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An Indeterminate Mix of Due Process and Equal Protection: The Undertow of In Forma Pauperis

Eric K. Weingarten

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COMMENT

AN INDETERMINATE MIX OF DUE PROCESS AND EQUAL PROTECTION: THE UNDERTOW OF *IN FORMA PAUPERIS*

INTRODUCTION

In 1994 a Mississippi trial court took away Melissa L. Brooks's right to be the legal mother of her own children; her name was removed from their birth certificates.[1] When Ms. Brooks attempted to appeal the termination of her parental rights, Mississippi law required her to pay for the necessary transcripts to obtain such an appeal.[2] Unable to pay the transcript expense, Ms. Brooks requested that the state supreme court waive this requirement and allow her to proceed *in forma pauperis*.[3] The Mississippi Supreme Court denied her request.[4] Simply put, Ms. Brooks could not legally question the termination of her parental rights because she was poor.

Believing she had a constitutional right to proceed *in forma pauperis*, Ms. Brooks appealed her case to the United States Supreme Court. In *M.L.B. v. S.L.J.*, Ms. Brooks struggled through the Court's complex *in forma pauperis* jurisprudence in order to gain an appeal of her parental rights termination. Ms. Brooks ultimately won her Supreme Court case because the private interest involved, her parental right, was too important to ignore.[5] In *M.L.B.*, the private interest overcame the doctrinal difficulties. Not every indigent, however, will be as lucky as Ms. Brooks.

While past *in forma pauperis* decisions have generally expanded protections for the poor, and at least on the surface appear consistent, there are potentially devastating problems with this doctrine. *In forma pauperis* lies within the confusing overlap of fundamental rights jurisprudence of equal protection and due process. As a result, Supreme Court *in forma pauperis* decisions have consistently cited varying constitutional grounds. The doctrine in this area thus lies indeterminate. With indeterminacy comes uncertainty and the potential for abuse by judges. As such, danger lurks in the undertow below the apparently calm and consistent surface of *in forma pauperis* protection. This Comment analyzes this dangerous doctrinal undertow and attempts to provide a definitive current of analysis.

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1. David G. Savage, *Ruling for a Mother's Rights Puts Human Face on Supreme Court's Work*, A.B.A. J., Mar. 1997, at 40.

2. M.L.B. v. S.L.J., 117 S. Ct. 555, 560 (1996).

3. *In forma pauperis* "[d]escribes permission given to a poor person (i.e., indigent) to proceed without liability for court fees or costs." BLACK'S LAW DICTIONARY 779 (6th ed. 1990).

4. *M.L.B.*, 117 S. Ct. at 560.

5. *See id.* at 563-69.

Part I of this Comment analyzes the similar historical and doctrinal roots of due process and equal protection jurisprudence. Part I also places this analysis within the court access setting. Part II presents the *M.L.B.* case, focusing on each method of Fourteenth Amendment analysis upon which the majority, concurrence, and dissent are founded. Part III illustrates the confusion in the doctrine and the resulting problems. It then proposes a solution. Part IV underscores the need to choose a definitive doctrinal direction so that appropriate *in forma pauperis* analysis is ensured.

I. BACKGROUND

The Fourteenth Amendment represents one device in a long progression that is designed to protect individuals from the potentially awesome power of the state. While much of Fourteenth Amendment doctrine is seen as a lineage, parts of that lineage overlap in concept and scope. These overlapping sections of doctrine are fundamental to understanding the right to court access predicament.

A. *Historical Roots of Overlap*

In the broadest sense, *in forma pauperis* protection for indigents is merely the latest expansion of protection that has grown since the Magna Carta.[6] In 1225, the Magna Carta declared that no "freeman" could be denied his freedom or land without fair hearing before some sort of body.[7] One hundred twenty years later this concept was enforced by another English legal provision that reiterated similar protections, this time specifying the familiar words, "by due process of law."[8] These provisions

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6. Edward J. Eberle, *Procedural Due Process: The Original Understanding*, 4 CONST. COMMENT 339, 340 (1987). At the heart of Eberle's commentary is the fact that these particular laws, and their underlying original impulse of due process, was to protect the process itself, namely notice and the right to answer legal allegations before a court of law. *Id.*

7. Eberle notes the applicable text:

> No Freeman shall be taken, or otherwise imprisoned, or be disseized of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or destroyed; nor we will not pass upon him, nor condemn him, but by lawful Judgment of his Peers, or by the Law of the Land.

Id. (citing the original Latin text, 9 Hen. 3, ch. 29 (1225)).

The Supreme Court itself has recognized the implications of the Magna Carta in the *in forma pauperis* situation that this Comment addresses. The Court stated:

> Providing equal justice for poor and rich, weak and powerful alike is an age-old problem. People have never ceased to hope and strive to move closer to that goal. This hope, at least in part, brought about in 1215 the royal concessions of Magna Carta . . . . These pledges were unquestionably steps toward a fairer and more nearly equal application of criminal justice. In this tradition, our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.

Griffin v. Illinois, 351 U.S. 12, 16-17 (1956).

8. Eberle notes the full text of the 1354 English statute: "That no Man of what Estate or Condition that he be, shall be put out of Land or Tenement, nor taken nor imprisoned, nor disinher-

grew in importance, eventually becoming the rallying cry of the English constitutionalists of the 1600s.[9] These pioneers were the philosophical forefathers of the American legislators and judges who in the 1800s opened the door for the establishment of the Fourteenth Amendment.[10] Incorporated in American government in sources ranging from state constitutions to the United States Supreme Court, political ideas from six hundred years ago emerged again and again, and were finally adopted by Congress in 1868.[11]

B. *The Fourteenth Amendment Setting: Overlapping Tests and Goals*

Ensuring court access for indigents is an example of the Fourteenth Amendment's protection of individual rights from unwarranted governmental interference. These individual rights derive, in great part, from the weight of the words, "nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny any person within its jurisdiction the equal protection of the laws."[12] Out of these words grew two distinct lines of constitutional protection, due process and equal protection.

The Court identifies two types of due process: substantive and procedural. Procedural due process encompasses that process which is due before the government can take away an individual's life, liberty, or property.[13] In determining whether a procedural due process violation occurred the Court will weigh the individual and governmental interests.[14]

The Court begins substantive due process analysis with a determination of the right's fundamental/non-fundamental nature.[15] Such analysis

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ited, nor be put to death, without being brought in Answer by due Process of the Law." Eberle, *supra* note 6, at 340 (citing 28 Edw. 3 ch. 3 (1354)).

9. *Id.* at 341.

10. *Id.* at 341-42.

11. *Id.*

12. U.S. CONST. amend. XIV, § 1.

13. *See* Board of Regents v. Roth, 408 U.S. 564, 569 (1972); *see also* David Crump, *How Do the Courts Really Discover Unenumerated Fundamental Rights? Cataloguing the Methods of Judicial Alchemy*, 19 HARV. J.L. & PUB. POL'Y 795, 810-11 (1996).

14. For the assessment of challenged state procedures, the Court has adopted the *Mathews v. Eldridge*, 424 U.S. 319 (1976), procedural due process test. *See* Parham v. J.R., 442 U.S. 584, 599-600 (1979). The Court in *Mathews* stated the test as a balance and consideration of three factors: (1) the private interest involved; (2) the risk that the procedures in question will erroneously usurp that right; and (3) the justification or interest that the Government has in using such procedures. *Mathews*, 424 U.S. at 335; *see, e.g.*, Lassiter v. Department of Social Servs., 452 U.S. 18, 27-31 (1981) (determining that the *Mathews* test applies to parental termination proceedings).

15. *See* Reno v. Flores, 507 U.S. 292 (1993). Initially, substantive due process was seen as only providing protection from economic regulation that impinged upon liberty and, as such, only "economic" fundamental rights. *See* Lochner v. New York, 198 U.S. 45 (1905); Rosalie Berger Levinson, *Protection Against Government Abuse of Power: Has the Court Taken the Substance Out of Substantive Due Process*, 16 U. DAYTON L. REV. 313, 318 (1991). The notion of substantive due process, however, gradually changed and expanded. *See* Anthony C. Cicia, *A Wolf in Sheep's*

is often subjective and is a point of contention among the Justices.[16] After such a determination, the Court subjects the infringement on the right to the appropriate level of scrutiny under which the governmental interest is placed,[17] through a device called a "means-end scrutiny test."[18] Under this framework, the Court examines the end goal of the infringing statute and the means by which the state attempts to achieve these results.[19]

Clothing?: A Critical Analysis of Justice Harlan's Substantive Due Process Formulation, 64 FORDHAM L. REV. 2241, 2241 (1996). Substantive due process rights came to be recognized under the Fourteenth Amendment's zone of privacy protection. *See, e.g.*, Loving v. Virginia, 388 U.S. 1 (1967) (right to freedom of marriage); Griswold v. Connecticut, 381 U.S. 479 (1965) (right to contraception). Yet, the judicial conservatism present in the 1980s stemmed this expansion and threatened the existence of the doctrine itself, as exemplified in *Bowers v. Hardwick*, 478 U.S. 186 (1986). In *Bowers*, the Court determined that no fundamental right to homosexual sodomy existed. *Bowers*, 478 U.S. at 190-91. The Court went further, stating:

> Nor are we inclined to take a more expansive view of our authority to discover new fundamental rights imbedded in the Due Process Clause. The Court is most vulnerable and comes nearest illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution.

Id. at 194.

