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M.L.B. v. S.L.J.: Protecting Familial Bonds and Creating a New Right of Access in the Civil Courts

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NOTES

M.L.B. v. S.L.J.: Protecting Familial Bonds and Creating a New Right of Access in the Civil Courts

As every school child knows, American ideals rest on the ability to enjoy life, liberty, and the pursuit of happiness.[1] For most Americans, the pursuit of happiness includes life with a family, free from unwanted intrusions by the government.[2] In some families, however, the pursuit of happiness goes awry, and the government must step in to protect the children involved.[3] At first, such intrusions may be limited to investigations of the family or visits from social workers.[4] When a child's life is threatened, however, states

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1. *See* THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776).

2. *See, e.g.*, Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925) (striking a statute that required children to attend public schools because of the "liberty of parents and guardians to direct the upbringing and education of children under their control"); Marion Huxtable, *Child Protection: With Liberty and Justice for All*, 39 SOC. WORK 60, 60 (1994) ("The Bill of Rights guarantees civil liberties that are envied around the world. Family privacy, freedom from government interference, and the right to raise children according to individual beliefs are among the fundamental rights secured by the Constitution.").

3. *See* Michele Ingrassia & John McCormick, *Why Leave Children with Bad Parents?*, NEWSWEEK, Apr. 25, 1994, at 52, 54, 58. The article describes a grisly scene of abuse and neglect discovered in one Chicago apartment:

> In the dining room, police said, a half-dozen children lay asleep on a bed, their tiny bodies intertwined like kittens. On the floor beside them, two toddlers tussled with a mutt over a bone they had grabbed from the dog's dish. In the living room, four others huddled on a hardwood floor, crowded beneath a single blanket. "We've got eight or nine kids here," Officer John Labiak announced. Officer Patricia Warner corrected him: "I count 12." The cops found the last of 19 asleep under a mound of dirty clothes; one 4-year-old, gnarled by cerebral palsy, bore welts and bruises.

Id. at 52; *see also* Peter T. Kilborn, *Priority on Safety Is Keeping More Children in Foster Care*, N.Y. TIMES, Apr. 29, 1997, at A1 (describing several children who have left abusive homes for a healthier life with foster parents); Steven V. Roberts, *Neglecting Children—and Parents*, U.S. NEWS & WORLD REP., Apr. 25, 1994, at 10, 11 ("Probably the best thing that society can do for its toddlers is to make 'parent' an honorable title again. No job is more important, yet no job is more often taken for granted.").

4. *See generally* JEANNE M. GIOVANNONI & ROSINA M. BECERRA, DEFINING CHILD ABUSE 211-38 (1979) (describing the types of complaints brought against parents, dispositions of cases, and resources available to state agencies); CYNTHIA CROSSON TOWER, UNDERSTANDING CHILD ABUSE AND NEGLECT 194-219 (1989) (explaining the process of reporting and investigating child abuse and neglect); Paul E. Knepper & Shannon M. Barton, *The Effect of Courtroom Dynamics on Child Maltreatment*

have the power to sever the parent-child relationship completely and irreversibly.[5]

Since the social norms and mores of each state may vary, the federal government traditionally has left these domestic issues to the states.[6] Over fifteen years ago, then-Justice Rehnquist observed that federal involvement in domestic law "will only thwart state searches for better solutions in an area where this Court should encourage state experimentation."[7] Thus, absent constitutional violations, the states are free to govern their residents' family lives as they see fit.[8] In one area of domestic law, however, the Supreme Court has been increasingly willing to intervene: When a state acts to terminate a parent-child relationship, the Court looks to the Fourteenth Amendment to decide what protections the parents should have.[9]

Proceedings, 71 SOC. SERV. REV. 288, 295-305 (1997) (examining Kentucky's implementation of federal child-welfare legislation).

5. *See, e.g.*, ALA. CODE § 26-18-7 (1992); ALASKA STAT. § 47.17.030 (Michie 1996); FLA. STAT. ANN. § 39.469(2) (West 1988 & Supp. 1997); KAN. STAT. ANN. § 38-1583 (1993 & Supp. 1996); MINN. STAT. ANN. § 260.241(1) (West 1992); MISS. CODE ANN. § 93-15-109 (1994 & Law. Co-op. 1997); NEB. REV. STAT. ANN. § 43-292 (Michie 1993); N.H. REV. STAT. ANN. § 170-C:11(II) (1994 & Supp. 1996); N.J. STAT. ANN. § 30:4C-15.1 (West 1997); N.D. CENT. CODE § 27-20-44 (1991); S.C. CODE ANN. § 20-7-1566 (Law. Co-op. 1996); S.D. CODIFIED LAWS § 26-8A-26 (Michie 1992 & Supp. 1997); TENN. CODE ANN. § 37-1-147 (1996); UTAH CODE ANN. § 78-3a-407 (1996).

6. *See* Santosky v. Kramer, 455 U.S. 745, 770 (1982) (Rehnquist, J., dissenting). Then-Justice Rehnquist remarked:

> If ever there were an area in which federal courts should heed the admonition of Justice Holmes that "a page of history is worth a volume of logic," it is in the area of domestic relations. This area has been left to the States from time immemorial, and not without good reason.

Id. (Rehnquist, J., dissenting) (quoting New York Trust Co. v. Eisner, 256 U.S. 345, 349 (1921)).

7. *Id.* at 773 (Rehnquist, J., dissenting); *cf.* New State Ice Co. v. Liebmann, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting) ("It is one of the happy incidents of the federal system that a single courageous state may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.").

8. *See, e.g.*, Mansell v. Mansell, 490 U.S. 581, 587 (1989) ("Because domestic relations are preeminently matters of state law, we have consistently recognized that Congress, when it passes general legislation, rarely intends to displace state authority in this area."); Griswold v. Connecticut, 381 U.S. 479, 482 (1965) ("We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions."); DeSylva v. Ballentine, 351 U.S. 570, 580 (1956) ("[T]here is no federal law of domestic relations, which is primarily a matter of state concern."); *In re* Burrus, 136 U.S. 586, 593-94 (1890) ("The whole subject of the domestic relations of husband and wife, parent and child, belongs to the laws of the States and not to the laws of the United States.").

9. *See, e.g.*, *Santosky*, 455 U.S. at 768 ("[T]he 'fair preponderance of the evidence' standard prescribed by [the New York statute at issue] violates the Due Process Clause of the Fourteenth Amendment."); Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24-25 (1981) ("Applying the Due Process Clause is ... an uncertain enterprise which must

Prior decisions have established that indigent parents threatened with termination of their parental rights are entitled to a higher standard of proof than parties in other civil proceedings[10] and that court-appointed counsel might be required in certain complex cases.[11] In *M.L.B. v. S.L.J.*,[12] the Court continued its trend of protecting indigent parents whose familial bonds are threatened by state action, holding that they should be provided with transcripts when appealing a termination of their parental rights.[13]

This Note discusses the facts of *M.L.B.*, its history in the lower courts, and the Supreme Court's resolution of the issues presented by the case.[14] The Note examines the functions of due process and equal protection,[15] and traces the Court's application of them in both criminal[16] and civil[17] cases involving indigents. Next, the Note examines the protections afforded to indigents in cases that cannot easily be classified as criminal or civil.[18] The Note explains several of the underlying doctrines in the majority opinion in *M.L.B.*, then analyzes the majority's application of procedural due process, substantive due process, and equal protection.[19] The Note then discusses difficulties with the dissenting opinion[20] and concludes that due to the quasi-criminal character of a parental rights termination proceeding, the majority's convergence of due process and equal protection reached the correct result.[21]

In June of 1992, M.L.B. and her husband S.L.J. divorced after eight years of marriage, agreeing to leave their two children in

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discover what 'fundamental fairness' consists of in a particular situation by first considering any relevant precedents and then by assessing the several interests that are at stake."); Armstrong v. Manzo, 380 U.S. 545, 550 (1965) ("It is clear that failure to give the petitioner notice of the pending adoption proceedings [involving his child] violated the most rudimentary demands of due process of law.").

10. *See Santosky*, 455 U.S. at 769 ("We hold that [a clear and convincing] standard adequately conveys to the factfinder the level of subjective certainty about his factual conclusions necessary to satisfy due process.").

11. *See Lassiter*, 452 U.S. at 31-32 ("[We] leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.").

12. 117 S. Ct. 555 (1996).

13. *See id.* at 559.

14. *See infra* notes 22-75 and accompanying text.

15. *See infra* notes 76-98 and accompanying text.

16. *See infra* notes 99-118 and accompanying text.

17. *See infra* notes 119-37 and accompanying text.

18. *See infra* notes 138-48 and accompanying text.

19. *See infra* notes 149-94 and accompanying text.

20. *See infra* notes 195-201 and accompanying text.

21. *See infra* notes 202-228 and accompanying text.

S.L.J.'s custody.[22] S.L.J. remarried shortly thereafter, and in November 1993, he and his second wife sued to terminate M.L.B.'s parental rights.[23] Their complaint alleged that M.L.B. had not maintained reasonable visitation and that she had not kept up with her child support payments.[24] M.L.B. counterclaimed, arguing that S.L.J. had not permitted her reasonable visitation, despite a provision in the divorce decree requiring him to do so.[25] After three evidentiary hearings over the course of several months, the Chancellor of the Chancery Court of Benton County, Mississippi, handed down his decree terminating M.L.B.'s parental rights and approving the adoption by the children's stepmother.[26]

The Chancellor's decree did not set forth any evidence or any reasons for the decision.[27] Instead, the Chancellor drew his language directly from Mississippi's parental termination statute, declaring that the children's relationship with their mother had eroded because of M.L.B.'s " 'serious neglect, abuse, prolonged and unreasonable absence or unreasonable failure to visit or communicate with her minor children.' "[28] The Chancellor's decree accused M.L.B. of abuse, an allegation S.L.J. never raised in any stage of the proceedings.[29] The Chancellor also stated that S.L.J. and his second wife had met their burden of proof by " 'clear and convincing evidence.' "[30]

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22. *See M.L.B.*, 117 S. Ct. at 559. The couple had two children, a boy born in April 1985 and a girl born in February 1987. *See id.*

23. *See id.* S.L.J.'s brief alleged that M.L.B. was living with a convicted felon at the time of the divorce and that their divorce decree allowed M.L.B. reasonable visitation, so long as that person was not present. *See* Brief for Respondents at 1, *M.L.B.* (No. 95-853). M.L.B. contested those allegations, arguing that S.L.J. did not allege or prove any dangerous conduct on her part. *See* Reply Brief for Petitioner at 2-3, *M.L.B.* (No. 95-853).

