

## “Equal Right to the Poor”

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*By law, federal judges must swear or affirm that they will “do equal right to the poor and to the rich.” This frequently overlooked oath, which I call the “equal right principle,” has historical roots dating back to the Bible and entered US law in a statute passed by the First Congress. Today, the equal right principle is often understood to require only that judges faithfully apply other laws. But that reading, like the idea that the rich and poor are equally barred from sleeping under bridges, is questionable in light of the equal right principle’s text, context, and history.*

*This Article argues that the equal right principle supplies at least a plausible basis for federal judges to consider substantive economic equality when implementing underdetermined sources of law. There are many implications. For example, the equal right principle suggests that federal courts may legitimately limit the poor’s disadvantages in the adjudicative and legislative processes by expanding counsel rights and interpreting statutes with an eye toward economically vulnerable groups. The equal right principle should also inform what qualifies as a compelling or legitimate governmental interest within campaign finance jurisprudence, as well as whether to implement “underenforced” equal protection principles.*

*More broadly, the equal right principle should play a more central role in constitutional culture. The United States is unusual in that its fundamental law is relatively silent on issues of economic equality. The equal right principle can fill that void by providing a platform for legal and public deliberation over issues of wealth inequality. Through judicial confirmation hearings and other forms of public contestation, the equal right principle can help to specify federal judges’ legal and moral commitments toward the poor.*

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*Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: “I, \_\_\_\_\_, do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as \_\_\_ under the Constitution and laws of the United States. So help me God.”<sup>1</sup>*

#### INTRODUCTION

During the confirmation hearings for then-Judge John Roberts, Senator Richard Durbin asked about economic equality. “Would you at least concede,” Durbin asked, “that you would take into consideration that in our system of justice the race goes to the swift, and the swift are those with the resources, the money, the lawyers, the power in the system?”<sup>2</sup> “Absolutely,” Roberts replied. After all, “the judicial oath talks about doing justice without regard to persons, to rich and to poor.”<sup>3</sup> So it’s “critically important,” Roberts continued, “to appreciate that there are going to be interests who, for one reason or another, don’t have the same resources as people on the other side.”<sup>4</sup>

<sup>1</sup> 28 USC § 453.

<sup>2</sup> See *Nomination of John G. Roberts Jr to Be Chief Justice of the United States, Hearing before the Senate Committee on the Judiciary*, 109th Cong, 1st Sess 448 (2005) (“Roberts Hearings”). Roberts also referred to the phrase “Equal Justice Under Law.” See notes 233–34 and accompanying text.

<sup>3</sup> *Roberts Hearings*, 109th Cong, 1st Sess at 448–49 (cited in note 2).

<sup>4</sup> *Id* at 449.

Roberts was referring to the statutory oath of office taken by every federal judge.<sup>5</sup> In the Judiciary Act of 1789,<sup>6</sup> the First Congress required that all federal judges "solemnly swear or affirm" that they would, among other things, "do equal right to the poor and to the rich."<sup>7</sup> That statutory oath requirement, which I call "the equal right principle," remains in place today.<sup>8</sup> Remarkably, the language in question long predates the United States. For centuries, British judges were instructed to "do equal right to the Poor, and to the Rich."<sup>9</sup> And similar injunctions appear among the ancient judicial duties set out in the biblical texts of Exodus, Leviticus, and Deuteronomy.<sup>10</sup>

What does this evocative oath mean? On its face, the command to "do equal right to the poor and to the rich" has several components. Its reference to "equal right" connotes some form of impartial justice, or fair treatment with respect to legal decision-making.<sup>11</sup> And in applying not only "to the poor" but also "to the rich," the oath conveys that even vast disparities in wealth must be met with "equal" provision of "right."<sup>12</sup> In short, the equal right principle obligates federal judges to honor an unspecified form of economic equality. That basic idea can be fleshed out via either of two broad approaches.<sup>13</sup>

The first broad approach emphasizes formal equality. A weak version of formal equality would assert a straightforward directive: federal judges must apply other laws without regard to disparities in wealth. In other words, federal judges should

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<sup>5</sup> See *id.* at 448–49.

<sup>6</sup> 1 Stat 73.

<sup>7</sup> Judiciary Act of 1789 § 8, 1 Stat at 76, 28 USC § 453.

<sup>8</sup> Federal judges also take the general federal oath to "support and defend the Constitution." 5 USC § 3331.

<sup>9</sup> *The Book of Oaths and the Several Forms Thereof, Both Ancient and Modern* 176 (1689). See also Part I.B.

<sup>10</sup> See Part I.A. See also Alvin K. Hellerstein, *The Influence of a Jewish Education and Jewish Values on a Jewish Judge*, 29 *Touro L Rev* 517, 525 (2013) (noting that the federal judicial oath "resonates Biblically").

<sup>11</sup> See notes 91–92 and accompanying text.

<sup>12</sup> To the extent that the equal right principle requires a working definition of "the poor" and "the rich," other sources of federal law supply useful benchmarks. See, for example, *San Antonio Independent School District v Rodriguez*, 411 US 1, 19–20 (1973) (identifying the poor as those who "because of their impecunity [ ] 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"); US Department of Health and Human Services, *U.S. Federal Poverty Guidelines Used to Determine Financial Eligibility for Certain Federal Programs* (Jan 26, 2017), archived at <http://perma.cc/LR6J-YL46>.

<sup>13</sup> See Aviam Soifer, *Law and the Company We Keep* 134, 167 (Harvard 1995).

simply follow separate sources of law, wherever they lead.<sup>14</sup> Federal judicial duty would thus be unchanged if Congress had omitted any mention of “the poor” and “the rich” and had instead demanded, for example, equal right “to the short and to the tall.” In fact, this reading would cast the equal right principle as a merely rhetorical flourish, because the federal judicial oath includes separate commitments to impartiality and lawfulness.<sup>15</sup> A stronger version of formal equality is also possible, as the equal right principle could be read as a statutory ban on considering wealth disparities or accommodating poverty. These arguments are not merely hypothetical. Courts, legislators, and scholars have enlisted formal equality readings to oppose judicial “empathy” for the poor.<sup>16</sup> And those readings could call into question such entrenched accommodations as the precedential norm in favor of generously construing pro se filings.<sup>17</sup>

On the second broad approach, the equal right principle might obligate federal judges to foster some measure of substantive equality by taking account of economic disparities. This second approach is really a cluster of related approaches, as there are many ways of defining and implementing substantive economic equality. The equal right principle might demand greater counsel rights, so that the judicial process itself does not unduly contribute to economic inequality or compound its effects.<sup>18</sup> Or the equal right principle might support a statutory canon in favor of economic equality, whereby ambiguous statutes are construed to

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<sup>14</sup> See, for example, *Patterson v McLean Credit Union*, 485 US 617, 619 (1988) (per curiam) (interpreting the equal right principle as requiring that the Court treat all litigants equally, without regard to the worthiness of the litigant in terms of extralegal criteria), which is discussed in Part III.B. See also *Original Great American Chocolate Chip Cookie Co v River Valley Cookies, Ltd*, 970 F2d 273, 282 (7th Cir 1992) (Posner) (noting “the judicial oath, which, echoing Deuteronomy, requires judges to judge ‘without respect to persons,’” and arguing that “[t]he idea that favoring one side or the other in a class of contract disputes can redistribute wealth is one of the most persistent illusions of judicial power”); *West v Louisiana*, 478 F2d 1026, 1033 (5th Cir 1973) (“To ‘administer justice without respect to persons, and do equal right to the poor and to the rich’ we must apply the same standard, whether counsel be court-appointed or privately retained.”), quoting 28 USC § 453.

<sup>15</sup> See 28 USC § 453. See also 5 USC § 3331 (general federal oath).

<sup>16</sup> See notes 157–59, 249–54.

<sup>17</sup> See, for example, *Erickson v Pardus*, 551 US 89, 94 (2007) (“A document filed *pro se* is ‘to be liberally construed.’”), quoting *Estelle v Gamble*, 429 US 97, 106 (1976); 28 USC § 1915 (outlining procedures for in forma pauperis filings).

<sup>18</sup> See Part III.A.

promote the interests of “the poor.”<sup>19</sup> Finally, the equal right principle might inform federal courts’ case law under the Equal Protection Clause or the Free Speech Clause—two areas that have struggled lately with issues of economic equality.<sup>20</sup> For instance, the equal right principle might inform the kind of reasons that judges should regard as legitimate or compelling within the confines of campaign finance doctrine.<sup>21</sup> Or the equal right principle could support federal judicial activity in areas characterized by constitutional “underenforcement.”<sup>22</sup> Already, versions of the substantive reading appear intermittently in US law, from trial court rulings to recent Supreme Court opinions.<sup>23</sup>

This Article explores the possibility that the federal judicial oath calls for some measure of substantive economic equality. While barring group favoritism, the federal judicial oath may demand consideration of economic disparities that threaten justice or “equal right.” This basic approach is at least defensible under conventional principles of statutory interpretation.<sup>24</sup> Historical versions of the equal right principle coincided with judicial efforts to promote substantive equality.<sup>25</sup> And even if the equal right principle were originally understood to command nothing more than formal equality between economic groups, that reading would be readily contestable today. The equal right principle is written in broad, open-ended language and so is not limited by historical expectations. And current understandings of politics, economics, and justice plausibly support a substantive view of what it means to “do equal right to the poor and to

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<sup>19</sup> See Part III.B. This suggestion requires a definition of “the poor,” perhaps drawn from federal law. See note 12.

<sup>20</sup> See Parts III.C–D.

<sup>21</sup> See Part III.C.

<sup>22</sup> See Lawrence Gene Sager, *Fair Measure: The Legal Status of Underenforced Constitutional Norms*, 91 Harv L Rev 1212, 1218 (1978) (arguing that *Rodriguez* rested on “arguments which support the underenforcement of the equal protection clause by the federal courts”).

<sup>23</sup> See, for example, *Griffin v Illinois*, 351 US 12, 16–19 (1956) (Black) (plurality) (citing a biblical version of the equal right principle in holding that “[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts”); *United States v Cilins*, 2013 WL 3802012, \*3 (SDNY) (concluding that the equal right principle “is violated if a defendant, who is a serious risk of flight . . . is permitted to buy his way out of detention”), citing 28 USC § 453; *Williams-Yulee v Florida Bar*, 135 S Ct 1656, 1666 (2015) (quoting the equal right principle while upholding a state rule prohibiting judicial candidates from personally soliciting campaign funds).

<sup>24</sup> See Part II.A.

<sup>25</sup> See notes 49, 57–61, and accompanying text.

the rich.” Thus, federal judges could plausibly read the equal right principle to call for substantive economic equality. That legalistic conclusion is likely to be of practical significance to at least some judges—namely, to jurists who are prepared to pursue substantive economic equality on a given issue, but only provided a stronger positive-law basis for doing so.

Moreover, confirmation hearings and other forms of public contestation might specify the equal right principle’s meaning. The equal right principle is a promise as well as a statute, and the meaning of a promise generally depends on how its speaker and audience understand it.<sup>26</sup> This promissory aspect introduces a distinctive avenue for legal reform: by clarifying the public understanding of federal judges’ oaths, public contestation could specify those judges’ moral obligations. This point is most vivid during judicial confirmation hearings, in which popularly elected senators often ask prospective judges to make various representations regarding their future official conduct.<sup>27</sup> If senators glossed the federal judicial oath as a substantive principle and prospective jurists agreed, then those public statements would shape the moral content of the jurists’ subsequent oaths. The equal right principle thus offers a platform for deliberation on economic equality. Moreover, successful use of this deliberative platform could influence who is selected for the judiciary, as well as those judges’ sense of their obligations regarding substantive economic equality.

Whether viewed as a statute or a promise, the equal right principle offers a distinctive way of addressing the institutional and moral position of federal judges within a constitutional system characterized by economic inequality. As argued below, the equal right principle operates in tandem with federal judges’ more general oath to adhere to law; therefore, the equal right principle is best understood not as a basis for overriding clear legal rules, but rather as an interpretive aid that should shape

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<sup>26</sup> See Part II.B.

<sup>27</sup> See notes 2–4 and accompanying text. See also, for example, *Nomination of Elena Kagan to Be an Associate Justice of the Supreme Court of the United States, Hearing before the Senate Committee on the Judiciary*, 111th Cong., 2d Sess 231 (2010) (“Kagan Hearings”); *Nomination of Judge Sandra Day O’Connor of Arizona to Serve as an Associate Justice of the Supreme Court of the United States, Hearings before the Senate Committee on the Judiciary*, 97th Cong., 1st Sess 57–58 (1981) (“O’Connor Hearings”).

jurists’ implementation of other laws.<sup>28</sup> Under that approach, federal judges can attend to their oaths without overstepping their authority or exerting control over economic matters traditionally governed by the political branches.<sup>29</sup> Implementation of the equal right principle entails normal adherence to statutory law and so does not rest on a constitutional Lochnerian view that judges should govern economic policy. Moreover, the equal right principle offers judges useful guidance regardless of how best to answer broader questions of economic efficiency<sup>30</sup> or welfare egalitarianism.<sup>31</sup> Doing “equal right” in federal court is simply not the same as redistributing or equalizing wealth in society at large.<sup>32</sup> In drawing attention to previously neglected legal, political, and moral possibilities, the equal right principle creates new avenues for lawful reform.

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<sup>28</sup> Scholars have used the term “interstitial” to describe certain judicial efforts to enforce economic rights, particularly by providing that legislatively constructed benefits programs do not engage in unjustifiable wealth discrimination. See, for example, Goodwin Liu, *Rethinking Constitutional Welfare Rights*, 61 *Stan L Rev* 203, 215, 244–45 (2008); Laurence H. Tribe, *Unraveling National League of Cities: The New Federalism and Affirmative Rights to Essential Government Services*, 90 *Harv L Rev* 1065, 1089–90 (1977); Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls’ Theory of Justice*, 121 *U Pa L Rev* 962, 1013–15 (1973). Here, I use “interstitial” more broadly to mean an interpretive principle that guides judges in areas of legal underdeterminacy.

<sup>29</sup> For leading critiques of constitutional welfare rights, including on grounds of unintended consequences and judicial incompetence on matters of economic policy, see Frank B. Cross, *The Error of Positive Rights*, 48 *UCLA L Rev* 857, 902–05, 910–12 (2001); Henry Paul Monaghan, *The Constitution Goes to Harvard*, 13 *Harv CR–CL L Rev* 117, 118–20, 128 (1978); Ralph K. Winter Jr, *Poverty, Economic Equality, and the Equal Protection Clause*, 1972 *S Ct Rev* 41, 43, 93–97. Much of this literature takes aim at proposals to achieve wealth “redistribution,” rather than equal right.

<sup>30</sup> See, for example, Zachary Liscow, Note, *Reducing Inequality on the Cheap: When Legal Rule Design Should Incorporate Equity as Well as Efficiency*, 123 *Yale L J* 2478, 2483–85 (2014).

<sup>31</sup> See, for example, Frank I. Michelman, *The Supreme Court 1968 Term—Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 *Harv L Rev* 7, 9 (1969). For a theory built on republican government, see Jon D. Michaels, Note, *To Promote the General Welfare: The Republican Imperative to Enhance Citizenship Welfare Rights*, 111 *Yale L J* 1457, 1459–60, 1498 (2002). For more discussion of the evolving scholarly treatment of poverty rights during the last fifty years, see generally Mark A. Graber, *The Clintonification of American Law: Abortion, Welfare, and Liberal Constitutional Theory*, 58 *Ohio St L J* 731 (1997).

<sup>32</sup> The best critics of constitutionalizing economic equality recognize that some accommodation for the poor may be practicable. See Cross, 48 *UCLA L Rev* at 923 (cited in note 29) (“It is possible that some particular right, or some circumstances, might escape this critique.”); Winter, 1972 *S Ct Rev* at 85 (cited in note 29) (“To reject general and substantial redistributions, however, is not to reject all redistributions.”).

Greater attention to the federal judicial oath can also help bridge a rift that has developed between politics and legal practice. Problems of extreme wealth and poverty have become salient subjects of political controversy, as illustrated by the recent presidential campaigns of Senator Bernie Sanders and Secretary Hillary Clinton, as well as by the economic populism sometimes expressed by President Donald Trump.<sup>33</sup> Yet American legal culture currently lacks any clear basis for reasoning and deliberating about economic equality.<sup>34</sup> In fact, the United States is unusual in having a fundamental law that is relatively silent on matters of economic equality.<sup>35</sup> That constitutional silence makes it difficult for either the adjudicative process or public contestation to reckon systematically with issues of economic justice. The equal right principle can help address that difficulty. As part of a venerable federal statute that explicitly addresses economic inequality, the equal right principle offers a focal point for both legal reflection and political mobilization.<sup>36</sup> Attention to

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<sup>33</sup> See, for example, Stephen Long, *US Election: Trump Victory a Working-Class Backlash against Economic Inequality* (ABC News, Nov 9, 2016), archived at <http://perma.cc/NT8T-PLP6>; Joseph Fishkin, *The Mirror* (Balkinization, Nov 9, 2016), archived at <http://perma.cc/9C2M-PLRV> (noting “the economic populism that was one crucial thread of Trump’s appeal”); Robert Kuttner, *Sanders, Trump, and Economic Populism: Why Populists in Both Parties Are Gaining Support* (American Prospect, Jan 12, 2016), archived at <http://perma.cc/HT58-5SRQ>; Kate Linticum, *Occupy Movement Protesters Fight On—Now in Support of Bernie Sanders* (LA Times, Feb 1, 2016), archived at <http://perma.cc/56ZX-TQW2>; Dan Merica, *Clinton: I Will Introduce Campaign Finance Amendment in First 30 Days* (CNN, July 16, 2016), archived at <http://perma.cc/86BC-RTXE>.

<sup>34</sup> For discussion of the Equal Protection Clause, see Part III.D.

<sup>35</sup> See, for example, Cass R. Sunstein, *Why Does the American Constitution Lack Social and Economic Guarantees?*, in Michael Ignatieff, ed., *American Exceptionalism and Human Rights* 90, 92 (Princeton 2005) (“The constitutions of most nations create social and economic rights, whether or not they are enforceable. But the American Constitution does nothing of the kind.”); William E. Forbath, *The New Deal Constitution in Exile*, 51 Duke L J 165, 168 (2001) (“These social and economic rights are found in most of the world’s constitutions; but they are foreign to contemporary American constitutional law.”). But see Stephen Gardbaum, *The Myth and the Reality of American Constitutional Exceptionalism*, 107 Mich L Rev 391, 446–53 (2008) (arguing that US exceptionalism in this area can be overstated).

<sup>36</sup> See Liu, 61 Stan L Rev at 212 (cited in note 28) (“Judicial recognition of welfare rights must derive its legitimacy from our shared commitments. . . . [W]e cannot hope to change our law without first doing the hard work of changing our politics.”). See also K. Sabeel Rahman, *Domination, Democracy, and Constitutional Political Economy in the New Gilded Age: Towards a Fourth Wave of Legal Realism?*, 94 Tex L Rev 1329, 1332 (2016) (noting, in the context of economic equality, the relationship between “the ‘big-C’ Constitutionalism of Supreme Court doctrine, precedent, or textual interpretation” and the “‘small-c’ . . . constitutionalism” of “social movements” and “public philosophy”).



the federal judicial oath can prompt federal judges and other participants in the legal system not just to subscribe to class neutrality in the abstract, but also to confront the legal and practical relationship between two class-based groups: “the poor” and “the rich.”

The argument proceeds in three parts that respectively explore the equal right principle’s history, its legal meaning today, and its potential implications for the future.

## I. HISTORICIZING EQUAL RIGHT

The equal right principle has persisted in various forms and contexts for centuries and even millennia—yet its intellectual history has largely gone unexplored.<sup>37</sup> This Part outlines the equal right principle’s development, beginning with the Bible, continuing to British legal practice, and finally concluding with US law. This historical analysis reveals, but does not resolve, the ancient tension between formal and substantive approaches to doing equal right.

### A. The Bible

The equal right principle is traceable to religious sources, as federal judges of varied faiths have observed.<sup>38</sup> Texts whose meaning is similar to the equal right principle date back at least to the Bible, which contains three distinct versions of the same core idea. This Section outlines the most relevant biblical passages from the standpoint of the predominantly Christian First Congress and so emphasizes the King James Version, which was by far the biblical translation most familiar to early generations in the United States.<sup>39</sup>

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<sup>37</sup> For treatment of broader historical issues regarding how money should or does influence judicial behavior, see John T. Noonan Jr, *Bribes* 83–113, 313–33, 534–53 (Macmillan 1984). For discussion of Founding-era views on corruption, see Zephyr Teachout, *The Anti-Corruption Principle*, 94 *Cornell L Rev* 341, 373–79 (2009).

<sup>38</sup> See Hellerstein, 29 *Touro L Rev* at 525 (cited in note 10); *Original Great American Chocolate Chip Cookie Co v River Valley Cookies, Ltd*, 970 F2d 273, 282 (7th Cir 1992) (Posner); William H. Pryor Jr, *The Religious Faith and Judicial Duty of an American Catholic Judge*, 24 *Yale L & Pol Rev* 347, 353 (2006) (“My oath to ‘administer justice without respect to persons, and do equal right to the poor and to the rich’ clearly echoes the *Catechism’s* aforementioned command to respect the ‘rights of everyone, especially of families and the disadvantaged.’”), quoting *Catechism of the Catholic Church* ¶ 2237, archived at <http://perma.cc/3J72-S4RT>. See also text accompanying note 223.

<sup>39</sup> See Mark A. Noll, *America’s God: From Jonathan Edwards to Abraham Lincoln* 18 (Oxford 2002) (“[S]criptural quotations are taken from the King James Version, which

The Book of Exodus has the seeds of both halves of the equal right principle but separates them with several lines of distinct text. In the King James Version, the relevant lines from Exodus are translated: “Neither shalt thou countenance a poor man in his cause. . . . Thou shalt not wrest the judgment of thy poor in his cause.”<sup>40</sup> This pair of separated injunctions suggests that poverty could spawn both positive and negative forms of adjudicatory bias, depending on whether the judge responds with sympathy or disdain. Notably, this early version of the equal right principle identifies only the poor, not the rich.

