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The Fading Free Exercise Clause

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THE FADING FREE EXERCISE CLAUSE

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ABSTRACT

This Article uses the Supreme Court's recent opinion in *Christian Legal Society v. Martinez* as a point of departure for analyzing the current state of free exercise doctrine. I argue that one of the most notable features of the *Christian Legal Society (CLS)* case is its almost total lack of engagement with the Free Exercise Clause. For the core of CLS's complaint was unambiguously about the declaration and exercise of religious beliefs: the group claimed that it was being excluded from campus life because it required its members to live according to shared religious principles and to subscribe to a Statement of Faith. Yet notwithstanding the clear religious basis of its claims, CLS devoted a mere two pages to the Free Exercise Clause in its brief. The Court's Free Exercise Clause analysis was similarly elliptical: the majority dispensed with the free exercise argument in a single footnote. For his part, Justice Alito did not even mention the Free Exercise Clause once in his lengthy dissent.

What accounts for this paucity of treatment? The following sections explore this question. I begin by tracing the fading status of the Free Exercise Clause from *Employment Division v. Smith* in 1990 to *Christian Legal Society v. Martinez* in 2010. I show that while the Clause has occasionally played a supporting role in Supreme Court decisions over the past two decades, it has not provided an independent basis for constitutional relief in a single case since 1993. I then suggest that the fact that the Free Exercise Clause has become so doctrinally otiose is itself an argument for reinvesting the Clause with independent meaning.

But what kind of meaning should it have? Unlike commentators who have reasoned that free exercise doctrine must either treat all citizens equally or give religious believers special privileges, I outline an approach to the Free Exercise Clause that seeks to accomplish both. Specifically, I propose that the Clause be reinvigorated to provide some exemptions from generally-applicable laws for conscientious objectors—but that these exemptions must be available to religious and secular claimants on an equal footing. To illustrate how my proposal might operate in practice, I then apply the reinvigorated Free Exercise Clause to *Christian Legal Society v. Martinez* itself. I conclude that even though a reinvigorated Free Exercise Clause might not have changed the result in the *CLS* case, there are nevertheless strong arguments in favor of giving greater weight to the Clause in future cases.

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INTRODUCTION

At the end of the 2009 term, the Supreme Court issued its opinion in *Christian Legal Society v. Martinez*.[1] The case involved a challenge to a University of California Hastings College of Law policy that required student organizations to accept "all comers" in order to receive official recognition, use campus communication networks, and apply for financial assistance through the law school's student-activity fee fund.[2] The challenge was brought by the Hastings chapter of the Christian Legal Society (CLS), whose bylaws required members and officers to subscribe to a "Statement of Faith" and to live in accordance with certain beliefs and values.[3] These bylaws operated to disqualify from membership any students who engaged in "unrepentant homosexual conduct" or who held "religious convictions different from those in the Statement of Faith."[4] Hastings concluded that CLS's bylaws did not comply with the school's nondiscrimination policy and refused to grant the group official status as a Registered Student Organization ("RSO").[5] CLS brought suit, claiming that Hastings's refusal to grant it RSO status violated the organization's rights to free speech, expressive association, and free exercise of religion.[6] The Supreme Court rejected all of CLS's claims.[7] Applying limited public forum doctrine, the Court held by a vote of 5-4 that Hastings's policy was both reasonable and viewpoint-neutral.[8] In sum, while "[t]he First Amendment shields CLS against state prohibition of [its] expressive activity, however exclusionary that activity may be," the organization "enjoys no constitutional right to state subvention of its selectivity."[9]

Early assessments of the significance of the *CLS* decision have been decidedly mixed. Robert Vischer, for example, has opined that the decision is a significant one indeed—though not necessarily at the level of constitutional doctrine.[10] Rather, Vischer finds the decision noteworthy at the level of political discourse about diversity, discrimination, and associational freedom. He emphasizes the need "to help deepen our public discourse about discrimination and diversity to include recognition that associational diversity is a key component of religious and moral liberty," and appears dismayed by "the shared mindset that appears to have animated the law school's actions and the

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[1] 130 S. Ct. 2971 (2010).
[2] *Id.* at 2979.
[3] *Id.* at 2980.
[4] *Id.*
[5] *Id.* at 2980–81.
[6] *Id.* at 2981.
[7] *Id.* at 2981–82.
[8] *Id.* at 2978.
[9] *Id.*
[10] Robert K. Vischer, *Diversity and Discrimination in the Case of the Christian Legal Society*, PUBLIC DISCOURSE: ETHICS, LAW, AND THE COMMON GOOD (July 9, 2010), http://www.thepublicdiscourse.com/2010/07/1410.

Justices' interpretation and evaluation of those actions as reasonable."[11] But while Vischer criticizes the Justices for failing to appreciate the nature and strength of CLS's associational freedom claims, he nevertheless commends them for distinguishing between the legality and advisability of Hastings's policy.[12] Thus, however misguided the Court's opinion may have been, it does not necessarily mark the end of the debate: for public actors may yet recognize that "even if a university now has the right to make all groups accept everyone, it is a right best left unexercised."[13]

By contrast, Steven Shiffrin finds the majority opinion rather unremarkable and "do[es] not see the law declared in the Christian Legal Society case as a serious blow to freedom of religion or freedom of speech."[14] Shiffrin's conclusion is supported by the limits he notes in the opinion: it did not hold that Hastings could discriminate against religious groups or ban groups with selective membership outright; it merely held that Hastings did not have to formally recognize or subsidize those groups.[15] Shiffrin does express doubt about the wisdom of an "all-comers" policy and voices concern that such a policy could potentially hide discriminatory motivations.[16] But as long as groups like CLS retain some access to campus facilities and to alternative means of communication with other students—and for purposes of its opinion, the majority assumed that CLS did have such access—then Shiffrin does "not think this case is very significant."[17]

Vikram David Amar takes a position somewhere between those of Vischer and Shiffrin: he agrees that *CLS v. Martinez* is a significant case, but not because of its impact on religious freedom. In his view, the case is significant for what it teaches about the importance of factual concessions and doctrinal frameworks.[18] CLS made two key concessions in this case: 1) that Hastings had created a limited public forum, and 2) that Hastings's policy requires student groups to accept all comers.[19] Once these concessions had been made, it was relatively easy for the Court to conclude that limited public forum doctrine was the applicable standard and that Hastings's policy was viewpoint neutral.[20] Of course, Hastings's policy also had to be reasonable to pass constitutional muster. This requirement leads to the third lesson Amar draws from the

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[11] *Id.*

[12] *Id.*

[13] *Id.*

[14] Steven Shiffrin, *The Insignificance of the* Christian Legal Society *Case*, RELIGIOUSLEFT LAW (June 30, 2010, 5:15AM), http://www.religiousleftlaw.com/2010/06/the-insignificance-of-the-christian-legal-society-case.html.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] Vikram David Amar, *What the* CLS v. Martinez *Ruling Reveals About the Supreme Court's Processes*, FINDLAW (July 2, 2010), http://writ.news.findlaw.com/amar/20100702.html.

[19] *Id.*

[20] *Id.*

case—i.e., that the Court is reluctant to second-guess institutional judgments when evaluating the reasonableness of educational policies at colleges and universities.[21]

The reactions of Vischer, Shiffrin, and Amar are broadly representative of the narratives that have emerged thus far about *CLS v. Martinez*.[22] However, this Article offers a different take on the case. I argue that the case's primary significance does not derive from what it says about factual stipulations, limited forum doctrine, or associational freedom under the Free Speech Clause. Instead, I argue that its primary significance derives from what it says—or rather fails to say—about the Free Exercise Clause.

Indeed, the absence of engagement with the Free Exercise Clause in this case is striking. For the core of CLS's complaint was unambiguously about the declaration and exercise of religious beliefs. The group claimed that it was being excluded from campus life because it required its members to live according to shared religious principles and to sign a Statement of Faith—one that included declarations of belief in "God the Father Almighty," the "Deity of our Lord, Jesus Christ," and "[t]he Bible as the inspired Word of God."[23] Yet notwithstanding the clear religious basis of its claims, CLS devoted a mere two pages to the Free Exercise Clause in its brief[24] (a summary treatment that Hastings characterized as "half-hearted" and "telling" in its own brief).[25] The Court's Free Exercise Clause analysis was similarly elliptical: the majority dispensed with the free exercise argument in a single footnote.[26] For his part, Justice Alito did not even mention the Free Exercise Clause once in his lengthy dissent.

What accounts for this paucity of treatment? The remainder of this Article explores this question. At one level, the explanation is simple: the 1990 case of *Employment Division v. Smith* substantially curtailed the scope of the Free Exercise Clause by holding that religious claimants were not entitled to exemptions from neutral and generally-applicable laws.[27] But even *Smith* held open the possibility that the Free Exercise

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[21] *Id.*

[22] *See, e.g.*, Richard Garnett, *What Would Kagan Do?*, USA TODAY, July 26, 2010, at 9A ("[T]he court should not have deferred to the law-school's 'all comers' rule. True, the policy might seem, at first glance, to promote [an] inclusive political community . . . . In fact, though, it excludes from the law school's common life groups with distinctive identities and penalizes the view that members' beliefs matter to the group's shared purpose."); Michael Dorf, *A Funny Thing Happened on the Way to the Limited Designated Public Forum*, DORF ON LAW (July 14, 2010, 2:22 AM), http://www.dorfonlaw.org/2010/07/funny-thing-happened-on-way-to-limited.html (citing Amar, *supra* note 18, and discussing factual concessions by CLS); Stanley Fish, *Being Neutral Is Oh So Hard to Do*, N.Y. TIMES OPINIONATOR (July 19, 2010, 9:00 PM), http://opinionator.blogs.nytimes.com/2010/07/19/being-neutral-is-oh-so-hard-to-do/?ref=opinion ("Under cover of 'neutrality,' Hastings, with the majority's approval, is imposing the goals and ideology of liberal multiculturalism on the very diverse members of the law school's community.").

[23] Christian Legal Soc'y v. Martinez, 130 S.Ct. 2971, 2980 n.3 (2010).

[24] Brief for Petitioner at 40–41, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371).

[25] Brief of Respondents at 49, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371).

[26] *Christian Legal Soc'y*, 130 S. Ct. at 2995 n.27.

[27] Emp't Div. v. Smith, 494 U.S. 872, 885 (1990).

Clause could have constitutional force in cases involving "hybrid" claims—i.e., cases in which free exercise claims were combined with other claims, including free speech claims.[28] Thus, in 2001, Mark Tushnet observed that while the Free Exercise Clause might have become redundant in many instances, it could still have sufficient "residual" effect to make a meaningful difference in other instances.[29] The *CLS* case, however, suggests that the Free Exercise Clause is rapidly fading beyond redundancy into irrelevance.

In the sections below, I trace and analyze the doctrinal demise of the Free Exercise Clause from *Smith* through *CLS*. I show that while the Clause has occasionally played a supporting role in Supreme Court decisions over the past two decades, it has not provided an independent basis for constitutional relief in a single case since 1993. I then consider some of the implications of this development, focusing on the claim that the Free Exercise Clause should be re-invested with independent significance. I also consider how a more robust interpretation of the Free Exercise Clause might have played out in *Christian Legal Society v. Martinez*. I conclude that even though a re-invigorated Free Exercise Clause might not have changed the result in the *CLS* case itself, there are nevertheless strong arguments in favor of giving greater weight to the Clause in future cases.

I. THE FADING OF FREE EXERCISE DOCTRINE

As noted above, the current state of free exercise doctrine traces its origins to *Employment Division v. Smith*. The case was brought by members of a Native American church whose rites involved the sacramental consumption of peyote.[30] State drug laws prohibited possession of the hallucinogenic substance, but the church members argued that consumption of peyote was central to their religious beliefs and practices and claimed that they were entitled to an exemption from the law under the Free Exercise Clause.[31] In an opinion authored by Justice Scalia, the Court held that the Free Exercise Clause required no such exemptions.[32] Although the Court had evaluated free exercise cases under the "compelling state interest" standard for

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[28] *Id.* at 881–82 (discussing cases in which free exercise claims were combined with claims involving parental rights, freedom of speech and press, or freedom of association).

[29] Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 LOY. U. CHI. L.J. 71, 91–92 (2001) (discussing cases "[i]n which a free exercise claim that would be insufficient standing alone to trigger close examination of the challenged government conduct is joined with some other constitutionally rooted claim that would be insufficient standing alone to do so as well"); *see also* Daniel O. Conkle, *The Free Exercise Clause: How Redundant, and Why?*, 33 LOY. U. CHI. L.J. 95, 115 (2001) (arguing that in some cases, the Free Exercise Clause "does no *independent* doctrinal work, but it does do *important* doctrinal work," and "[t]o this extent, the Clause is not redundant").

[30] *Smith*, 494 U.S. at 874.

[31] *Id.* at 874, 878.

[32] *Id.* at 885.

decades,[33] the *Smith* majority rejected that standard in favor of a much more lenient test.[34] Henceforth, laws burdening religious exercise need only be neutral and of general applicability to survive constitutional scrutiny; as long as a prohibition of religious practice was not the purpose "but merely the incidental effect of a generally applicable and otherwise valid provision, the First Amendment has not been offended."[35]

The *Smith* decision thus marked a significant change in free exercise jurisprudence, and it generated an outpouring of objections. In academe, a number of prominent scholars criticized the decision on precedential, historical, and normative grounds.[36] In Congress, legislators passed the Religious Freedom Restoration Act (RFRA) in a bipartisan effort to overrule *Smith* and restore the compelling interest standard.[37] A discernable concern behind both the scholarship and the legislation was that *Smith* had seriously undermined religious liberty, and that religious minorities in particular would be left without constitutional protection from discrimination in matters of belief and practice.[38]

This fear was not to be realized—at least not in the next Free Exercise Clause to reach the Court. That case was *Church of Lukumi Babalu Aye, Inc. v. Hialeah*,[39]

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[33] *See* Sherbert v. Verner, 374 U.S. 398, 406–07 (1963) (holding that a "substantial infringement" on religious liberty must be justified by a "compelling state interest"). However, some commentators have argued that this heightened standard was rarely applied with much impact in the majority of cases. *See* CHRISTOPHER L. EISGRUBER & LAWRENCE G. SAGER, RELIGIOUS FREEDOM AND THE CONSTITUTION 42 (2007) ("Not surprisingly, courts, while paying lip service to the *Sherbert* case and its compelling state interest test in free exercise cases, in practice shied away from this radical prescription.").

[34] *See Smith*, 494 U.S. at 884–85 (holding the *Sherbert* test inapplicable to challenges to "generally applicable prohibitions of socially harmful conduct").

[35] *Id.* at 878.

[36] *See, e.g.*, MARTHA C. NUSSBAUM, LIBERTY OF CONSCIENCE: IN DEFENSE OF AMERICA'S TRADITION OF RELIGIOUS EQUALITY 147–74 (2008); Douglas Laycock, *The Remnants of Free Exercise*, 1990 SUP. CT. REV. 1, 2 (noting criticism of *Smith*); Michael McConnell, *Free Exercise Revisionism and the* Smith *Decision*, 57 U. CHI. L. REV. 1109 (1990) [hereinafter McConnell, *Free Exercise Revisionism*] (same). While much of the commentary on *Smith* has been critical, some of it has also been supportive. *See, e.g.*, EISGRUBER & SAGER, *supra* note 33, at 78–81;William P. Marshall, *In Defense of* Smith *and Free Exercise Revisionism*, 58 U. CHI. L. REV. 308 (1991).

[37] 42 U.S.C. § 2000bb-1 (2008). RFRA was ultimately struck down by the Supreme Court as applied to the states in *City of Boerne v. Flores*, 521 U.S. 507 (1997), which held that the statute exceeded Congress's enforcement powers under the Fourteenth Amendment. The statute remains in effect as applied to the federal government. *See* Gonzales v. O Centro Espírita Beneficente União do Vegetal, 546 U.S. 418 (2006).

[38] This concern may have been driven by the Court's observation that "[i]t may fairly be said that leaving accommodation to the political process will place at a relative disadvantage those religious practices that are not widely engaged in; but that unavoidable consequence of democratic government must be preferred to a system in which each conscience is a law unto itself. . . ." *Smith*, 494 U.S. at 890.

[39] 508 U.S. 520 (1993).

decided three years after *Smith*. The petitioners were members of a church that practiced the Santeria religion, which involves the ritual sacrifice of animals.[40] When church members leased property in the city of Hialeah with the intention of opening a house of worship, the city council responded by enacting a series of resolutions and ordinances.[41] The first expressed "concern . . . that certain religions may propose to engage in practices which are inconsistent with public morals, peace or safety."[42] Subsequent enactments effectively banned central components of Santeria worship, declaring it to be "unlawful for any person . . . to sacrifice any animal within the corporate limits of the City of Hialeah, Florida."[43] Church members challenged the ordinances under the Free Exercise Clause.[44]

The Supreme Court applied the *Smith* standard to petitioners' claims.[45] The Court first held that facial neutrality in a law was not sufficient to end the constitutional inquiry, and proceeded to find that the record "compel[led] the conclusion that suppression of the central element of the Santeria worship service was the object of the ordinances."[46] Consequently, the challenged laws could not be considered neutral as required by *Smith*.[47] Nor could the laws be considered generally applicable: for they pursued the government's professed interest in preventing animal cruelty "only against conduct motivated by religious belief."[48] The ordinances could therefore only survive if they were narrowly tailored to serve a compelling government interest—for even after *Smith*, laws that single out religious conduct for prohibition are subject to strict scrutiny.[49] Given that Hialeah's ordinances failed the relatively lenient *Smith* standard, it was no surprise that they also failed the more rigorous compelling interest standard.[50]

While *Lukumi* resulted in a favorable outcome for petitioners, the free exercise implications of the case are fairly limited. True, the Court once again applied the compelling interest test to vindicate the rights of religious minorities, and did so in a case that was decided under the Free Exercise Clause alone—for *Lukumi* was not evaluated as a "hybrid" case of the sort mentioned in *Smith*.[51] *Lukumi* can thus be read to belie the claim that *Smith* deprived the Free Exercise Clause of meaningful content. But

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[40] *Id.* at 525–26.
[41] *Id.*
[42] *Id.* at 526 (internal quotation marks omitted).
[43] *Id.* at 528 (internal quotation marks omitted).
[44] *Id.*
[45] *Id.* at 531–32.
[46] *Id.* at 534.
[47] *Id.* at 533, 542.
[48] *Id.* at 545.
[49] *Id.* at 546–47.
[50] *Id.*
[51] However, the case arguably presented hybrid issues that could have been decided on other grounds. *See* Tushnet, *supra* note 29, at 76 & n. 27 (arguing that the Free Speech Clause's ban on viewpoint discrimination would have produced the same result as the Free Exercise Clause).

at the same time, there was no suggestion that the *Lukumi* majority was limiting or retreating from the holding of *Smith* in any way.[52] Moreover, the Court plainly viewed *Lukumi* as an exceptional case. Justice Kennedy began his majority opinion by noting that "[t]he principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our opinions."[53] Hence, it is not clear how much significance the case has outside of those rare instances in which a particular religious practice is the target of obvious discrimination.[54] But one thing about the case *is* clear: it did not lead to a resurgence of successful free exercise claims at the Supreme Court level. Quite to the contrary: *Lukumi* would prove to be the last case decided by the Court to date in which the Free Exercise Clause provided the primary basis for relief.

This is not to say that the Free Exercise Clause disappeared from view entirely. Rather, it simply faded from constitutional significance. The only case after *Lukumi* to prominently feature a Free Exercise Clause claim was *Locke v. Davey*.[55] The case involved a challenge to the State of Washington's Promise Scholarship Program, which provides financial assistance to students pursuing post-secondary educational opportunities.[56] However, under state law, the scholarships may not be used to pursue a degree in theology or other devotional studies.[57] Respondent Davey was initially awarded a Promise Scholarship but was denied funding after attempting to pursue a double major in pastoral ministries and business.[58] Davey brought suit, arguing that the denial of funding violated his rights under the Free Exercise Clause.[59]

In asserting his free exercise claims, Davey argued that the scholarship program was not facially neutral with respect to religion and was therefore presumptively unconstitutional under *Lukumi*—for the Washington program singled out religious education for exclusion, much like the Hialeah ordinances had singled out religious sacrifice for prohibition.[60] Yet the Court rejected this argument.[61] The Court distinguished the kind of disfavor of religion that was present in *Lukumi* from the "far

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[52] *See* Douglas Laycock, *Free Exercise and the Religious Freedom Restoration Act*, 62 FORDHAM L. REV. 883, 892 (1994) ("The Court struck down these ordinances 9-0, but without casting the slightest doubt on *Smith*. There seemed clearly to be six votes for *Smith* in the *Lukumi* opinions.").

[53] *Lukumi*, 508 U.S. at 523; *see also* Laycock, *supra* note 52, at 892 (discussing his decision as counsel for petitioners to frame church's appeal as religious discrimination case).

[54] *See* Laycock, *supra* note 52, at 892 ("Here was one of the few cases the Supreme Court had ever seen where government set out to suppress a single religion.").

[55] 540 U.S. 712 (2004).

[56] *Id.* at 715.

[57] *Id.* at 716 (citing WASH. ADMIN. CODE §§ 250-80-020(12)(f) to (g) (2003)).

[58] *Id.* at 717.

[59] *Id.* at 718. Davey also brought claims under the Free Speech and Equal Protection Clauses, but the Court summarily rejected these claims in a footnote. *See id.* at 720, n.3.

[60] *Id.* at 720.

[61] *Id.*

milder" kind that was present here: whereas the city criminalized certain religious practices in the latter case, the State was imposing "neither criminal nor civil sanctions on any type of religious service or rite" in the present case.[62] Nor was the state denying theology students the right to participate in public life, or forcing students to give up their beliefs in order to receive government benefits; it was simply declining to fund "a distinct category of instruction."[63] In addition, there were strong historical and constitutional reasons that supported the state's decision not to fund devotional studies. Government support for church leaders had generated public opposition since the founding era, and was prohibited in many early state constitutions.[64] In light of these factors, the majority saw no evidence of the sort of hostility toward religion that would justify a presumption of unconstitutionality.[65] And in the absence of such a presumption, the Court held that Davey's claim must fail: "The State's interest in not funding the pursuit of devotional degrees is substantial and the exclusion of such funding places a relatively minor burden on Promise Scholars. If any room exists between the two Religion Clauses, it must be here."[66]

Davey is a significant case, in that it permits government to discriminate against religion in funding cases without necessarily violating the Free Exercise Clause.[67] In this respect, it arguably erodes the scope of the Clause beyond the limits set out in *Smith* and *Lukumi*. As Douglas Laycock has written:

> The *Smith-Lukumi* rules ban facial discrimination against religion as part of "the minimum requirement of neutrality." Yet *Davey* upholds facial discrimination against religion, without requiring a compelling justification. An exception to the ban on facial discrimination is surely also an exception to the ban on more subtle forms of discrimination manifested in laws that are less than generally applicable. *Davey* is thus an important exception to the remaining protection for religious practice . . . .[68]

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[62] *Id.*

[63] *Id.* at 720–21. With respect to benefits, the Court noted that Promise Scholars could still receive funding for their secular studies if they pursued their devotional studies at a separate institution. *Id.* at 721 n.4.

[64] *Id.* at 722–23.

[65] *Id.* at 724.

[66] *Id.* at 725.

[67] *See* Douglas Laycock, *Theology Scholarships, The Pledge of Allegiance, and Religious Liberty: Avoiding the Extremes But Missing the Liberty*, 118 HARV. L. REV. 155, 171 (2004) ("From the perspective of the Court's cases on discrimination against religion, [the *Davey* holding] is remarkable. The Court had never before held that the state can discriminate against religion.").

[68] *Id.* at 213–14 (internal citation omitted).

Laycock repeatedly emphasizes that *Davey* is a funding case, and concludes that it has limited implications outside of that context.[69] But within that context he also concludes that the freedom to discriminate against religion is now quite broad and that serious limitations are difficult to find.[70]

Davey thus reflects the fading of the Free Exercise Clause in two respects. First, it demonstrates the declining force that the Clause offers to claims of religious discrimination. Second, it is the only case in the last seventeen years in which the Free Exercise Clause has been at the front and center of a Supreme Court opinion. The Clause has occasionally made appearances in other cases over this time period, but only in a limited role—usually in support of a Free Speech claim. For example, in *Watchtower Bible and Tract Society of New York, Inc. v. Village of Stratton*,[71] Jehovah's Witnesses brought a facial challenge to an ordinance that prohibited door-to-door advocacy without first obtaining a permit from the mayor's office.[72] While the petitioners wished to engage in such door-to-door advocacy for religious purposes, the Court did not frame its analysis solely or even primarily as a question of religious exercise.[73] To the contrary, the Court began its opinion by explaining that it was considering the constitutionality of the ordinance "not only as it applies to religious proselytizing, but also to anonymous political speech and the distribution of handbills."[74] The analysis that followed was consistent with this framing of the case. The Court emphasized the value accorded to religious speech under the First Amendment and duly acknowledged the role played by the Jehovah's Witnesses in past pamphleteering cases;[75] but it also emphasized the general importance of door-to-door advocacy as a means of disseminating information and the fact that "the Jehovah's Witnesses are not the only 'little people' who face the risk of silencing by regulations like the Village's."[76] But the real constitutional defect in the ordinance was its dramatic breadth: it included both religious causes and political activity, and seemingly extended as well to "residents casually soliciting the votes of neighbors."[77] Such a broad ordinance threatened speakers' rights to freedom, anonymity, and spontaneity in speech.[78] Compounding this defect, the

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[69] *See id.* at 183, 200, 216–18.

[70] Laycock himself identifies a few possibilities. One is that the opinion indicates that government may not penalize religious activity by withholding funding that is available for non-religious activity. *Id.* at 161. Furthermore, "[o]n its face, the holding is confined to the training of clergy, to refusals to fund that are not based on hostility to religion, and to cases that do not involve forums for speech." *Id.* at 184. However, Laycock also concedes that "each of these limitations may well turn out to be illusory." *Id.* at 184.

[71] 536 U.S. 150 (2002).

[72] *Id.* at 153.

[73] *See id.* at 161–62.

[74] *Id.* at 153.

[75] *Id.* at 160–61.

[76] *Id.* at 161–63.

[77] *Id.* at 165 (quoting Hynes v. Mayor of Oradell, 425 U.S. 610, 620 n.4 (1976)).

[78] *Id.* at 166–67.

ordinance was not closely tailored to the government's asserted interests in protecting residents' privacy or preventing fraud and crime.[79]

The *Watchtower* case is perhaps a good illustration of the "redundant" Free Exercise Clause described by Professor Tushnet.[80] For while the Clause was included among the petitioner's claims and in the Court's opinion, it was clearly not necessary to support the outcome.[81] An even greater level of redundancy can be seen in *Rosenberger v. Rector and Visitors of the University of Virginia*,[82] a case that was cited several times in the *CLS* opinions.[83] *Rosenberger* presented challenges to a University of Virginia program that paid the printing costs of a broad range of student publications with funds collected through a mandatory student activities fee.[84] Petitioners were members of a student organization that published a journal offering "a Christian perspective on both personal and community issues, especially those relevant to college students at the University of Virginia."[85] The university refused to cover the journal's publication costs, citing a policy that excluded from eligibility any publications that "promote[d] or manifest[ed] a particular belie[f] in or about a deity or an ultimate reality."[86] Petitioners brought suit under a number of constitutional provisions, including the Free Exercise Clause.[87]

However, the opening paragraph of the majority opinion made clear that the case was to be analyzed through the lens of free speech doctrine.[88] The Court engaged in public forum analysis, and held that the university had created a limited forum through its funding program and that the decision to exclude publications with a religious perspective amounted to impermissible viewpoint discrimination.[89] It therefore followed that "the regulation invoked to deny [financial] support, both in its terms and in its application to these petitioners, is a denial of their right of free speech guaranteed by the First Amendment."[90]

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[79] *Id.* at 168.

[80] *See* Tushnet, *supra* note 29.

[81] Nor, it would seem, was it sufficient—for the ordinance was facially neutral with respect to religion, and was not found to have been motivated by religious hostility. *Watchtower*, 536 U.S. at 158–59. And while he joined the majority opinion, Justice Scalia wrote separately to express the view that had the ordinance been otherwise valid, it would not have lost its validity simply because "some people will choose, for religious reasons, to forgo speech rather than observe it." *Id.* at 171 (Scalia, J., concurring).

[82] 515 U.S. 819 (1995).