24. *See M.L.B.*, 117 S. Ct. at 559. S.L.J. alleged that the divorce decree required M.L.B. to pay $40 per week to maintain medical insurance on the children, plus half of any medical bills not covered by insurance. *See* Brief for Respondents at 1, *M.L.B.* (No. 95-853).

25. *See M.L.B.*, 117 S. Ct. at 559.

26. *See id.* The Chancellor further ordered that J.P.J., the adopting parent, be shown as the mother of the children on their birth certificates. *See id.*

27. *See id.* at 559-60. According to M.L.B., "the Chancellor cited no specific grounds for the termination and, despite a vigorously contested trial, cited no specific evidence relating to or supporting his decision." Brief for Petitioner at 3, *M.L.B.* (No. 95-853).

28. *M.L.B.*, 117 S. Ct. at 559 (quoting Petitioner's Appendix to Petition for Certiorari at 9-10, *M.L.B.* (No. 95-853)); *see* MISS. CODE. ANN. § 93-15-103(3)(e) (1994).

29. *See M.L.B.*, 117 S. Ct. at 559 n.1 (citing Reply Brief for Petitioner at 6 n.1, *M.L.B.* (No. 95-853)).

30. *Id.* at 560 (quoting Petitioner's Appendix to Petition for Certiorari at 10, *M.L.B.* (No. 95-853)); *see also* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (requiring clear and

M.L.B. appealed the Chancellor's decree and paid the required $100 filing fee.[31] Under the Mississippi Rules of Appellate Procedure, appellants who plan to argue that the trial court's finding is unsupported by the evidence must order a transcript of the first proceeding.[32] Also, civil litigants in Mississippi could appeal only if they could pay for court costs of their appeal in advance.[33] Accordingly, the Clerk of the Chancery Court notified M.L.B. that preparing and transmitting the record would cost $2352.36.[34] Unable to afford the cost of the transcript, M.L.B. sought leave to appeal in forma pauperis.[35] The Mississippi Supreme Court denied her appeal because, under its precedent, no right to proceed in forma pauperis existed in a civil appeal.[36]

The United States Supreme Court reversed the Mississippi court's decision,[37] with six Justices agreeing that Mississippi could not bar M.L.B. from seeking an appellate review of her parental rights termination simply because she could not afford to pay the costs of the appeal in advance.[38] The majority reasoned that both equal

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convincing evidence for parental terminations).

31. *See M.L.B.*, 117 S. Ct. at 560.

32. *See id.* (citing MISS. R. APP. P. 10(b)(2); MISS. CODE ANN. § 11-51-29 (Supp. 1996)).

33. *See id.* (citing MISS. CODE ANN. §§ 11-51-3, -29).

34. *See id.* The charges included $1900 for the transcript (950 pages at $2 per page); $438 for other documents in the record (219 pages at $2 per page); $4.36 for binders; and $10 for mailing. *See id.* S.L.J. claimed that the charges were rationally related to the legitimate state interest in helping offset costs. *See* Brief for Respondents at 8, *M.L.B.* (No. 95-853). M.L.B. claimed that the charges arose because Mississippi law requires $2 per page to pay the court reporters and that such charges should be reduced for paupers. *See* Reply Brief for Petitioner at 9, *M.L.B.* (No. 95-853).

35. *See M.L.B.*, 117 S. Ct. at 560. *Black's Law Dictionary* defines "in forma pauperis": "[P]ermission given to a poor person (*i.e.* indigent) to proceed without liability for court fees or costs. An indigent will not be deprived of his rights to litigate and appeal; if the court is satisfied as to his indigence he may proceed without incurring costs or fees of court." BLACK'S LAW DICTIONARY 537 (6th ed. 1991) (citing FED. R. APP. P. 24).

36. The Mississippi Supreme Court issued an order denying M.L.B.'s request to proceed in forma pauperis. The order stated:

> "The appellant claims he [sic] is unable to pay the costs of appeal and that the Court should suspend the rules and allow the appellant to proceed in forma pauperis.... The right to proceed in forma pauperis in civil cases exists only at the trial level. The [Mississippi Supreme] Court finds that the motion should be denied."

Brief for Petitioner at 7, *M.L.B.* (No. 95-853) (quoting the order) (citations omitted). An editorial describing this case remarked that "Mississippi's insensitivity seemed to scream out for reversal." *Opening the Door to Equal Justice*, N.Y. TIMES, Dec. 18, 1996, at A26.

37. *See M.L.B.*, 117 S. Ct. at 570.

38. *See id.* at 559. Justice Ginsburg wrote the majority opinion, which was joined by Justices Stevens, O'Connor, Souter, and Breyer. *See id.* at 558. Justice Kennedy

protection and due process concerns were at stake in the case.[39] The equal protection concern, the Court explained, related to "the legitimacy of fencing out would-be appellants based solely on their inability to pay core costs,"[40] whereas the due process concern centered on "the essential fairness of the state-ordered proceedings anterior to adverse state action."[41] Writing for the Court, Justice Ginsburg avoided putting any precise label on the rationale, but noted that most decisions in this area " 'res[t] on an equal protection framework.' "[42]

The majority agreed with M.L.B. that *Mayer v. City of Chicago*[43] was controlling.[44] In *Mayer*, the Court struck down an Illinois rule that allowed free transcripts on appeal only when the defendant had been convicted of a felony.[45] Finding the distinction between felonies and non-felonies to be an " 'unreasoned distinction,' "[46] the Court in *Mayer* held that the defendant should be permitted to appeal without paying for a transcript.[47] In reaching that conclusion, the Court weighed the State's fiscal interest against the defendant's interest in appealing his conviction and determined that the State's interest was "irrelevant."[48] In *M.L.B.*, therefore, the Court applied the same analysis employed in *Mayer*: balancing the individual interests on the one hand and the State's interests on the other.[49] Noting the severity

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concurred in the result. *See id.* at 570 (Kennedy, J., concurring in the judgment). Justice Thomas wrote a dissenting opinion, which was joined in full by Justice Scalia and in part by Chief Justice Rehnquist. *See id.* (Thomas, J., dissenting).

39. *See id.* at 566.

40. *Id.* (citing Griffin v. Illinois, 351 U.S. 12, 23 (1956) (plurality opinion)).

41. *Id.* (citing Ross v. Moffitt, 417 U.S. 600, 609 (1974)). Justice Kennedy remarked in his concurrence that "[h]ere, due process is quite a sufficient basis for our holding." *Id.* at 570 (Kennedy, J., concurring in the judgment).

42. *Id.* at 566 (alteration in original) (quoting Bearden v. Georgia, 461 U.S. 660, 665 (1983)).

43. 404 U.S. 189 (1971). *Mayer* worked an extension of the rule established in *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion), that indigent defendants in a criminal trial have a right to a free transcript. *See Mayer*, 404 U.S. at 196-97; *see also infra* notes 99-104, 108-14 and accompanying text (discussing *Mayer* and *Griffin*).

44. *See M.L.B.*, 117 S. Ct. at 566.

45. *See Mayer*, 404 U.S. at 191.

46. *Id.* at 196 (quoting Rinaldi v. Yeager, 384 U.S. 305, 310 (1966)).

47. *See id.* ("The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case."). The Court went on to note that "[t]he invidiousness of the discrimination that exists when criminal procedures are made available only to those who can pay is not erased by any differences in the sentences that may be imposed." *Id.* at 197.

48. *See id.*

49. *See M.L.B.*, 117 S. Ct. at 566 (citing Bearden v. Georgia, 461 U.S. 660, 666-67 (1983)).

and finality of having one's parental status terminated, the Court determined that the stakes for M.L.B. were "large [and] 'more substantial than mere loss of money,' " while Mississippi's interest was merely financial.[50] In addition, although fee requirements generally are examined only for rationality,[51] the Court noted two important limitations to this rule: (1) the right to vote or to run for office cannot be limited by the ability to pay for a license,[52] and (2) the right of access to the courts in criminal or "quasi-criminal"[53] cases may not be limited by the ability to pay.[54] M.L.B.'s case, the Court determined, was to be treated as a petty offense appeal;[55] under the holding in *Mayer*, therefore, she would be entitled to a free transcript.[56]

After examining the due process protections afforded criminal defendants, the Court examined the procedural protections that are

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50. *Id.* (quoting Santosky v. Kramer, 455 U.S. 745, 756 (1982)).

51. If challenged legislation does not involve a fundamental interest or a suspect classification, then it is reviewed for a rational relationship to a legitimate governmental interest. *See* United States v. Kras, 409 U.S. 434, 446 (1973); *see also, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (upholding a $25 filing fee as a rational offset to expenses when the litigants sought appeal of an administrative agency's decision to reduce their welfare payments); *Kras*, 409 U.S. at 447 (upholding a $50 filing fee as a rational precondition to bankruptcy discharge).