16. The fundamental rights debate is often a clash between originalists and non-originalists. *See* David B. Anders, Note, *Justices Harlan and Black Revisited: The Emerging Dispute Between Justice O'Connor and Justice Scalia over Unenumerated Fundamental Rights*, 61 FORDHAM L. REV. 895, 897 (1993). Originalists argue that the Constitution should be read strictly and thus only the specific rights described therein should be recognized. *Id.* at 897-98. At the heart of the originalist position is the notion that the Court should engage in legal analysis, not political policy making. *Id.* The solution for originalists, then, is an ethic of restraint and neutrality couched in the guises of striving for the Framers' original intention of the text. *Id.* at 898-99. In this manner, the independent political views of a particular judge will hopefully be weeded out of the analysis mix. *Id.* at 899.

Non-originalists, sometimes called fundamental rights theorists, argue that the Constitution was never intended to be an all inclusive laundry list of fundamental rights. *Id.* at 900. Rather, they argue that the Constitution presents a set of "general moral concepts." *Id.* In this manner they posit that non-originalism does not ignore the precepts of the Constitution at all, rather, non-originalism is just a different interpretation of the Constitution's meaning. *Id.* From these "general moral concepts," rights are distilled and applied to particular situations. *Id.* This debate between originalists and non-originalists, while highly intriguing, is beyond the scope of this Comment.

From either of theese two positions, the Court has been clear that expanding the scope of substantive due process is no cavalier endeavor. The Court clearly stated:

> As a general matter, the Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field.

Collins v. City of Harker Heights, 503 U.S. 115, 125 (1992).

17. If the Court determines that the right violated was fundamental, then the state must first prove that the state interest in violating that fundamental right is "narrowly tailored to serve some compelling state interest." *Reno*, 507 U.S. at 301-02. In order for a law to be considered narrowly tailored it must be "the least onerous alternative available for achieving the purpose [compelling state interest]." Russell W. Galloway, Jr., *Basic Substantive Due Process Analysis*, 26 U.S.F. L. REV. 625, 638 (1992).

If the right violated is deemed not to be fundamental, then through a "means-end scrutiny" test the burden is on the individual, *id.* at 643-44, to prove that the law infringing the right is not rationally related to some legitimate state interest. Washington v. Glucksberg, 117 S. Ct. 2258, 2271 (1997). This is known as the rational basis test. *Glucksberg*, 117 S. Ct. at 2271.

18. Galloway, *supra* note 17, at 627.

19. *Id.*

The Equal Protection Clause[20] protects rights that are either "explicitly or implicitly guaranteed by the Constitution."[21] Additionally, the Equal Protection Clause "embodies a general rule that States must treat like cases alike but may treat unlike cases [dissimilarly],"[22] as long as that dissimilarity is not based upon a suspect classification or a fundamental right.[23] At the highest level of scrutiny there are two possible analytical approaches. Under one, if a law has an "invidious discriminatory purpose,"[24] disproportionately harming a group of people similarly situated to others and the statute classifies individuals in a suspect manner, the respondent State must prove a compelling state interest for such discrimination.[25] Under the other, if the law unequally burdens a fundamental right in its classification (regardless of whether that classification is suspect), a compelling interest must also exist.[26]

As the Court duly notes, most state laws classify individuals in some manner.[27] However, the Court recognizes few classifications as suspect. Only race,[28] national origin,[29] and ethnicity[30] currently qualify. Wealth is the classification at issue in court access situations, as statutes that set fees for court access inherently classify individuals into those

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20. "No state shall . . . deny any person within its jurisdiction equal protection of the laws." U.S. CONST. amend. XIV, § 1.

21. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973).

22. Vacco v. Quill, 117 S. Ct. 2293, 2297 (1997).

23. *See, e.g.*, Rinaldi v. Yeager, 384 U.S. 305, 309 (1966). The Court underscored its focus on such particularized equal protection when it noted that

> To be sure, the constitutional demand is not a demand that a statute necessarily apply equally to all persons. "The Constitution does not require things which are different in fact . . . to be treated in law as though they are the same." . . . Hence, legislation may impose special burdens upon defined classes in order to achieve permissible ends. But the Equal Protection Clause does require that, in defining a class subject to legislation, the distinctions that are drawn have "some relevance to the purpose for which the classification is made."

Id. at 309 (quoting Tigner v. Texas, 310 U.S. 141, 147 (1940)).

24. Washington v. Davis, 426 U.S. 229, 241-42 (1976). Under this test, the Court ruled that mere statistical demonstration of discrimination is inadequate to prove violation of the Equal Protection Clause. *Id.* at 240.

25. *Id.* If no fundamental right is violated, yet the statute burdens a suspect class, the state must still show the statute is narrowly tailored to achieve a compelling interest. Russell W. Galloway, Jr., *Basic Equal Protection Analysis*, 29 SANTA CLARA L. REV. 121, 130 (1989). There can also be a lower level of scrutiny yet still above rationality review called intermediate scrutiny. This scrutiny is implicated when a law burdens a quasi-suspect class. *Id.* If a law does not burden a fundamental right or suspect or quasi-suspect class, the Court affords the law in question "a strong presumption of validity." Heller v. Doe, 509 U.S. 312, 319 (1993). Consequently, the individual will then have to prove that the law does not rationally relate to some legitimate state interest. *See generally* Christopher E. Austin, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 776-77 (1982) (discussing equal protection analysis in the context of court access fees).

26. Galloway, *supra* note 25, at 130.

27. Personnel Adm'r v. Feeney, 442 U.S. 256, 271-72 (1979).

28. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954) (holding unconstitutional a law segregating public schools on the basis of race).

29. *See, e.g.*, Korematsu v. United States, 323 U.S. 214 (1944).

30. *See, e.g., id.* at 214.

who can and cannot pay.[31] However, the Court does not recognize wealth as a suspect classification.[32] Furthermore, in the *in forma pauperis* scenario, the Court considers this inevitable classification as rationally related to the efficient administration of state courts.[33]

While the lines of constitutional protection emanating from the Fourteenth Amendment have separate tests, the lines blur and overlap. Right to court access situations underscore this overlap.[34] The Court, under rational relation analysis, has consistently upheld state court fee requirements.[35] As such, an indigent must argue for a heightened level of scrutiny under either due process or equal protection.[36] Under due process the indigent must argue that some fundamental right was taken away without due process. Under an equal protection analysis the indigent must argue that the statute classified based upon wealth or unequally burdened a fundamental right in its classification.

The most significant factor in creating the overlap between due process and equal protection analyses in right to court access cases is that the Court does not find wealth a suspect classification. Once the Court removes the ability of the indigent to argue a suspect classification, the only remaining method of recovery is to implicate a fundamental right. This reality exposes the indigent to rather subjective and indeterminate judicial analyses.[37] A closer look at the right to court access cases elucidates this overlap.

C. *The Right to Court Access: Due Process and Equal Protection Overlap in Action*

Access to the courts encompasses ideas about a process that is due, equal access to that process, liberties and freedoms that are unfairly constrained, and judicial relief.[38] As a result, *in forma pauperis* analysis involves many issues. At a surface level the denial of court access appears a pure denial of fundamental process, and therefore, a denial of proce-

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31. *See* Austin, *supra* note 25, at 768.

32. *See* Dandridge v. Williams, 397 U.S. 471 (1970).

33. The Court explained that "[i]n the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect." *Id.* at 485.

34. M.L.B. v. S.L.J., 117 S. Ct. 555, 566 (1996) ("We observe first that the Court's decisions concerning access to judicial processes . . . reflect both equal protection and due process concerns."). At their respective cores, due process and equal protection really deal with the same concern, as has been noted. *See* Richard H. Fallon, Jr., *Some Confusions About Due Process, Judicial Review, and Constitutional Remedies*, 93 COLUM. L. REV. 309, 310 (1993) ("In its commonest form, substantive due process doctrine reflects the simple but far-reaching principle—also embodied in the Equal Protection Clause—that government cannot be arbitrary." (citation omitted)).

35. *See* Austin, *supra* note 25, at 777-78.

36. *Id.*

37. *See supra* notes 15-16 and accompanying text.

38. *See generally* Austin, *supra* note 25 (discussing various methods of constitutional analysis posited by commentators as the correct framework in which to view court access situations).

dural due process. Such a denial also triggers equal protection concerns, as a distinct group of individuals (the poor) are denied equal treatment under the law. At a deeper level, if the denial of process or the discrimination itself implicates a fundamental right, substantive due process may be triggered. All of these issues influence the form of the *in forma pauperis* piecemealed together by the Court.

The following cases illustrate the extent to which the Justices disagree on what constitutional test to apply: whether to use equal protection, due process, or both. The evolution of the right to court access and its blurred due process, equal protection, and fundamental rights implications began in 1956 with the case of *Griffin v. Illinois*.[39]

In *Griffin*, two individuals were convicted of armed robbery and subsequently appealed their convictions to the Illinois Appellate Court.[40] Illinois state law granted them this right to appeal. However, Illinois law also dictated that the appellant present particular documents to the appellate court. These documents were almost impossible to prepare without obtaining full trial transcripts.[41] Because these defendants were poor and could not afford to pay for these transcripts they requested a fee waiver.[42] The Illinois Supreme Court denied this request.[43] On appeal the U.S. Supreme Court declared the Illinois law unconstitutional, violating the Fourteenth Amendment on both due process and equal protection grounds.[44]

The Court invoked both due process and equal protection, stating that "our own constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discrimination between persons and different groups of persons."[45] Underscoring the equal protection nature of *in forma pauperis* scenarios the Court noted that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[46] The Court made it clear that states were not required to grant such appeals. Once a state afforded individuals that right, however, it could not create an arbitrary monetary bar to exercising that right.[47]

Griffin spawned many cases that further defined the right of court access for indigent appellants. The following are the essential highlights in that series of cases. These cases further demonstrate the overlap be-

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39. 351 U.S. 12 (1956).
40. *Griffin*, 351 U.S. at 13-14.
41. *Id.*
42. *Id.* at 15.
43. *Id.* at 15-16.
44. *Id.* at 17-19.
45. *Id.* at 17.
46. *Id.* at 19.
47. *Id.* at 18-19.

tween due process and equal protection that currently exists in this area of Supreme Court jurisprudence.

