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POVERTY AND SUBSTANTIVE DUE PROCESS

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The advent of the War on Poverty in 1964 coincided with, and to a large extent precipitated, an activist period of the United States Supreme Court[1] that has revitalized the long dormant concept of "substantive" or "economic" due process.[2] Successful test-case litigation has carved out major exceptions on behalf of poor persons and other classes of citizens to the almost dogmatic reluctance of the Highest Court since 1937 even to review state regulations unrelated to race or to first amendment guarantees.[3]

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[1] In 1964, Congress for the first time appropriated funds for locally administered, action oriented programs to combat poverty. Economic Opportunity Act, 42 U.S.C. § 2701 *et seq.* (1964). In 1965, § 2785(a) of the Act was amended, 79 Stat. 974 (1965), to implicitly include legal services among the Community Action Programs focused upon the needs of low income individuals and families. *See* 2 U. S. CODE CONG. & AD. NEWS 3509 (1965).

In early 1970, the Office of Legal Services of the United States Office of Economic Opportunity had jurisdiction over 600 local units receiving $42 million in federal funds. 14 AM. B. NEWS, No. 6, June, 1969, at 5. *See also* CCH POVERTY L. REP. ¶ 8020, at 9051-9119.

[2] Technically, substantive due process refers to those rights, substantive as opposed to procedural in nature, entitled to protection under the due process clause of the fourteenth amendment. *See* Snell v. Wyman, 281 F. Supp. 853, 863 n.19 (S.D.N.Y. 1968). Historically "substantive" or "economic due process" refers to the readiness of court majorities during the approximate period, 1900 to 1933, to strike down state or federal social legislation usually under the due process clause but sometimes under the equal protection clause. *See* Paulsen, *The Persistence of Substantive Due Process in the States,* 34 MINN. L. REV. 91 (1950); Reeder, *The Due Process Clause and "the Substance of Individual Rights,"* 58 U. PA. L. REV. 191 (1910); Warren, *The New "Liberty" Under the Fourteenth Amendment,* 39 HARV. L. REV. 431 (1926).

[3] Except for decisions under the Commerce Clause prior to the War on Poverty, the only exception to the rule of judicial restraint in the area of state "substantive" regulation was made in a decision striking down an Illinois statute that granted a special exemption from licensing to the American Express Co., Morey v. Doud, 354 U.S. 457 (1957). Justice Hugo L. Black, who joined the Court in 1937, has expressly linked the post-1937 trend to a reaction to the "due process phi-

At the Supreme Court level the trend reached a high point in March, 1970, in a due process decision affirming the right to a hearing prior to termination of Aid to Families with Dependent Children.[4] Several weeks later, however, the Court shut the door, at least temporarily, to more substantive assaults on state action in the socio-economic area by unequivocally upholding state discretion to pay welfare benefits inadequate for recipients to maintain a bare existence.[5]

The current direction of the Court has been heavily influenced by the divergent philosophies of three jurists who have faced squarely the substantive due process question. Mr. Justice Hugo L. Black, in vigorous dissents from decisions overturning birth control laws and welfare residency and poll tax requirements,[6] has accused his colleagues of imposing

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losophy which brought on President Roosevelt's Court fight." Sniadach v. Family Fin. Corp., 395 U.S. 337, 345 (1969) (Black, J., dissenting).

Since 1964, review has been successfully sought of state regulation in areas other than first amendment or race. Shapiro v. Thompson, 394 U.S. 618 (1969) (invalidated state durational residency requirements for receipt of welfare benefits as interference with right to travel); Levy v. Louisiana, 391 U.S. 68 (1968), and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (companion decisions which invalidated a Louisiana statute denying recovery for wrongful death to illegitimate children and their parents); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (invalidated poll tax requirement for voting).

See Goldberg v. Kelly, 90 S. Ct. 1011 (1970), and Wheeler v. Montgomery, 90 S. Ct. 1026 (1970) (companion decisions which invalidated New York and California welfare regulations permitting termination of benefits prior to hearing); Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969) (invalidated Wisconsin statute permitting garnishment of wages prior to notice and hearing). While the gravamen of *Sniadach* and *Goldberg* involved procedural issues, they are included here as "poverty law" decisions because they also raise questions of protection of substantive property rights.

See also King v. Smith, 392 U.S. 309 (1968) (invalidated on statutory grounds Alabama's "man-in-the-house" rule in welfare administration). The Court later extended the *King* doctrine to regulations presuming the availability of a stepparent's income for inclusion in the welfare budget, Solman v. Shapiro, 396 U.S. 5 (1969), even where state statute imposes a support obligation upon the man in the house. Lewis v. Martin, 90 S. Ct. 1282 (1970).

The major decision not directly involving the poor was Griswold v. Connecticut, 381 U.S. 479 (1965) (invalidated Connecticut birth control statute). *See also* Loving v. Virginia, 388 U.S. 1 (1967) (struck down statute barring interracial marriages). Though a race case, *Loving* is included in the discussion here because the Court also found a violation of substantive due process by the state's interference with the interracial couple's freedom to marry.

[4] Goldberg v. Kelly, 90 S. Ct. 1011 (1970), *followed in* Hackney v. Machado, 90 S. Ct. 1347 (1970).

[5] Dandridge v. Williams, 90 S. Ct. 1153 (1970) (upheld a Maryland "maximum grant" statute imposing a ceiling on AFDC benefits according to the number of children in the home). *Dandridge* was a 5-3 decision (Douglas, Brennan, and Marshall, JJ., dissenting) and could be reversed by a slight addition to and shift in the composition of the Court.

In Rosado v. Wyman, 90 S. Ct. 1207 (1970), decided the same day as *Dandridge*, the essential holding was that New York violated the Social Security Act by failing to increase its *theoretical* minimum needs level. However, dicta in the Harlan majority opinion also indicated that the Court would approve a "percentage reduction" formula utilized, *inter alia*, by Arizona welfare administrators. No state pays benefits higher than the survival level.

[6] Griswold v. Connecticut, 381 U.S. 479, 507 (1965) (birth control); Shapiro v. Thompson, 394 U.S. 618, 644 (1969) (welfare residency); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 675 (1966) (poll tax). *See also* Sniadach v.

their "natural law" views on state prerogatives. Mr. Justice John M. Harlan, the Court's principal exponent of judicial restraint, frequently joins Black in dissent, but not, however, by reason of the same doctrinal reluctance to interfere.[7] Justice Harlan, using a "balancing" formula, often reaches the same result as Justice Black by taking a highly selective view of private rights entitled to protection against state action.

At the other end of the spectrum is Mr. Justice William O. Douglas, who seems to have become the Court's foremost "liberal,"[8] replacing Earl Warren as the object of right wing attacks.[9] A close analysis of the votes by the veteran jurist in selected non-poverty law cases[10] shows that the label "egalitarian," affixed to Douglas in 1969 by a sympathetic commentator,[11] does not adequately explain his jurisprudence. To the extent that "egalitarian" conjures up the image of a judge waging partisan battle on behalf of disadvantaged classes of citizens, such an appellation might also hamper the public effectiveness of that member of the Court whose

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Family Fin. Corp., 395 U.S. 337, 344 (1969) (Black, J. dissenting); Adamson v. California, 332 U.S. 46, 90 (1947) (Black, J., dissenting). In Ferguson v. Skrupa, 372 U.S. 726 (1963), the majority opinion by Black also contains a lengthy discussion of substantive due process.

[7] Mr. Justice Harlan failed, however, to follow his traditional policy of judicial restraint in *Griswold, Sniadach,* and *Goldberg.* Black and Harlan joined the majority in *Loving,* but Harlan dissented in Sherbert v. Verner, 374 U.S. 398, 418 (1963), the unemployment insurance benefits case.

[8] In 1968-1969 Justice Douglas voted in favor of individuals asserting constitutional rights in 61 out of 69 such cases. AMERICAN JEWISH CONGRESS, SUMMARY AND ANALYSIS OF THE CIVIL RIGHTS AND CIVIL LIBERTIES DECISIONS OF THE UNITED STATES SUPREME COURT FOR THE 1968-1969 TERM (1970). The study does not evaluate the merits of the claims. Douglas led as the most "liberal," followed by Marshall, Brennan, Warren, Fortas, Harlan, White, Stewart, and Black, in that order.

[9] In the spring of 1970, after the defeat in the Senate of the successive nominations of Judges Clement Haynesworth and Harrold Carswell to the Court and the publication of Douglas' book, POINTS OF REBELLION (1969), a movement began in the House of Representatives, supported by Vice President Spiro Agnew and House Minority Leader Gerald Ford, to impeach Justice Douglas. N.Y. Times, April 17, 1970, at 1, col. 8.

[10] *See* Korematsu v. United States, 323 U.S. 214 (1944) (upheld the wartime relocation of Japanese-Americans); Morey v. Doud, 354 U.S. 457 (1957) (invalidated Illinois licensing exemption of American Express Co.).

For labor cases, see H.K. Porter Co., Inc. v. NLRB, 90 S. Ct. 821 (1970); NLRB v. J.H. Rutter-Rex Mfg. Co., 90 S. Ct. 417 (1970); American Shipbldg. Co. v. NLRB, 380 U.S. 300 (1965); NLRB v. Brown, 380 U.S. 279 (1965); Textile Workers' Union v. Darlington Mfg. Co., 380 U.S. 263 (1965); Humphrey v. Moore, 375 U.S. 335 (1964); NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962); Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962); Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961); Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961); NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963); NLRB v. Insurance Agents' Union, 361 U.S. 477 (1960); Radio Officers Union v. NLRB, 347 U.S. 17 (1954); American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100 (1953).

For cases under the Commerce Clause, see Hood & Sons v. DuMond, 336 U.S. 525 (1949), and citations in Linde, *Justice Douglas on Liberty in the Welfare State,* 40 WASH L. REV. 10, 52 n.340 (1964).

[11] Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural Law-Due Process Formula,"* 16 U.C.L.A.L. REV. 716, 718 (1969).

Reference to the recent " 'egalitarian' interventions" by the Court as a whole appears in Michelman, *The Supreme Court 1968 Term, Foreward: On Protecting the Poor Through the Fourteenth Amendment,* 83 HARV. L. REV. 7, 9 (1969).

interventionist approach is most responsive to the needs of our times and thoroughly compatible with the pluralistic American Dream. The natural law philosophy of Mr. Justice Douglas has its roots, not in Union Square or Thomas Aquinas, but in the mountains and rivers of the Pacific Northwest, and his standards for judicial review would protect businessmen[12] and "hippies"[13] as well as poor Blacks from irrational, chauvinistic, or vindictive governmental restraints upon their upward mobility.

By focusing on Douglas, Black, and Harlan, I propose to show that the popular modern estimation of the substantive due process Court (1900-1933) as socially reactionary has been at best oversimplified, due principally to the influence of Justice Black. Historians, however, have also played a part in creating this misconception. Many failed to examine even superficially the legislative intent underlying the various pieces of state legislation struck down in the name of substantive due process.[14] Rather they have tended to pluck *Lochner v. New York*[15] and later decisions out of their respective eras without paying sufficient attention to numerous other decisions by that same Court upholding social legislation[16] and protecting fundamental "liberties" of aliens and school children against parochial-minded legislators.[17]

A stereotyped image of these three decades of decisionmaking also began to emerge out of New Deal efforts to combat the Depression. Because the substantive due process Court was deemed, in retrospect, to have been unduly solicitous for the accumulation of wealth, the modern Court reacted by placing "property" rights almost completely beyond the constitutional pale.[18] Until the recent barrage of claims advanced by poverty lawyers, the post-1937 court had been noticeably less zealous than its predecessor in safeguarding those aspects of personal liberty that were intertwined with both old and new forms of property.[19] Despite the recent

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12 *See* Morey v. Doud, 354 U.S. 457 (1957).

13 Douglas dissented on equal protection grounds from a memorandum decision upholding lower court determinations denying federal judicial review to a student expelled from school because of his hair length. Ferrell v. Dallas Independent School Dist., 393 U.S. 856, *denying cert. to* 392 F.2d 697 (5th Cir. 1968).

14 *See* R. GABRIEL, THE COURSE OF AMERICAN DEMOCRATIC THOUGHT 292-96 (1956); S. MORISON, THE OXFORD HISTORY OF THE AMERICAN PEOPLE 770-72 (1965).

15 198 U.S. 45 (1905). The Court in *Lochner* struck down, as an interference with freedom of contract, a statute restricting hours of daily employment in bakeries. *Lochner* is often cited as the epitome of the substantive due process cases.

16 Muller v. Oregon, 208 U.S. 412 (1908) (upheld Utah statute regulating employment of women); Jacobson v. Massachusetts, 197 U.S. 11 (1905) (upheld a compulsory vaccination law).

17 Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1922); Truax v. Raich, 239 U.S. 33 (1915).

18 In Hague v. C.I.O., 307 U.S. 496, 531 (1939), Chief Justice Stone, concurring, enunciated the post-1937 rule that the due process clause only protects liberties not dependent for their existence on property rights.