[83] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 2978, 2984–86, 2988, 2993 (2010); *id.* at 2998–99 (Kennedy, J., concurring); *id.* at 3009–11, 3013, 3016 (Alito, J., dissenting).

[84] *Rosenberger*, 515 U.S. at 824.

[85] *Id.* at 826 (internal quotation marks omitted).

[86] *Id.* at 827 (alterations in original).

[87] *Id.* at 827.

[88] *Id.* at 823.

[89] *Id.* at 829–32.

[90] *Id.* at 837. The Court proceeded to reject the University's claim that funding to groups with a religious viewpoint would violate the Establishment Clause. *Id.* at 838–46.

Despite the religious dimensions of the underlying controversy, *Rosenberger* is properly understood as a case about the Free Speech Clause; the Free Exercise Clause is doing none of the doctrinal work.[91] And *Rosenberger* is in many ways analogous to *CLS*, which partially explains why the parties and the Court focused on the Free Speech Clause in both cases. However, there are also important differences between the two cases—differences that make the absence of Free Exercise Clause analysis in *CLS* much more notable than it was in *Rosenberger* and other cases. *Rosenberger* really was about freedoms of speech and press in a fairly straightforward way: the case was about funding of student newspapers with particular editorial viewpoints.[92] At both the intuitive and constitutional level, it therefore made sense for free speech analysis to take precedence over free exercise analysis. Similar observations can be made about other cases in which the Free Exercise Clause has played a diminished or redundant role.[93]

But the conceptual primacy of speech over religion is far less obvious in *CLS*. The petitioners in *CLS* were ineligible for RSO status not because they wanted to publish a journal, sponsor speakers and events, or engage in advocacy from a religious perspective. They were ineligible because they wanted to do something more fundamentally religious: instead of accepting all comers, they wanted to limit membership in their organization to those willing to sign a Statement of Faith and live their lives according to the Christian principles contained therein.[94] Surely a strong argument

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[91] The majority in *Davey* held that *Rosenberger* was inapplicable to its analysis precisely because it was a speech case. Locke v. Davey, 540 U.S. 712, 720 n.3 (2003) ("Davey, relying on *Rosenberger* . . . contends that the Promise Scholarship Program is an unconstitutional viewpoint restriction on speech. But the Promise Scholarship Program is not a forum for speech. . . . Our cases dealing with speech forums are simply inapplicable.").

[92] *See Rosenberger*, 515 U.S. at 825–27.

[93] *Watchtower*, for example, involved a ban on all door-to-door pamphleteering and advocacy in the absence of a permit; religious advocacy was not isolated as the only concern of the ordinance or of the Court's opinion. Watchtower Bible & Tract Soc'y of N.Y. Inc. v. Village of Stratton, 536 U.S. 150, 153 (2002); *see also* Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist., 508 U.S. 384 (1993) (applying free speech doctrine and holding that once the school district created limited public forum by making facilities available for social and civic events, it could not deny access to the group whose proposed event would have been permissible but for its religious viewpoint).

[94] The full text of the Statement of Faith is as follows:

> Trusting in Jesus Christ as my Savior, I believe in: One God, eternally existent in three persons, Father, Son and Holy Spirit. God the Father Almighty, Maker of heaven and earth. The Deity of our Lord, Jesus Christ, God's only Son conceived of the Holy Spirit, born of the virgin Mary; His vicarious death for our sins through which we receive eternal life; His bodily resurrection and personal return. The presence and power of the Holy Spirit in the work of regeneration. The Bible as the inspired Word of God.

Christian Legal Soc'y v. Martinez, 130 S.Ct. 2971, 2980 n.3 (2010).

could be made that defining membership and administering rites of initiation is a core component the free exercise of religion—but such arguments were barely mentioned in the briefs and opinions in this case.[95] Instead, the case was argued and decided almost exclusively on free speech grounds.[96]

None of this is to suggest that the petitioners in CLS *should* have devoted more attention to the Free Exercise Clause in arguing their case. As a matter of litigation strategy, the decision to downplay the Free Exercise Clause was perfectly understandable—for as this section has amply demonstrated, the Clause no longer carries much doctrinal weight and would likely not have lent much help to CLS's cause. Rather, the point is to illustrate the extent to which the Free Exercise Clause has faded from constitutional significance. This fading is so complete that even in a case as unambiguously about religion as *CLS*, the Clause had nothing meaningful to contribute to the analysis.[97]

Such is the state of contemporary Free Exercise Clause jurisprudence. *Smith* and *Lukumi* held that laws burdening religious exercise only had to be neutral and generally-applicable to pass constitutional muster;[98] the Free Exercise Clause did not require exemptions from such laws. *Davey* clarified that the requirements of neutrality and general applicability did not extend to cases involving funding of religious activity.[99] Unless the controversy could be characterized as a speech case, the government had substantial freedom to discriminate against religious groups and activities when making funding decisions. Free exercise considerations may have lent implicit support to petitioners' free speech claims in cases like *Rosenberger*, but the Free Exercise Clause itself was rarely invoked as an explicit basis of the Court's opinions. The nadir of the Free Exercise Clause was reached in *CLS*. The Clause was utterly inadequate to support petitioners' claims, either on its own or in conjunction with the Free Speech Clause.[100] In short, the Free Exercise Clause may well have become doctrinally otiose.

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[95] *See supra* notes 24–26 and accompanying text.

[96] *See Christian Legal Soc'y*, 130 S. Ct. at 2986 (focusing on whether school's all-comers policy violates "CLS's speech and expressive association rights," and analyzing "the merits of the instant dispute . . . with the limited public forum decisions as our guide").

[97] Stanley Fish has also noted the irony that *CLS*, "a case squarely about religion, [could not] be directly adjudicated under either of the two prongs of the religion clause." Stanley Fish, *Is Religion Special?*, N.Y. TIMES OPINIONATOR, (July 26, 2010, 5:19 PM), http://opinionator.blogs.nytimes.com/2010/07/26/is-religion-special/?hp.

[98] *See supra* notes 35, 48 and accompanying text.

[99] *See supra* notes 62–66 and accompanying text.

[100] Indeed, the majority does not appear to have seriously entertained the possibility that *CLS* presented a hybrid case—i.e., a case in which the combined force of free exercise and free speech considerations might entitle a petitioner to an exemption from a neutral and generally applicable law. *Cf.* Emp't Div. v. Smith, 494 U.S. 872, 881 (1989) ("The only decisions in which we have held that the First Amendment bars application of a neutral, generally applicable law to religiously motivated action have involved not the Free Exercise Clause alone, but the Free Exercise Clause in conjunction with other constitutional protections, such as freedom of speech and of the press . . . .").

The next sections discuss some of the implications of this development. I begin by suggesting that the very fact that the Free Exercise Clause has become so devoid of meaning is an argument in favor of re-investing it with independent significance. I then consider what a reinvigorated Clause might look like, and how it might have informed the Court's analysis in *CLS* itself.

II. A REINVIGORATED FREE EXERCISE CLAUSE?

Some scholars have suggested that no constitutional provision should be interpreted in such a way as to deprive it of independent meaning.[101] This argument can only be stronger with respect to the Free Exercise Clause.[102] Textually, the Free Exercise Clause enjoys a prominent position in the Constitution. It appears in the opening clauses of the First Amendment, occupying pride of place in the Bill of Rights.[103] No doubt this textual position reflects the prominence of free exercise concerns in the constitutional debates. Recent scholarship has convincingly argued that "[r]eligious exercise was among those rights the framers of the First Amendment were most concerned with protecting against interference by the federal government . . . and there is evidence that the framers of the Fourteenth Amendment were similarly concerned with protecting religious exercise against encroachments by state governments . . . ."[104] Given this textual and substantive importance of free exercise rights in constitutional history, "[t]he most defensible reading of the Free Exercise Clause cannot be one that reads it right out of the Constitution."[105]

But the question remains: even if the Clause should have independent meaning, what kind of meaning should it have? To be sure, several commentators have argued that something akin to its current meaning actually works reasonably well, and that the current state of the law is preferable to pre-*Smith* approaches that privileged religion over non-religion. These commentators have been especially critical of the idea that

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[101] *See* Tushnet, *supra* note 29, at 73 n.10 (noting that some approaches to constitutional interpretation "insist that every constitutional provision have some independent meaning").

[102] *See* Frederick Mark Gedicks, *Towards a Defensible Free Exercise Doctrine*, 68 GEO. WASH. L. REV. 925, 929–30 & n.27 (2000) (arguing that it "makes more sense to proceed on the assumption that the Free Exercise Clause means something rather than nothing," but noting that "the Supreme Court occasionally interprets constitutional provisions as if they really do mean virtually nothing").

[103] U.S. CONST. amend. I.

[104] Gedicks, *supra* note 102, at 930. For in-depth analysis of the origins of the Free Exercise Clause, see Michael W. McConnell, *Freedom From Persecution or Protection of the Rights of Conscience?: A Critique of Justice Scalia's Historical Arguments in* City of Boerne v. Flores, 39 WM. & MARY L. REV. 819 (1998) [hereinafter McConnell, *Freedom from Persecution*]; McConnell, *Free Exercise Revisionism*, *supra* note 36; Michael W. McConnell, *The Origins and Historical Understanding of Free Exercise of Religion*, 103 HARV. L. REV. 1409 (1990) [hereinafter McConnell, *Origins and Historical Understanding*].

[105] Gedicks, *supra* note 102, at 929–30.

religious claimants should be entitled to special exemptions from generally-applicable laws. Christopher Eisgruber and Lawrence Sager are among the most prominent of these critics. In their view, a regime of religious exemptions is both "normatively unjustified and unattractive in its practical implications . . . ."[106] They deny that religious belief and practice are uniquely worthy of constitutional protection, and maintain that "[w]hat properly motivates constitutional solicitude for religious practices is their distinct vulnerability to discrimination, not their distinct value . . . ."[107] Thus, the proper approach under the Free Exercise Clause is one that provides religion with "protection against discrimination, not privilege against legitimate governmental concerns."[108] Eisgruber and Sager call this theory of religious freedom "Equal Liberty."[109] As its name implies, this theory places strong emphasis on equality between believers and non-believers: it "demands that *all* persons—whether engaged in religiously inspired enterprises or not—enjoy rights of free speech, personal autonomy, associative freedom, and private property that, while neither uniquely relevant to religion nor defined in terms of religion, will allow religious practice to flourish."[110] Religious exemptions violate this equality norm, and are to be rejected accordingly.[111]

Frederick Mark Gedicks likewise emphasizes equality considerations in rejecting the idea that the Free Exercise Clause should be read to mandate religious exemptions.[112] Indeed, he suggests that those who support exemptions "no longer hold the high ground," and notes the difficulty of justifying the pre-*Smith* approach of "giving religious practices special constitutional protection that is not afforded to secular activities that appear to be just as morally serious and socially valuable as religion."[113] But while Gedicks does not believe that the *Smith* Court erred in denying a uniquely privileged status to religious practice and in eliminating the doctrine of religious exemptions, he does suggest that the Court may have gone a step too far.[114] For while earlier Free

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[106] Christopher L. Eisgruber & Lawrence G. Sager, *The Vulnerability of Conscience: The Constitutional Basis for Protecting Religious Conduct*, 61 U. CHI. L. REV. 1245, 1248 (1994).

[107] *Id.*

[108] *Id.*

[109] *See* EISGRUBER & SAGER, *supra* note 33, at 4–5, 51–77.

[110] *Id.* at 52–53.

[111] *See id.* at 54.

[112] *See* Gedicks, *supra* note 102.

[113] *Id.* at 926–27. Gedicks clarifies that his position is "prudential, not ethical; because a defense of the religious exemption doctrine is no longer plausible, one must construct other defenses of religious liberty. . . . This is not to argue that it is wrong to defend religious exemptions, but only that, in the long run, no effective defense is possible." *Id.* at 950–51; *see also* Frederick Mark Gedicks, *An Unfirm Foundation: The Regrettable Indefensibility of Religious Exemptions*, 20 U. ARK. LITTLE ROCK L.J. 555, 557 (1998) ("I emphasize that I am not urging the abandonment of exemptions on the basis of a normative argument, but rather for the pragmatic reason that they can no longer be justified with the theoretical resources available in the late 20th century legal culture.").

[114] Gedicks, *supra* note 102, at 929.

Exercise Clause doctrine gave religious belief and practice *greater* protection than other fundamental rights like speech and association, current doctrine gives religious exercise *less* protection than these other rights.[115] Gedicks proposes that this imbalance be remedied by giving Free Exercise Clause claims the same kind of scrutiny given to Free Speech and Equal Protection Clause claims—"even when the activity at issue cannot plausibly be characterized as expression or association for expressive purposes."[116] For example, the Free Exercise Clause should require intermediate scrutiny of incidental time, place, and manner regulations of religious practice,[117] and should offer direct protection to freedom of religious association.[118] Such refinements to existing doctrine would offer protection to religion that is analogous to the protection afforded to speech, but would avoid the problem of privileging religious commitments over secular ones.[119]

While the current state of Free Exercise Clause doctrine has thus been defended to varying degrees, it has more commonly been subjected to sustained criticism.[120] Michael McConnell, for example, has written a series of articles questioning contemporary free exercise jurisprudence on historical grounds.[121] One of McConnell's main arguments is that the original understanding of the Free Exercise Clause may well have included a right to religious exemptions from generally applicable laws.[122] McConnell is careful not to overstate the strength of this conclusion: for "[e]xemptions were not common enough to compel the inference that the term 'free exercise of religion' necessarily included an enforceable right to exemption, and there was little direct discussion of the issue."[123] Nevertheless, his reading of the evidence suggests that "the [pre-*Smith*] doctrine of free exercise exemptions is more consistent with the original understanding than is a position that leads only to the facial neutrality of legislation."[124]

Moreover, McConnell maintains that exemptions should be limited to conduct motivated by religious belief; they should not be extended to conduct motivated by

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[115] *Id.* at 932.

[116] *Id.* at 934.

[117] *Id.* at 935–38.

[118] *Id.* at 941–44.

[119] *Id.* at 944.

[120] *See* Michael W. McConnell, *Institutions and Interpretation: A Critique of* City of Boerne v. Flores, 111 HARV. L. REV. 153, 154 (1997) (noting that "the general (though far from unanimous) weight of scholarly opinion has been critical of *Smith*" and citing examples).

[121] *See supra* note 104; *see also* René Reyes, *Justice Souter's Religion Clause Jurisprudence: Judgments of Conscience*, 43 CONN. L. REV. 303, 315, 317–18 (2010) (discussing McConnell's views on freedom of conscience under the Free Exercise Clause).

[122] McConnell, *Origins and Historical Understandings*, *supra* note 104, at 1511.

[123] *Id.* at 1512.

[124] *Id.* For a contrary reading of the historical record, see Philip Hamburger, *A Constitutional Right of Religious Exemption: An Historical Perspective*, 60 GEO. WASH. L. REV. 915, 916 (1992) ("In fact, late eighteenth-century Americans tended to assume that the Free Exercise Clause did not provide a constitutional right of religious exemption from civil laws.").

secular moral commitments.[125] McConnell marshals a number of arguments in support of this position. As a matter of constitutional history, he notes that the First Congress considered and rejected a draft of the First Amendment that would have protected "rights of conscience" in general, choosing to insert language protecting "the free exercise of religion" in particular instead.[126] As a matter of intellectual history, he further notes that in the founding era, conflicts between religious duty and secular law "were conceived not as a clash between the judgment of the individual and the state, but as a conflict between earthly and spiritual sovereigns."[127] In other words, religious duties were understood to be duties to God—a higher and prior source of authority than the state or the self.[128] Consequently, the Free Exercise Clause should be read to "accord[ ] a special, protected status to religious conscience not because religious judgments are better, truer, or more likely to be moral than nonreligious judgments, but because the obligations entailed by religion transcend the individual and are outside the individual's control."[129] Thus, far from sharing Eisgruber's and Sager's view that religion should never be a constitutionally privileged sphere of activity,[130] McConnell insists "that 'singling out religion' for special constitutional protection is fully consistent with our constitutional tradition."[131]

Douglas Laycock has been another forceful and consistent critic of recent developments in free exercise jurisprudence.[132] He was one of the first to extensively analyze and critique the *Smith* decision—a decision he described as "dubious or demonstrably wrong as a matter of text, precedent, and original intent . . . ."[133] Laycock cites McConnell's work in support of his own arguments, and agrees with McConnell that religion is special in a constitutionally relevant sense and therefore entitled to special exemptions from otherwise valid laws.[134] In his view, one of the chief flaws of the *Smith* opinion was its failure to recognize these special attributes of religious practice:

> [I]n applying the equal protection rule, the unique features of religion do not require that religion be distinguished from any other human activity. In the Court's view, religious use of peyote . . . is no more protected than its recreational use. A soldier who

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[125] McConnell, *Origins and Historical Understandings*, *supra* note 104, at 1491–92.

[126] *Id.* at 1488–1500.

[127] *Id.* at 1496.

[128] *Id.* at 1497.

[129] *Id.*

[130] *See supra* notes 106–11 and accompanying text.

[131] Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DEPAUL L. REV. 1, 3 (2000).

[132] *See, e.g.,* Laycock, *supra* note 36.

[133] *Id.* at 3.

[134] *Id.* at 16 & n.69 (arguing that the text of the Religion Clauses and the debates that surrounded their adoption "presuppose that religion is in some way a special human activity, requiring special rules applicable only to it").

> believes he must cover his head before an omnipresent God is constitutionally indistinguishable from a soldier who wants to wear a Budweiser gimmie cap.[135]

Laycock refers to this equality-based approach to the Free Exercise Clause as formal neutrality, which he distinguishes from substantive neutrality.[136] Whereas a formally neutral law treats religious activity just like any other activity, a substantively neutral law does something more: "it neither encourages nor discourages religious belief or disbelief, practice or nonpractice, observance or nonobservance."[137] In *Smith*, substantive neutrality would have supported an exemption for the religious use of peyote—for the state's ban clearly discouraged a religious practice, while an exemption would not likely have encouraged anyone to adopt the Native American religion.[138] Similarly, in *Davey*, substantive neutrality would have required the state to finance the petitioner's theology major—for the ban on funding discouraged religious practice by effectively paying students not to pursue devotional studies.[139] Laycock acknowledges that substantive neutrality has never been adopted by the Court as the governing standard for Religion Clause cases,[140] but maintains that it would be the approach that often best serves religious freedom.[141]

How is one to resolve this debate over the proper meaning of the Free Exercise Clause? On the one hand, scholars like Eisgruber, Sager, and Gedicks might allow for some expanded protection of religious activity, but insist that special exemptions for religiously-motivated conduct are normatively indefensible and should not be constitutionally mandated. On the other hand, commentators like McConnell and Laycock maintain that religion is qualitatively different from other forms of activity and should be afforded special exemptions in order to protect religious conscience and to promote substantive neutrality. If these are the only two options, then we are left with seemingly irreconcilable understandings of religion and its place under the Free Exercise Clause. Either religion is special, or it is not. Either religious believers are entitled to exemptions from generally applicable laws, or nobody is. This apparent duality is implicit in Gedicks's formulation of the challenge faced by those seeking to promote religious liberty: "How, then might religious liberty be protected, if not by exemptions?

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[135] *Id.* at 11.

[136] *Id.* at 10.

[137] Douglas Laycock, *Substantive Neutrality Revisited*, 110 W. VA. L. REV. 51, 54–55 (2007) (internal quotation marks omitted).

[138] *See* Laycock, *supra* note 36, at 7 (discussing unpleasant aspects of peyote consumption that make it an unlikely choice for insincere or recreational use).

[139] Laycock, *supra* note 67, at 160.

[140] Laycock, *supra* note 137, at 53 ("Of all the thousands of judges in America, only Justice Souter has ever cited my account of substantive neutrality in reported opinions, and of course he did it only when it suited his purposes.").

[141] *See* Laycock, *supra* note 67, at 156.

More precisely, how can those concerned about religious liberty argue for a meaningful level of constitutional protection for religious exercise without elevating it above comparable activities motivated by secular morality?"[142]

Yet there may be a third way. My own suggestion is that the Free Exercise Clause should recognize that religious beliefs are special—but not more special than fundamental moral commitments that spring from secular foundations. This understanding in turn suggests that the Free Exercise Clause should be read to require some exemptions from generally applicable laws—but these exemptions should protect religious and secular claimants to the same degree. My proposal thus draws upon some of the strongest arguments offered by both sides in the debate over the meaning of the Free Exercise Clause. It conceives of free exercise as a substantive right rather than a mere equality right, and affords claimants greater freedom to act in accordance with their deeply held beliefs.[143] But it also ensures that this is a right of equal liberty that does not give religious claimants special benefits that it denies to others.[144] Gedicks notes that more limited versions of my suggestion have occasionally appeared in the literature,[145] and argues that the impulse to include secular claims along with religious ones implicitly concedes the weakness of the entire exemptions argument.[146] I argue that the opposite is true: by treating religious and secular claims of conscience as presumptively valuable, my proposed understanding of the Free Exercise Clause is strengthened by its simultaneous commitment to both liberty and equality.

There are, of course, a number of objections that might be raised against the reinvigorated Free Exercise Clause that I am proposing. One objection is textual: the First Amendment speaks of religion rather than conscience, and this was apparently the result of a deliberate drafting choice made by the First Congress.[147] But recent scholarship has convincingly demonstrated that protecting liberty of conscience was indeed among the chief purposes of the Religion Clauses, and there is disagreement among scholars as to how much significance should be attached to the omission of the term "conscience" from the final version of the text. Michael McConnell concludes that the omission indicates that secular claims of conscience were to be excluded from the protective ambit of the Clauses,[148] but Noah Feldman maintains that

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[142] Gedicks, *supra* note 102, at 927.

[143] *See* Laycock, *supra* note 36, at 13 ("Most directly, the Free Exercise Clause creates a substantive right, and the Court has reduced it to a mere equality right. . . . Congress may prohibit many things, but it may not prohibit religious exercise. On its face, this is a substantive entitlement, and not merely a pledge of non-discrimination.").

[144] *See* EISGRUBER & SAGER, *supra* note 33, at 52 ("Equal Liberty insists that . . . we have no constitutional reason to treat religion as deserving special benefits . . . .").

[145] Gedicks, *supra* note 113, at 571–72.

[146] *Id.*

[147] *See* McConnell, *Origins and Historical Understanding*, *supra* note 104, at 1488–1500; *see also* Noah Feldman, *The Intellectual Origins of the Establishment Clause*, 77 N.Y.U. L. REV. 346, 398–405 (2002) (analyzing the drafts and debates of the Religion Clauses).

[148] McConnell, *Origins and Historical Understanding*, *supra* note 104, at 1491–93.

separate mention of "conscience" was simply unnecessary once free exercise and nonestablishment had already been guaranteed.[149] Furthermore, the mere fact that my proposed reading of the Free Exercise Clause may be broader than the text or its original meaning should hardly constitute a fatal objection. Contemporary interpretations of the Constitution often go beyond the plain reading and original understandings of the relevant text,[150] and are sometimes even said to "mark the progress of a maturing society."[151] A broadly reinvigorated Free Exercise Clause would simply be consistent with this well-established interpretive approach.

A stronger objection is that the breadth of my proposed understanding would render the Free Exercise Clause too unwieldy. As Professor McConnell has argued, the Clause cannot possibly extend to "everything and anything"[152]—particularly if every restriction on conscientious activity must be justified by a compelling government interest. However, the fact that the Free Exercise Clause might include secular claims of conscience does not mean that it would treat all claims equally; the term "conscience" itself excludes from protection conduct that results from mere personal preference as opposed to deeply held moral commitments. Nor does my proposal necessarily require the Court to return to the compelling interest standard. Most commentators agree that even before *Smith*, the compelling interest standard was unworkable and frequently avoided in free exercise cases.[153] Courts could therefore adopt a lower

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[149] Feldman, *supra* note 147, at 404 ("The reasons for the Senate's omission of the reference to conscience are not clear. What is certain is that the notion of liberty of conscience was not being abandoned; rather, protection of free exercise and a ban on establishment, taken together, were thought to cover all the ground required to protect the liberty of conscience." (citation omitted)).

[150] Examples include interpretations of the Free Speech Clause that protect expressive conduct or the transmission of sexually explicit material over the Internet. *See* Reno v. ACLU, 521 U.S. 844, 874 (1997) (protecting transmission of material that is "indecent but not obscene"); Texas v. Johnson, 491 U.S. 397 (1989) (protecting flag burning as expressive conduct); *see also* Christopher L. Eisgruber & Lawrence G. Sager, *Does It Matter What Religion Is?*, 84 NOTRE DAME L. REV. 807, 822, 833 (noting that while the First Amendment "singles out 'speech' and 'press' for special protections . . . the Court has had no trouble generalizing those protections to encompass other forms of expression" and arguing that their own "approach to the Religion Clauses has much in common with familiar features of free speech doctrine").

[151] *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 561 (2005) (holding that the Eighth Amendment prohibits the imposition of the death penalty on those who committed crimes before the age of eighteen, and noting the need to consider "evolving standards of decency" to determine whether punishment is cruel and unusual).

[152] McConnell, *Origins and Historical Understanding*, *supra* note 104, at 1493.

[153] Eisgruber and Sager put it best: "Elsewhere, the compelling state interest test was 'strict in theory but fatal in fact'; in religious liberty cases, it was strict in theory but feeble in fact." EISGRUBER & SAGER, *supra* note 33, at 43; *see also* 1 KENT GREENAWALT, RELIGION AND THE CONSTITUTION: FREE EXERCISE AND FAIRNESS 215 (2006) ("Perhaps the courts have not been generous enough; but we need frank recognition that a compelling interest test for exemptions cases neither has been, nor should be, *as stringent* as the test is in other contexts."); McConnell, *Free Exercise Revisionism*, *supra* note 36, at 1127 ("In an area of law where a

but nonetheless meaningful standard of review, such as a "significant interest"[154] or "peace and safety" test.[155]

I do not mean to suggest that administrative challenges would not remain. Courts would be called upon to evaluate the sincerity of beliefs, many of which could be idiosyncratic and difficult to weigh against government interests in regulation. Martha Nussbaum alludes to such concerns in her own recent examination of the Religion Clauses.[156] While Nussbaum generally supports a broad and equal right to exemptions and accommodations, she is also swayed by "pragmatic and historical arguments for giving religion a special place."[157] She therefore is willing to give some preference to religious claimants, and acknowledges that extending equal protection to non-religious claimants may be limited by the demands of "administrability."[158] Kent Greenawalt likewise supports equal treatment of religious and nonreligious claimants in general—but likewise notes that administrative concerns may occasionally override considerations of equality.[159]

However, there are reasons to believe that such administrative challenges would not be insurmountable. For one, free exercise doctrine prior to *Smith* required courts to engage in this very sort of analysis: they would evaluate the sincerity of beliefs and the weight of burdens on religious practice, and compare them to the government's asserted interest in regulating the affected conduct.[160] For another, even after *Smith*, courts continue to make these kinds of judgments when deciding cases brought against the federal government under RFRA.[161] Religious claims can be highly individualized,

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genuine 'compelling interest' test has been applied, intentional discrimination against a racial minority, no such interest has been discovered in almost half a century. Even the Justices committed to the doctrine of free exercise exemptions have in fact applied a far more relaxed standard to these cases, and they were correct to do so.").

[154] *See* GREENAWALT, *supra* note 153, at 215.

[155] *See* McConnell, *Free Exercise Revisionism*, *supra* note 36, at 1128.

[156] *See* NUSSBAUM, *supra* note 36.

[157] *Id.* at 173; *see also* René Reyes, *Conscience Reexamined: Liberty, Equality, and the Legacy of Roger Williams*, 36 HASTINGS CONST. L.Q. 1, 8–9 (2008) (discussing Nussbaum's treatment of non-religious claims of conscience).

[158] NUSSBAUM, *supra* note 36, at 173.

[159] *See* Kent Greenawalt, *Diverse Perspectives and the Religion Clauses: An Examination of Justifications and Qualifying Beliefs*, 74 NOTRE DAME L. REV. 1433, 1472 (1999) (arguing that "it is not so easy to conceptualize a nonreligious objection to schooling or Saturday work that is quite like one that might be based on religious understanding" and that "[t]he law may appropriately require that religious belief or practice be a condition for a valid claim to exemption from such rules . . . .").