In 1971, the Court decided two key cases which expanded the *in forma pauperis* doctrine established in *Griffin*. In *Mayer v. City of Chicago*,[48] the *Griffin* holding was extended on due process grounds to cover appeals of non-felony criminal cases, essentially including all criminal appeals under the *Griffin* umbrella.[49] The *Mayer* Court, however, never *specifically* implicated due process or equal protection alone as the basis for its decision. Rather, the Court based its ruling on the "unreasoned distinction" between felony and non-felony convictions.[50] The Court's analysis, however, possessed a distinct equal protection flavor. The "unreasoned distinction" discussion focused on the rule's unreasonable and differential treatment of similarly situated individuals.[51]

The Court, in 1971, also decided *Boddie v. Connecticut*.[52] In *Boddie*, the Court held that the private interest in dissolving a marriage was of such importance that the state fiscal interest in demanding a fee for such a court transaction violated the Due Process Clause.[53] Focusing on the basic importance of the right of marriage, the Court tied its analysis to the due process historical framework of protection for fundamental rights.[54] In his concurrence, Justice Brennan agreed with the majority, yet believed that the case also presented a classic equal protection problem.[55] He believed that while the majority focused only on due process, the very fact that the case dealt with a denial of a hearing additionally implicated analysis under the Equal Protection Clause.[56] While disagreeing with the majority and Justice Brennan, dissenting Justice Black based his reasoning on both equal protection and due process.[57]

The expansion of the exemption of court access fees for indigents did find its limits. In *United States v. Kras*,[58] the Court held that fees required to file a bankruptcy petition did not violate the Due Process or Equal Protection Clauses of the Fourteenth Amendment.[59] The Court stated that bankruptcy is different than marriage in that "[t]he *Boddie* appellants' inability to dissolve their marriages seriously impaired their

48. 404 U.S. 189 (1971).
49. *Mayer*, 404 U.S. at 193-99.
50. *Id.* at 195.
51. *Id.* at 195-98.
52. 401 U.S. 371 (1971).
53. *Boddie*, 401 U.S. at 374.
54. *Id.* at 376 ("Recognition of this [due process] theoretical framework illuminates the precise issue presented in this case. As this Court on more than one occasion has recognized, marriage involves interests of basic importance to our society.").
55. *Id.* at 387-88 (Brennan, J., concurring).
56. *Id.* at 388.
57. *Id.* at 390-94 (Black, J., dissenting).
58. 409 U.S. 434 (1973).
59. *Kras*, 409 U.S. at 446.

freedom to pursue other protected associational activities."[60] Although Kras's desire to start anew financially was important, it did "not rise to the same constitutional level."[61]

The *Kras* Court noted that the appellant could dissolve his debt in other manners. The legal remedy of bankruptcy, while an option, was not the only option available to the appellant.[62] Also, the "state monopoly" on marriage was an important factor in *Boddie*, and this factor distinguished the two scenarios.[63] The Court based much of its analysis on the absence of a fundamental right and utilized a due process approach.[64]

The *Kras* Court went further yet, implicating equal protection as grounds for ruling in favor of the government. In the process, the Court underscored the overlap between due process and equal protection in such situations.[65] The Court noted that since bankruptcy does not rise to the level of a fundamental right, as it falls into the area of economics and social welfare, strict scrutiny cannot be applied to the government regulation.[66] In the absence of strict scrutiny the Court applied the rational-relation test, finding the filing fees constitutional.[67]

In *Ortwein v. Schwab*,[68] the Court held that a filing fee for welfare appeals did not violate the Due Process Clause because no fundamental right was at stake.[69] The Court reiterated that the poor are not a suspect class and the government's financial interest in supporting its court system was rational.[70] The Court, as it did in *Kras*, noted the non-fundamental nature of the private interest in welfare.[71] To bolster its argument the Court delineated that welfare payments are "in the area of economics and social welfare,"[72] and as such bring the analysis down to the rational-relation level.[73]

In addition, the *Ortwein* Court implicated procedural due process, stating that "procedural due process requires that a welfare recipient be given a pretermination evidentiary hearing. . . . These appellants have

60. *Id.* at 444-45.
61. *Id.*
62. *Id.* In 1994 Congress created a pilot program providing for *in forma pauperis* bankruptcy filing in six federal districts. Karen Gross, *In Forma Pauperis in Bankruptcy: Reflecting on and Beyond* United States v. Kras, 2 AM. BANKR. INST. L. REV. 57, 65 (1994) (discussing *Kras*, the law after *Kras*, and the pilot program itself). However, despite the pilot programs, as the *M.L.B.* case attests, *Kras* still appears to be good law.
63. *Kras*, 409 U.S. at 445.
64. *Id.*
65. *Id.* at 446.
66. *Id.*
67. *Id.* at 446-50.
68. 410 U.S. 656 (1973).
69. *Ortwein*, 410 U.S. at 660-61 (additionally finding no equal protection violation).
70. *Id.* at 659-60.
71. *Id.* at 659.
72. *Id.* at 660 (quoting *Kras*, 409 U.S. at 446).
73. *Id.*

had hearings.'"[74] While the Court clearly performed a fundamental/non-fundamental rights analysis on the asserted right, it is unclear why the Court did not directly discuss its ruling on substantive due process grounds.

Through *Kras* and *Ortwein*, the Court attempted to further clarify the types of interests that would rise to the level of fundamental and deserve protection in court access inquiries.[75] What was clear by the time these cases were decided, however, was that extending *Griffin* to civil court fee waivers was the exception, not the rule.[76]

II. *M.L.B. v. S.L.J.*

M.L.B. v. S.L.J. is the most recent case in the *Griffin* line. It demonstrates the indeterminate undertow of Fourteenth Amendment *in forma pauperis* doctrine. *M.L.B.* is particularly useful because the Court itself acknowledges the confusion and unclear doctrine in this area.

A. *Facts and Procedural History*

Melissa L. Brooks (M.L.B.) and Sammy Lee James (S.L.J.)[77] had two children, were married for approximately eight years, and were divorced in 1992.[78] Upon their divorce, Mr. James retained custody of the children and Ms. Brooks provided child support payments and retained visitation rights.[79] Three months after the divorce[80] Mr. James married J.P.L., and together they filed suit to terminate Ms. Brooks's parental rights so that J.P.L. could legally adopt the children.[81] At the center of the dispute was whether Ms. Brooks had fulfilled her child support and visitation obligations.[82]

On December 14, 1994, the chancery court terminated the parental rights of Ms. Brooks, stating that there had been a "'substantial erosion of the relationship between the natural mother, [M.L.B.], and the minor

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74. *Id.*

75. It has been noted that, "[a]lthough it is not clear how significant the 'fundamental' nature of the marriage relationship was for the *Boddie* Court, the *Kras* and *Ortwein* opinions confirmed the view that access challenges would be unsuccessful unless a fundamental right was involved." Austin, *supra* note 25, at 770-71. This view may be confirmed by the *M.L.B.* case itself where the majority, noting what appears to be a fundamental rights standard in the area of court access fees inquiries, stated, "[w]e place this case within the framework established by our past decisions in this area. . . . [W]e inspect the character and intensity of the interest at stake, on the one hand, and the State's justification for its exaction, on the other." M.L.B. v. S.L.J., 117 S. Ct. 555, 566 (1996).

76. *M.L.B.*, 117 S. Ct. at 563-64. ("In sum, as *Ortwein* underscored, this Court has not extended *Griffin* to the broad array of civil cases.").

77. *See* Savage, *supra* note 1, at 40.

78. *M.L.B.*, 117 S. Ct. at 559.

79. *Id.*

80. Savage, *supra* note 1, at 40.

81. *M.L.B.*, 117 S. Ct. at 559.

82. *Id.*

children.'"[83] This erosion had been caused "'at least in part by [M.L.B.'s] serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children.'"[84] The chancery court determined that Mr. James and J.P.L. "met their burden of proof by 'clear and convincing evidence.'"[85]

Approximately one year later, Ms. Brooks appealed the ruling.[86] While she was granted the right to appeal by Mississippi law, she had to prepay transcript costs amounting to $2,352.36 to fully avail herself of that right.[87] As she was too poor to afford these costs, Ms. Brooks applied for an appeal *in forma pauperis*.[88] The Supreme Court of Mississippi denied her application on the basis that a fee waiver in civil court was only available at the trial level. Unable to pay the fees, Ms. Brooks was effectively denied an appeal.[89] Subsequently, Ms. Brooks filed a writ of certiorari with the U.S. Supreme Court, which the Court granted.[90]

B. *Opinion for the Majority*

The Court framed the issue presented by Ms. Brooks's appeal as whether "a State, consistent with the Due Process and Equal Protection Clauses of the Fourteenth Amendment [may] condition appeals from trial court decrees terminating parental rights on the affected parent's ability to pay record preparation fees."[91] In response, the majority placed *Griffin* and its progeny at the heart of its opinion. Justice Ginsburg utilized the *Griffin* line of cases as the analytical starting point for the majority opinion.[92]

Carefully dissecting the line of *in forma pauperis* decisions, the Court underscored the importance of availing to the poor the right to court access in situations where a fundamental interest is at stake.[93] In contrast, the Court juxtaposed the line of cases dealing with the non-fundamental right of an indigent to counsel in certain proceedings.[94] The Court pointed out that while its decision in *Gideon v. Wainwright*[95] man-