19 *See* Reich, *The New Property*, 73 YALE L.J. 733 (1964). For present purposes, I use Reich's definition of property as choses of value entitled to legal protection. *Id.* at 739.

breakthroughs, some of which could have been or were decided in principle in earlier cases,[20] the current bench for the most part has avoided interventions into economic discrimination litigation out of excessive respect for the legislative process.[21]

Following an examination of the 1930-33 Court, I will suggest that the pragmatic, humanistic philosophy of William O. Douglas points the way to needed formulas for federal court intervention. Although borrowed from the substantive due process era, it adjusts well to present realities. Sound tests, which will take into consideration the gravity of the private interests at stake, can be devised for application under the due process or equal protection clauses of the fourteenth amendment or the "penumbra" of protected rights emanating from the first eight amendments. By placing the dependency of indigents upon governmental aid at the top of a descending order of priorities, the standards to be proposed should not strain the caseload of the federal judiciary nor dilute the important principle of separation of powers.

THE EARLY COURT 1900-1933

"The Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."[22] This famous statement from the dissent in *Lochner* by Mr. Justice Oliver Wendell Holmes celebrates two interrelated concepts: the utmost judicial deference should be given to legislative expertise in economic matters, and the absolute rule of reason should prevail in decisionmaking. Sixty-five years after its utterance, Holmes' comment still has vitality among jurists and lawyers who suppose, naively, that a judge can divorce a lifetime of religious, political, and sociological influences from the case at hand.

Although the *Lochner* dissent and its author have come to symbolize progressive opposition to three decades of reactionary pronouncements from the Highest Court (which roughly coincided with Holmes' term),[23]

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[20] The Court rejected, on highly technical grounds, an earlier opportunity to rule on interracial marriage prohibitions. Naim v. Naim, 350 U.S. 891 (1955). For all practical purposes, the Court first established on behalf of paupers a right to travel in Edwards v. California, 314 U.S. 160 (1941), because the prohibition on bringing indigents into the state obviously was intended to avoid additional welfare costs.

[21] *See* McInnis v. Ogilvie, 394 U.S. 322 (1969) (upheld distribution of educational facilities according to tax contributions); Snell v. Wyman, 393 U.S. 323 (1969) (upheld New York welfare repayment statutes). The author of this article was co-counsel for the unsuccessful plaintiff recipients in *Snell*.

[22] Lochner v. New York, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting). The writings of the Englishman, Herbert Spencer (1810-1890), had a vital influence persisting as late as 1920 on American sociologists. Spencer adapted Darwin's notion of the "survival of the fittest" to socio-political activities. Spencer opposed most forms of government regulation, including relief measures for the poor. He believed in the "greatest happiness of the greatest number," and that the state should permit an individual absolute freedom provided he did not infringe upon the natural rights of others. R. HOFSTADTER, SOCIAL DARWINISM IN AMERICAN THOUGHT, 33, 36, 41 (1955); S. MORISON, *supra* note 14, at 770-72.

[23] Holmes sat from 1902 to 1932.

it will be seen that Holmes' own approach was quite doctrinaire. And conversely, it will also be seen that the Supreme Court majorities during those years, though influenced as always by the temper of the times, were more considerate of minority rights than is generally realized.

In 1905, when *Lochner* was decided, Arizona was still a territory. The Gold Rush was of recent memory and other portions of the West were ripe for exploration and settlement by hardy adventurers. Imperialism at the national level—the Spanish-American War— had added Cuba and the Philippines to American wealth and coincided with, and perhaps fostered, the compromise between political leaders of the North and South which subjected Black citizens to Jim Crow laws for at least the next 50 years.[24]

By 1905, the Knights of Labor and the rural-based Populist Party, two political-economic movements which for a time served as effective spokesmen for disadvantaged Black and White workers, had almost disappeared from the American scene.[25] Organizing in the mass production industries did not begin until the late twenties. The American Federation of Labor, to the detriment of Black members, deplored but acquiesced in local discriminatory practices.[26] Extremists of the left, including the International Workers of the World ("Wobblies"), moved into the vacuum with anarchistic slogans borrowed from more potent European workers' movements. Frustrated radicals then, as now, substituted dynamite for violent rhetoric as a form of political expression.[27]

Although the realities of the Depression profoundly altered conservative notions of the role of government in public welfare and industrial regulation, the first three decades of this century had provided a fertile climate for doctrines of rugged individualism. Thus, the writings of Spencer and his American disciple, William Graham Sumner, the Yale sociologist, were extremely popular.[28] Oliver Wendell Homes, himself, reportedly was an admirer of Spencer.[29]

Holmes' colleague, Mr. Justice David J. Brewer (1889-1910), an influential spokesman of sorts for the Court in those days, incorporated in his person most if not all of the values then prevailing among the nation's Establishment figures.[30] While a jurist in Kansas, Brewer wrote a much-

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24 C. WOODWARD, THE STRANGE CAREER OF JIM CROW 74 (2d ed. 1966).
25 P. TAFT, ORGANIZED LABOR IN AMERICAN HISTORY 665 (1964).
26 *Id.* at 667.
27 The temper of the times had its effect even on Brandeis, who voted to sustain convictions under a criminal syndicalist statute. Whitney v. California, 274 U.S. 357, 372 (1927) (concurring opinion).
28 R. HOFSTADTER, *supra* note 22, at 5, 51. *See* Barnes, *Two Representative Contributions of Sociology to Political Theory: The Doctrines of William Graham Sumner and Lester Frank Ward*, 25 AMER. J. SOC. 1-23 (1919); SUMNER TODAY, SELECTED ESSAYS 84 (M. Davie ed. 1940) ("capital always means the fruits of prudence and self-denial already accomplished").
29 R. HOFSTADTER, *supra* note 22, at 47.
30 Brewer was a nephew of Supreme Court Justice Stephen J. Field (1863-1897)

cited opinion affirming in natural law terms reminiscent of Blackstone[31] a state's obligation to relieve paupers, but restricted that class to those utterly without resources.[32] Brewer, like Adam Smith, believed in the right to strike as vital to the free enterprise system, although he deplored the disruptions which followed.[33] He was a racist,[34] as well as a Christian chauvinist,[35] but was also a champion of women's rights and contributed heavily to the development of international law.[36]

Brewer, along with Stephen Field and John Marshall Harlan, pioneered in advancing the principle that the fourteenth amendment incorporates the entire Bill of Rights.[37] Rejected by the pre-1900 Court in *O'Neil v. Vermont*,[38] this approach later provided the substantive due process foundation for the post-*Lochner* line of decisions. The enlarged category of "liberties" entitled to judicial protection concededly posed some threat to the principle of separation of powers. It is interesting to note, however, that at least two major articles published in law reviews during the substantive due process period criticized the Court and expressed the view, restrictive even by post-1937 standards, that the due process clause had *no* substantive content.[39]

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and of the famous codifier, David Dudley Field of New York. Brewer, according to a sympathetic critic, was reputedly a "conservative [justice] on what is often thought of as the most conservative Supreme Court in the history of the land"; but Brewer was, in fact, a humanist who derived his values "from many of the same sources as those liberals who criticize him." Gamer, *Justice Brewer and Substantive Due Process: A Conservative Court Revisited*, 18 VAND. L. REV. 615 (1965).

Gilbert Rossiter has described Brewer and his colleagues as "politically, socially, culturally and in the most obvious sense, economically anti-radical." G. ROSSITER, CONSERVATISM IN AMERICA 133 (1955).

[31] The law not only regards life and member, and protects every man in the enjoyment of them, but also furnishes him with everything necessary for their support. For there is no man so indigent or wretched, but he may demand a supply sufficient for all the necessaries of life from the more opulent part of the community, by means of the several statutes enacted for the relief of the poor . . . . 1 W. BLACKSTONE, COMMENTARIES *131.

[32] State *ex rel.* Griffith v. Osawkee Township, 14 Kan. 322 (1875). "[T]he care of those who are unable to care for themselves—is among the unquestioned objects of public duty. In obedience to the impulses of common humanity, it is everywhere so recognized." *Id.* at 324.

[33] Gamer, *supra* note 30, at 621; D. BREWER, AMERICAN CITIZENSHIP, YALE LECTURES ON THE RESPONSIBILITIES OF CITIZENSHIP 102 (1970).

[34] Brewer favored Philippine independence to prevent America's "Anglo-Saxon stock" from becoming "submerged." Gamer, *supra* note 30, at 620.

[35] *See* D. BREWER, *supra* note 33, at 54. *See also* Brewer, *The United States, A Christian Nation*, in HAVERFORD LIBRARY LECTURES 51, 58 (1905), where Brewer states "the oppressed Cuban appealed to [the American flag] for deliverance . . . . Christianity has always stood for purity of the brave."

[36] Gamer, *supra* note 30, at 620. Bergan, *Mr. Justice Brewer: Perspective of a Century*, 25 ALBANY L. REV. 191, 197 (1961).

[37] In Poe v. Ullman, 367 U.S. 497, 516 (1961), Mr. Justice Douglas, dissenting, noted that Justices Bradley, Swayne, Field, Clifford, the first Harlan, probably Brewer, and Black, Murphy, Rutledge, and he had accepted this principle.

[38] 144 U.S. 323 (1892). "[I]n all cases touching life or liberty I deem it the duty of this court, when once it has jurisdiction of a case, to enforce these [constitutional] restraints." *Id.* at 359 (Field, J., dissenting).

[39] Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926). The author, criticizing Meyer v. Nebraska, 262 U.S. 390 (1923),

Historians have stressed the Early Court's role in safeguarding business interests against state regulation. But other more proletarian "liberties" also came to the fore during the substantive due process period. An opinion written by Mr. Justice (later Chief Justice) Edward D. White (1894-1921) of Louisiana rejected attempts by the southern states to deny the ballot to Negroes.[40] This Court also affirmed the right of parents to have a voice in the education of their children, including the choice of school[41] and subjects to be learned.[42] The right to pursue one's calling, deemed fundamental by Harlan and Field prior to 1900,[43] also achieved protected status in *Meyer v. Nebraska.*[44] In one of the most humanistic opinions of this century, the Court in *Truax v. Raich,*[45] 26 years before the first of the modern right to travel decisions, affirmed on behalf of Mexican laborers that "the right to work for a living in the common occupations of the community is of the very essence of personal freedom [protected by the fourteenth amendment]."[46] Moreover, said Charles Evans Hughes, denial to work is tantamount to denial of entrance to aliens "for in ordinary cases they cannot live where they cannot work."[47]

Justice Holmes, but not Brandeis, dissented in *Meyer,* which suggests a close relationship between the jurisprudence of Holmes, characterized by dogmatic restraint,[48] and that of Justice Black, who has dismissed *Meyer* as a product of the discredited substantive due process era[49] and has pointed to the *Slaughter House Cases*[50] as a good example of the judicial restraint that prevailed prior to 1889.[51] But the reluctance of that earlier Court, over the frequent dissents of Field, Brewer, and

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argued that "liberty" in the due process clause derived from the English common law where it meant simply freedom from physical restraint. Moreover, "if anything has no need of National Protection, it is the relation between a State and its own pupils." *Id.* at 431. Reeder, *The Due Process Clause and "the Substance of Individual Rights,"* 58 U. PA. L. REV. 191, 217 (1910). *Cf.* Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform,* 45 YALE L.J. 816 (1936), who contended that excessive judicial review interfered with legislative experimentations.

40 Guinn v. United States, 238 U.S. 347 (1915). The decision found the "grandfather clause" in the Oklahoma Constitution violative of the fifteenth amendment. The Louisiana Constitution also had such a provision in 1915.

41 Pierce v. Society of Sisters, 268 U.S. 510 (1925).

42 Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

43 *See* Allgeyer v. Louisiana, 165 U.S. 578 (1897); Powell v. Pennsylvania, 127 U.S. 678 (1888).

44 262 U.S. 390 (1923). The *Meyer* opinion by Justice McReynolds, citing *Allgeyer,* enunciated a broad definition of liberty including the right "to engage in any of the common occupations of life." 262 U.S. at 393.

45 239 U.S. 33 (1915).

46 *Id.* at 41.

47 *Id.* at 42.

48 For a recent characterization of Holmes as the leading apostle of judicial restraint, see the comments of Chief Justice Burger in N.Y. Times, May 11, 1970, at 9, col. 3. *But cf.* Hough, *Due Process of Law—To-Day,* 32 HARV. L. REV. 218 (1919). The author contended that Holmes' principal quarrel with his colleagues was the test to be utilized in weighing the constitutionality of legislation.

49 Griswold v. Connecticut, 381 U.S. 479, 515, 516 (1965) (Black, J., dissenting).

50 83 U.S. (16 Wall.) 36 (1873).

51 Adamson v. California, 332 U.S. 46, 77-79 (1946) (Black, J., dissenting).

Harlan, to interfere with state action also caused it to sustain, on evidence too thin presumably to satisfy Hugo L. Black, the death sentences of anarchists convicted of the Chicago Hay Market murders.[52] That Court also upheld against the eighth amendment defense of cruel and unusual punishment a Vermont prison sentence of 54 years for selling intoxicating liquors.[53] But most important, the model period of judicial restraint praised by Justice Black probably concluded with *Plessy v. Ferguson*,[54] an opinion laced with hypocrisy and thinly disguised racism that legitimatized segregation and second-class status for Negro citizens for at least the next five decades.