[160] *See supra* note 33 and accompanying text; *see also* Emp't Div. v. Smith, 494 U.S. 872, 907 (1990) (O'Connor, J., concurring) ("The distinction between questions of centrality and questions of sincerity and burden is admittedly fine, but it is one that is an established part of our free exercise doctrine . . . and one that courts are capable of making." (internal citations omitted)).

[161] Recall that while RFRA was struck down as applied to the states, it remains in force as applied to the federal government. *See supra* note 37; *see also* the Religious Land Use and

but the mere fact that a particular belief or practice is not widely shared and thus more difficult to evaluate does not render it ineligible for protection.[162] The same should hold true for idiosyncratic secular claims of conscience.

Having now traced the fading of free exercise doctrine from redundancy into irrelevance, and having offered an argument in favor of reinvigorating the Free Exercise Clause with independent constitutional meaning, this Article will now return to where it began: to the facts and holding of *CLS*. Specifically, the next section will consider whether and to what extent a reinvigorated Free Exercise Clause might have affected the analysis and outcome of the case.

III. THE REINVIGORATED FREE EXERCISE CLAUSE AND *CHRISTIAN LEGAL SOCIETY V. MARTINEZ*

The version of the reinvigorated Free Exercise Clause sketched above proposes that conscientious claimants—religious or otherwise—should be entitled to exemptions from generally applicable laws, unless the government has a sufficiently weighty reason for denying the exemption. The chief concerns of this version of the Clause are twofold: protecting liberty and respecting equality. Both concerns should therefore factor into the analysis of any claims brought under the Free Exercise Clause.

The petitioner in *CLS* claimed that it was being denied both liberty and equality.[163] These claims were primarily advanced under the doctrinal rubrics of freedom of speech and association,[164] but readily lend themselves to analysis under the rubric of a reinvigorated Free Exercise Clause. With respect to liberty, CLS argued that it was being denied the right to participate in the life of the law school community because it required voting members and officers to sign a statement of faith.[165] The right to limit membership in this way was said to be essential to the group's identity and message.[166] As petitioner framed it: "To require a religious group like CLS to admit nonbelievers is a severe burden on its freedom of association," and "[t]he same is true of requiring CLS to accept leaders who do not follow its moral teachings."[167] CLS also claimed

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Institutionalized Persons Act (RLUIPA) of 2000, 42 U.S.C. § 2000cc (making the compelling interest test applicable to claims for religious accommodation brought by state and federal prisoners, and to challenges to certain land use regulations brought by religious organizations). It is also worth noting that many states apply equivalent standards to free exercise claims brought under state law. *See* Laycock, *supra* note 67, at 212 ("In all, more than half the states appear to have adopted some version of the *Sherbert-Yoder* test.").

[162] *See* Thomas v. Review Bd., 450 U.S. 707 (1981) (fact that petitioner's religious beliefs were not widely shared among other members of his faith did not defeat Free Exercise Clause claim).

[163] *See* Brief for Petitioner, *supra* note 24, at 23, 30–36.

[164] *Id.* at 21–36.

[165] *Id.* at 5, 37.

[166] *Id.* at 28–34.

[167] *Id.* at 32.

that the denial of RSO status placed a significant burden on its liberty rights, asserting that "[t]he ability to participate in a campus forum on equal terms with other groups is the very lifeblood of a student organization."[168] This burden took the form of limited access to campus facilities for meetings and events, and the unavailability of certain campus-wide communication networks.[169]

As to equality, CLS emphasized that it was the only group ever to be denied RSO status at Hastings.[170] It argued that other identity groups had long been permitted to place conditions on membership,[171] and that the school's written nondiscrimination policy prohibited such conditions only if they were religious in nature.[172] And while CLS conceded that Hastings's policy had been interpreted to require RSOs to accept "all comers," it also argued that this interpretation was not invoked until litigation was well under way and should therefore not govern the Court's analysis.[173]

Finally, petitioner maintained that Hastings had no compelling—or even reasonable—interest in enforcing its nondiscrimination policy against CLS.[174] Whereas the state undeniably has an interest in eliminating discrimination on the basis of race and sex, CLS argued that "government has no such interest . . . in eliminating the desire or ability of co-religionists to flock together."[175] CLS further suggested that the all-comers policy was "frankly absurd," insofar as it would undermine the ability of groups to form and express diverse viewpoints—one of the very purposes for which the RSO program was created.[176]

CLS thus arguably could have established a prima facie case for an exemption under a reinvigorated Free Exercise Clause. So should the group have prevailed in its case against Hastings? I am inclined to think not. Admittedly, this inclination may seem unexpected—especially in light of the arguments and observations about religious liberty that I have made elsewhere in this Article. But I suggest that my inclination is justified both by the facts of the case and by the underlying values of the reinvigorated Free Exercise Clause.

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[168] *Id.* at 23; *see also* Christian Legal Soc'y v. Martinez, 130 S. Ct. 2971, 3007 (2010) (Alito, J., dissenting) ("As CLS notes, '[t]o university students, the campus is their world. The right to meet on campus and use campus channels of communication is at least as important to university students as the right to gather on the town square and use local communication forums is to the citizen.'" (quoting Reply Brief for Petitioner at 13, *Christian Legal Soc'y*, 130 S. Ct. 2971 (No. 08-1371)).

[169] Brief for Petitioner, *supra* note 24, at 23–25.

[170] *Id.* at 4 ("Only one group has ever been denied the right to participate in the forum: Petitioner Christian Legal Society."); *see also Christian Legal Soc'y*, 130 S. Ct. at 3000 (Alito, J., dissenting) ("Hastings currently has more than 60 registered groups and, in all its history, has denied registration to exactly one: the Christian Legal Society.").

[171] Brief for Petitioner, *supra* note 24, at 12–14.

[172] *Id.* at 36–37.

[173] *Id.* at 47–48.

[174] *Id.* at 42–47.

[175] *Id.* at 43.

[176] *Id.* at 49–50.

Factually, the case appears to have involved a lighter burden on religious liberty than CLS's brief might imply. Most importantly, there is no indication that Hastings sought to prohibit the group from existing on campus or to starve it of the resources that it would need in order to survive. The Court's majority opinion emphasizes that Hastings "offered CLS access to school facilities to conduct meetings and the use of chalkboards and generally available bulletin boards to advertise events"[177]—a point that CLS acknowledges in its brief.[178] Nor did Hastings condition this access on any change in CLS's membership policies; the group was permitted to make limited use of school resources even while continuing to require its members to sign the statement of faith.[179] The opinion also notes that in the year since Hastings denied CLS recognition, the number of students attending its meetings actually doubled.[180] The burdens on religious liberty therefore appear to have been incidental and of limited severity.

This does not mean that CLS suffered no burdens whatsoever. By refusing to abandon its membership requirements, CLS incurred the burden of ineligibility for funding opportunities that accompanied RSO status.[181] The Court indicated that the funding issue was potentially significant, noting that the financial assistance given to RSOs was drawn from mandatory student fees, and that "the all-comers policy ensures that no Hastings student is forced to fund a group that would reject her as a member."[182] But for its part, CLS did not place much emphasis on the availability of financial assistance. Petitioner described funding as merely "one of the incidents of RSO status at Hastings,"[183] and focused much more attention on access to campus life in general. In his dissent, Justice Alito agreed that "funding plays a very small role in this case."[184] Thus, it does not appear that the financial aspects of the case strongly favored CLS, nor that the unavailability of funding was a particularly severe burden imposed on the group.

It also does not appear that equality considerations strongly favored CLS. At least on the record before the Court, this was not a case like *Lukumi* or *Davey* in which religion was singled out for unfavorable treatment. Early in the litigation, CLS and Hastings jointly stipulated that the nondiscrimination policy was interpreted to require all student groups to accept all comers; it was accordingly not open to CLS to argue

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[177] Christian Legal Soc'y v. Martinez, 130 S. Ct. 2871, 2991 (2010).

[178] Brief for Petitioner, *supra* note 24, at 25.

[179] *Id.* at 11–12.

[180] *Christian Legal Soc'y*, 130 S. Ct. at 2991.

[181] Interestingly, Hastings suggested that CLS might have been able to get around even this burden by "associating within the RSO program consistent with that program's rules, and also *outside* that program in any manner they wish." Brief of Respondents, *supra* note 25, at 40.

[182] *Christian Legal Soc'y*, 130 S. Ct. at 2989.

[183] Brief for Petitioner, *supra* note 24, at 56; *see also* Reply Brief for Petitioner, *supra* note 168, at 26 ("This case has never focused on money. . . . We suspect Respondents obsess about funding because it is so hard to defend excluding CLS from meeting places and communications media.").

[184] *Christian Legal Soc'y*, 130 S. Ct. at 3007 (Alito, J., dissenting); *see also* Vischer, *supra* note 10 (criticizing majority opinion and insisting that "the case was never about money").

on appeal that the policy applied only to religious groups.[185] Nor was this a situation in which exemptions to the policy were available to some groups but not to others. Though CLS appears to have been the only group ever to be denied RSO status, it also appears to have been the only group ever to seek an exemption from Hastings's nondiscrimination policy.[186] Notwithstanding this evidence of even-handedness, CLS argued that the all-comers policy was pretextual and selectively enforced—but those arguments had not been addressed below and the Court accordingly declined to entertain them.[187]

Turning to the other side of the ledger, the government's interests in enforcing the nondiscrimination policy against CLS were at least reasonable and arguably significant. The Court considered several such interests, and evaluated each with deference to Hastings's authority to make educational decisions.[188] These included the school's interests in ensuring that leadership opportunities in RSOs were open to all students;[189] in administering its nondiscrimination policy without inquiring into the motives behind exclusionary membership decisions;[190] in promoting tolerance, cooperation, and conflict resolution by bringing together students with diverse beliefs;[191] and in conveying its decision not "to subsidize with public monies and benefits conduct of which the people of California disapprove."[192]

On balance, then, CLS's interests in liberty and equality would not seem to justify an exemption even under a reinvigorated Free Exercise Clause. But does this conclusion suggest that the heightened standard of review that I propose in theory would simply be evaded in practice, much like the compelling interest standard that came before it? And does it undermine the very case I have been making for a reinvigorated doctrine of religious liberty? This Article began by arguing that *Christian Legal Society v. Martinez* was unambiguously about religion, and that the most notable

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[185] *Christian Legal Soc'y*, 130 S. Ct. at 2984 ("In light of the joint stipulation, both the District Court and the Ninth Circuit trained their attention on the constitutionality of the all-comers requirement . . . . We reject CLS's unseemly attempt to escape from the stipulation and shift its target to Hastings' policy as written."); *see also* Amar, *supra* note 18 (emphasizing importance of concession to outcome of the litigation).

[186] *Christian Legal Soc'y*, 130 S. Ct. at 2980 ("From Hastings' adoption of its Nondiscrimination Policy in 1990 until the events stirring this litigation, no student organization at Hastings . . . ever sought an exemption from the Policy." (internal quotation marks omitted)).

[187] *Id.* at 2995 (leaving the pretext argument for consideration on remand "if, and to the extent, it is preserved").

[188] *See id.* at 2989 ("Schools, we have emphasized, enjoy 'a significant measure of authority over the type of officially recognized activities in which their students participate.'" (citing Board of Ed. of Westside Comm. Sch. v. Mergens, 496 U.S. 226, 240 (1990))); s*ee also* Amar, *supra* note 18 ("[D]eference by the Court to educational judgments matters a great deal in resolving constitutional cases against universities.").

[189] *Christian Legal Soc'y*, 130 S. Ct. at 2989.

[190] *Id.* at 2990.

[191] *Id.*

[192] *Id.*

aspect of the case was its absence of engagement with the Free Exercise Clause. Yet I have just concluded that such engagement should not have changed the outcome of the case. Does this imply that the promise of a reinvigorated Free Exercise Clause would prove illusory after all?

Once again, I am inclined to think not. Indeed, far from exposing its vice, the foregoing application of the reinvigorated Free Exercise Clause to *CLS* confirms its virtue. For the version of the Free Exercise Clause that I have proposed is not a blunt instrument. The fact that a law is neutral and generally applicable does not necessarily mean that it will pass muster; but nor does the fact that it burdens conscientious activity necessarily mean that it will fail. Rather, courts must carefully attend to the details of the case and consider how they inform the Clause's twin concerns with liberty and equality. In *CLS*, these considerations of liberty and equality—at least on the facts before the Court—did not strongly support a result for the petitioner. Thus, one of the ironies of *CLS* is that while the facts of the case cried out for analysis under the Free Exercise Clause, the ultimate result of that analysis was to demonstrate the insufficiency of petitioner's claims.

CONCLUSION

This Article has used *Christian Legal Society v. Martinez* as a point of departure for analyzing the current state of free exercise doctrine. I have argued that the conspicuous absence of free exercise analysis from the case highlights the extent to which the Free Exercise Clause has faded from constitutional significance, and have traced the course of this development through the Court's recent First Amendment jurisprudence. I have also suggested that the fact that the Free Exercise Clause has become so doctrinally otiose is itself an argument for reinvesting the Clause with independent meaning. But what kind of meaning should it have? Unlike commentators who have reasoned that free exercise doctrine must either treat all citizens equally or give religious believers special privileges, I have outlined an approach to the Free Exercise Clause that seeks to accomplish both. Specifically, I have proposed that the Clause be reinvigorated to provide some exemptions from generally-applicable laws for conscientious objectors—but that these exemptions must be available to religious and secular claimants on an equal footing.

To illustrate how my proposal might operate in practice, I have also applied the reinvigorated Free Exercise Clause to *Christian Legal Society v. Martinez* itself. The fact that application of the Clause would not have changed the outcome does not indicate that my version of the Clause would be without effect; it rather demonstrates that my approach is sufficiently nuanced and flexible to distinguish between stronger and weaker claims for exemptions. While *CLS* proved to involve claims of the latter sort, future cases may well present more compelling claims for relief. A reinvigorated Free Exercise Clause has the potential to vindicate those claims, and to do so in service to both liberty and equality.

PLEDGE YOUR BODY FOR YOUR BREAD: WELFARE, DRUG TESTING, AND THE INFERIOR FOURTH AMENDMENT

Jordan C. Budd*

ABSTRACT

Proposals to subject welfare recipients to periodic drug testing have emerged over the last three years as a significant legislative trend across the United States. Since 2007, over half of the states have considered bills requiring aid recipients to submit to invasive extraction procedures as an ongoing condition of public assistance. The vast majority of the legislation imposes testing without regard to suspected drug use, reflecting the implicit assumption that the poor are inherently predisposed to culpable conduct and thus may be subject to class-based intrusions that would be inarguably impermissible if inflicted on the less destitute. These proposals are gaining increasingly substantial political support, suggesting that the enactment of drug testing legislation is now a real and immediate prospect.

Given the gravity of the suspicionless searches at issue, the proposals raise serious concerns under conventional Fourth Amendment doctrine. Nevertheless, there is considerable doubt whether the federal courts will accede to that authority and prohibit the proposed intrusions, given the long tradition of relegating the privacy rights of the poor to inferior and indifferent enforcement. This Article explores these legislative developments and the constitutional context within which they arise, and makes the case for using the impending battle over suspicionless drug testing to reclaim for the indigent the full reach of the Fourth Amendment's privacy right.

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> We are sending the absolutely wrong signal to the next generation about what is needed to get ahead in life if we don't threaten benefits for recipients who won't even lift a finger to help themselves or their children. . . . I am hearing from people who accept random drug testing as a condition for their jobs. They see no problem with having people on public assistance doing the same.[1]

INTRODUCTION

In 1275, an English woman named Alice Crese failed to pay Richard of Ely for two shillings' worth of bread.[2] Richard brought her before the Court of St. Ives Fair, which ordered that she "pledge her body" for the debt.[3] Seven centuries later, the poor still face the prospect of pledging their bodies for the debt of bread. Legislatures across the United States are considering scores of drug testing proposals that will require the indigent to periodically submit to invasive extraction procedures as an ongoing condition of public assistance.[4] The majority of the proposals require no suspicion of drug use whatsoever; they rest instead on the implicit notion that the poor are intrinsically predisposed to immoral conduct and that, once indebted, their bodies are the domain of the state in any event.[5] Not surprisingly, the proposals face nearly insurmountable difficulties under conventional Fourth Amendment authority. Perhaps more surprisingly, there is great uncertainty whether the federal courts will accede to that

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[1] Andre Bauer, Lieutenant Governor of South Carolina, *Culture of Dependency Must be Broken*, TIMES AND DEMOCRAT (Orangeburg, S.C.), Feb. 13, 2010, *available at* http://www.thetandd.com/news/opinion/columnists/article_6b97a743-e3f6-5747-874e-0026fe6c3674.html.

[2] Stephen E. Sachs, *From St. Ives to Cyberspace: The Modern Distortion of the Medieval 'Law Merchant*,' 21 AM. U. INT'L L. REV. 685, 704 n.54 (2006).

[3] *Id.*

[4] *See infra* Part II.C.

[5] *See infra* Part II.A.1 & II.A.2.

authority and prohibit the proposed search practices, given a series of recent decisions that have upheld related privacy intrusions in defiance of apparently controlling law.[6] This Article explores these legislative developments and the constitutional context within which they arise, and makes the case for using the impending battle to reclaim for the indigent the full reach of the Fourth Amendment's privacy right.

The poor as a class live largely beyond the Constitution. Unlike the indigent in many comparable constitutional states, impoverished Americans enjoy no positive socioeconomic rights nor any appreciable protection against discriminatory state action. Recent scholarship has characterized this absence of rights recognition as the "deconstitutionalization" of American poverty law[7]—a description that the United States Supreme Court itself would likely embrace.[8] The rhetoric of American constitutionalism, however, holds fast to the assertion that rights of general applicability in fact apply equally and without regard to socioeconomic status. The law may be indifferent to the poor, we are told, but it certainly bears them no ill will.[9] The claim is demonstrably false. In several contexts—the Fourth Amendment prominent among them—American law effectively if disguisedly denies the indigent the full force of generally applicable constitutional guarantees, thus establishing a dual system of rights enforcement that relegates the poor to subconstitutional status.[10] Beyond declarations of formal neutrality, this veiled truth lies at the core of the nation's constitutional relationship with the dispossessed: the enforced Constitution is not only blind to poverty but frequently antagonistic to it as well.[11] Thus the poor live not merely beyond the Constitution but also beneath it, at once deconstitutionalized and subconstitutionalized in relation to the law.

This Article considers the subconstitutional dimension of American poverty law in relation to the Fourth Amendment's privacy right. Privacy intrusions that are plainly impermissible in analogous contexts are regularly imposed on the poor and upheld by the courts based on the improbable recharacterization of otherwise applicable doctrine or, as likely, its disregard. The willingness of the judiciary to suspend or dilute core

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[6] *See infra* Parts I.B.2 & II.D.2.

[7] *See, e.g.*, Julie A. Nice, *No Scrutiny Whatsoever: Deconstitutionalization of Poverty Law, Dual Rules of Law, & Dialogic Default*, 35 FORDHAM URB. L.J. 629, 629–36 (2008) [hereinafter *No Scrutiny*].

[8] *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 487 (1970) ("[T]he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.").

[9] *See, e.g.*, Griffin v. Illinois, 351 U.S. 12, 16 (1956) (noting aspiration to "[p]rovid[e] equal justice for poor and rich, weak and powerful alike"); *cf.* Stephen Loffredo, *Poverty, Democracy and Constitutional Law*, 141 U. PA. L. REV. 1277, 1358–59 (1993) ("[E]quality of formal rights are to be scrupulously maintained . . . but the immeasurably greater political inequalities that flow from private wealth through less visible and more ad hoc processes may not be disturbed.").

[10] *See, e.g.*, Jordan C. Budd, *A Fourth Amendment for the Poor Alone: Subconstitutional Status and the Myth of the Inviolate Home*, 85 IND. L.J. 355 (2010).

[11] *See infra* Part I.B.

constitutional protections in this respect is consistent with the longstanding conception of the poor as inherently prone to and deserving of their predicament. Imagined as criminally predisposed and morally bereft, the indigent constitute a presumptively culpable class and, accordingly, face status-based intrusions that would be otherwise irreconcilable with the Fourth Amendment's emphasis on individualized suspicion.[12] This biased and bifurcated rights analysis is sufficiently well-established to merit its recent characterization as a "poverty exception" to the Fourth Amendment.[13]

The next chapter of this constitutional assault is now being written in legislatures across the country. Over the last three years, over half of the states have considered legislation linking the receipt of public assistance to mandatory screening for drug use.[14] Some of the proposals are relatively innocuous, involving written questionnaires and recommended treatment protocols for individuals whose responses suggest the possibility of drug dependence.[15] Most of the proposals, however, are far more severe, often requiring that every recipient submit to the invasive extraction of bodily fluids and barring assistance to anyone testing positive.[16] Recently, members of the United States Congress have joined the cavalcade and introduced legislation requiring states that administer federal welfare funds to conduct blanket drug testing of all program participants.[17]

To date, only one state has implemented a suspicionless and invasive testing requirement, although several others have enacted less onerous variants.[18] In 1999, Michigan passed a mandatory testing law that conditioned public assistance for every adult recipient on a clean urinalysis report.[19] The statute was challenged immediately and struck down by a federal district judge, who was then reversed by a three-judge panel of the Sixth Circuit.[20] The full circuit subsequently reheard the matter en banc and produced a perfectly ambiguous resolution: the court divided equally on the question, with six judges voting to uphold the testing requirement and six voting to

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[12] *See infra* Part I.B.3.

[13] Christopher Slobogin, *The Poverty Exception to the Fourth Amendment*, 55 FLA. L. REV. 391 (2003); *cf. ACLU Challenges Invasive Home Searches Of Welfare Recipients in San Diego Area*, ACLU, July 24, 2000, http://www.aclu.org/technology-and-liberty/aclu-challenges-invasive-home-searches-welfare-recipients-san-diego-area ("There is no poverty exception to the Fourth Amendment . . . . No one should be forced to waive her constitutional rights and submit to an unannounced, personally humiliating, and suspicionless search of her home just because she is in need of public assistance.").

[14] *See infra* Part II.C.

[15] *See infra* notes 287–88 and accompanying text.

[16] *See infra* Part II.C.1 and II.C.2.

[17] *See infra* note 188 and accompanying text.

[18] *See infra* Part II.B.

[19] Pub. Act No. 17, 1999 Mich. Pub. Acts 49–50 (codified at MICH. COMP. LAWS § 400.57l (2009)).

[20] Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated,* 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

strike it down, thus reinstating the lower court's injunction but failing to clarify the constitutional question in any respect.[21]

Not surprisingly, the evenly divided outcome has been taken not as a repudiation of such extraordinarily overreaching proposals but as an encouraging sign that the federal courts may well uphold such intrusions.[22] In the years since the conclusion of the Michigan case, legislatures across the country have considered scores of bills proposing testing requirements of equal or harsher application.[23] The proposals have garnered ever-increasing and, recently, quite substantial support.[24] It thus appears that other states may soon follow Michigan's lead and require the federal courts to finally resolve the permissibility of blanket drug testing as a condition of public assistance. Based on the judiciary's approach to other seemingly impermissible intrusions upon the privacy of the poor, as well as the divided resolution in the Michigan litigation, the prospects of vindicating the constitutional rights of aid recipients is uncertain at best.

The Article is divided into two parts. Part One provides a brief overview of the relationship of the poor to the United States Constitution, describing both the overt exclusion of socioeconomic class from constitutional recognition and the veiled subordination of the poor with respect to the enforcement of generally applicable constitutional rights. The primary focus of the discussion is an elaboration of the subconstitutional characteristic of poverty law in the specific context of the Fourth Amendment's right to privacy, which sets the stage for the emerging controversy over the blanket drug testing of welfare recipients.

Part Two turns to the prospect of invasive drug testing as a condition of public assistance and presents the results of a national survey of related legislation over the last three years. As the survey reveals, bills with increasingly harsh provisions are being introduced in greater numbers each year and proceeding further through the legislative process, suggesting that the ultimate enactment of drug testing legislation may soon occur. Considering the absence of any data to suggest that the incidence of drug abuse among the poor is appreciably greater than in the general population, coupled with the harsh and disparaging rhetoric surrounding many of the current legislative proposals, this emerging political groundswell evidently seeks to vindicate little more than the familiar impulse to stigmatize and stereotype the impoverished.

In conclusion, Part Two contrasts the profound constitutional deficiencies of the harshest of these proposals under conventional doctrine with the irreconcilable approach of recent decisions sanctioning equally severe privacy intrusions upon the poor. When

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[21] Marchwinski v. Howard, 60 F. App'x 601 (6th Cir. 2003) (en banc).

[22] *See, e.g.*, Allan Greenblatt, *Should Welfare Recipients Get Drug Testing?*, NPR (Mar. 31, 2010), http://www.npr.org/templates/story/story.php?storyId=125387528 ("[The sponsor of drug testing legislation in Kansas] thinks the constitutionality of the drug-testing regime is itself 'definitely worth testing.' The Michigan case was decided by a tied vote, which [the sponsor] believes is 'hardly a definite decision against states' rights.'").

[23] *See infra* Part II.C.

[24] *See infra* note 187 and accompanying text.

the time comes for the federal courts to finally resolve the constitutionality of suspicionless drug testing proposals, these two lines of authority will present the judiciary with a clear and defining choice: either to reset the relationship of our nation's poor to the promise of equal justice, or to betray again the integrity of constitutional adjudication itself.

I. POVERTY, PRIVACY, AND THE CONSTITUTION

The current debate over the drug testing of welfare recipients proceeds in the shadow of a substantial "if somewhat improvised and largely impoverished"[25] body of constitutional authority addressing the rights of the American poor. It is a familiar refrain that the jurisprudence accounts for class in a manner that unambiguously disfavors the indigent.[26] This general proposition in turn reflects at least three interrelated but distinct doctrinal themes. First, as a matter of express constitutional policy, the American poor enjoy no positive rights to socioeconomic security, irrespective of the magnitude of the deprivation at issue.[27] Second, and also as a matter of express doctrine, the American poor receive no special solicitude when defending against discriminatory state action and thus may be subject to virtually any burden that does not violate otherwise applicable constitutional constraints.[28] Finally, with respect to the enforcement of generally applicable constraints, American law implicitly differentiates on the basis of class by diluting the poor's exercise of rights that purport to apply without regard to socioeconomic status.[29] Taken together, these interrelated processes—the express denial of positive socioeconomic rights, the express denial of protected status, and the implicit dilution of generally applicable rights—render much of the Constitution irrelevant at best, and hostile at worst, to the American poor. Nowhere is that theme more powerfully evident than with respect to the Fourth Amendment's privacy right.

A. The Declared Constitution and the Irrelevance of Class

In significant contrast to the basic law of most comparable nations, the United States Constitution treats socioeconomic status as formally irrelevant in almost all respects.[30] This approach has been characterized as the "deconstitutionalization" of

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[25] Mario L. Barnes & Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 LAW & CONTEMP. PROBS. 109, 110 (2009).

[26] *See, e.g.*, *id.*, *passim*; Loffredo, *supra* note 9, at 1305–13; Nice, *No Scrutiny*, *supra* note 7, at 629–36; James G. Wilson, *Reconstructing Section Five of the Fourteenth Amendment to Assist Impoverished Children*, 38 CLEV. ST. L. REV. 391, 402–15 (1990).

[27] *See infra* Part I.A.

[28] *Id.*

[29] *See infra* Part I.B.

[30] *See, e.g.*, Martha T. McCluskey, *Constitutionalizing Class Inequality: Due Process in* State Farm, 56 BUFF. L. REV. 1035, 1035–36 (2008) ("[T]he Constitution treats questions of economic inequality as matters of policy largely immune from scrutiny by the judicial branch.").

American poverty law[31] and is embedded in the federal judiciary's broader retreat from fundamental rights enforcement over the last forty years.[32] This indifference to class dictates a distinctive approach to positive socioeconomic rights as well as negative protections against discriminatory state action.

With respect to positive rights, American constitutional law unambiguously rejects any affirmative claim to minimal material security[33] despite repeated calls for the recognition of such interests.[34] As then-judge Antonin Scalia wrote in 1986, "It is impossible to say that our constitutional traditions mandate the legal imposition of even so basic a precept of distributive justice as providing food to the destitute."[35] Most generally, the doctrine is but one manifestation of a broader conception of the Constitution as a guarantor of negative rights that imposes no affirmative duty on the state to protect or sustain the populace.[36] In particular, the absence of positive socioeconomic rights reflects the fact that the Constitution lacks express language addressing such

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One of the few exceptions to this principle is the right to counsel in criminal prosecutions, which imposes an affirmative state obligation to provide representation for indigent defendants. Gideon v. Wainwright, 372 U.S. 335, 344–45 (1963); *see also* Griffin v. Illinois, 351 U.S. 12, 17–19 (1956). The Court has also barred economic discrimination in the exercise of the franchise. Harper v. Va. Bd. of Elections, 383 U.S. 663, 667–68 (1966). Outside the context of criminal prosecutions and the right to vote, however, American constitutional law is generally indifferent to the fact that poverty may impair or preclude the exercise of other rights. *See, e.g.*, *infra* notes 58–59.