The Book of Leviticus takes a large step toward the federal judicial oath by combining Exodus’s dual injunctions into a single epigrammatic statement that mentions two contrasted groups. The King James Version translates the relevant passage from Leviticus as: “Ye shall do no unrighteousness in judgment: thou shalt not respect the person of the poor, nor honour the person of the mighty.”<sup>41</sup> This version opens with a broad prohibition on “unrighteousness.” It then combines “the poor” and “the mighty” into a single, twinned prohibition. Here, poverty and might are cast as alternative and opposite sources of bias, apparently on the theory that poverty might generate sympathy while wealth might prompt ingratiation. The result is a pleasing sense of symmetry and poetic balance that replicates the kind of justice that is meant to be carried out.<sup>42</sup>

Finally, the Book of Deuteronomy contains a similar directive, which the King James Version translates as: “Ye shall not respect persons in judgment; but ye shall hear the small as well as the great.”<sup>43</sup> This last version begins with a broad prohibition against interpersonal partiality that is itself balanced (“but”) by twinned commands to engage in certain positive conduct. But rather than expressly mentioning the poor at all, Deuteronomy uses even broader figurative language (“the small”), apparently to contrast vulnerable and powerful groups.

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was the Bible of choice for almost all Americans throughout the decades treated in this book.”). For a good introduction to the Hebrew text, see Baruch A. Levine, *The JPS Torah Commentary: Leviticus* 128–29 (Jewish Publication Society 1989).

<sup>40</sup> Exodus 23:3, 23:6 (King James Version).

<sup>41</sup> Leviticus 19:15 (King James Version).

<sup>42</sup> See Jonathan Magonet, *The Structure and Meaning of Leviticus 19*, 7 *Hebrew Ann Rev* 151, 156–58 (1983).

<sup>43</sup> Deuteronomy 1:17 (King James Version).

Moreover, Deuteronomy addresses what “ye shall hear,” and so seems expressly directed toward equalization of judicial access.

While this is not the place for a comprehensive study of these passages, a few pertinent observations stand out. First, the biblical passages apparently refer to economic class in a figurative sense, to capture the broader idea of unequal social status.<sup>44</sup> Poverty becomes less prominent in each iteration, as the biblically paired groups go from poor/poor to poor/mighty and finally small/great. Second, the passages are often read as being focused on the judicial role,<sup>45</sup> but influential commentators have suggested that aspects of the passages also apply to the *selection* of judges.<sup>46</sup> Third, the biblical passages establish a norm of adjudicatory impartiality for courts that is distinct from other legal principles, such as separate biblical directives that foster distributive justice by directing that private persons must help to provide sustenance to the poor.<sup>47</sup> Finally, broad phrases like “unrighteousness in judgment” suggest a capacious notion of justice, consistent with salient biblical depictions of jurists exercising discretion.<sup>48</sup> Confirming as much, noted commentators have thought that the biblical equal right principle required, for example, that judges take steps to ensure that both rich and poor litigants dressed in similar quality clothing.<sup>49</sup> These

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<sup>44</sup> See Magonet, 7 Hebrew Ann Rev at 156–58 (cited in note 42); Nobuyoshi Kiuchi, *Leviticus* 352 (InterVarsity 2007) (suggesting that Leviticus 19:15 “prohibits partiality in matters of judgment motivated by the social status of the person being judged”). For discussion of the equal right principle’s potential applicability to noneconomic groups, see note 252 and accompanying text.

<sup>45</sup> See, for example, Kiuchi, *Leviticus* at 352 (cited in note 44) (calling Leviticus 19:15 “[a] prohibition against injustice in court”).

<sup>46</sup> See Rashi, *The Complete Tanach with Rashi’s Commentary* (Chabad-Lubavitch) (Rosenberg, trans), archived at <http://perma.cc/4ZSV-L9EG> (commenting that Deuteronomy 1:17 “refers to the person who appoints judges”).

<sup>47</sup> See, for example, Leviticus 25:25, 25:35–41; Deuteronomy 15:7–11.

<sup>48</sup> See, for example, 1 Kings 3:16–28 (King James Version) (recounting the judgment of Solomon). Many commentators have viewed the biblical equal right principles as general or “generic” directives to do “justice.” See, for example, Pietro Bovati, *Re-Establishing Justice: Legal Terms, Concepts and Procedures in the Hebrew Bible* 188–91 (JSOT 1994). See also Elliot N. Dorff, *To Do the Right and the Good: A Jewish Approach to Modern Social Ethics* 139 n 40 (Jewish Publication Society 2002) (“The poor, though, were not to be preferred in their cases just because they were poor any more than the rich were to be given special consideration just because they were rich; rather, fairness to all litigants was to be the rule.”); Bruce V. Malchow, *Social Justice in the Hebrew Bible: What Is New and What Is Old* 24 (Liturgical 1996).

<sup>49</sup> See Maimonides, *Mishneh Torah, Law of Courts (Sanhedrin)* 21:1–3 (Elliot N. Dorff and Arthur Rosett, trans), in Elliot N. Dorff and Arthur Rosett, *A Living Tree: The Roots and Growth of Jewish Law* 282, 283–84 (SUNY 1988). Further, judges were

measures increased the odds that the poor would enjoy fair outcomes, as well as a fair degree of respect.

Ultimately, the biblical passages pose, but cannot answer, the question whether economic justice calls for only formal equality, or for some measure of substantive equality as well.

## B. British Practice

For centuries, British judges took oaths that incorporated versions of the equal right principle. Some of those oaths separately required lawfulness and impartiality, thereby suggesting that the equal right principle had a distinct meaning.

By the seventeenth century, many established British oaths included versions of the equal right principle, which often appeared in addition to separate oaths to impartiality and lawfulness. To wit, the British Lord Chancellor swore that he “shall doe right to all manner of people, poore and rich, after the lawes and usages of the Realm”<sup>50</sup>—which nicely captures the idea that the equal right principle, like the Chancellor’s equity powers, were constrained by “the lawes.” Common-law judges took a somewhat different oath to “do equal Law and Execution of Right, to all the *Kings* Subjects Rich and Poor, without having regard to any person.”<sup>51</sup> That oath suggests a distinction between “equal Law” and “Execution of Right,” with both equally apportioned among the rich and the poor. Finally, justices of the peace closely anticipated the federal judicial oath in swearing that they “shall do equal right to the Poor, and to the Rich after [their] cunning, wit, and power, and after the Laws and Customs of the Realm, and Statutes thereof made.”<sup>52</sup> Far from being limited to judges, versions of the equal right principle were a staple of British oaths of office, appearing for example in the oaths taken by the Treasurer of the Exchequer and the Mayor of London.<sup>53</sup>

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sometimes to assist unlearned or inarticulate parties in making their arguments. See *id.* These principles operated in an inquisitorial legal system in which judges were also viewed as lawgivers. For discussion of how similar judicial principles might operate within the adversarial US legal system, see notes 225–29 and accompanying text.

<sup>50</sup> Edward Coke, *The Fourth Part of the Institutes of the Laws of England* 88 (Flesher 1644).

<sup>51</sup> *Book of Oaths* at 120–21 (cited in note 9). See also John Fortescue, *De Laudibus Legum Angliae* 194–95 (Cambridge 1825) (A. Amos, trans).

<sup>52</sup> See *Book of Oaths* at 176 (cited in note 9).

<sup>53</sup> See *id.* at 118, 211. For example, the law provided the following as to the Mayor of London: “And ye shall truely and right wisely treat the people of your Bayly, and right

Thus, the idea of equal right clearly had application outside the context of judicial impartiality and neutrality.

In discussing some of these oaths, Professor Philip Hamburger has argued that only those “judges who might be especially apt to make decisions that did not conform to the law of the land” had to “expressly” swear to rule according to the law.<sup>54</sup> In particular, Hamburger observes that the common-law judges did not take explicit, separate oaths to adhere to law, whereas the Lord Chancellor and the justices of the peace did. (As Hamburger notes, however, common-law judges did take an oath that references a duty to “do equal Law.”<sup>55</sup>) Hamburger infers from this promissory disparity that common-law judges must have understood that the duty to rule according to law was inherent in their office, whereas the Lord Chancellor and the justices of the peace “might need an extra reminder to attend to their statutory duties.”<sup>56</sup> Hamburger’s conclusion suggests that the equal right principle had a meaning distinct from the general obligation to adhere to the law. After all, the three categories of judge that Hamburger describes—the Lord Chancellor, the common-law judges, and the justices of the peace—all explicitly swore some version of the equal right principle, even though (at least in Hamburger’s judgment) not all explicitly swore to adhere to law.

Further, the King, Parliament, and Chancery all acted on the ideal of equal right.<sup>57</sup> In 1495, for instance, “[t]he King ‘will[ed] and intend[ed] indifferent justice to be had and ministered according to his common laws to all his true subjects as well to poor as rich,’ and Parliament responded with a statutory right to counsel—and a waiver of court fees—for indigent civil

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ye shall do to every person, as well to Stranger as to privy, to poor as to rich, in that that belongeth to you for to do.” Id at 211.

<sup>54</sup> Philip Hamburger, *Law and Judicial Duty* 110 (Harvard 2008). See also Emilio M. Garza, *Judicial Duty and the Future: Two Issues of Fundamental Law*, 6 J L Phil & Culture 147, 149 (2011) (agreeing with Hamburger that common-law judges “understood their duty to include an obligation to make decisions in accord with the law of the land, including the Constitution, although their oath did not make this commitment express”). Judge Emilio M. Garza further argued that the common-law judges’ “express emphasis in the oath on fairness indicates that the common-law judges viewed their commitment to the law of the land in terms other than pure positivism.” Id.

<sup>55</sup> Hamburger, *Law and Judicial Duty* at 111 (cited in note 54).

<sup>56</sup> Id.

<sup>57</sup> For more on Magna Carta’s prohibition on punitive impoverishment, see Beth A. Colgan, *Reviving the Excessive Fines Clause*, 102 Cal L Rev 277, 321–22 (2014) (discussing Blackstone’s *Commentaries*).

plaintiffs.”<sup>58</sup> Equity supplies another example. As one seventeenth-century authority put it: Equity “is the refuge of the poor and afflicted; It is the Altar and sanctuary for such as against the might of rich men, and the countenance of great men cannot maintain the goodnesse of their cause.”<sup>59</sup> Because a poor person’s “adversary could be so rich and powerful that it would be hopeless to proceed in the law courts,”<sup>60</sup> courts of equity historically recognized a lack of remedy at law when “the person injured may be too poor to avail himself of the orthodox remedy.”<sup>61</sup> At the same time, equity is often said to follow the law, rather than contradicting it. As we will see, the equal right principle might play a similarly interstitial role today.

Still, the equal right principle was cabined in important respects. In some areas, British law formally recognized distinct economic classes with differing legal rights.<sup>62</sup> And even equitable attention to substantive economic equality was often controversial.

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<sup>58</sup> Scott F. Llewellyn and Brian Hawkins, *Taking the English Right to Counsel Seriously in American “Civil Gideon” Litigation*, 45 U Mich J L Ref 635, 641–42 (2012), quoting An Act to Admit Such Persons as Are Poor to Sue in Forma Pauperis, 11 Hen 7 ch 12 (1495), reprinted in 2 *Statutes of the Realm* 499, 578 (1816) (with some modifications for modernization). See also Scott L. Cummings, *The Politics of Pro Bono*, 52 UCLA L Rev 1, 10 n 36 (2004).

<sup>59</sup> Thomas, Lord Ellesmere, *Certain Observations Concerning the Office of the Lord Chancellor* 21 (1651). See also Dennis R. Klinck, *Conscience, Equity and the Court of Chancery in Early Modern England* 19–20 (Ashgate 2010):

Conscience is certainly presented as a necessary complement to law, and its function here is consistent with that aspect of Chancery jurisdiction which provided recourse to petitioners whose adversaries were too rich or powerful to allow them to get a remedy at law, although less clearly with that aspect of the jurisdiction which involved qualification of “strict law.”

See also A.H. Marsh, *History of the Court of Chancery and of the Rise and Development of the Doctrines of Equity* 14–15, 47–49 (Carswell 1890) (describing Chancery as “the secret closett of his Majesty’s conscience where his oppressed and distressed subjects hope to find mercy and mitigation against the rigour and extremitie of his lawes” and noting that the Chancellor “Afforded Protection to the Poor and Weak”).

<sup>60</sup> Thomas O. Main, *Traditional Equity and Contemporary Procedure*, 78 Wash L Rev 429, 441 n 69 (2003).

<sup>61</sup> Willard Barbour, *Some Aspects of Fifteenth-Century Chancery*, 31 Harv L Rev 834, 856 (1918) (describing “one class of cases which come into chancery because of the inequality of the parties” on the theory that a party’s “adversary may be very rich and powerful, and it will be hopeless to proceed in the ordinary courts”). See also Wesley Newcomb Hohfeld, *The Relations between Equity and Law*, 11 Mich L Rev 537, 561 (1913) (“In many cases the poverty of the plaintiff is urged as the sole reason why the chancellor should interfere.”); Main, 78 Wash L Rev at 441 n 69 (cited in note 60).

<sup>62</sup> For example, the phrase “a jury of one’s peers” originally conveyed the idea that a jury should be composed of persons from the same social class as the accused. See Theodore F.T. Plucknett, *A Concise History of the Common Law* 203–04 (Butterworth 1956).

For example, in the eighteenth century, Henry Home, Lord Kames discussed a case in which a court of equity had apparently ruled partly based on considerations of economic egalitarianism.<sup>63</sup> “In a question between a rich landlord and a poor tenant,” Kames explained, “the subject in controversy may be a trifle to the landlord, and yet be the tenant’s all.”<sup>64</sup> But Kames viewed such circumstances as “extraneous” and even a source of “bias.”<sup>65</sup> While Kames’s formal approach to economic equality lost out in the case, his well-known commentary demonstrates that judicial promotion of substantive economic equality could be controversial.<sup>66</sup>

### C. American Law

Though it dates back to the early months of the republic, the federal judicial oath has precursors within US law. And its nature and context have gradually changed, as the American practice of official oath taking took shape.

Article VI of the US Constitution provides that all state and federal officers, including federal judges, “shall be bound by Oath or Affirmation, to support this Constitution.”<sup>67</sup> This provision was somewhat controversial, as some Founders doubted that official oaths served any purpose.<sup>68</sup> The prevailing view, however, was that oaths of office—like testimonial oaths—created moral obligations and would play a meaningful role in curbing improper conduct.<sup>69</sup>

After the Constitution’s ratification, the first statute passed by the First Congress was entitled “An Act to regulate the Time

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<sup>63</sup> See Henry Home of Kames, *Principles of Equity* 244–45 (Neill 4th ed 1800) (originally published 1760).

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> Later, US courts would be on guard lest equity be used to oppress the poor. See *Whalen v Union Bag and Paper Co*, 208 NY 1, 5 (1913) (rejecting a result that would “deprive the poor litigant of his little property by giving it to those already rich”). See also generally John Leland Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine in Equity*, 28 S Cal L Rev 139 (1955).

<sup>67</sup> US Const Art VI, cl 3.

<sup>68</sup> For example, Delegate James Wilson of Pennsylvania said of oaths that “[a] good government did not need them, and a bad one could not or ought not be supported.” Jonathan Elliot, ed, *Debates on the Adoption of the Federal Constitution* 352 (Lippincott 2d ed 1881).

<sup>69</sup> See Steve Sheppard, *What Oaths Meant to the Framers’ Generation: A Preliminary Sketch*, 2009 Cardozo L Rev De Novo 273, 277, 283.

and Manner of administering certain Oaths.”<sup>70</sup> That measure explicitly implemented Article VI of the Constitution by providing for a number of oaths for salient offices, including members of Congress (whose oaths were to be taken within three days of taking office) as well as state legislators and judges.<sup>71</sup> The decision to legislate state oath taking sparked debate, in part because some legislators disagreed that the Necessary and Proper Clause could authorize such regulation of state governmental activity.<sup>72</sup> For all covered officials, the prescribed terms were succinct: “I, A.B., do solemnly swear or affirm (as the case may be) that I will support the Constitution of the United States.”<sup>73</sup> The modern version of this statutory oath applies to all persons “elected or appointed to an office of honor or profit in the civil service or uniformed services” and, while significantly more elaborate, still does not mention the poor, the rich, or the idea of equal right.<sup>74</sup> In other words, the statutory oath that implements Article VI has always applied to a wide range of government officials, state and federal, and has never included the equal right principle.

A few months later, the First Congress enacted the Judiciary Act of 1789,<sup>75</sup> including the federal judicial oath.<sup>76</sup> This statute applied to “the justices of the Supreme Court, and the district

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<sup>70</sup> Act of June 1, 1789, 1 Stat 23. See also *Department of Transportation v Association of American Railroads*, 135 S Ct 1225, 1235 n \* (2015) (Alito concurring).

<sup>71</sup> See Act of June 1, 1789 §§ 1, 3, 1 Stat at 23–24. The First Congress separately prohibited bribes. See Peter W. Bowie, *The Last 100 Years: An Era of Expanding Appearances*, 48 S Tex L Rev 911, 912–13 (2007).

<sup>72</sup> See, for example, 1 Annals of Cong 277–82 (May 6, 1789). See also David P. Currie, *The Constitution in Congress: The Federalist Period, 1789–1801* 13–15 (Chicago 1997).

<sup>73</sup> Act of June 1, 1789 § 1, 1 Stat at 23.

<sup>74</sup> 5 USC § 3331:

I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God.

<sup>75</sup> Debate on the Act included concern for the poor. See, for example, 1 Annals of Cong 851 (Aug 31, 1789) (statement of Rep Smith) (supporting a statutory jurisdictional amount so that “the poor will be protected from being harassed by appeals to the Supreme Court”).

<sup>76</sup> Judiciary Act of 1789 § 8, 1 Stat at 76. The First Congress has often been treated as “a sort of continuing constitutional convention,” because of the Founders who composed it and the fundamentality of its decisions. David P. Currie, *The Constitution in Congress: Substantive Issues in the First Congress, 1789–1791*, 61 U Chi L Rev 775, 777 (1994).



judges.”<sup>77</sup> Expressly providing that federal judges were to take the oath “before they proceed to execute the duties of their respective offices,”<sup>78</sup> the statute echoed both biblical and British versions of the equal right principle:

I, A. B., do solemnly swear or affirm, that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent on me as [judge/justice], according to the best of my abilities and understanding, agreeably to the constitution and laws of the United States. So help me God.<sup>79</sup>

This is the oath that Chief Justice John Marshall prominently quoted in *Marbury v Madison*<sup>80</sup> as part of his defense of judicial review.<sup>81</sup> The original version of the federal judicial oath establishes three duties, including the equal right principle, before adding that they must be done “agreeably to the constitution and laws of the United States.”<sup>82</sup> That formulation seems to cast lawfulness as a side constraint on fulfillment of the equal right principle, among other duties.

Today, the federal judicial oath is still provided for by statute and remains substantially the same,<sup>83</sup> albeit with some

<sup>77</sup> Judiciary Act of 1789 § 8, 1 Stat at 76.

<sup>78</sup> Judiciary Act of 1789 § 8, 1 Stat at 76. See also Ross E. Davies, *William Cushing, Chief Justice of the United States*, 37 U Toledo L Rev 597, 599–600 (2006) (“The Judiciary Act did not formulate the oath as a command, but rather as a condition on the performance of the duties for which a Chief Justice (or other federal judge) had been commissioned.”). Davies further notes “that the modern Supreme Court includes on its *Court Roster* only those who have ‘taken the prescribed oaths.’” *Id* at 600.

<sup>79</sup> Judiciary Act of 1789 § 8, 1 Stat at 76. This oath both borrows from and adds to the British judicial oaths while excluding those oaths’ promise not to take bribes. See John T. Noonan Jr, *Judicial Impartiality and the Judiciary Act of 1789*, 14 Nova L Rev 123, 124 (1989). The federal judicial oath also borrows the biblical phrase “without respect of persons” from the Virginia chancellor’s oath authored by George Wythe. See Noonan, *Bribes* at 428 (cited in note 37). See also Acts 10:34 (King James Version) (Saint Peter famously declaring: “I perceive that God is no respecter of persons”); Romans 2:11 (King James Version).

<sup>80</sup> 5 US (1 Cranch) 137 (1803).

<sup>81</sup> See *id* at 180 (quoting the federal judicial oath). For Marshall’s endorsement of the oath’s constitutionality as necessary and proper, see *M’Culloch v Maryland*, 17 US 316 (4 Wheat), 416 (1819).

<sup>82</sup> Judiciary Act of 1789 § 8, 1 Stat at 76.

<sup>83</sup> See 28 USC § 453. For the full text of the current oath, see text accompanying note 1. Committee reports on § 453 shed little light on the equal right principle’s meaning.

apparently stylistic changes.<sup>84</sup> In addition, an amendment in 1990 eliminated the qualifying phrase “according to the best of my abilities and understanding.”<sup>85</sup> While that phrase could have been deemed superfluous,<sup>86</sup> some legislators had worried that a “judge who violates the oath should certainly not have a defense of weakness, of ability, or of mind.”<sup>87</sup>

US law honed prior versions of the equal right principle in two notable and interrelated ways. First, US official oaths exhibit a sharp divide between judicial and nonjudicial officials, as federal judges swear or affirm to do equal right to the poor and to the rich, whereas executive and legislative officials generally do not. The equal right principle’s unique prevalence in the context of judges may be consonant with biblical sources, but is quite different from nineteenth-century and earlier British practice, in which many executive oaths included versions of the equal right principle. Second, the equal right principle is largely limited to the *federal* courts. As noted, the equal right principle was part of the Judiciary Act of 1789, which did not apply to state judges.<sup>88</sup> And most state judicial oaths echo the general federal oath to support the Constitution, without mentioning the rich or the poor.<sup>89</sup>

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<sup>84</sup> For example, the phrase “agreeably to” has now been replaced with the modern expression “under.” See Judicial Improvements Act of 1990 § 404, Pub L No 101-650, 104 Stat 5089, 5124, codified at 28 USC § 453. As a result, the affected phrase now appears to modify “duties” rather than “perform.”