Among the decisions of the substantive due process Court less palatable to modern civil libertarians are the "labor" cases, *i.e.*, those relating to union membership, hours, and conditions of employment, which brought substantive due process to "full flower."[55] However, a defense can be made even for these cases. To begin with, almost all of the prominent labor decisions arose during the first half of the substantive due process period,[56] and should be distinguished from non-labor holdings during the decade immediately prior to the Depression invalidating legislation that, *inter alia*, fixed prices for theater tickets,[57] gasoline,[58] and employment agency rates,[59] regulated the quality and cleanliness of manufactured bedding,[60] made all interstate truckers common carriers,[61] and fixed the weight of loaves of bread.[62]

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52 Spies v. Illinois, 123 U.S. 131 (1887). None of the defendants was found to have thrown the bomb which killed seven policemen at an anarchist rally, nor did the evidence show that they conspired to do so. They were convicted because of their sometimes violent rhetoric and physical proximity to the murders. *See* Taft, *supra* note 25, at 132, 133.

53 O'Neil v. Vermont, 144 U.S. 323 (1892) (Brewer, Field, and Harlan dissented).

54 163 U.S. 537 (1896). The Louisiana statute providing for separate but equal railroad accommodations exempted nurses attending children of the other race. Rejecting the argument that segregation stamps Blacks as inferiors, the Court upheld the reasonableness of the legislation in the light of "established usages, customs and traditions of the people . . . the promotion of their comfort, and the preservation of the public peace and good order." *Id.* at 550.

The vigorous dissent by Harlan in *Plessy* stressed the common knowledge that discrimination against Negroes was intended. *Id.* at 557. Field joined the majority but Brewer did not participate.

55 Paulsen, *The Persistence of Substantive Due Process in the States*, 34 MINN. L. REV. 91, 113 (1950). *See also* W. DOUGLAS, WE THE JUDGES 274 (1956).

56 Lochner v. New York, 198 U.S. 45 (1905); Adair v. United States, 208 U.S. 161 (1908); Coppage v. Kansas, 236 U.S. 1 (1915). *But see* Adkins v. Children's Hospital, 261 U.S. 525 (1923); Morehead v. New York, 298 U.S. 587 (1936).

57 Tyson & Bros. v. Banton, 273 U.S. 418 (1927). *But cf.* Tagg Bros. v. United States, 280 U.S. 420 (1930) (upheld an act of Congress regulating charges of commission agents in stockyards).

58 Williams v. Standard Oil Co., 278 U.S. 235 (1929).

59 Ribnik v. McBride, 277 U.S. 350 (1928). *See also* Adams v. Tanner, 244 U.S. 590 (1917).

60 Weaver v. Palmer Bros. Co., 270 U.S. 402 (1926).

61 Frost v. Railroad Comm'n, 271 U.S. 583 (1926).

62 Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924).

While these last mentioned decisons do not appear likely on their face to have had reactionary social consequences, particularly when viewed in the light of earlier and post-1937 interferences with business regulations on authority of the Commerce Clause,[63] the later economic due process decisions do suggest that the Court majorities at that time leaned towards a doctrinaire view of property rights,[64] perhaps deemphasizing, as Brandeis charged, more fundamental liberties.[65] Moreover, at the very least the Court during this period may justifiably be accused of insensitivity towards state efforts during an expansionist, flamboyant era, to redress inequities in the free enterprise system.

But what of the labor cases? In *Adair v. United States*,[66] the lone dissenter in *Plessy*, Justice Harlan, wrote the majority opinion overturning a federal criminal statute proscribing job discrimination against union members. In *Coppage v. Kansas*,[67] the Court struck down state misdemeanor legislation banning "yellow dog" contracts, *i.e.*, agreements to remain nonunion as a condition of employment. Both decisions, resting on notions of freedom of contract, seem naive even in the light of industrial conditions then prevailing when workers may have been more mobile than today but certainly enjoyed less collective bargaining power. But it is important for our purposes here that Holmes' dissents in both cases did not rely on freedom of association but instead upon the notion less tenable, then and now, that it was within the power of the legislative branch to encourage the formation of strong unions, thus indicating that it was his doctrinaire view of the functions of the legislature and judiciary, rather than concern for individual freedoms, which prompted his dissent.[68]

In *Lochner v. New York*,[69] the Court struck down a statute imposing criminal penalties upon an employer who required or permitted an em-

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[63] *See, e.g.*, Pennsylvania v. West Virginia, 262 U.S. 553 (1923); Hood & Sons v. DuMond, 336 U.S. 525 (1949).

[64] "[T]he right of the owner to fix a price at which his property shall be sold or used is an inherent attribute of the property itself . . . and, as such within the protection of the due process clauses of the Fifth and Fourteenth Amendments." Tyson & Bros. v. Banton, 273 U.S. 418, 429 (1927).

It should be noted that the late historian, Perry Miller, charged the legal profession in mid-19th century America with "Americanizing" Blackstone to give property rights a natural law character. P. MILLER, THE LIFE OF THE MIND IN AMERICA 223-30 (1965). "[I]t is to be observed . . . that the unjust action of government with us [Americans] is most likely to take the shape of attacks upon rights of property . . . ." Sedgewick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (1857), *quoted in* P. MILLER, *supra*. at 223.

[65] Gilbert v. Minnesota, 254 U.S. 325, 343 (1920) (Brandeis, J., dissenting).

[66] 208 U.S. 161 (1908) (McKenna and Holmes, JJ., dissenting).

[67] 236 U.S. 1 (1915) (Day and Holmes, JJ., dissenting).

[68] Adams v. Tanner, 244 U.S. 590 (1917), invalidating a State of Washington statute that prohibited fees for procuring employment, drew a dissent from Brandeis, in which Holmes concurred, about the evils of employment agencies that today seems anachronistic.

[69] 198 U.S. 45 (1905) (Justices White and Day joined in Harlan's dissenting opinion).

ployee to work more than 60 hours per week in a bakery shop. "The employe may desire to earn the extra money . . . .," said the Court.[70] Today, strong unions, as well as unorganized workers, would agree and probably would balk at the paternalism implicit in the state's contention in *Lochner* that it had a right to safeguard the citizen against his own lack of knowledge of work conditions detrimental to health.[71]

For the most part, the type of labor legislation struck down by the Early Court has not been reasserted into modern industrial schema, even under the National Labor Relations Act which preempts state legislation in this area.[72] Perhaps this is a point in favor of the defensibility of the substantive due process labor cases. In fact, legislation restricting hours of work for women, upheld by the Early Court,[73] has come under fire in recent years from women's equality groups. Less defensible are the minimum wage decisions in the last decade of the substantive due process era,[74] but even in these cases the statutes involved, as in *Lochner*, were subject to the criticism of being somewhat overdrawn or of arbitrarily including only certain industries.[75]

It is fair to conclude, therefore, that while the Early Court's regard for obsolescent notions of freedom to contract and, more crudely, property rights may have delayed, at least in industrial matters, some progressive regulatory legislation, the record on this score is not altogether clear. On the other hand, it is also likely that the substantive due process Court may have influenced state legislatures to enact more precise statutes in the socio-economic area. But, most important, the interventionist approach of the Early Court resulted in the affirmance of certain basic freedoms, long neglected after 1937, and only recently revitalized by the federal judiciary.[76]

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[70] *Id.* at 52.

[71] *Id.* at 51. The statute in *Lochner* was restricted to biscuit, bread, or cake bakeries or confectionery establishments. The state apparently did not attempt to justify the discrimination, but simply argued the reasonableness, on grounds of health, of imposing such restrictions on these establishments.

[72] San Diego Bldg. Trades v. Garmon, 350 U.S. 236 (1958).

[73] Muller v. Oregon, 208 U.S. 412 (1908).

[74] Morehead v. New York, 298 U.S. 587 (1936); Adkins v. Children's Hospital, 261 U.S. 525 (1923).

[75] In Jay Burns Baking Co. v. Bryan, 264 U.S. 504 (1924), the Court noted that a state has the right to protect its citizens against short-weight loaves of bread, but found that Nebraska imposed criminal penalties even for periods when compliance was not possible, because of water evaporation, without extraordinary and expensive measures. *Id.* at 513-16.

[76] Professor K.L. Karst credits Justice Stephen J. Field and the other Justices who favored the incorporation theory with laying the doctrinal foundation for the affirmance, in the last decade of the substantive due process era, of individual liberties in Meyer v. Nebraska, 262 U.S. 390 (1923), and Gitlow v. New York, 268 U.S. 652 (1925). Karst, *supra* note 11, at 747.

Frequent references to *Meyer v. Nebraska* appear in the recent poverty law decisions. *Truax v. Raich* was cited with approval in Shapiro v. Thompson, 394 U.S. 618, 642 (1969) (Stewart, J., concurring), and is the principal authority for litigation commenced in 1970 by Anthony Ching, Chief Trial Attorney of the Pima County Legal Aid Society, attacking Arizona's refusal to provide medical services to

The Court of Holmes' time presents a tempting parallel with the Fifth Circuit Court of Appeals since the decision of the Supreme Court in *Brown v. Board of Education.*[77] With the legal demise of "separate but equal," the Fifth Circuit has emerged as the federal appeals court most willing to protect individual freedoms against repressive government action.[78] On balance this sort of judicial activism, within a sound value framework, poses less threat to the democratic process than doctrinaire restraint. This seems to be the view of William O. Douglas.

MEASURED INTERVENTIONS—MR. JUSTICE DOUGLAS

Despite making periodic disparaging references to the substantive due process Court from the time he joined the Bench in 1939 until as recently as last year,[79] Douglas has said that his principal quarrel with that Court has to do with the values they utilized to strike down state legislation.[80] His own approach, which is clearly reflected in the substantive due process decisions of the past two years, recognizes the need for restraint but does not accord carte blanche to legislators. "While the Court these days does not strike down laws because it deems them unwise, improvident or unexpedient it stands ready to act once the outside limits have been breached."[81] The granting of absolute discretion to legislators or

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indigent aliens unless they have been residents for 15 years. The three-judge district court held the residency requirement violated the equal protection clause. Richardson v. Graham, Civ. No. 69-158 (D. Ariz. May, 1970). *See* Tucson Daily Citizen, May 27, 1970, at 19, col. 1. *See also* Vaughan v. Bower, Civ. No. 70-10 (D. Ariz. May 15, 1970).

77 347 U.S. 483 (1954).

78 The Fifth Circuit has broken new ground in affirming procedural due process rights where students are expelled from state colleges and, by implication, where other public "benefits" are arbitrarily discontinued. Dixon v. Alabama Bd. of Educ., 294 F.2d 150 (5th Cir.), *cert. denied,* 368 U.S. 930 (1961). In the socio-economic area, the Fifth Circuit sustained complaint allegations of civil rights violations under "color of law" on behalf of classes of public housing tenants. Gomez v. Florida State Employment Serv., 417 F.2d 569 (5th Cir. 1969); Heyward v. Public Housing Admin., 238 F.2d 689 (5th Cir. 1956). Three-judge panels in the Fifth Circuit sustained equal protection claims of welfare mothers subjected to "employable" mother policies, Anderson v. Burson, 300 F. Supp. 401 (N.D. Ga. 1968), and "substitute parent" discriminations, Smith v. King, 277 F. Supp. 31 (M.D. Ala. 1967), *aff'd,* 392 U.S. 309 (1968).

The numerous, and determined, efforts of the Fifth Circuit in the segregation area are beyond the scope of this paper but even in labor cases, the court, no friend of the National Labor Relations Board, has sustained Board attempts to expand its jurisdiction to include invidious discrimination claims by unions and employees for reasons, such as race, unrelated to traditional protected activities. Rubber Workers Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied,* 389 U.S. 837 (1967).

79 Sniadach v. Family Fin. Corp., 395 U.S. 337, 339 (1969). *See* Griswold v. Connecticut, 381 U.S. 479, 482 (1965), where Douglas wrote, "We do not sit as a super-legislature to determine the wisdom, need and propriety of laws that touch economic problems, business affairs or social conditions." Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966); W. DOUGLAS, *supra* note 55, at 424. It would appear that Douglas' sensitivity to the charge of "natural law" decisionmaking leads him into unnecessarily disparaging references to *Lochner* and freedom of contract.

80 Poe v. Ullman, 367 U.S. 497, 517 (1961) (Douglas, J., dissenting).

81 W. DOUGLAS, *supra* note 55, at 425.

administrators "is more destructive of freedom than any of man's other inventions."[82]

The fact that Douglas has not spelled out a precise legal formula for Court interventions has led to charges of inconsistency in decisionmaking.[83] But this omission is not only compatible with Douglas' apparent disdain for dogma, but it also coincides with his explicit declarations that the Constitution must be interpreted in the light of present, ever changing realities.[84]

Moreover, Douglas' opinions and other writings leave no doubt as to his own set of judicial values, or conscious prejudices, which translate, quite logically, into a framework of specific and general individual freedoms he would defend against state action. Though most noticeable in the poverty field, where indigency gives rise to disproportionate government oppressions, Douglas' catalogue of values would also protect the need for self-expression and social and economic growth of rich or middle income Americans. These values may fairly be put into five main groupings to facilitate their examination.