[31] *See* Nice, *No Scrutiny*, *supra* note 7, at 629–36.

[32] *See, e.g.*, Erwin Chemerinsky, *The Deconstitutionalization of Education*, 36 LOY. U. CHI. L.J. 111, 123–24 (2004) (discussing deconstitutionalization of education-related interests of racial minorities and the poor); Thomas S. Schrock & Robert C. Welsh, *Reconsidering the Constitutional Common Law*, 91 HARV. L. REV. 1117, 1118–20 (1978) (discussing the deconstitutionalization of criminal procedure); Richard K. Sherwin, *Rhetorical Pluralism and the Discourse Ideal: Countering* Division of Employment v. Smith, *A Parable of Pagans, Politics, and Majoritarian Rule*, 85 Nw. U. L. REV. 388, 423–24 (1991) (discussing "the Court's deconstitutionalization of basic aspects of the freedom of religious conscience").

[33] *See, e.g.*, Bowers v. DeVito, 686 F.2d 616, 618 (7th Cir. 1982) (Posner, J.) ("The Constitution is a charter of negative liberties; it tells the state to let people alone; it does not require the federal government or the state to provide services, even so elementary a service as maintaining law and order."); Robin West, *Katrina, the Constitution, and the Legal Question Doctrine*, 81 CHI.-KENT L. REV. 1127, 1134–35 (2006).

[34] *See, e.g.*, CHARLES L. BLACK, JR., A NEW BIRTH OF FREEDOM: HUMAN RIGHTS, NAMED AND UNNAMED 141–65 (1997); Peter B. Edelman, *The Next Century of Our Constitution: Rethinking Our Duty to the Poor*, 39 HASTINGS L.J. 1, 19–43 (1987); Frank I. Michelman, *The Supreme Court 1968 Term—Foreword*: *On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7 (1969); Charles A. Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245, 1254–56 (1965); Lawrence G. Sager, *Justice in Plain Clothes: Reflections on the Thinness of Constitutional Law*, 88 Nw. U. L. REV. 410, 429–33 (1993).

[35] Antonin Scalia, *Scalia Speaks*, WASH. POST, June 22, 1986, at C2.

[36] *See, e.g.*, Town of Castle Rock v. Gonzales, 545 U.S. 748, 768–69 (2005); DeShaney v. Winnebago Cnty. Dep't of Soc. Servs., 489 U.S. 189 (1989); West, *supra* note 33, at 1134–35.

interests,[37] unlike the majority of constitutions enacted in the modern era,[38] as well as a national sentiment that is relatively unreceptive to redistributionist principles[39] and an increasingly conservative Supreme Court that for forty years has emphatically rejected any reading of the Constitution that might accommodate such values.[40]

This defining characteristic of the American approach to social welfare contrasts with the recognition by most comparable constitutional states of some minimal interest in health, education, and material security as an element of protected human dignity.[41] The Italian Constitutional Court, for example, has held that "the right to health . . . [is] protected by the [Italian] Constitution as an inviolable part of human dignity. There can be no question that the right of poorer citizens . . . to free health care comes under this heading."[42] German constitutional doctrine likewise exempts from taxation "income that is minimally necessary for a humane existence—a 'subsistence minimum . . . .'"[43] The law of most European nations follows suit,[44] and the obligations imposed by the leading international treaty on socioeconomic rights bind most other nations to similar commitments.[45] Conspicuously, the United States is not among the 160 states that are party to the agreement.[46]

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[37] Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, 56 SYRACUSE L. REV. 1, 3–4, 8 (2005).

[38] *Id.* at 4.

[39] *See, e.g.*, *id.* at 17–19; *cf.* Dennis Jacobe, *Americans Oppose Income Redistribution To Fix Economy*, GALLUP (June 27, 2008), http://www.gallup.com/poll/108445/americans-oppose-income-redistribution-fix-economy.aspx (noting that 84% of surveyed adults oppose taking steps to distribute wealth more evenly among Americans).

[40] Sunstein, *supra* note 37, at 19–23; Barnes & Chemerinsky, *supra* note 25, at 123–24.

[41] *See* MARK TUSHNET, WEAK COURTS, STRONG RIGHTS 220 (2008).

[42] Corte Cost., 16 Luglio 1999, n. 309, Racc. uff. corte cost. 1999, 29 (It.), *translated in* NORMAN DORSEN ET AL., COMPARATIVE CONSTITUTIONALISM 1363 (2d ed. 2010).

[43] Bundesverfassungsgericht [BVerfG] [Federal Constitutional Court] Nov. 10, 1998, 99 ENTSCHEDUNGEN DES BUNDESVERFASSUNGSGERICHTS [BVerfGE] 216 (Ger.), *translated in* DORSEN ET AL., *supra* note 42, at 1354.

[44] *See*, e.g., DORSEN ET AL., *supra* note 42, at 1354; TUSHNET, *supra* note 41, at 220; Sunstein, *supra* note 37, at 3–4.

[45] International Covenant on Economic, Social, and Cultural Rights, *opened for signature* Dec. 16, 1966, 993 U.N.T.S. 3 (*entered into force* Jan. 3, 1976) [hereinafter ICESCR]; *see, e.g.*, John H. Knox, *Climate Change and Human Rights Law*, 50 VA. J. INT'L L. 163, 201 (2009). Article 11 of the Covenant recognizes "the right of everyone to an adequate standard of living for himself and his family, including adequate food, clothing and housing, and to the continuous improvement of living conditions." ICESCR art. 11, ¶1. Articles 12 and 13 recognize corollary rights to health and education. ICESCR art. 12, 13. In view of these provisions, "a State party in which any significant number of individuals is deprived of essential foodstuffs, of essential primary health care, of basic shelter and housing, or of the most basic forms of education is, prima facie, failing to discharge its obligations under the Covenant." U.N. Comm. on Econ., Soc. and Cultural Rights [CESCR], Gen. Comment No. 3, para. 10, U.N. Doc. E/1991/22-E/CN.4/1991/1 Annex III (1990).

[46] U.N. Treaty Collection, International Covenant on Economic, Social, and Cultural Rights, http://treaties.un.org/doc/Publication/MTDSG/Volume%20I/Chapter%20IV/IV-3.en.pdf. The

The formal irrelevance of class in the American system also bears on the scope of the poor's negative protections against discriminatory state action. Under equal protection doctrine, special scrutiny is brought to bear on discriminatory enactments that draw suspect classifications.[47] To qualify as suspect, a legislative classification must target a class that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[48] For decades scholars have made the case that indigence meets these core criteria and that the poor accordingly should be entitled to heightened scrutiny when challenging class-based legislative burdens.[49] While the Supreme Court briefly flirted with the idea,[50] it ultimately and definitively rejected the proposition in *Dandridge v. Williams*[51] and a series of subsequent cases in which the Court withdrew entirely from the field and suspended review of virtually all discriminatory classifications burdening the poor.[52] As John Hart Ely summarized, "the retreat from the once glittering crusade to extend special constitutional protection to the poor has turned into a rout."[53] Discriminatory enactments targeting the indigent accordingly receive the lowest and most permissive degree of scrutiny, requiring only that there be some conceivably rational basis for the government to burden the poor as it has.[54] As a practical matter, this prohibits little more than legislative animus.[55]

United States signed the ICESCR in 1977 but the Senate never ratified the treaty. *Id.*; *see* Sunstein, *supra* note 37, at 15.

[47] San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1973); United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

[48] *San Antonio*, 411 U.S. at 28; *see* Johnson v. Robison, 415 U.S. 361, 375 n.14 (1974); William D. Araiza, *Democracy, Distrust, and the Public Trust: Process-Based Constitutional Theory, the Public Trust Doctrine, and the Search for a Substantive Environmental Value*, 45 UCLA L. REV. 385, 415–16 (1997).

[49] *See, e.g.*, Barnes & Chemerinsky, *supra* note 25, at 117–30; Edelman, *supra* note 34; Loffredo, *supra* note 9, at 1306–13; Michelman, *Forward*, *supra* note 34, at 21; Lawrence Sagar, *Tight Little Islands: Exclusionary Zoning, Equal Protection, and the Indigent*, 21 STAN. L. REV. 767, 785–87 (1969).

[50] *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969); King v. Smith, 392 U.S. 309 (1968); Harper v. Va. State Bd. of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956); *cf.* Plyler v. Doe, 457 U.S. 202 (1982).

[51] 397 U.S. 471 (1970).

[52] *Id.* at 487*; see, e.g.*, Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988); Harris v. McRae, 448 U.S. 297, 323 (1980); Maher v. Roe, 432 U.S. 464, 471 (1977); Jefferson v. Hackney, 406 U.S. 535, 548–51 (1972); Loffredo, *supra* note 9, at 1306–13 (summarizing case authority).

[53] JOHN HART ELY, DEMOCRACY AND DISTRUST 148 (1980).

[54] *See, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 660 (1973); *Dandridge*, 397 U.S. at 508 (Marshall, J., dissenting).

[55] *See* West, *supra* note 33, at 1137 ("Thus, it is arguable, given our doctrine, that legislators cannot deny to poor people rights or privileges or goods solely on the grounds of their poverty, where that poverty bears no relation to any legitimate public purpose."); *cf.* Loffredo, *supra* note 9, at 1283–84.

The practical consequences of this doctrinal indifference cut sharply against the interests of the poor. As commentators have often observed, the construed Constitution's formal neutrality on questions of class is highly discriminatory in its secondary substantive effects[56]—an elaboration of Anatole France's familiar remark that the law in its "majestic equality . . . forbid[s] rich and poor alike to sleep under the bridges, to beg in the streets, and to steal their bread."[57] Without the minimal resources necessary to access and exercise rights, the promise of formal neutrality is substantively hollow: a poor woman cannot exercise her right to abortion if she cannot purchase the procedure,[58] nor can the poor exercise equal rights of political participation if they cannot buy access to the conversation itself.[59] Likewise, without heightened negative protections against discriminatory legislation, the poor are at the practical mercy of lawmakers whose political debts rarely trace back to empty pockets. Robert Bork's infamous assertion in 1979 that "the poor and the minorities . . . have done very well" in the political process, and thus need no special protection from it,[60] has been reduced to malevolent farce by the intervening three decades of legislative animosity and escalating distress among America's indigent.[61]

The rights deficit of the American poor influences the terms of political discourse as well. Irrespective of the degree to which positive socioeconomic rights are judicially enforceable—and there is great disparity in that regard among nations recognizing such interests[62]—the mere articulation of a right can legitimate corresponding claims in the political sphere.[63] Citing the experience of South Africa, Frank Michelman

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[56] *See, e.g.,* Angela P. Harris, *Cluster III—Introduction*, 55 FLA. L. REV. 319, 334–35 (2003); West, *supra* note 33, at 1138.

[57] ANATOLE FRANCE, THE RED LILY 95 (Winifred Stephens trans., John Lane Co. 1914) (1894).

[58] *See* Harris v. McRae, 448 U.S. 297, 323 (1980); Maher v. Roe, 434 U.S. 464, 470–71 (1977).

[59] *See* Buckley v. Valeo, 424 U.S. 1, 48 (1976) (rejecting as illegitimate any "governmental interest in equalizing the relative [economic] ability of individuals and groups to influence the outcome of elections [as an incident of the First Amendment].").

[60] Robert H. Bork, *The Impossibility of Finding Welfare Rights in the Constitution*, 1979 WASH. U. L.Q. 695, 701 ("The premise that the poor or the black are underrepresented politically is quite dubious. In the past two decades we have witnessed an explosion of welfare legislation, massive income redistributions, and civil rights laws of all kinds. . . . [T]he welfare-rights theory rests less on demonstrated fact than on a liberal shibboleth.").

[61] *See, e.g.*, Budd, *supra* note 10, at 376–80; Julie A. Nice, *Forty Years of Welfare Policy Experimentation: No Acres, No Mule, No Politics, No Rights*, 4 Nw. J.L. & SOC. POL'Y 1, 4–5, 9, 12 (2009) [hereinafter *Forty Years*]; Mark R. Rank, *Rethinking the Scope and Impact of Poverty in the United States*, 6 CONN. PUB. INT. L.J. 165, 170–76 (2007).

[62] *See, e.g.*, Mark Tushnet, *Social Welfare Rights and the Forms of Judicial Review*, 82 TEX. L. REV. 1895, 1898–1909 (2004).

[63] *See, e.g.*, *id.* at 1901; *cf.* Kimberlé Williams Crenshaw, *Race, Reform, and Retrenchment: Transformation and Legitimation in Antidiscrimination Law*, 101 HARV. L. REV. 1331, 1364–65 (1988).

describes how merely declaratory socioeconomic rights supply "a useful basis on which to engage governments in a kind of public cross-examination of their relevant laws and policies."[64] Julie Nice conversely notes that the rights deficit in the American context contributes to "a dialogic default on the very question of economic justice."[65] As Nice argues, the inability of the American poor to ground political advocacy in rights rhetoric has frustrated their claims to social and economic inclusion, which in turn has reinforced the perceived illegitimacy of corresponding claims in the judicial context.[66]

B. The Veiled Constitution and Class Bias

As the preceding sketch suggests, the declared Constitution is unapologetically indifferent to class. Proponents concede that the doctrine offers scant hope for the poor but assert that the case for distributive justice is moral, not constitutional, and thus must be made outside the judicial sphere.[67] In this respect, the law as it relates to poverty is overtly deconstitutionalized; it frankly acknowledges the irrelevance of class and accepts with relative candor the harsh substantive implications of that precept. As others have thoroughly documented, it is a jurisprudence that defies the effects of poverty on the exercise of basic rights while failing to "center[] class in the judicial analysis or creat[e] a humane and robust constitutional jurisprudence for socioeconomic disparity."[68]

For all of its manifest failings, however, the doctrine of class indifference is at least transparent: the law does what it purports to do. From the perspective of adjudicative integrity, it is obviously quite a different matter when a jurisprudence is not merely unmoved by the brutal consequences of its stated terms but instead skews or misrepresents the terms themselves to prejudice a particular class of disfavored litigants. This reaches beyond class indifference to the question of veiled bias and the subconstitutional status of the American poor. The articulation and enforcement of fundamental rights so as to withhold from the poor the full force of generally applicable guarantees is not merely an offense to the indigent but to the core legitimating principle of American constitutionalism: that the "equality of formal rights" will be "scrupulously maintained."[69]

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[64] Frank Michelman, *Economic Power and the Constitution*, *in* THE CONSTITUTION IN 2020, at 45, 52 (Jack M. Balkin & Reva B. Siegel, eds., 2009).

[65] Nice, *Forty Years*, *supra* note 61, at 9; *cf.* Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005).

[66] *See* Nice, *No Scrutiny*, *supra* note 7, at 662–63; Nice, *Forty Years*, *supra* note 61, at 9 ("Poor people seem trapped in a perpetual stalemate: without rights, no politics and without politics, no rights.").

[67] *See, e.g.*, RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 319–24 (1985); Antonin Scalia, *Scalia Speaks*, WASH. POST, June 22, 1986, at C2 ("[T]he moral precepts of distributive justice . . . surely fall within the broad middle range of moral values that *may* be embodied in law but *need not* be.").

[68] Barnes & Chemerinsky, *supra* note 25, at 112.

[69] Loffredo, *supra* note 9, at 1358.

For several decades, scholars writing in areas across the rights spectrum have drawn attention to the veiled subordination of the poor through the enforcement of purportedly neutral doctrine.[70] Without attempting to classify the diverse manifestations of this bias, it is useful to distinguish generally between two particular ways in which the subordinating process plays out. First, the articulation of certain constitutional doctrines itself embeds socioeconomic bias.[71] In such cases, the law is enforced on its stated terms but the terms themselves skew constitutional enforcement against the interests of the poor.[72] Second, and most threatening to the claim of legitimate adjudication, are instances where the judiciary subordinates the rights of the poor by simply ignoring or grossly misrepresenting the articulated doctrine itself.[73] Both of these processes are relevant to the poor's inferior relationship with the Fourth Amendment's privacy right.[74]

There are two dimensions of protected privacy under the Fourth Amendment, each reflecting a different aspect of enforcement bias. First, the articulated doctrine protects what the Supreme Court characterizes as "reasonable expectation[s] of privacy."[75] This formulation embeds socioeconomic bias in the terms of the doctrine itself insofar as the construction of "reasonableness" reflects a particular set of social arrangements and assumptions that largely excludes the experience of the American poor.[76] Second, and

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[70] *See, e.g.*, Susan Frelich Appleton, *Standards for Constitutional Review of Privacy-Invading Welfare Reforms: Distinguishing the Abortion-Funding Cases and Redeeming the Undue-Burden Test*, 49 VAND. L. REV. 1 (1996) (discussing "dual system" of constitutional enforcement in the context of substantive due process rights); McCluskey, *supra* note 30, at 1057; Nice, *No Scrutiny*, *supra* note 7, at 650–55; Jacobus tenBroek, *California's Dual System Of Family Law: Its Origin, Development, and Present Status*, 16 STAN. L. REV. 257 (1964) (Part I), 16 STAN. L. REV. 900 (1964) (Part II), and 17 STAN. L. REV. 614 (1965) (Part III).

[71] The doctrine of formal indifference also implicates socioeconomic bias insofar as it ignores the practical impossibility of exercising certain fundamental rights without material resources. *See supra* notes 56–59 and accompanying text. In that respect, however, the doctrine discriminates against the poor in its secondary effect, as the enforced law interacts with the underlying material conditions of poverty; its enforcement in the first instance is class-neutral. In contrast, the discriminatory impact discussed here is a primary effect the doctrine: the law directly differentiates based on class and distributes its protections unequally in its immediate application.

[72] *See, e.g.*, McCluskey, *supra* note 30, at 1043–57; *infra* Part I.B.1.

[73] *See, e.g.*, Budd, *supra* note 10, at 385–403; *infra* Part I.B.2.

[74] *See, e.g.*, Budd, *supra* note 10, at 385–403; Kaaryn Gustafson, *The Criminalization of Poverty*, 99 J. CRIM. L. & CRIMINOLOGY 643, 708 (2009); Nice, *No Scrutiny*, *supra* note 7, at 652–55; Slobogin, *supra* note 13, at 392; William J. Stuntz, *The Distribution of Fourth Amendment Privacy*, 67 GEO. WASH. L. REV. 1265 (1999) [hereinafter *Fourth Amendment Privacy*]; William J. Stuntz, *Race, Class, and Drugs*, 98 COLUM. L. REV. 1795, 1822–24 (1998) [hereinafter *Race, Class, and Drugs*].

[75] Katz v. United States, 389 U.S. 347, 360–61 (1967) (Harlan, J., concurring); *see, e.g.*, Kyllo v. United States, 533 U.S. 27, 33 (2001).

[76] *See* William J. Stuntz, *The Political Constitution of Criminal Justice*, 119 HARV. L. REV. 780, 798 (2006) [hereinafter *Political Constitution*].

at its textual core,[77] the Fourth Amendment protects certain uniquely inviolable physical spaces per se—in particular, the home[78] and the person.[79] In decisions that barely attempt to reconcile with prevailing authority, the courts have simply refused to safeguard the poor when facing intrusions upon these uniquely protected interests.[80] We consider each of these dimensions of the privacy right in turn.

1. Bias Embedded in the Privacy Doctrine

The discriminatory effect of the Fourth Amendment's protection of "reasonable expectations of privacy" is rooted in the formulation itself. The concept of reasonableness is irreducibly subjective; what may seem to be a reasonable expectation of privacy to an indigent resident of a crowded tenement may seem entirely unreasonable to an affluent member of the federal bench. The Court attempts to address this problem by declaring broadly that the relevant measure of reasonableness is the judgment of "society" generally.[81] But there is no isolable "society" in a nation as diverse and divided as ours.[82] Necessarily, then, the Court must choose among competing perspectives and experiences to resolve the reasonableness inquiry. As Chief Judge Alex Kozinski of the Ninth Circuit recently noted, the Court predictably chooses its own:

> There's been much talk about diversity on the bench, but there's one kind of diversity that doesn't exist: No truly poor people are appointed as federal judges, or as state judges for that matter. Judges, regardless of race, ethnicity or sex, are selected from the class of people who don't live in trailers or urban ghettos. The everyday problems of people who live in poverty are not close

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[77] U.S. CONST. amend. IV ("The right of the people to be secure in their persons [and] houses . . . against unreasonable searches and seizures, shall not be violated . . . .").

[78] Payton v. New York, 445 U.S. 573, 590 (1980); *see, e.g.*, *Kyllo*, 533 U.S. at 34; Wilson v. Layne, 526 U.S. 603, 610 (1999); United States v. U.S. Dist. Court *(Keith)*, 407 U.S. 297, 313 (1972).

[79] Schmerber v. California, 384 U.S. 757, 769–70 (1966); *cf.* Union Pac. Ry. Co. v. Botsford, 141 U.S. 250, 251 (1891) ("No right is held more sacred, or is more carefully guarded, by the common law, than the right of every individual to the possession and control of his own person, free from all restraint or interference of others, unless by clear and unquestionable authority of law.").

[80] *See infra* Part I.B.2 & Part II.D.3.

[81] Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring); *see, e.g.*, Morgan Cloud, *Pragmatism, Positivism, and Principles in Fourth Amendment Theory*, 41 UCLA L. REV. 199, 250 (1993) ("[B]y asking whether the expectation in dispute is one society is willing to recognize as reasonable, the test's second prong implicitly encourages decisionmakers to define fundamental constitutional values by referring to contemporary social values, goals, and attitudes.").

[82] *See, e.g.*, MICHAEL HARRINGTON, THE OTHER AMERICA 158–61 (Touchstone 1997) (1962).

> to our hearts and minds because that's not how we and our friends live.[83]

Thus the Court, in giving specific content to the category of reasonable privacy expectations, relies on a set of assumptions about prevailing social norms and arrangements that bears little relationship to the lives of the poor.[84] In particular, the Court links the reasonableness of privacy expectations to "the existence of 'effective' barriers to intrusion"[85] upon occupied space itself—a consideration that largely overlaps with the exercise of private property rights.[86] In spaces where one exercises no power to bar intrusions—the underside of a bridge, for example, or a park bench—the doctrine accordingly offers negligible protection.[87] Obviously this concept of reasonableness works well for those who can retreat to the private confines of their homes, offices, or judicial chambers, but it leaves very little protected privacy for individuals without a home or who share their physical space with others.[88]

Most of the American poor are not homeless, however, and have some private space to call their own.[89] Nevertheless, their ability to utilize that space for private purposes is still differentially burdened by the reality that "the homes of the rich are larger and more comfortable, making it possible to live a larger portion of life in them. Privacy follows space, and people with money have more space than people without."[90] With relatively less access to private space, the poor spend a greater proportion of their lives in available common space—such as parks, playgrounds, sidewalks, and streets—

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[83] United States v. Pineda-Moreno, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from the denial of en banc review).

[84] *See, e.g.*, Stuntz, *Political Constitution*, *supra* note 76, at 798; Stuntz, *Race, Class, and Drugs*, *supra* note 74, at 1823–24 ("Existing social arrangements define the Fourth Amendment baseline. This proposition has large distributive consequences, for people with money enjoy more privacy than people without.").

[85] Slobogin, *supra* note 13, at 401.

[86] *See Pineda-Moreno*, 617 F.3d at 1123 (Kozinski, C.J., dissenting from the denial of en banc rehearing) ("The very rich [are] able to protect their privacy with the aid of electric gates, tall fences, security booths, remote cameras, motion sensors and roving patrols . . . ."); *cf.* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435 (1982) ("The power to exclude has traditionally been considered one of the most treasured strands in an owner's bundle of property rights.").

[87] Katz v. United States, 389 U.S. 347, 351 (1967) ("What a person knowingly exposes to the public . . . is not a subject of Fourth Amendment protection."); *see* Slobogin, *supra* note 13, at 401.

[88] *See* Ronald J. Bacigal, *Some Observations and Proposals on the Nature of the Fourth Amendment*, 46 GEO. WASH. L. REV. 529, 541–42 & nn.94–95 (1978); Slobogin, *supra* note 13, at 401; Stuntz, *Fourth Amendment Privacy*, *supra* note 74, at 1266.

[89] Jonathan L. Hafetz, *Homeless Legal Advocacy: New Challenges and Directions for the Future*, 30 FORDHAM URB. L.J. 1215, 1223 (2003) (noting that between five and ten percent of the poor experience homelessness in a given year).

[90] Stuntz, *Fourth Amendment Privacy*, *supra* note 74, at 1270.

where Fourth Amendment doctrine recognizes only limited privacy expectations.[91] Necessarily then, the articulated doctrine, while neutral on its face, cuts powerfully against the poor in its direct application.[92]

Speaking directly to his colleagues on the Ninth Circuit, Chief Judge Kozinski recently decried this "unselfconscious cultural elitism"[93] in a case upholding the ability of police to surreptitiously attach a GPS tracking device to the underside of a car parked in the driveway of a modest home:

> [P]oor people are entitled to privacy, even if they can't afford all the gadgets of the wealthy for ensuring it. . . . When you glide your BMW into your underground garage or behind an electric gate, you don't need to worry that somebody might attach a tracking device to it while you sleep. But the Constitution doesn't prefer the rich over the poor; the man who parks his car next to his trailer is entitled to the same privacy and peace of mind as the man whose urban fortress is guarded by the Bel Air Patrol.[94]

2. Bias Enforced on the Privacy Doctrine

The second dimension of protected privacy relates to the first but predates and subsumes it. Historically, the Fourth Amendment privacy right has reserved its highest protection for certain textually-specified spaces—most prominently, the home and the person.[95] While the Court declared that "the Fourth Amendment protects people, not

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[91] *See id.* at 1271–72.

[92] This embedded bias is evident in other areas of Fourth Amendment doctrine as well. For example, in establishing the "reasonable suspicion" of wrongdoing required to justify a search or seizure, the Supreme Court has identified two factors that embed profound class bias. First, the Court has held that mere presence in a "high-crime area" independently contributes to suspected wrongdoing. Illinois v. Wardlow, 528 U.S. 119, 124 (2000); Adams v. Williams, 407 U.S. 143, 147–48 (1972). This consideration applies in practice almost exclusively to poor urban neighborhoods with high rates of street crime, thus placing an innocent poor person at objectively greater risk of a permissible search than an identically situated individual in an affluent community. *See* Andrew Guthrie Ferguson & Damien Bernache, *The "High-Crime Area" Question: Requiring Verifiable and Quantifiable Evidence for Fourth Amendment Reasonable Suspicion Analysis*, 57 AM. U. L. REV. 1587, 1605–06 (2008); Margaret Raymond, *Down on the Corner, Out in the Street: Considering the Character of the Neighborhood in Evaluating Reasonable Suspicion*, 60 OHIO ST. L.J. 99, 137–38 (1999). This bias is exacerbated by the Court's identification of "evasive" behavior as an additional factor contributing to reasonable suspicion. *Wardlow*, 528 U.S. at 124. Given that "contact with the police can itself be dangerous" for the urban poor, "unprovoked flight [by an innocent person] is neither 'aberrant' nor 'abnormal.'" *Id.* at 132–33 (Stevens, J., concurring).

[93] United States v. Pineda-Moreno, 617 F.3d 1120, 1123 (9th Cir. 2010) (Kozinski, C.J., dissenting from the denial of en banc rehearing).