<sup>85</sup> See Judicial Improvements Act of 1990 § 404, 104 Stat at 5124, 28 USC § 453.

<sup>86</sup> Similar qualifying language (“to the best of my ability”) appears in the presidential oath set out in Article II of the Constitution, which persisted in the document despite James Wilson’s motion to strike it during the Constitutional Convention. See US Const Art II, § 1, cl 8 (laying out the presidential oath); Philip B. Kurland and Ralph Lerner, eds, 3 *The Founder’s Constitution* 573–74 (Chicago 1987) (quoting James Madison’s *Journal*). For the idea of a “mental reservation,” see note 142.

<sup>87</sup> Robert W. Kastenmeier and Michael J. Remington, *Judicial Discipline: A Legislative Perspective*, 76 Ky L J 763, 792 (1988). Robert W. Kastenmeier was on the House Judiciary Committee, and this article was entered into the record on Pub L No 101-650. See *Judicial Improvements Act of 1990, Hearings before the Subcommittee on Courts, Intellectual Property, and the Administration of Justice of the House Committee on the Judiciary*, 101st Cong, 1st Sess 134 (1989).

<sup>88</sup> See text accompanying notes 76–78.

<sup>89</sup> See, for example, Cal Const Art XX, § 3; NY Const Art XIII, § 1; Fla Const Art II, § 5; Va Const Art II, § 7; Mich Const Art XI, § 1; Okla Const Art XV, § 1. However, there are significant exceptions. See, for example, *Pruett v Mississippi*, 574 So 2d 1342, 1363 n 33 (Miss 1990) (Anderson dissenting) (discussing Mississippi’s equal right principle), citing Miss Const Art 6, § 155. See also Philip Fahringer, *Equal Protection and the Indigent Defendant: Griffin and Its Progeny*, 16 Stan L Rev 394, 394–95 (1964) (“The vast

As we will see, the equal right principle continues to appear in judicial reasoning, as federal judges cite the oath in support of both formal and substantive approaches to economic equality.<sup>90</sup>

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The brief historical treatment provided above does not resolve the original meaning of the equal right principle at any point in time, but several considerations point toward a substantive equality reading. The biblical antecedents available to the First Congress conveyed a capacious principle of divine justice that was at least sometimes viewed as having substantive implications. British oath-taking practice likewise suggests that the equal right principle demanded something besides adherence to separate sources of law: the equal right principle was distinct from oaths of lawfulness, and it coexisted with judicial attention to substantive equality. Finally, Congress added the federal judicial oath after implementing the Article VI oath requirement and later tightened the oath’s text without eliminating the equal right principle. These congressional actions, too, suggest that the equal right principle meant something more than that federal judges must follow the law.

## II. UNDERSTANDING EQUAL RIGHT

This Part outlines two ways that federal judges might approach the equal right principle. The first involves statutory interpretation, while the second involves “promissory constitutionalism,” or the view that oaths of office are promises that create personal moral obligations. Under either of those approaches, the equal right principle is plausibly viewed as a principle of substantive equality. Further, promissory constitutionalism suggests that the equal right principle’s moral content could be specified through future political mobilization.

### A. Statutory Interpretation

Under conventional standards of statutory interpretation, there is at least a plausible case that the equal right principle calls on federal judges to consider substantive economic equality.

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majority of our states included in their constitutions provisions adopting the ideal of equal justice for all.”).

<sup>90</sup> See note 23.

On its face, a requirement to do “equal right to the poor and to the rich” is quite broad.<sup>91</sup> From the Founding to the present day, the word “right” has been understood to encompass “justice,” or moral correctness.<sup>92</sup> So, unlike the other clauses making up the federal judicial oath, the equal right principle’s text calls for federal judges to adhere to a significantly open-ended principle of class equality. And judicial decision-making that exhibits formal equality does not necessarily constitute class impartiality or “do equal right.”<sup>93</sup> The idea here is not to punish the rich<sup>94</sup> or to achieve equality for equality’s sake,<sup>95</sup> but rather to be just, given relevant economic differences.<sup>96</sup> Much like the idea that the rich and poor alike are forbidden from sleeping under bridges,<sup>97</sup> a

<sup>91</sup> See Paul Horwitz, *Judicial Character (and Does It Matter)*, 26 Const Comm 97, 163 (2009) (noting “[t]he short but sweeping language of the federal judicial oath”).

<sup>92</sup> See J.A. Simpson and E.S.C. Weiner, eds, 13 *Oxford English Dictionary* 922–23 (Clarendon 2d ed 1989) (collecting historical usages of the term “right”); Noah Webster, 2 *An American Dictionary of the English Language* “right, *n*” (Converse 1828); Samuel Johnson, 2 *A Dictionary of the English Language* “right, *n*” (Strahan 1755) (first definition of right, *n*: “Justice”). Even the legalistic (second-listed) definition of “right” in Webster’s original *Dictionary* expressly blurs consideration of legal and nonlegal factors: “When laws are definite, right and wrong are easily ascertained and understood,” but when matters are “left without positive law, we are to judge what is right by fitness or propriety, by custom, civility or other circumstances.” Webster, 2 *American Dictionary* at “right, *n*” (cited in note 92) (emphasis omitted).

<sup>93</sup> See Joan B. Gottschall, *Factfinding as a Spiritual Discipline*, 4 U St Thomas L J 325, 335–36 (2006) (“Insofar as an accurate assessment of reality causes a decision-maker to decide in favor of the less powerful person, the decision-maker is simply doing what the oath of federal judges requires: to ‘do equal right to the poor and to the rich.’”); Walter Kendall, *Reflections on Judicial Review and the Plight of the Poor in a World Where Nothing Works*, 37 John Marshall L Rev 555, 572 n 94 (2004) (glossing the oath: “Do not deny the rich what is theirs by right; but make sure the poor actually receive equal right without regard to their poverty”); James D. Gordon III, Book Review, *Cardozo’s Baseball Card*, 44 Stan L Rev 899, 907 (1992) (responding to Judge Richard Posner’s formalist invocation of the equal right principle: “It is not ‘bending the rules’ at all to treat unequal things unequally”); Aviam Soifer, *On Being Overly Discrete and Insular: Involuntary Groups and the Anglo-American Judicial Tradition*, 48 Wash & Lee L Rev 381, 394 (1991) (denying that the oath “rejects a basic point made by John Winthrop . . . : ‘If the same penalty hits a rich man, it pains him not, it is not affliction to him, but if it lights upon a poor man, it breaks his back’”).

<sup>94</sup> Efforts to promote justice are not zero-sum, so promoting justice for one party does not necessitate injustice for another. For example, rights to criminal counsel, see text accompanying notes 227–30, do not unfairly harm “the rich,” and may not adversely affect rich litigants at all.

<sup>95</sup> But see generally *Harrison Bergeron*, in Kurt Vonnegut, *Welcome to the Monkey House* 7 (Dell 1968).

<sup>96</sup> See H.L.A. Hart, *The Concept of Law* 155–59 (Clarendon 1961) (proposing the Aristotelian idea that justice is treating like cases alike).

<sup>97</sup> Justice Felix Frankfurter once quoted Nobel Laureate Anatole France—“The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg

formal equality reading will often ring hollow.<sup>98</sup> The equal right principle thus commands that federal judges ask a certain question (“What is ‘equal right to the poor?’”), but the statutory text does not determine whether the correct answer in any particular case is to pursue either formal or substantive equality. Federal judges must instead answer that question for themselves. So, in light of its textual breadth, the equal right principle is at least plausibly understood as a statutory basis for federal judges to consider substantive equality.<sup>99</sup> That conclusion accords with widespread interpretive agreement on the importance of textual fidelity in statutory interpretation.

A substantive equality reading also finds support in the traditional presumption against statutory superfluity.<sup>100</sup> Because other portions of the federal judicial oath separately address non-economic aspects of judicial impartiality<sup>101</sup> as well as the duty to follow the law,<sup>102</sup> the equal right principle would be superfluous if read as nothing more than a principle of formal equality.<sup>103</sup> Embracing that result, some commentators candidly view the federal judicial oath as “repetitive.”<sup>104</sup> But while placing a thumb on the scales in favor of the substantive equality reading, the

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in the streets, and to steal bread”—in objecting to a “ruthless consequence, inevitably resulting from a money hurdle erected by a State.” *Griffin v Illinois*, 351 US 12, 23 (1956) (Frankfurter concurring in the judgment).

<sup>98</sup> See Soifer, *Law and the Company We Keep* at 134, 167 (cited in note 13).

<sup>99</sup> For an argument on the importance of having the word “poor” precede the word “rich,” see 75th Cong. 1st Sess. in 81 Cong Rec 9089 (Aug 17, 1937) (statement of Sen Connally) (quoting the equal right principle and asserting: “They put the poor first. If there is any difference, they give the seniority to the poor”).

<sup>100</sup> See, for example, *Lowe v Securities and Exchange Commission*, 472 US 181, 207 n 53 (1985) (“[W]e must give effect to every word that Congress used in the statute.”); *Montclair v Ramsdell*, 107 US 147, 152 (1883) (“It is the duty of the court to give effect, if possible, to every clause and word of a statute.”). See also Ernst Freund, *Interpretation of Statutes*, 65 U Pa L Rev 207, 218 (1917) (“[T]he legislator is presumed to . . . choose his words deliberately intending that every word shall have a binding effect.”).

<sup>101</sup> See 28 USC § 453. See also note 15 and accompanying text.

<sup>102</sup> Federal judges also take the general federal oath to “support and defend the Constitution.” 5 USC § 3331. And the federal judicial oath promises compliance with all “duties incumbent upon me as \_\_\_ under the Constitution and laws of the United States.” 28 USC § 453.

<sup>103</sup> But see William E. Nelson, *History and Neutrality in Constitutional Adjudication*, 72 Va L Rev 1237, 1260–61 (1986) (linking the equal right principle to the “classical liberal tradition of judicial neutrality”).

<sup>104</sup> Raymond J. McKoski, *Reestablishing Actual Impartiality as the Fundamental Value of Judicial Ethics: Lessons from “Big Judge Davis”*, 99 Ky L J 259, 324 (2011) (asserting that the federal judicial oath contains three “repetitive statements about administering justice impartially”).

superfluity argument is not dispositive. Legislators, like other authors, often repeat themselves over and over again.<sup>105</sup> And an oath's ceremonial aspect arguably makes emphasis by repetition, or by slight variation, especially appropriate. By comparison, some wedding vows create a sense of escalating, all-encompassing commitment by promising fidelity not just "in sickness and in health" but also "till death do us part." In one sense, the "in sickness and in health" promise is superfluous, given what follows. Yet the inclusion of both promises is rhetorically powerful, as they draw attention to different aspects of marriage (illness and age) and so "make assurance double sure."<sup>106</sup> Extending this point, one might argue that the equal right principle simply represents a class-based variation on a singular theme of impartiality. If accepted, that reading would return us to the same question posed by the equal right principle's text: Just what does it mean to afford "equal right" to both "the poor" and "the rich"?

A skeptic might respond that a substantive reading of the equal right principle would violate the first clause of the federal judicial oath, in which jurists promise to "administer justice without respect to persons."<sup>107</sup> But why would the oath's first clause convey a broad commitment to formal equality? Textually, it is at least plausible to reject that premise, given that the "administer justice" promise is itself open-ended and so can easily be read in harmony with a substantively understood equal right principle. Indeed, a substantive reading of the equal right principle would readily allow all of the federal judicial oath's clauses to have mutually compatible and distinctive meanings. In promising

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<sup>105</sup> See *Arlington Central School District Board of Education v Murphy*, 548 US 291, 299 n 1 (2006) ("[I]nstances of surplusage are not unknown."); Abbe R. Gluck and Lisa Schultz Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 *Stan L Rev* 901, 933–36 (2013) (adducing evidence that Congress engages in redundancy).

<sup>106</sup> William Shakespeare, *Macbeth* Act IV, Scene I (Penguin 2000). See also Brett M. Kavanaugh, Book Review, *Fixing Statutory Interpretation*, 129 *Harv L Rev* 2118, 2161–62 (2016) (quoting *Macbeth* in discussing statutory redundancy).

<sup>107</sup> 28 USC § 453. For full text, see text accompanying note 1. This phrase, too, is biblical, see Acts 10:34 (Saint Peter famously declaring: "I perceive that God is no respecter of persons"); Romans 2:11, and has a long history in Anglo-American law, see James Q. Whitman, *Harsh Justice: Criminal Punishment and the Widening Divide between America and Europe* 41–42 (Oxford 2003); Richard M. Re and Christopher M. Re, *Voting and Vice: Criminal Disenfranchisement and the Reconstruction Amendments*, 121 *Yale L J* 1584, 1595 nn 53–54, 1662 n 425 (2012) (using "formal equality" to mean desert-based fairness).

"justice without respect to persons," the first clause is perhaps best read as a promise to ignore morally irrelevant personal traits,<sup>108</sup> whereas the final clause entails a promise to "faithfully and impartially discharge and perform"—not neglect or avoid—"all the duties" defined by law.<sup>109</sup> So, for example, a federal judge might transgress the first clause by disfavoring an old rival when ruling on a motion and violate the third clause by postponing hearings in boring cases. Thus, the federal judicial oath's other promises do not preclude—and arguably support—a substantive reading of the equal right principle.

Alternatively, a skeptic might shift attention from the equal right principle's text to its authors' expectations. As we have seen, historical expectations surrounding the equal right principle are far from clear.<sup>110</sup> Still, the First Congress (or subsequent congresses that have reenacted or amended the federal judicial oath) may have believed that "equal right to the poor" conveyed only a requirement of formal equality. But even if that view of Congress's expectations were correct, those historical understandings would not necessarily limit the equal right principle's ambit today.<sup>111</sup> Conventional principles of interpretation dictate that an interpreter's primary duty of fidelity is to the meaning of the enacted text, not unenacted background understandings.<sup>112</sup>

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<sup>108</sup> See Re and Re, 121 Yale L J at 1662 n 425 (cited in note 107). Thomas Aquinas took a similar view, contrasting "respect for persons" with fair considerations. See Thomas Aquinas, *Summa Theologica* II-II, Q 63, Art 1 at 187 (Benziger 1918) ("Respect of persons is opposed to distributive justice."). Commentators who view the clauses as having similar meanings disagree as to whether both or neither clause call for substantive equality. Compare notes 14, 32, with 156, 194, 227.

<sup>109</sup> 28 USC § 453.

<sup>110</sup> See Part I.

<sup>111</sup> See William N. Eskridge Jr, *Dynamic Statutory Interpretation*, 135 U Pa L Rev 1479, 1481 (1987) (arguing that "original legislative expectations should not always control statutory meaning" and that "[t]his is especially true when the statute is old and generally phrased and the societal or legal context of the statute has changed in material ways"). See also William N. Eskridge Jr, *Dynamic Statutory Interpretation* 125–27 (Harvard 1994) (discussing changed social contexts and legal rules). The Supreme Court routinely acknowledges "that a statute can be applied in situations not expressly anticipated by Congress," at least provided that the statute exhibits textual "breadth." *Pennsylvania Department of Corrections v Yeskey*, 524 US 206, 212 (1998) (quotation marks omitted).

<sup>112</sup> The basic approach to statutory interpretation outlined in the main text and referenced in note 111 parallels similar approaches in constitutional theory, calling to mind Professor Ronald Dworkin's distinction between concepts and conceptions, "new originalism," and other dynamic modes of constitutional argument. See, for example, Ronald Dworkin, *Law's Empire* 70–72 (Belknap 1986); Jack M. Balkin, *Original Meaning and Constitutional Redemption*, 24 Const Comm 427, 444 (2007); Lawrence B. Solum, *The*

When promulgating both the equal right principle and the Bill of Rights,<sup>113</sup> the First Congress set broad principles while delegating significant work to later interpreters. So even if eighteenth-century legislators expected that “equal right to the poor” would generate nothing more or less than strict formal equality, that original expectation would not itself be the law and so would not necessarily bind later jurists.

A loose comparison might be drawn to, for example, the antitrust laws, whose prohibition on certain “restraint[s] of trade” has long generated an elaborate and ever-evolving set of “common law” reasonableness requirements reflecting contemporary economic theory and reality.<sup>114</sup> When implementing the Act, courts do not ask whether the enacting Congress envisioned or approved any particular antitrust requirement but instead endeavor to implement the broad statutory principle of “reasonableness” as best they can today.<sup>115</sup> Courts implementing the equal right principle might likewise follow its broad text, which incorporates equity’s dynamic concern for the poor.<sup>116</sup> Or take the long-dormant Alien Tort Statute<sup>117</sup> (ATS), which—like the equal right principle—was originally part of the 1789 Judiciary Act. The ATS authorizes suit for torts “in violation of the law of nations.”<sup>118</sup> In implementing that statute, the Court has recognized the need for judicial restraint but is nonetheless prepared to go beyond the bounds of liability recognized under eighteenth-century law.<sup>119</sup> So federal courts often take broad statutes as

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*Fixation Thesis: The Role of Historical Fact in Original Meaning*, 91 Notre Dame L Rev 1, 55 (2015); Christopher R. Green, *Originalism and the Sense-Reference Distinction*, 50 SLU L J 555, 556–58 (2006); Mark D. Greenberg and Harry Litman, *The Meaning of Original Meaning*, 86 Georgetown L J 569, 574–82 (1998).

<sup>113</sup> The Bill of Rights was passed by Congress on September 25, 1789. See *Primary Documents in American History: The Bill of Rights* (Library of Congress), archived at <http://perma.cc/ZAB5-25FS>. The Judiciary Act was signed into law the day before. Judiciary Act of 1789, 1 Stat at 73.

<sup>114</sup> See, for example, *Leegin Creative Leather Products, Inc v PSKS, Inc*, 551 US 877, 888, 899 (2007) (calling the Sherman Act a “common-law statute” and noting that its use of “restraint of trade” “invokes the common law itself, . . . not merely the static content that the common law had assigned to the term in 1890”).

<sup>115</sup> See, for example, *Business Electronics Corp v Sharp Electronics Corp*, 485 US 717, 732 (1988) (“The Sherman Act adopted the term ‘restraint of trade’ along with its dynamic potential.”).

<sup>116</sup> See Part I.B.

<sup>117</sup> Judiciary Act of 1789 § 9, 1 Stat at 76–77, 28 USC § 1350.

<sup>118</sup> 28 USC § 1350. See also *Sosa v Alvarez-Machain*, 542 US 692, 712–38 (2004) (construing 28 USC § 1350).

<sup>119</sup> *Sosa*, 542 US at 729–30.



occasions for ongoing reflection. That approach is consistent with a substantive reading of the equal right principle.

Further, changing times and experience have profoundly altered preponderant as well as reasonable understandings of economic equality. While many eighteenth-century legislators may have assumed that the proper ruling class consisted of the landed elite,<sup>120</sup> decades of populist democratic politics have ensured that no official today would publicly assert that the rich should govern the poor. New understandings of legitimate democracy have thus given rise to a more egalitarian constitutional culture, one defined by legal epigraphs like “one person, one vote” and public institutions like social security.<sup>121</sup> The formal constitutional order has likewise changed, including through the direct election of senators and greater tethering of the presidential electoral college to the popular vote.<sup>122</sup> And empirical research has shown that US politics disadvantage the poor.<sup>123</sup> These new understandings can inform modern interpreters, leading them to conclude that doing “equal right” calls for at least some substantive commitment to preventing an economic class from obtaining an unjust advantage—or suffering an unjust deprivation—due to wealth disparities.

Yet the equal right principle should remain limited in significant ways. No matter how dynamically construed, for instance, the federal judicial oath is not itself a source of primary law binding on private individuals. In this sense, the equal right principle is unlike, say, the antitrust laws or the ATS, which provide sources of judicial authority to craft and modify rules of conduct binding on private parties. When federal courts elaborate antitrust or ATS rules, they understand themselves to be exercising a kind of delegated legislative authority.<sup>124</sup> The federal

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<sup>120</sup> See, for example, Suzanna Sherry, *An Originalist Understanding of Minimalism*, 88 Nw U L Rev 175, 178 (1993) (“To the extent that the founders *were* good civic republicans, their elitism was derived not so much from economic self-interest as from a belief that only the ‘natural aristocracy’ had the education, leisure, and inclination to deliberate rationally and disinterestedly about the good of the nation.”).

<sup>121</sup> See, for example, *Reynolds v Sims*, 377 US 533, 558 (1964); William N. Eskridge Jr and John Ferejohn, *A Republic of Statutes: The New American Constitution* 183–86 (Yale 2010) (discussing the Social Security Act).

<sup>122</sup> See US Const Amend XVII. See also Beverly J. Ross and William Josephson, *The Electoral College and the Popular Vote*, 12 J L & Pol 665, 690 (1996) (summarizing the history of states requiring electors to follow the popular vote).

<sup>123</sup> See note 236 and accompanying text.

<sup>124</sup> See text accompanying notes 114–19.

judicial oath likewise requires elaboration, but it does not directly govern private conduct or even conduct by nonjudicial governmental officials. As a result, the equal right principle cannot have practical effect apart from other sources of law. Instead, it helps to establish the judge's relationship to other laws. Viewing the equal right principle in this way suggests that it might serve only an interstitial or supplemental role. The specific governs the general, so the judge's obligation to "do equal right to the poor" could not overcome separate legal authority, or replace that authority when it is absent. Yet the general can supply guidance when specific sources of law are ambiguous. So the equal right principle could resolve underdeterminacy in other legal principles, or assist in their implementation.