(1) Justice Douglas has been described as being as much a conservationist as a civil libertarian.[85] His own writings and an acknowledged love of camping and hiking lend support to this appraisal. Douglas' humanism, however, does not lack an element of jingoism, as evidenced in *Korematsu v. United States*,[86] and is almost bloodless by comparison with the controversial natural law approach of the late Justice Frank Murphy, who in some respects was ahead of his times.[87]

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82 United States v. Wunderlich, 342 U.S. 98, 101 (1951) (Douglas, J., dissenting).

83 *See* Karst, *supra* note 11, at 718.

84 *See* Poe v. Ullman, 367 U.S. 497, 516-18 (1961) (Douglas, J., dissenting); Douglas, *The Human Welfare State*, 97 U. PA. L. REV. 597, 605 (1949). In Harper v. Virginia Bd. of Elections, 383 U.S. 663, 669 (1966), Douglas pointed out that notions of equal protection change with the times. Douglas has also declared that feudal concepts of wages do not apply to our era, Sniadach v. Family Fin. Corp., 395 U.S. 337, 340 (1969).

85 Rodell, *Divers Scraps, Shreds, and Shards*, 16 U.C.L.A.L. REV. 704, 714 (1969). In his two-volume study, MY WILDERNESS, Douglas writes, "[t]hose born today may never be able to lie on moss-covered rocks and drink safely from a stream."

86 323 U.S. 214 (1944). The Court sustained a conviction under a federal statute for refusing to leave an area barred by order of military authorities to persons of Japanese ancestry.

87 Murphy was often criticized bitterly by the late Justice Felix Frankfurter for allegedly injecting his Roman Catholic natural law views into his decisionmaking. Murphy, dissenting in *Korematsu*, argued that the military evacuation order, based on the assumption that all Japanese-Americans were security risks, was essentially racist. 323 U.S. at 233. In Steele v. Louisville & Nashville R.R., 323 U.S. 192, 208 (1944), Murphy, concurring, said that the majority opinion, joined in by Douglas, engaged in "legal niceties," adding that the duty of fair representation was imposed on the collective bargaining agent union by the Railway Labor Act and by the fourteenth amendment. In Griswold v. Connecticut, 381 U.S. 479 (1965), Douglas apparently accepted the constitutional "floor" theory of protected rights first expressed by Justice Murphy in dissenting in Adamson v. California, 332 U.S. 46, 124 (1947).

(2) While apparently not an Economic Royalist, there are overtones of Adam Smith, a libertarian unkindly treated by history, in Douglas' regard for the relatively uninhibited flow of commerce. Under the American economic system "every farmer and every craftsman shall be encouraged to produce by the certainty that he will have free access to every market in the Nation . . . ."[88] At least since *Hood & Sons v. DuMond*[89] in 1949, Douglas has consistently differed with most of his "liberal" colleagues on the Court, by joining the majority in striking down under the Commerce Clause state legislation unduly protective of local industries. In *Hood & Sons*, the Court held illegal a New York refusal to grant a license to open a new plant to a large Massachusetts milk distributor, who already owned three plants in New York, on the grounds that the refusal was an unreasonable restraint on interstate commerce. Apropos Douglas' philosophy, Professor Hans Linde has written that Douglas regards with some prejudice state efforts to regulate trade across its borders especially if Congress has declared a national policy relevant to the dispute.[90]

Parenthetically, the Commerce Clause decisions of the post-1937 Court are curiously overlooked by critics of substantive due process even though they are similar in principle to the substantive due process decisions of the Early Court. Their similarity is underscored by the fact that Black today is dissenting on many of the same grounds as did Holmes.[91]

(3) Linde's comment helps to clarify Douglas' complex votes in National Labor Relations Board cases. Though protective of minority rights, he is even more concerned about expansion of bureaucratic power absent congressional authorization. For example, Douglas concurred in extending the doctrine of fair representation to non-racial grievances, while at the same time recognizing that the right existed independently of the National Labor Relations Act,[92] was not preempted by the NLRB,[93] and that an employee suit would not lie against the employer alone or under the collective bargaining agreement.[94]

Balancing stability in the bargaining relationship against the right to strike or an employee's contractual right to severance pay, Douglas has

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[88] Hood & Sons v. DuMond, 336 U.S. 525, 539 (1949). *See* Douglas, *supra* note 84, at 597: "The foremost problem of society today is to cultivate and preserve incentive and independence for the individual and security for the masses of the people."

[89] 336 U.S. 525 (1949).

[90] Linde, *supra* note 10.

[91] *Compare* Pennsylvania v. West Virginia, 262 U.S. 553, 600 (1923) (Holmes, J., dissenting), *with* Hood & Sons v. DuMond, 336 U.S. 525, 545 (1949) (Black, J., dissenting). *Cf.* Pike v. Church, 90 S. Ct. 844 (1970), where the Court unanimously struck down an Arizona regulation as violative of the Commerce Clause.

[92] Humphrey v. Moore, 375 U.S. 335, 351 (1964) (Douglas, J., concurring). The doctrine of fair representation refers to the duty of a union to fairly represent the members of the union.

[93] *See* Vaca v. Sipes, 386 U.S. 171 (1967).

[94] Humphrey v. Moore, 375 U.S. 335, 351 (1964) (Douglas, J., concurring).

joined in opinions that read a no-strike clause into contracts providing for exclusive and final arbitration of grievances,[95] and has rejected for failure to attempt to utilize grievance procedures the wage suit in state court of an employee whose work situs had shut down.[96]

Douglas joined in an opinion written by Harlan which held that there was no congressional intent expressed in the NLRA to prohibit an employer from terminating his entire business for any reason including anti-union motivation.[97] Douglas has voted to uphold an employer's right to lockout as protection against union whipsaw tactics,[98] or after a bargaining impasse, even for the purpose of bringing economic presssure against the union.[99] The right to lockout was later extended by the Court to allow the subsequent temporary replacement of the barred strikers.[100] And in *NLRB v. Insurance Agents' International Union* the Court disagreed with the NLRB and unanimously held that a union did not violate the "good faith" provisions of the NLRA by engaging in harassing tactics during negotiations.[101]

Douglas and Black dissented in a 1954 case upholding the Board's new prohibition of employer-union discrimination against individual workers for reasons unrelated to traditionally "protected" activities,[102] and Douglas later wrote majority opinions rejecting, for lack of congressional authorization, Board attempts to declare hiring halls discriminatory per se[103] and to require, by way of remedy, refund of dues and fees paid by members.[104]

In a recent case,[105] involving a particularly recalcitrant employer with a long history of unfair labor practices and unusual delay on the part of the Board in processing back-pay claims for about 180 mostly Black poverty level clothing workers in New Orleans, Douglas (joined by Harlan and Chief Justice Burger) dissented from a decision reversing the Fifth Circuit's attempt to protect the "due process" rights of the employer by arbitrarily reducing the back pay almost in half.[106] The majority

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[95] Teamsters Local 174 v. Lucas Flour Co., 369 U.S. 95 (1962).
[96] Republic Steel Corp. v. Maddox, 379 U.S. 650 (1965).
[97] Textile Workers' Union v. Darlington Mfg. Co., 380 U.S. 263 (1965).
[98] NLRB v. Truck Drivers Local 449, 353 U.S. 87 (1957).
[99] American Shipbldg. Co. v. NLRB, 380 U.S. 300 (1965).
[100] NLRB v. Brown, 380 U.S. 278 (1965).
[101] 361 U.S. 477 (1960).
[102] Radio Officers Union v. NLRB, 347 U.S. 17 (1954). Presumably Douglas would also vote to reverse the Fifth Circuit in Rubber Workers, Local 12 v. NLRB, 368 F.2d 12 (5th Cir. 1966), *cert. denied*, 389 U.S. 837 (1967), which upheld the Board's inclusion of racial discrimination among the unfair labor practices proscribed by Sections 8(a)(3) to 8(b)(2) of the NLRA.

Protected activities, such as the right to join or not join a union, are set forth in Section 7 of the NLRA, 29 U.S.C. § 157 (1964).
[103] Teamsters Local 357 v. NLRB, 365 U.S. 667 (1961), *rev'g* Mountain Pacific Chap., 119 N.L.R.B. 883 (1958).
[104] Carpenters Local 60 v. NLRB, 365 U.S. 651 (1961).
[105] NLRB v. J.H. Rutter-Rex Mfg. Co., 90 S. Ct. 417 (1969). The author of this article was co-counsel for the Union-Intervenor in *Rutter-Rex*.
[106] J.H. Rutter-Rex Mfg. Co. v. NLRB, 399 F.2d 356, 363 (5th Cir. 1968).

opinion, written by Mr. Justice Thurgood Marshall, upheld the Board's discretion in balancing the interests of innocent employees, aggrieved by employer misconduct and the Board's delay, against the wrongdoing employer's right to a speedy hearing.[107] Douglas, however, consistent with his labor law philosophy, would have sustained Congress' intent as expressed in *Universal Camera Corp. v. NLRB*[108] to give wide review powers to the circuit courts.

On the other hand, Douglas joined in a reversal of the Fifth Circuit for fashioning a special rule in reinstatement cases in disregard of *Universal Camera*.[109] In another case, Douglas voted to sustain Board findings of per se discrimination in the award of super-seniority to non-strikers, on the ground that such findings were authorized by Congress.[110] In a picketing case, Douglas, dissenting, argued that the NLRB preempted state court jurisdiction over mass picketing and abusive and provocative language by pickets.[111]

Finally, Douglas in two dissents would have sustained Board findings of a featherbedding violation by newspaper typographers who demanded payment for setting "bogus type,"[112] and bad faith bargaining by an employer who refused to include a dues checkoff clause in the contract solely to avoid reaching any agreement with the union.[113] Thse two dissenting opinions by Douglas perhaps best illustrate his regard for free enterprise coupled with industrial stability, a national labor relations policy approved by Congress, and the industrial or human conditions lying beneath legal technicalities.

(4) According to Professor Linde, Justice Douglas since 1939 "has concerned himself with the realities behind the formulas of 'privilege' and unreviewable discretion."[114] Douglas, who led his students into empirical research ventures while on the Yale law faculty[115] is a legal realist; in his decisionmaking, says Linde, he looks first at the injury done to the litigant and not to the government's choice of weapons.[116]

This estimation seems overly sanguine in light of the labor cases discussed above and Douglas' willingness to permit the forced relocation during wartime of Japanese-Americans. However, it would seem to ex-

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107 NLRB v. J.H. Rutter-Rex Mfg. Co., 90 S. Ct. 417, 420-21 (1969).
108 340 U.S. 474 (1951).
109 NLRB v. Walton Mfg. Co., 369 U.S. 404 (1962).
110 NLRB v. Erie Resistor Corp., 373 U.S. 221 (1963).
111 Youngdahl v. Rainfair, Inc., 355 U.S. 131, 140 (1957). *See also* Douglas' dissent (with Black) to a decision upholding a Virginia state court injunction against peaceful picketing intended to pressure a contractor to hire union members in violation of the state right-to-work law. Plumbers Local 10 v. Graham, 345 U.S. 192, 201 (1953).
112 American Newspaper Publishers Ass'n v. NLRB, 345 U.S. 100, 111 (1953).
113 H.K. Porter Co. v. NLRB, 90 S. Ct. 821, 827 (1970).
114 Linde, *supra* note 10, at 45.
115 *Id.* at 69.
116 *Id.*

plain Douglas' liberality as to Supreme Court review[117] and standing to sue in the lower courts,[118] both of which perhaps relate to his comparatively broad catalogue of protected liberties.

Douglas' pragmatism is very evident in the poverty area. Concurring in the Alabama "man-in-the-house" case,[119] where the majority found the state welfare rule in conflict with the Social Security Act, Douglas would have overturned the state welfare regulation on constitutional grounds to avoid the possibility that Alabama would discontinue entirely the Aid to Families with Dependent Children program.[120] Douglas has also argued against "mootness" where an indigent tenant who had been evicted lost her appeal by failing to post a bond.[121]

Douglas would have avoided prolonged, and ultimately inconclusive, litigation by deciding the constitutional claim presented in litigation over an eviction from public housing, rather than remanding for further findings.[122] And upholding the right of illegitimates to sue for the wrongful death of their mother, Douglas, unlike Black and Harlan, logically assumed that an actual parent-child blood relationship existed.[123]

(5) Unquestionably, Douglas' legal realism is intertwined with and has influenced the kinds of "liberties" he would protect. Douglas, along with Black, the first Harlan, Brewer, and Field, accepts the notion that the entire Bill of Rights is "incorporated" into the fourteenth amendment,[124] but in addition, much more so than Black or the second Harlan, he reads a substantive content into the due process clause.[125] He concedes that the scope for legislative action, though not limitless, is quite

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[117] Douglas would have noted probable jurisdiction in Snell v. Wyman, 393 U.S. 323 (1969), and in McInnis v. Ogilvie, 394 U.S. 322 (1969).

[118] In Flast v. Cohen, 392 U.S. 83 (1968), Douglas, concurring, agreed with Harlan, dissenting, that the decision would eventually result in the demise of Massachusetts v. Mellon, 262 U.S. 447 (1923), which denied taxpayers standing to sue, but Douglas argued that the majority should in *Flast* explicitly overrule *Mellon* as an anachronism. 392 U.S. at 107. Douglas also said that taxpayers in establishment clause cases can be "vigilant private attorneys general." *Id.* at 109.