[94] *Id.*

[95] *See supra* notes 78–79 and accompanying text.

places,"[96] when it announced the reasonable expectation standard in 1967, it has subsequently and repeatedly underscored the singular protections afforded the home and the person without first filtering its analysis through the lens of reasonable expectations.[97] This reflects the indisputably protected status of these intimate spaces; it is axiomatic that individuals possess the highest expectation of privacy within their dwellings and with respect to their bodies, and the doctrine takes that premise as a starting point.[98]

Nevertheless, the federal courts have withheld from the poor the full reach of these doctrinally unambiguous protections as well. In the absence of any credible basis to subordinate the interests of the poor in this respect, the courts have simply ignored or distorted otherwise applicable authority.[99] This doctrinal subterfuge has played out primarily in the context of the poor's privacy within the home—the location of the Fourth Amendment's "ultimate protection."[100] The long tradition of respecting the sanctity of the home[101] follows an equally long tradition of excluding the indigent from the full reach of that protection,[102] and the decisions of both the Supreme Court and the intermediate appellate courts reflect the disjuncture.[103]

The Supreme Court spoke directly to the poor's domestic privacy rights in its 1971 decision in *Wyman v. James*,[104] which addressed the constitutionality of mandatory home visits conducted by welfare caseworkers.[105] In upholding the practice, *Wyman* departed from Fourth Amendment doctrine in two significant respects. First, the Court concluded that the visits were not "searches" at all within the meaning of the Fourth Amendment—and thus were not subject to constitutional review—because of their

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[96] Katz v. United States, 389 U.S. 347, 351 (1967).

[97] Regarding the home, *see, e.g.*, Wilson v. Layne, 526 U.S. 603, 610 (1999); Payton v. New York, 445 U.S. 573, 590 (1980). Regarding the body, *see, e.g.*, Wyoming v. Houghton, 526 U.S. 295, 303 (1999); Terry v. Ohio, 392 U.S. 1, 24–25 (1968).

[98] *Id.; see, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting) ("[A] person's body and home [are] areas afforded the greatest Fourth Amendment protection."); *cf.* Erik G. Luna, *Sovereignty and Suspicion*, 48 DUKE L.J. 787, 847–56 (1999); Stephanie M. Stern, *The Inviolate Home: Housing Exceptionalism in the Fourth Amendment*, 95 CORNELL L. REV. 905, 912 (2010).

[99] *See infra* notes 104–55 and accompanying text.

[100] United States v. Haqq, 278 F.3d 44, 54 (2d Cir. 2002).

[101] *See* Budd, *supra* note 10, at 359–63.

[102] *Id.* at 363–68.

[103] The one contemporary appellate opinion addressing the poor's parallel right of bodily privacy disparaged that interest as well but was reversed by an equally divided en banc court. Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated,* 319 F.3d 258 (6th Cir. 2003) (en banc), *rev'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc). That decision, addressing the permissibility of mandatory drug testing as a condition of public assistance, is discussed in detail in Part II.D.3.

[104] 400 U.S. 309 (1971).

[105] *Id.* at 310.

predominantly rehabilitative (as opposed to investigatory) character and the fact that they purportedly occurred by consent.[106] This conclusion defied otherwise applicable authority establishing that the presence or absence of criminal consequences has no bearing on whether an intrusion constitutes a Fourth Amendment search,[107] and that consent, if any, serves not to eliminate a search but to validate it.[108] Accordingly, the Court was "unquestionably incorrect in its assertion that a home visit is not a search."[109]

The second rationale offered in *Wyman* was equally suspect. Assuming arguendo that home visits fell within the reach of the Fourth Amendment, the Court offered an "ad hoc"[110] list of reasons why the suspicionless and warrantless searches were nonetheless reasonable.[111] The enumerated factors—including the non-criminal nature of the visit, the friendly attitude of the caseworkers, and the state's interests in fiscal integrity and the welfare of poor children[112]—offered virtually no doctrinal support for the conclusion that the visits constituted a permissible entry in the absence of a warrant or suspicion.[113] *Wyman* thus stood in obvious conflict with the surrounding body of Fourth Amendment law, and the "glaring inconsistency" was not lost on the lower courts.[114] As Christopher Slobogin notes, its analysis is coherent only "on the ground that the homes of people on welfare get less Fourth Amendment protection."[115]

Wyman, however, was limited in its scope. The Court stressed that its conclusions turned upon the rehabilitative[116] and non-invasive[117] nature of the visit, which in the Court's estimation more closely approximated an interaction with "a friend to one in need" than an adversarial encounter with the state.[118] Whether or not one accepts that characterization,[119] the analysis clearly does not extend to endorse highly invasive investigative intrusions by law enforcement officers for the sole purpose of uncovering

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[106] *Id.* at 317–18.

[107] *See, e.g.*, California v. Ciraolo, 476 U.S. 207, 226 (1986) (Powell, J., dissenting); Camara v. Mun. Court, 387 U.S. 523, 530–31 (1967).

[108] *Cf.* Schneckloth v. Bustamonte, 412 U.S. 218, 222 (1973).

[109] 5 WAYNE R. LAFAVE, SEARCH & SEIZURE: A TREATISE ON THE FOURTH AMENDMENT § 10.3(a) (4th ed. 2004).

[110] *Wyman*, 400 U.S. at 341 (Marshall, J., dissenting).

[111] *Id.* at 318–26 (majority opinion).

[112] *Id.*

[113] *See* Budd, *supra* note 10, at 369–73.

[114] Reyes v. Edmunds, 472 F. Supp. 1218, 1224 (D. Minn. 1979); *see, e.g.*, Blackwelder v. Safnauer, 689 F. Supp. 106, 140–41 (N.D.N.Y. 1988).

[115] Slobogin, *supra* note 13, at 403.

[116] *Wyman*, 400 U.S. at 317, 319–21, 323; *see* Budd, *supra* note 10, at 386–87.

[117] *Wyman*, 400 U.S. at 321; *see* Budd, *supra* note 10, at 393–94.

[118] *Wyman*, 400 U.S. at 323; *see* Gustafson, *supra* note 74, at 700.

[119] *See, e.g.*, Sherry F. Colb, *The Qualitative Dimension of Fourth Amendment "Reasonableness,"* 98 COLUM. L. REV. 1642, 1720–22 (1998); Thomas Ross, *The Rhetoric of Poverty: Their Immorality, Our Helplessness*, 79 GEO. L. J. 1499, 1522–25 (1991).

evidence of ineligibility or fraud.[120] However, those are precisely the practices that the intermediate courts have recently read *Wyman* to sanction.[121]

In the wake of federal welfare-reform legislation devolving administrative authority for public assistance to state and local governments,[122] many jurisdictions have utilized their new discretion to impose exceptionally harsh verification procedures on aid applicants and recipients.[123] Among the requirements is an updated variant of the *Wyman* home visit that lacks virtually all of its moderating characteristics.[124] The prototype for these new home visits is San Diego County's "Project 100%," which employs investigative practices that are among "the most aggressive in the country."[125] As a condition of public assistance, all aid applicants in the county must agree to an unscheduled home visit by a sworn law-enforcement investigator from the District Attorney's Public Assistance Fraud Division.[126] Refusal to permit the visit or to accept the scope of the investigator's inspection results in the denial of benefits.[127] The visit itself is exclusively for investigatory purposes and has no rehabilitative component.[128] Once in the home, the investigator's discretion is unlimited and any area of the home is subject to inspection.[129] Investigators accordingly rifle through dresser drawers, medicine cabinets, closets, and refrigerators,[130] all in search of evidence of ineligibility or fraud.[131]

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[120] *See, e.g.*, Sanchez v. Cnty. of San Diego, 483 F.3d 965, 967 (9th Cir. 2007) (Pregerson, J., dissenting from the denial of rehearing en banc); Budd, *supra* note 10, at 386–95.

[121] Sanchez v. Cnty. of San Diego, 464 F.3d 916, 918–19, 923–25 (9th Cir. 2006); S.L. v. Whitburn, 67 F.3d 1299, 1306–11 (7th Cir. 1995); *cf.* Smith v. L.A. Cnty. Bd. of Supervisors, 128 Cal. Rptr. 2d 700, 712–14 (Ct. App. 2002).

[122] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of the U.S.C.); *see* Matthew Diller, *The Revolution in Welfare Administration: Rules, Discretion, and Entrepreneurial Government*, 75 N.Y.U. L. REV. 1121, 1145–86 (2000); William P. Quigley, *Backwards into the Future: How Welfare Changes in the Millenium Resemble English Poor Law of the Middle Ages*, 9 STAN. L. & POL'Y REV. 101, 102 (1998).

[123] *See* Amy Mulzer, Note, *The Doorkeeper and the Grand Inquisitor: The Central Role of Verification Procedures in Means-Tested Welfare Programs*, 36 COLUM. HUM. RTS. L. REV. 663, 674–78 (2005).

[124] *See* Budd, *supra* note 10, at 379–85.

[125] Gustafson, *supra* note 74, at 646.

[126] *Sanchez*, 464 F.3d at 918–20; Sanchez v. County of San Diego, 2003 WL 25655642, at *2 (S.D. Cal. March 10, 2003), *aff'd*, 464 F.3d 916.

[127] *Sanchez,* 464 F.3d at 919; *Sanchez,* 2003 WL 25655642, at *2.

[128] *Sanchez,* 464 F.3d at 919; *see id.* at 935 (Fisher, J., dissenting).

[129] *Sanchez*, 2003 WL 25655642, at *8 n.8 ("[N]o specific protocol limits where the investigator may look . . . .").

[130] *Sanchez,* 464 F.3d at 919; *id.* at 936 (Fisher, J., dissenting).

[131] *Sanchez,* 2003 WL 25655642, at *2, *8 n.8; Plaintiffs-Appellants' Opening Brief at 9–10, *Sanchez*, 464 F.3d 916 (No. 04-55122), 2004 WL 1949000, at *23–25.

In *Sanchez v. County of San Diego*,[132] the Ninth Circuit relied on the "radically different"[133] facts of *Wyman* as controlling authority for the conclusion that Project 100% does not even implicate the Fourth Amendment search doctrine[134]—or, in the alternative, that its practices are a reasonable exercise of the search power in the absence of suspicion or a warrant.[135] Other courts have reached the same holding on similar facts.[136] To equate *Wyman*'s friendly visit with an adversarial search by sworn fraud investigators, however, defies any plausible comparison.[137] As seven circuit judges noted in their dissent from the denial of rehearing en banc in *Sanchez*, "The differences between San Diego's program and the program in *Wyman* are of a quality and character that cannot be ignored. . . . [T]he simple fact of the matter is that a home visit in *Sanchez* is fundamentally different from a home visit in *Wyman*."[138]

There is a second reason why *Wyman* cannot support these contemporary search practices: it no longer states the relevant Fourth Amendment standard for the intrusions at issue.[139] Idiosyncratic from the start, *Wyman* was long ago superseded by the special-needs doctrine as the appropriate analytic framework within which to assess warrantless and suspicionless searches for purposes unrelated to law enforcement.[140] Under the special-needs analysis, courts engage in a reasonableness calculation that directly balances the magnitude of the threatened privacy loss against the weight of the state's countervailing interest in the search at issue.[141] Under prevailing authority, this balancing calculation cannot possibly authorize the practices at issue in San Diego and related jurisdictions.[142] On one side of the equation is a privacy interest of the highest order—the sanctity of the home itself.[143] On the other side of the equation is an entirely pedestrian administrative objective—the state's general interest in the fiscal integrity

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[132] 464 F.3d 916. Before joining the faculty of University of New Hampshire School of Law, the author served as Legal Director of the ACLU Foundation of San Diego & Imperial Counties and in that capacity represented the plaintiff class in *Sanchez*.

[133] *Id.* at 938 (Fisher, J., dissenting).

[134] *Id.* at 921 ("*Wyman* directly controls the instant case.").

[135] *See id.* at 923–25.

[136] S.L. v. Whitburn, 67 F.3d 1299, 1307 (7th Cir. 1995) ("We are bound by *Wyman*"); *see also id.* at 1306–11; *cf.* Smith v. L.A. Cnty. Bd. of Supervisors, 128 Cal. Rptr. 2d 700, 712–14 (Ct. App. 2002).

[137] *See* Budd, *supra* note 10, at 386–95.

[138] Sanchez v. Cnty. of San Diego, 483 F.3d 965, 967 (9th Cir. 2007) (Pregerson, J., dissenting from the denial of rehearing en banc).

[139] *See, e.g.*, *Sanchez*, 464 F.3d at 922 n.8.

[140] *See generally* Budd, *supra* note 10, at 395–97; Jennifer Y. Buffaloe, Note, *"Special Needs" and the Fourth Amendment: An Exception Poised to Swallow the Warrant Preference Rule*, 32 HARV. C.R.-C.L. L. REV. 529 (1997).

[141] *See* Skinner v. Ry. Labor Execs. Ass'n, 489 U.S. 602, 619 (1989).

[142] *See infra* notes 143–47 and accompanying text; *see also* Part II.D.1.

[143] *See supra* notes 100–01 and accompanying text.

of a benefits program[144]—that falls well outside the relatively narrow range of public safety[145] and *in loco parentis*[146] concerns that the Court has recognized as sufficient to justify a special needs search.[147]

In the face of this doctrinal impediment, the Ninth Circuit simply distorted both sides of the analytic equation.[148] As to the privacy interest at stake, the *Sanchez* court explicitly equated welfare recipients with convicted felons to establish the proposition that the poor have a diminished expectation of privacy within their homes—citing as controlling authority a case that permits a state's penal authorities to search the home of a probationer without a warrant.[149] Taking a slightly different tack, other courts have returned to *Wyman* as authority for some generalized diminution in the expectation of privacy of all welfare recipients, simply by virtue of their receipt of a public benefit.[150] Stating the obvious but to no avail, the dissenting judge in *Sanchez* reminded his colleagues that "unlike convicted felons, welfare applicants have no lesser expectation of privacy in their homes than the rest of us."[151]

On the other side of the equation, *Sanchez* and related cases have declared that the state's pedestrian fiscal interests are sufficient to support the intrusions at issue, despite the absence of any special-needs authority to support the assertion, and have notably failed to acknowledge the broader consequences of their reasoning.[152] If the state may search the home of any recipient of a public benefit merely to verify compliance with administrative requirements, the search power is essentially unlimited in its application to the general population—since it is exceedingly difficult to find anyone who is not a recipient of some public benefit, subsidy, credit, or deduction that depends in part on representations about conditions within one's home.[153] Of course, the prospect of

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[144] Sanchez v. Cnty. of San Diego, 483 F.3d 965, 968 (9th Cir. 2007) (Pregerson, J., dissenting from denial of en banc review).

[145] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 674 (1989); *Skinner*, 489 U.S. at 634; Griffin v. Wisconsin, 483 U.S. 868, 875 (1987); *cf.* Chandler v. Miller, 520 U.S. 305, 323 (1997) ("[W]here, as in this case, public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."); Bd. of Educ. v. Earls, 536 U.S. 822, 836–37 (2002).

[146] *Earls*, 536 U.S. at 836–37; Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 654–57 (1995).

[147] *See, e.g.*, *Chandler*, 520 U.S. at 309 (referring to the "closely guarded category of constitutionally permissible suspicionless searches").

[148] *See* Budd, *supra* note 10, at 397–403.

[149] Sanchez v. Cnty. of San Diego, 464 F.3d 916, 925 (9th Cir. 2006) (citing Griffin v. Wisconsin, 483 U.S. 868, 872–73 (1987)).

[150] S.L. v. Whitburn, 67 F.3d 1299, 1310 (7th Cir. 1995); Smith v. L.A. Cnty. Bd. of Supervisors, 128 Cal. Rptr. 2d 700, 712 (Ct. App. 2002).

[151] *Sanchez,* 464 F.3d at 940 (Fisher, J., dissenting); *see* Gustafson, *supra* note 74, at 708.

[152] *See Sanchez*, 464 F.3d at 926; *Whitburn*, 67 F.3d at 1310; *Smith*, 128 Cal. Rptr. 2d at 712.

[153] *See* Wyman v. James, 400 U.S. 309, 343 (1971) (Marshall, J., dissenting); *Sanchez*, 464 F.3d at 941 n.12 (Fisher, J., dissenting); Slobogin, *supra* note 13, at 403 ("Those

the federal courts authorizing such a sweeping expansion of the search power is non-existent as a practical and jurisprudential matter,[154] and it is beside the point to worry about the possibility. *Sanchez* and related authorities do not threaten the broader security of Americans in their homes; they instead demonstrate that the poor stand alone, beneath those protections, and face unique intrusions based on rationales that apply to no one else.[155]

3. Rationalizing Bias: Poverty as a Proxy for Cause

Unusual in several respects, these cases are notable in particular for the degree to which they overtly mischaracterize controlling authority. This is not the way courts typically go about their business,[156] however politicized one believes them to be,[157] and the holdings raise obvious questions regarding subjective motivation and intent. At one end of the explanatory spectrum is simple malice—the possibility that the decisions arise from unvarnished class animus. Innumerable intermediate possibilities range forward from that point, involving various shades and degrees of cognitive dissonance, objectification, paternalism, and the like.[158] At the far end of the spectrum is the possibility that the judges have no subjective sense whatsoever of how far outside the parameters of conventional adjudication these cases fall.[159]

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suspected of tax fraud get full Fourth Amendment protection; those suspected of welfare fraud get none."); Note, *Ninth Circuit Upholds Conditioning Receipt of Welfare Benefits on Consent to Suspicionless Home Visits*—Sanchez v. County of San Diego, 120 HARV. L. REV. 1996, 2003 (2007).

[154] *See, e.g.*, City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000) (observing that the Fourth Amendment must be construed to prohibit suspicionless intrusions "from becoming a routine part of American life.").

[155] *See Sanchez*, 483 F.3d 965, 969 (9th Cir. 2007) (Pregerson, J., dissenting from denial of en banc review).

[156] *Cf.* Amanda Frost & Stefanie A. Lindquist, *Countering the Majoritarian Difficulty*, 96 VA. L. REV. 719, 758–60 (2010).

[157] *See, e.g.*, CASS R. SUNSTEIN ET AL., ARE JUDGES POLITICAL? AN EMPIRICAL ANALYSIS OF THE FEDERAL JUDICIARY 17–57, 147–50 (2006).

[158] *Cf.* Bradley W. Joondeph, *The Many Meanings of "Politics" in Judicial Decision Making*, 77 UMKC L. REV. 347, 374 (2008) ("[J]udges' subjective motivations can only explain a part what is going on in their decisions. Human beings are often, and perhaps mostly, unaware of why they hold particular beliefs or choose certain courses of action.").

[159] *Id.* at 375 ("Thus, even if judges subjectively experience their decision-making as an attempt to reach the most coherent, logical reading of the relevant legal authorities, their own perceptions generally misapprehend much of what actually determines their behavior. The judges themselves can only see a part of what moves them. No matter what they write in their opinions, or how much they might protest to the contrary, there is much more to their choices than the objective interpretation of law. Forces external to the law and outside the judges' cognition shade their interpretations of texts and precedent and frame their readings of history and tradition." (footnote omitted)).

The complexity of the question is confounding, to say the least, and any effort to address it would be an ambitious project of its own. There is, however, a related and more modest inquiry that sheds some light on the internal logic of these decisions. Presuming a judge were interested in rationalizing the outcomes as the product of legitimate adjudication, any explanation would necessarily require some articulation with the values of the Fourth Amendment itself. The narrower question, then, is how might the wholesale suspension of the poor's domestic privacy rights be articulated with those values—and, in particular, the Fourth Amendment's emphasis on individualized suspicion?[160]

A possible answer begins with the broader societal conception of the poor that contextualizes the decisions. As the literature exhaustively documents, the "able-bodied" poor have been demonized for centuries as indolent, immoral, and intrinsically predisposed to their predicament.[161] This caricature traces back to the colonial era[162] and has played a central role in shaping the contemporary American ideology of class.[163] Most recently, the stereotypical account of the poor—and, more specifically, of welfare recipients—has taken the form of the mythical "welfare queen"[164] or "welfare mother"[165] whose imagined exploits continue to shape the public debate surrounding issues of socioeconomic justice.[166] Reinforcing this longstanding caricature has been the increasing isolation and residential segregation of poor Americans, who are now largely invisible to broader society.[167] As the lives of the poor become more divorced from the experience of others, the dehumanizing and reductionist force of the caricature

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[160] *See, e.g.*, Chandler v. Miller, 520 U.S. 305, 318 (1997).

[161] *See, e.g.*, MIMI ABRAMOVITZ, REGULATING THE LIVES OF WOMEN 144–45 (1988); Budd, *supra* note 10, at 363–65; Gustafson, *supra* note 74, at 648–55; Quigley, *supra* note 122, at 105–06; William P. Quigley, *Reluctant Charity: Poor Laws in the Original Thirteen States*, 31 U. RICH. L. REV. 111, 114 (1997) [hereinafter *Reluctant Charity*]; Ross, *supra* note 119, at 1502–08; *see generally* MICHAEL B. KATZ, IN THE SHADOW OF THE POORHOUSE: A SOCIAL HISTORY OF WELFARE IN AMERICA (1986).

[162] *See* Ann M. Burkhart, *The Constitutional Underpinnings of Homelessness*, 40 HOUS. L. REV. 211, 221–22 (2003).

[163] *See, e.g.*, HERBERT J. GANS, THE WAR AGAINST THE POOR 74–102 (1995); Ross, *supra* note 119, at 1502–08.

[164] *See, e.g.*, Peter Edelman, *The World After Katrina: Eyes Wide Shut?*, 14 GEO. J. ON POVERTY L. & POL'Y 1, 3–4 (2007); Gustafson, *supra* note 74, at 655–58; April Land, *Children in Poverty: In Search of State and Federal Constitutional Protections in the Wake of Welfare "Reforms,"* 2000 UTAH L. REV. 779, 811.

[165] Thomas W. Ross, *The Faith-Based Initiative: Anti-Poverty or Anti-Poor?*, 9 GEO. J. ON POVERTY L. & POL'Y 167, 172 (2002).

[166] *See, e.g.*, Gustafson, *supra* note 74, at 658–64; Ross, *supra* note 165, at 172.

[167] *See, e.g.*, HARRINGTON, *supra* note 82, at 2–7; Debra Lyn Bassett, *Distancing Rural Poverty*, 13 GEO. J. ON POVERTY L. & POL'Y 3, 13 (2006) ("[P]overty is literally out of sight as well as out of mind."); David Ray Papke, *Keeping the Underclass in its Place: Zoning, the Poor, and Residential Segregation*, 41 URB. LAW. 787, 788 (2009) ("[C]ontemporary American metropolitan areas remain overwhelmingly segregated by socioeconomic class.").

correspondingly increases[168]—and the strengthening caricature, in turn, further intensifies the isolation of the poor.[169] Over time, the individual fades into the encompassing myth.

So objectified, welfare recipients as a class are understood to possess characteristics that evoke the reasonable suspicion and disdain of broader society. As Kaaryn Gustafson has recently documented, these imputed qualities increasingly correspond not merely with poverty but with criminality as well.[170] She notes that "welfare applicants are treated as presumptive liars, cheaters, and thieves,"[171] and that federal and state welfare laws increasingly "assume[] a latent criminality among the poor."[172] Consistent with these assumptions, contemporary state and federal welfare policy is punitive, adversarial, and distrustful.[173] Surveillance, sanctions, and verification "extremism" are now prominent characteristics of welfare administration,[174] all with the intended purpose of reducing the total number of individuals receiving relief[175]—either by blocking entry to the programs at the front end[176] or by terminating benefits as quickly as possible.[177] Thus it comes as no surprise that the number of individuals receiving federal welfare assistance has dropped precipitously[178] as the poverty rate escalates.[179] These outcomes coincide with the archaic notion that the immorality of the poor is the ultimate cause of their plight and that the state's capacity and responsibility to ameliorate poverty is limited as a result.[180]

This conception of the indigent influences judicial perceptions as well.[181] As Thomas Ross notes, "When judges construct their arguments, they must depend on

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[168] *See, e.g.,* Stephen Loffredo, *Poverty, Inequality, and Class in the Structural Constitutional Law Course*, 34 FORDHAM URB. L.J. 1239, 1247 (2007) ("This socially constructed otherness of the poor is reinforced by (or perhaps serves as justification for) the social and spatial isolation of low-income families in economically segregated neighborhoods and inferior public schools.").

[169] *See* Ross, *supra* note 119, at 1503 ("[The poor] have been cast as different, deviant, and morally weak. These assumptions make coherent the physical separation of the poor from the affluent." (footnote omitted)).

[170] Gustafson, *supra* note 74, at 665–66; *see also* CYNTHIA A. BRIGGS & JENNIFER L. PEPPERELL, WOMEN, GIRLS, AND ADDICTION 126 (2009).

[171] Gustafson, *supra* note 74, at 646.

[172] *Id.* at 647.

[173] *See id.*

[174] *See id.* at 646; Mulzer, *supra* note 123, at 674–78.

[175] *See, e.g.*, 42 U.S.C. § 601(a)–(b) (2006); Diller, *supra* note 122, at 1178–84.

[176] *See, e.g.*, JOHN GILLIOM, OVERSEERS OF THE POOR: SURVEILLANCE, RESISTANCE, AND THE LIMITS OF PRIVACY 40 (2001).

[177] *See, e.g.*, Diller, *supra* note 122, at 1171, 1184.

[178] *See id.* at 1123; Michele Estrin Gilman, *Poverty and Communitarianism: Toward a Community-Based Welfare System*, 66 U. PITT. L. REV. 721, 741 & n.85 (2005); Land, *supra* note 164, at 818.

[179] *See* Rank, *supra* note 61, at 170–76.

[180] *See, e.g.*, Barnes & Chemerinsky, *supra* note 25, at 125–26.

[181] *See, e.g.*, *id.* at 126; Budd, *supra* note 10, at 403–06; Ross, *supra* note 119, at 1513–38.

assumptions widely shared by their audience. Judges depend on these assumptions both because they give their arguments power and the potential for influence, and because the judges, as members of the culture, are likely to believe them."[182] The Fourth Amendment's skewed application to the poor occurs against the backdrop of such assumptions, and considering the law in that broader context suggests a rough logic to the judicial bias. If welfare recipients are understood in the collective (sub)consciousness as a malingering class of "liars, cheaters, and thieves,"[183] it is then only a small step to the conclusion that each among them merits suspicion by virtue of that status. In this sense, the outcomes in *Wyman*, *Sanchez* and related cases begin to align on some visceral level with the Fourth Amendment's normative allocation of privacy. Quite simply, poverty serves as a proxy for cause, relieving the state of the obligation to establish individualized suspicion when it seeks to search the homes—and perhaps the bodies—of the intrinsically culpable poor.

To suggest that the popular conception of welfare recipients aligns with their exclusion from specific Fourth Amendment protections is not to say that any judge has purposively reasoned from one to the next. But it does imply that the deep and wounding myth of the immoral poor has particular resonance for a doctrine that turns on subjective judgments about the "reasonableness" of the state's suspicions. As part of the context within which those judgments have been made, the caricature of the poor may well have exerted some influence over the judiciary's decision to classify welfare recipients as a presumptively suspect class—whether or not the courts consciously acknowledge the connection.[184]

II. POVERTY, PRIVACY, AND SUSPICIONLESS DRUG TESTING

The poor's exercise of Fourth Amendment privacy rights remains under siege. Having authorized government to search the homes of welfare recipients without individualized suspicion or a warrant, the courts may soon be asked whether the bodies of aid recipients are subject to similar intrusions. Over the last three years, proposals to drug-test welfare recipients have emerged as a significant legislative trend across the country.[185] Introduced in just a few legislatures in 2007, drug testing legislation appeared in over half of the states by 2009.[186] The bills have garnered increasingly substantial support, with some having passed at least one legislative chamber.[187] Recently

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[182] Ross, *supra* note 119, at 1513.

[183] Gustafson, *supra* note 74, at 646.

[184] *See supra* notes 158–59.

[185] *See infra* Part II.C.

[186] *See infra* notes 284 & 287.

[187] *See, e.g.*, Tom Breen, *Some States, Including Minn., Move Toward Drug Tests For Welfare Recipients*, STAR TRIB. (Minneapolis-St. Paul, Minn.), Mar. 26, 2009, http://www.startribune.com/politics/state/41904442.html?elr=KArks:DCiUMcyaL_nDaycUiacyKUUr; Terry Ganey, *Senate Keeps Welfare Drug-Testing Item From Advancing*, COLUM. DAILY TRIB. (Columbia,

members of Congress have joined the effort and introduced legislation requiring all states to test recipients of federally-funded public assistance.[188] While very little attention has yet focused on this emerging development, it may soon present the judiciary with an important occasion to revisit its treatment of the poor's right to privacy under the Fourth Amendment. Involving suspicionless intrusions into one of the two spheres of privacy at the apex of constitutional sanctity—the body itself—the proposals, if enacted, will require the courts to decide between two starkly different visions of the privacy right.