52. *See M.L.B.*, 117 S. Ct. at 568 (citing Lubin v. Panish, 415 U.S. 709, 710, 718 (1974) (striking down a California ballot-access fee); Bullock v. Carter, 405 U.S. 134, 135, 145, 149 (1972) (striking down a Texas ballot-access fee); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (striking down a poll tax of $1.50 per year)).

53. Quasi-criminal offenses include violations of city ordinances and are commonly referred to as petty offenses. *See, e.g.*, Williams v. Oklahoma City, 395 U.S. 458, 459 (1969) (" '[A]n indigent person, convicted for a violation of a city ordinance, quasi criminal in nature and often referred to as a petty offense, is entitled to a . . . transcript at city expense in order to perfect an appeal . . . .' " (quoting Williams v. Oklahoma City, 439 P.2d 965, 965 (Okla. Crim. App. 1968), *rev'd*, 395 U.S. 458 (1969))).

54. *See M.L.B.*, 117 S. Ct. at 568. The Court recognized a right of access to the criminal courts in *Draper v. Washington*, 372 U.S. 487, 496 (1963). In *Rinaldi v. Yeager*, 384 U.S. 305 (1966), the Court remarked that "once established, . . . avenues [of appellate review] must be kept free of unreasoned distinctions that can only impede open and equal access to the courts." *Id.* at 310 (citations omitted). The Court has further explained that the right of access to the courts cannot be limited to those cases in which confinement was the penalty. *See, e.g.*, Mayer v. City of Chicago, 404 U.S. 189, 197 (1971) (noting that a "fine may bear as heavily on an indigent accused as forced confinement").

55. *See M.L.B.*, 117 S. Ct. at 565-66. The Court noted that "M.L.B. . . . maintains that the accusatory state action she is trying to fend off is barely distinguishable from criminal condemnation in view of the magnitude and permanence of loss she faces." *Id.* at 565 (footnote omitted).

56. *See id.* at 570; *see also Mayer*, 404 U.S. at 196 ("The size of the defendant's pocketbook bears no more relationship to his guilt or innocence in a nonfelony than in a felony case.").

available for civil litigants.[57] Citing *Boddie v. Connecticut*,[58] the Court reiterated that when a fundamental interest is at stake, "the State must provide access to its judicial processes without regard to a party's ability to pay court fees."[59] Justice Ginsburg distinguished termination proceedings from the "mine run" of civil cases by noting that the Court has not extended heightened procedural protections to civil litigants when "state controls or intrusions on family relationships" were not at issue.[60]

Finally, the Court recognized that "[c]hoices about marriage, family life, and the upbringing of children are among associational rights this Court has ranked as 'of basic importance in our society.' "[61] In light of its previous decisions establishing heightened procedural protections for indigent parents facing parental rights terminations,[62] the Court concluded that the parent-child relationship is " 'sufficiently fundamental' " to warrant special protection under the Fourteenth Amendment.[63] Justice Ginsburg also noted that previous decisions in *Lassiter v. Department of Social Services*[64] and *Santosky*

57. *See M.L.B.*, 117 S. Ct. at 562.

58. 401 U.S. 371 (1971) (striking a statute that premised the right to divorce on a litigant's ability to pay a $60 filing fee).

59. *M.L.B.*, 117 S. Ct. at 562 ("We have also recognized a narrow category of civil cases in which the State must provide access to its judicial processes without regard to a party's ability to pay court fees.").

60. *See id.* at 563-64. Justice Ginsburg stated that *Ortwein v. Schwab*, 410 U.S. 656, 659 (1973) (per curiam), which upheld a $25 filing fee as a rational offset to expenses when the litigants sought appeal of an administrative agency's decision to reduce their welfare payments, underscores her point. *See M.L.B.*, 117 S. Ct. at 563-64.

61. *M.L.B.*, 117 S. Ct. at 564 (quoting *Boddie*, 401 U.S. at 376).

62. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982) (holding that a "clear and convincing" standard is the appropriate burden of proof in termination of parental rights proceedings); Lassiter v. Department of Soc. Servs., 452 U.S. 18, 33 (1981) (suggesting that due process might require appointed counsel in certain types of complicated termination proceedings).

63. *See M.L.B.*, 117 S. Ct. at 565 (quoting *Santosky*, 455 U.S. at 774). The Court has long recognized that certain rights are "fundamental" and therefore require heightened protection under the Fourteenth Amendment. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 483, 484 (1965) ("[S]pecific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance."); *see also* Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (recognizing a fundamental right in interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (holding that the right to vote is fundamental); Douglas v. California, 372 U.S. 353, 356-57 (1963) (requiring states to provide counsel for indigents in criminal appeals, implying that the right of access is fundamental); NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449, 460-61 (1958) (determining that the right to free association is a fundamental right implied by the First Amendment).

64. 452 U.S. 18 (1981).

v. Kramer[65] were especially on point because they dealt specifically with termination proceedings.[66] In *Lassiter*, the Court stated that appointed counsel might be required for indigent parents in certain complex termination proceedings in order to serve due process, although the Court did not grant appointed counsel in that case.[67] Moreover, in *Santosky*, the Court afforded parents additional protection by holding that a "clear and convincing" standard of proof was required in any termination proceeding.[68]

Justice Thomas, in a dissenting opinion joined in full by Justice Scalia and in part by Chief Justice Rehnquist, rejected the majority's conclusion that due process and equal protection concerns were at issue in *M.L.B.*[69] First, Justice Thomas argued that due process does not require a state to provide any appeal, even in a criminal case.[70] He distinguished the Court's previous decision in *Boddie v. Connecticut*,[71] which allowed indigents to proceed in forma pauperis when they sought divorce, because *Boddie* did not involve any right to an appeal.[72] In *M.L.B.*, unlike *Boddie*, Justice Thomas asserted that the litigants were not seeking their first hearing, but had already been afforded a full trial.[73] Justice Thomas also noted the procedural protections that Mississippi had provided for M.L.B.—including court-appointed counsel and a "clear and convincing" standard of proof—and concluded that her due process rights had been served.[74] Finally, he criticized the majority's application of equal protection

65. 455 U.S. 745 (1982).

66. *See M.L.B.*, 117 S. Ct. at 564.

67. *See Lassiter*, 452 U.S. at 31 ("If, in a given case, the parent's interests were at their strongest, the State's interests were at their weakest, and the risks of error were at their peak, it could not be said that the *Eldridge* factors did not overcome the presumption against the right to appointed counsel . . . ." (applying *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), in which the Court articulated that due process requires balancing the private interests, the government interests, and the risk of an erroneous deprivation)).

68. *See Santosky*, 455 U.S. at 747-48.

69. *See M.L.B.*, 117 S. Ct. at 571 (Thomas, J., dissenting).

70. *See id.* at 571-72 (Thomas, J., dissenting). See also *McKane v. Durston*, 153 U.S. 684 (1894), in which the Court noted:

> A review by an appellate court of the final judgment in a criminal case, however grave the offence of which the accused is convicted, was not at common law and is not now a necessary element of due process of law. It is wholly within the discretion of the State to allow or not to allow such a review.

Id. at 687.

71. 401 U.S. 371 (1971).

72. *See M.L.B.*, 117 S. Ct. at 572 (Thomas, J., dissenting).

73. *See id.* (Thomas, J., dissenting).

74. *See id.* (Thomas, J., dissenting).

principles because Mississippi's statute was facially neutral and did not involve any purposeful discrimination.[75]

It is well accepted that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[76] Writing for the Court in *Griffin v. Illinois*,[77] Justice Black invoked the language of Magna Carta to emphasize the longevity of that idea: " 'To no one will we sell, to no one will we refuse, or delay, right or justice.' "[78] In accordance with those principles, the Fourteenth Amendment guarantees certain rights:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.[79]

The Court has long struggled to determine how much process is due when those involved cannot pay for it.[80]

The Fourteenth Amendment guarantees citizens both due process and equal protection of law.[81] A precise definition of due

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75. *See id.* at 573-75 (Thomas, J., dissenting). Previously, in *Washington v. Davis*, 426 U.S. 229 (1976), the Court upheld a personnel test it found "facially neutral," notwithstanding a challenge that the test had a discriminatory effect. *See id.* at 241. The holding in *Washington* established that a prima facie case of discriminatory state action must include proof of intent to discriminate. *See id.*

76. Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion). The Supreme Court has quoted this language frequently. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 664 (1983); Mayer v. City of Chicago, 404 U.S. 189, 193 (1971); Williams v. Illinois, 399 U.S. 235, 241 (1970); Smith v. Bennett, 365 U.S. 708, 710 (1961).

77. 351 U.S. 12 (1956).

78. *Id.* at 16 (quoting MAGNA CARTA ch. 40). In modern times, these guarantees have stood for the idea that "all people charged with crime, must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court.' " *Id.* at 17 (quoting Chambers v. Florida, 309 U.S. 227, 241 (1940)).

79. U.S. CONST. amend. XIV, § 1.

80. *See, e.g.*, Douglas v. California, 372 U.S. 353, 357 (1963) (granting a right to appointed counsel in first appeal of right in criminal cases); *Griffin*, 351 U.S. at 19 (recognizing the right to a free transcript in a criminal appeal). *But see* Ross v. Moffitt, 417 U.S. 600, 616-17 (1974) (determining that the right to appointed counsel in criminal appeals does not extend to discretionary appeals to appellate courts or the United States Supreme Court). Helpful background information on the Fourteenth Amendment, including full-text United States Supreme Court opinions, is available on the Internet. *See Findlaw: U.S. Constitution: Fourteenth Amendment* (visited Oct. 29, 1997) <http://www.findworld.com/data/constitution/amendment14>.