[119] King v. Smith, 392 U.S. 309 (1968).

[120] *Id.* at 334-36. Presumably, Douglas was referring to the equal protection finding of the lower court. Arguably, since the state has instituted the program, discontinuance would conflict with the equal protection clause. Unquestionably, however, a substantive due process finding of a fundamental interest of eligible recipients in the benefits would preclude such action.

[121] Williams v. Shaffer, 385 U.S. 1037, 1037-41 (1967) (Douglas, J., dissenting).

[122] Thorpe Housing Authority v. Durham, 386 U.S. 670, 674-81 (1967) (Douglas, J., concurring), *on remand*, 271 N.C. 468, 157 S.E.2d 147 (1967), *rev'd*, 393 U.S. 268 (1969). The Court remanded to the state court to determine the impact of a circular issued subsequent to the eviction by the United States Department of Housing and Urban Development providing for a hearing prior to eviction. After remand, the Court simply determined the extremely narrow issue that the circular had retroactive protective effect as to plaintiff, who had contended her eviction was motivated by her activities as a tenant organizer.

[123] Levy v. Louisiana, 391 U.S. 68, and Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73 (1968) (companion cases).

[124] Poe v. Ullman, 367 U.S. 497, 515 (1961) (Douglas, J., dissenting).

[125] W. DOUGLAS, *supra* note 55, at 282.

broad,[126] but some light is shed on the restrictions Douglas would impose on the states:

(a) by his vision of a "human welfare state" maximizing advancement opportunities for all citizens,[127] thus pushing his jurisprudence towards, but to date not quite reaching, the recognition of a federal or state duty not only to avoid discriminating against disadvantaged citizens but to provide certain minimum needs;[128]

(b) by his early acceptance of the theory, expressed in modern legal terms by Professor Charles Reich,[129] and earlier by A. Delafield Smith,[130] that the increasing dependency of citizens upon the state has given rise to new forms of property, *i.e.*, choses of value—welfare benefits, wages, housing accommodations—entitled to greater legal safeguards than traditional items such as diamonds, realty, or stock certificates.[131]

The Douglas-Reich-Smith theory of property is reflected in the precedent-shattering *Sniadach v. Family Finance Corp.*[132] where the Douglas opinion stressed heavily the serious detriment to a working man's family which results from an attachment of wages prior to a judicial determination of the merits of the creditor's claim. The New Property theory appeared in greatly expanded form in *Goldberg v. Kelly*[133] where the opinion by Mr. Justice Brennan pointed out the need of welfare recipients for more stringent procedural due process guarantees than taxpayers generally.

More substantively, Douglas in recent years has written opinions striking down poll tax requirements[134] and prohibitions against suits by illegitimates.[135] He would have found a constitutional right of welfare children to receive benefits regardless of their mother's extra-marital activities[136] and a statutory right to AFDC payments at a minimum needs level.[137] Douglas would have applied to indigent tenants the liberty principle, enunciated in criminal decisions, that a person cannot be deprived of constitutional rights because of his indigency.[138] There is rea-

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126 *Id.*

127 *See* Karst, *supra* note 11, at 720.

128 *See* Michelman, *supra* note 11, for a discussion of the "minimum protection" theory.

129 Reich, *supra* note 19, at 785.

130 A. SMITH, THE RIGHT TO LIFE (1955); Smith, *Public Assistance as a Social Obligation*, 63 HARV. L. REV. 266 (1949).

131 *See* Linde, *supra* note 10. Douglas has accepted the fact that "modern Americans live on what they can earn, not on what they own." *Id.* at 45. *See* Douglas, *supra* note 84. Private property, said Douglas, is necessary to freedom, but should not become a "fetish." *Id.* at 605. *See also* H. Jones, *The Rule of Law and the Welfare State*, 58 COLUM. L. REV. 143, 154-55 (1958).

132 395 U.S. 337 (1969).

133 90 S. Ct. 1011 (1970).

134 Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966).

135 Levy v. Louisiana, 391 U.S. 68 (1968).

136 King v. Smith, 392 U.S. 309, 334-36 (1968).

137 Rosado v. Wyman, 90 S. Ct. 1207 (1970).

138 Williams v. Shaffer, 385 U.S. 1037, 1041 (1967) (Douglas, J., dissenting)

son to believe he also would have found deprivations of fundamental freedoms in state regulations requiring repayment of welfare monies and predicating educational services on tax contributions.[139] Douglas also found a right to privacy for married couples within the penumbra of rights emanating from the first eight amendments in a case involving Connecticut suburbanites.[140]

It is also important for an understanding of Douglas' activist philosophy to note that he, like the first Harlan,[141] sees the right to work or to pursue a business or profession as a fundamental interest for constitutional purposes.[142] I disagree with one commentator who posits that, with one exception, the aggrieved plaintiffs in these cases—female bar owners, tugboat captains, attorneys—were citizens without political clout and that their plight aroused Douglas' "egalitarian" concern.[143] Instead, these votes, along with his votes in *Korematsu* and the NLRA, Commerce Clause, and "poverty" cases, are quite compatible with a description of Justice Douglas as a New Conservative concerned with affording equal opportunities, subject to flexible limitations, to all Americans.[144]

(*citing, inter alia,* Griffin v. Illinois, 351 U.S. 12 (1956), and Douglas v. California, 372 U.S. 353 (1963)).

[139] Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), *aff'd,* 393 U.S. 323 (1969); McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969) (Douglas would have noted probable jurisdiction in both cases).

[140] Griswold v. Connecticut, 381 U.S. 479 (1965). In *Griswold* a physician had been convicted of the crime of giving married persons information and medical advice and prescribing devices to prevent conception. The Court permitted the defendant to raise as a defense the right to privacy of his patients.

[141] *See* Powell v. Pennsylvania, 127 U.S. 678, 684 (1888).

[142] Douglas, but not Black, dissented in two post-1937 substantive due process cases: Kotch v. Board of River Pilot Comm'rs, 330 U.S. 552 (1947) (majority upheld a Louisiana statute restricting new river boat pilots' licenses to relatives of incumbents); Goesaert v. Cleary, 335 U.S. 464 (1948) (majority upheld a Michigan law prohibiting female bartenders except wives or daughters of male owners).

In Martin v. Walton, 368 U.S. 25 (1961), Douglas dissented (along with Black) from a decision upholding a Kansas statute which prohibited even attorneys licensed in Kansas, but who maintained out-of-state offices, from appearing in Kansas courts without local counsel. In Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), Douglas joined in a majority opinion written by Black which rejected the state's attempt to disqualify an attorney for "lack of good moral character" because of his past political activities. *Schware* was explicitly recognized by Black to be a substantive due process case, and the Court noted that it was unnecessary to decide a "procedural due process" contention. *Id.* at 235 n.2. Harlan, Clark, and Frankfurter concurred.

In Morey v. Doud, 354 U.S. 457 (1957), Douglas joined the majority in an opinion finding "invidious discrimination" violative of equal protection on behalf of small competitors of the American Express Co. Black, Harlan, and Frankfurter dissented.

[143] Karst, *supra* note 11, at 725. The exception is said to be *Morey v. Doud.*

[144] In Ferguson v. Skrupa, 372 U.S. 726 (1963), Douglas joined in an opinion by Black upholding a Kansas misdemeanor statute prohibiting the business of debt adjusting "except as an incident to 'the lawful practice of law. . . .'" Black, quoting Holmes on Spencer, criticized at length the substantive due process decisions of the pre-1937 Court. *Id.* at 726-27.

DOCTRINAL RESTRAINTS—JUSTICES BLACK AND HARLAN

"These decisions can only be classed as constitutional curiosities." This icy comment by Justice Harlan, dissenting with Black and Stewart against decisions affirming the right of mothers and illegitimate children to bring wrongful death actions,[145] indicates that despite disparate origins and professional careers and distinct judicial philosophies, Black and Harlan have more in common than not. For different reasons they both fail to empathize with the disadvantaged elements of society.

By insisting that a formal acknowledgement of parenthood by poor, unsophisticated women "executed in the presence of a notary public and two witnesses" is reasonable, Black and Harlan say a great deal about the threshold values which have shaped their vision of an aloof federal judiciary. Unlike William O. Douglas, both these jurists are vulnerable to the occasional and perhaps excessive criticism of the old substantive due process Court—that of having more regard for form than substance, for the "logic and symmetry" of the law than the actual impact of legislative or administrative conduct.[146]

Black's jurisprudence has fundamentalist overtones. His rejection of neo-substantive due process is as dogmatic as his positive regard for the free speech provisions of the first amendment.[147] Although close to Douglas on labor questions,[148] he differs widely with the pragmatic humanism of his fellow New Dealer in the socio-economic area. Except for his votes in the "attorney" cases,[149] which can only be described as aberrational, and the reapportionment decisions,[150] which apparently reflect Black's concern for at least the *appearance* of functional democracy, this most senior member of the Court consistently combines in his approach to state regulation a "strict constructionist" interpretation of the Constitution in accord with the expressed intentions of the Founding Fathers, together with excessive respect for the legislative process.

In the "poverty law" decisions of recent years it is evident that the

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145 Glona v. American Guar. & Liab. Ins. Co., 391 U.S. 73, 76, and Levy v. Louisiana, 391 U.S. 68 (1968) (companion cases). In Goldberg v. Kelly, 90 S. Ct. 1011 (1970), Black, dissenting, described public assistance as a "promise of charity" and not property. *Id.* at 1024. In the companion decision, Wheeler v. Montgomery, 90 S. Ct. 1026 (1970), Chief Justice Burger, dissenting with Justice Black, made the curious comment (since individual rights were involved) that he rejected the notion that a government spending billions on welfare "is heartless, insensitive or indifferent to the legitimate needs of the poor." *Id.* at 1029.

146 *See* Haines, *Judicial Review of Acts of Congress and the Need for Constitutional Reform*, 45 YALE L.J. 816 (1936).

147 *Compare* Sniadach v. Family Fin. Corp., 395 U.S. 337 (1969), with Garrison v. Louisiana, 379 U.S. 64, 79 (1964) (Black, J., concurring), *and* New York Times v. Sullivan, 376 U.S. 254, 293 (1964) (Black, J., concurring).

148 Black voted with Douglas in almost all of the NLRA decisions discussed above.

149 Martin v. Walton, 368 U.S. 25 (1961); Schware v. Board of Bar Examiners, 353 U.S. 232 (1957).

150 Baker v. Carr, 369 U.S. 186 (1962); Reynolds v. Sims, 377 U.S. 533 (1964).

restrained approach of Harlan, competing unsuccessfully for the most part with that of Douglas until the decisive maximum grants case,[151] has had a greater influence on the Court than the isolated thinking of Hugo Black.[152] However, Harlan is only slightly more difficult to explain than Black. His evident regard for the formal structure as opposed to the theoretical integrity or actual workings of existing American government led him into unrealistic dissents in *Baker v. Carr*,[153] and, more recently, in a decision affording taxpayers standing to sue that effectively overruled precedent.[154] But Justice Harlan tends to stress the principle of separation of powers rather than the inviolability of the Constitution and, though exceedingly restrained in his choice of values entitled to protection, he seems to offer a more flexible approach than Black to state regulation that must be more acceptable to the majority of his brothers on the Bench.

Harlan and Justice Byron White, both of whom joined the majorities in *Goldberg* and *Sniadach*, provided the winning margin for the 5-3 decision several weeks later in the maximum grants case, *Dandridge v. Williams*,[155] which upheld a state statute imposing a ceiling on AFDC benefits according to the number of children in the home. Harlan also wrote the opinion in *Rosado v. Wyman*,[156] which read together with *Dandridge*, decided the same day, stands for the depressing principle (at least to welfare recipients and their lawyers) that a state is obliged by the Social Security Act to raise the theoretical needs level in accordance with increases in the cost of living while remaining free to reduce actual cash payments and pay less than needed for survival.[157] *Rosado*, however, is consistent with the apparent readiness of Harlan to strike down state substantive regulations on statutory grounds when local action conflicts with express national policies.

Harlan expressed the view in *Shapiro v. Thompson*,[158] the welfare residency case, that alleged threats to fundamental rights should be examined under the due process clause. His concurrence in *Goldberg* and *Sniadach* shows that he is not adamantly opposed to finding fundamental rights in socio-economic matters nor to interfering with state action on

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151 Dandridge v. Maryland, 90 S. Ct. 1153 (1970).

152 However, Chief Justice Burger, since joining the Court in 1969, has voted consistently with Black in the poverty law decisions discussed here.

153 369 U.S. 186, 330 (1962).

154 Flast v. Cohen, 392 U.S. 83, 116 (1968).

155 90 S. Ct. 1153 (1970). On April 20, Harlan and White also helped form the 6-2 majority that expanded the principle of King v. Smith, 392 U.S. 309 (1968), to strike down state regulations requiring the inclusion of the income of a stepparent in determining an AFDC budget, even when a statute imposed a support liability for the non-adopted child on such stepparents. Lewis v. Martin, 90 S. Ct. 1282 (1970).

156 90 S. Ct. 1207 (1970).