A. Prelude: Federal Welfare Reform

The recent surge in mandatory drug testing proposals traces back to a provision of federal welfare reform passed in 1996.[189] Among a vast array of punitive provisions that fundamentally altered the nature of federal public assistance,[190] the legislation expressly authorizes individual states to impose drug testing as a condition of aid: "Notwithstanding any other provision of law, States shall not be prohibited by the Federal Government from testing welfare recipients for use of controlled substances nor from sanctioning welfare recipients who test positive for use of controlled substances . . . ."[191] This provision is one of several that address drug use among welfare recipients, including a related measure that permits states to impose a lifetime ban on aid to individuals who have been convicted of certain drug-related offenses.[192]

1. The Premise of the Addicted Poor

The legislative debates attending the passage of the federal statute made clear that its proponents fully embraced the disparaging caricature of the American poor as well as the corollary proposition that state aid only exacerbates the problem. In justifying the legislation, a parade of representatives took to the floor to recite a litany of charges

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Mo.), May 14, 2009, http://www.columbiatribune.com/news/2009/may/14/senate-keeps-welfare-drug-testing-item-from/; Press Release, Okla. State Senate, Senate Approves Measure Linking Drug Testing to Welfare Eligibility (Feb. 25, 2009), http://www.oksenate.gov/news/press_releases/press_releases_2009/pr20090225c.html; S. Minutes, 2008 Reg. Sess. (Va. Feb. 11, 2008).

[188] Drug Free Families Act of 2009, S. 97, 111th Cong. § 2; Press Release, Sen. Orrin Hatch, Hatch Introduces Amendment Requiring Drug Testing for Welfare, Unemployment Benefits (June 15, 2010), http://hatch.senate.gov/public/index.cfm?FuseAction=PressReleases.Detail&PressRelease_id=3d3e1ab4-1b78-be3e-e099-95c71cb7495e&Month=6&Year=2010.

[189] Personal Responsibility and Work Opportunity Reconciliation Act of 1996 (PRWORA), Pub. L. No. 104-193, 110 Stat. 2105 (codified in scattered sections of the U.S.C.).

[190] *See, e.g.*, Gustafson, *supra* note 74, at 658–78.

[191] 21 U.S.C. § 862b (2009).

[192] *Id.* § 862a(a). PRWORA also authorized substance abuse treatment as part of "an individual responsibility plan" for welfare recipients. 42 U.S.C. § 608(b)(2)(A).

against the "welfare system"[193] and its recipient population. Speakers alleged that welfare teaches people "to depend on it and not to be able to depend on themselves,"[194] "discourages thrift, discourages work, separates . . . and destroys families, isolates children, and from an early age, stifles their ambition,"[195] creates an environment that "is not . . . morally healthy,"[196] and "fosters poverty, despair, hopelessness, and illegitimacy."[197] Others asserted that "the Federal Government is completely incapable of helping these people"[198] and that welfare instead constitutes "federally funded child abuse."[199]

Allegations of criminal behavior and drug abuse among welfare recipients were high on the list of rationales recited in support of the bill.[200] Representatives declared that "[t]he high crime rates, the high drug abuse rates . . . are very, very closely linked to our welfare system,"[201] while others decried "the destructive practice of giving . . . benefits to drug addicts and alcoholics, blighting their lives at great public expense."[202] Poor children, whose "ideologues and . . . role models are pimps and drug dealers,"[203] were depicted as "selling drugs . . . [and] killing each other."[204] It was, in short, a world of "skyrocket[ing]"[205] crime, illegitimacy, "fraud, and abuse,"[206] and Congress had a "very straightforward" message in response: "No more money for nothing. . . . [G]et a real job."[207]

While empirical data regarding drug abuse among the poor played little part in the hyperbolic political debate,[208] it is noteworthy that the correlation between poverty and drug addiction is quite weak. Researchers analyzing data from the National Longitudinal Alcohol Epidemiologic Survey—described by the National Institutes of Health as the "'gold standard' for estimating the prevalence of adult alcohol and other drug disorders"[209]—concluded in 1996 that "[p]roportions of welfare recipients using, abusing,

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[193] 142 CONG. REC. 17674 (1996) (statement of Rep. Ensign).

[194] *Id.* at 17603 (statement of Rep. Kasich).

[195] *Id.* at 17677 (statement of Rep. Traficant).

[196] *Id.* at 17687 (statement of Rep. Buyer).

[197] *Id.* at 17672 (statement of Rep. Zimmer).

[198] *Id.* at 17618 (statement of Rep. Weldon).

[199] *Id.* at 17674 (statement of Rep. Ensign).

[200] *See, e.g.*, H.R. REP. NO. 104-651, at 4 (1996); *see also* H.R. REP. NO. 104-725, at 490 (1996) (Conf. Rep.).

[201] 142 CONG. REC. 17618 (1996) (statement of Rep. Weldon).

[202] *Id.* at 17674 (statement of Rep. English); *see, e.g.*, *id.* (statement of Rep. Ensign) ("Should we continue to give cash payments to prisoners and drug addicts?").

[203] *Id.* at 17614 (statement of Rep. Cunningham).

[204] *Id.* at 17683 (statement of Rep. Shays).

[205] *Id.* at 17674 (statement of Rep. Ensign).

[206] *Id.* at 17687 (statement of Rep. Buyer).

[207] *Id.* at 17672 (statement of Rep. Zimmer).

[208] *See generally supra* notes 193–207 and accompanying text.

[209] Press Release, U.S. Dep't of Health and Human Servs., Nat'l Insts. of Health, NIAAA Researchers Estimate Alcohol and Drug Use, Abuse and Dependence Among Welfare Recipients

or dependent on alcohol or illicit drugs are consistent with proportions of both the adult U.S. population and adults who do not receive welfare."[210] The researchers found that the rate of alcohol abuse and/or dependence among welfare recipients ranged from 4.3 to 8.2 percent across five welfare programs, compared to a rate of 7.4 among the general population,[211] while the rate of drug abuse and/or dependence among welfare recipients ranged between 1.3 and 3.6 percent in comparison to a rate of 1.5 percent among the broader population.[212] Data from the National Household Survey of Drug Abuse roughly coincides with these findings, with a rate of drug dependence among welfare recipients in 1994 and 1995 of approximately four percent and a rate of alcohol dependence of nine percent.[213] Perhaps most notably, the data suggests that no more than one in five welfare recipients uses an illicit drug in any given year—and half of those individuals use marijuana alone.[214] The depiction of aid recipients as welfare-enabled drug addicts and the resulting statutory provisions authorizing drug testing and related sanctions thus bear little relation to the actual lives of the American poor.

Finally, even if poverty did correlate with significantly higher rates of drug abuse and addiction, the question of causation would remain: does the harsh reality of poverty lead to drug use, or do reckless choices by individuals lead to addiction and then to poverty as a secondary effect?[215] The answer obviously bears on the punitive rationality of get-tough proposals denying assistance to impoverished applicants who test positive for illicit drug use. There are "surprisingly few studies"[216] that have examined this relationship, and what little research exists suggests that there "is not a direct, causal relationship between the two social problems, but instead one which is mitigated by a range of complex factors, including characteristics of the agent (e.g., alcohol), of the person (e.g., coping style), and of the environment (e.g., availability of substances, family structure, lack of job opportunities)."[217] Rather than grapple with this complexity and factual uncertainty, federal welfare policy simply posits the politically expedient myth that drug abuse among welfare recipients is a volitional choice reflecting a punishable moral failure.[218] To the extent that the policy thus denies assistance to debilitated

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(Oct. 23, 1996), *available at* http://www.niaaa.nih.gov/newsevents/newsreleases/pages/welfare.aspx.

[210] *Id.*

[211] *Id.*

[212] *Id.*

[213] RUKMALIE JAYAKODY ET AL., SUBSTANCE ABUSE AND WELFARE REFORM 2 (Nat'l Poverty Ctr., Policy Brief Ser. No. 2, Apr. 2004), *available at* http://www.npc.umich.edu/publications/policy_briefs/brief02/brief2.pdf.

[214] *Id.*

[215] *See, e.g.*, Nancy J. Smyth & Kathleen A. Kost, *Exploring the Nature of the Relationship Between Poverty and Substance Abuse: Knowns and Unknowns*, 1 J. HUM. BEHAV. SOC. ENV'T 67 (1998).

[216] *Id.* at 78.

[217] *Id.*

[218] *See supra* notes 193–207 and accompanying text.

applicants whose drug use is enmeshed with the trauma of poverty, it simply exacerbates their misfortune.[219]

2. The Premise of State Dominion

Just as the 1996 federal legislation posits a caricature of the addicted poor, so too it rests on a longstanding conception of the state's dominion over the private lives of welfare recipients. For centuries, the assistance of the state has come at the sacrifice of personal autonomy.[220] In the eighteenth and nineteenth centuries, for example, those in need of public assistance were regularly auctioned off or indentured as laborers, barred from moving to new communities, and functionally imprisoned in poorhouses.[221] The process extended to children as well, whose labor could be auctioned to pay a parent's debts.[222] In the early twentieth century, officials continued to closely regulate the intimate lives of aid recipients—raiding their homes at night to search for male visitors,[223] barring evening dates for women receiving assistance,[224] and mandating religious instruction for dependent children.[225] Investigators assessed the "suitability" of applicants and denied aid based on "use of tobacco, lack of church attendance, dishonesty, drunkenness, housing a male lodger, extramarital relations, poor discipline, criminal behavior, child delinquency, and overt child neglect. Agencies even forced families to move from neighborhoods with questionable reputations."[226] Some of these practices continued through the 1950s and 1960s, including most notably the use of surprise midnight raids in search of male guests.[227]

This tradition of intrusion has extended to the bodily autonomy of welfare recipients, as several scholars have observed in the context of reproductive choice.[228] In the last twenty years, policymakers have considered a long list of measures linking the level and availability of welfare benefits to marital status,[229] limitations on childbearing,[230]

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[219] *See, e.g.*, Harold A. Pollack et al., *Substance Use Among Welfare Recipients: Trends and Policy Responses*, 76 SOC. SERV. REV. 256, 261 (2002).

[220] *See, e.g.*, GILLIOM, *supra* note 176, at 22–24.

[221] *See id.* at 23–24; Quigley, *Reluctant Charity*, *supra* note 161, at 140–75.

[222] *See* Burkhart, *supra* note 162, at 223.

[223] *See* Jonathan L. Hafetz, *"A Man's Home Is His Castle?": Reflections on the Home, the Family, and Privacy During the Late Nineteenth and Early Twentieth Centuries*, 8 WM. & MARY J. WOMEN & L. 175, 208–09 (2002).

[224] *See id.* at 222–23.

[225] *See* GILLIOM, *supra* note 176, at 25.

[226] ABRAMOVITZ, *supra* note 161, at 202.

[227] *See id.* at 324–25; GILLIOM, *supra* note 176, at 31–32.

[228] *See, e.g.*, Dorothy E. Roberts, *The Only Good Poor Woman: Unconstitutional Conditions and Welfare*, 72 DENV. U. L. REV. 931 (1995); Lucy A. Williams, *The Ideology of Division: Behavior Modification Welfare Reform Proposals*, 102 YALE L.J. 719 (1992).

[229] *See* Williams, *supra* note 228, at 720.

[230] *See* Rebekah J. Smith, *Family Caps in Welfare Reform: Their Coercive Effects and Damaging Consequences*, 29 HARV. J. L. & GENDER 151, 152–54 (2006).

the use of contraception,[231] and even "the sterilization of women on welfare as a condition of receiving benefits."[232] As Lucie White observes, "these kinds of 'welfare reform' provisions [relate] back to this country's long history of targeting the reproductive autonomy of poor women, particularly women of color. The powerful have repeatedly marshalled state power to use the bodies of poor women to further their own economic and symbolic ends."[233] Federal legislation permitting states to physically intrude upon the bodies of welfare recipients for purposes of invasive extraction procedures continues quite literally in this incursive tradition.

3. The Irrelevance of Efficacy

Among the most striking aspects of the push for suspicionless drug testing, and a telling indication that it has little to do with ordinary public policy concerns, is its inefficacy in achieving any of the purported objectives associated with the procedure. Drug testing is variously touted as a means of encouraging welfare recipients to overcome substance abuse as a barrier to employment,[234] stopping drug-related child abuse,[235] and removing government from the business of subsidizing drug addiction.[236] All of these objectives rest, in part, on the unfounded premise that drug abuse is a significantly greater concern among the poor than in the general population.[237] Putting aside that assumption, however, the use of punitive drug testing to address issues surrounding drug abuse is a highly overinclusive and ineffective means of accomplishing any of the declared policy goals.

First, a positive drug test reflects only recent drug use, not drug abuse or impairment, and is accordingly an overinclusive means of identifying drug-related dysfunction.[238] Thus, "[i]f drug testing is used as a form of screening, many recipients likely to test positive will be casual drug users who do not satisfy diagnostic criteria for

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[231] *See* Pamela D. Bridgewater, *Reproductive Freedom as Civil Freedom: The Thirteenth Amendment's Role in the Struggle for Reproductive Rights*, 3 J. GENDER RACE & JUST. 401, 404–08 (2000); Williams, *supra* note 228, at 720.

[232] Smith, *supra* note 230, at 163; *see* Lynn M. Paltrow, *Why Caring Communities Must Oppose C.R.A.C.K./Project Prevention: How C.R.A.C.K. Promotes Dangerous Propaganda and Undermines the Health and Well Being of Children and Families,* 5 J.L. SOC'Y 11, 11–12, 93 (2003) (describing program that "offers $200 for current and former drug users to get sterilized or to use certain long-acting birth control methods").

[233] Lucie White, *Searching for the Logic Behind Welfare Reform*, 6 UCLA WOMEN'S L.J. 427, 433–34 (1996).

[234] *See, e.g.*, Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1140 (E.D. Mich. 2000), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

[235] *Id.* at 1141.

[236] *See, e.g.*, *supra* notes 200–02 and accompanying text; *infra* notes 276–83 and accompanying text.

[237] *See supra* notes 209–14 and accompanying text.

[238] *See, e.g.*, Pollack et al., *supra* note 219, at 269.

dependence."[239] Because "[w]idespread drug testing of welfare recipients will detect use among many women who have no accompanying problem with impaired social performance or employment,"[240] it will inevitably sanction individuals for whom the state has no cause for concern with respect to its stated objectives.

Second, drug abuse itself is not a significant contributing factor to welfare dependency. "Although [welfare] recipients have become more disadvantaged along a number of characteristics related to health and mental health, substance abuse and dependence is not a major contributor in defining the core group of recipients remaining on the rolls."[241] As noted above, the incidence of drug abuse among welfare recipients is estimated to be no higher than four percent of the entire beneficiary population.[242] If all illicit drug use were completely eliminated among recipients, the number of individuals in need of public assistance would decline by no more than three to five percent.[243]

Finally, current drug testing methods are poorly designed to detect the types of illicit drug use that are most likely to impair the lives of welfare recipients. Because drugs such as heroin and cocaine are metabolized quickly, their use is undetectable within a few days of ingestion.[244] By contrast, marijuana use is detectable for a much longer period of time due to the fact that metabolites of the drug are fat soluble and thus are retained in body tissue.[245] The use of marijuana, however, has a less statistically significant association with welfare receipt than even tobacco.[246] Conversely, welfare receipt is most powerfully associated with cocaine, a drug that current testing methods regularly fail to detect.[247] Compounding the poor fit is the exclusion of alcohol from federally authorized drug testing,[248] despite the fact that it is by far the most widely abused drug among the recipient population.[249]

Summarizing these efficacy considerations, researchers from the University of Michigan reached the following conclusions:

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[239] *Id.*

[240] Rukmalie Jayakody et al., *Welfare Reform, Substance Abuse, and Mental Health*, 25 J. HEALTH POL. POL'Y & L. 623, 644 (2000); *see also* SUSAN BOYD, MOTHERS AND ILLICIT DRUGS: TRANSCENDING THE MYTHS 14–15 (1999).

[241] JAYAKODY ET AL., *supra* note 213, at 3.

[242] *See supra* notes 212–13 and accompanying text.

[243] Pollack, *supra* note 219, at 261.

[244] Richard Hawks & C. Nora Chiang, *Examples of Specific Drug Assays, in* URINE TESTING FOR DRUGS OF ABUSE 84–112 (Nat'l Inst. on Drug Abuse, Research Monograph Series No. 73, 1987).

[245] *Id.*; *see* LYNN ZIMMER & JOHN MORGAN, MARIJUANA MYTHS, MARIJUANA FACTS: A REVIEW OF THE SCIENTIFIC EVIDENCE 121–22 (1997).

[246] Pollack, *supra* note 219, at 261–62.

[247] *Id.* at 262.

[248] 21 U.S.C. § 862(b) (2006) (authorizing testing for "controlled substance[s]").

[249] Bridget F. Grant & Deborah A. Dawson, *Alcohol and Drug Use, Abuse, and Dependence Among Welfare Recipients*, 86 AM. J. PUB. HEALTH 1450, 1451–53 (1996).

> Most recipients likely to test positive are casual marijuana users who do not satisfy DSM III-R criteria for drug-dependence. Moreover, the benefits of drug testing must be weighed against the potential misallocation of resources if positive results divert scarce treatment slots to occasional users. . . . Suspicionless, population-based chemical testing of welfare recipients will detect some "true positives" who are drug-dependent, a greater number of "accidental positives" with complex psychological problems, and a larger group of "false positives" who have no apparent psychiatric (including drug-related) disorder. . . . [C]hemical testing [also] does not detect the large group of "false negatives" . . . who are alcohol-dependent or who experience psychiatric disorders, but who do not use illicit drugs.[250]

That Congress pressed ahead with the authorization of punitive drug testing in the face of such serious efficacy concerns lends considerable support to the suggestion that its purpose had less to do with crafting coherent public policy than with the symbolic affirmation of a politically expedient stereotype.

B. The Initial Response of the States

Following passage of federal welfare reform and its invitation to the states to impose suspicionless drug testing on welfare recipients, several states responded by adopting more limited programs that sought to avoid the most serious constitutional concerns associated with mandatory testing.[251] Many of these ongoing programs apply only to convicted drug felons or other individuals for whom the state has some individualized reason to suspect drug abuse.[252] Other programs apply generally to the applicant or recipient population but rely on noninvasive screening assessments to identify individuals for whom there is reasonable suspicion to support more invasive drug testing.[253] The State of Idaho, for example, "requires substance abuse testing of

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[250] Harold A. Pollack et al., *Drug Testing Welfare Recipients—False Positives, False Negatives, Unanticipated Opportunities*, 12 WOMEN'S HEALTH ISSUES 23, 29–30 (2002).

[251] This is not to suggest that the adopted measures are unobjectionable. To the contrary, they raise serious legal and policy questions. *See, e.g.*, Deborah N. Archer & Kele S. Williams, *Making America "The Land of Second Chances": Restoring Socioeconomic Rights for Ex-Offenders*, 30 N.Y.U. REV. L. & SOC. CHANGE 527 (2006); Gustafson, *supra* note 74, at 672–74. The focus here, however, is the particularly severe constitutional threat posed by suspicionless drug testing.

[252] *See, e.g.*, 2009 Ariz. Sess. Laws 3rd S.S., ch. 10, § 27; LA. REV. STAT. ANN. § 460:10 (2009); MINN. STAT. § 609B.435 (2009); N.C. GEN. STAT. § 108A-29.1 (2009); VA. CODE ANN. § 63.2-605 (West 2009); WIS. STAT. §§ 49.79(5), 49.148(4) (2009).

[253] *See, e.g.*, IDAHO CODE ANN. § 56-209j (2009); LA. ADMIN. CODE tit. 67, § 1249(B) (2009).

any [welfare] applicant or recipient, if the [state] has a reasonable suspicion they are engaged in, or at high risk of, substance abuse. Testing will be conducted if screening and assessment give a reasonable suspicion the participant is engaged in substance abuse."[254] These programs may exist independently of or in combination with other measures that temporarily or permanently bar the provision of aid to individuals convicted of certain drug-related offenses, as authorized by a separate provision of the 1996 federal statute.[255]

In contrast to this more limited approach, Michigan embraced the federal invitation and enacted legislation in 1999 to impose suspicionless drug testing as a blanket condition of state aid.[256] Michigan's statute called for the establishment of a pilot program in at least three counties as a prelude to statewide testing within the following four years.[257] The program required all new applicants to submit to a drug test and additionally mandated that twenty percent of existing recipients would be randomly tested every six months.[258] The statute directed that any individual testing positive would participate in a substance-abuse treatment program[259] and that noncompliance could trigger the termination of aid.[260] In the brief period that the program operated prior to being enjoined by a federal court,[261] the state tested 258 welfare applicants of whom only twenty-one tested positive for illicit drug use.[262] Consistent with the efficacy considerations discussed above, all but three of those positive test results were for marijuana use alone.[263]

As discussed in detail in Part II.D, below, the pilot program was challenged immediately and struck down by a district judge, who was then reversed by a three-judge panel of the Sixth Circuit.[264] The full circuit subsequently reheard the matter en banc and upheld the district court by an equally divided vote.[265] The constitutional question was thus left entirely unresolved, and the resulting ambiguity has opened the door for

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[254] IDAHO ADMIN. CODE r.16.03.08.120 (2009).

[255] 21 U.S.C. § 862a(a); *see, e.g.*, KAN. STAT. ANN. § 39-709e (2009); LA. REV. STAT. ANN. § 46:233.2 (2009).

[256] MICH. COMP. LAWS § 400.57l (2009).

[257] *Id.* § 400.57l(2).

[258] *See* Gustafson, *supra* note 74, at 679.

[259] MICH. COMP. LAWS § 400.57l(3) (2009).

[260] *Id.*; *see* Michael D. Socha, *An Analysis of Michigan's Plan for Suspicionless Drug Testing of Welfare Recipients Under the Fourth Amendment "Special Needs" Exception*, 47 WAYNE L. REV. 1099, 1101–02 (2001).

[261] *See infra* Part II.D.2.

[262] Lisa R. Metch & Harold A. Pollack, *Welfare Reform and Substance Abuse*, 83 MILBANK Q. 65, 76 (2005).

[263] *Id.*

[264] Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated,* 319 F.3d 258 (6th Cir. 2003) (en banc), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

[265] *Id.*

other states to reconsider more aggressive drug testing proposals.[266] Scores of such proposals have appeared over the last three years,[267] suggesting that the enactment and implementation of another blanket testing program is a genuine threat.

C. The Legislative Groundswell

A recent survey of state legislative activity over the last three years reveals very substantial renewed interest in aggressive drug testing of welfare applicants and recipients. Since 2007, lawmakers in at least thirty states and the District of Columbia have proposed over sixty bills to impose testing requirements as a condition of eligibility for public assistance.[268] With limited exception, this body of legislation provides broadly for ongoing suspicionless testing and embraces the entire population of public aid beneficiaries, but omits any privacy protections or procedural safeguards.[269] Notably, the number of aggressive drug testing bills has climbed each of the last three years,[270] corresponding with the onset of the recent financial crisis[271] and consistent with the thesis that public policy grows increasingly punitive towards the poor during periods of economic hardship.[272] Whatever the cause may be, this legislative groundswell has quickly emerged as an important development with serious implications for the Fourth Amendment privacy rights of the poor.

Consistent with the legislative history of the authorizing federal statute, recent state efforts reflect a caricaturized conception of welfare recipients[273] and make no effort to grapple with data suggesting that drug dependence among the poor is not a significantly greater concern than it is among the general population.[274] The political rhetoric thus depicts recipients as addicts and criminals, the welfare system as a counterproductive enabler of addiction, and drug abuse as a moral failing that drives families into poverty.[275] A state senator from Arizona captured these themes in his recent defense of a drug testing bill:

> There's a moral issue here. . . . If you're getting taxpayer benefits, and this isn't money you've earned, you're getting free stuff . . . .

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[266] *See, e.g.*, Greenblatt, *supra* note 22.

[267] *See infra* note 284.

[268] *See infra* Part II.C.1.

[269] *See infra* Part II.C.1 & II.C.2.

[270] *See infra* note 284.

[271] MARTIN NEAL BAILY & DOUGLAS J. ELLIOTT, THE BROOKINGS INST., THE U.S. FINANCIAL AND ECONOMIC CRISIS: WHERE DOES IT STAND AND WHERE DO WE GO FROM HERE? 3–5 (2009), *available at* http://www.brookings.edu/~/media/Files/rc/papers/2009/0615_economic_crisis_baily_elliott/0615_economic_crisis_baily_elliott.pdf.

[272] *See, e.g.*, Clark Allen Peterson, *The Resurgence of Durational Residence Requirements for the Receipt of Welfare Funds*, 27 LOY. L.A. L. REV. 305, 334 n.195 (1993).

[273] *See infra* notes 276–83 and accompanying text.

[274] *See supra* note 212 and accompanying text.

[275] *See infra* notes 276–83 and accompanying text.

> The minimum ought to be that you ought to not be somebody's [sic] that's engaged in criminal activity. . . . A lot of the folks that are in desperate need are (that way) because they have a substance abuse problem. . . . So I'm hoping that this will drive them to get help or at least protect the taxpayer from funding folks who need to get their act together.[276]

Other state legislators describe drug testing proposals as an effort to "provide[] these drug-addicted welfare recipients with the wake-up call they need,"[277] to change "the status quo system that enables drug addicts with taxpayer money,"[278] "to prevent the state . . . from becoming an enabler to addiction,"[279] to assure that "taxpayers [do] not have to subsidize drug abuse,"[280] and to "protect[] our tax dollars from fueling drug addictions."[281] The theme of moral failing pervades the debate: "individuals who continue to use drugs are unable to provide for their families and end up on public assistance,"[282] and, once there, "[t]oo often . . . take advantage of our public assistance program and try to pocket or use their extra funds to purchase items they're not suppose to such as drugs."[283] Against this backdrop of moral condemnation, the rising tide of drug testing proposals is predictably severe.

1. The Elimination of Individualized Suspicion

The most significant attribute of recent legislative proposals is the overwhelming absence of any requirement that individualized suspicion support invasive drug testing. Suspicionless testing is thus a condition of aid embraced by forty-nine bills introduced

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[276] *Drug Test for Arizona Welfare Recipients May Be Needed*, DOUGLAS DISPATCH, Feb. 2, 2009, http://www.douglasdispatch.com/articles/2009/02/02/news/doc4987b79c78787767632585.txt (quoting Ariz. State Sen. Russell Pearce).

[277] *Party-Liners Again Reject Compassionate Reforms of Welfare System*, CAL. CHRONICLE, Apr. 29, 2009, http://www.californiachronicle.com/articles/view/100510 (quoting Cal. State Sen. John Benoit).

[278] *Id.*

[279] Juana Summers, *Missouri House Approves Drug Testing Welfare Recipients, But Proposal Shows Trouble in Senate*, ST. LOUIS TODAY, Feb. 11, 2010, http://www.stltoday.com/news/local/govt-and-politics/political-fix/article_12c95ddd-654b-56ed-943a-169704da04a6.html (quoting Mo. State Sen. Gary Nodler).

[280] Marshall Griffin, *Missouri House Passes Bill to Require Drug Testing for Welfare Recipients*, ST. LOUIS PUB. RADIO NEWS, Feb. 11, 2010, http://www.publicbroadcasting.net/kwmu/news.newsmain/article/0/0/1611354/St.Louis.Public.Radio.News/Mo.House.passes.drug.testing.bill (quoting Mo. State Rep. Ellen Brandom).

[281] *Lawmaker Introduces Bill to Require Drug Tests for Public Assistance*, CBS NEWS AUGUSTA (Apr. 1, 2009), http://www.wrdw.com/home/headlines/42272572.html (quoting S.C. State Rep. Rex Rice).

[282] Press Release, Okla. State Senate, Senate Approves Measure Linking Drug Testing to Welfare Eligibility (Feb. 25, 2009), *available at* http://www.oksenate.gov/news/press_releases/press_releases_2009/pr20090225c.html.