If understood as an interstitial principle, the federal judicial oath would hardly be unique. A great deal of law consists of second-order principles—that is, principles that shape the interpretation of other principles.<sup>125</sup> Many of these second-order rules have arisen without any discernible source in positive law. Canons of statutory interpretation, principles of stare decisis, and clear statement rules offer perhaps the most salient examples of second-order rules that often control or affect substantive legal outcomes but frequently appear to be judge-made. In comparison, the equal right principle is more firmly rooted in positive law because it has a foothold in the plain, albeit open-ended, text of a federal statute. Moreover, a substantive reading of the equal right principle finds support in a significant judicial tradition of advancing economic equality through acts of interpretation.<sup>126</sup> So the equal right principle is plausibly read as a second-order legal rule, guiding federal judges to approach their work with the understanding that substantive economic equality is a significant legal value.

But if the equal right principle really does call for some judicial attention to substantive economic equality, would that law lie within Congress's legislative power? The answer depends to some extent on how the equal right principle is implemented, a topic discussed in Part III. For now, a précis will suffice. The

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<sup>125</sup> See, for example, US Const Amend IX; Dictionary Act § 2, 16 Stat 431, 431, codified as amended at 1 USC § 1; William Baude and Stephen E. Sachs, *The Law of Interpretation*, 130 Harv L Rev 1079, 1082–83 (2017).

<sup>126</sup> See R. Shep Melnick, *Between the Lines: Interpreting Welfare Rights* 7 (Brookings 1994) (arguing that "judicial interpretation of entitlement statutes has substantially enlarged programs for the poor").

easy cases are the numerous potential applications of the equal right principle affecting only nonconstitutional federal law and practice. Insofar as it influences how federal judges go about their business, such as by spending more time parsing pro se and in forma pauperis filings, the equal right principle is supported by Congress’s power to legislate in a manner necessary and proper to operating the Article III judiciary.<sup>127</sup> The equal right principle could also or alternatively be viewed as an aid in interpreting federal statutory law, in which case it would again be supported by Congress’s enumerated legislative powers.<sup>128</sup>

The issue of congressional power is more complicated when the equal right principle is directed toward federal constitutional law, because no statute has authority to override the Constitution. But even so, Congress and the equal right principle can play an important role in shaping constitutional doctrine. Implementing constitutional law often depends on variables that lie within legislative control or influence,<sup>129</sup> and the equal right principle

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<sup>127</sup> See *M’Culloch v Maryland*, 17 US (4 Wheat) 316, 416 (1819) (“[H]e would be charged with insanity who should contend, that the legislature might not superadd, to the oath directed by the constitution, such other oath of office as its wisdom might suggest.”). See also *Jinks v Richland County*, 538 US 456, 462 (2003) (upholding state-court duty to toll certain claims as necessary and proper, noting that “it suffices that [the law] is ‘conducive to the due administration of justice’ in federal court, and is ‘plainly adapted’ to that end”) (citation omitted). Note that Congress’s Necessary and Proper powers may implement the Article III judicial power relating to “equity.” US Const Art III, § 2. See also Part I.B (discussing equity’s history of attention to the poor).

<sup>128</sup> See generally Nicholas Quinn Rosenkranz, *Federal Rules of Statutory Interpretation*, 115 Harv L Rev 2085 (2002) (defending the general constitutionality of congressional authority to establish rules of statutory construction, and distinguishing effects on constitutional rules). The equal right principle may be on stronger footing than some of Professor Nicholas Quinn Rosenkranz’s proposed rules: rather than dictating basic features of judicial interpretation and so arguably encroaching on the “judicial Power” of Article III, the equal right principle operates only interstitially, after federal judges have already exercised their interpretive powers and ascertained a legal ambiguity. See Larry Alexander and Saikrishna Prakash, *Mother May I? Imposing Mandatory Prospective Rules of Statutory Interpretation*, 20 Const Commen 97, 98–100 (2003) (opposing “mandatory prospective rules of statutory interpretation,” at least if they override “clear” legislative intent). But see Linda D. Jellum, “Which Is to Be Master,” *the Judiciary or the Legislature? When Statutory Directives Violate Separation of Powers*, 56 UCLA L Rev 837, 842 (2009) (arguing that “interpretive directives are likely unconstitutional when enacted to apply generally to many statutes”).

<sup>129</sup> See for example, *Nevada Department of Human Resources v Hibbs*, 538 US 721, 730–35 (2003) (drawing on a legislative record to uphold a statute enacted pursuant to the Fourteenth Amendment’s Enforcement Clause); *Lujan v Defenders of Wildlife*, 504 US 555, 578 (1992) (holding that Congress may, through legislation, “elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate” to establish standing in federal court); Henry P. Monaghan, *The Supreme Court*

can credibly speak to some of those variables. For instance, the equal right principle supports economic equality's public and moral legitimacy as a "compelling" governmental interest. Relatedly, federal courts may view some issues as not within their traditional role and so "underenforce" the Constitution in those areas—unless the political branches legislate otherwise.<sup>130</sup>

Congressional power aside, the equal right principle raises certain federalism questions. Because it is directed toward *federal* judges, the equal right principle would not directly affect state courts. In this respect, the equal right principle resembles many other aspects of federal law, such as federal canons of interpretation and rules of precedent.<sup>131</sup> There may be some benefit to interpretive pluralism among state and federal courts because something might be learned from allowing both state courts and lower federal courts to operate as "laboratories" of experimentation in the area of economic equality.<sup>132</sup> But while it might have some unique implications for the federal court system, such as by influencing court rules and administrative choices, the equal right principle is unlikely to generate permanent state–federal divergence on questions of federal law. Because US Supreme Court rulings bind both state and federal courts, the equal right principle would often reach state courts, too.

A pragmatically minded skeptic might respond with a dose of legal realism. Conventional legal argument is all well and good, but will those arguments change outcomes? The next Section will have more to say on this score, but for now it should suffice to posit that conventional legal arguments both do and should matter to a significant set of judges in a significant set of cases. True, federal courts should frequently decline to consider substantive economic equality based on clear law or other considerations, without having occasion to consider the interstitial equal right principle. Yet the equal right principle would still matter. When arguments for substantive economic equality are neither

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1974 Term—Foreword: *Constitutional Common Law*, 89 Harv L Rev 1, 2 (1975) (recognizing that "a wide variety of Supreme Court pronouncements are subject to modification and even reversal through ordinary political processes").

<sup>130</sup> For discussion of legislation authorizing greater judicial enforcement, see note 335 and accompanying text.

<sup>131</sup> See Abbe R. Gluck, *The States as Laboratories of Statutory Interpretation: Methodological Consensus and the New Modified Textualism*, 119 Yale L J 1750, 1753–54 (2010).

<sup>132</sup> *New State Ice Co v Liebmann*, 285 US 262, 311 (1932) (Brandeis dissenting).

foreclosed nor foreordained by separate sources of law, at least some jurists will be concerned about overstepping their conception of the judicial role or inviting unwanted public criticism. And that caution may be especially acute for the median jurist. At that critical juncture, a new argument from positive law and conventional legal interpretation could play an important role in tipping the scales and altering outcomes.

Finally, some readers might wonder whether the equal right principle is a rule of judicial decision-making at all. Read narrowly, the statute establishing the equal right principle might simply prescribe a ritual that incoming jurists must perform. The oath's legal implications would then be exhausted once federal judges swear or affirm the oath, regardless of how they later decide cases. But why would Congress legislate such an oath, if it did not want the oath to be obeyed? A more plausible view is that the statutory oath impliedly conveys a legal directive that installed judges actually "do equal right to the poor," after taking office. However, there is another, closely related explanation for the equal right principle: perhaps Congress recognized and desired that a legally required practice of oath taking would generate certain moral obligations. That possibility is explored in the next Section.

## B. Promissory Constitutionalism

The equal right principle is not just a statute; it is also a promise and, therefore, a source of personal moral obligations. This Section explores the promissory aspect of the equal right principle and argues that its moral content can be specified through public contestation, particularly during judicial confirmation hearings.

Promissory constitutionalism begins with the observation that oaths of office are "promissory oaths"—that is, they define social roles through a kind of promise.<sup>133</sup> Promises are almost universally recognized as sources of moral obligation, though the reasons for that conclusion are contested. Fortunately, there is

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<sup>133</sup> See Richard M. Re, *Promising the Constitution*, 110 Nw U L Rev 299, 307, 310–11 (2016) (discussing "promissory oaths" in discussing the Article VI oath to support "the Constitution"). See also William Baude, *Is Originalism Our Law?*, 115 Colum L Rev 2349, 2394 (2015); Frank H. Easterbrook, *Textualism and the Dead Hand*, 66 Geo Wash L Rev 1119, 1122 (1998). The Supreme Court often posits that oaths affect officials. See, for example, *Hollingsworth v Perry*, 133 S Ct 2652, 2667 (2013).

no need to choose among competing accounts of promissory obligation because the equal right principle satisfies many, and perhaps all, leading theories. For instance, promises might create obligations when they are invited, desired, relied upon, or capable of equalizing objectionable power disparities.<sup>134</sup> As a legal prerequisite for holding office, the equal right principle meets all of those criteria: Through the democratic process, the public has determined that prospective federal jurists may obtain office only if they provide certain assurances regarding their future conduct. And members of the public—like presidents and senators—both expect and rely on judges' subsequent adherence to their official oaths.<sup>135</sup>

Just as important, the equal right principle avoids important promissory pitfalls, or reasons why some apparent promises do not actually carry moral force. Most saliently, promises have moral force only if both adequately voluntary and morally permissible.<sup>136</sup> The equal right principle meets those criteria as well: nobody is forced into federal judicial service, and substantive economic equality is not an inherently immoral goal. By contrast, a judge who made a promise in response to coercion or bribery would not generally have a binding obligation.<sup>137</sup> Because oaths of office govern aspects of governmental authority, they may be subject to a special criterion—namely, a requirement of democratic legitimacy.<sup>138</sup> The equal right principle passes muster under that standard as well: not only is it a statute enacted through presumptively legitimate democratic processes, but—as we will see—it could also come to serve as a focal point

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<sup>134</sup> See Ronald Dworkin, *Justice for Hedgehogs* 303–04 (Belknap 2011) (outlining the reliance account); T.M. Scanlon, *What We Owe to Each Other* 302–09 (Belknap 1998) (outlining the assurance account); Judith Jarvis Thomson, *The Realm of Rights* 296–301 (Harvard 1990) (emphasizing the need for some type of “uptake” by the promisee); Seana Valentine Shiffrin, *Promising, Intimate Relationships, and Conventionalism*, 117 *Phil Rev* 481, 484–85 (2008) (outlining the power relationship account).

<sup>135</sup> See *Re*, 110 *Nw U L Rev* at 308 (cited in note 133) (discussing the Article VI constitutional oath).

<sup>136</sup> See Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* 47–48 (Princeton 2014) (arguing that, under certain conditions, promises can be binding despite duress); Joseph Raz, *The Morality of Freedom* 173 (Oxford 1988) (noting that in most instances the “right to promise does not include the right to promise to perform immoral acts”).

<sup>137</sup> See Shiffrin, *Speech Matters* at 47 (cited in note 136). In addition, the equal right principle cannot trump other sources of law. See text accompanying note 175.

<sup>138</sup> See *Re*, 110 *Nw U L Rev* at 313–14 (cited in note 133).

for constitutional politics.<sup>139</sup> In short, the equal right principle creates promissory obligations.

But if the equal right principle creates a promissory obligation, then what is its content? In general, the content of a promissory obligation derives from the mutually understood meaning communicated between promisor and promisee at the time of the promise.<sup>140</sup> Of course, promises, like any other use of language, can be ambiguous or vague,<sup>141</sup> and so frequently give rise to underdetermined moral obligations. If I promise a coworker that I will bring a “healthy snack,” for instance, then my obligation might clearly exclude brownies but allow for either broccoli or carrots. Likewise, the federal judicial oath communicates a promise between the judge and the public, and the content of each judge’s oath accordingly depends on its public meaning, to the extent that meaning is discernible.<sup>142</sup> Given the breadth of its terms, the equal right principle certainly requires a great deal more judgment than the kind of promises that are typical of everyday life. But if judges and the public understood the equal right principle more specifically, then the federal judicial oath would correspondingly generate a more specific promissory obligation. Promissory constitutionalism thus links the moral content of each federal judge’s oath to the then-prevailing public understanding of equal right.<sup>143</sup>

At present, the public meaning of the equal right principle hovers somewhere between prohibiting and requiring consideration of substantive economic equality. This underdeterminacy is visible in the divided opinions on the subject.<sup>144</sup> Complicating matters, the equal right principle, unlike everyday promises, is

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<sup>139</sup> To the extent that the equal right principle became a subject of popular mobilization, its moral implications might be compared (and contrasted) with political campaign promises by elected officials—a topic for further research.

<sup>140</sup> See, for example, David Hume, *A Treatise of Human Nature* 523 (Clarendon 1896) (L.A. Selby-Bigge, ed) (noting that an “expression makes on most occasions the whole of the promise”). This claim sets aside defective promises, such as deception or miscommunication, which may not give rise to promises at all.

<sup>141</sup> See generally Ralf Poscher, *Ambiguity and Vagueness in Legal Interpretation*, in Peter M. Tiersma and Lawrence M. Solan, eds, *The Oxford Handbook of Language and Law* 128 (Oxford 2012).

<sup>142</sup> I focus on public meaning to exclude any private meanings that a speaker might secretly intend by using a certain expression. See Shiffrin, *Speech Matters* at 150 n 59 (cited in note 136) (criticizing the “doctrine of mental reservation” and noting that the federal oath disclaims any mental reservation); 5 USC § 3331.

<sup>143</sup> See text accompanying notes 109–12.

<sup>144</sup> See note 23.

also a statute. Its public meaning therefore depends in part on publicly authoritative methods of statutory interpretation—much as the public meaning of a promise that included a complex equation would depend in part on authoritative methods of reading mathematical symbols.<sup>145</sup> And while we have seen that the equal right principle is at least plausibly interpreted as having substantive implications, conventional methods of statutory interpretation leave room for reasonable disagreement about just what the equal right principle requires.<sup>146</sup> Moreover, the equal right principle has played a relatively peripheral role in public discussion on economic equality.<sup>147</sup> The equal right principle could even be viewed as the federal judiciary's forgotten promise to the American people.<sup>148</sup> In short, federal judges' promissory obligations are relevantly underdetermined. Current federal judges therefore have moral discretion to construe the equal right principle as a lawful basis for promoting substantive economic equality, as discussed below in Part III. And some judges have already done so, giving rise to a nascent oath-based jurisprudence of equal right.<sup>149</sup>

Yet the equal right principle's underdeterminacy is contingent on current political and cultural conditions. Promissory constitutionalism suggests that political contestation could inform public understandings of official oaths, thereby specifying their content.<sup>150</sup> The United States has recently seen diverse political efforts substantially addressed toward issues of economic inequality. Examples include the Occupy movement, Senator Sanders's presidential campaign, Secretary Clinton's campaign pledge to propose a campaign finance amendment, and some

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<sup>145</sup> See Re, 110 Nw U L Rev at 320–22 (cited in note 133) (arguing that oaths incorporate lawful interpretive methods). See also text accompanying note 176.

<sup>146</sup> See Part II.A.

<sup>147</sup> See Douglas W. Kmiec, *Judicial Selection and the Pursuit of Justice: The Unsettled Relationship between Law and Morality*, 39 Cath U L Rev 1, 17 (1989) (“Few laymen are familiar with the first line of the judicial oath to ‘administer justice without respect to persons, and do equal right to the poor and to the rich.’”).

<sup>148</sup> The promise is “forgotten” by comparison with the Article II and various Article VI oaths to uphold the Constitution. See Re, 110 Nw U L Rev at 317–18 (cited in note 133). See also Kermit Roosevelt III, *The Myth of Judicial Activism: Making Sense of Supreme Court Decisions* 23 (Yale 2006) (noting the general constitutional oath and observing that “[i]t is one of the striking features of American government that the primary object of loyalty is not a person, a party, an office, or even a nation, but the Constitution itself”).

<sup>149</sup> See note 23.

<sup>150</sup> See Re, 110 Nw U L Rev at 322–28 (cited in note 133).



aspects of President Trump’s presidential campaign.<sup>151</sup> The equal right principle offers these and other political movements a new object of political mobilization. If the public came to view the federal judicial oath as calling for judicial promotion of substantive economic equality, that new public understanding would inform the content of new federal judicial oaths. In this way, what had once been an arguably formal promise could become a clearly substantive commitment. In taking their oaths, newly appointed federal judges would be committing themselves to the project of working out that substantive obligation over time.

Viewing the equal right principle as substantive would help to fill a void in constitutional culture.<sup>152</sup> Economic inequality is a central topic of contemporary politics and implicates myriad legal issues, yet there is currently no legal focal point or deliberative platform for public debate on broadly applicable questions of economic justice.<sup>153</sup> In this respect, the United States is unlike the many constitutional democracies whose governing charters prominently feature at least some basic principles of economic equality.<sup>154</sup> The equal right principle can fill that void. Though it lacks the public authority of a constitutional text,<sup>155</sup> the equal right principle has its own sources of authority, including its status as legislation, the moral force of promising, and the tradition

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<sup>151</sup> See text accompanying note 33.

<sup>152</sup> For the need to link the law of economic equality with politics, see note 36. For the history of political mobilization around economic equality, including in legal contexts, see generally Sean Wilentz, *The Politicians and the Egalitarians: The Hidden History of American Politics* (Norton 2016); Joseph Fishkin and William E. Forbath, *The Anti-Oligarchy Constitution*, 94 *BU L Rev* 669 (2014).

<sup>153</sup> Many broad constitutional principles serve as a “platform” or “focal point” for public contestation over time. See Jack M. Balkin, *Living Originalism* 134 (Belknap 2011) (“To argue about the Constitution, one must have a common platform for arguing, first to disagree with others, then to persuade them.”); David A. Strauss, *Common Law, Common Ground, and Jefferson’s Principle*, 112 *Yale L J* 1717, 1734 (2003) (“The text of the Constitution is a particularly good focal point of this kind. Because of the way it is regarded in our culture, it is a natural place to look for a solution on which we can all agree, when agreement is especially valuable.”).

<sup>154</sup> See note 35.

<sup>155</sup> The best alternative platform is probably the Equal Protection Clause, discussed in Part III.D. For now, note that the Equal Protection Clause does not specify economic class and so can more easily be construed—consistent with extant precedent—as agnostic on matters of economic justice. At the same time, the Equal Protection Clause is also relatively confining: it has given rise to a complex doctrinal edifice involving “tiers of scrutiny,” and that framework—while powerful—tends to obscure subtler options, such as those discussed in Parts III.A–C.

and practice of official oath taking. As an unusually salient commitment that is also an express condition on assuming a federal judgeship, the equal right principle is an apt object of political mobilization. And because the federal judicial oath is a statute, it can be amended, supplemented, or even eliminated if the political branches feel that the statute has been misinterpreted. Each time the federal courts used the equal right principle might prompt additional political and judicial reflection, giving rise to a proverbial court–Congress “dialogue” on what it means to do equal right to the poor.<sup>156</sup>

Some public contestation over the federal judicial oath’s meaning has already taken place, albeit indecisively. Consider then-Senator Barack Obama’s argument that federal judges should have “empathy to understand what it’s like to be poor,” among other things.<sup>157</sup> This statement sparked controversy, and some attention focused on the federal judicial oath. For instance, Professor Steven Calabresi penned a *Wall Street Journal* piece that quoted the federal judicial oath, including the equal right principle, and contended that “Mr. Obama’s emphasis on empathy in essence requires the appointment of judges committed in advance to violating this oath.”<sup>158</sup> Calabresi argued that the equal right principle precluded “empathy” for the poor, thereby highlighting the implications of adopting a strict formal equality reading. Some senators likewise argued that “empathy” on the part of a federal judge would be “contrary to the judicial oath.”<sup>159</sup>

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<sup>156</sup> See William E. Nelson, *The Role of History in Interpreting the Fourteenth Amendment*, 25 *Loyola LA L Rev* 1177, 1180 (1992) (“[The Court should] commit itself to the furtherance of the principles best able to generate public support for the judiciary’s duty to ‘administer justice without respect to persons, and do equal right to the poor and to the rich.’”); Dan T. Coenen, *A Constitution of Collaboration: Protecting Fundamental Values with Second-Look Rules of Interbranch Dialogue*, 42 *Wm & Mary L Rev* 1575, 1596 (2001). See also generally William N. Eskridge Jr., *Overriding Supreme Court Statutory Interpretation Decisions*, 101 *Yale L J* 331 (1991).

<sup>157</sup> See Carrie Dann, *Obama on Judges, Supreme Court* (NBC News, July 17, 2007), archived at <http://perma.cc/AZG8-KC6M> (quoting Obama’s speech).

<sup>158</sup> Steven G. Calabresi, *Obama’s ‘Redistribution’ Constitution*, *Wall St J* A17 (Oct 28, 2008). See also Jonah Goldberg, *Empathy vs. Impartiality*, (National Review Online, May 27, 2009), archived at <http://perma.cc/N9Y9-Q7J3> (“[Obama] wants the justice’s oath to in effect be rewritten. Judges must administer justice with respect to persons, they must be partial to the poor, and so on.”).