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83. *Id.* (quoting the chancery court's opinion in terminating the parental rights of M.L.B.).
84. *Id.* (quoting the chancery court's opinion).
85. *Id.* (quoting the chancery court's opinion).
86. *Id.* at 560.
87. *Id.*
88. *Id.*
89. *Id.*
90. Savage, *supra* note 1, at 40.
91. *M.L.B.*, 117 S. Ct. at 559.
92. *Id.* at 560-61.
93. *Id.* at 560-62. Justice Ginsburg illustrated this point with the juxtaposition of *Mayer v. City of Chicago*, 404 U.S. 189 (1989), pointing out that even at lesser levels of criminal liability culpability the liberty interest at stake is equally as important as the interest involved at at higher level of criminal culpability in court access cases. *Id.* at 561-62.
94. *Id.* at 562.
95. 372 U.S. 335 (1963).

dates that an indigent be granted counsel if charged with a felony,[96] *Scott v. Illinois*[97] indicates that this is not the case where conviction would not result in imprisonment.[98] With respect to appeals, the Court noted that under *Douglas v. California*[99] the state must provide counsel if the indigent will have to serve prison time and is appealing as a matter of right,[100] yet under *Ross v. Mofitt*[101] no such obligation exists in a discretionary appeal.[102]

Justice Ginsburg then made the jump to the civil court extensions of the *Griffin* doctrine, subsequently detailing *Boddie*.[103] Ginsburg quickly noted *Kras* and *Ortwein*, and declared the extension of *Griffin* to civil cases as the exception, not the rule.[104] Despite this cautionary approach, Justice Ginsburg set the stage for the analysis that was to follow, stating that the Court treats "state controls or intrusions on family relationships"[105] at a different level, implying that Ms. Brooks's case may be on the level of *Boddie*.[106] Ginsburg noted the importance the Court placed on "[c]hoices about marriage, family life, and the upbringing of children."[107] The majority highlighted the importance of the parent-child relationship by detailing the parental rights termination cases of *Lassiter v. Department of Social Services*[108] and *Santosky v. Kramer*.[109]

The Court then used a hybrid standard of due process and equal protection analysis in its analysis of Ms. Brooks's predicament.[110] The Court explained that

> In the Court's *Griffin*-line cases, "[d]ue process and equal protection principles converge." The equal protection concern relates to the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs . . . . The due process concern homes [sic] in

96. *M.L.B.*, 117 S. Ct. at 562 (citing *Gideon*, 372 U.S. at 339).
97. 440 U.S. 367 (1979).
98. *M.L.B.*, 117 S. Ct. at 562 (citing *Scott*, 440 U.S. at 373-74).
99. 372 U.S. 353 (1963).
100. *M.L.B.*, 117 S. Ct. at 562 (citing *Douglas*, 372 U.S. at 357).
101. 417 U.S. 600 (1974).
102. *M.L.B.*, 117 S. Ct. at 562 (citing *Ross*, 417 U.S. at 610, 612, 616-18).
103. *Id.* at 562.
104. *Id.* at 563-64.
105. *Id.* at 564.
106. *Id.* at 563-64.
107. *Id.* at 564.
108. 452 U.S. 18 (1981). In *Lassiter*, the Court essentially underscored the fundamental nature of the parental right by noting that a parent has a right to "'companionship, care, custody and management of his or her children.'" *Lassiter*, 452 U.S. at 27 (quoting Stanley v. Illinois, 405 U.S. 645, 651 (1972)).
109. 455 U.S. 745 (1982). In *Santosky*, the Court again highlighted the primary importance of such rights. The Court determined that due to the importance of the parental right and the severity of its termination, a high degree of proof, under whatever allegations, would have to be proven before a court could terminate parental rights. *Santosky*, 455 U.S. at 766-70; *see also M.L.B.*, 117 S. Ct. at 564.
110. *M.L.B.*, 117 S. Ct. at 566.

> on the essential fairness of the state-orders proceedings anterior to adverse state action.[111]

Justice Ginsburg still noted that while no clear combination test had been devised, the *Griffin* cases "res[t] on an equal protection framework."[112] The Court would weigh the "character and intensity of the individual interest at stake"[113] against the "[s]tate's justification for its exaction."[114]

In its analysis, the Court determined that Ms. Brooks's parental interest was quite important considering the impact of Mississippi's intrusion upon that right: the termination of her parental rights.[115] In contrast, Mississippi's interest in requiring the payment of fees was financial, which the Court felt was not nearly as great as Ms. Brooks's interest, comparing the situation to that in *Mayer*.[116]

Continuing to separate this situation out of the bundle of civil cases, the Court framed the equal protection argument. "[S]anctions . . . like the Mississippi prescription here . . . are not merely disproportionate in impact. Rather, they are wholly contingent on one's ability to pay, . . . they apply to all indigents and do not reach anyone outside that class."[117] The majority overruled the Mississippi Supreme Court after characterizing (1) the state intrusion into the private interest as severe, (2) Ms. Brooks's parental interest as fundamental to liberty, and (3) the state financial interest as minor in comparison.[118]

C. *Justice Kennedy's Concurrence*

Justice Kennedy stated that due process alone, not the *Griffin*-inspired due process/equal protection analysis upon which the majority relied, was a "sufficient basis" for the decision.[119] He justified his position by relying on *Boddie*, *Lassiter*, and *Santosky*. Kennedy stated that these cases dealt with state intrusion into family rights and relations, and were all decided on due process grounds.[120]

D. *Justice Thomas's Dissent*[121]

Justice Thomas, while recognizing the importance of the interest involved in Ms. Brooks's case, feared that the majority's rationale would result in the unnecessary expansion of the fee waiver doctrine, further

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111. *Id.* (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)).
112. *Id.*
113. *Id.*
114. *Id.*
115. *Id.*
116. *Id.* at 566-67.
117. *Id.* at 569.
118. *Id.* at 569-70.
119. *Id.* at 570 (Kennedy, J., concurring).
120. *Id.*
121. Justice Scalia joined in full and Chief Justice Rehnquist joined in Part I only.

burdening the states.[122] He also stated that "[t]he cases on which the majority relies were questionable when decided, and have, in my view been undermined since. Even accepting those cases, however, I am of the view that the majority takes them too far."[123] Justice Thomas criticized the majority's hybrid due process/equal protection analysis for being misguided and confused. Thomas stated that this confused approach warranted at best a separate analysis on both due process and equal protection grounds.[124]

Thomas determined that due process was afforded to Ms. Brooks through her original hearing and that the due process requirement did not require an appeal of such a hearing.[125] In regard to the equal protection issue, he determined that Ms. Brooks, while disproportionally affected by the Mississippi law, was afforded equal protection. This was because the law treated all individuals equally and her inability to pay only prevented her from availing herself of process that was "above and beyond" what the Constitution demanded.[126]

In Part II of his dissent, Justice Thomas declared that he would go as far as overruling the *Griffin* line of cases, including *Griffin* itself.[127] Justice Thomas drew a sharp distinction between criminal and civil actions, arguing that the line of cases succeeding *Griffin* extended the fee waiver principle to interests never contemplated by the *Griffin* Court. It appears that Justice Thomas felt that a clear line could never be drawn limiting the *Griffin* holding, as the lines between the criminal and civil arenas are often unclear.[128] As he stated, "I fear that the growth of *Griffin* in the criminal area may be mirrored in the civil area."[129]

III. ANALYSIS

Beginning with a theoretical exposition into reasons for the inherent problems in the *in forma pauperis* doctrine, this analysis sets out three premises. First, a heightened degree of doctrinal confusion exists in the Court's *in forma pauperis* decisions. Second, this doctrinal indeterminacy facilitates a judge's ability to justify any desired outcome. Third, as such, current *in forma pauperis* doctrine, arguably designed to protect indigents, could be used to deny that protection. Working from the understanding of this three-tiered problem, this analysis ultimately arrives at a solution, a new equal protection test specifically designed for *in forma pauperis* situations.

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122. *M.L.B.*, 117 S. Ct. at 570.
123. *Id.* at 571.
124. *Id.*
125. *Id.* at 572.
126. *Id.* at 574-75.
127. *Id.* at 575.
128. *Id.* at 576-77.
129. *Id.* at 577.

A. *Ms. Brooks's Court Access: What Doctrine?*

In his *M.L.B.* dissent, Justice Thomas presented a valid and striking point. The state of analysis in the majority's opinion is, to put it bluntly, confused.[130] Justice Ginsburg herself drew attention to this jumbled analysis, noting that while decisions in the *in forma pauperis* area rest on an equal protection framework, they also address due process concerns.[131] Indeed, Justice Ginsburg admitted that "[a] 'precise rationale' has not been composed . . . because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis.'"[132] This rationalization seems to be the best explanation the Court can present to explain the unkempt doctrinal mess that is *in forma pauperis*.

One can see from the doctrinal history the vivid inconsistency of the *Griffin* line. Sometimes cases were decided on due process grounds (both substantive and procedural), sometimes equal protection, and sometimes both.[133] The test that the Court uses to analyze *in forma pauperis* is jumbled and unclear. One only has to look to Justice Kennedy's *M.L.B.* concurrence to confirm the Court's confusion in this area. He treats due process alone as the correct justification for the holding in the case, rather than the majority's hybrid analysis.[134]

While the *M.L.B.* majority certainly felt that it ruled justly by protecting a fundamentally important interest,[135] one cannot precisely determine how the majority reached that result. Such decisions only serve to further confuse the concept of fundamental rights and the question of

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130. *See id.* at 570-71 (Thomas, J., dissenting). Justice Thomas argued:

> [C]arrying forward the ambiguity in the cases on which it relies, the majority does not specify the source of relief it grants . . . . And while we are told that cases of this order "cannot be resolved by resort to easy slogans or pigeonhole analysis," the majority nonetheless acknowledges that "most decisions in this area . . . res[t] on an equal protection framework." It then purports to "place this case within the framework established by our past decisions in this area." It is not clear to me whether the majority disavows any due process support for its holding. (Despite the murky disclaimer, the majority discusses numerous cases which squarely relied on due process considerations.)