[283] NY Spons. Memo., Assemb. 3602, 231st Legis. Sess. (N.Y. 2009).

in twenty-seven legislatures since 2007,[284] accounting for eighty percent of the identified drug testing legislation over the last three years. Ten legislatures— those of Arkansas, California, Illinois, Indiana, Kentucky, Minnesota, Mississippi, Oklahoma, Pennsylvania, and Tennessee—have each produced multiple bills providing for suspicionless testing,[285] while seventeen others have each produced one such bill.[286] By contrast, only thirteen bills from seven states and the District of Columbia follow the lead of earlier programs and limit invasive testing to circumstances supported by probable cause or reasonable suspicion,[287] often established by a preliminary noninvasive assessment of the entire applicant or recipient population.[288]

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[284] H.R. 2678, 48th Leg., 2d Reg. Sess. (Ariz. 2008); H.R. 1281, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); S. 216, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); S. 384, 2009–2010 Reg. Sess. (Cal. 2009); Assemb. 2389, 2007–2008 Reg. Sess. (Cal. 2008); S. 268, 149th Gen. Assemb., Reg. Sess. (Ga. 2007); S. 3184, 24th Leg., Reg. Sess. (Haw. 2008); H.R. 4452, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 2252, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 389, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 1717, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1186, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); S. 268, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1339, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008); S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); H.R. 2275, 83d Leg., Reg. Sess. (Kan. 2009); H.R. 221, 2008 Reg. Sess. (Ky. 2008); H.R. 190, 2008 Reg. Sess. (Ky. 2008); H.R. 137, 35th Reg. Sess. (La. 2009); H.D. 1300, 425th Sess. Gen. Assemb. (Md. 2008); H.R. 6580, 94th Leg., Reg. Sess. (Mich. 2008); H.R. 3698, 86th Leg., Reg. Sess. (Minn. 2010); H.R. 1982, 85th Leg., Reg. Sess. (Minn. 2007); H.R. 916, 124th Leg., Reg. Sess. (Miss. 2009); S. 2647, 124th Leg., Reg. Sess. (Miss. 2009); H.R. 320, 124th Leg., Reg. Sess. (Miss. 2009); S. 2419, 123d Leg., Reg. Sess. (Miss. 2008); H.R. 2342, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); Assemb. 3602, 231st Legis. Sess. (N.Y. 2009); S. 941, 2009 Reg. Sess. (N.C. 2009); S. 178, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.R. 1939, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1649, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 769, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 390, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1407, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 3130, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 1513, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 606, 74th Legis. Assemb., Reg. Sess. (Or. 2007); S. 832, 2009–2010 Reg. Sess. (Pa. 2009); H.R. 1597, 2007–2008 Reg. Sess. (Pa. 2007); H.R. 3829, 118th Sess. Gen. Assemb., 1st Reg. Sess. (S.C. 2009); H.R. 2648, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 2731, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 102, 105th Gen. Assemb., 1st Reg. Sess (Tenn. 2007); H.R. 588, 105th Gen. Assemb., 1st Reg. Sess. (Tenn. 2007); H.R. 830, 81st Leg., Reg. Sess. (Tex. 2009); H.D. 3007, 79th Leg., Reg. Sess. (W. Va. 2009); S. 91, 59th Leg., Budget Sess. (Wyo. 2008).

[285] See *supra* note 284.

[286] *See id.* (Arizona, Georgia, Hawaii, Iowa, Kansas, Louisiana, Maryland, Michigan, Missouri, New York, North Carolina, Ohio, Oregon, South Carolina, Texas, West Virginia, Wyoming).

[287] S. 1026 sec. 27, 49th Leg., 3d Spec. Sess. (Ariz. 2009); Council 661, 17th Council Period (D.C. 2008); S. 1189, 25th Leg., Reg. Sess. (Haw. 2009); H.R. 949, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 183, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 73, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); H.R. 2330, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 1259, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); H.R. 868, 49th Leg., 1st Sess. (N.M. 2009); S. 614, 75th Legis. Assemb., Reg. Sess. (Or. 2009); S. 404, 2008 Reg. Sess. (Va. 2008); H.D. 365, 2008 Reg. Sess. (Va. 2008); H.R. 3209, 60th Leg., Reg. Sess. (Wash. 2008).

[288] *See, e.g.*, Council 661, 17th Council Period (D.C. 2008); S. 404, 2008 Reg. Sess. (Va. 2008); H.D. 365, 2008 Reg. Sess. (Va. 2008).

Suspicionless testing under these bills takes one of two forms—it is either imposed on an entire class of applicants or recipients or it is applied randomly to some subset of the target population. In this regard, thirty-one bills in nineteen states impose invasive testing upon their entire target population,[289] while seventeen bills in ten legislatures impose testing on randomly selected individuals.[290] Two bills combine these methods by testing the entire population of applicants while randomly testing some subset of the larger class of current recipients.[291]

2. The Attributes of Testing: Breadth, Process, and Consequences

The surveyed legislation varies to some extent regarding the breadth of the population subject to drug testing, the steps taken to protect procedural integrity and personal privacy, and the consequences of a positive test result. On balance, a substantial majority of the proposed bills apply to the broadest possible target population, provide very few, if any, privacy or procedural protections, and impose the harshest possible sanction for a positive drug test.

With respect to the breadth of the subject population, drug testing may target aid applicants, current recipients, or both. Among the sixty-two identified bills introduced

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[289] H.R. 2678, 48th Leg., 2d Reg. Sess. (Ariz. 2008); H.R. 1281, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); S. 216, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); S. 268, 149th Gen. Assemb., Reg. Sess. (Ga. 2007); H.R. 2252, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 389, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 2275, 83d Leg., Reg. Sess. (Kan. 2009); H.R. 221, 2008 Reg. Sess. (Ky. 2008); H.R. 190, 2008 Reg. Sess. (Ky. 2008); H.R. 137, 35th Reg. Sess. (La. 2009); H.D. 1300, 425th Sess. Gen. Assemb. (Md. 2008); H.R. 6580, 94th Leg., Reg. Sess. (Mich. 2008); H.R. 1982, 85th Leg., Reg. Sess. (Minn. 2007); Assemb. 3602, 231st Legis. Sess. (N.Y. 2009); S. 941, 2009 Reg. Sess. (N.C. 2009); S. 178, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.R. 1939, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1649, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 769, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 390, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1407, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 3130, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 606, 74th Legis. Assemb., Reg. Sess. (Or. 2007); S. 832, 2009–2010 Reg. Sess (Pa. 2009); H.R. 1597, 2007–2008 Reg. Sess. (Pa. 2007); H.R. 2648, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 2731, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 102, 105th Gen. Assemb., 1st Reg. Sess (Tenn. 2007); H.R. 588, 105th Gen. Assemb., 1st Reg. Sess. (Tenn. 2007); H.R. 830, 81st Leg., Reg. Sess. (Tex. 2009); S. 91, 59th Leg., Budget Sess. (Wyo. 2008).

[290] S. 384, 2009–2010 Reg. Sess. (Cal. 2009); Assemb. 2389, 2007–2008 Reg. Sess. (Cal. 2008); S. 3184, 24th Leg., Reg. Sess. (Haw. 2008); H.R. 4452, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 1717, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1186, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); S. 268, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1339, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008); S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); H.R. 3698, 86th Leg., Reg. Sess. (Minn. 2010); H.R. 916, 124th Leg., Reg. Sess. (Miss. 2009); S. 2647, 124th Leg., Reg. Sess. (Miss. 2009); H.R. 320, 124th Leg., Reg. Sess. (Miss. 2009); S. 2419, 123d Leg., Reg. Sess. (Miss. 2008); H.R. 2342, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); H.R. 3829, 118th Sess. Gen. Assemb., 1st Reg. Sess. (S.C. 2009); H.D. 3007, 79th Leg., Reg. Sess. (W. Va. 2009).

[291] S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); S. 1513, 51st Leg., 2d Reg. Sess. (Okla. 2008).

since 2007, over half—thirty-five—reach both categories.[292] Of the remaining bills, sixteen apply to recipients alone[293] while eleven are limited to applicants for assistance.[294] There are a few notable outliers. Two Mississippi bills from 2009 expand the subject population to include children as young as thirteen years old.[295] In an egalitarian nod, two bills require drug testing not only of applicants and recipients but also of all candidates for the Illinois state legislature[296] and all sitting members of the Missouri General Assembly.[297]

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[292] S. 1026 sec. 27, 49th Leg., 3d Spec. Sess. (Ariz. 2009); H.R. 2678, 48th Leg., 2d Reg. Sess. (Ariz. 2008); H.R. 1281, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); S. 216, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); H.R. 2252, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 389, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 1717, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1186, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); S. 268, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1339, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008); S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); H.R. 221, 2008 Reg. Sess. (Ky. 2008); H.R. 190, 2008 Reg. Sess. (Ky. 2008); H.R. 3698, 86th Leg., Reg. Sess. (Minn. 2010); H.R. 1982, 85th Leg., Reg. Sess. (Minn. 2007); H.R. 949, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 183, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 73, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); H.R. 2330, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 1259, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); H.R. 868, 49th Leg., 1st Sess. (N.M. 2009); H.R. 1939, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1649, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 769, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 390, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1407, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 3130, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 1513, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 614, 75th Legis. Assemb., Reg. Sess. (Or. 2009); S. 606, 74th Legis. Assemb., Reg. Sess. (Or. 2007); S. 832, 2009–2010 Reg. Sess (Pa. 2009); H.R. 1597, 2007–2008 Reg. Sess. (Pa. 2007); H.R. 3829, 118th Sess. Gen. Assemb., 1st Reg. Sess. (S.C. 2009); H.R. 830, 81st Leg., Reg. Sess. (Tex. 2009); H.D. 3007, 79th Leg., Reg. Sess. (W. Va. 2009).

[293] S. 384, 2009–2010 Reg. Sess. (Cal. 2009); Assemb. 2389, 2007–2008 Reg. Sess. (Cal. 2008); S. 1189, 25th Leg., Reg. Sess. (Haw. 2009); S. 3184, 24th Leg., Reg. Sess. (Haw. 2008); H.R. 2275, 83d Leg., Reg. Sess. (Kan. 2009); H.R. 137, 35th Reg. Sess. (La. 2009); H.R. 6580, 94th Leg., Reg. Sess. (Mich. 2008); H.R. 916, 124th Leg., Reg. Sess. (Miss. 2009); S. 2647, 124th Leg., Reg. Sess. (Miss. 2009); H.R. 320, 124th Leg., Reg. Sess. (Miss. 2009); S. 2419, 123d Leg., Reg. Sess. (Miss. 2008); H.R. 2342, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 404, 2008 Reg. Sess. (Va. 2008); H.D. 365, 2008 Reg. Sess. (Va. 2008); H.R. 3209, 60th Leg., Reg. Sess. (Wash. 2008); S. 91, 59th Leg., Budget Sess. (Wyo. 2008).

[294] Council 661, 17th Council Period (D.C. 2008); S. 268, 149th Gen. Assemb., Reg. Sess. (Ga. 2007); H.R. 4452, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.D. 1300, 425th Sess. Gen. Assemb. (Md. 2008); Assemb. 3602, 231st Legis. Sess. (N.Y. 2009); S. 941, 2009 Reg. Sess. (N.C. 2009); S. 178, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.R. 2648, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 2731, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 102, 105th Gen. Assemb., 1st Reg. Sess (Tenn. 2007); H.R. 588, 105th Gen. Assemb., 1st Reg. Sess. (Tenn. 2007).

[295] H.R. 916, 124th Leg., Reg. Sess. (Miss. 2009); H.R. 320, 124th Leg., Reg. Sess. (Miss. 2009).

[296] H.R. 4452, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009).

[297] H.R. 2342, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008).

The testing itself requires the extraction and collection of bodily fluids and tissues including blood,[298] "urine, hair, saliva, sweat, or whatever [other] specimen proves to be the most cost-effective."[299] Nevertheless, an overwhelming majority of the surveyed legislation makes no mention of privacy protections for individuals facing such intimately invasive procedures.[300] Only two bills specifically provide for the collection of samples with "due regard to the privacy of the individual" and "in a manner reasonably calculated to prevent substitutions or interference"[301] with the collected material.

With respect to the use and distribution of test results, the legislation likewise imposes few restrictions.[302] A handful of bills require that results be maintained in confidence, with no public disclosure except by consent of the person tested or pursuant to a judicial order.[303] Three other bills specify that positive test results may not be used in criminal proceedings.[304] Only one bill combines these protections of confidentiality and immunity from prosecution.[305] Similarly, the vast majority of legislation offers no procedural safeguards with regard to the testing process.[306] Bills proposed in Indiana,[307] Missouri,[308] and Tennessee[309] provide for a hearing or other appeal of a positive test result, while a few others require specific notice prior to actual testing.[310] Bills in Illinois,[311] Indiana,[312] and Tennessee[313] provide for the retesting of samples to rule out

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[298] H.R. 868, 49th Leg., 1st Sess. (N.M. 2009).

[299] H.R. 137, 35th Reg. Sess. (La. 2009).

[300] *See generally*, *supra* notes 284, 287.

[301] S. 1513, 51st Leg., 2d Reg. Sess. (Okla. 2008); *see* S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009).

[302] *See generally, supra* notes 284, 287.

[303] S. 268, 149th Gen. Assemb., Reg. Sess. (Ga. 2007); H.R. 1717, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 2275, 83d Leg., Reg. Sess. (Kan. 2009); S. 1513, 51st Leg., 2d Reg. Sess. (Okla. 2008); H.R. 3007, 79th Leg., Reg. Sess. (W. Va. 2009).

[304] S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); H.R. 221, 2008 Reg. Sess. (Ky. 2008); H.R. 190, 2008 Reg. Sess. (Ky. 2008).

[305] S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009).

[306] *See generally, supra* notes 284, 287.

[307] H.R. 1717, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1186, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); S. 268, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1339, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008).

[308] H.R. 949, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 183, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 73, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); H.R. 2330, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 1259, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008).

[309] H.R. 2648, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 2731, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008).

[310] H.R. 221, 2008 Reg. Sess. (Ky. 2008); H.R. 190, 2008 Reg. Sess. (Ky. 2008).

[311] H.R. 4452, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 2252, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009).

[312] H.R. 1717, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1186, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); S. 268, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1339, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008).

[313] H.R. 2648, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 2731, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008).

false positives. Also to rule out false positives, a handful of bills allow individuals to submit additional medical information that may provide an alternative explanation for positive test results.[314] Notwithstanding these provisions, fully two-thirds of the recent legislation contains no privacy or procedural protections whatsoever.[315]

Finally, a substantial majority of the bills impose the harshest possible consequence for a positive test result. Over two-thirds of the identified legislation, from twenty-one states, mandates the immediate termination or denial of benefits as the sanction for a positive test.[316] Of these bills, several deny aid without specifying when, if ever, benefits might resume.[317] Others permit individuals to reapply for assistance after some prescribed period of ineligibility.[318] Among the bills requiring the denial or termination of

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[314] S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); S. 268, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009).

[315] *See supra* notes 284, 287.

[316] S. 1026 sec. 27, 49th Leg., 3d Spec. Sess. (Ariz. 2009); S. 268, 149th Gen. Assemb., Reg. Sess. (Ga. 2007); S. 1189, 25th Leg., Reg. Sess. (Haw. 2009); S. 3184, 24th Leg., Reg. Sess. (Haw. 2008); H.R. 2252, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 389, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 1186, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); S. 268, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 1339, 115th Gen. Assemb., 2d Reg. Sess. (Ind. 2008); S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); H.R. 221, 2008 Reg. Sess. (Ky. 2008); H.R. 190, 2008 Reg. Sess. (Ky. 2008); H.R. 6580, 94th Leg., Reg. Sess. (Mich. 2008); H.R. 3698, 86th Leg., Reg. Sess. (Minn. 2010); H.R. 1982, 85th Leg., Reg. Sess. (Minn. 2007); H.R. 916, 124th Leg., Reg. Sess. (Miss. 2009); S. 2647, 124th Leg., Reg. Sess. (Miss. 2009); H.R. 320, 124th Leg., Reg. Sess. (Miss. 2009); S. 2419, 123d Leg., Reg. Sess. (Miss. 2008); H.R. 949, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 183, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 73, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); H.R. 2330, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 1259, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 178, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.R. 1939, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1649, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 769, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1407, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 3130, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 1513, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 614, 75th Legis. Assemb., Reg. Sess. (Or. 2009); S. 832, 2009–2010 Reg. Sess. (Pa. 2009); H.R. 3829, 118th Sess. Gen. Assemb., 1st Reg. Sess. (S.C. 2009); H.R. 2648, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 2731, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 102, 105th Gen. Assemb., 1st Reg. Sess. (Tenn. 2007); H.R. 588, 105th Gen. Assemb., 1st Reg. Sess. (Tenn. 2007); H.R. 830, 81st Leg., Reg. Sess. (Tex. 2009); H.D. 365, 2008 Reg. Sess. (Va. 2008); H.D. 3007, 79th Leg., Reg. Sess. (W. Va. 2009); S. 91, 59th Leg., Budget Sess. (Wyo. 2008).

[317] *See, e.g.*, S. 1189, 25th Leg., Reg. Sess. (Haw. 2009); S. 3184, 24th Leg., Reg. Sess. (Haw. 2008); H.R. 389, 96th Gen. Assem., 1st Reg. Sess. (Ill. 2009); H.R. 221, 2008 Reg. Sess. (Ky. 2008); H.R. 190, 2008 Reg. Sess. (Ky. 2008); H.R. 6580, 94th Leg., Reg. Sess. (Mich. 2008); H.R. 1939, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1649, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 769, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 1407, 52d Leg., 1st Reg. Sess. (Okla. 2009); H.R. 3130, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 614, 75th Leg. Assemb., Reg. Sess. (Or. 2009); H.R. 3829, 118th Sess. Gen. Assemb., 1st Reg. Sess. (S.C. 2009); H.R. 2648, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008); S. 2731, 105th Gen. Assemb., 2d Reg. Sess. (Tenn. 2008).

[318] *See, e.g.*, S. 1026 sec. 27, 49th Leg., 3d Spec. Sess. (Ariz. 2009); S. 268, 149th Gen. Assemb., Reg. Sess. (Ga. 2007); S. 232, 83d Gen. Assemb., 1st Sess. (Iowa 2009); H.R. 4452,

aid to a primary beneficiary, a few provide that aid to dependents may continue through disbursements to a third-party payee.[319] By contrast, only seventeen bills allow benefits to be paid to an individual who tests positive for illicit drug use, typically on condition that the recipient participate in a drug rehabilitation treatment program.[320]

Across the identified legislation, the most common provisions are invariably the harshest. The typical bill applies without suspicion to the entire class of welfare applicants and recipients, makes no provision for the protection of either the individual's privacy during the testing process or the security of test results, affords no procedural recourse for individuals testing positive, and mandates the immediate denial of aid to anyone identified as having used an illicit drug. While it is impossible to predict whether such legislation ultimately will be enacted, the character and intensity of legislative activity over the last three years suggests that the possibility is significant.

D. Two Visions of a Constitutional Response

The enactment of suspicionless drug testing legislation will force the federal courts to answer, finally, the constitutional question left open by the Michigan litigation.[321] In assessing how the courts might approach the issue, the Michigan decisions are highly instructive. The district court in *Marchwinski* considered the issue within the conventional parameters of the Fourth Amendment and reached the straightforward conclusion that the state's blanket drug testing proposal was impermissible.[322] On

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96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 2252, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.R. 916, 124th Leg., Reg. Sess. (Miss. 2009); S. 2647, 124th Leg., Reg. Sess. (Miss. 2009); H.R. 320, 124th Leg., Reg. Sess. (Miss. 2009); S. 2419, 123d Leg., Reg. Sess. (Miss. 2008); H.R. 949, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 183, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 73, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); H.R. 2330, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 1259, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); S. 1513, 51st Leg., 2d Reg. Sess. (Okla. 2008); S. 178, 128th Gen. Assemb., Reg. Sess. (Ohio 2009); H.R. 830, 81st Leg., Reg. Sess. (Tex. 2009); H.R. 3007, 79th Leg., Reg. Sess. (W. Va. 2009).

[319] H.R. 949, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 183, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 73, 95th Gen. Assemb., 1st Reg. Sess. (Mo. 2009); S. 1259, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); H.D. 365, 2008 Reg. Sess. (Va. 2008).

[320] H.R. 2678, 48th Leg., 2d Reg. Sess. (Ariz. 2008); S. 216, 87th Gen. Assemb., Reg. Sess. (Ark. 2009); S. 384, 2009–2010 Reg. Sess. (Cal. 2009); Assemb. 2389, 2007–2008 Reg. Sess. (Cal. 2008); Council 661, 17th Council Period (D.C. 2008); H.R. 1717, 116th Gen. Assemb., 1st Reg. Sess. (Ind. 2009); H.R. 2275, 83d Leg., Reg. Sess. (Kan. 2009); H.R. 4452, 96th Gen. Assemb., 1st Reg. Sess. (Ill. 2009); H.D. 1300, 425th Sess. Gen. Assemb. (Md. 2008); H.R. 2342, 94th Gen. Assemb., 2d Reg. Sess. (Mo. 2008); H.R. 868, 49th Leg., 1st Sess. (N.M. 2009); Assemb. 3602, 231st Legis. Sess. (N.Y. 2009); S. 390, 52d Leg., 1st Reg. Sess. (Okla. 2009); S. 606, 74th Legis. Assemb., Reg. Sess. (Or. 2007); H.R. 1597, 2007–2008 Reg. Sess. (Pa. 2007); S. 404, 2008 Reg. Sess. (Va. 2008); H.R. 3209, 60th Leg., Reg. Sess. (Wash. 2008).

[321] *See supra* notes 264–65 and accompanying text.

[322] Marchwinski v. Howard, 113 F. Supp. 2d 1134 (E.D. Mich. 2000), *rev'd*, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated,* 319 F.3d 258 (6th Cir. 2003), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

appeal, a panel of the Sixth Circuit reversed based on an entirely different, if unstated, premise—that the poor constitute a subconstitutional class for purposes of the privacy right and thus fall beyond the protections of conventional doctrine.[323] These irreconcilable approaches perfectly mirror the parallel controversy, discussed above, over the application of the Fourth Amendment's privacy right to the homes of welfare recipients.[324] If the federal courts are asked again to consider the question in the context of suspicionless drug testing, the divergent outcomes in the Michigan litigation will frame for the judiciary an unambiguous choice.

1. Bodily Privacy: A Preface

At the core of the Fourth Amendment is "the individual's legitimate expectations that in certain places and at certain times he has 'the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.'"[325] When the state seeks to intrude upon the body, it implicates the "most personal and deep-rooted expectations of privacy"[326] grounded in the "moral fact that a person belongs to himself and not others nor to society as a whole."[327] These deeply invested expectations trigger, in turn, "the unique, significantly heightened protection afforded against searches of one's person."[328]

The Fourth Amendment traditionally guards this private sphere through the dual requirements of probable cause and a warrant. As the Court noted in *Schmerber v. California*, both requirements apply with considerable force in the context of intrusions upon the body.[329] As to cause, the *Schmerber* Court noted:

> The interests in human dignity and privacy which the Fourth Amendment protects forbid any such intrusions [beyond the

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[323] 309 F.3d 330.

[324] *See supra* Part I.B.2.

[325] Winston v. Lee, 470 U.S. 753, 758 (1985) (quoting Olmstead v. United States, 277 U.S. 438, 478 (1928) (Brandeis, J., dissenting)).

[326] *Id.* at 760.

[327] Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S. 747, 777 n.5 (1986) (Stevens, J., concurring) (quoting Charles Fried, *Correspondence*, 6 PHIL. & PUB. AFF. 288 (1977)).

[328] Wyoming v. Houghton, 526 U.S. 295, 303 (1999). The highly protected status of the body is recognized across other constitutional doctrines as well, most notably as a component of liberty and privacy under the Due Process Clause. *See, e.g.*, Riggins v. Nevada, 504 U.S. 127, 135 (1992); Cruzan *ex rel.* Cruzan v. Dir., Mo. Dep't of Health, 497 U.S. 261, 278–79 (1990); Washington v. Harper, 494 U.S. 210, 221–22, 229 (1990); Rochin v. California, 342 U.S. 165, 172–74 (1952); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); *see also* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 857 (1992) ("[*Roe v. Wade*] . . . may be seen . . . as a rule . . . of personal autonomy and bodily integrity, with doctrinal affinity to cases recognizing limits on governmental power to mandate medical treatment or to bar its rejection.").

[329] 384 U.S. 757, 769–70 (1966).

> body's surface] on the mere chance that desired evidence might be obtained. In the absence of a clear indication that in fact such evidence will be found, these fundamental human interests require law officers to suffer the risk that such evidence may disappear unless there is an immediate search.[330]

The requirement of judicial review plays an equally important role, as the Court also underscored in *Schmerber*:

> Search warrants are ordinarily required for searches of dwellings, and absent an emergency, no less could be required where intrusions into the human body are concerned. . . . The importance of informed, detached and deliberate determinations of the issue whether or not to invade another's body in search of evidence of guilt is indisputable and great.[331]

While these requirements obviously do not prohibit a search of the body, they provide a significant constraint "against intrusions which are not justified in the circumstances, or which are made in an improper manner."[332]

In applying these principles, the Court has required that probable cause support the extraction of blood from a drunk-driving suspect,[333] barred suspicionless drug testing of maternity patients for purposes of identifying child-abuse suspects,[334] and prohibited the extraction of a bullet from a suspect's body even in the presence of probable cause, given the gravity of the intrusion.[335] Prior to the incorporation of the Fourth Amendment, the Court similarly restricted the search of a suspect's stomach under the Due Process Clause[336] and more recently has underscored the significant liberty interest implicated when the state seeks to forcibly inject medication into a nonconsenting person's body.[337] As these cases intuitively confirm, "The integrity of an individual's person is a cherished value of our society"[338] and triggers "the greatest Fourth Amendment protection."[339]

Outside the context of criminal law enforcement, the Court has relaxed the requirements of the Warrant Clause in certain circumstances to permit the state to conduct

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330 *Id.*
331 *Id.* at 770.
332 *Id.* at 768.
333 *Id.* at 770.
334 Ferguson v. City of Charleston, 532 U.S. 67, 84–86 (2001).
335 Winston v. Lee, 470 U.S. 753, 766–67 (1985).
336 Rochin v. California, 342 U.S. 165, 172 (1952).
337 Washington v. Harper, 494 U.S. 210, 221–22, 229 (1990).
338 *Schmerber*, 384 U.S. at 772.
339 City of Indianapolis v. Edmond, 531 U.S. 32, 54 (2000) (Rehnquist, C.J., dissenting).

otherwise impermissible body searches for civil or administrative purposes.[340] The authority that embraces these circumstances—the special-needs doctrine[341]—bears directly on the permissibility of recent drug testing proposals insofar as the searches at issue rest on neither cause nor a warrant. Under the doctrine, the Court engages in a two-step analysis considering, first, whether the proposed search advances a "special need" of the state, and, if so, whether the search strikes a reasonable balance between individual privacy interests and the strength of the countervailing government objective.[342] The doctrine has been used primarily to justify targeted drug testing programs[343] but has been applied in other contexts as well—for example, to sustain a warrantless home search conducted as a condition of probation.[344]

The first and central inquiry under the doctrine is whether the state's special need is sufficiently compelling to suspend otherwise applicable constitutional restrictions.[345] In the absence of a special need, the analysis goes no further.[346] While the need must be unrelated to the ordinary demands of criminal law enforcement,[347] a civil or administrative objective is not sufficient, standing alone, to satisfy the doctrine. In addition, the need "must be substantial—important enough to override the individual's acknowledged privacy interest, sufficiently vital to suppress the Fourth Amendment's normal requirement of individualized suspicion."[348] Although the formulation is highly indeterminate,[349] the practical application of the doctrine has typically involved one of two permissible objectives: the promotion of public safety and the related protection of the health and security of schoolchildren under the state's *in loco parentis* control.[350] Regarding the first rationale, the Court has stated that "where . . . public safety is not genuinely in jeopardy, the Fourth Amendment precludes the suspicionless search, no matter how conveniently arranged."[351] Regarding the second, the Court has "caution[ed] against the assumption that suspicionless drug testing will readily pass constitutional

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[340] *See infra* notes 345–52 and accompanying text.

[341] *See, e.g.*, Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 619 (1989).

[342] *See, e.g.*, 19 Solid Waste Dep't Mechs. v. City of Albuquerque, 156 F.3d 1068, 1072 (10th Cir. 1998).

[343] *See, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822 (2002); Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646 (1995); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989); *Skinner*, 489 U.S. 602.

[344] Griffin v. Wisconsin, 483 U.S. 868 (1987).

[345] *See, e.g.*, *19 Solid Waste Dep't Mechs.*, 156 F.3d at 1072.

[346] *Id.*

[347] *Von Raab*, 489 U.S. at 665–66.

[348] Chandler v. Miller, 520 U.S. 305, 318 (1997).