81. *See* U.S. CONST. amend. XIV, § 1. One commentator has found the Court's conflation of due process and equal protection analyses somewhat disturbing: "Because the Court has uncritically substituted one for the other, and because historical circumstance and the value commitments of different generations have combined in

process, however, is both nonexistent[82] and arguably undesirable.[83] Over time, the Court has recognized two facets to due process review: procedural and substantive.[84] "Procedural due process guarantees only that there is a fair decision-making process before the government takes some action directly impairing a person's life, liberty or property."[85] When the Court reviews a statute for procedural due process violations, it weighs the private interests affected, the risk of an erroneous deprivation, and the countervailing government interests.[86]

Alternatively, substantive due process is concerned with the constitutionality of the underlying rule being challenged.[87] Unlike procedural due process, substantive due process refers to a broad concept of autonomy and liberty guaranteed to all citizens, including rights enumerated by the United States Constitution and the common law.[88] Within this concept, the "Court has long recognized that freedom of personal choice in matters of marriage and family life is one of the liberties protected by the Due Process Clause of the Fourteenth Amendment."[89] Such rights are held to be

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twisted patterns, liberty and equality have become blurred as constitutional ideals." Ira C. Lupu, *Untangling the Strands of the Fourteenth Amendment*, 77 MICH. L. REV. 981, 983 (1979).

82. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 24 (1981) ("For all its consequence, 'due process' has never been, and perhaps never can be, precisely defined.").

83. *See Griffin*, 351 U.S. at 20-21 (Frankfurter, J., concurring in the judgment) (" 'Due process' is, perhaps, the least frozen concept of our law—the least confined to history and the most absorptive of powerful social standards of a progressive society.").

84. *See* 2 RONALD D. ROTUNDA ET AL., TREATISE ON CONSTITUTIONAL LAW: SUBSTANCE AND PROCEDURE § 14.6, at 12-15 (1986).

85. 2 *id.* at 12. The authors also comment that "[o]ne cannot ascribe a specific meaning to the term 'liberty' [in the Due Process Clauses] for it may encompass any form of freedom of action or choice which is accorded constitutional recognition by the Court." 2 *id.* § 17.4, at 212 (footnote omitted).

86. *See* Mathews v. Eldridge, 424 U.S. 319, 334-35 (1976).

87. *See* 2 ROTUNDA ET AL., *supra* note 84, § 14.6, at 13. As the authors note, "[e]very form of review other than that involving procedural due process is a form of substantive review." *Id.*

88. *See, e.g.*, Palko v. Connecticut, 302 U.S. 319, 328 (1937) (stating that the test for whether certain rights are fundamental is whether the right is a " 'fundamental principle[] of liberty and justice which lie[s] at the base of all our civil and political institutions' " (quoting Hebert v. Louisiana, 272 U.S. 312, 316 (1926))).

89. Cleveland Bd. of Educ. v. Lafleur, 414 U.S. 632, 639-40 (1974); *see also, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 485-86 (1965) (determining that married couples have a constitutionally guaranteed right to privacy). Justice Harlan, concurring in *Griswold*, wrote: "[T]he proper constitutional inquiry in this case is whether this Connecticut statute infringes the Due Process Clause of the Fourteenth Amendment because the enactment violates basic values 'implicit in the concept of ordered liberty.' " *Griswold*, 381 U.S. at 500 (Harlan, J., concurring in the judgment) (quoting *Palko*, 302

"fundamental,"[90] and if a statute threatens a fundamental right, the Court allows it to stand only if the government can demonstrate a compelling interest.[91] If a statute does not interfere with a fundamental right, then the Court is deferential, examining the statute only for a rational relationship between the statute and a legitimate state interest.[92]

In addition to due process, the Fourteenth Amendment also guarantees "equal protection of the laws."[93] Succinctly put, the thrust of the Equal Protection Clause is that states must treat similarly situated citizens similarly.[94] Whereas substantive due process protects certain modes of conduct by citizens, equal protection of the law protects citizens from arbitrary discrimination.[95] In examining

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U.S. at 325).

90. *See* 2 ROTUNDA ET AL., *supra* note 84, § 15.7, at 79. The authors explain that fundamental rights are those that the Court recognizes as so essential to individual liberty that it is justified in reviewing the acts of other branches of government to ensure no violations occurred. *See* 2 *id.*; *see also* Lupu, *supra* note 81, at 1030-50 (listing the sources of fundamental rights as (1) incorporation of the Bill of Rights into the Due Process Clause, (2) values implied by the structure of the Constitution, (3) judicial judgment, (4) traditional values, and (5) contemporary values); Martha I. Morgan, *Fundamental State Rights: A New Basis for Strict Scrutiny in Federal Equal Protection Review*, 17 GA. L. REV. 77, 78 (1982) (asserting that state-recognized fundamental rights should be an additional basis for strict scrutiny analysis).

91. *See, e.g.*, Maher v. Roe, 432 U.S. 464, 472 (1977).

92. *See, e.g.*, *id.* at 474 (upholding a Connecticut statute that withheld funds in cases in which an abortion was not medically necessary; the statute was not unconstitutional because there was no fundamental right to an abortion, the state had a legitimate interest in encouraging childbirth, and the statute was rationally related to this purpose); Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (per curiam) (determining that interests in welfare payments are not fundamental, and therefore only examining a filing fee for rationality); United States v. Kras, 409 U.S. 434, 445 (1973) (holding that there is no fundamental interest in discharging bankruptcy debts, and therefore only examining a filing fee for rationality). At first, the Court used substantive due process to overturn state laws regulating citizens' economic affairs, *see, e.g.*, Lochner v. New York, 198 U.S. 45, 64 (1905), but this approach was ultimately abandoned in the late 1930s, leaving "debatable issues as respects business, economic, and social affairs to legislative decision," Day-Brite Lighting, Inc. v. Missouri, 342 U.S. 421, 423, 425 (1952). During the 1960s, however, the Court embarked on a period of judicial activism during which it reviewed statutes closely for both suspect classifications and state infringements on "fundamental rights." *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618, 629 (1969) (interstate travel); Harper v. Virginia Bd. of Elections, 383 U.S. 663, 666 (1966) (voting); Griffin v. Illinois, 351 U.S. 12, 19 (1956) (plurality opinion) (access to courts).

93. U.S. CONST. amend. XIV, § 1. Distinctions between substantive due process and equal protection are often subtle, and the Court consistently shies away from confining its holdings to one or the other. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 666 (1983) ("[T]he issue cannot be resolved by resort to easy slogans or pigeonhole analysis.").

94. *See* LAURENCE H. TRIBE, AMERICAN CONSTITUTIONAL LAW § 16-1, at 1438 (2d ed. 1988).

95. *See id.* § 16-2, at 1440; *see also* San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 24 (1973) ("[T]he Equal Protection clause does not require absolute equality or

statutes for equal protection violations, the Court applies one of three standards of review: rational basis, intermediate scrutiny, or strict scrutiny.[96] The standard of review applied will depend primarily on whether the Court finds that the legislation in question creates a "suspect class."[97] Suspect classifications include race and national origin, but generally classifications based on wealth are not "suspect" unless a fundamental right is involved.[98]

The Court first recognized the problems faced by indigent criminal defendants more than forty years ago in *Griffin v. Illinois*.[99]

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precisely equal advantages."). Professor Tribe explains that the right to equal treatment applies to a limited set of interests—including voting, interstate travel, access to the courts, and family interests—and "demands that every person have the same access to these interests"; the right to equal treatment does not extend to all interests, however, because then governments would be prevented from classifying citizens when it is in the public interest. *See* TRIBE, *supra* note 94, § 16-1, at 1437.

96. *See, e.g.*, Dandridge v. Williams, 397 U.S. 471, 485 (1970) (establishing that under rational basis review, a statute will be overturned only if there is no rational justification for the legislation); United States v. Carolene Prods. Co., 304 U.S. 144, 152-53 n.4 (1938) (anticipating that legislation that discriminates against "discrete and insular minorities" will be reviewed for equal protection violations more closely than legislation that is facially neutral). *See generally* 2 ROTUNDA ET AL., *supra* note 84, § 18.3, at 324-35 (explaining the different standards of review and their applications).

97. *See, e.g.*, Lyng v. Castillo, 477 U.S. 635, 638 (1986) (defining suspect classes as those groups who historically have been discriminated against; or who exhibit obvious, immutable, or distinguishing characteristics that define them as a discrete group; or who are a minority or are politically powerless). The Court has elaborated upon suspect classifications:

> Some classifications are more likely than others to reflect deep-seated prejudice rather than legislative rationality in pursuit of some legitimate objective. Legislation predicated upon such prejudice is easily recognized as incompatible with the constitutional understanding that each person is to be judged individually and is entitled to equal justice under the law. Classifications treated as suspect tend to be irrelevant to any proper legislative goal. Finally, certain groups ... have historically been "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."

Plyler v. Doe, 457 U.S. 202, 216-17 n.14 (1982) (quoting *Rodriguez*, 411 U.S. at 28 (citations omitted)). *See generally* TRIBE, *supra* note 94, § 16.6, at 1453-54 (arguing that strict scrutiny is most powerful when applied in challenges to legislation that discriminates against the "perennial losers in the political struggle").

98. *See, e.g.*, *Rodriguez*, 411 U.S. at 29. In *Rodriguez*, the Court did not apply strict scrutiny because it held that the class of citizens in any given tax district was too large and amorphous to be suspect and that the challenged statute did not deprive any citizen of a fundamental right. *See id.* at 28, 37; *see also* Maher v. Roe, 432 U.S. 464, 470-71 (1977) (holding that indigent women seeking abortions did not constitute a suspect class). *See generally* 2 ROTUNDA ET AL., *supra* note 84, § 18.25, at 548-54 (discussing classifications based on wealth).

99. 351 U.S. 12 (1956) (plurality opinion). *See generally* Michael J. Klarman, *Rethinking the Civil Rights and Civil Liberties Revolutions*, 82 VA. L. REV. 1, 64-65 (1996) (explaining that attitudes toward indigents had changed considerably since the Great Depression had left many destitute).