<sup>159</sup> See 111th Cong, 1st Sess, in 155 *Cong Rec* 15848 (June 23, 2009) (statement of Sen Sessions) (“[W]hatever else empathy might be, it is not law. So I think empathy as a standard, preference as a standard is contrary to the judicial oath.”). The Senate has heard contrary readings of the oath. See, for example, note 99 (quoting the equal right

But that argument invited the response, also rooted in the oath, that providing “equal right to the poor and to the rich” sometimes requires consideration of who is poor and who is rich. And Obama could have fueled the public discussion by arguing that substantive economic equality is a key judicial value.<sup>160</sup>

Confirmation hearings for Supreme Court justices offer perhaps the most salient forum for public discussion of the equal right principle.<sup>161</sup> These hearings reflect the Senate’s implementation of its constitutional power and responsibility to give “Advice and Consent.”<sup>162</sup> For most of US history, hearings on Supreme Court nominees were closed to the public, and nominees did not attend, but that began to change during the early twentieth century.<sup>163</sup> In 1916, public hearings were held, and in 1925 a nominee appeared before the Senate Judiciary Committee.<sup>164</sup> By the late 1950s, it had become customary for Supreme Court nominees to appear and testify.<sup>165</sup> These changes stemmed from diverse causes, including the Court’s increased public salience, the direct election of senators (accomplished by the Seventeenth Amendment in 1913<sup>166</sup>), and new technologies of mass media,

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principle and asserting: “They put the poor first. If there is any difference, they give the seniority to the poor”).

<sup>160</sup> Ultimately, the hearings for then-Judge Sonia Sotomayor featured expressions of both formal and substantive readings of the equal right principle. See *Nomination of Hon. Sonia Sotomayor to Be an Associate Justice of the Supreme Court of the United States, Hearing before the Senate Committee on the Judiciary*, 111th Cong. 1st Sess 6, 22–23, 39, 67–69, 73 (2009).

<sup>161</sup> A large literature endorses significant substantive engagement with nominees during confirmation hearings. See, for example, Christopher L. Eisgruber, *The Next Justice: Repairing the Supreme Court Appointments Process* 169–77 (Princeton 2007); Elena Kagan, Book Review, *Confirmation Messes, Old and New*, 62 U Chi L Rev 919, 935 (1995) (“[T]he Senate’s confirmation hearings [ ] ought to focus on substantive issues.”); Robert C. Post and Reva B. Siegel, *Questioning Justice: Law and Politics in Judicial Confirmation Hearings*, 115 Yale L J Pocket Part 38, 44–45 (2006). But see note 173 (noting that nominees often resist making promises).

<sup>162</sup> US Const Art II, § 2, cl 2. That is, the hearings could be a senatorial construction of the Constitution.

<sup>163</sup> See Michael J. Gerhardt, *The Federal Appointments Process: A Constitutional and Historical Analysis* 67 (Duke 2d ed 2003).

<sup>164</sup> See Henry J. Abraham, *Justices, Presidents, and Senators: A History of the U.S. Supreme Court Appointments from Washington to Bush II* 153–54 (Rowman & Littlefield 5th ed 2008).

<sup>165</sup> See Denis Steven Rutkus, *Supreme Court Appointment Process: Roles of the President, Judiciary Committee, and Senate* \*20–21 (Congressional Research Service, Feb 19, 2010), archived at <http://perma.cc/UUM8-QT3B>.

<sup>166</sup> US Const Amend XVII.

such as radio and television.<sup>167</sup> The result is a forum in which judicial nominees can make democratic commitments. As then-Senate Judiciary Committee Chairman Joseph Biden put it, “The Constitution provides for one democratic moment [ ] before a lifetime of judicial independence.”<sup>168</sup> So with each new nominee, “the people, through their elected representatives, get to ask questions of a President’s choice for the highest Court.”<sup>169</sup>

Confirmation hearings have recently drawn public attention to judicial minimalism, *stare decisis*, and hot-button issues like abortion rights.<sup>170</sup> And a nominee’s public assurances are often thought to shape her future jurisprudence.<sup>171</sup> In that spirit, nominees might reasonably be asked to opine on the relationship between their prospective oaths and economic equality. As we have seen, the equal right principle has already come up at confirmation hearings, such as when then-Judge Roberts acknowledged that persons of limited means might deserve some special consideration within the judicial process.<sup>172</sup> And once *some* judicial accommodation for the poor is recognized as lawful, the door is open to considering more.

Over time, a pattern of confirmation hearings or a trend in public debate could establish a new, generally applicable public understanding of what the equal right principle requires. Or a particular hearing could inflect the public meaning of a single

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<sup>167</sup> See Gerhardt, *The Federal Appointments Process* at 65–66 (cited in note 163); David R. Stras, Book Review, *Understanding the New Politics of Judicial Appointments*, 86 *Tex L Rev* 1033, 1057–68 (2008).

<sup>168</sup> *Nomination of Samuel A. Alito, Jr. to Be an Associate Justice of the Supreme Court of the United States, Hearing before the Senate Committee on the Judiciary*, 109th Cong, 2d Sess 17 (2006).

<sup>169</sup> *Id.*

<sup>170</sup> See, for example, *Roberts Hearings*, 109th Cong, 1st Sess at 448–49 (cited in note 2) (statement of John G. Roberts Jr).

<sup>171</sup> As Professor Stephen J. Wermiel noted, senators “hope that, once confirmed, the new Justices will remember the importance of the core values urged on them by the senators or at least feel bound by the assurances they gave during their hearings.” Stephen J. Wermiel, *Confirming the Constitution: The Role of the Senate Judiciary Committee*, 56 *L & Contemp Probs* 121, 142 (1993). Empirical research suggests that a nominee’s answers in hearing have some albeit limited correlation with the nominee’s subsequent behavior. See Jason J. Czarnezki, William K. Ford, and Lori A. Ringhand, *An Empirical Analysis of the Confirmation Hearings of the Justices of the Rehnquist Natural Court*, 24 *Const Comm* 127, 130, 158–59 (2007). Of course, such a correlation may not be caused by a judge’s sense of having committed herself to a view.

<sup>172</sup> See text accompanying notes 2–4. Still, Roberts’s apparent endorsement of substantive economic equality was ambivalent, as he went on to make statements that arguably suggested a formal equality view. See text accompanying notes 3–4.

jurist’s promissory obligations: to the extent that a nominee publicly specified the equal right principle’s meaning, that public meaning would then become part of the relevant nominee’s subsequent promise to the public.<sup>173</sup> And if a confirmation hearing instead left the equal right principle underdetermined—perhaps because background understandings remained ambiguous or because the nominee publicly disavowed the generally accepted understanding—then the nominee would, as a confirmed federal judge, retain moral discretion to implement the underdetermined meaning of her oath as she understood it, consistent with other relevant sources of law.<sup>174</sup>

Still, promissory constitutionalism confirms that the equal right principle should operate only interstitially, not as a means of trumping or replacing separate sources of law. As we have seen, the equal right principle operates in tandem with a separate oath to uphold the law,<sup>175</sup> and federal judges must reconcile that more general commitment with the equal right principle. To achieve that reconciliation, federal judges should use the equal right principle to operate as a filter or lens when evaluating separate sources of law, without defeating those sources of law when their meaning is clear. Further, conventional methods of statutory interpretation should constrain any promissory gloss that political mobilization might place on the equal right principle. When federal judges undertake their general obligation to obey the law, they commit to conventional methods of

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<sup>173</sup> See Re, 110 Nw U L Rev at 325–26 (cited in note 133). See also Baude, 115 Colum L Rev at 2394–96 (cited in note 133). Confirming the perceived moral significance of statements made in hearings, nominees customarily decline to answer certain questions, such as questions about specific cases, to avoid the appearance or reality of making a “promise.” See, for example, *Kagan Hearings*, 111th Cong, 2d Sess at 231 (cited in note 27) (statement of Elena Kagan) (declining to “promise”); *O’Connor Hearings*, 97th Cong, 1st Sess at 57–58 (cited in note 27) (statement of Sandra Day O’Connor) (declining to answer certain questions to avoid having “morally committed myself to a certain position”).

<sup>174</sup> Notably, a judge’s legal and promissory obligations are not necessarily identical to the proper conditions for the judge’s removal. See US Const Art II, § 4; US Const Art III, § 1. For example, someone can coherently argue for or against originalism without endorsing the impeachment of judges who take a contrary view.

<sup>175</sup> See text accompanying notes 67–69. See also Part I.C. But see William C. Porth and Robert P. George, *Trimming the Ivy: A Bicentennial Re-Examination of the Establishment Clause*, 90 W Va L Rev 109, 112 n 10 (1987) (“If anyone were to argue that the form of the judicial oath confers upon judges a special license to manipulate or disregard constitutional provisions, he would merely be making a case for the unconstitutionality of the statute prescribing the oath.”).

legal interpretation.<sup>176</sup> And because the equal right principle is rooted in statute, a federal judge's effort to interpret her oath must itself adhere to accepted interpretive methods. Thus, the moral implications of federal judges' oaths cannot revise the equal right principle but can *specify* its meaning, insofar as that meaning is underdetermined as a matter of statutory interpretation.<sup>177</sup>

Promissory constitutionalism can be compared with some forms of "popular constitutionalism," particularly the view that popular movements should inform constitutional law.<sup>178</sup> Under both views, a judge's constitutional duty is dynamically linked to publicly disputable popular understandings of the Constitution's meaning. As a result, both approaches allow that legal uncertainty—here, whether the equal right principle is a substantive principle—can be resolved at least in part through the messy process of public contestation. Yet promissory constitutionalism is distinct in that it identifies a specific mechanism for public views to alter or specify judicial obligation. For example, promissory constitutionalism would deny that a shift in public opinion should in itself be regarded as a proper basis for federal judges to alter their legal rulings.<sup>179</sup> Instead, promissory constitutionalism focuses first on each judge's oath.<sup>180</sup> By prospectively shaping the public meaning of new judicial promises to "do equal right to the poor and to the rich," a political movement in favor

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<sup>176</sup> See Re, 110 Nw U L Rev at 304–05 (cited in note 133) (arguing that oaths to adhere to law incorporate lawful interpretive methods).

<sup>177</sup> So while judges could in principle experience moral conflict between a promised interpretive method and a promised principle of law, see *id.* at 351–54, there is no need to determine how to resolve that conflict here, see Part II.A.

<sup>178</sup> See Barry Friedman, *Mediated Popular Constitutionalism*, 101 Mich L Rev 2596, 2598 & n 11 (2003) (explaining that what popular constitutionalists "seem to share is a notion that—at least in specified circumstances—judicial review should mirror popular views about constitutional meaning"). See also Katie R. Eyer, *The Declaration of Independence as Bellwether*, 89 S Cal L Rev 427, 429 n 7 (2016); Robert Post and Reva Siegel, *Roe Rage: Democratic Constitutionalism and Backlash*, 42 Harv CR–CL L Rev 373, 376–77 (2007) (elaborating a related, primarily descriptive view of "democratic constitutionalism"); Robert Post and Reva Siegel, *Popular Constitutionalism, Departmentalism, and Judicial Supremacy*, 92 Cal L Rev 1027, 1039 (2004) ("[J]udges can ground constitutional law in the Constitution only by incorporating the political convictions of the nation into the substance of constitutional law.").

<sup>179</sup> But see Post and Siegel, 42 Harv CR–CL L Rev at 381–82 (cited in note 178) (arguing that "[p]residential politics and Supreme Court nominations [ ] are blunt and infrequent methods of affecting the content of constitutional law").

<sup>180</sup> See Re, 110 Nw U L Rev at 304–05 (cited in note 133) (setting out two mechanisms of legal change relating to the Article VI oath to support the Constitution).

of substantive economic equality could shape the content of those new judges' obligations.<sup>181</sup>

Greater public attention to the equal right principle should have widespread appeal, even among people who disagree about how to resolve questions of equal right. Already, federal courts routinely assert competing versions of economic equality when implementing the law. Think of recent constitutional cases on the right to counsel or campaign finance, or statutory cases on the Patient Protection and Affordable Care Act<sup>182</sup> ("Affordable Care Act"). In all those areas, and many others besides, federal judges must decide whether to pursue one or another form of economic equality. The legal questions that arise in federal court make it all but inevitable that federal judges must rely on some understanding of equal right, whether formal, substantive, or some combination thereof. And, at different times, different judges have tacitly adopted different answers, often without acknowledging that their diverse decisions implicate the same widely applicable issue.<sup>183</sup> So the question is not whether courts should consider questions of economic equality. They already do, and will continue to do so for the foreseeable future. Rather, the question is whether judicial conceptions of economic equality should be governed by law and public political processes, or remain off the page and out of view.

Promissory constitutionalism answers that question by advancing a principled framework for addressing public disagreement on economic equality, not by dictating any specific deliberative outcome. Again, some public contestation on these points has already taken place.<sup>184</sup> Additional contestation regarding the meaning of the equal right principle could be resolved in many possible ways, including via a decisive endorsement of formal equality. For instance, the federal courts could be viewed as

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<sup>181</sup> New popular views can sometimes alter the implications of prior oaths by triggering "change rules," or rules for altering rules. See Re, 110 Nw U L Rev at 304–05 (cited in note 133). For example, a judge who took her oath today might be committed to changing her view of certain laws in light of new amendments, statutes, or precedents. In some areas of law, change rules may be sensitive to changes in popular views. See *id.*

<sup>182</sup> Pub L No 111-148, 124 Stat 119 (2010). These examples are discussed in Part III.A (counsel), Part III.B (healthcare), and Part III.C (campaign finance).

<sup>183</sup> For examples of federal-court debate on the issue of "equal right," see *Patterson v McLean Credit Union*, 485 US 617, 619, 621 (1988); *United States v Cilins*, 2013 WL 3802012, \*3 (SDNY), citing 28 USC § 453.

<sup>184</sup> See notes 157–60 and accompanying text (discussing public debate over judicial "empathy" and the equal right principle).

unable to advance substantive economic equality with adequate efficiency,<sup>185</sup> or substantive economic equality could itself be rejected in favor of free market values.<sup>186</sup> These diverse possibilities illustrate that promissory constitutionalism is open to all comers. Promissory constitutionalism does not “embody a particular economic theory”<sup>187</sup> but rather allows egalitarians, libertarians, and everyone in between to point to the federal judicial oath when articulating their contrasting views of what “equal right” entails. Those efforts at public justification would then foster greater clarity on federal judges’ obligations, as public debate, legislative confirmation hearings, and judicial precedents specified the oath’s meaning. Consensus on equal right is unlikely to be any more immediate than consensus on equal protection, freedom of speech, or any number of other abstract legal concepts. But the possibility of some persistent disagreement is part of the point. The equal right principle may be an “essentially contested concept,” and one purpose of democracy may be to explore its evolving meaning, without ever reaching a definitive, comprehensive conclusion.<sup>188</sup>

In sum, promissory constitutionalism points toward an untapped source of legal and public reasoning regarding economic equality: the statutorily established federal judicial oath. At present, the equal right principle can plausibly be read as a principle of substantive economic equality, and current federal judges therefore have moral discretion to consider and promote class-based fairness. Yet the content of the federal judicial oath depends in part on its public meaning, which can change. Moreover, the equal right principle is an unusually salient promise that could become a focal point for public contestation, including

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<sup>185</sup> See Liscow, Note, 123 Yale L J at 2483–84 (cited in note 30). See also *Bowen v Gilliard*, 483 US 587, 600–01 (1987) (emphasizing the need for judicial deference to the political branches in spending and entitlement programs); *Atkins v Parker*, 472 US 115, 129 (1985) (same).

<sup>186</sup> See generally, for example, Randy E. Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton 2004) (providing a libertarian constitutionalism). See also notes 357–59 and accompanying text (discussing the oath’s theoretical thinness).

<sup>187</sup> *Lochner v New York*, 198 US 45, 75 (1905) (Holmes dissenting). For other contrasts with *Lochner*, see text accompanying notes 357–59.

<sup>188</sup> See W.B. Gallie, *Essentially Contested Concepts*, 56 Proc Aristotelian Socy 167, 173–80 (1956). See also Mark Tushnet, *Taking the Constitution Away from the Courts* 194 (Princeton 1999) (“Populist constitutional law does not determine the outcomes of political controversies. . . . Instead, it orients us as we think about and discuss where our country ought to go.”).



during confirmation hearings. In time, increased attention to the equal right principle could specify federal judges’ promissory obligations and thus generate important changes in how federal judges ought to discharge their oaths of office. That normative conclusion would have legal implications to the extent that promissory constitutionalism influences who is nominated, as well as how those nominees, once confirmed, understand their obligations. The next Part explores these implications.

### III. IMPLEMENTING EQUAL RIGHT

Even if the equal right principle plausibly calls for federal judges to consider substantive economic equality, there is still ample room for debate about how to implement that ideal. This Part outlines several mutually compatible and overlapping possibilities. These proposals all operate within the interstices of existing law and so are quite different from saying that federal courts should aim to equalize or redistribute social wealth.<sup>189</sup> In operating within these traditional judicial projects, the equal right principle respects federal courts’ special institutional status, including both their distinctive attention to fairness and their limited institutional role in matters of economic policy.<sup>190</sup>

#### A. Adjudicative Equality

If judges are to “do equal right to the poor,” they might look first to their own courthouses. Because it is directed toward judges, the equal right principle forcefully applies to adjudicatory principles—that is, to the system for resolving competing claims of “right.” Federal judges thus have legal and moral reasons to foster a legal process that vindicates the rights of both the rich and the poor.

The adjudicative process is not just practically but also morally distinct from many other types of social endeavor. Though the legal profession is itself a kind of trade that operates within a market, the judicial process has distinctly noneconomic purposes that are central to its legitimacy.<sup>191</sup> Those purposes,

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<sup>189</sup> See note 32 and accompanying text.

<sup>190</sup> See note 185.

<sup>191</sup> See, for example, Michael Walzer, *Spheres of Justice: A Defense of Pluralism and Equality* 100–02 (Basic 1983). The legal profession’s simultaneous efforts at adhering to both fairness- and market-based values have always been challenging. See, for example, Gillian K. Hadfield, *The Price of Law: How the Market for Lawyers Distorts the Justice*

which include adherence to the law and the fair treatment of the parties, support an aspirational ideal: when litigants enter a courthouse, they should have the same ability to invoke the law—and vindicate their claims of “right”—no matter whether they are wealthy or impoverished.<sup>192</sup> To be sure, this ideal is qualified in many ways because of competing values, such as the legal system’s desire for efficiency. As a result, there will always be significant wealth disparities in litigation. But to reject this ideal entirely would imply that market values should dominate the adjudicative process—and that the law should be regarded as just another commodity for sale.

In most cases, federal courts can fully honor their special social role simply by applying the law in accordance with formal equality, without making any accommodation for the implications of economic disparities. When procedural rules interact with background conditions of economic inequality, however, a court’s adherence to principles of formal equality can generate substantive economic inequality, contrary to equal right.<sup>193</sup> Examples of this phenomenon are all too familiar. Imagine for instance that two people are separately accused of crimes and could make comparably strong arguments in their own defense. In this situation, principles of substantive law and basic fairness suggest that both individuals should be treated similarly. But if one person is rich while the other is impoverished, the wealthier

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*System*, 98 Mich L Rev 953, 955 (2000) (“The profession is entrusted with guardianship of the justice system, and so imbued with the qualities of public service, but it also primarily distributes its goods via commercial, private markets.”).

<sup>192</sup> As Professor Alexandra D. Lahav puts it: “[E]ven if resource inequality characterizes our society, the court system ought not reflect and reinforce those extant inequalities in enforcing legal rights and obligations. . . . The oath of judicial office requires fidelity to a principle of equality before the court.” Alexandra D. Lahav, *Symmetry and Class Action Litigation*, 60 UCLA L Rev 1494, 1519–20 (2013). See also Owen M. Fiss, *The Supreme Court 1978 Term—Foreword: The Forms of Justice*, 93 Harv L Rev 1, 24 (1979) (arguing that judges must ensure “that a just result will be reached, not one determined by the distribution of resources in the natural lottery or in the market”); Kenneth L. Karst, *The Supreme Court 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment*, 91 Harv L Rev 1, 59 (1977).

<sup>193</sup> See Soifer, 48 Wash & Lee L Rev at 394 (cited in note 93) (denying that the equal right principle “would require judges to ignore different starting places, significant encumbrances, and the weight of the past”); William M. Richman and William L. Reynolds, *Elitism, Expediency, and the New Certiorari: Requiem for the Learned Hand Tradition*, 81 Cornell L Rev 273, 277 (1996) (“Federal appellate courts are treating litigants differently, a difference that generally turns on a litigant’s ability to mobilize substantial private legal assistance. As a result, judicial procedures no longer permit judges to fulfill their oath of office.”).

individual alone might have the ability to retain experts in his defense and so escape conviction by creating a reasonable doubt at trial. In this situation and many others, the adjudicative process exacerbates preexisting economic inequalities and so itself becomes an engine of economic injustice.

The US Supreme Court offered similar reasoning in *Griffin v Illinois*,<sup>194</sup> which established a “principle of ‘equal justice’” that “has been applied in numerous other contexts.”<sup>195</sup> Illinois law provided that persons convicted of noncapital crimes could obtain appellate review of trial errors only if they procured a transcript at their own expense. The effect was to deny appellate review to indigent defendants.<sup>196</sup> Illinois defended this practice by noting that the Constitution did not require appellate review of criminal convictions at all.<sup>197</sup> In response, the *Griffin* plurality emphasized the Court’s duty to “do equal justice for poor and rich” and, in a footnote, quoted the federal judicial oath’s biblical precursor in Leviticus.<sup>198</sup> The plurality then held that, once a state has granted convicted persons a right of appeal, the state cannot limit that right in a way that fosters economic inequality. “There can be no equal justice,” the plurality concluded, “where the kind of trial a man gets depends on the amount of money he has.”<sup>199</sup> In this way, a biblically grounded version of the equal right principle explicitly guided the Court’s implementation of two open-ended constitutional principles: due process and equal protection.<sup>200</sup>

Once applied to adjudicatory equality, the equal right principle plausibly supports a variety of legal reforms. For starters, federal courts can allocate their own resources in a way that would achieve substantive economic equality. Perhaps the best

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<sup>194</sup> 351 US 12 (1956) (Black) (plurality). See also *Thiel v Southern Pacific Co*, 328 US 217, 226 (1946) (Frankfurter dissenting):

The process of justice must of course not be tainted by property prejudice any more than by racial or religious prejudice. The task of guarding against such prejudice . . . is embraced in the duty, formulated by the judicial oath, to “administer justice without respect to persons, and do equal right to the poor and to the rich.”