Id. at 571 (quoting Bearden v. Georgia, 461 U.S. 660, 666, 665 (1983)).

131. *See supra* notes 111-12 and accompanying text.

132. *M.L.B.*, 117 S. Ct. at 566 (quoting Ross v. Moffitt, 417 U.S. 600, 609 (1974) and *Bearden*, 461 U.S. at 666, respectively).

133. *See supra* notes 38-76 and accompanying text.

134. *M.L.B.*, 117 S. Ct. at 570.

135. The majority stated:

> [W]e have repeatedly noticed what sets parental status termination decrees apart from mine run civil actions . . . . To recapitulate, termination decrees "wor[k] a unique kind of deprivation." In contrast to matters modifiable at the parties' will or based on changed circumstances, termination adjudications involve the awesome authority of the State "to destroy permanently all legal recognition of the parental relationship."

Id. at 569-70 (quoting Lassiter v. Department of Social Servs., 452 U.S. 18, 27 (1981), and Rivera v. Minnich, 483 U.S. 574, 580 (1987), respectively).

how those rights interplay with due process, equal protection, and the Fourteenth Amendment in right to court access situations.[136]

B. *Problems in the Current State of* In Forma Pauperis *Analysis*

In *M.L.B.*, the right to proceed *in forma pauperis* flows into the fundamental right of parenthood. This confluence brings the Court's analysis into the area of overlap between substantive due process and equal protection at the fundamental rights level.[137] As the Court duly notes, "'[d]ue process and equal protection principles converge'"[138] in *Griffin*-line cases.[139]

M.L.B. follows the typical *in forma pauperis* pattern. The unequal treatment resulting from the court fee statute immediately implicates equal protection concerns.[140] The denial of process brings into question procedural due process.[141] The parental rights well up substantive due process concerns yet at the same time permeate the heightened scrutiny level of equal protection. True to form, due to this overlap the Court is indecisive about which method of analysis to pursue.

What initially seems to be a quite innocuous confluence of two previously declared rights becomes something greater. *M.L.B.* stands as a red flag. *In forma pauperis* doctrine, in conjunction with the protection it affords indigents, is dangerously close to being pulled into the chaotic undertow of politically motivated judicial decision making spawned by indeterminate doctrine.

In *in forma pauperis* analysis the doctrinal confusion itself is not the entire problem. This confusion expands the avenues judges can follow in their analyses. The right to proceed *in forma pauperis* is sometimes a due process issue, sometimes equal protection, and sometimes both.[142] In reality, any combination or choice of these doctrinal analysis strands effectively leads to a justifiable solution, *any* justifiable solution. A demonstration with the *M.L.B.* situation elucidates these possibilities.

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136. *See* Austin, *supra* note 25. The article by Austin is a good analysis of this state of confusion. As a solution to such confusion, Austin proposes a procedural due process method of analysis based upon *Mathews v. Eldridge*, 424 U.S. 371 (1971). Austin, *supra* note 25, at 779-80. *See generally* Fallon, *supra* note 34 (underscoring the state of confusion that exists in the totality of due process doctrine and the problems that this confusion presents). Two of the problems that Fallon discusses go straight to the heart of the problems that crop up in *M.L.B.*: confusion in what substantive due process doctrine tests to use and their application and what interests are protected by the Due Process Clause. *Id.* at 312-13, 314-37.

137. *See supra* notes 12-37 and accompanying text.

138. *M.L.B.*, 117 S. Ct. at 566 (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)).

139. *Id.* at 565.

140. *See supra* notes 20-33 and accompanying text.

141. *See* Austin, *supra* note 25, at 773. Austin's article presents the argument that the procedural due process model, while not the predominant model in analyzing court access fee cases, is a better method than substantive due process at solving the access fee problem. *See id.* at 779-803.

142. *See supra* notes 38-76 and accompanying text.

1. Holding for Ms. Brooks

A Justice could argue that Ms. Brooks's procedural due process rights were denied; that she should have had an appeal hearing.[143] As the Court pointed out in *Lassiter*, *Santosky*, and *M.L.B.*, fundamental human nature encompasses the parent-child bond. This fundamentally human relationship is congruent with the factors defining the liberty interests previously protected by the Court through procedural due process.[144] Thus, the parent-child bond should be accorded a high level of procedural protection. The state's fee requirement, as demonstrated by Ms. Brooks's situation, carried an undue amount of risk that such rights would erroneously be taken away. The result of the fee law in effect *was* the final, point-of-no-return removal of Ms. Brooks's parental right. Finally, the state's interest in efficiency is quite minor and unimportant in the face of the results, the termination of Ms. Brooks's parental rights.

A Justice could additionally argue that Ms. Brooks's substantive due process rights were denied.[145] The primacy of the parent-child relationship again underscores the fundamental importance of such a familial bond. Contrasting this fundamental importance with the similar underlying human importance of other rights of association already deemed fundamental, a clear fundamental right to parenthood arises. Next, compelling state interest analysis ensues. The fundamental parental right involved trumps the state efficiency right.[146]

Finally, a Justice can find for Ms. Brooks under equal protection theory.[147] Once the Justice establishes the fundamental right of parenthood, circumventing the need for suspect class status, the last step is the same state interest inquiry made under substantive due process.

2. Holding for the State

Under procedural due process analysis, a Justice could validly hold in favor of the State.[148] The Justice could reason the parental interest at the appeal stage as less important than it is at the stage of the initial hearing. At the initial hearing, where the termination of parental rights occurred, the specific private interest itself clashed with government process. At the appeal stage, however, the private interest is the right to appeal. The justification for the state is efficiency and fiscal health. The law

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143. See *supra* note 14 for the *Mathews* procedural due process test applied in this scenario.

144. The Court has noted that "[liberty] denotes . . . the right of the individual to . . . establish a home and bring up children." Meyer v. Nebraska, 262 U.S. 390, 399 (1923).

145. See *supra* notes 15-19 for the substantive due process test applied in this scenario.

146. The argument presented here is much like that of Justice Kennedy in his *M.L.B.* concurrence. *See supra* notes 119-20 and accompanying text; *see also M.L.B.*, 117 S. Ct. at 570 (Kennedy, J., concurring).

147. See *supra* notes 20-33 and accompanying text for the equal protection test applied in this scenario.

148. See *supra* note 14 for the *Mathews* procedural due process test applied in this scenario.

facilitating this interest does exactly that, regulating entry into the courts, and thus contributes to a more efficient court docket. Given the non-fundamental nature of the right to appeal, the state's efficiency and economic interests take precedence.

Under substantive due process,[149] a Justice could argue that parental rights, while highly important, are not the rights at issue in this *in forma pauperis* situation. The right in question is, rather, a free appeal in a civil case. No *fundamental* right to appeal exists in civil cases. If no such right exists, no fundamental right to a free appeal exists. This determination brings the analysis under the rational relation test. Regulation of court access falls under how a state regulates its own welfare.[150] Thus, the state's right to regulate its own courts trumps the individual's right to court access. The statute attempts to place a limit on access to the appellate process through a monetary requirement. The results of such a restriction naturally further the legitimate constitutional power to regulate state welfare.[151]

Finally, a Justice could validly advocate resolution for the state under equal protection.[152] The Justice would essentially reiterate the substantive due process argument that no fundamental right is at issue. The right implicated is, rather, the non-fundamental right to proceed *in forma pauperis* in a civil appeal. The absence of a fundamental right reduces the analysis to looking for a suspect classification by the statute. The Court does not find classification based on wealth to be suspect. Again, the court fee statute rationally relates to the state's efficiency and fiscal policy interests.[153]

3. The Problem Stated

The method a Justice uses to resolve a particular *in forma pauperis* case develops somewhat independently from the constitutional test she chooses to apply. The doctrine as it stands does not sufficiently constrain judicial discretion. The doctrine itself is not *the* determinative factor. The determining factor in the end emanates from what right the Justice seeks

149. See *supra* notes 15-19 and accompanying text for the substantive due process test applied in this scenario.

150. State court fees logically fit within the large police power of the state. The broad deference to the state at this rational relation level is rooted within the infamous footnote four in *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

151. This argument is similar to that of Justice Thomas in the substantive due process part of his *M.L.B.* dissent. *See supra* notes 121-29 and accompanying text; *see also M.L.B.*, 117 S. Ct. at 570-72 (Thomas, J., dissenting).

152. See *supra* notes 20-33 and accompanying text for the equal protection test applied in this scenario.

153. This argument is similar to that of Justice Thomas in the equal protection part of his *M.L.B.* dissent. *See supra* notes 121-29 and accompanying text; *see also M.L.B.*, 117 S. Ct. at 571-72 (Thomas, J., dissenting).

to protect—the individual's or the state's. The differing opinions in *M.L.B.* underscore this indeterminate reality. As Justice Ginsburg stated:

> Choices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as "of basic importance in our society," rights sheltered by the Fourteenth Amendment against the State's unwarranted usurpation, disregard, or disrespect . . . M.L.B.'s case, involving the State's authority to sever permanently a parent-child bond, demands the close consideration the Court has long required to when a family association so undeniably important is at stake.[154]

Justice Thomas, however, used the same constitutional tests as the majority to establish a right on behalf of the state, which he deemed more important than any individual right to civil appeal. "The inevitable consequence will be greater demands on the States to provide free assistance to would-be appellants in all manner of civil cases involving interests that cannot, based on the test established by the majority, be distinguished from the admittedly important interest at issue here."[155]

In the final assessment, the constitutional "test" used in *in forma pauperis* situations becomes a subjective means to an end, merely a tool. The fungability of *in forma pauperis* doctrine poses the true problem. Identifying doctrinal problems is, however, relatively easy. The following pages address the more difficult endeavor of effectively solving these problems.