In *Griffin*, the Supreme Court considered whether a state's denial of a free transcript to an indigent prisoner seeking appellate review violated the Constitution.[100] A plurality of the Court reasoned that because all states provide appeals in criminal cases and because many criminal convictions are reversed by appellate courts, denying adequate review would lead to unjust results.[101] Noting that appellate review was an integral part of the Illinois trial system, the plurality concluded that "[d]estitute defendants must be afforded as adequate appellate review as defendants who have money enough to buy transcripts."[102] Because Illinois's denial of a free transcript discriminated against poor defendants, the Court determined that it violated the Fourteenth Amendment.[103] In reaching this conclusion, the Court relied on both the Equal Protection and Due Process Clauses.[104]

Consistent with its holding in *Griffin*, the Court in *Douglas v. California*[105] decided that the Fourteenth Amendment also requires appointed counsel in criminal appeals of right.[106] Although the Court

100. *See Griffin*, 351 U.S. at 13-15. Previously, Illinois provided transcripts only for indigent prisoners with death sentences. *See id.* at 14.

101. *See id.* at 18-19 ("Such a denial is a misfit in a country dedicated to affording equal justice to all and special privileges to none in the administration of its criminal law.").

102. *Id.* at 19. The Court cautioned, however, that although a transcript may not be necessary in every case, the State must still provide some means of affording adequate and effective appellate review to indigent defendants. *See id.* at 20. Moreover, Justice Frankfurter remarked that the states cannot "bolt the door to equal justice." *Id.* at 24 (Frankfurter, J., concurring in the judgment).

103. *See id.* at 20. Justice Harlan disagreed with the plurality in *Griffin*, arguing that "if a transcript is used, it is surely not unreasonable to require the appellant to bear its cost." *Id.* at 34 (Harlan, J., dissenting). Justice Harlan maintained that "the basis for [this] holding is simply an unarticulated conclusion that it violates 'fundamental fairness' for a State which provides for appellate review . . . not to see to it that such appeals are in fact available to those it would imprison for serious crimes." *Id.* at 36 (Harlan, J., dissenting). Justice Harlan's vigorous dissents against the majority's ostensible equal protection holdings continued until he wrote the majority opinion in *Boddie v. Connecticut*, 401 U.S. 371 (1971), which rested on substantive due process grounds. *See id.* at 381. *See generally* Norman Dorsen, *John Marshall Harlan and the Warren Court, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 109, 109-22 (Mark Tushnet ed., 1993) (discussing the broad spectrum of political views embraced by Justice Harlan during his tenure on the Court).

104. *See Griffin*, 351 U.S. at 17 ("[O]ur . . . constitutional guaranties of due process and equal protection both call for procedures in criminal trials which allow no invidious discriminations between persons and different groups of persons.").

105. 372 U.S. 353 (1963).

106. *See id.* at 357. In dissent, however, Justice Harlan pointed out that California's screening procedure did not deny anyone the right to appeal and argued that the majority was reading into the Constitution "a philosophy of leveling that would be foreign to many

did not explicitly state which clause of the Fourteenth Amendment the challenged statute violated, it seemed to rest its holding on both due process and equal protection concerns.[107] Likewise, in *Mayer v. City of Chicago*,[108] a unanimous court agreed that a state could not restrict an indigent's access to a transcript in a criminal appeal to cases in which the defendant faced imprisonment.[109] The defendant in *Mayer*, convicted of a petty offense,[110] had been denied a free transcript to appeal his conviction because Illinois law required free transcripts only in felony cases.[111] Rejecting the argument that states need only provide transcripts for defendants facing jail terms, the Court determined that *Griffin* represented "a flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way."[112] Thus, under the rule established in *Mayer*, even defendants convicted of petty offenses or " 'quasi-criminal' "[113] conduct have rights to a free transcript if necessary for their appeal.[114]

After *Mayer*, the Court began restricting its previously expansive approach to the Fourteenth Amendment.[115] In *Ross v. Moffitt*,[116] the

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of our basic concepts of the proper relations between government and society." *Id.* at 362 (Harlan, J., dissenting). Other decisions of the Court also protected indigent access to the criminal courts. *See, e.g.*, Gardner v. California, 393 U.S. 367, 370 (1969) (recognizing an automatic right to free transcripts for indigents applying for writs of habeas corpus to a state supreme court); Rinaldi v. Yeager, 384 U.S. 305, 309 (1966) (striking down a New Jersey statute that required unsuccessful appellants who were imprisoned to pay for their transcripts, while those who were sentenced to probation or a fine did not have to pay).

107. *See Douglas*, 372 U.S. at 360-61 (Harlan, J., dissenting) ("[T]he Court appears to rely both on the Equal Protection Clause and the guarantees of fair procedure inherent in the Due Process Clause of the Fourteenth Amendment, with obvious emphasis on 'equal protection.' "). The Court's reliance on equal protection was hardly surprising given that "[w]hen the Warren era opened, due process clause activism, outside of Bill of Rights concerns, was in the deepest disrepute." Lupu, *supra* note 81, at 995-96.

108. 404 U.S. 189 (1971).

109. *See id.* at 198. Chief Justice Burger concurred, noting that alternatives to a full verbatim transcript did exist. *See id.* at 199-201 (Burger, C.J., concurring). Justice Blackmun added that the defendant's financial situation had probably changed upon his graduation from medical school, and that such factors should be considered on remand. *See id.* at 201 (Blackmun, J., concurring).

110. The defendant had been charged with disorderly conduct and interference with a police officer, resulting in fines of $500. *See id.* at 190.

111. *See id.* at 191. Following *Griffin*, Illinois provided free transcripts to any indigent convicted of a felony. *See id.* at 191-92 n.2.

112. *Id.* at 196-97. That the defendant did not face a jail term was unimportant, the Court concluded, because fines and other punishments could weigh just as heavily. *See id.*

113. *Id.* at 196 (quoting Williams v. Oklahoma City, 395 U.S. 458, 459 (1969)).

114. *See id.* at 198. In *M.L.B.*, however, Justice Thomas argued that *Mayer* was "an unjustified extension [of *Griffin v. Illinois*] that should be limited to its facts, if not overruled." *M.L.B.*, 117 S. Ct. at 576 (Thomas, J., dissenting).

115. *See* United States v. MacCollom, 426 U.S. 317, 327 (1976) (holding that a free

defendant, after exhausting his appeals of right, sought court-appointed counsel for discretionary appeals to the North Carolina and United States Supreme Courts.[117] Writing for the United States Supreme Court, then-Justice Rehnquist concluded that neither due process nor equal protection required North Carolina to provide counsel for discretionary appeals.[118]

While a fundamental right of access to the courts for indigent criminal defendants is well-established, the rights of indigent civil litigants are far less clear.[119] The Court first addressed this problem in *Boddie v. Connecticut*,[120] when indigents seeking a divorce could not pay their court costs in advance.[121] To file for divorce in Connecticut, litigants had to pay a sixty-dollar fee for filing and service of process.[122] Relying solely on due process,[123] the Court concluded that the statute violated the appellants' due process rights.[124] Writing for the Court, Justice Harlan reasoned that because the power of the state must be invoked to create or dissolve a marriage, the appellants

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transcript is not required on discretionary appeal if the indigent chose not to pursue his first appeal of right). *See generally* Michael J. Klarman, *An Interpretive History of Modern Equal Protection*, 90 MICH. L. REV. 213, 289-90 (1991) (accounting for the shift in approach by positing that the Burger Court was reluctant to reconceptualize equal protection as an entitlement to affirmative governmental assistance).

116. 417 U.S. 600 (1974).

117. *See id.* at 604.

118. *See id.* at 610, 616. Under the Due Process Clause, the Court explained, "[t]he fact that an appeal *has* been provided does not automatically mean that a State then acts unfairly by refusing to provide counsel to indigent defendants at every stage of the way." *Id.* at 611. Examining the defendant's equal protection argument, the Court noted that the Fourteenth Amendment requires only "that the state appellate system be 'free of unreasoned distinctions.'" *Id.* at 612 (quoting Rinaldi v. Yeager, 384 U.S. 305, 310 (1966)). The dissent argued that *Douglas v. California*, 372 U.S. 353 (1963), was grounded in concepts of fairness and that an indigent defendant seeking a discretionary review would be at a substantial disadvantage without counsel. *See Ross*, 417 U.S. at 620-21 (Douglas, J., dissenting).

119. *See, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 660 (1973) (per curiam) (denying access to appellants seeking review of an administrative decision to reduce their welfare benefits); United States v. Kras, 409 U.S. 434, 450 (1973) (rejecting the argument that litigants seeking discharge of bankruptcy debts have a fundamental interest in litigating); *cf.* Jeffrey R. Pankratz, *Neutral Principles and the Right to Neutral Access to the Courts*, 67 IND. L.J. 1091, 1104-08 (1992) (arguing that because only the judiciary can be relied on to protect individual rights, all citizens must have access to the courts).

120. 401 U.S. 371 (1971).

121. *See id.* at 372.

122. *See id.* There was no dispute as to the inability of the appellants, whose sole income was welfare, to afford the court costs. *See id.* at 372-73.

123. *See id.* at 377 ("These [aforementioned] due process decisions ... provide, we think, complete vindication for appellant's contentions.").