<sup>195</sup> *Bearden v Georgia*, 461 US 660, 664 (1983) (collecting cases that cite the *Griffin* principle).

<sup>196</sup> *Griffin*, 351 US at 13–14.

<sup>197</sup> See *id* at 18.

<sup>198</sup> *Id* at 16 & n 10.

<sup>199</sup> *Id* at 19.

<sup>200</sup> See *Griffin*, 351 US at 17.

example is the already widely held maxim that pro se filings should be carefully and generously construed, which represents a judicial response to background conditions of poverty.<sup>201</sup> The Supreme Court has most emphasized the need to read pro se filings charitably in prisoner-litigation cases, which tend to involve issues of not only poverty but also (uncoincidentally) political powerlessness.<sup>202</sup> In a similar spirit, the equal right principle might guide federal courts' considerable discretion as to whether and how to implement in forma pauperis policies, which reduce the financial burdens of litigation for those of limited means.<sup>203</sup>

In addition, the Court might consider the equal right principle when interpreting, implementing, and constructing adjudicatory rules.<sup>204</sup> For example, federal courts might interpret nonconstitutional procedural rules with an eye toward mitigating economic inequality's effects on the adjudicative process.<sup>205</sup> Take recent decisions tightening the procedural requirements for bringing class actions.<sup>206</sup> Plaintiffs often lack the financial resources necessary to obtain specialized counsel who can challenge the lawyers hired by well-funded defendants.<sup>207</sup> Class actions can address that financial and legal disparity by allowing

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<sup>201</sup> See *Erickson v Pardus*, 551 US 89, 94 (2007) (noting that a document filed pro se is "to be liberally construed"). See also FRCP 8(e) ("Pleadings must be construed so as to do justice."); Kevin H. Smith, *Justice for All?: The Supreme Court's Denial of Pro Se Petitions for Certiorari*, 63 Albany L Rev 381, 385 (1999) (invoking the equal right principle to criticize pro se certiorari practice); William M. Richman, *Rationing Judgeships Has Lost Its Appeal*, 24 Pepperdine L Rev 911, 912 (1997) (invoking the equal right principle in criticizing appellate practice for having "created different tracks of justice for different cases and different litigants"); Carl Tobias, *The New Certiorari and a National Study of the Appeals Courts*, 81 Cornell L Rev 1264, 1267 (1996).

<sup>202</sup> See, for example, *Estelle v Gamble*, 429 US 97, 106 (1976).

<sup>203</sup> See *Erickson*, 551 US at 94, quoting *Estelle*, 429 US at 106; 28 USC § 1915 (establishing procedures for in forma pauperis filings).

<sup>204</sup> For discussion of legal construction, as opposed to interpretation, see note 279 and accompanying text.

<sup>205</sup> This approach overlaps with the canon-based approach of Part III.B.

<sup>206</sup> See, for example, *Wal-Mart Stores, Inc v Dukes*, 564 US 338, 367 (2011). See also Brooke D. Coleman, *One Percent Procedure*, 91 Wash L Rev 1005, 1013–24 (2016) (arguing that interests of the wealthy set the tone for civil procedure, including for class actions); Myriam Gilles, *Class Warfare: The Disappearance of Low-Income Litigants from the Civil Docket*, 65 Emory L J 1531, 1536–37 (2016).

<sup>207</sup> See Samuel Issacharoff, *Preclusion, Due Process, and the Right to Opt Out of Class Actions*, 77 Notre Dame L Rev 1057, 1060 (2002) (noting that defendants may have "an incentive to expend resources in litigation that would overwhelm any individual litigant, even if the amount of the claim would conceivably justify one-on-one litigation").

for cost sharing across plaintiffs.<sup>208</sup> So when resolving class action questions, federal courts might resolve legal ambiguities in favor of protecting plaintiffs who otherwise lack the means to pursue relief.<sup>209</sup>

Procedural due process cases supply another pointed example. Under current doctrine, courts must consider “the private interest that will be affected by the official action,”<sup>210</sup> and that inquiry should be attentive to the poor’s special needs and burdens.<sup>211</sup> Though sometimes attending to these class considerations,<sup>212</sup> the Court has also exhibited indifference to economic disparities. Perhaps most controversially, *United States v Kras*<sup>213</sup> upheld a fixed \$50 fee for a voluntary bankruptcy discharge, even though the fee applied to the indigent.<sup>214</sup> The Court arrived at this conclusion in part by explaining that the fee, if paid in extended installments, would amount to a weekly payment that was “less than the price of a movie.”<sup>215</sup> As Justice Thurgood Marshall argued in dissent, the Court’s logic ignored that many poor individuals live “close to the margin of survival” and cannot spend money on the cinema.<sup>216</sup> Marshall found it “disgraceful for an interpretation of the Constitution to be premised on unfounded assumptions about how people live,”<sup>217</sup> but the equal right principle suggests another flaw in the Court’s reasoning. Court fees, including bankruptcy fees, often prevent “the poor” from receiving “equal right”—as Marshall himself observed in a

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<sup>208</sup> See Lahav, 60 UCLA L Rev at 1519–20 (cited in note 192); Marvin E. Frankel, *Amended Rule 23 from a Judge’s Point of View*, 32 Antitrust L J 295, 299 (1966) (reporting Benjamin Kaplan’s reference to the “class action’s historic mission of taking care of the smaller guy”) (quotation marks omitted).

<sup>209</sup> See, for example, *Campbell-Ewald Co v Gomez*, 136 S Ct 663, 672, 677 (2016).

<sup>210</sup> *Matthews v Eldridge*, 424 US 319, 335 (1976).

<sup>211</sup> *Goldberg v Kelly*, 397 US 254, 264 (1970). The Supreme Court has indicated that the proper inquiry focuses on the needs of the affected group as a whole, not necessarily the needs of any individual claimant. See *Walters v National Association of Radiation Survivors*, 473 US 305, 321 (1985).

<sup>212</sup> See *Goldberg*, 397 US at 264 (expressing concern that there be adequate process to preserve the “means by which to live”).

<sup>213</sup> 409 US 434 (1973).

<sup>214</sup> See *id* at 436, 449–50.

<sup>215</sup> *Id* at 449.

<sup>216</sup> *Id* at 460 (Marshall dissenting).

<sup>217</sup> *Kras*, 409 US at 460 (Marshall dissenting).

separate case.<sup>218</sup> Greater attention to this point could shape judicial applications of due process.

Similar reasoning extends to criminal adjudication. Consider the imposition of criminal fines. Even though the Eighth Amendment prohibits “excessive fines,” courts often fail to consider defendants’ wealth when establishing financial penalties.<sup>219</sup> As a result, formal equality in the application of fines can—and often does—translate into extreme substantive inequality. For some, a \$100 fine is a pittance; for others, it is devastating. Moreover, financially debilitating fines can indirectly impair an individual’s ability to supply a defense, thereby compounding preexisting economic inequalities and distorting the adjudicative process. The equal right principle thus complements other Founding-era sources that link the Eighth Amendment to accommodations for poverty.<sup>220</sup>

Likewise with the bail process: the Eighth Amendment bars “[e]xcessive bail,”<sup>221</sup> yet many local judicial systems require that bail must be paid in cash—to the detriment of poor persons who lack financial reserves.<sup>222</sup> Notably, the equal right principle has already come to bear in the bail context. In a recent federal case, for instance, a defendant offered to create a prison-like enclosure in his home, so that he could avoid actual imprisonment. Formal equality supported that claim; after all, the legal option of paying for an in-home enclosure would be extended to all, regardless

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<sup>218</sup> See *In re Amendment to Rule 39*, 500 US 13, 15 n \* (1990) (per curiam) (Marshall dissenting) (quoting the expression of the equal right principle in the judicial oath). Dean Martha Minow, a former clerk of Justice Thurgood Marshall, noted that the Justice:

maintained that [a] new [in forma pauperis] rule in effect amended the oath of each Justice by eliminating the commitment to “do equal right to the poor and to the rich” to read instead: “All men and women are entitled to their day in Court only if they have the *means* and the *money*.”

Martha Minow, *A Tribute to Justice Thurgood Marshall*, 105 Harv L Rev 66, 74 n 68 (1991), quoting *In re Amendment to Rule 39*, 500 US at 15 n \* (Marshall dissenting).

<sup>219</sup> US Const Amend VIII. See also *United States v Bajakajian*, 524 US 321, 328–36 (1998); Colgan, 102 Cal L Rev at 320–36 (cited in note 57).

<sup>220</sup> See Colgan, 102 Cal L Rev at 322 (cited in note 57) (relaying Blackstone’s observation that “[t]he value of money itself changes from a thousand causes; and, at all events, what is ruin to one man’s fortune, may be matter of indifference to another’s”). See also *id* (“[T]he Magna Carta treated a fine that would impoverish a defendant as *per se* disproportionate.”), citing Magna Carta Art 20.

<sup>221</sup> US Const Amend VIII.

<sup>222</sup> See Nick Pinto, *The Bail Trap* (NY Times Mag, Aug 13, 2015), online at <http://www.nytimes.com/2015/08/16/magazine/the-bail-trap.html> (visited Apr 30, 2017) (Perma archive unavailable).

of wealth. The district court responded, “Federal judges swear an oath, with ancient roots dating to Deuteronomy, to ‘administer justice without respect to persons, and do equal right to the poor and to the rich[.]’ . . . That pledge is violated if a defendant . . . is permitted to buy his way out of detention.”<sup>223</sup> This argument for substantive equality links the statutory oath with one of its biblical precursors. Subsequent decisions have quoted and followed this reasoning.<sup>224</sup>

Or consider *Gideon v Wainwright*,<sup>225</sup> which read the Counsel Clause to guarantee not just a right to hire an attorney but also to representation at the public’s expense.<sup>226</sup> *Gideon* did not cite the federal judicial oath, but it did articulate and apply a vision of economic equality as a “noble ideal” to guide judicial action:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>227</sup>

By providing a statutory basis for this “noble ideal,” the equal right principle might help sustain or even strengthen *Gideon* during what is widely regarded as a time of crisis for public defenders.<sup>228</sup> Further, the equal right principle could plausibly

<sup>223</sup> *United States v Cilins*, 2013 WL 3802012, \*3 (SDNY), citing 28 USC § 453.

<sup>224</sup> See, for example, *United States v Zarrab*, 2016 WL 3681423, \*13 (SDNY) (“That pledge is violated if a defendant, who is a serious risk of flight with every incentive to flee and the means to do so, is permitted to buy his way out of detention.”), quoting *Cilins*, 2013 WL 3802012 at \*3; *United States v Valerio*, 9 F Supp 3d 283, 292–94 (EDNY 2014) (noting that “it is highly questionable whether the Bail Reform Act contemplates” private jail), quoting *Cilins*, 2013 WL 3802012 at \*3.

<sup>225</sup> 372 US 335 (1963).

<sup>226</sup> *Id.* at 342–44 (construing US Const Amend XIV). On the same day the Court also afforded indigents a right to counsel for their first appeal of right from a criminal conviction. See *Douglas v California*, 372 US 353, 357 (1963) (“But where the merits of *the one and only appeal* an indigent has as of right are decided without benefit of counsel, we think an unconstitutional line has been drawn between rich and poor.”).

<sup>227</sup> *Gideon*, 372 US at 344. See also *Daugherty v Beto*, 388 F2d 810, 817 (5th Cir 1967) (Rives dissenting) (“It seems to me that my oath of office to ‘administer justice without respect to persons, and do equal right to the poor and to the rich,’ compels me to do all in my power to require really effective service from appointed counsel.”) (citation omitted).

<sup>228</sup> See *Turner v Rogers*, 564 US 431, 444–49 (2011) (discussing the right to counsel in connection with civil litigation when the party may face imprisonment). See also Dylan

support greater counsel rights in civil cases, an idea often called “civil *Gideon*.”<sup>229</sup> Notably, these reforms can resemble the accommodations sometimes undertaken in Jewish law pursuant to biblical versions of the equal right principle.<sup>230</sup>

*Miranda v Arizona*<sup>231</sup> supplies a final example. In establishing standard warnings for arrestees, the Court endeavored to level the adjudicatory playing field for the many individuals who “cannot afford” an attorney and might not know or believe that they had a right to appointed representation.<sup>232</sup> The equal right principle suggests that the ever-besieged *Miranda* decision could find new support not just in the Self-Incrimination Clause but also in statutory law.

Many advocates for greater adjudicative equality presently overlook the equal right principle and focus instead on the phrase “Equal Justice Under Law.”<sup>233</sup> Those words are inscribed over the entrance to the US Supreme Court and stand as a powerful symbol of the judiciary’s role in promoting economic justice.<sup>234</sup> Still, the terse inscription is not law and does not expressly identify economic disparities. Efforts to achieve greater class-based adjudicative equality would thus find a far better foothold in the equal right principle.

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Walsh, *On the Defensive* (The Atlantic, June 2, 2016), archived at <http://perma.cc/9SQG-JTKV>.

<sup>229</sup> Tamara Audi, ‘*Civil Gideon*’ Trumpets Legal Discord (Wall St J, Oct 27, 2009), archived at <http://perma.cc/7M8X-KZ2M>.

<sup>230</sup> See note 49 and accompanying text.

<sup>231</sup> 384 US 436 (1966).

<sup>232</sup> *Id.* at 471–72.

<sup>233</sup> See Deborah L. Rhode, *Access to Justice* 3–25 (Oxford 2004) (invoking the “equal justice under law” inscription to challenge procedural barriers to justice for the poor). See also Judith Resnik, *Equality’s Frontiers: Courts Opening and Closing*, 122 Yale L J Online 243, 254 (2013); Rebecca E. Zietlow, *Exploring a Substantive Approach to Equal Justice Under Law*, 28 NM L Rev 411, 438 (1998); Zoe Tillman, *Garland, Mum on Nomination, Urges Lawyers to Close Justice Gap* (Nat’l Law J, Apr 21, 2016), archived at <http://perma.cc/5JFX-93DW> (recounting Chief Judge Merrick B. Garland’s remarks that “[w]ithout legal assistance, poor individuals and families have no real access to justice” and that “[w]ithout access to justice, the promise of equal justice rings hollow”).

<sup>234</sup> See Office of the Curator, Supreme Court of the United States, *The West Pediment: Information Sheet* (Aug 28, 2003), archived at <http://perma.cc/XHJ2-NTP3>. See also Jim Chen, *Mayteenth*, 89 Minn L Rev 203, 217 n 81 (2004). The inscription resembles Pericles’s funeral oration, which invoked a kind of equal right principle. See Thucydides, *The Peloponnesian War* 108 (Random House 1982) (T.E. Wick, ed) (Richard Crawley, trans) (“If we look to the laws, they afford equal justice to all in their private differences; . . . class considerations [are] not being allowed to interfere with merit.”).



## B. Canon of Interpretation

Another possibility is to view the equal right principle as a canon of interpretation—that is, as a reason to construe ambiguous law in favor of economic equality.<sup>235</sup> This approach can mitigate pathologies in the political process and thus foster democratic equality.

Begin with the link between wealth and political power. In general, several features of the US political process tend to empower the wealthy over those of more modest means. Examples include campaign contributions, lobbying efforts, and even the likelihood of voting (or being able to vote).<sup>236</sup> The net result is that the government attends more closely to those who have more money, while placing the poor in a more vulnerable political position.<sup>237</sup> This effect implicates both “the rich” and “the poor” because the wealthy have an outsized influence, whereas the poor have unduly small influence.<sup>238</sup> The rich may therefore exploit groups who are less wealthy but equally or more numerous, contrary to principles of democratic equality.<sup>239</sup> Further, the political process is more likely to respond to judicial interpretations that impinge on the interests of the wealthy, given their greater political power.<sup>240</sup> Given all this, courts have good reason to err on the side of protecting the interests of the poor.

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<sup>235</sup> In construing ambiguous statutory provisions directed toward the poor, courts have often—if inconsistently—erred on the side of expanding statutory welfare rights and other aspects of economic equality. See generally Melnick, *Between the Lines* (cited in note 126).

<sup>236</sup> See generally Martin Gilens, *Affluence and Influence: Economic Inequality and Political Power in America* (Princeton 2012). See also Daryl J. Levinson, *The Supreme Court 2015 Term—Foreword: Looking for Power in Public Law*, 130 Harv L Rev 31, 122, 138 (2016); Nicholas O. Stephanopoulos, *Political Powerlessness*, 90 NYU L Rev 1527, 1577–79 (2015); Ganesh Sitaraman, *The Puzzling Absence of Economic Power in Constitutional Theory*, 101 Cornell L Rev 1445, 1455–66 (2016); Bertrall L. Ross II and Su Li, *Measuring Political Power: Suspect Class Determinations and the Poor*, 104 Cal L Rev 323, 324 (2016) (arguing that “legislators’ support for antipoverty legislation is not motivated by the political power of the poor”).

<sup>237</sup> See Sitaraman, 101 Cornell L Rev at 1455–66 (cited in note 236) (reviewing relevant political science literature).

<sup>238</sup> See id at 1464–65.

<sup>239</sup> See Bruce A. Ackerman, *Beyond Carolene Products*, 98 Harv L Rev 713, 729–31 (1985) (pointing out that “the poor are both relatively anonymous and diffuse” and therefore politically vulnerable). “Perhaps because Ackerman focused on constitutional law, he overlooked the possibility of protecting such groups in other areas.” Jonathan Zasloff, *Courts in the Age of Dysfunction*, 121 Yale L J Online 479, 495 (2012).

<sup>240</sup> See Einer Elhauge, *Statutory Default Rules: How to Interpret Unclear Legislation* 168–87 (Harvard 2008).

That conclusion finds support in leading theories of statutory interpretation. For instance, Professor Einer Elhauge has argued in favor of “preference-eliciting default rules,” which would place the burden of legislative correction on groups who are more able to correct judicial errors.<sup>241</sup> And Professor Jonathan Macey has argued that courts advance public values by construing statutes in favor of their openly stated (and so relatively public-minded) goals.<sup>242</sup> But those commentators did not focus on economic inequality or on the poor. Coming closer to the equal right principle, Professor Cass Sunstein has proposed a statutory canon in favor of broadly interpreting “welfare rights.”<sup>243</sup> But as Professor Jonathan Zasloff has pointed out, a canon “recognizing ‘welfare rights’ is not the same as construing statutes to the benefit of poor people.”<sup>244</sup> Zasloff himself did propose a political process-based canon in favor of economic equality.<sup>245</sup> But Zasloff—like Elhauge, Macey, and Sunstein—argued from policy and process, without identifying a foothold in positive law.

The equal right principle can help. As a federal statute, the equal right principle supplies a sound foundation in positive law for adopting a canon in favor of economic equality.<sup>246</sup> And because it is directed toward federal judges and their efforts to dispense justice, the equal right principle is easily understood as a second-order judicial principle—that is, as a statutorily established

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<sup>241</sup> Elhauge’s case for “preference-eliciting default rules” includes an argument for construing statutes against the interests of the politically empowered on the theory that they will be better able to lobby Congress to state its preferences more clearly. See *id.*

<sup>242</sup> See Jonathan R. Macey, *Promoting Public-Regarding Legislation through Statutory Interpretation: An Interest Group Model*, 86 Colum L Rev 223, 238–40 (1986). Macey’s approach is designed to counterbalance the influence of focused interest groups that lobby in favor of their own economic interests, at the public’s expense. See also *id.* at 228 n 29 (noting by way of example that a statute promoting the interests of “the poor” would likely qualify as “public-regarding”).

<sup>243</sup> See Cass R. Sunstein, *Interpreting Statutes in the Regulatory State*, 103 Harv L Rev 405, 473–74 (1989) (raising the possibility of “aggressive statutory construction to ensure against irrational or arbitrary deprivations of benefits”).

<sup>244</sup> Zasloff, 121 Yale L J Online at 495 n 66 (cited in note 239). Zasloff also noted that Sunstein “offered no process justification” for his “welfare rights” canon. *Id.*, citing William N. Eskridge Jr, Philip P. Frickey, and Elizabeth Garrett, *Cases and Materials on Legislation: Statutes and the Creation of Public Policy* 949 (West 4th ed 2007).

<sup>245</sup> See Zasloff, 121 Yale L J Online at 495–98 (cited in note 239).

<sup>246</sup> By comparison, the equal right principle is at least as firmly grounded in law and popular norms as, say, substantive canons of interpretation rooted in federalism. For an example of a federalism canon at work, see *Bond v United States*, 134 S Ct 2077, 2090 (2014).

canon of interpretation that governs judicial implementation of first-order legal rules.

Moreover, a substantive reading of the equal right principle may be necessary to demonstrate the legal permissibility of the interpretive approaches proposed by Elhauge, Macey, Sunstein, Zasloff, and others.<sup>247</sup> For if the federal judicial oath is truly a strict principle of formal equality, then the foregoing scholars’ proposed interpretive principles are arguably unlawful.<sup>248</sup> The Supreme Court has already come close to saying as much. In *Patterson v McLean Credit Union*,<sup>249</sup> dissenting justices argued that principles of stare decisis should take account of the country’s commitment to “ending racial discrimination” by vindicating civil rights.<sup>250</sup> A slim majority of the Court rejected that argument based on a formal reading of the federal judicial oath:

[T]he claim of any litigant for the application of a rule to its case should not be influenced by the Court’s view of the worthiness of the litigant in terms of extralegal criteria. We think this is what Congress meant when it required each Justice or judge of the United States to swear to “administer justice without respect to persons, and do equal right to the poor and to the rich . . . .”<sup>251</sup>

In assuming a strict principle of formal equality, *Patterson* would apparently reject as “extralegal” any judicial consideration of a litigant’s race, poverty, vulnerability, or any other trait that may be pertinent to the achievement of substantive equality.<sup>252</sup> But we have seen that there are good reasons to reject that rigid

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<sup>247</sup> For another example, see William N. Eskridge Jr., *Public Values in Statutory Interpretation*, 137 U Pa L Rev 1007, 1089 (1989) (noting that “[o]ne of the marginalized groups in our society is the poor”).