Logic dictates that a more determinate doctrine would guarantee more consistent results. Thus, a viable solution to the *in forma pauperis* problem is the construction of an objective analytical structure around the applicable clauses of the Fourteenth Amendment. A purely objective superstructure of analysis will curtail the ability of a Justice to substitute her own beliefs for constitutional analysis. While focussing on objectivity, a new and effective *in forma pauperis* test must also capture the spirit of the Fourteenth Amendment, protection from undue state regulation.[156] Such is the paradoxical challenge that the next section of this Comment confronts.

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154. *M.L.B.*, 117 S. Ct. at 564 (quoting Boddie v. Connecticut, 401 U.S. 371, 376 (1971)).

155. *Id.* at 570-71.

156. Drawing on this Comment's background, it is evident that the Fourteenth Amendment, from its Magna Carta roots forward, protects the individual from the unjustified oppressive intrusion of the state. Protecting the poor from some arbitrary court affordability cut-off flows with the familiar goals of justice. Thus, in this manner it seems that the Court's current conception of *in forma pauperis* flows with the driving spirit at the heart of the Fourteenth Amendment.

C. *Doctrine and Indeterminacy*

Critical and Feminist Legal scholars argue that doctrine is extremely subject to manipulation.[157] The critique that these scholars present, demonstrated by the inexactness of *in forma pauperis* doctrine,[158] is often described as the indeterminacy of law and doctrine.[159] The argument follows that a judge will unconsciously manipulate a doctrine in order to arrive at the outcome she wishes. Consequently, any doctrine or law can be manipulated by a judge to justify her determination in a case.[160] In addition, many of these theorists argue that, under what is commonly called the critique of rights, any particular stance by a judge can be justified by a rights-based argument.[161]

The pure law and indeterminacy critique seems to suggest that one doctrine is just as bad as multiple doctrines because any singular doctrine suffers from indeterminacy. From a more pragmatic view, limiting a particular area of the law to just one doctrine does control some of the indeterminacy problem. The more varied the strands of doctrine in a particular area of the law, the more room and opportunity a judge has to be subjective and make more rights-based arguments for an individual or the state.

Thus, a judge faced with such a muddled area of the law as *in forma pauperis* will have multiple avenues to make a rights-based argument for

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157. *See, e.g.*, Karl E. Klare, *Judicial Deradicalization of the Wagner Act and the Origins of Modern Legal Consciousness, 1937-1941*, 62 MINN. L. REV. 265 (1978) (demonstrating how a rather radical law, one that was seen originally as championing the rights of powerless workers, was indeterminate in a "doctrinal sense," and eventually was used by courts as a device to constrain the limits of workers' bargaining power); Frances E. Olsen, *The Myth of State Intervention in the Family*, 18 MICH. J.L. REFORM 835 (1985) (demonstrating the Critique of Rights in showing how a perfectly valid rights-based argument could be made for any sort of state action or non-action in domestic relations cases, either for or against state intervention, and that the idea of intervention itself is indeterminate).

158. *See supra* notes 142-55 and accompanying text.

159. J. Paul Oetken, *Form and Substance in Critical Legal Studies*, 100 YALE L.J. 2209, 2211 (1991). The indeterminacy of law and doctrine was first discussed and presented formally by the legal realists of the early twentieth century. *See generally* John Hasnas, *Back to the Future: From Critical Legal Studies Forward to Legal Realism, or How Not to Miss the Point of the Indeterminacy Argument*, 45 DUKE L.J. 84, 86-98 (1995) (delineating the history of the indeterminacy argument from the legal realists through the process theorists towards the critical legal theorists).

Critical Legal Studies (CLS) is a far-reaching and non-homogenous body of thought. Critical Legal Scholars differ across the spectrum in their approach to and degree of extremity in the application of indeterminacy doctrine. For a better understanding of this universe of opinion and a thorough listing of works on the foundations of CLS, see Duncan Kennedy & Karl E. Klare, *A Bibliography of Critical Legal Studies*, 94 YALE L.J. 461 (1984).

160. *See* Richard Michael Fischl, *Some Realism About Critical Legal Studies*, 41 U. MIAMI L. REV. 505, 513-16 (1987) (describing the nuances of a sample indeterminacy of law and doctrine argument).

161. Elizabeth M. Schneider, *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. REV. 589, 593-97 (1986) (giving an in-depth formulation of all aspects of the critique of rights).

the indigent individual ("private" liberty rights) or for the State ("public" court efficiency rights). This indeterminacy allows for many different lines of justification to evolve, often contradicting each other though they are rooted in the same doctrinal tree.

The following exercise in mathematical metaphor demonstrates this Comment's understanding and approach to the indeterminacy critique.[162] Many proponents of the more extreme vision of doctrine and indeterminacy believe that the problem lies within the existence of doctrine itself.[163] For these advocates, any doctrine, no matter what its original intention or prudent and descriptive wording, will be used by judges to conform to any particular decision.[164] Any doctrine in this extreme vision can be symbolized by ∞ (infinity), meaning that the doctrine has an infinite realm of possible results. Infinity, simply put, encompasses everything.[165] This wholly "infinite" indeterminate aspect of doctrine thus becomes the inherent problem *of* doctrine.[166]

The radical vision of doctrine and indeterminacy becomes quite cumbersome when it comes time to construct a solution that results in a more consistent application.[167] A slight variation of the metaphor presents

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162. In a broader sense, the implications of mathematics on the indeterminacy argument have been previously discussed within the scope of legal scholarship. The context of such discussion focuses on the applicability of particular mathematical theories and proofs to potential indeterminacy of language. Mark R. Brown & Andrew C. Greenberg, *On Formally Undecidable Propositions of Law: Legal Indeterminacy and the Implications of Metamathematics*, 43 HASTINGS L.J. 1439, 1441 (1992). Brown and Greenberg ponder the avenues for obtaining a viable legal formalism through mathematical inference. *See generally id.* (comparing formalism in both the legal and mathematical communities and their corresponding indeterminacy).

163. *See infra* notes 166-67.

164. *Id.*

165. "The symbol '∞' represents a limitless quantity." BARRON'S DICTIONARY OF MATHEMATICS TERMS 167 (Douglas Downing ed., 2d ed. 1995).

166. The radical indeterminacy argument can be drawn out to absurd lengths. Taken to extremes, everything, anywhere in the universe, is entirely indeterminate because it can only be defined relative to something else. That "something else" itself must be defined before it can be used in relation to the original object, color, shape, etc., for definitional purposes. In turn, the "something else" is defined in relation to another "something else," and so on, and so on *ad nauseum*. So every term a judge uses in analysis is in the purest sense indeterminate. However, this Comment, as discussed in the proceeding text and footnotes, works from an understanding that some terms can be defined with sufficient determinacy if placed in a quantifiable matrix. There is precedent for such thinking. *See* Jeremy Waldron, *Vagueness in Law and Language: Some Philosophical Issues*, 82 CAL. L. REV. 509, 522-27. "One should not exaggerate the problem. If vagueness is generally ineliminable, it does not follow that it is irreducible in a given area, or with respect to a given speech community. The most successful endeavors in this regard have involved the comparativization and the quantification of descriptions." *Id.* at 525.

167. Guyora Binder articulates this position, noting that

> If critical legal studies is to have a meaningful effect on an oppressive cultural system, it must move beyond criticism. It must begin to imagine and build social situations that offer people empowered identities. And if critical legal scholars hope to influence their students, they must start thinking about how these situations . . . can be fostered by lawyers.

Guyora Binder, *Beyond Criticism*, 55 U. CHI. L. REV. 888, 889-90 (1988). Binder sternly criticizes the futility of radical critical legal studies and poses a practical solution of political action. *Id.* at 905-14. Binder's solution is a direct response to the frustrating and unending circularity of the radical

a more optimistic approach and, in the end, a more practical solution. One must first admit that at its heart, doctrine is indeterminate. No matter how much one fine-tunes a doctrine there still will be some potential for subjective analysis by any particular judge. Yet, at the same time, if a doctrine can be constructed in a well-defined manner, objective and quantifiable in material terms, it minimizes the impact of indeterminacy.

In the mathematical metaphor, as per this adjustment in theory and understanding, substitute π (pi) for ∞ for a particular doctrine. π, the exact ratio of the circumference to the diameter of any circle, is very well defined.[168] This ratio is the same for *any* circle in the universe.[169] Despite the precise, well-defined, and consistent nature of π, the ratio itself is indeterminate. π is an irrational number, a number which has no last digit; the decimal places carry out forever.[170] Despite this indeterminacy, the ratio remains quite clear and definable, as the indeterminacy becomes less drastic with the calculation of more decimal places. In very much the same way, a highly defined doctrine, based on easily quantifiable objective criteria that are exact (not abstract ideas such as fundamental rights, class status, etc.), can minimize the impact of subjective judicial interpretation. Under this approach indeterminacy becomes manageable.[171]

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critical legal studies conundrum. Hasnas presents the problem succinctly: "If by showing the law to be indeterminate . . . [Critical Legal Studies has] . . . shown it to be an inherently political mechanism by which dominant social groups illegitimately impose their ideological preferences upon society, how can [Critical Legal Studies] advocate its use to produce the egalitarian society [CLS theorists] favor?" Hasnas, *supra* note 159, at 101.

168. DAVID WELLS, THE PENGUIN DICTIONARY OF CURIOUS AND INTERESTING NUMBERS 48 (1987). Selecting π as a metaphor is not an arbitrary decision. π permeates the world that we live in and holds a special place in mathematics. As Wells notes and demonstrates, the value of π crops up in numerous mathematical solutions and the sums of numerous infinite series. *Id.* at 53. Simply put, think of the beauty in a naturally occurring ratio, a ratio in an object that is real, observable, and tangible, that is the same everywhere, that recurs throughout mathematics, that yet at the same time has no exact value.