[349] *See, e.g.*, Tracey Maclin, *Is Obtaining an Arrestee's DNA a Valid Special Needs Search Under the Fourth Amendment? What Should (and Will) the Supreme Court Do?*, 34 J.L. MED. & ETHICS 165, 170 (2006); William J. Stuntz, *Implicit Bargains, Government Power, and the Fourth Amendment*, 44 STAN. L. REV. 553, 554 (1992).

[350] *See* Budd, *supra* note 10, at 397–98; *cf. Chandler*, 520 U.S. at 309.

[351] *Chandler*, 520 U.S. at 323; *see, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 836–37 (2002).

muster in other contexts. The most significant element in this case is . . . that the Policy was undertaken in furtherance of the government's responsibilities, under a public school system, as guardian and tutor of children entrusted to its care."[352]

There is considerable speculation about how far these two categories reach.[353] While the Court has underscored in recent opinions that special needs constitute a "closely guarded category of constitutionally permissible suspicionless searches,"[354] the decisional law demonstrates that the doctrine may be employed to permit suspicionless body searches in circumstances that only tenuously relate to the sanctioned rationales.[355] Regardless of how distant the two categories may extend, however, they cannot rationally stretch so far as to justify suspicionless drug testing of the entire population of welfare applicants and recipients—for whom the state has neither *in loco parentis* responsibility nor any encompassing public-safety concern.[356] The constitutionality of such proposals is accordingly highly doubtful under conventional doctrine, as Wayne LaFave and others have observed.[357]

2. Principled Adjudication

Accepting this conventional account of the Fourth Amendment, the district court in the Michigan litigation concluded that the challenged testing program failed to advance any recognized special need and was thus impermissible.[358] The district court first noted that the declared purpose of the authorizing federal statute was to move welfare recipients to work, and that the state's drug testing program rested on the complementary objective of "address[ing] substance abuse as a barrier to employment."[359] Since neither goal touched remotely on a public safety concern, the district court concluded that the testing program was irreconcilable with the Supreme Court's specification of permissible special needs.[360]

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[352] Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 665 (1995).

[353] *See, e.g.*, *supra* note 349; *cf.* Fabio Arcila, Jr., *Special Needs and Special Deference: Suspicionless Civil Searches in the Modern Regulatory State*, 56 ADMIN. L. REV. 1223, 1231–34 (2004).

[354] *Chandler*, 520 U.S. at 309; Ferguson v. City of Charleston, 532 U.S. 67, 77 (2001).

[355] *See, e.g.*, Aubrey v. Lafayette Parish Sch. Bd., 148 F.3d 559 (5th Cir. 1998) (upholding suspicionless drug testing of school janitors on grounds that they hold safety-sensitive positions and work closely with children).

[356] *See* 2 WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE § 3.9(d) (3d ed. 2007) ("While federal legislation authorizes states to undertake suspicionless drug testing of welfare recipients, such action is not justified by . . . the Supreme Court's drug testing decisions."); *see, e.g.*, Corinne A. Carey, *Crafting a Challenge to the Practice of Drug Testing Welfare Recipients: Federal Welfare Reform and State Response as the Most Recent Chapter in the War on Drugs*, 46 BUFF. L. REV. 281 (1998); Socha, *supra* note 260, at 1118–19.

[357] *Id.*

[358] Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1139–40 (E.D. Mich. 2000), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

[359] *Id.* at 1140.

[360] *Id.*

The State nevertheless proposed that it sought to protect recipients' children from drug-related child abuse and thus pursued a safety-related objective as well.[361] After noting the post hoc nature of the rationale,[362] the district court addressed its implications:

> [This] excuse could be used for testing the parents of all children who receive Medicaid, State Emergency Relief, educational grants or loans, public education or any other benefit from the State. In all cases in which the State offers a benefit on behalf of minor children, the State could claim that it has a broad interest in the care of those children which overcomes the privacy rights of the parents. . . . "Such a categorical approach to an entire class of citizens would be dangerously at odds with the tenets of our democracy."[363]

To the district court's rejoinder might be added the fact that welfare recipients abuse drugs at no greater rate than the general population[364]—and, thus, that the state has no greater interest in stopping drug-related child abuse among welfare recipients than it has with respect to the vast majority of other parents who receive some tax deduction, credit, or similar subsidy on behalf of dependent children.[365] Michigan's child-safety rationale would thus eviscerate the Fourth Amendment's requirement of individualized suspicion across the spectrum of American families—a result that is neither politically nor doctrinally tenable.[366]

The court turned next to Michigan's separate contention that its drug testing scheme was authorized by the Supreme Court's decision in *Wyman v. James*, which upheld mandatory home visits by welfare caseworkers.[367] The district court dismissed the argument on two grounds. First, as the district court noted, *Wyman* held that the home visits at issue did not even constitute a Fourth Amendment search and authorized the entries, in part, on that basis.[368] Since it is indisputable that invasive drug testing is

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[361] *Id.* at 1141.

[362] *Id.* at 1141–42.

[363] *Id.* at 1142 (quoting Wyman v. James, 400 U.S. 309, 342 (1971) (Marshall, J., dissenting)).

[364] *See supra* note 212 and accompanying text.

[365] *See, e.g.*, Alan Berube, *Individual Income Tax Credits as Social Policy in Rural America*, 13 GEO. J. ON POVERTY L. & POL'Y 151, 155–59 (2006).

[366] *Cf.* City of Indianapolis v. Edmond, 531 U.S. 32, 42 (2000). Outside the context of welfare, at least one other court has rejected a suspicionless drug testing proposal on grounds that parents have no diminished expectation of privacy simply by virtue of the state's general interest in the well-being of their children. *See* State v. Moreno, 203 P.3d 1000, 1008–12 (Utah 2009) (barring drug testing of the parents of delinquent minors for purposes of assuring that they set a good example for their children).

[367] 400 U.S. 309 (1971); *see Marchwinski*, 113 F. Supp. 2d at 1142–43.

[368] *Marchwinski*, 113 F. Supp. 2d at 1142–43; *see Wyman*, 400 U.S. at 317; *supra* notes 106–09 and accompanying text.

a search within the scope of the Fourth Amendment, the *Wyman* analysis is obviously irrelevant in that respect.[369]

Michigan argued, however, that *Wyman*'s alternative holding—that the home visits constituted a reasonable entry under the Fourth Amendment[370]—supported its testing program by establishing that welfare applicants have a generally diminished expectation of privacy as a result of their voluntary request for assistance.[371] The district court rejected the argument in light of the conflicting analysis in *Chandler v. Miller*, which struck down a suspicionless drug testing program directed at candidates for public office.[372] As the court noted, the act of seeking elected office is considerably more voluntary than submitting an application for public assistance, which typically reflects some measure of economic coercion.[373] Nevertheless, the *Chandler* Court recognized that candidates for political office possess a legitimate and defensible expectation of privacy irrespective of the highly consensual nature of the activity at issue.[374] Necessarily, then, welfare recipients must possess an equally defensible privacy expectation in the substantially less voluntary context within which they interact with the state.[375] Finally, the district court noted that *Wyman* predates the Supreme Court's special-needs jurisprudence and in particular the requirement articulated in *Chandler* that a safety-related justification support a special-needs search.[376] "To the extent that *Wyman* could be construed as allowing otherwise, its holding is no longer viable."[377]

Unable to identify either a special need or a credible basis to defer to the fading authority of *Wyman*, the district court enjoined Michigan's testing program as a violation of the Fourth Amendment.[378] In view of prevailing special needs authority, the holding is a straightforward application of reasonably well-settled law.

3. Subconstitutional Adjudication

A three-judge panel of the Sixth Circuit reversed the district court in an opinion rooted in an entirely different, and frankly biased, set of analytic assumptions.[379] The opinion proceeds squarely in the tradition of the bifurcated Fourth Amendment and offers arguments and rationales that are impossible to reconcile with conventional

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[369] *Marchwinski*, 113 F. Supp. 2d at 1142–43.

[370] *See supra* notes 110–13 and accompanying text.

[371] *Marchwinski*, 113 F. Supp. 2d at 1143; *see Wyman*, 400 U.S. at 324.

[372] 520 U.S. 305 (1997).

[373] *Marchwinski*, 113 F. Supp. 2d at 1143.

[374] *Id.*; *see Chandler*, 520 U.S. at 318.

[375] *Marchwinski*, 113 F. Supp. 2d at 1143.

[376] *Id.* at 1143; *see Chandler*, 520 U.S. at 323.

[377] *Marchwinski*, 113 F. Supp. 2d at 1143.

[378] *Id.* at 1144; *see also* Drug Tests as a Condition of Receiving Public Assistance, Op. Att'y Gen. 07-84 (Tenn. 2007).

[379] Marchwinski v. Howard, 309 F.3d 330 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc).

authority.[380] To make sense of the opinion, one must accept at the outset the premise that the poor inhabit a different constitutional universe where their presumed culpability justifies intrusions that are otherwise at odds with traditional doctrine. Throughout the opinion, poverty is implicitly employed as a proxy for individualized suspicion as the poor are cast as an inherently criminal, child-abusing, and drug addicted class.

The Sixth Circuit's decision begins with the state's asserted special need. To accommodate its substantive objectives, the court first reframed the governing standard to drain the special-needs concept of virtually any limiting effect. Rejecting the pronouncement in *Chandler* that a permissible special need must be grounded in some public safety concern,[381] the court asserted instead that safety "is but one consideration" and "need not predominate" in the special needs calculation.[382] In support, the circuit relied exclusively on *Board of Education v. Earls*,[383] the Supreme Court's latest opinion dealing with the *other* rationale for a special needs search—the state's *in loco parentis* responsibility for schoolchildren under its care and supervision.[384] In *Earls*, the Court upheld a school's suspicionless drug testing program for students involved in extracurricular activities on the expressly qualified basis that "Fourth Amendment rights . . . are different in public schools than elsewhere; the 'reasonableness' inquiry cannot disregard the schools' custodial and tutelary responsibility for children."[385] Moreover, within that uniquely supervisory context, the *Earls* Court accepted as "correct" the proposition that "safety factors into the special needs analysis" but concluded that "the safety interest furthered by drug testing is undoubtedly substantial for all children" in the setting of a public school.[386] To derive from *Earls* that safety "need not predominate"[387] in a special-needs analysis beyond the context of public education—thus trumping the express requirements of *Chandler*—is a "dubious conclusion"[388] that defies the terms of the opinion itself.

Having rewritten the constitutional standard to accommodate an open and undefined set of additional special needs, the Sixth Circuit proceeded to manufacture an amalgam of rationales that bear no relation to any preceding authority and that render the doctrine nearly limitless in its application to the general population. First, in a nod to *Chandler*, the court embraced Michigan's post hoc safety rationale for drug testing and asserted without analysis that the program was designed to protect children from

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[380] *See, e.g.*, LAFAVE ET AL., *supra* note 109, at § 10.3 ("[The opinion] misread *Wyman* and reached the dubious conclusion that *Earls*, the Supreme Court's latest school drug testing case, trumped *Chandler* even outside a public school context").

[381] Chandler v. Miller, 520 U.S. 305, 323 (1997).

[382] *Marchwinski*, 309 F.3d at 335.

[383] 536 U.S. 822 (2002).

[384] *Id.*; *see Marchwinski*, 309 F.3d at 334–35.

[385] *Earls*, 536 U.S. at 829–30 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. 646, 656 (1995)).

[386] *Id.* at 836.

[387] *Marchwinski*, 309 F.3d at 335.

[388] LAFAVE, *supra* note 109, § 10.3.

drug-related abuse.[389] In doing so, the court ignored the fact that the authorizing federal statute as well as Michigan's own policy rationale made no mention of child safety in justifying the testing at issue,[390] ignored empirical data refuting the premise that welfare parents abuse drugs at a significantly greater rate than the general population,[391] and declined to acknowledge the necessary implication of its argument: that any parent could henceforth be subject to suspicionless drug testing simply by accepting a child-related state subsidy.[392]

Moving further beyond the record, the Sixth Circuit next imagined that the drug testing program might advance an even broader public safety concern—"the risk to the public from the crime associated with illicit drug use and trafficking."[393] Reasoning now in a factual vacuum, the court conjured the image of welfare-subsidized drug dealers preying on a victimized public and declared that the threat constituted yet another safety-related special need supporting universal drug testing among welfare recipients.[394] The characterization, however, bears no relation to available data establishing that no more than one in five welfare recipients even uses an illicit drug in a given year,[395] that no more than four percent of recipients are addicted,[396] and that less than six percent of applicants and recipients in related aid programs have lost benefits based on drug-related criminal activity.[397] The court's analysis at this juncture mirrors rational-basis review in the context of equal protection, where any imaginable justification is sufficient to sustain the state's conduct irrespective of the record or the state's actual objectives.[398] Rational basis review is essentially synonymous with no review at all,[399] and its application in this context reduces the special-needs inquiry to pretense.[400]

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[389] *Marchwinski*, 309 F.3d at 336.

[390] *See* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1140 (E.D. Mich. 2000), *aff'd by an equally divided court*, 60 F. App'x 601 (6th Cir. 2003) (en banc).

[391] *See supra* notes 212–13 and accompanying text.

[392] *See supra* notes 363–66 and accompanying text.

[393] *Marchwinski*, 309 F.3d at 336.

[394] *Id.*

[395] *See supra* note 214 and accompanying text.

[396] *See supra* notes 212–13 and accompanying text.

[397] *See, e.g.*, U.S. GOV'T ACCOUNTABILITY OFFICE, GAO-05-238, DRUG OFFENDERS: VARIOUS FACTORS MAY LIMIT THE IMPACTS OF FEDERAL LAWS THAT PROVIDE FOR DENIAL OF SELECTED BENEFITS 13–15 (2005) (setting forth data from public housing programs).

[398] *See, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 660 (1973); Dandridge v. Williams, 397 U.S. 471, 508 (1970) (Marshall, J., dissenting).

[399] *Id.*; *cf.* Loffredo, *supra* note 9, at 1283–84 ("Indeed, in the nearly twenty years that this rule has been in effect, the Court has not invalidated a single poverty classification or social welfare restriction.").

[400] To the extent that the circuit's imagined crime-fighting rationale might envision testing as a means of identifying specific criminal suspects, it would also run headlong into the first and primary restriction placed on special-needs searches—that they be employed only for purposes "divorced from the State's general interest in law enforcement." Ferguson v. City of Charleston, 532 U.S. 67, 79 (2001); Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656, 665–66 (1989).

Completing its reinvention of special needs, the court struck out beyond public safety to declare yet another rationale for suspicionless searches—the state's pedestrian interest in the fiscal integrity of its benefits program.[401] The court asserted, without citation to any authority, that it is true "beyond cavil that the state has a special need to insure that public moneys expended in the [program] are used by the recipients for their intended purposes and not for procuring controlled substances . . . ."[402] The implications of this claim are most sweeping of all. Applicable to virtually any government benefit, the rationale establishes that the simple receipt of a tax deduction, credit, or subsidy empowers the state to conduct warrantless and suspicionless searches to verify that the beneficiary does not use the funds to buy contraband. There is virtually no one left who, in the wake of such reasoning, might remain protected from suspicionless searches to advance the state's generalized interest in assuring that its ubiquitous largesse is not diverted to the purchase of illicit drugs.[403]

Having devised an unprecedented set of special needs to justify Michigan's testing program,[404] the Sixth Circuit was obliged to proceed to the next step of the special-needs inquiry and balance the strength of the government's rationale against the individual privacy interests at stake.[405] Acknowledging that this inquiry required consideration of the efficacy of Michigan's search policy in meeting the government's asserted goals,[406] the Sixth Circuit declared that blanket drug testing was indeed an effective method of addressing drug abuse—for the sole reason that Michigan's program applied universally to the applicant and recipient population and thus assertedly would catch all abusers in its net.[407] As discussed above, however, blanket drug testing is actually an ineffective method of identifying drug-related abuse and associated dysfunction.[408] The overwhelming majority of positive drug tests will be for the casual use of marijuana, which implicates none of the state's purported concerns.[409] Conversely, much of the most serious drug abuse will avert detection due to the speed with which such drugs are metabolized following ingestion.[410] Rather than an effective means of addressing the state's interest in drug-related abuse and crime, blanket drug testing of the

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[401] Marchwinski v. Howard, 309 F.3d 330, 336 (6th Cir. 2002), *reh'g en banc granted*, *judgment vacated*, 319 F. 3d 258 (6th Cir. 2003) (en banc).

[402] *Id.* Notably, recent drug testing legislation has incorporated this rationale. A bill introduced in Louisiana in 2009 declares that the state has a "compelling interest in providing safeguards to eliminate the misappropriation of entitlement benefits." H.R. 137, 35th Reg. Sess. (La. 2009).

[403] *Cf.* Note, *supra* note 153, at 2001–02.

[404] *See* Gustafson, *supra* note 74, at 679.

[405] *Marchwinski*, 309 F.3d at 336–37.

[406] *Id.* at 336; *see, e.g.*, Bd. of Educ. v. Earls, 536 U.S. 822, 834 (2002).

[407] *Marchwinski*, 309 F.3d at 336.

[408] *See supra* Part II.A.3.

[409] *See supra* note 250 and accompanying text.

[410] *See supra* notes 244 & 247 and accompanying text.

welfare population is precisely the kind of symbolic empty gesture that the Supreme Court has repudiated as a basis for suspicionless searches in other contexts.[411]

The results of Michigan's brief period of testing corroborate this conclusion. Of the 258 participants, only twenty-one tested positive for an illicit drug, all but three of whom for marijuana use alone.[412] Thus, of the subject population, only 8.1 percent tested positive for any drug, and only 1.2 percent were identified as using a serious illicit drug.[413] In the recounting of the Sixth Circuit, however, this data reduced to the following fiction: "[T]he tests so far conducted have resulted in approximately ten percent positive results, demonstrating that the means utilized by Michigan are effective in detecting drug abuse among aid recipients."[414]

Positing the efficacy of drug testing, the Sixth Circuit turned next to the countervailing privacy interests and predictably concluded that welfare recipients lack a defensible expectation of bodily privacy.[415] The court based this conclusion on the novel assertion that welfare is a heavily regulated "industry"[416] that carries with it "a correspondingly diminished expectation of privacy."[417] In support of the proposition, the Sixth Circuit cited—but did not quote—a passage from *Skinner v. Railway Labor Executives' Association* that referenced the scope of industrial regulation in upholding a drug testing program for certain railroad employees.[418] The actual language of the cited passage, however, demonstrates a quite different and especially unhelpful point: "[T]he expectations of privacy of [the tested] employees are diminished by reason of their participation in an industry that is regulated pervasively to ensure safety, a goal dependent, in substantial part, on the health and fitness of the covered employees."[419] The diminished expectation of privacy in *Skinner*, then, was not a function of regulation generally but of the specific employees' state-supervised obligation to protect public safety—a concern that obviously offers no support for Michigan's blanket drug testing scheme.

The Sixth Circuit thus advanced a proposition bearing no relation to the holding in *Skinner*: that the state's general power to search regulated businesses[420] establishes by analogy an equivalent power to search the blood and urine of "heavily regulated" welfare recipients.[421] It is not an elusive distinction, however, that

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411 Chandler v. Miller, 520 U.S. 305, 322 (1997).

412 *See supra* notes 262–63 and accompanying text.

413 *Id.*

414 Marchwinski v. Howard, 309 F.3d 330, 336 (6th Cir. 2002), *reh'g en banc granted, judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc).

415 *Id.* at 336–37.

416 *Id.* at 336.

417 *Id.* at 337.

418 *Id.* at 336–37.

419 Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602, 627 (1989).

420 *See, e.g.*, Camara v. Mun. Court, 387 U.S. 523 (1967).

421 *Marchwinski*, 309 F.3d at 337.

> the general acceptance of random inspection programs with respect to the scrutiny of business *premises* does not support a comparable approach as to drug testing of [individuals] . . . . Urinalysis in particular is more intrusive, as it involves a "basic offense to human dignity." This means, for one thing, that random drug testing should be rarely allowed and only upon a showing considerably more substantial than would suffice to support a random business inspection scheme.[422]

Needless to say, the suggestion that a welfare recipient's expectation of bodily privacy is analogous to the privacy of a meat-packing plant is an improbable stretch. Were it not, the Sixth Circuit's argument would subject virtually anyone receiving a regulated government benefit to suspicionless searches within the administrative scope of the program in question. By unhinging privacy expectations from public safety, as in *Skinner*, and linking them instead to the degree of government regulation, the court's argument would empower the state to unilaterally disable the Fourth Amendment—since by simply increasing the extent of its regulatory intrusion, government would simultaneously invalidate any countervailing privacy expectation.[423] So construed, the Fourth Amendment would be reduced to a perfectly circular nullity.[424]

The circuit completed its analysis by turning to *Wyman v. James*.[425] "Even were we to conclude that the state could not show a special need sufficient to justify the drug testing," the court declared, plaintiffs would still lose under *Wyman*.[426] Reliance on the superseded and idiosyncratic authority of *Wyman* to trump the special-needs analysis, however, is impossible as a matter of ordinary adjudication. First, as the district court noted, *Wyman*'s analysis rests on a variety of assumptions that are irreconcilable with more recent special needs authority, including the proposition that the voluntary nature of a request for assistance generally diminishes a recipient's expectation of privacy with respect to all related administrative interactions.[427] If *Wyman*'s voluntariness analysis were still good law, the Supreme Court's subsequent special-needs decisions in the employment context would have been reasoned in an entirely different fashion, since in each the individual's relationship with the state was the product of a voluntary employment arrangement that would have obviated any further inquiry under the Sixth Circuit's reasoning.[428] Indeed, as the district court noted, the outcome

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[422] LAFAVE, *supra* note 109, § 10.2(g) (footnote omitted).

[423] *See* Stuntz, *Fourth Amendment Privacy*, *supra* note 74, at 1268.

[424] *Id.*

[425] 400 U.S. 309 (1971).

[426] *Marchwinski*, 309 F.3d at 337.

[427] *See* Marchwinski v. Howard, 113 F. Supp. 2d 1134, 1143 (E.D. Mich. 2000), *aff'd by an equally divided court*, 60 Fed. Appx. 601 (6th Cir. 2003) (en banc); *cf. Marchwinski*, 309 F.3d at 337.

[428] *See* Nat'l Treasury Emps. Union v. Von Raab, 489 U.S. 656 (1989); Skinner v. Ry. Labor Execs.' Ass'n, 489 U.S. 602 (1989).

itself would have changed in *Chandler v. Miller*, since the activity in question—running for public office—is voluntary as well.[429] Similarly, *Wyman*'s reference to the state's interest "in ensuring that the money it gives to recipients is used for its intended purposes"[430] echoes the Sixth Circuit's effort to devise a special need on the same fiscal-oversight grounds and suffers from the same insurmountable flaws.[431] Thus, to accede to *Wyman* in the face of the conflicting requirements of the special-needs doctrine necessarily requires that one accept a poverty-specific Fourth Amendment doctrine which, through *Wyman*, bypasses the protections afforded all others. In dismissing special needs in deference to *Wyman*, this is precisely the conclusion reached by the Sixth Circuit.

Beyond the fact that the special-needs doctrine supersedes *Wyman* and forecloses its reasoning, the *Wyman* analysis itself provides quite limited support for the privacy intrusion at issue in the Michigan litigation. In *Wyman*, caseworkers visited the homes of welfare recipients for the specific purpose of assessing their needs and the welfare of dependent children.[432] The *Wyman* Court relied heavily on this rehabilitative objective to uphold the contested practice—emphasizing in particular that the entries were friendly,[433] involved no close inspection of the premises,[434] and were designed not to penalize program participants but to aid in their assistance.[435] By contrast, drug testing is punitive, invasive, and has only an attenuated connection to either the needs of recipients or the well-being of their children.[436] Ignoring these differences, the Sixth Circuit declared that the Michigan program was analogous to *Wyman* because "[t]he State is attempting to insure that children are adequately cared for" and that "ascertaining whether the adult recipients . . . are abusing controlled substances is directly related to that end."[437]

Having thus mischaracterized all material aspects of the special-needs inquiry and its relationship to *Wyman*, the Sixth Circuit reached the predestined conclusion that Michigan's drug testing program was constitutionally permissible.[438] The breadth and magnitude of the court's analytic errors, and their improbable implications if applied beyond the context of welfare administration, highlight the fundamentally different type

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[429] *See Marchwinski*, 113 F. Supp. at 1143; Chandler v. Miller, 520 U.S. 305 (1997).

[430] *Marchwinski*, 309 F.3d at 338; *see Wyman*, 400 U.S. at 318–19.

[431] *See supra* notes 401–03 and accompanying text.

[432] *Wyman*, 400 U.S. at 319–20.

[433] *Id.* at 322–23.

[434] *Id.* at 320–21 ("snooping in the home [was] forbidden").

[435] *Id.* at 317, 319–20; *see, e.g.*, *id.* at 319 ("The emphasis of the [program] is upon the home, upon 'close contact' with the beneficiary, upon restoring the aid recipient 'to a condition of self-support,' and upon the relief of his distress.").

[436] *See supra* notes 408–13 and accompanying text.

[437] Marchwinski v. Howard, 309 F.3d 330, 338 (6th Cir. 2002), *reh'g en banc granted*, *judgment vacated*, 319 F.3d 258 (6th Cir. 2003) (en banc); *see* LAFAVE, *supra* note 109, § 10.3 (noting that the *Marchwinski* court "misread *Wyman*").

[438] *Marchwinski*, 309 F.3d at 338.

of adjudication at issue here. To make sense of *Marchwinski* in light of the conventional Fourth Amendment, one must accept that the analysis operates outside the constraints of normal doctrine—as illustrated by the court's desultory effort to reconcile its reasoning with otherwise binding authority. The Sixth Circuit's opinion inhabits a separate and subconstitutional dimension of the law, demarcated by the court's instinctive sense that welfare recipients are simply different when it comes to the question of privacy. Within that separate sphere, poverty functions as a proxy for cause and the requirements of individualized suspicion yield to the presumptive culpability of an imagined class of drug addicts, criminals, and welfare queens.

The fate of Michigan's testing program, however, was still not settled. On plaintiffs' petition for en banc review, the full Sixth Circuit vacated the panel opinion,[439] reheard the matter, and ultimately upheld the district court's injunction by an equally divided vote announced in a four-sentence order.[440] That divided and conclusory resolution, while bringing an end to Michigan's testing program, simply underscored the broader challenges that face indigent litigants asserting privacy interests. The question should not have been remotely close: neither the special-needs doctrine nor *Wyman* provides any principled basis to inflict suspicionless body searches upon the entire population of welfare recipients. The full circuit's equivocation in addressing the question merely deferred the issue to another day and compounded the sense that few rights come easily to the American poor.

CONCLUSION

The Constitution remains an elusive and often hollow promise for impoverished Americans. Facing doctrine that formally rejects both positive socioeconomic rights as well as any meaningful protection against discriminatory state action, the poor as a class are explicitly deconstitutionalized in relation to the law. Beyond doctrinal indifference, however, the indigent face affirmative bias as well. Across a range of fundamental interests, the judiciary has established a bifurcated system of rights enforcement that denies indigent litigants the full force of otherwise applicable constitutional guarantees. The construed Constitution is thus not merely irrelevant but at times quite hostile to the interests of those most in need of its protection.

This Article proposes a modest step forward in the effort to reset this constitutional relationship: to finally repudiate the longstanding bias that burdens indigent litigants seeking to vindicate basic privacy rights. In a series of decisions stretching from *Wyman* to *Marchwinski* and *Sanchez*, the federal appellate courts have crafted a subconstitutional privacy doctrine that subjects welfare recipients to unique and humiliating intrusions. The decisions reflect the familiar premise that the poor constitute an inherently culpable class and thus that poverty itself may be used as a proxy for cause in

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[439] Marchwinski v. Howard, 319 F.3d 258 (6th Cir. 2003) (en banc).

[440] Marchwinski v. Howard, 60 F. App'x 601 (6th Cir. 2003) (en banc).

justifying suspicionless intrusions. In rejecting this caricature, the district court in *Marchwinski* took the Constitution at its word and applied the Fourth Amendment on its conventional terms to uphold the poor's basic right to bodily autonomy. The prospect of litigation around the flood of new drug testing proposals may offer the federal judiciary a chance to revisit its choice between these two starkly different visions of the privacy right, and to finally remedy an enduring injustice.

The choice should not be difficult. Embracing neutral adjudication in this context, however, would represent a decisive shift in the judiciary's treatment of impoverished Americans. The opportunity may soon arrive for the courts to take that small but defining step. It will be an occasion not only to redeem a corrupted doctrine but to affirm for the poor the legitimating promise of constitutional adjudication itself.