<sup>248</sup> This concern holds for any process-based argument that is ungrounded in the Constitution itself. As we see in Part III.D, however, there are constitutionally grounded theories in favor of erring on the side of the poor when engaged in statutory interpretation—and the equal right principle can buttress those theories as well. See notes 322–26 and accompanying text.

<sup>249</sup> 485 US 617 (1988).

<sup>250</sup> See *id.* at 621 (Blackmun dissenting) (emphasizing “our society’s earnest commitment to ending racial discrimination”).

<sup>251</sup> *Id.* at 619, quoting 28 USC § 453.

<sup>252</sup> Could the equal right principle’s use of “poor” and “rich” figuratively refer to relatively powerless and powerful groups? If so, the oath might capture noneconomic distinctions, such as race. As the main text indicates, *Patterson* suggests as much, as do the oath’s biblical precursors. See note 44 and accompanying text. Still, that broader reading would require additional argument, in part because the federal judicial oath—unlike its biblical precursors—expressly contrasts two economic groups.

reading.<sup>253</sup> Instead, the equal right principle can itself be read as an “intralegal” invitation for judges to consider poverty and other aspects of economic inequality, when doing so is necessary to achieve “equal right.”<sup>254</sup>

The equal right principle can also help refine several existing canons. Take the rule of lenity. The idea that criminal statutes should be narrowly construed has been defended as a way of providing notice while protecting politically underrepresented interests.<sup>255</sup> That thumb on the scales in favor of criminal defendants accords with the equal right principle because criminals are disproportionately poor.<sup>256</sup> But if the equal right principle provides statutory support for the rule of lenity, it also suggests a significant refinement. While most prosecuted crimes tend to involve the poor, some criminal laws are directed against wealthy individuals or corporations. And wealthy defendants are more likely to be effectively represented in the political process. Further, wealthy defendants are far more likely to enjoy the advance advice of an attorney and, as a result, to experience actual as opposed to merely hypothetical notice regarding their legal obligations. So lenity should generally have greater force in connection with crimes that target poorer defendants—and less force in connection with white-collar crimes.<sup>257</sup> Notably, some cases already suggest just that pattern.<sup>258</sup> The equal right principle draws attention to and supports that result.

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<sup>253</sup> See Part II.

<sup>254</sup> See Part II. See also Soifer, 48 Wash & Lee L Rev at 393–95 (cited in note 93) (leveling a similar critique).

<sup>255</sup> See *United States v Bass*, 404 US 336, 348 (1971) (notice); Matthew R. Christiansen and William N. Eskridge Jr, *Congressional Overrides of Supreme Court Statutory Interpretation Decisions, 1967–2011*, 92 Tex L Rev 1317, 1466 (2014) (“representation-reinforcing”).

<sup>256</sup> See William J. Stuntz, *The Uneasy Relationship between Criminal Procedure and Criminal Justice*, 107 Yale L J 1, 51 n 167 (1997); Steven K. Smith and Carol J. DeFrances, *Indigent Defense* \*1, 4 (Bureau of Justice Statistics, Feb 1996), archived at <http://perma.cc/4326-WRAJ>.

<sup>257</sup> Again, the idea is not to disadvantage the rich, see notes 94–96 and accompanying text, but rather to treat both rich and poor fairly—here, by preventing some wealthy defendants from sometimes receiving the double benefit of both adequate notice and lenity.

<sup>258</sup> See Zachary Price, *The Rule of Lenity as a Rule of Structure*, 72 Fordham L Rev 885, 927 (2004) (noting that, “in general,” the Court “has tolerated broad interpretations of white collar crimes”); Justin Weitz, Note, *The Devil Is in the Details: 18 U.S.C. § 666 after Skilling v. United States*, 14 NYU J Legis & Pub Pol 805, 812–13 (2011) (noting that “judicial construction of . . . criminal statutes that address white-collar crime and public corruption has frequently failed to follow” the rule of lenity). See also *Durland v*

The equal right principle most readily functions as a canon of interpretation when federal courts make case-specific judgments that are relevant to poverty or economic equality. For instance, many statutes providing for criminal fines raise broad, standard-like questions of whether various potential fines are excessive.<sup>259</sup> In applying a statutory standard of that kind, a court might be unsure of whether to accommodate a specific defendant's financial means.<sup>260</sup> A canon in favor of promoting economic equality would counsel in favor of doing so. The court would already be assessing what justice requires of a specific party. And accommodating a party's economic status would be consistent with the role that courts have traditionally played in promoting fairness and equity.<sup>261</sup>

But when construing rule-like statutory principles of broad applicability, federal courts must be especially cautious, because even well-intentioned efforts to advance economic equality can have unintended consequences. For instance, favoring debtors over creditors in litigation under the Bankruptcy Code might not ultimately redound to the poor's advantage because legal rules in the area might indirectly affect the availability of credit to relatively high-risk borrowers.<sup>262</sup> Yet problems of institutional competence are hardly unique to the equal right principle, and the federal courts have accordingly developed a range of doctrines to minimize the adverse consequences of their own limitations. Perhaps most importantly, federal courts generally exercise restraint in the face of predictive uncertainty and generally defer to the political branches' economic judgments.<sup>263</sup> Those principles of judicial restraint are fully applicable to the equal right principle and should guide its implementation. Sometimes, the relevant empirical question will be sufficiently clear for a federal court to act. And, in other cases, an expert agency might help

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*United States*, 161 US 306, 312–13 (1896) (construing ambiguity in a criminal fraud statute broadly); *Carpenter v United States*, 484 US 19, 27–28 (1987) (same).

<sup>259</sup> See, for example, 18 USC § 3572 (providing for consideration of numerous factors when imposing fines, including the "defendant's income, earning capacity, and financial resources").

<sup>260</sup> Eighth Amendment doctrine resists that consideration. See note 219 and accompanying text.

<sup>261</sup> See text accompanying note 61.

<sup>262</sup> See 11 USC § 101 et seq.

<sup>263</sup> See, for example, *Bowen*, 483 US at 600–01 (emphasizing the need for judicial deference to the political branches in spending and entitlement programs); *Atkins*, 472 US at 129 (same).

the court make empirical judgments as to how one interpretation or another might affect economic equality.

For a salient and recent example, consider the Supreme Court's ruling in *King v Burwell*.<sup>264</sup> The relevant statutory question affected whether the Affordable Care Act allowed for subsidies to certain persons at or above the poverty line.<sup>265</sup> The Court concluded that the statutory text was relevantly ambiguous and relied on the legislative purpose or "plan" to resolve that ambiguity.<sup>266</sup> Instead of resting solely on its view of the statute's purpose, the Court could have invoked an equal right canon to resolve the identified ambiguity.<sup>267</sup> If federal subsidies did not run to federally established exchanges, then many millions of Americans near the poverty line would have been unable to obtain health insurance. That outcome would plainly have inflicted serious and disproportionate harm on low-income Americans, as expert government agencies confirmed.<sup>268</sup> Because of its generalizability, this canon-based approach would arguably have fostered greater predictability and administrability. And an economic equality canon would have allowed for reliance on a statutory principle of interpretation, rather than the Court's own view of how best to implement Congress's goals.<sup>269</sup> At a minimum, invocation of the equal right principle would have added a canon-based rejoinder to the canon-based arguments leveled by the *King* dissent.<sup>270</sup>

The equal right principle would also have supported a broader outcome in *De Sylva v Ballentine*,<sup>271</sup> which arguably involved a kind of federal common law. A copyright holder had died, leaving his widow as well as a child born out of wedlock.

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<sup>264</sup> 135 S Ct 2480 (2015).

<sup>265</sup> See id at 2482 (discussing 26 USC § 36B).

<sup>266</sup> See id at 2496.

<sup>267</sup> For a similar argument without reference to the federal judicial oath, see Frank I. Michelman, *The Unbearable Lightness of Tea Leaves: Constitutional Political Economy in Court*, 94 Tex L Rev 1403, 1408–09 (2016) (suggesting that, in *King*, the Court should perhaps have erred against the interpretive option that "would have denied health care benefits to certain needy individuals and families no less deserving than others to whom benefits would flow").

<sup>268</sup> See Transcript of Oral Argument, *King v Burwell*, Docket No 14-114, \*45 (US Mar 4, 2015) (available on Westlaw at 2015 WL 916473) (Solicitor General Donald Verrilli arguing against a result that would "revoke[] the promise of affordable care for millions of Americans").

<sup>269</sup> See *King*, 135 S Ct at 2494.

<sup>270</sup> See id at 2497–99 (Scalia dissenting).

<sup>271</sup> 351 US 570 (1956).

The child sought a share of the inheritance as an heir, raising the question whether an “illegitimate” child was one of the copyright holder’s “children” within the meaning of federal copyright law.<sup>272</sup> Applying the canonical principle that “domestic relations” are “primarily a matter of state concern,” the Court held that federal law in this area would follow the most applicable state law.<sup>273</sup> And the Court further concluded that the relevant state would view the child as an heir (despite not being a recognized child for all purposes).<sup>274</sup> Justice William Douglas concurred on the broader ground that the child should prevail irrespective of state law, based on a “statutory policy of protecting dependents.”<sup>275</sup> The equal right principle could have buttressed Douglas’s conclusion by supplying a canon-based counterweight to the rule that states presumptively govern domestic relations. Moreover, the equal right principle could help direct implementation of the Court’s actual holding: when relevant ambiguities in state law arise—as happened in *De Sylva* itself—federal copyright law should resolve those ambiguities in favor of needy dependents.<sup>276</sup>

### C. Governmental Interests

The equal right principle can also play an important role by establishing economic equality as a governmental interest. In a variety of contexts, federal courts have implemented constitutional rights in part by evaluating the importance of the government’s regulatory interest. The equal right principle can inform that inquiry. This approach would counsel in favor of greater judicial restraint in some regulatory areas, thereby affording the political branches greater latitude in addressing issues of economic equality.

Under current doctrine, courts often tolerate otherwise-unconstitutional conduct when the government pursues a “compelling” or “legitimate” interest via appropriately tailored means.<sup>277</sup> Given that scrutiny framework, federal courts must

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<sup>272</sup> *Id.* at 572.

<sup>273</sup> *Id.* at 580.

<sup>274</sup> *Id.* at 581–82.

<sup>275</sup> *De Sylva*, 351 US at 583 (Douglas concurring).

<sup>276</sup> *Id.* at 580.

<sup>277</sup> See, for example, *Citizens United v Federal Election Commission*, 558 US 310, 340 (2010) (discussing strict scrutiny); *Turner Broadcasting System, Inc v Federal Communications Commission*, 520 US 180, 235 (1997) (O’Connor dissenting) (discussing intermediate scrutiny).

ascertain which interests are compelling or legitimate. But current case law is surprisingly unclear on how to do that and so yields ad hoc results.<sup>278</sup> Moreover, judicial efforts at evaluating governmental interests typically have less to do with *interpretation*, or ascertaining constitutional meaning, than with *construction*, or implementing underdetermined meaning.<sup>279</sup> The need to engage in construction in this area creates analytical room for the equal right principle to play a role. Rather than relying solely on their own judgment, federal judges might find guidance in public values, as expressed in longstanding federal law and their own official promises.<sup>280</sup> So to the extent that the equal right principle takes on a substantive equality gloss,<sup>281</sup> federal judges might recognize that legislative efforts to promote economic equality serve an adequate interest.

Doctrine surrounding the Contract Clause affords an example.<sup>282</sup> Though that Clause's text posits a seemingly absolute

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<sup>278</sup> See Richard H. Fallon Jr., *Strict Judicial Scrutiny*, 54 UCLA L Rev 1267, 1321 (2007) (“[T]he Supreme Court has frequently adopted an astonishingly casual approach to identifying compelling interests.”); Note, *Let the End Be Legitimate: Questioning the Value of Heightened Scrutiny’s Compelling- and Important-Interest Inquiries*, 129 Harv L Rev 1406, 1408–09 (2016) (“[N]o watershed opinion has set out a clear method for determining whether any given interest is compelling, important, or merely legitimate.”).

<sup>279</sup> See David A. Strauss, *The Ubiquity of Prophylactic Rules*, 55 U Chi L Rev 190, 198 (1988) (“[T]he most significant aspects of first amendment law can be seen as judge-made prophylactic rules that exceed the requirements of the ‘real’ first amendment.”). See also Lawrence B. Solum, *Originalism and the Unwritten Constitution*, 2013 U Ill L Rev 1935, 1951. For discussion of “interpretation” and “construction,” see Balkin, *Living Originalism* 3–6 (cited in note 153); Akhil Reed Amar, *America’s Unwritten Constitution: The Precedents and Principles We Live By* 216–18 (Basic 2012); Keith E. Whittington, *Constitutional Construction: Divided Powers and Constitutional Meaning* 1 (Harvard 1999); Lawrence B. Solum, *Semantic Originalism* \*18–19 (Ill Pub L & Legal Theory Rsrch Papers Series, No 07-24, 2008), archived at <http://perma.cc/TN7M-23ZD>. But see John O. McGinnis and Michael B. Rappaport, *Original Methods Originalism: A New Theory of Interpretation and the Case against Construction*, 103 Nw U L Rev 751, 773 (2009) (arguing that construction can and should be avoided by following original methods).

<sup>280</sup> In ascertaining compelling interests, the Court sometimes considers statutory law or defers to other government actors. See, for example, *Fisher v University of Texas at Austin*, 133 S Ct 2411, 2419 (2013) (“According to *Grutter*, a university’s ‘educational judgment that such diversity is essential to its educational mission is one to which we defer.’”), quoting *Grutter v Bollinger*, 539 US 306, 328 (2003); *New York v Ferber*, 458 US 747, 756–58 (1982) (citing widespread laws banning child pornography as evidence of a compelling interest).

<sup>281</sup> See Part II.B.

<sup>282</sup> US Const Art I, § 10, cl 1.



prohibition,<sup>283</sup> case law maintains that a “legitimate end” can justify even significant contract impairments. The canonical example is *Home Building & Loan Association v Blaisdell*,<sup>284</sup> which upheld a state moratorium on mortgage payments during the Great Depression.<sup>285</sup> The Court emphasized that the state had acted in response to an “emergency” and had pursued “a legitimate end; that is, the legislation was not for the mere advantage of particular individuals.”<sup>286</sup> Some commentators point out that *Blaisdell* allowed states to mitigate the effects of then-extraordinary deflation, which caused the real cost of debt to balloon.<sup>287</sup> That line of reasoning resonates with the equal right principle: because of background economic changes, once-fair contracts suddenly imposed unfair costs on debtors, thereby burdening persons of limited means.

Existing campaign finance doctrine furnishes another salient example. At present, legislative regulation of campaign contributions and expenditures is understood to implicate the First Amendment “freedom of speech.”<sup>288</sup> So to justify those restrictions, the government must adduce a compelling interest.<sup>289</sup> And, in the Court’s view, equalizing political influence along class lines is *not* a compelling governmental interest.<sup>290</sup> For instance, the Court has soundly “rejected the premise that the Government has an interest ‘in equalizing the relative ability of individuals and groups to influence the outcome of elections.’”<sup>291</sup> In fact, the Court has denied that leveling the economic playing field for candidates is even “a legitimate government objective, let alone a compelling one.”<sup>292</sup>

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<sup>283</sup> See US Const Art I, § 10, cl 1 (“No state shall . . . pass any . . . Law impairing the Obligation of Contracts.”). See also Douglas W. Kmiec and John O. McGinnis, *The Contract Clause: A Return to the Original Understanding*, 14 *Hastings Const L Q* 525, 526 (1987).

<sup>284</sup> 290 US 398 (1934).

<sup>285</sup> *Id.* at 415–16, 447.

<sup>286</sup> *Id.* at 444–45.

<sup>287</sup> See, for example, Richard A. Epstein, *Toward a Revitalization of the Contract Clause*, 51 *U Chi L Rev* 703, 737 (1984) (“The net economic consequence of the (unanticipated) deflation was to provide creditors with windfall transfers from their debtors.”).

<sup>288</sup> US Const Amend I. See also *Buckley v Valeo*, 424 US 1, 44 (1976).

<sup>289</sup> See *Federal Election Commission v Wisconsin Right to Life, Inc.*, 551 US 449, 464–65 (2007) (Roberts) (plurality).

<sup>290</sup> See *Buckley*, 424 US at 48–49.

<sup>291</sup> *Citizens United*, 558 US at 350, quoting *Buckley*, 424 US at 48.

<sup>292</sup> *Arizona Free Enterprise Club’s Freedom Club PAC v Bennett*, 564 US 721, 750 (2011), quoting *Davis v Federal Election Commission*, 554 US 724, 741 (2008).

If we accept the scrutiny framework that currently governs First Amendment cases,<sup>293</sup> then the equal right principle would generally support greater judicial solicitude toward campaign finance regulation. In particular, the equal right principle would support the notion that there can sometimes be a compelling interest in promoting economic equality in the area of political speech and influence. Again, the Court has rejected that logic,<sup>294</sup> but similar reasoning continues to find support among many critics of the Court's campaign finance jurisprudence, including of *Citizens United v Federal Election Commission*.<sup>295</sup> This debate implicates the equal right principle: in rejecting the equalization of political influence as a justification for campaign finance regulation, the Court adopted a doctrinal rule that strengthened the political position of the rich, especially as compared with the poor.<sup>296</sup>

Remarkably, the Court's campaign finance jurisprudence has already cited the equal right principle in finding a compelling interest and rejecting a First Amendment challenge. In *Williams-Yulee v Florida Bar*,<sup>297</sup> the Court recently ended its streak of invalidating campaign finance measures by upholding a Florida bar rule that prohibited state judges from personally soliciting campaign funds.<sup>298</sup> The Court's reasoning, per Chief Justice Roberts, expressly drew on both the common law and federal oaths. After noting the importance of public confidence in judicial impartiality and integrity, the Court added:

The same concept underlies the common law judicial oath, which binds a judge to “do right to all manner of people . . . without fear or favour, affection or ill-will,” and the oath

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<sup>293</sup> Which, perhaps, we should not. See, for example, *Simon & Schuster, Inc v Members of the New York State Crime Victims Board*, 502 US 105, 124 (1991) (Kennedy concurring in the judgment); Eugene Volokh, *Freedom of Speech, Permissible Tailoring and Transcending Strict Scrutiny*, 144 U Pa L Rev 2417, 2418–21 (1996). Alternative ways of evaluating First Amendment rights might reduce or change the role of construction and thereby diminish the equal right principle's relevance in this area.

<sup>294</sup> See *Buckley*, 424 US at 48.

<sup>295</sup> 558 US 310 (2010). For criticism of the ruling, see, for example, *id* at 471–78 (Stevens dissenting) (discussing the government's “anti-distortion” interest); Richard L. Hasen, *Plutocrats United: Campaign Money, the Supreme Court, and the Distortion of American Elections* 73 (Yale 2016).

<sup>296</sup> Under the logic outlined in the main text, other First Amendment restrictions on campaign finance would remain, such as the “narrow tailoring” requirement and prohibitions on illegitimate legislative purposes.

<sup>297</sup> 135 S Ct 1656 (2015).

<sup>298</sup> See *id* at 1662.

that each of us took to “administer justice without respect to persons, and do equal right to the poor and to the rich.”<sup>299</sup>

The Court’s reasoning can be outlined as follows: (i) the equal right principle supports the value of judicial impartiality; (ii) judicial solicitation of campaign funds creates a risk that judges will exhibit favoritism to their donors, or be perceived to do so; (iii) therefore, there is a “compelling interest” in promoting judicial impartiality by regulating the judicial solicitation of campaign funds.<sup>300</sup> So the Court is already invoking the equal right principle when ascertaining the weight of interests within the First Amendment scrutiny framework.

Still, *Williams-Yulee* invoked the equal right principle only in the context of *judicial* elections.<sup>301</sup> That narrow view assumes that the equal right principle is at stake only when the Court reviews efforts to regulate other judges. But that assumption is questionable. As we have seen, the equal right principle implicates the basic role of federal judges, not just their review of laws directed toward other judges.<sup>302</sup> Because the Court is itself composed of jurists who have taken the federal judicial oath, the equal right principle should inform the Court’s assessment of government interests whenever it evaluates a campaign finance measure or any other legislative effort to promote economic equality. So while *Williams-Yulee* may be correct that the federal judicial oath has special import for campaign finance regulations that are specifically directed toward judges, the equal right principle should be relevant in other campaign finance contexts as well.

Even without establishing that government interests are “compelling” or “legitimate” the equal right principle can do significant work in the First Amendment context simply by showing that certain interests are permissible. Take *Arizona Free Enterprise Club’s Freedom Club PAC v Bennett*,<sup>303</sup> which invalidated a state system for apportioning public campaign funding.<sup>304</sup> Because state law provided that one candidate’s

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<sup>299</sup> See *id.* at 1666 (citations omitted), quoting 10 *Encyclopaedia of the Laws of England* 105 (Sweet & Maxwell 2d ed 1908) and 28 USC § 453.

<sup>300</sup> See *Williams-Yulee*, 135 S Ct at 1666.

<sup>301</sup> See *id.*

<sup>302</sup> See Part I.C.

<sup>303</sup> 564 US 721 (2011).