157 However, the Family Assistance Plan recently enacted by the United States Congress will prohibit the states from reducing the level of actual welfare payments. Act of Jan. 12, 1968, 81 Stat. 893.

158 394 U.S. 618, 661-62 (1969) (Harlan, J., dissenting).

procedural due process grounds.[159] However, while Harlan acknowledges some substantive contents to the due process clause,[160] including protection of property rights,[161] he seems to apply a stricter standard to non-procedural issues with the result that to date Harlan has found little substantive content in the clause.

This view of due process distinguishes Harlan from Black, who accused the majority in *Goldberg* of natural law decisionmaking; he could see no distinction between Court interference in strictly substantive matters and compelling the states to surround "property rights" with procedural safeguards.[162] In *Sniadach* Black accused his colleague Harlan of injecting personal values into the due process clause in a manner similar to the late Justice Felix Frankfurter.[163] Harlan, in reply, rejected the notion that the clause was or should be interpreted according to the "mere predilections of individual judges," but said he differed with Black in that the content of the clause derives not only from the specifics of the Constitution but also "from concepts of the Anglo-American legal heritage."[164]

Nevertheless, except for *Griswold v. Connecticut*[165] and the procedural due process cases,[166] Harlan, using a different route, has arrived at the same conclusions as Black in recent socio-economic cases. In *Griswold*, Harlan found under the due process clause a fundamental right to privacy in the bedroom for married couples, but in an earlier birth control case, *Poe v. Ullman*,[167] Harlan indicated he would not apply the same guarantee to the unmarried or to homosexuals. The "incorporation" theory, he also said in *Griswold*, would not encourage judicial self-restraint.[168] His opinions in the two birth control cases express an expansive view of due process and liberty[169] severely qualified, however, by the

159 It would appear that Harlan (and White) regarded the stepparent case, Lewis v. Martin, 90 S. Ct. 1282 (1970), as sounding in procedural due process.

160 *See* Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting).

161 *See* Flemming v. Nestor, 363 U.S. 603 (1960). The majority opinion by Harlan, though holding against a Social Security beneficiary on the merits, decided that his interest in the payments was "of sufficient substance to fall within the protection from arbitrary governmental action afforded by the Due Process Clause." *Id.* at 611.

162 In *Rosado*, Black, dissenting on the grounds that HEW was in the process of examining the New York legislation, noted that in King v. Smith, 392 U.S. 309 (1968), in which he concurred in the majority opinion, the question of HEW jurisdiction was not "so clearly and sharply presented." 90 S. Ct. at 1227 n.1.

163 Sniadach v. Family Fin. Corp., 395 U.S. 337, 350 (1969) (Black, J., dissenting). Frankfurter viewed the scope of due process "liberties" in the light of the traditions of the English-speaking people. Rochin v. California, 342 U.S. 165, 169 (1952).

164 395 U.S. 337, 343 (1969) (Harlan, J., concurring).

165 381 U.S. 479, 500 (1965) (Harlan, J., concurring).

166 Lewis v. Martin, 90 S. Ct. 1282 (1970); Goldberg v. Kelly, 90 S. Ct. 1011 (1970); Sniadach v. Family Fin. Corp., 395 U.S. 337, 342 (1969) (Harlan, J., concurring).

167 367 U.S. 497, 553 (1961) (Harlan, J., dissenting).

168 381 U.S. at 501 (Harlan, J., concurring).

169 In *Griswold*, Harlan said a statute infringes upon the due process clause if

"insistence upon respect for the teachings of history . . . [and] the doctrines of federalism and separation of powers"[170] and the need to balance individual liberties against the demands of organized society.[171]

Under that formulation, the individual asserting fresh notions of liberty is at a severe disadvantage, especially if he claims to be oppressed because of his poverty.[172] In *Shapiro*, Harlan in dissent disparaged the notion that survival benefits constitute a fundamental interest for fourteenth amendment purposes. He interpreted what he described as a "cryptic suggestion" in Brennan's majority opinion[173] to mean that a more rigid test of state action, *i.e.*, the compelling interest test, was deemed applicable, "*merely* because the result of the classification may be to deny [the non-resident indigents] 'food, shelter and other necessities of life.' "[174] In *Shapiro*, Harlan flatly rejected the notion that a state was under any compulsion to afford indigents the means for survival; this same rejection of "parens patriae"[175] and the "right to life"[176] underlies the holding in the important maximum grants decision, *Dandridge v. Williams*.[177]

Neither Harlan nor Black, like Douglas, can fairly be described as an "egalitarian." But while Black, like Douglas, has consistently applied his jurisprudence to the poor, the middle class and businessmen alike,[178]

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it "violates basic values implicit in the concept of ordered liberty." 381 U.S. at 500 (*quoting* Palko v. Connecticut, 302 U.S. 319, 325 (1937), *overruled in* Benton v. Maryland, 395 U.S. 784 (1969)). In *Poe*, Harlan defined due process as a "discrete concept which subsists as an independent guaranty of liberty and procedural fairness, more general and inclusive than the specific prohibitions." 367 U.S. at 542. "Liberty," he continued, is a "rational continuum" which, broadly speaking, includes a freedom from all *substantive* arbitrary impositions and purposeless restraints. *Id.* at 543 (emphasis added), *citing, inter alia*, Meyer v. Nebraska, 262 U.S. 390 (1922), and Chief Justice Stone's concurring opinion, on due process grounds, in Skinner v. Oklahoma, 316 U.S. 535, 544 (1942).

170 Griswold v. Connecticut, 381 U.S. 479, 501 (1965) (Harlan, J., concurring).

171 Poe v. Ullman, 367 U.S. 497, 542 (1960) (Harlan, J., dissenting).

172 Harlan dissented in the indigent prisoner cases. Douglas v. California, 372 U.S. 353, 360 (1963) (entitlement to attorney on appeal); Griffin v. Illinois, 351 U.S. 12, 29 (1956) (entitlement to free transcripts).

173 Brennan indicated that even under the traditional equal protection test, namely, whether the classification is "without any reasonable basis," the welfare residency requirement (apparently because survival benefits were involved) "would seem irrational and unconstitutional." 394 U.S. at 638.

174 *Id.* at 661 (Harlan, J., dissenting) (emphasis added).

175 This phrase, expressive of a modern state's obligation to relieve its needy, appears in a California supreme court decision striking down a relative's responsibility statute. Department of Mental Hygiene v. Kirchner, 60 Cal. 2d 716, 722, 388 P.2d 720, 36 Cal. Rptr. 488 (1964), *remanded*, 380 U.S. 194, *aff'd* 62 Cal. 2d 586, 400 P.2d 321, 43 Cal. Rptr. 329 (1965).

176 *See* A. SMITH, THE RIGHT TO LIFE (1955).

177 90 S. Ct. 1153 (1970). The holding in *Dandridge* must be interpreted in the light of dicta by Harlan in *Rosado* which explicitly refuses to find a constitutional requirement that states maintain poor residents at a survival level.

178 *But see* Black's dissent in Martin v. Walton, 368 U.S. 25, 26-28 (1961) (Black, J., dissenting), and his majority opinion in Schware v. Board of Bar Examiners, 353 U.S. 232 (1957), which suggests that Black regards the practice of law as entitled to special protection against state action.

Harlan inserts a set of elitist values into the due process clause.[179] I do not agree with Professor Dorsen's sanguine view of Harlan's place in history,[180] especially in light of the acknowledged inconsistencies in his opinions.[181] I also believe that Harlan's opinions in the poverty law, standing, reapportionment, and antitrust cases[182] can best be explained by his lack of empathy as alluded to by Professor Dorsen.[183] Indeed, it is enough to say that Harlan's "conception of the federal system is a product of the practical experience of a [Wall Street] lawyer with a self-reliant nature in the world of affairs."[184]

A SUBSTANTIVE DUE PROCESS FORMULA

It would appear that Black's thought won the day in *Dandridge*. The dissent of Oliver Wendell Holmes in *Lochner* certainly permeates that portion of Justice Stewart's majority opinion, acquiesced in by three other members, rejecting the equal protection argument. But, on closer inspection, it seems more likely that at least Justice White who, with Harlan, joined the majorities in *Goldberg* and *Sniadach*, may have been most influenced not by Black's doctrinaire restraint but by the low value Harlan would assign to welfare benefits for substantive due process purposes.

The majority in *Dandridge* relied heavily upon language by District Judge Marvin Frankel in *Snell v. Wyman*,[185] upholding the New York welfare repayment statute, to find no greater constitutional safeguards available to welfare recipients than to other citizens adversely affected by state action. It is clear, however, that if *Snell* is read literally, the "minimal rationality" test of state action applied by Frankel also would have required different results in *Griswold* and *Harper v. Virginia Board of Elections*, since there were at least arguments that the state action in those cases rested on rational grounds. Presumably, the members of the pres-

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179 In Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), Harlan, dissenting, argued that the poll tax has a rational basis in producing an electorate with a "deeper stake in community affairs," but admitted that this notion conflicted with much contemporary thought. *Id.* at 685.

180 "Harlan has produced opinions that . . . have not been exceeded for professional competence by any Supreme Court justice since Brandeis . . . [and] he has been a restraining force during a period of rapid change; a conservative conscience to a highly active Court." Dorsen, *The Second Mr. Justice Harlan: A Constitutional Conservative*, 44 N.Y.U.L. REV. 249 (1969).

181 *Id.* at 255, 263-64, 265, 267, 269.

182 Harlan has frequently voted to limit the impact of the antitrust laws. Dorsen, *supra* note 180, at 253, *citing* FTC v. Procter & Gamble Co., 386 U.S. 568 (1967); United States v. Continental Can Co., 378 U.S. 441, 467 (1964).

183 Dorsen, *supra* note 180, at 252, 256. However, Professor Dorsen attributes Harlan's reluctance to "accept constitutional claims based on alleged unequal treatment of poor persons" to Harlan's "profound respect for precedent and a limited view of the Supreme Court's role in a federal system." *Id.* at 257.

184 *Id.* at 271.

185 281 F. Supp. 853, 862 (S.D.N.Y. 1968), *aff'd per curiam*, 393 U.S. 323 (1968).

ent court—Black and Burger excepted—would not agree with Frankel, in the light of both logic and precedent, that there is no middle ground for protected rights between an examination of state action merely for "capriciousness reaching a level of irrationality,"[186] and policy judgments by the Court itself.

Dandridge must also be considered together with Harlan's opinion in the companion case of *Rosado*. Straightforward dicta in the latter, inexplicably concurred in by Brennan and Marshall who dissented in *Dandridge*, assumes gratuitously that comparatively wealthy states like New York have budget problems caused by welfare costs that cannot be met by a reallocation of funds or increased taxes.[187] There are unpleasant overtones of Holmes and *Buck v. Bell*[188] (upholding the compulsory sterilization of idiots) in the apparent readiness of the majority in *Dandridge* to accept reduced benefits as a means of discouraging AFDC mothers, *i.e.*, the poor, from breeding.[189] And the *Rosado* opinion attaches so low an importance to survival benefits as to invite New York to economize, with impunity, by substituting percentage or maximum grants for the state's purported policy of paying 100 percent of need.[190]

Dandridge also contains the major defect of overlooking *Griswold* and, especially, *Harper* as exceptions, along with the right to travel and race discrimination decisions, to the post-1937 rejection of substantive due process.[191] Moreover, Justice Marshall's dissent in *Dandridge* correctly

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[186] The district court majority opinion in *Snell* has been criticized for approaching the repayments issue "with the assumption that the legislature is virtually the sole arbiter of all questions raised by welfare repayments provisions." Comment, *Snell v. Wyman and the Constitutional Issues Posed by Welfare Repayments Provisions*, 55 VA. L. REV. 177, 182 (1969). The dissent by Judge Irving Kaufman, on the other hand, "begins with the premise that repayments provisions may infringe important individual rights which the federal courts must be vigilant to protect." *Id.*

The author of this article was co-counsel with Martin Garbus for the unsuccessful plaintiff-recipients in *Snell*. The legal "approach" chosen by Judge Frankel may also be described, despite his expression of "profound sympathy," as a lack of empathy for the true plight of the plaintiffs and a consequent failure to assign the proper value to their fundamental interest in the case.

[187] 90 S. Ct. at 1221. *See also* majority opinion reference in *Dandridge* to Maryland's "finite" resources. 90 S. Ct. at 1159.

[188] 274 U.S. 200 (1927).

[189] "Incentives for family planning" were among the justifications advanced by Maryland. Dandridge v. Williams, 90 S. Ct. at 1161. The Stewart opinion did not accept or reject this argument but did find a "solid foundation" for maximum grants, *inter alia*, in the state's alleged desire to avoid discriminating between welfare families and the working poor. But this last justification was advanced by Alabama in King v. Smith, 392 U.S. 309 (1968), and rejected by the Court.

[190] The invitation, while not explicit, is both unmistakeable and difficult to reconcile with Justice Harlan's acknowledged predilection for judicial restraint.

The New York State Legislature, less than three weeks after *Rosado* and over the objections of the New York City Commissioner of Social Services, voted to permit the State Commissioner to reduce welfare payments, for the first time since 1955, below the estimated minimum needs level. The legislature presumably contemplates reduced appropriations for welfare expenditures.