169. *Id.* at 48.

170. An irrational number is "any real number that is not rational, and therefore any number that cannot be written as a decimal that either terminates or repeats." *Id.* at 12.

171. Using a highly precise metaphor such as π might imply, on the surface at least, that law is a science. The use of this analogy is not meant to imply that law is scientific and ultimately definable. Obviously there are no absolute truths that can be distilled from the vast laboratory of judicial opinions. It is precisely the critique of Critical Legal Studies (and legal realism before it) that such truths do not exist. *See supra* notes 164-73 and accompanying text. The π metaphor implies a solution that works within the Critical Legal Studies matrix (the less radical version of the theory, more along the lines of pragmatic Critical Race Theory or Feminist Legal Theory). The π metaphor accepts the basic Critical Legal Studies critique of doctrinal indeterminacy. Yet, within that indeterminacy the metaphor explores the possibilities for consistency of analysis. The metaphor thus becomes a tool to show that law, while indeterminate and not necessarily scientific *per se*, can be consistent and not arbitrary.

D. *Material Equal Protection*

In forma pauperis analysis inevitably deals with concerns that implicate equal protection. At the heart of all *in forma pauperis* situations is an individual who is denied access to the courts when others are able to gain such access. The law treats at least one person differently from the larger societal group. As previously noted, the current equal protection matrix poses a problem in that indigent individuals fighting for free access to the courts do not comprise a suspect or semi-suspect class.[172] Without such status they must argue some fundamental rights violation and face the indeterminate doctrine of that arena.[173]

Any new structure of analysis must recognize and address the equal protection nature of an *in forma pauperis* analysis and its overlap with substantive due process at the fundamental rights level. A new test for *in forma pauperis* analysis must incorporate equal protection and fundamental rights analysis in a single, separate, determinative test. The new test must clarify and define rights through objective manifestations, not through indeterminate terminology.

While it is true that "the Constitution does not provide judicial remedies for every social and economic ill,"[174] the language of the Equal Protection Clause itself provides judicial remedy for *in forma pauperis* situations. The Equal Protection Clause reads, "[n]o state shall . . . deny any person within its jurisdiction the equal protection of the laws."[175] These words themselves are ample building material for a new constitutional test that avoids the pitfalls that plague current *in forma pauperis* analysis. The best way to gain an understanding of the Equal Protection Clause for the purposes of *in forma pauperis* is to look at what characterizes the Court's results in such cases.

In characterizing the results of *in forma pauperis* cases, a scholar noted that

> the conventional wisdom is that these cases can be reduced to two propositions: first, waiver of access fees is required only if the right sought to be enforced through the courts is fundamental, and second, that waiver is required only when the courts provide the sole means of vindicating that right.[176]

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172. *See* Austin, *supra* note 25, at 773-74. In reality the true root of the *in forma pauperis* problem is the fact that the Court does not see classification based upon wealth as suspect. If the Court did recognize such classification as suspect, an indigent seeking *in forma pauperis* status would have no need to demonstrate a fundamental rights violation. With the absence of a fundamental rights discussion, the overlap between due process and equal protection would be moot. Regardless, this Comment does not take issue with the Court's current construction of suspect class status. Such discussion is beyond the scope of this Comment.

173. *See supra* notes 15-16 and accompanying text.

174. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 32 (1973).

175. U.S. Const. amend. XIV, § 1.

176. Austin, *supra* note 25, at 770.

The Court, discussing its previous protection of individuals from wealth-based discrimination, noted that "[t]he individuals . . . who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were completely unable to pay for some desired benefit, and as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit."[177]

In moving towards determinacy, the key to utilizing these characterizations is removing the rights-based analysis (the root of the current problems of indeterminacy) from consideration while still retaining the Court's intention. Keeping this goal in mind, we turn to an interpretation of the Equal Protection Clause, informed at the most fundamental level by the desired results of the Court.

The first key phrase in the Equal Protection Clause is "any person." This phrase does not imply any need to prove suspect classification to invoke such protection. Under these words the state need only deny one specific individual the protections of the law. The other key phrase is "equal protection of the laws." Simply interpreted, this means that all individuals should be treated equally under the law. While at certain times some legal avenues may be open to some and not others, a violation of "equal protection of the laws" encompasses a situation where a law actually takes away *all* protection. Additionally, nowhere does the Amendment provision discuss state interests. In light of these considerations, this Comment creates a solution to the *in forma pauperis* dilemma: material equal protection.[178]

In its construction, material equal protection analysis takes direct guidance from the wording of the Fourteenth Amendment, yet at the same time eradicates the problems currently present in the muddled doctrine of *in forma pauperis*.[179] Material equal protection focuses on the *material effect* of a statute on the individual seeking relief. In this context, a *material effect* could also be described as a substantive or objective effect. The material effect is the taking away of the only recourse available to the individual to get out of the differential treatment situation. In this situation of differential treatment, the only remedy available is one which only the court can grant.

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177. San Antonio Indep. Sch. Dist. v. Rodriquez, 411 U.S. 1, 20 (1973).

178. The solution and test presented in this article are designed only for use in *in forma pauperis* situations. However, there may very well be applications of such a solution outside the area of *in forma pauperis* in other equal protection cases.

179. Material equal protection was inspired by proposals for reforming equal protection analysis in the area of maternity leave. *See* CATHARINE MACKINNON, SEXUAL HARASSMENT OF WORKING WOMEN (1979); Lucinda M. Finley, *Transcending Equality Theory: A Way Out of the Maternity and the Workplace Debate*, 86 COLUM. L. REV. 1118 (1986). Both Finley and MacKinnon discuss methods of transcending the inherent male standards that women must compare themselves to in order to gain either equal or special protection for maternity leave.

Under material equal protection, a petitioning party will receive protection by the court if she was denied the material legal protection afforded to others. Class status and indeterminate fundamental rights would never be discussed as they are incorporated into the *material* aspect of the analysis.[180] In essence, this method focuses on any *material* differences that the law creates. In the final calculation, the material equal protection assessment of materiality is accomplished through two yes/no questions: (1) Is the court access that the individual seeks access that any other in society can gain under the statute?; (2) Does that individual have any other recourse whatsoever to resolve his or her situation other than the remedy that the court can grant?[181] Under this test a yes answer to the first question and a no answer in the second invoke equal protection.

This two-pronged test effectively blocks the openings for indeterminate judicial decision-making. Both questions require a judge to make an objective determination.[182] The first question fixes its operation around the words "any others." For example, if a statute states that an individual must pay $2000 to gain an appeal it is obvious that some individuals will be able to pay such fees. The answer to the first question is yes, others can gain court access under the statute. Most of the time this answer will be yes. In the interests of docket efficiency, these statutes are written with the expectation that some people can pay, while others cannot. As court access is commonly understood as bringing a grievance before the court, the first question effectively limits the subjective determination that a judge can make. The second question then becomes the key aspect of the material equal protection test.

With respect to both questions in the material equal protection test, the words themselves highly define and guide the decision-making process. These words have common understandings and are placed into a controlled environment: the construction of the test itself. The precise and objective nature of the language makes a Justice look quite unreasonable when she says something does not exist when it really does. In other words, when a test forces a Justice to look for court access that "any others" have and "any other recourse whatsoever," the analysis is reduced to looking for factors that are objectively quantifiable.

The concern might be raised that material equal protection is too narrowly constructed to adapt to changes over time. It is true that the

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180. *See infra* Part III.E.

181. Of course, for any such recourse to be valid it must also be lawful.

182. It may be argued that despite its attempts at objectivity, material equal protection fails at the gate in its use of terms. It is true, as the author has recognized, that all words are indeterminate in exact meaning. This allegation could be made at the words "access" and "recourse," words that are fundamental in the implementation of material equal protection. Yet, as already discussed, there are some terms that *do* have some common understanding attached to them, some aspect of determinacy that guides their usage. "Access" and "recourse" are two such words. *See supra* note 166.

method of material equal protection analysis is constructed narrowly. This construction creates consistency in analysis and results. The scope of the analysis and the results, however, are quite broad. The material equal protection test allows for adaptation as it has no prescription on particular quantities, class status, levels of scrutiny, or protected rights. The *material* effects of different laws may vary over time, yet the ramifications of that differential treatment remains a constant. The methods of assessment are the same yes/no questions and the results are the same *type* of results; the only difference being different situations, rights, and issues.

An intriguing aspect of material equal protection is how the test protects individual fundamental rights without mentioning them. As previously presented in this Comment, a practical critique of rights analysis draws out the fundamental indeterminacy problem with current *in forma pauperis* doctrine.[183] With the many avenues of resolution available to a Justice, all dealing in some manner with a rights-based inquiry, a Justice can validly justify a decision for the individual or the state. While the Equal Protection Clause is often seen as protecting individual rights, by actually bringing rights into the debate the door opens for the denial of such rights. The best way to protect individual rights is to take the rights-based decision away from the judge.

While never dealing with individual rights in a judicially determinative sense, material equal protection is inherently informed by the fact circumstances attendant to such rights. Racial, ethnic, sexual orientation, religious, and gender discrimination are often the bases for differential treatment by laws. As these discriminatory implications inform the particular differential treatment under a law, a Justice answering yes to the first question and no to the second implicitly upholds the rights that were violated in the statute's operation, thus *validating* those individual rights. Under this approach, a Justice who would rather not uphold certain individual rights has no choice but to do so in the appropriate circumstances, based upon the *material and objective* nature of the two yes/no material equal protection questions.

Material equal protection, in sum, fits the model of the mathematical ratio of π. Material equal protection analysis is well-defined and based on easily quantifiable, objective determinations, in the same manner as the ratio of a circle's circumference to its diameter. Indeterminacy still exists in the sense that the judge will make the ultimate decision, as the π ratio is also indeterminate. The quantitative observations the judge must make, however, minimize that indeterminacy.