124. *See id.* at 380.

had no other recourse for resolving their dispute.[125] The Court explained further that because the appellants were forced to seek judicial remedies, under the Due Process Clause they must be given an opportunity to be heard.[126] Emphasizing the importance of the marriage relationship in American society, the Court concluded that Connecticut's interest in preventing frivolous litigation and managing court costs was not enough to override the appellants' right to be heard.[127]

In the decisions that followed *Boddie*, the Court refrained from expanding judicial access to civil litigants when no fundamental right was involved.[128] In *United States v. Kras*,[129] the Court upheld a statute requiring those involved in bankruptcy proceedings to pay a filing fee before they could discharge their debts in court.[130] Resting its decision on due process, the Court stated that "bankruptcy is hardly akin to free speech or marriage"[131] and determined that no fundamental interest was at stake.[132] Instead, the Court noted that the appellants could seek other avenues of redress and that they had

125. *See id.* at 376. Justice Brennan, concurring, agreed with the majority that the statute violated due process but argued that the judiciary provided the *only* forum for disputes that could not be settled privately; therefore, it should not matter whether the dispute being litigated involved a fundamental right or not. *See id.* at 387 (Brennan, J., concurring in part). In *Maher v. Roe*, 432 U.S. 464 (1977), however, the Court characterized *Boddie* as a case in which the state monopolized processes affecting fundamental rights. *See id.* at 469-70 n.5. For a discussion of the monopoly doctrine, see Lupu, *supra* note 81, at 1006-11. According to Professor Lupu, the Court's decisions suggest that there is a core of exclusive governmental activities that the state may not administer in a discriminatory way. *See id.* at 1010.

126. *See Boddie*, 401 U.S. at 377.

127. *See id.* at 381.

128. *See, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 658-59 (1973) (per curiam); United States v. Kras, 409 U.S. 434, 445 (1973). Despite many appeals to do so, the Court has been reluctant to find new fundamental rights in recent years. *See, e.g.*, Washington v. Glucksberg, 117 S. Ct. 2258, 2271 (1997) (holding that no fundamental right is threatened when a statute bans suicide); Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 462 (1988) (holding that there is no fundamental right to free bus service to school); Bowers v. Hardwick, 478 U.S. 186, 190-91 (1986) (holding that there is no fundamental right to engage in homosexual sodomy); Village of Belle Terre v. Boraas, 416 U.S. 1, 7 (1974) (holding that there is no fundamental right to cohabitate with non-family members). *But cf.* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 957-58 (1971) (Black, J., dissenting from denial of certiorari) (arguing that civil courts should be open to all citizens, regardless of the dispute, because "fundamental rights" are difficult to define).

129. 409 U.S. 434 (1973).

130. *See id.* at 450.

131. *Id.* at 466.

132. *See id.* at 445 ("We see no fundamental interest that is gained or lost depending on the availability of a discharge in bankruptcy.").

not been denied due process.[133] In its equal protection analysis, the Court reasoned that because bankruptcy legislation fell under the rubric of social and economic legislation and did not threaten any fundamental rights, the statute should be reviewed only for rationality.[134] Similarly, in *Ortwein v. Schwab*,[135] the Court upheld an Oregon statute that required litigants to pay twenty-five dollars before filing suit when the appellants sought review of administrative decisions affecting their welfare payments.[136] The *Ortwein* Court found that the challenged filing fee did not violate due process or equal protection.[137]

Finally, several cases reviewed by the Court did not fit neatly into either criminal or civil categories.[138] Mental competency hearings,[139] juvenile proceedings,[140] and termination of parental rights proceedings[141] were all labeled as civil matters, but the Court recognized the punitive aspects inherent in all three.[142] Accordingly,

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133. *See id.* at 446. In dissent, Justice Stewart argued that the appellants' due process rights had been violated because, like the appellants in *Boddie*, they had no effective recourse outside the judicial system. *See id.* at 455 (Stewart, J., dissenting).

134. *See id.* at 446 (citing Dandridge v. Williams, 397 U.S. 471, 485-86 (1970)).

135. 410 U.S. 656 (1973) (per curiam).

136. *See id.* at 661.

137. *See id.* at 659. The majority distinguished *Boddie* because these appellants had already had an agency hearing and *Boddie* was not concerned with post-hearing review. *See id.* Among four separate dissents, Justice Douglas argued that *Boddie* should apply because the statute threatened the appellants' ability to subsist and because their only recourse was judicial review. *See id.* at 662 (Douglas, J., dissenting). *See generally* Klarman, *supra* note 115, at 287 (reviewing Justice Douglas's conference notes and concluding that "all four of the Nixon appointees either doubted whether *Boddie* remained good law, or emphasized that, if it did, the Court should narrowly confine it").

138. *See, e.g.*, *In re* Gault, 387 U.S. 1, 40-41 (1967) (implying that constitutional guarantees of due process applicable to criminal proceedings are also applicable to juvenile court proceedings).

139. *See* Addington v. Texas, 441 U.S. 418, 425-26 (noting that civil commitment constitutes a significant deprivation of liberty and results in a stigma).

140. *See Gault*, 387 U.S. at 50.

141. *See, e.g.*, Lassiter v. Department of Soc. Servs., 452 U.S. 18, 25-26 (1981) (differentiating between civil and criminal cases on the basis of loss of physical liberty).

142. *See* Santosky v. Kramer, 455 U.S. 745, 763 (1982) (recognizing the similarities between termination of parental rights and criminal proceedings). The Court pointed out that "[u]nlike criminal defendants, natural parents have no 'double jeopardy' defense against repeated state termination efforts." *Id.* at 764; *see also* Florence I. Brammer, Recent Case, 49 U. CIN. L. REV. 664, 673 (1980) (arguing that courts could simplify the problems created by quasi-criminal proceedings if they appointed counsel only for those indigent defendants who were "haled into court"); Thomas W. Hardin, Recent Case, 7 OHIO N.U. L. REV. 316, 321-25 (1980) (claiming that the rights available to those involved in juvenile court proceedings and civil commitment hearings ought to be extended to indigent parents in termination proceedings).

the Court afforded parties in these types of cases more protection.[143] In both *Lassiter v. Department of Social Services*[144] and *Santosky v. Kramer*,[145] the Court grounded its holdings in procedural due process concepts.[146] In *Lassiter*, the majority agreed that certain complex parental termination cases might require appointed counsel.[147] Likewise, in *Santosky*, the Court determined that clear and convincing evidence was required whenever the individual interests at stake were both " 'particularly important' and 'more important than mere loss of money.' "[148]

In granting M.L.B. a free transcript, the Court marked a significant shift in its Fourteenth Amendment jurisprudence.[149] In essence, the Court has created a new right: the right to proceed in forma pauperis in any civil appeal in which a "fundamental right" is at stake.[150] Before *M.L.B.*, the Court in *Boddie v. Connecticut*[151] determined that indigent civil litigants seeking a divorce could proceed in forma pauperis at the trial level due to the fundamental

143. *See, e.g.*, *Santosky*, 455 U.S. at 756 (explaining that "clear and convincing" evidence is the appropriate standard when government-initiated action threatens the individual with a significant deprivation of liberty); *Lassiter*, 452 U.S. at 31 (suggesting that appointed counsel for indigents facing termination of parental rights would be appropriate in complex cases); *Addington*, 441 U.S. at 432-33 (noting that a "clear and convincing" standard of proof in civil commitment hearings is appropriate because it impresses the factfinder with the seriousness of the matter).

144. 452 U.S. 18 (1981).

145. 455 U.S. 745 (1982).

146. *See id.* at 759 (explaining that the parents' commanding interest in raising their children weighs against use of the preponderance of the evidence standard); *Lassiter*, 452 U.S. at 27 (explaining that under *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), determination of what process is due requires the Court to balance the private interests, the government interests, and the risk of an erroneous deprivation).

147. *See Lassiter*, 452 U.S. at 31. Ultimately, the Court determined that the plaintiff's case did not warrant appointed counsel because the evidence against her was strong and because she failed to attend an earlier hearing about her parental rights. *See id.* at 32-33. *But see* William L. Dick, Jr., Note, *The Right to Appointed Counsel for Indigent Civil Litigants: The Demands of Due Process*, 30 WM. & MARY L. REV. 627, 660-65 (1989) (asserting that due process requires appointment of counsel in all parental rights terminations).

148. *Santosky*, 455 U.S. at 756 (quoting *Addington*, 441 U.S. at 424)).

149. *Cf.* Washington v. Davis, 426 U.S. 229, 248 (1976) (holding that facially neutral statutes would not be invalidated merely for disproportionate impact).

150. *Cf. M.L.B.*, 117 S. Ct. at 577 (Thomas, J., dissenting) ("Under the rule announced today, I do not see how a civil litigant could constitutionally be denied a free transcript in any case that involves an interest that is arguably as important as the interest in *Mayer*...."). As noted in S.L.J.'s brief, no other federal appellate court has found such a right to exist. *See* Brief for Respondents at 4, *M.L.B.* (No. 95-583).

151. 401 U.S. 371 (1971).

rights involved.[152] Later decisions established that the rights in *Boddie* did not extend to cases in which the litigants had less than a fundamental interest at stake.[153] In accordance with the heightened protection traditionally due fundamental rights, the Court also has suggested that parents in certain complex termination hearings might be entitled to counsel[154] and has held that states would have to prove their cases with clear and convincing evidence.[155] In *M.L.B.*, the Court extended these protections one step further by requiring that states provide indigent parents a free transcript for their appeals.[156]

Although not expressly emphasized in the majority opinion, the Court's holding appears to be prompted by two distinct factors: (1) the state monopolization over parental termination proceedings, and (2) the deprivation of a fundamental right in parenthood. As for the first factor, the majority cited several cases in which "monopolization" was a concern.[157] Generally, monopolization is a concern when a statute's wealth classification threatens access to a fundamental right and the indigent's only form of redress is through the government.[158] As *M.L.B.* has now confirmed, when a state monopolizes the resolution of issues surrounding a fundamental right, the Court will not bar access.[159] Abandonment of the monopoly doctrine is unlikely, as one commentator has argued that abandoning the doctrine would leave the Court with only two choices: (1) requiring the states to provide all services necessary for the exercise

152. *See id.* at 383; *see also supra* notes 119-27 and accompanying text (discussing *Boddie*).