[191] The majority opinion by Mr. Justice Stewart in *Dandridge* makes no reference to *Griswold* or *Harper*. The Court also said the doctrine of "overreaching"

stresses the majority's failure to follow the separate test for welfare recipients enunciated by Justice Brennan in *Goldberg*, where Brennan recognized that the new forms of property held by citizens critically dependent on government assistance for survival invoke exceptional notions of protected liberties. In substantive matters, this concept also permits the Court to deny the same entree to its jurisdiction to businessmen, landlords, etc., thus avoiding a floodgate of claims, a real danger perhaps, but, incidentally, one belittled by the late Edmond Cahn as an "imperial" view of decisionmaking.[192]

It is important to refute the sharp legal distinction made by Harlan between the same fundamental interests in the procedural and substantive contexts. On occasion, Harlan, former Chief Justice Warren, both of whom dissented in *Shapiro* but concurred in *Griswold*, and White, who found an interference with substantive rights in both *Shapiro* and *Griswold*, have stated that the "liberty" of the due process clause extends beyond vague statutes, procedural fairness at trial, and freedom from physical restraint.[193] In fact, in *Griswold*, White pointed out that a federal court which imposes procedural safeguards on entry into or expulsions from state educational institutions must retain jurisdiction to review the standards applied for evidence of social or religious discrimination or *arbitrariness*. Qualifications for admission to a state bar, White has said, must have a rational connection with an applicant's fitness or capacity to practice law.[194] Justice Harlan, also, has noted the logical nexus between protection of procedural and substantive rights.[195]

Thus, it is difficult if not impossible to justify a constitutional equation made by Harlan and White[196] which in *Goldberg* requires a hearing

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has no place in state socio-economic regulation "not affecting freedoms guaranteed by the Bill of Rights," and where unlike the right to travel claim in *Shapiro*, the regulation violates the fourteenth amendment, allegedly "*only* because . . . [it] results in some disparity in grants . . . ." 90 S. Ct. at 1161 (emphasis added).

[192] According to Mr. Justice Douglas, the late Professor Edmond Cahn of New York University Law School expressed Douglas' own philosophy of the "protective" role of the federal judiciary. Flast v. Cohen, 392 U.S. 83, 110 (1968) (Douglas, J., concurring). In his writing, Cahn stressed the need for empathy of judges for a "consumer perspective" in decisionmaking, with much attention being paid to the impact of a decision on the affected parties. *See* E. CAHN, THE SENSE OF INJUSTICE (1963); *cf.* J. FRANK, COURTS ON TRIAL: MYTH AND REALITY IN AMERICAN JUSTICE 146 (1949).

[193] *See* Griswold v. Connecticut, 381 U.S. 479, 502 (1965) (White, J., concurring); Poe v. Ullman, 367 U.S. 497, 540 (1960) (Harlan, J., dissenting); Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (Warren, C.J., majority opinion).

Former Chief Justice Warren's broad definition of "liberty" under the due process clause is reminiscent of dicta in the majority opinions in Allgeyer v. Louisiana, 165 U.S. 578, 591 (1897), and in Meyer v. Nebraska, 262 U.S. 390, 399 (1923). But the Warren exposition contains one major and severe qualification: "Liberty under law extends to the full range of conduct which the individual is free to pursue and it cannot be restricted *except for a proper governmental objective.*" Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (emphasis added).

[194] Griswold v. Connecticut, 381 U.S. 479, 504 (1965) (White, J., concurring).

[195] Poe v. Ullman, 367 U.S. 497, 540 (1961) (Harlan, J., dissenting).

[196] Since Justices White and Harlan did not write opinions in *Dandridge*,

prior to termination of welfare benefits, yet in *Dandridge* and *Rosado* permits the state to reduce such payments below the survival level, even by discriminating against a class of children living with their own mothers; nor would it make sense in the *Sniadach* situation for the Court to reject a subsequent challenge to a state statute that permitted, for example, attachment *after* judgment of 90 percent of a worker's weekly earnings.

Reliance by the modern Court upon equal protection as a vehicle for enunciating basic rights stems perhaps, as Professor Michelman has suggested,[197] from a fear of returning to the substantive due process era, or, expressed another way, from reluctance to sculpt a system of values so fundamental as to require the imposition of *affirmative* burdens on the states.[198] However, the concepts of equal protection and due process, while not interchangeable, are not mutually exclusive.[199] In *Douglas v. California*,[200] giving convicts the right to an attorney on appeal, the majority opinion did not specify which clause it relied upon to afford procedural rights to indigent convicts.[201] The substantive due process Court in some cases struck down socio-economic regulations under the equal protection clause.[202] Justice Black explicitly objects with equal passion to use of either route for "natural law" intrusions.[203]

Justice Harlan also warned of the threat to the doctrine of judicial restraint in expanding the scope of equal protection to encompass additional fundamental rights.[204] More cogently, in my opinion, he argues that such rights are more properly encompassed within the "liberty" of the due process clause.[205] The classic instance of geometric jurisprudence

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Sniadach, or *Goldberg*, I can only assume, on the basis of their votes with the majorities in those cases, that they attach illogically disparate values to fundamental rights for procedural and substantive due process purposes. See the reference to the distinction in the Stewart opinion in *Dandridge*, 90 S. Ct. at 1163.

197 Michelman, *supra* note 11, at 17.

198 It is true that use of the due process clause for substantive purposes does edge the Court into the controversial area of affirmative obligations but, as a practical matter, the Court has crossed this line already in other poverty law decisions. In *Rosado*, Justice Harlan acknowledged that the Court's decision in King v. Smith, 392 U.S. 309 (1968) (invalidating the substitute parent rule), had imposed an additional financial burden on the Alabama welfare administration. The same occurred in the aftermath of *Shapiro* and is inevitable in all such situations even though the Court does not explicitly compel the affected state to raise additional revenues.

199 Bolling v. Sharpe, 347 U.S. 497, 499 (1954).

200 372 U.S. 353 (1963).

201 *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 682 (1966) (Harlan, J., dissenting), where Harlan points this out.

202 For example, in Truax v. Raich, 239 U.S. 33 (1915), the Court found that the Arizona statute refusing aliens the right to work denied aliens equal protection of the laws.

203 *See* Harper v. Virginia Bd. of Elections, 383 U.S. 663, 676 (1966) (Black, J., dissenting).

204 Shapiro v. Thompson, 394 U.S. 618, 661 (1969) (Harlan, J., dissenting).

205 *Id.* at 659.

may be *Skinner v. Oklahoma*[206] where the modern Court struck down a state compulsory sterilization statute essentially on the grounds of invidious discrimination against a class of felons. Chief Justice Stone, concurring, noted that interference with procreation was properly a question of substantive due process.[207]

The *Skinner* approach is an extreme example of the failure of the modern Court, for whatever reason, to inject a secular moral dimension into dry legal principles.[208] *Skinner* also gives implicit warning of the dangers of a pyrrhic victory for plaintiffs contesting governmental action. Presumably Oklahoma could have satisfied the equal protection clause by sterilizing all of its felons. Litigation attacking Arizona's percentage reduction (from 100 percent to 63 percent of need) of benefits from AFDC families never got off the ground because poverty lawyers reasonably feared that the legislature might respond by reducing Old Age Assistance grants from 100 percent to the AFDC level.[209]

Professor Michelman has argued for an affirmative and, in his opinion, a more generally acceptable approach by the Court to cases of "economic inequality."[210] His concept of "minimum protection" stresses "deprivation" and "provision"[211] rather than the traditional but somewhat artificial considerations under the fourteenth amendment of "discrimination" and "equalization." But his apparent preference for equal protection over due process because of a literal reading of the respective clauses strikes me as a semantic quibble. The latter, say Michelman, inveighs against "deprivations," by positive state action; the former's injunction against "denying . . . is not so devoid of a requirement that the quiescent state must act."[212] However, in most poverty law controversies, including public assistance, urban renewal,[213] municipal services, and housing, the state *has* acted by acknowledging and physically implementing to some extent its obligation inherent in the very concept of government to satisfy

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206 316 U.S. 535 (1942).

207 *Id.* at 544.

208 The traditional quarrel, usually in law school corridors, over whether "law" includes "morals" probably has its origins in the positivism of John Austin and, as in the substantive due process area, can be attributed to the influence of Holmes who contended that breach of contract results in secular penalties, *i.e.*, damages, only.

The distinction, however, is unreal, as evidenced by the many allusions to "morality" that thread decisions on all levels. *See* Palko v. Connecticut, 302 U.S. 319 (1937), *overruled in* Benton v. Maryland, 395 U.S. 784 (1969).

209 Interview with Anthony Ching, Chief Trial Attorney of Pima County Legal Aid Society.

210 Michelman, *supra* note 11.

211 *Id.* at 13.

212 *Id.* at 17.

213 In urban renewal litigation, the uncontroverted fact of segregated housing patterns permits a judge to impose an affirmative obligation upon housing authorities to integrate displaced minorities into White communities. The government having undertaken the task of demolishing run-down neighborhoods often inhabited by Black or Spanish-speaking low income residents acts "unreasonably" and, therefore, unconstitutionally, by providing accommodations only in ghetto areas. *See* Norwalk CORE v. Norwalk Redevelopment Agency, 395 F.2d 920 (2d Cir. 1968).

certain basic needs of all its citizens.[214] Michelman's "minimum protection" formulation has intriguing possibilities, however, whether the claim is asserted under the equal protection or due process clauses, the ninth amendment, or the penumbra of rights emanating from the Bill of Rights.

While admittedly a generic way of expressing fundamental rights owing to individuals complaining of state action, Michelman's phrase has a nondoctrinaire tone. It avoids the shibboleth of "vested" rights[215] and the stark confrontation between jurists and the "right to life" theory.[216] Moreover, a request for minimum protection rather than equalization of classes may reassure a judge that he will not be required to police a continuing controversy. In welfare, for example, a federal court, having decided that legislators or administrators must satisfy a recipient's claim for minimum protection, *i.e.*, benefits pegged at 100 percent of need, might properly decline to review her contention that state policy arbitrarily deprives her children of a supplementary, but nonessential or gratuitous clothing allowance. The activist approach suggested here would not compel the federal courts to take cognizance of welfare claims above the survival level or of minor statutory or administrative deprivations. In the areas of education and municipal services, a federal court might restrict relief to services reasonably or "minimally" adequate for instructional purposes or for health and safety, without being required to redress the "inequalities" between public facilities available in affluent and poor neighborhoods.[217]

The idea of minimum protection is also compatible with the "new property" concept accepted by the Court in *Goldberg* in establishing a fundamental interest of welfare recipients entitling them to a hearing prior to termination of benefits.[218] The relative dependency of the poor,

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[214] Since the time of Elizabeth I the Anglo-American tradition has included care of the destitute among the fundamental obligations of government. *See* Griffith v. Osawkee Township, 14 Kan. 322, 324 (1875); 1 W. BLACKSTONE, COMMENTARIES *131.

The right to life concept of course also appears in the Declaration of Independence among the "inalienable rights," the security of which "governments are instituted among [m]en . . . ." According to one historian, Thomas Jefferson's original version called for the "preservation of life" but this was shortened on the understanding that the right to life encompassed and guaranteed its preservation. C. BECKER, THE DECLARATION OF INDEPENDENCE 198-99 (1922); *see* discussion in Comment, *Thompson v. Shapiro: Residence Requirements and the Right to Life*, 15 CATH. LAW. 265, 273-76 (1969).

[215] For a discussion of the "rights" controversy under the Social Security Act programs, see Graham, *Public Assistance: The Right to Receive; The Obligation to Repay*, 43 N.Y.U.L. REV. 451, 462-67 (1968).

[216] In McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969), the Court stressed the impossibility of achieving true equality in educational facilities. *Id.* at 336.

[217] Note, *The Right to Adequate Municipal Services: Thoughts and Proposals*, 44 N.Y.U.L. REV. 753 (1969).

[218] The distinction made by Justice Brennan in *Goldberg* is crucial because even today property rights in the traditional sense are regarded with special favor in some jurisdictions. *See* Gold v. Lomenzo, — F.2d — (2d Cir. 1970) (real estate broker's claim of confiscatory denial of his commissions by New York State raises a federal question for three-judge court determination).

of businessmen, and in fact, of all Americans, upon government aid and services suggests a viable and equitable formula for sculpting out values that call for the imposition of affirmative obligations on the states.

The test to be applied could be determined by the degree of dependency *and* the nature of the benefits, services, or "liberties" involved. These last must be viewed in the prism of the American experience. In *Sniadach* Justice Black, with some justification, balked at Justice Harlan's use of "concepts of the Anglo-American legal heritage" in judging socio-economic legislation. That heritage, as well as the traditions of the "English-speaking people"[219] contains some unsavory elements such as slavery and repression of the welfare poor; hence, a more desirable background against which to weigh rights or values might be the one suggested by Justice Goldberg in *Griswold*, namely, "the traditions and [presumably collective] conscience of our people."[220] Though a thin majority of the current Supreme Court does not agree, the survival of indigents who have no other recourse but to rely upon government for sustenance should rank even higher on the value scale than the right to travel, so as to require the state to advance a "compelling interest," for example, a depletion of tax revenues caused by an economic depression of disaster proportions, to justify paying its poor less than survival benefits.