It is important to note how material equal protection parallels the Court's previous results, yet implements those results in a more determi-

183. *See supra* notes 157-59 and accompanying text.

nate and objective manner. At a deeper level the emphasis on fundamental rights translates such that the more severe the threat to a fundamental right (such as in criminal convictions, parental terminations, etc.), the less the possibility that there will exist some other recourse for the individual to resolve the situation. As detailed previously, fundamental rights are incorporated into material equal protection but in a more determinate manner. A demonstration of this parallel relationship is presented in the next section: an application of material equal protection to the *Griffin* line of *in forma pauperis* cases.

E. *Applying Material Equal Protection to* In Forma Pauperis

This Comment does not disagree with the Court's holdings in the *Griffin* line. It should be clear, however, that future decisions may retract this line of protections. In response, material equal protection promises consistent results in which judges cannot decide cases based upon political leanings. The following section demonstrates the consistent applicability of material equal protection to the *Griffin* line, including *M.L.B.*

The application of material equal protection to Ms. Brooks's situation results in the same outcome reached by the Court. The first question in the analysis, whether the court access sought is available to at least one individual in society is answered with a resounding yes. Quite obviously, at least one individual could pay the transcript costs. The second inquiry, whether the individual has any other recourse whatsoever to resolve her situation other than the remedy that the court can grant, is answered with a definitive no. Ms. Brooks's attempt to re-obtain her parental rights absolutely requires an appeal. The *material* result of the Mississippi law is that Ms. Brooks has no method of appealing the parental rights termination while others faced with the same legal situation could afford the court costs. No method other than a court determination can alleviate the differential treatment. She will thus be able to proceed *in forma pauperis*. In material equal protection terminology, the law *substantively* treats her differently and *materially* affects her differently than other citizens.

Under material equal protection the civil court limitations on the *Griffin* line stand. In *Kras*,[184] while others could gain the desired court access under the statute (by paying the filing fee), other recourses to dissolve debt are available. This denial of bankruptcy proceedings does not violate material equal protection because there is no *material effect* created by such a law. As the *Kras* Court noted, many methods exist for a debtor to resolve his debts, only one of which is filing for bankruptcy.[185]

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184. For a description of the case, see *supra* notes 58-67.

185. United States v. Kras, 409 U.S. 434, 445 (1973). There is evidence in the *Kras* decision itself for the compatibility of material equality with the Equal Protection Clause. The Court stated that, "[Kras's] position [would] not be *materially* altered in any constitutional sense." *Id.* (emphasis added).

The law itself does not deny an individual the ability to resolve debt, which is the *material* aspect of bankruptcy. In contrast, Ms. Brooks is *differentially* affected in a *material* manner because she has no method whatsoever to appeal the termination of her parental rights when others can utilize that method as they can afford the costs.

Additionally, in *Ortwein*,[186] material equal protection upholds the law mandating filing fees for welfare appeals. Some individuals on welfare will probably be able to pay for a welfare appeal filing fee, so the answer to the first inquiry is yes. However, with respect to "any other recourse whatsoever," arguably other recourses do exist for these individuals to alleviate their impoverished situation, such as receiving private charity or obtaining employment.[187] Thus the situation is similar to *Kras*, in that other recourses exist for the individuals seeking relief. The answer to the second question in turn is yes. Invocation of equal protection does not occur. This result may seem anti-intuitive at first glance. The poor in this situation however are not *differentially* treated in any *material* matter as per material equal protection analysis. Simply put, this law does not discriminate on the basis of wealth. While *in forma pauperis* is designed to protect the poor from having poverty itself be used as an obstacle to the ultimate fair distribution of justice and treatment of rights, such protection is not invoked by the *Ortwein* fact pattern. In *Ortwein*, the law in question deals obstensively with poverty itself. Such a law does not violate equal protection. In contrast, a law violative of material equal protection *discriminates on the basis of poverty.*

Under material equal protection the holdings of the other major cases in the *Griffin* line are also consistent. The *Griffin* and *Mayer* cases both elicit the same results. Again, in response to the first question under material equal protection, other people could pay the required court transcript fees and gain court access in a situation where the appellants could not. No other recourse whatsoever exists for the *Griffin* and *Mayer* applicants as their criminal convictions can only be overturned through an appeal granted by the court.[188] Both cases, therefore, invoke equal protection. The *Boddie* case follows in kind.[189] As the appellants have no other way to legally end their marriage and others in society could afford to legally end their own marriages, equal protection is invoked under the two-question material equal protection test.

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186. *See supra* notes 68-74 and accompanying text.

187. While this stance may be controversial, welfare is no longer an entitlement, nor an absolute right. In essence, welfare is a safety net that is not the only method of fiscal recovery for the individual. Compare welfare to the parental rights scenario in which no individual or body can grant or terminate parental rights other than the court. *See* Personal Responsiblity and Work Opportunity Reconciliation Act of 1996, Pub. L. No. 104-193, §§ 103, 401, 110 Stat. 2105, 2112 (codified in scattered sections of 42 U.S.C.).

188. *See supra* notes 39-51 and accompanying text.

189. *See supra* notes 52-57 and accompanying text.

Material equal protection circumvents the discussion of suspect or semi-suspect classifications, which represents a large stumbling block for indigents in equal protection analysis. Rational or compelling state interests are never at issue. Additionally, and most importantly in cases such as Ms. Brooks's, fundamental rights are involved only indirectly and in a much more objective and determinate analysis structure.[190] While material equal protection disregards these considerations, its results are exactly the same as the *Griffin* line decisions. Material equal protection thus avoids the indeterminate pitfalls of current *in forma pauperis* analysis while retaining the desired results embodied in the *Griffin* line. This replacement analysis effectively reduces the indeterminacy in the doctrine to a controllable, manageable level. Without any meaningful level of indeterminacy, Justices will not be able to abuse the doctrine set up to protect indigents to the point to actually revoke such protection.

IV. CONCLUSION

M.L.B. undoubtedly was a victory for parental and individual fundamental rights. This victory must not, however, obscure the problems that the *M.L.B.* decision portends for the future. The confused and indeterminate doctrine upon which the decision rests will eventually turn on itself, each resulting strand of doctrine ending up on different sides of future opinions. There is too much room at present for a Justice to ma-

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190. Interestingly enough, as a sidelight, material equal protection brings the debate back to the side argument of whether or not the court should follow an originalist interpretive pattern in assessing the Constitution and its amendments. In fact, material equal protection poses a possibility for harmonization of the originalist and non-originalist positions.

As is clear from the background of this Comment, a primarily fundamental rights non-originalist approach has brought the doctrine this far to its climax in confusion. *See supra* notes 15-16 and accompanying text. For some time, originalists, among them Justice Scalia, have been arguing that such focus is incoherent, deviates from original constitutional intentions, and places too much judge subjectivity in place of the constitution itself. Anders, *supra* note 16, at 904-05. Yet, at present there exists no real originalist solution except to exercise judicial restraint, invalidate current unenumerated fundamental rights, and frame constitutional interpretation in an original intention framework. *See id.* at 903-12 (detailing Justice Scalia's originalist approach to constitutional analysis).

Critical Legal Studies, the basic radical legal theory that is the impetus for much of the author's vision, is looked upon by the mainstream legal community as something of a fringe rebel group, described as "dangerous, potentially violent, and on at least one occasion as a form of 'guerrilla warfare.'" Guyora Binder, *On Critical Legal Studies as Guerrilla Warfare*, 76 GEO. L.J. 1, 1 (1987) (quoting *Critical Legal Times at Harvard*, TIME, Nov. 18, 1985, at 87). Material equal protection creates no unenumerated rights, no suspect classes, and in the end works rather closely with only the words given in the Fourteenth Amendment. The goals and roots of material equal protection are rather progressive, yet the means by which these goals are achieved end up in a much more conservative looking package. By no means is this idea alone in its basic approach. In a rather parallel way Professor Nancy Ehrenreich proposes embracing privatization as a means of implementing progressive forms as privatization is a means "to use the master's tools to dismantle the master's house." Nancy Ehrenreich, *The Progressive Potential in Privatization*, 73 DENV. U. L. REV. 1235, 1238 (1996). Ehrenreich turns the logic of Audre Lorde's famous quote, "[t]he master's tools will never dismantle the master's house" upon itself. *See* Audre Lorde, *The Master's Tools Will Never Dismantle the Master's House*, *in* SISTER OUTSIDER 112 (1984).

nipulate a particular strand of doctrine to further a political agenda. The very doctrine protecting the indigent inevitably will deny the indigent protection from the oppressive monetary constraints of court access.

Recognizing such problems, yet realizing the possibility for a more determinate solution, the Court must clarify *in forma pauperis* analysis. Doctrinal application can be consistent, yet manageably indeterminate at the same time. The common understanding of the determinacy/indeterminacy quandary must move away from a futile critique and, instead, reflect reality. The time has come, therefore, to envision doctrine in the mathematical model of π, not ∞. Material equal protection, a clear and objective means of analysis, achieves this goal. It also retains the Court's important limitations on *in forma pauperis*. While the indeterminacy inherent in doctrine can never be fully eradicated, a solution based upon easily quantifiable and objective factors minimizes the effects of indeterminacy. Material equal protection enables the Court to limit subjective judicial bias and move toward an objective standard of *in forma pauperis*.

M.L.B. announces a glaring weakness in *in forma pauperis* analysis. The doctrinal sea of which *M.L.B.* is a part, while well intentioned, is unpredictable under the surface. This undertow threatens the stability and reliability of *in forma pauperis* doctrine. It is time to establish a determinate flow of constitutional analysis protecting court access. Material equal protection offers a stabilizing solution.

Eric K. Weingarten[*]

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