<sup>304</sup> *Id.* at 727–28.

campaign expenditures would trigger an increase in her rival's public funding, the Court found an unconstitutional effort to equalize political speech.<sup>305</sup> In the Court's view, a legislative intent to level the economic playing field would in itself be a reason to invalidate the law.<sup>306</sup> Given the equal right principle, however, the government has at least a permissible interest in providing less well-funded candidates with the ability to campaign.<sup>307</sup>

If the equal right principle supports the propriety of governmental interests in promoting economic equality, as in the examples above, then it can also demonstrate the impropriety of other interests. Take *Martin v Struthers*,<sup>308</sup> which found a First Amendment right to engage in door-to-door distribution of political literature.<sup>309</sup> In concluding that a prohibition on such efforts was unsupported by any adequate interest, the Court noted that "[d]oor to door distribution of circulars is essential to the poorly financed causes of little people."<sup>310</sup> Thus, the government's basis for curtailing political activity had to be defined in a way that accommodated class disparities in political activity.

More broadly, consider cases that look askance at governmental action that both implicates a fundamental right and entails economic discrimination.<sup>311</sup> Already, the equal right principle makes cameo appearances in these cases.<sup>312</sup> In the future, it could play a leading role by supplying a unified analytical framework. When a constitutional right is implicated, the next doctrinal question is whether the government's asserted interest is permissible. This inquiry—like the identification of compelling and legitimate interests—involves construction in the face of interpretive ambiguity.<sup>313</sup> And the equal right principle

<sup>305</sup> See *id.* at 748–50.

<sup>306</sup> See *id.* at 749–50 & n 10 (adducing extrarecord evidence of an impermissible “leveling” motive on the part of the state legislature).

<sup>307</sup> See *Arizona Free Enterprise Club's Freedom Club PAC*, 564 US at 755–57 (Kagan dissenting).

<sup>308</sup> 319 US 141 (1943).

<sup>309</sup> *Id.* at 148–49.

<sup>310</sup> *Id.* at 146.

<sup>311</sup> See, for example, *Zablocki v Redhail*, 434 US 374, 387 (1978) (invalidating a state restriction on the fundamental right to marriage in part because the restriction imposed burdens on individuals who “lack the financial means” to comply).

<sup>312</sup> See, for example, *id.* at 404 & n 5 (Stevens concurring) (quoting the equal right principle in a fundamental right to marry case).

<sup>313</sup> See note 279 and accompanying text.

addresses that ambiguity by suggesting that the distribution of constitutional rights should not rest on wealth.<sup>314</sup>

*Harper v Virginia Board of Elections*,<sup>315</sup> which invalidated poll taxes for impinging on the fundamental right to vote, supplies an example.<sup>316</sup> Though wealth discrimination might serve certain interests, the equal right principle would reject those interests as impermissible grounds for curtailing a fundamental right.<sup>317</sup> *Harper* was a relatively easy case because the wealth discrimination appeared on the face of the poll tax measure.<sup>318</sup> A harder set of cases involves voter ID laws, which ostensibly aim to prevent fraud but diminish poor voters’ ability to cast ballots.<sup>319</sup> To the extent that voter ID requirements can be shown to generate economic inequality in the electoral franchise, that inequality would implicate the fundamental right to vote and so deny “equal right” to the poor. The equal right principle could thus limit the permissibility of the government’s asserted interest—namely, the prevention of voter fraud.

#### D. Protected “Class”

Finally, the equal right principle could be viewed as a legislative basis for judicial engagement in areas of constitutional “underenforcement.”<sup>320</sup> While there are several possible applications,<sup>321</sup> the most important involves the Equal Protection

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<sup>314</sup> For discussion of markets’ properly limited social role, see note 191 and accompanying text.

<sup>315</sup> 383 US 663 (1966).

<sup>316</sup> *Id.* at 666.

<sup>317</sup> See *id.* (“Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.”).

<sup>318</sup> See *id.* at 664 n. 1.

<sup>319</sup> See, for example, *Crawford v Marion County Election Board*, 553 US 181, 188–89 (2008) (plurality) (holding that a voter ID statute was not vulnerable to a facial challenge). For criticism rooted in equal right considerations, see *id.* at 212 (Souter dissenting) (noting that the requirement to acquire identification at a Bureau of Motor Vehicles location would especially burden “[p]oor, old, and disabled voters”).

<sup>320</sup> See Sager, 91 *Harv L Rev* at 1218 (cited in note 22).

<sup>321</sup> For a possible structural implication, consider the Republican Governance Clause, also called the Guarantee Clause, which is sometimes viewed as posing nonjusticiable political questions but was originally viewed by some as a legal bulwark against aristocracy. See US Const Art IV, § 4; *Luther v Borden*, 48 US 1, 42 (1849); Jonathan Elliot, ed, 4 *The Debates in the Several State Conventions on the Adoption of the Federal Constitution* 195 (Taylor & Maury 2d ed 1854). See also Jack M. Balkin, *Republicanism and the Constitution of Opportunity*, 94 *Tex L Rev* 1427, 1428–31 (2016); Fishkin and Forbath, 94 *BU L Rev* at 684 (cited in note 152). Perhaps the equal right principle supports judicial implementation of republican governance via economic equality.

Clause,<sup>322</sup> which affords special protection to certain groups or “protected classes.”<sup>323</sup> Current case law denies that economic “class” is itself a protected class.<sup>324</sup> Scholars have challenged that conclusion by elaborating broad readings of the Constitution or deep theories of political philosophy. The equal right principle offers a new and more modest approach.

Start with *San Antonio Independent School District v Rodriguez*,<sup>325</sup> which is still the leading case on equal protection and economic inequality.<sup>326</sup> The basic question was whether state public school funding violated the Equal Protection Clause when substantially based on local property taxes.<sup>327</sup> At the “threshold,” the Court emphasized that “the class of disadvantaged ‘poor’ cannot be identified or defined in customary equal protection terms” and expressed skepticism that “the relative—rather than absolute—nature of the asserted deprivation” should be legally decisive.<sup>328</sup> Later on, the Court noted that “[e]ducation, of course, is not among the rights afforded explicit protection under our Federal Constitution” and worried that the justices might impose “too rigorous a standard of scrutiny” given their lack of “expertise” in matters of school funding.<sup>329</sup>

*Rodriguez* reveals a Court struggling with its own institutional limitations. The Equal Protection Clause’s text does not clearly contemplate consideration of economic class, and that

<sup>322</sup> US Const Amend XIV (“No state shall . . . deny to any person within its jurisdiction the equal protection of the laws.”).

<sup>323</sup> See, for example, *Bowen v Gilliard*, 483 US 587, 602–03 (1987).

<sup>324</sup> See, for example, *Harris v McRae*, 448 US 297, 323 (1980) (emphasizing the Court’s repeated refusal to find “poverty, standing alone” to be a suspect classification). For arguments that the poor should qualify, see Mario L. Barnes and Erwin Chemerinsky, *The Disparate Treatment of Race and Class in Constitutional Jurisprudence*, 72 L & Contemp Probs 109, 119 (2009) (“Perhaps, however, one should need no other basis to call for closer scrutiny than the obvious truth that poverty takes on the character of a stigmatizing identity category.”); Michele Gilman, *A Court for the One Percent: How the Supreme Court Contributes to Economic Inequality*, 2014 Utah L Rev 389, 405–10 (arguing that poverty is intergenerational and more immutable than often believed). See also Ross and Li, 104 Cal L Rev at 380 (cited in note 236) (arguing for a test based on “interest group support, measures of political inequality, relative group voter turnout, and descriptive representation alongside favorable legislative actions to provide a more accurate assessment of a group’s political power”).

<sup>325</sup> 411 US 1 (1973).

<sup>326</sup> See Henry Rose, *The Poor as a Suspect Class under the Equal Protection Clause: An Open Constitutional Question*, 34 Nova L Rev 407, 407–08 (2010) (collecting citations).

<sup>327</sup> See *Rodriguez*, 411 US at 18–20.

<sup>328</sup> See *id* at 19.

<sup>329</sup> See *id* at 35, 41.

textual inaptness made it more difficult—both intellectually and politically—to do the hard work of identifying a constitutional wrong. Further, the Court believed that it lacked competence to review sophisticated questions pertaining to economic policy.<sup>330</sup> For these reasons of legitimacy and competence, the Court apparently let the Equal Protection Clause’s economic aspect become a judicially “underenforced” constitutional norm.<sup>331</sup> In other words, *Rodriguez*’s express holding had less to do with the Constitution’s limitations than with the federal judiciary’s reluctance to enter a regulatory arena dominated by the political branches. That apparent decision to engage in underenforcement creates room for the equal right principle to come to bear. In several respects, the equal right principle addresses *Rodriguez*’s expressed concerns and so strengthens the argument for judicial enforcement of equal protection claims based on economic class.<sup>332</sup>

First, the equal right principle is specifically directed toward federal judges, rather than states or other governmental actors, and so specifically endorses *judicial* engagement with issues of economic equality.<sup>333</sup> The equal right principle thus takes seriously the possibility of constitutional underenforcement, rather than positing that a broad reading of the Equal Protection Clause necessarily calls for comparably broad judicial implementation.<sup>334</sup> The equal right principle also provides a powerful rejoinder to legitimacy- or competency-based arguments that matters of economic equality should categorically lie within the domain of the political branches: by enacting the equal right principle into statutory law, Congress acknowledged the federal judiciary’s role in deciding matters of economic equality. In other contexts, the Court has responded to similar legislative cues as evidence that a legal question is fit for federal courts’ resolution. For example, the presence of a statute for interpretation has made the Court more willing to enter what might otherwise be

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<sup>330</sup> See *id.* at 31.

<sup>331</sup> See Sager, 91 Harv L Rev at 1218 (cited in note 22) (arguing that *Rodriguez* rested on “arguments which support the underenforcement of the equal protection clause by the federal courts”).

<sup>332</sup> See note 129 (arguing that a statute can influence constitutional law).

<sup>333</sup> See Part I.C (discussing related history). See also 28 USC § 453.

<sup>334</sup> But see note 324 and accompanying text (collecting sources arguing for broader readings of the Equal Protection Clause).

nonjusticiable territory.<sup>335</sup> Again, confirmation hearings could clarify this implication of the equal right principle.

Second, the equal right principle is expressly directed toward *economic* equality, whereas the Equal Protection Clause is not. So economic inequality is more plausibly viewed as incidental to, or even overlooked by, the Equal Protection Clause. By comparison, the equal right principle draws an explicit distinction between “the poor” and “the rich,” and so expressly contemplates the possibility of drawing distinctions between different economic classes.<sup>336</sup> In other words, the equal right principle recognizes that divergent economic classes exist under the law. And the federal judicial oath goes even further in contemplating that class disparities can generate problems of “right” that are properly considered in the course of judicial action.<sup>337</sup>

Third, the equal right principle addresses *Rodriguez’s* reluctance to afford special protection to activities like education that are not protected by an express constitutional right. In advert-ing to “equal right,” the equal right principle calls on federal courts to determine *which* disparities between the rich and poor undermine justice. By comparison, the constitutional phrase “equal protection of the laws” is most commonly construed in either of two ways: first, historical readings limit the Equal Protection Clause’s ambit to certain forms of “protection,” such as civil rights or security against mob violence;<sup>338</sup> second, modern doctrinal interpretations essentially read the Clause to provide for “equal laws” with respect to certain suspect classifications.<sup>339</sup> But historical readings of the Equal Protection Clause are far narrower than the equal right principle. And requiring economic equality with respect to *all* laws would be unduly rigid, given the frequently legitimate need for economically defined

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<sup>335</sup> See *Zivotofsky v. Clinton*, 566 US 189, 200–01 (2012); Chris Michel, Comment, *There’s No Such Thing as a Political Question of Statutory Interpretation: The Implications of Zivotofsky v. Clinton*, 123 Yale L J 253, 259–60 (2013). See also note 129 and accompanying text (collecting sources on legislative influence on constitutional rules).

<sup>336</sup> But see *Rodriguez*, 411 US at 19 (suggesting that “the class of disadvantaged ‘poor’ cannot be identified or defined in customary equal protection terms”).

<sup>337</sup> See 28 USC § 453.

<sup>338</sup> See William J. Stuntz, *The Collapse of American Criminal Justice* 104–06 (Belknap 2011); John Harrison, *Reconstructing the Privileges or Immunities Clause*, 101 Yale L J 1385, 1390 (1992).

<sup>339</sup> See Harrison, 101 Yale L J at 1390 (cited in note 338), citing *Yick Wo v. Hopkins*, 118 US 356, 369 (1886).



classifications. The federal judicial oath avoids both of those analytical shoals.

Given the above, a denial of “equal right” plausibly occurs when a state has distributed funding in a way that renders “the poor” much less likely than “the rich” to receive a minimally adequate public school education. In recognizing class groups as legal categories and directing federal judges to attend to them, the equal right principle addresses *Rodriguez*’s “threshold” concerns about recognizing “the poor” as a “class.”<sup>340</sup> And while *Rodriguez* hesitated when both authoritative text and judicial expertise were seemingly absent, the equal right principle plausibly suggests that the federal judiciary has a legislative basis to march ahead. Finally, the equal right principle substantially mitigates *Rodriguez*’s concerns about providing relief for “relative” deprivations: under the federal judicial oath, the Court is charged with identifying those special areas in which economic inequalities implicate “equal right.”<sup>341</sup> In all these ways, the equal right principle supplies at least a plausible basis for the Court to reconsider *Rodriguez*’s decision to underenforce the Equal Protection Clause.

Finally, nothing in *Rodriguez* or any other Supreme Court precedent forecloses arguments from equal right.<sup>342</sup> *Rodriguez* did not discuss or hear argument on the equal right principle or its implications for constitutional underenforcement. And while *Rodriguez* is frequently remembered for closing the door on class-based equal protection claims,<sup>343</sup> it did not actually do so. The Court instead held, “on the record” presented in that particular case, that the plaintiffs had failed to make certain showings necessary to sustain a poverty-based equal protection challenge.<sup>344</sup>

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<sup>340</sup> See *Rodriguez*, 411 US at 19–20. When implementing the equal right principle, federal courts might draw on executive branch definitions of poverty and affluence used in various programs. See, for example, *Federal Poverty Guidelines* (cited in note 12). For discussion of deferring to legislative action as well, see *Bowen*, 483 US at 600–01; *Atkins*, 472 US at 129.

<sup>341</sup> See *Rodriguez*, 411 US at 19–20.

<sup>342</sup> See *id.* See also Ross and Li, 104 Cal L Rev at 343 (cited in note 236) (“The Court, however, has never squarely addressed the status of the poor under the suspect class standard.”); Rose, 34 Nova L Rev at 419 (cited in note 326) (concluding that the Court misconstrued its own prior rulings when stating that precedent opposed treating the poor as a suspect class); Tribe, 90 Harv L Rev at 1083 (cited in note 28) (emphasizing key reservations in *Rodriguez*).

<sup>343</sup> See Rose, 34 Nova L Rev at 408 & nn 1–2 (cited in note 326).

<sup>344</sup> See *Rodriguez*, 411 US at 23. To wit, the Court concluded that there was no demonstrated correlation between relatively low-funded school districts and poverty,

So if the equal right principle were raised in a case that more strongly indicated discrimination against the poor in the provision of a basic public good, then the Court could quite properly view that case as posing an open question.

The foregoing approach might be contrasted with Professor Frank Michelman's classic work on protecting the poor through the Equal Protection Clause.<sup>345</sup> In brief, Michelman argued that equal protection conferred rights to "minimum welfare," rather than "equal" welfare.<sup>346</sup> Michelman's adequacy-based analysis rested partly on grounds of Rawlsian political theory and partly on grounds of institutional capability,<sup>347</sup> but it has the textual disadvantage of being in tension with the Equal Protection Clause's focus on equality.<sup>348</sup> And, as we have seen, the Clause's reference to "protection" tends to be read either too broadly or too narrowly to accommodate fairness.<sup>349</sup> The equal right principle mitigates these difficulties by introducing a new text. Because the federal judicial oath is ultimately concerned with "right," the "basic needs" that Michelman identified might correspond to claims of "equal right."<sup>350</sup> For instance, publicly secured goods like secondary education or healthcare could be viewed as objects of "right" whose availability cannot lawfully be conditioned on wealth.<sup>351</sup>

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much less the kind of correlation that might support a facial claim of wealth discrimination. See *id.* at 25. And the Court accepted the State's representation that the school funding system was designed to promote local participation in public education, rather than to secure class favoritism. See *id.* at 48–49.

<sup>345</sup> See Michelman, 83 Harv L Rev at 11–12 (cited in note 31).

<sup>346</sup> See *id.* at 9–11.

<sup>347</sup> See *id.* at 14–15, 35 (discussing Rawls's then-extant writings on justice as fairness). See also John Rawls, *A Theory of Justice* 60–61 (Belknap 1971). In a later work, Michelman drew on John Hart Ely's theory of representation reinforcement, which would lead to constitutionally grounded conclusions akin to the statutory ones laid out in Part III.C. See note 248 and accompanying text. See also Frank I. Michelman, *Welfare Rights in a Constitutional Democracy*, 1979 Wash U L Q 659, 666–85 (1979). But see John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* 148, 162 (Harvard 1980) (discussing difficulties regarding protected status to the poor).

<sup>348</sup> See Michelman, 83 Harv L Rev at 16–17 (cited in note 31) (acknowledging the incongruity between the Equal Protection Clause and assertions of minimum entitlements). See also Winter, 1972 S Ct Rev at 87 (cited in note 29) ("If the Equal Protection Clause requires absolute equality . . . the equality thus brought about seems to be within each state, not between them."); *id.* at 89 ("The language of the Equal Protection Clause thus seems at best very badly suited, at worst plainly hostile, to the objectives of equality under discussion.")

<sup>349</sup> See text accompanying notes 338–39.

<sup>350</sup> See Michelman, 83 Harv L Rev at 12–14 (cited in note 31).

<sup>351</sup> See *id.* at 29–30 (discussing "just wants").

More fundamentally, the equal right principle is rooted in a statute and so is not wedded to Rawlsian political philosophy or any other deep philosophical position on the essential elements of a just society.<sup>352</sup> That theoretical modesty is an asset.<sup>353</sup> Unelected, tenure-protected federal judges can legitimately enforce Rawlsian justice only if authorized.<sup>354</sup> Political theories are primarily the province of the people and the political branches, whereas the federal courts must abide by law. At the same time, federal courts are thought to have some discretionary authority to engage in construction or fashion federal common law, and we have seen that the equal right principle can guide jurists engaged in that interstitial work.<sup>355</sup> We have also seen that the equal right principle's legal and moral content would necessarily remain subject to political influence, including via promissory constitutionalism. Indeed, judicial implementation of the equal right principle would be easily reparable: if courts erred in assessing public values or wrongly discerned accepted limits on the market's proper operation, then the political branches could simply adjust the federal judicial oath.<sup>356</sup> In short, the equal right principle does not invite or assert judicial oversight of economic policy.

Ultimately, the equal right principle does not eliminate room for debate on whether or how to extend economic groups protection under the Equal Protection Clause.<sup>357</sup> Even after dislodging *Rodriguez's* rationale for underenforcement, there is still the critical question whether equal protection's meaning supports

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<sup>352</sup> For an alternative, deep account that focuses on vulnerability and dependency and is therefore arguably more consonant with the equal right principle's emphasis on judicial action, see Robert E. Goodin, *Reasons for Welfare: The Political Theory of the Welfare State* 165–83 (Princeton 1988).

<sup>353</sup> See Liu, 61 *Stan L Rev* at 210–11, 232–33 (cited in note 28) (criticizing Michelman for relying on a comprehensive theory of justice, rather than contingent political agreement). See also Cass R. Sunstein, *Incompletely Theorized Agreements*, 108 *Harv L Rev* 1733, 1735 (1995).

<sup>354</sup> See Monaghan, 13 *Harv CR–CL L Rev* at 128 (cited in note 29). John Rawls himself did not present his theory of justice as a prescriptive account of judicial action. For more on Michelman's effort to link Rawls's work with judicial action, see Frank I. Michelman, *In Pursuit of Constitutional Welfare Rights: One View of Rawls' Theory of Justice*, 121 *U Pa L Rev* 962, 1013–15 (1973).

<sup>355</sup> See Part II.B. In later work, Michelman embraced a similarly interstitial role for positive welfare rights. See Michelman, 121 *U Pa L Rev* at 1013–15 (cited in note 354).

<sup>356</sup> See notes 129 and 156 and accompanying text.

<sup>357</sup> See text accompanying notes 185–87 (noting that promissory constitutionalism does not aim to guarantee any particular deliberative outcome).

a measure of class-consciousness, a subject already canvassed by other scholars.<sup>358</sup> And the federal courts' institutional limitations might still warrant judicial restraint or deference to the political branches, particularly when equal protection claims depend on predictions or contestable empirics.<sup>359</sup> Once again, the equal right principle has an interstitial or supplemental role, and so must be implemented in light of other law.

#### CONCLUSION

Economic inequality is a salient topic in American politics, fostering a widespread if controversial sense that class should play a greater role in constitutional law. But discussion about class and the Constitution has largely overlooked that there is already an authoritative directive that federal courts attend to economic equality: the statutory oath of office taken by every federal judge.

By law, federal judges must swear or affirm that they will "do equal right to the poor and to the rich." This evocative statute and promise suggest that federal judges should adopt interstitial means of promoting substantive economic equality. For example, federal judges might strengthen counsel rights, construe ambiguous statutes in favor of the least advantaged, and recognize the legitimacy of legislative efforts to secure economic equality in campaign finance.

In addition, the equal right principle provides a platform for public contestation on matters of economic equality, including by judges, presidents, senators, and, ultimately, the public at large. There are many reasonable views of what economic justice requires of federal judges, and an auspicious first step toward choosing among them is to talk about the equal right principle—particularly when selecting judges who would commit themselves to the federal judicial oath.

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<sup>358</sup> See, for example, notes 324, 347, and accompanying text (collecting sources).

<sup>359</sup> See text accompanying note 263.