In a politically less controversial (but no less criticial) context, the "right to life" may be seen as the entitlement of all residents of a community to protection against environmental pollution which reaches beyond a minimum level of interference with life.[221] The need for such protection will be particularly acute in cities like Tucson, for example, where students, government employees, and retired pensioners create a largely nonmobile and therefore greatly dependent population. The extent of the threat to life, or to health and safety from smelter emissions and engine wastes—adduced by empirical evidence—will determine the adequacy of the response by municipal officials.

Though less fundamental, the liberty or freedom of welfare recipients—destitute in most jurisdictions almost by definition—to become rehabilitated[222] or to secure a divorce[223] or to appeal in court an eviction[224]

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219 This is the Frankfurter test, Rochin v. California, 342 U.S. 165, 169 (1952), referred to by Black in *Sniadach*.

220 381 U.S. at 487 (Goldberg, J., concurring), *quoting* Snyder v. Massachusetts, 291 U.S. 97, 105 (1934). *Cf.* Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968), where Judge Kaufman, dissenting, wrote "[w]hile the precise contours and boundaries of the term [liberty] may be vague, its reach is determined from the traditions and history of the land." *Id.* at 871.

221 During a five-day period in October, 1948, in the small town of Donora, Pa., 20 persons died and 5,910 others (42.7 percent of the population) were sickened by a "temperature inversion" which trapped cold dense air in the valley beneath a layer of warm air along with tons of soot, fumes, and smoke from, *inter alia*, steelmills and zinc works. Tucson Daily Citizen, April 15, 1970, at 24, col. 1.

222 *See* Snell v. Wyman, 281 F. Supp. 853 (S.D.N.Y. 1968). For a discussion of the repayment obligation and the "destitution" requirement, see Graham, *supra* note 215, and J. GRAHAM, ENEMIES OF THE POOR 16-35 (1970). The Family As-

or to receive a fair hearing determination[225] may be infringed upon by statutory repayment obligations or filing fee requirements.[226] In these cases, even by applying the traditional "reasonable basis" test, or by "balancing" the respective interests, or by construing the deprivations as "procedural" in nature, it should be evident that the interest of the state in making such nominal monetary recoveries does not equate with the deprivations of basic rights of the aggrieved individuals. A court might also regard such statutes as penalizing persons because of an involuntary condition of poverty over which they have no control;[227] or, as Judge Kaufman argued in *Snell*, such statutes may fail because of "over-breadth" or "imprecision."[228] This doctrine recognizes the right of the state to legislate and to achieve economies in these areas; but because of the fundamental individual interests involved, it imposes a "modest burden" upon state legislators to take cognizance of, and to make special provision for, their truly dependent constitutents.[229]

The "reasonable basis" test might also be adequate to protect businessmen,[230] long-haired students,[231] or taxicab drivers[232] against in-

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sistance Plan, *supra* note 157, can reasonably be construed to prohibit recoveries by the states of welfare monies except in cases of fraud and overpavments.

223 Boddie v. Connecticut, 286 F. Supp. 968 (D. Conn. 1968) *appeal dismissed*, 396 U.S. 938 (1969).

224 Sanks v. Georgia, *prob. juris noted*, 395 U.S. 974 (1969) (U.S. Docket No. 266), *on appeal from* 225 Ga. 88, 166 S.E.2d 19 (1969).

225 Frederick v. Schwartz, 296 F. Supp. 1321 (D. Conn. 1969).

226 For a sound, general discussion of these and other restrictions on the exercise of rights by poor persons, seé R. O'NEIL, THE PRICE OF DEPENDENCY: CIVIL LIBERTIES IN THE WELFARE STATE 39-57 (1970).

227 *See* Comment, *Snell v. Wyman and the Constitutional Issues Posed by Welfare Repayments Provisions*, 55 VA. L. REV. 177, 192 (1969). *See also* Gray & Rudovsky, *The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Insurance Co.*, 118 U. PA. L. REV. 1, 9 (1969).

Most jurisdictions have recognized the serious disability facing indigents who wish to assert civil claims by permitting such litigants to proceed in forma pauperis. Filing fee requirements that make no exception for the poor contravene this tradition.

228 281 F. Supp. at 869-70 (Kaufman, J., dissenting). *See also* Kramer v. Union Free School Dist., 395 U.S. 621 (1969). The Court determined that New York violated equal protection by restricting the right to vote in school district elections, because the classified "interest" group was not selected with sufficient precision. The same contention was made by the dissenters in *Dandridge*, 90 S. Ct. at 1173.

229 *See* United Public Workers v. Mitchell, 330 U.S. 75 (1947). Justice Douglas dissented in part on the grounds that the Hatch Act proscribing political activities by federal employees violated due process by including nonsensitive categories of employees in its scope. *Id.* at 116. "[W]here the balance was between constitutional rights of individuals and a community interest [the Court has insisted the statute be narrowly drawn]." *Id.* at 124.

230 *See* Morey v. Doud, 354 U.S. 457 (1957).

231 *See* Justice Douglas' dissent from denial of certiorari in Ferrell v. Dallas Independent School Dist., 393 U.S. 856 (1968) (long-haired student case); *cf.* Breen v. Kahl, 419 F.2d 1034 (7th Cir. 1969). The majority in *Ferrell* upheld a student's right to wear a certain hair style. The dissent argued that the case sounded in the traditional, discredited substantive due process.

232 Wall v. King, 206 F.2d 878 (1st Cir. 1953) (constitutionality of revocation of driver's license upheld).

vidious or punitive discrimination. Here, the rights involved are rarely so fundamental. Moreover, businessmen do take their chances in the market place.[233] Some workers may be able to find employment at other trades. Students usually can transfer to other schools. But, nevertheless, the claim by these groups to minimum protection is valid and, on occasion, has been sustained by the courts.[234]

Whether the due process or equal protection clauses, the ninth amendment, or the "penumbra" theory is relied upon as the technical vehicle for redressing these grievances may depend on the basic nature of the right asserted or on the judge's reading of history.[235] But, more important, the legal realism of William O. Douglas is instructive in stressing substance over form, in focusing attention, in the light of present realities, upon the true nature of the right asserted and the actual consequences of its deprivation. A nondoctrinaire view of Jeffersonian Democracy will not be blind to the imperfections in the democratic process,[236] including the inadequacy of representation available to the politically impotent among competing pressure groups.[237]

Less regard for abstract principle might have persuaded the majority in *Dandridge* that a foreseeable result of their decision will be an increase in criminal activity, prostitution, death from starvation, or malnutrition among the nation's hardcore poor. And as Justice Marshall's dissent noted, *Dandridge* can definitely be expected to result in displacement of children from the homes of their parents to homes of relatives in order to avoid the consequences of the maximum grant policy.[238]

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[233] *See* Morey v. Doud, 354 U.S. 457, 468-69 (1957), where the Court states "[t]his is not a case in which the Fourteenth Amendment is being invoked to protect a business from the general hazards of competition."

[234] Note, *Arbitrary Teacher Dismissal*, 44 N.Y.U.L. REV. 836 (1969). *See also* Freeman v. Gould Special School Dist., 405 F.2d 1153, 1162-63 (8th Cir.) (Lay, J., dissenting), *cert. denied*, 396 U.S. 843 (1969).

[235] Justice Black's dissents in the recent substantive due process cases are replete with references to the thoughts of the founding fathers and other historical citations.

[236] Consider these comments by a respected publication about the legislative activities in a large influential state. "[A]s the Legislature completes its business today, it can be safely predicted that in the closing rush many legislators will be passing upon additional bills without the slightest knowledge of what they are voting for. And it is reasonably sure that they will hope that the public doesn't learn about some bills until too late . . . ." N.Y. Times, May 2, 1969, at 42, col. 1. "[T]he wild and furious wind-up of this session . . . has been much like others in recent years. Good bills like bad bills pass. The crisis atmosphere prevents either from receiving proper review." N.Y. Times, April 20, 1970, at 43, col. 1.

[237] In *Rosado*, Justice Harlan suggested that state legislators who voted for cutbacks in welfare benefits levels would face the adverse political consequences of their actions. During the debate in Albany in March, 1969, over proposed reductions in AFDC levels it was quite apparent to this observer that most, if not all, of the Republicans who voted for the bill expected to win favor with the bulk of their constituents and that, conversely, many of the Democrats who voted unsuccessfully against the bill, at the insistence of their leadership, expected to suffer reprisals at the polls.

[238] 90 S. Ct. at 1176.

CONCLUSION

If *Goldberg* represents the outer limits of court intervention into state regulation peripherally affecting new property rights, and if *Dandridge* together with *Rosado*, effectively shuts the door to expanded substantive protections in welfare, housing, education, and municipal services, then this article would be an idle venture. But the dicta by Harlan in *Rosado*, inviting New York to ease its budget at the expense of the poor, could not have been fully accepted by his colleagues Douglas, Brennan, and Marshall, who dissented in *Dandridge*. The 5-3 decision in *Dandridge* is also bad law; but it may be reversed as the composition of the Court changes and as the nation's crisis of poverty, with its attendant crime, racial tensions, and repressive or violent political responses, worsens.

Two weeks after viewing receipt of welfare survival benefits as a fundamental interest for procedural due process purposes, the Court ignored precedent in other areas as well as the universal rejection of maximum grant regulations by lower federal and state courts and applied the "reasonable basis" test to the actual reduction of public assistance payments adversely affecting large families. In so doing, the Court relied essentially on Judge Marvin Frankel's doctrinaire rejection of substantive due process as a vehicle for expansion of protections owing to the "insular minorities" of our increasingly dependent society. The principal issue in poverty law cases is not whether the pre-1937 Court abused the principle of separation of powers in the socio-economic area; formulas are available for measured intervention that will not threaten, and may strengthen, the American legislative process.[239] I predict that the poor and their lawyers ultimately will force the Court to disregard both dogma and the mathematical niceties of equal protection and face squarely whether the due process clause or the Bill of Rights encompass a minimal right to life, to education, and to municipal services.

"Now that his dissenting thought has won the day," said the district court in *Snell*, "we ought not to trivialize [Holmes'] achievement."[240]

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[239] In Snell v. Wyman, 281 F. Supp. 853, 873 (S.D.N.Y. 1968), Judge Kaufman in dissent argued that imposing the modest burden on the state of devising more precise repayment regulations to take cognizance of the welfare rehabilitation objectives would in no way "compromise" Justice Brandeis' regard for experimentation by state legislatures. In fact, said Kaufman, the demand for "more precision from regulations that constrain liberty will challenge the ingenuity and inventive spirit of the states while ensuring fuller freedom for all the people."

[240] 281 F. Supp. at 863. Interestingly, the three decisions cited by Judge Frankel as examples of previously rejected personal "liberty" claims do not support his narrow view of substantive due process rights. *Id.* at 862-63. Fay v. New York, 332 U.S. 261 (1947), involved a traditional criminal law due process (jury trial) contention. In Ferguson v. Skrupa, 372 U.S. 726 (1963), the Court unanimously rejected a businessmen's claim of oppression by state action. In Jacobson v. Massachusetts, 197 U.S. 11 (1905), the substantive due process Court that decided *Lochner* upheld a state compulsory vaccination law.

The Great Dissenter, who was no libertarian except in the first and fifth amendment areas, personifies, like Hugo L. Black, ironclad judicial restraint.[241] His "achievements" in the socio-economic sector of decision-making, if valid at all, belong to his own time and not to ours, when the sons of New Deal blue collar workers now dominate many state legislatures. The poor classes of today, most of them Black, Indian or Mexican-American, are fewer in number, less organized, and therefore lack the collective political and economic strength of their predecessors.[242] On many issues, such as fair employment and increased welfare benefits, the demands of the poor for a share in the American Dream threaten the security of the entrenched middle class.

Whereas the pre-1937 Court in some cases may have temporarily thwarted the democratic process, in others the Court carved out values far more durable than mere freedom of contract. The Early Court may have been unnecessarily cynical of legislative activities, but the Black approach would have current constitutional determinations affecting fundamental property-related rights dictated by the thoughts of men dead for almost two centuries. The more influential view of Justice Harlan errs by being overly optimistic about the integrity of Jeffersonian Democracy and by insensitivity to the legitimate claims of liberty intertwined with the new forms of property made available by the government to those who qualify on account of poverty.

The pragmatic humanism of Justice William O. Douglas would adapt an organic constitution to present realities; his values, American to the core, encompass all social and economic classes but recognize the greater restraints on mobility that flow from lack of assets. On the other hand, an incredibly elitist notion of American freedoms attaches greater constitutional importance to the use of birth control devices by affluent citizens than to the right of destitute children to survive.

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241 This characterization of Holmes' thought may not be entirely correct or fair to Justice Holmes who, dissenting in Lochner v. New York, 198 U.S. 45, 74 (1905), seemed to be applying a somewhat flexible, though vague, "torts" test of the constitutionality of socio-economic legislation, *i.e.*, whether "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Id.* at 76. At least one commentator during the middle substantive due process period regarded the differences between Holmes and his colleagues as one "of degree and not kind." Hough, *Due Process of Law—To-Day*, 32 HARV. L. REV. 218, 233 (1918).

242 *See* W. DOUGLAS, POINTS OF REBELLION 56-57 (1970).