantive jurisprudential closing of these doors was further reinforced through the Supreme Court's increasingly restrictive interpretations of Section 1983, which prevented new arguments from even getting a hearing.

III. THE *RODRIGUEZ* FRAMEWORK, EQUAL PROTECTION, AND POLICY CHANGE

Rodriguez cannot be blamed for creating the cultural conditions that led to the demise of the welfare rights movement, nor was it the cause of punitive and restrictive transformations in federal and state poverty law and policy in the early 1980s and then again in the 1990s. The case and its successive development by the Court, however, created a grammar that separated poverty from other equal protection concerns and placed inequalities stemming from poverty outside of the scope of national constitutional remedy. The compartmentalization of poverty has muted it and discouraged constitutional activism around it, even as debate and litigation have swirled around racial inequality, abortion, gay rights, and other issues. The removal

of poverty ironically opened up the space that Justice Marshall tried to carve out for rational basis review with some potential for recognizing irrationality—but the irrationality in inequitable state policies has been visible primarily in the recognition that antigay animus is not rational and therefore cannot ground policies that stigmatize members of the lesbian, gay, bisexual, and transgender community.

Precedential social facts are powerful, as Kahn's work reveals. How then can this situation be addressed? The prospects for change look dim if we consider the Court's makeup and the possibility of further conservative appointments. We must couple Kahn's recognition of the importance of an embedded conception of rights and their scope along with a recognition that the heavily politicized and polarized climate may bleed over even into Supreme Court appointments and subsequent deliberations.

Although the situation may appear hopeless, however, understanding the dynamics among the Court, the legal interpretive community, and the broader public may provide some ground for longer term change. Kahn's work emphasizes the role of the Court in creating rights principles and embedding them in ways that resonate out into the political sphere, transforming political conversations. Although it may seem impossible to initiate a broad political conversation about the wrongs worked by inequitable state policies that stigmatize the poor, the current crisis in health care and health-care insurance affordability may provide an interesting political, and ultimately constitutional, moment. The trajectory for many national constitutional rights since the twilight of the Warren Court's expansion has been their expansion or maintenance in terms of individuals' private capacity to purchase access to them. Abortion and contraception, high-quality and racially diverse primary and secondary education, the privileges and protections associated with marriage, and even the right to bear arms are all available at a price, and the rightwardly shifting center of American politics was, through the 1980s, 1990s, and early 2000s, less willing to complain if the free exercise of protected civil rights and civil liberties was shrinking primarily among those who required government largesse or assistance to exercise them.

Perhaps health care can reverse this trajectory, as increasingly even those firmly ensconced in the middle class feel the direct connection between affordability and access. The political turmoil over efforts to eliminate Obamacare has generated stronger support for the program and more talk of health-care access as a right. Although few have focused on the outright irrationality of excluding some individuals from Medicare coverage because they live in states that have refused expansion and make either too much or too little for existing coverage in those states, the general irrationality of the American system of access is garnering increased

frustration and perhaps some political momentum toward change. If political changes help to spark and legitimize more rights-based discourse, we eventually could see the creation of new ground for constitutional analysis. This ground might then provide the foothold to recognize both the irrationality and the cruelty behind government policies that deny basic rights to Americans living in poverty.

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