153. *See, e.g.*, Ortwein v. Schwab, 410 U.S. 656, 659 (1973) (per curiam) (holding that there is no fundamental interest in welfare payments); United States v. Kras, 409 U.S. 434, 445 (1973) (holding that right to discharge debt in bankruptcy proceedings is not fundamental); *see also supra* notes 128-37 and accompanying text (discussing *Ortwein* and *Kras*).

154. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 31 (1981).

155. *See* Santosky v. Kramer, 455 U.S. 745, 769 (1982).

156. *See M.L.B.*, 117 S. Ct. at 570.

157. *See Boddie*, 401 U.S. at 383 (holding that state monopolization over divorce proceedings entitled appellants to proceed in forma pauperis); *cf. Kras*, 409 U.S. at 445-46 (refusing to extend *Boddie* to bankruptcy cases since there are other means of resolving such disputes).

158. *See* Lupu, *supra* note 81, at 1006. In parental rights cases, for example, monopolization is an issue because parental rights may be terminated only by judicial decree. *See, e.g., Santosky*, 455 U.S. at 748-49 (explaining that if the state can prove that a child has been permanently neglected, the family court judge is thereby empowered to terminate the natural parent's rights in the child). The Court in *Santosky* noted that while statutory mechanisms for restoring previously terminated parental rights did exist under New York law, such mechanisms had never been successfully invoked. *See id.* at 749 n.1.

159. *Cf. Boddie*, 401 U.S. at 376 (acknowledging that seeking marriage and divorce in any state requires the invocation of the state government).

of fundamental rights, or (2) exploring the adequacy of the market to provide the benefit for which the state charges a fee.[160]

Also functioning in *M.L.B.* is the notion that, if the Mississippi procedure were allowed to stand, the State would be working a complete devastation and deprivation of one of M.L.B.'s fundamental rights—her right to raise a family. As evidenced by previous decisions, the Court abhors a deprivation of a fundamental right.[161] In *Plyler v. Doe*,[162] for example, the Court held that a state cannot deny free public education to aliens even if the aliens were not legal residents of the state.[163] The decision in *Plyler* stands in stark contrast to *San Antonio Independent School District v. Rodriguez*,[164] in which the Court upheld a statute distributing education funding based on property taxes, despite claims that those individuals in the wealthier tax districts were receiving a much better education.[165] In *Rodriguez*, the Court reasoned that the class was too large and amorphous to be suspect[166] and that the education provided was adequate, notwithstanding significant variances in quality between tax districts.[167] The difference, then, between the two cases could be attributed to the outright denial of an education in *Plyler*, instead of mere unequal benefits under the Texas law in *Rodriguez*.[168]

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160. *See* Lupu, *supra* note 81, at 1007-08; *cf.* Christopher E. Austin, Note, *Due Process, Court Access Fees, and the Right to Litigate*, 57 N.Y.U. L. REV. 768, 773 (1982) (suggesting that a procedural due process analysis under the factors in *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976), would be a preferable approach, occasionally allowing access even without monopolization).

161. *See* Bullock v. Carter, 405 U.S. 134, 149 (1972) (striking down a statute that required payment of a large fee to run for office); Williams v. Illinois, 399 U.S. 235, 243 (1970) (striking down a statute that required indigent prisoners to remain in prison after completing their sentences if they could not pay fines that had been components of those sentences); Douglas v. California, 372 U.S. 353, 357 (1963) (requiring the State to provide representation for indigents who could not afford counsel and had no other means to appeal).

162. 457 U.S. 202 (1982).

163. *See id.* at 230.

164. 411 U.S. 1 (1973).

165. *See id.* at 55.

166. *See id.* at 28.

167. *See id.* at 25.

168. *Compare* Plyler v. Doe, 457 U.S. 202, 230 (1982) (striking down a statute that denied education to children of illegal aliens), *and Rodriguez*, 411 U.S. at 55 (upholding a statute that funded schools based on property taxes and therefore created disparate facilities), *with* Maher v. Roe, 432 U.S. 464, 474 (1977) (upholding a statute that did not provide funds for abortions that were not medically necessary), *and* Roe v. Wade, 410 U.S. 113, 166 (1973) (striking down a statute that prohibited abortions altogether). In *Rodriguez* and *Maher*, the state statutes withstood the Court's scrutiny because they did not deprive or interfere with a fundamental right. *See Maher*, 432 U.S. at 474; *Rodriguez*,

In M.L.B.'s case, the $2000 fee for a transcript threatened to stand in the way of her fundamental right to raise a family, and the Court duly invalidated the procedure. If the transcript had cost merely $200, however, the Court might have reached a different conclusion, because such a case arguably would not have created a deprivation. This distinction begs the question: At what point does a fee for a transcript in these cases work an outright deprivation? It is unsettling questions like these that lead to the assertion that such matters are more appropriately resolved by a legislature.[169]

Given the Court's demonstrated willingness to provide protections for parents, the result in *M.L.B.* logically follows from its earlier holdings.[170] Moreover, M.L.B.'s claim appears to be reasonable and non-frivolous.[171] No matter how sensible the decision seems, however, the Court did not give any specific source for the right it bestowed.[172] Instead, the Court self-consciously refused to give a precise rationale for its holding, reasoning that such cases " 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' "[173] Although the majority claimed that due process and equal protection principles converge,[174] it is unclear whether anything in the Fourteenth Amendment guarantees a right to a free transcript in a civil appeal.[175]

The Fourteenth Amendment provides that no one shall be

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411 U.S. at 36-37.

169. *See, e.g.*, Santosky v. Kramer, 455 U.S. 745, 772 (1982) (Rehnquist, J., dissenting). Then-Justice Rehnquist contended that "fixing the standard of proof as a matter of federal constitutional law will only lead to further federal-court intervention in state schemes." *Id.* (Rehnquist, J., dissenting).

170. *See, e.g., id.* at 753 ("The fundamental liberty interest of natural parents in the care, custody, and management of their child does not evaporate simply because they have not been model parents . . . ."); Lassiter v. Department of Soc. Servs., 452 U.S. 18, 27 (1981) (observing that parental rights to care for children warranted deference and protection, absent a countervailing state interest); Little v. Streater, 452 U.S. 1, 13 (1981) ("This Court frequently has stressed the importance of familial bonds, . . . and accorded them constitutional protection."); Meyer v. Nebraska, 262 U.S. 390, 399 (1923) (recognizing a fundamental interest in marriage and raising a family).

171. *Cf. M.L.B.*, 117 S. Ct. at 567 ("It would be anomalous to recognize a right to a transcript needed to appeal a misdemeanor conviction—though trial counsel may be flatly denied—but hold, at the same time, that a transcript need not be prepared for M.L.B.—though were her defense sufficiently complex, State-paid counsel . . . would be designated for her.").

172. *See id.* at 571 (Thomas, J., dissenting) ("[C]arrying forward the ambiguity in the cases on which it relies, the majority does not specify the source of the relief it grants.").

173. *Id.* at 566 (quoting Bearden v. Georgia, 461 U.S. 660, 666 (1983)).

174. *See id.*

175. *See id.* at 571 (Thomas, J., dissenting).

deprived of life, liberty, or property without due process of law.[176] In parental rights termination proceedings, parents face the potential loss of both property and liberty interests.[177] Thus, due process is clearly required, and the question inevitably becomes *how much* due process is required to satisfy the constitutional requirements.

If analyzed solely in terms of procedural due process, the Court's due process reasoning is difficult to sustain.[178] As Justice Thomas observed, M.L.B. received both notice and an opportunity to be heard, as well as representation by counsel.[179] Under *Mathews v. Eldridge*,[180] procedural due process requires "consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used ...; and finally, the Government's interest...."[181] The Court could have concluded that although M.L.B.'s private interest was commanding, the State's interest in recovering its court costs was substantial and the risk of error was slight, given all the procedural protections M.L.B. enjoyed.[182]

If considered solely in terms of substantive due process, an analysis of the majority opinion reveals similar problems. The Court admitted that due process does not require any appeals,[183] yet it rested its due process analysis on the monopoly doctrine of *Boddie v. Connecticut*.[184] As Justice Thomas quickly pointed out, however, the problem with relying on *Boddie* is that the parties there were not appealing, but were seeking their first hearing.[185] Again, because M.L.B. had notice of the proceeding and was represented by counsel, and because her unfitness as a parent had to be established with clear

176. *See* U.S. CONST. amend. XIV, § 1.

177. *See* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 59 (1981) (Stevens, J., dissenting). The loss of a liberty interest occurs when parents are deprived of their right "to associate with [their] child"; the loss of property occurs because parents have a statutory right of inheritance. *See id.* (Stevens, J., dissenting).

178. *See M.L.B.*, 117 S. Ct. at 571 (Thomas, J., dissenting). Procedural due process analysis would require a balancing of the private interests, the countervailing governmental interests, and the risk of an erroneous deprivation. *See* Mathews v. Eldridge, 424 U.S. 319, 335 (1976).

179. *See M.L.B.*, 117 S. Ct. at 572 (Thomas, J., dissenting).

180. 424 U.S. 319 (1976).

181. *Id.* at 335.

182. *Cf. M.L.B.*, 117 S. Ct. at 572 (Thomas, J., dissenting) ("Due process has never compelled an appeal where, as here, its rigors are satisfied by an adequate hearing.").

183. *See id.* at 560.

184. *See id.* at 562.

185. *See id.* at 572 (Thomas, J., dissenting).

and convincing evidence, it is unclear how her due process rights were violated.[186] Also, the substantive due process argument can be criticized on its usual pitfalls: that a precise source of fundamental rights is uncertain and ill-defined and can lead to inconsistent results.[187]

The majority opinion also may be criticized on equal protection grounds.[188] Justice Thomas summarized the problem in his dissent:

> I see no principled difference between a facially neutral rule that serves in some cases to prevent persons from availing themselves of state employment, or a state-funded education, or a state-funded abortion—each of which the State may, but is not required to, provide—and a facially neutral rule that prevents a person from taking an appeal that is available only because the State chooses to provide it.[189]

Justice Thomas cited *Washington v. Davis*[190] in his criticism of the majority opinion.[191] In *Davis*, the Court determined that any rule, neutral on its face but disproportionately affecting certain groups of people, would not be considered unconstitutional unless it could be proven to have a discriminatory purpose.[192] In *M.L.B.*, the majority agreed with Justice Thomas that the Mississippi statute was facially neutral, but did not require M.L.B. to prove any discriminatory intent, reasoning that the statute visited different consequences on different sets of people.[193] Justice Thomas further observed that equal protection had been served since M.L.B.'s indigence prevented

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186. *See id.* (Thomas, J., dissenting).

187. *See, e.g.*, San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 33 (1973) ("It is not the province of this Court to create substantive constitutional rights in the name of guaranteeing equal protection of the laws."); Griswold v. Connecticut, 381 U.S. 479, 511-12 (1965) (Black, J., dissenting) (arguing that substantive due process review requires judges to determine constitutional validity "on the basis of their own appraisal of what laws are unwise or unnecessary"); Austin, *supra* note 160, at 772 (arguing that the substantive due process approach has led to "inconsistent, confusing, and often incorrect decisions" in the lower courts).

188. *See M.L.B.*, 117 S. Ct. at 572-75 (Thomas, J., dissenting).

189. *Id.* at 574 (Thomas, J., dissenting).

190. 426 U.S. 229 (1976).

191. *See M.L.B.*, 117 S. Ct. at 573-74 (Thomas, J., dissenting).

192. *See Davis*, 426 U.S. at 239-42. Professor Klarman has remarked that "subsequent decisions have established that equal protection claimants, to succeed under *Davis*, must demonstrate a legislature's deliberate efforts to harm blacks (or another protected group), not simply an indifferent awareness that such harm was likely." Klarman, *supra* note 115, at 298.

193. *See M.L.B.*, 117 S. Ct. at 558; *cf. id.* at 573 (Thomas, J., dissenting) (arguing that equal protection claimants must do more than show disproportionate impact).

her only from appealing her hearing, a right that in the civil context has never been considered fundamental under any form of equal protection analysis.[194]

If viewed separately, the procedural due process, substantive due process, and equal protection analyses employed by the majority each have their respective weaknesses,[195] and Justice Thomas's dissent readily exposes them.[196] The problem with Justice Thomas's approach, however, is that the Court has not typically rested its opinions on due process or equal protection alone when considering indigents' access to courts, but instead has used the concepts in tandem to reach its decisions.[197] Although at least one commentator has objected to this commingling,[198] the *M.L.B.* Court confirmed that it will continue to review cases under procedural due process, substantive due process, and equal protection simultaneously.[199]

Moreover, Justice Thomas's dissent does not provide any satisfactory alternatives to the majority's conclusions. He sought out flaws in the majority's reasoning but did not offer solutions. Instead, he recommended overruling *Griffin v. Illinois* and the line of cases that followed.[200] One problem with overruling *Griffin*, however, is that many indigent defendants in criminal cases would no longer have any means of defending themselves. If indigent criminal defendants are not provided with assistance, then it would be unreasonable to provide assistance for indigents in any given legal context. To make such a rule would certainly "bolt the door to equal justice."[201]

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194. *See id.* at 574 (Thomas, J., dissenting); *cf.* Mathews v. Eldridge, 424 U.S. 319, 349 (1976) (rejecting the argument that appellate review of an administrative procedure was required when disability benefits were reduced).

195. *See supra* notes 178-94 and accompanying text.

196. *See M.L.B.*, 117 S. Ct. at 571-75 (Thomas, J., dissenting).

197. *See, e.g.*, Bearden v. Georgia, 461 U.S. 660, 665 (1983). In *Bearden*, the Court remarked that in cases decided under the holding in *Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion), "[d]ue process and equal protection principles converge." *Bearden*, 461 U.S. at 665.

198. *See* Lupu, *supra* note 81, at 981. Professor Lupu claims that "the partnership of liberty and equality in the fourteenth amendment . . . has led the Court into a tangle." *Id.* at 983. Professor Lupu further argues that "[l]iberty against government and equality under the law are not fungible concepts, and the majesty of both is sullied by attempts to treat them as such." *Id.* at 1026.

199. *See M.L.B.*, 117 S. Ct. at 566. Justice Ginsburg explained that "[a] 'precise rationale' has not been composed, because cases of this order 'cannot be resolved by resort to easy slogans or pigeonhole analysis.' " *Id.* (citation omitted) (quoting Ross v. Moffitt, 417 U.S. 600, 608 (1974) ("precise rationale"); *Bearden*, 461 U.S. at 666 ("pigeonhole analysis")).

200. *See id.* at 575 (Thomas, J., dissenting).

201. *Griffin*, 351 U.S. at 24 (Frankfurter, J., concurring in the judgment).

Perhaps the most daunting problem facing the Court in a case like *M.L.B.* is the peculiar role of parental termination adjudication in the court system.[202] While a private party may petition for termination, more frequently the state will bring the suit.[203] The state accuses the parents of wrongdoing and the parties then become adversaries, as in a criminal trial.[204] If the state wins, the parents lose their rights and their relationship with their children[205] in much the same way a criminal defendant loses his liberty. As several cases have discerned, the gravity of loss for the parents is " 'more substantial than mere loss of money.' "[206] The implication of a judgment for the state is that the parents are unfit to raise their children[207]—much like the implication in a criminal trial that a defendant is unfit to live in free society.[208] The above factors all make parental termination proceedings quite different from most other types of civil litigation. Thus, although M.L.B.'s adversary was her ex-husband, and not the state, it is easy to see why the Court views an indigent parent in her situation "[l]ike a defendant resisting criminal conviction."[209]

The Court's emphasis on parenthood raises another question regarding the limitations on its holding. Parenting involves many different aspects of living. At a minimum, parents must provide adequate food, housing, and clothing for their children.[210] If the parents' need to provide these items is inextricably linked with their fundamental interests in parenthood, it seems likely that a court, based on the holding in *M.L.B.*, could stretch the Fourteenth

202. *See M.L.B.*, 117 S. Ct. at 568 ("M.L.B.'s complaint is of a different order. She is endeavoring to defend against the State's destruction of her family bonds, and to resist the brand associated with a parental unfitness adjudication."); *cf. In re* Gault, 387 U.S. 1, 50 (1967) (holding that the privilege against self-incrimination applies in juvenile court proceedings, even though such proceedings have been deemed civil).

203. *See* MARK HARDIN & ROBERT LANCOUR, AMERICAN BAR ASSOCIATION ON CHILDREN AND THE LAW, EARLY TERMINATION OF PARENTAL RIGHTS: DEVELOPING APPROPRIATE STATUTORY GROUNDS 5 (1996) ("Most terminations of parental rights occur after parents have failed to respond to agency efforts to help.").

204. *See* Santosky v. Kramer, 455 U.S. 745, 759-61 (1982).

205. *See id.* at 760.

206. *Id.* at 756 (quoting Addington v. Texas, 441 U.S. 418, 424 (1979)).

207. *See id.* at 760.

208. *Cf.* Lassiter v. Department of Soc. Servs., 452 U.S. 18, 42 (1981) (Blackmun, J., dissenting) (arguing that termination proceedings closely resemble criminal prosecutions). Justice Blackmun commented that the proceeding "has an obvious accusatory and punitive focus." *Id.* at 43 (Blackmun, J., dissenting).

209. *M.L.B.*, 117 S. Ct. at 568.

210. *See* TOWER, *supra* note 4, at 20-25 (explaining the myriad functions of the modern family).

Amendment to protect any interest related to parenthood.[211] It would appear that the Court wanted to leave room for flexibility,[212] but the Court also flatly stated that its decision will not open the floodgates to other related litigation.[213] Justice Thomas, however, expressed concern that the majority was creating a broad precedent. "Under the rule announced today," he wrote, "I do not see how a civil litigant could constitutionally be denied a free transcript in any case that involves an interest that is arguably as important as the interest in *Mayer* . . . ."[214] Indeed, the majority's confidence in the restrictive nature of its holding[215] seems presumptuous, given that nowhere in the opinion did the Court specify how its holding should be limited.

The holding of *M.L.B.* certainly expands indigent access to the courts, at least when parental rights are at issue, but the principles espoused in the case have long been recognized.[216] When the Court once denied certiorari to a group of cases that Justice Black deemed worthy of review, he thoroughly explained his opinions on the matter of meaningful access to the courts:

> [T]here cannot be meaningful access to the judicial process until every serious litigant is represented by competent counsel. . . . [T]he fundamental importance of legal representation in our system of adversary justice is beyond dispute. Since *Boddie* held that there must be meaningful access to civil courts in divorce cases, I can only conclude that *Boddie* necessitates the appointment of counsel for indigents in such cases.[217]

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211. *See M.L.B.*, 117 S. Ct. at 576-77 (Thomas, J., dissenting). *But cf.* United States v. Kras, 409 U.S. 434, 447 (1973) (disallowing an indigent the right to proceed in forma pauperis in bankruptcy proceedings even though the appellant was unemployed and supporting three children, one of whom was seriously ill).

212. *See M.L.B.*, 117 S. Ct. at 566-67.

213. *See id.* at 570.

214. *Id.* at 577 (Thomas, J., dissenting).

215. *See id.* at 570. "Our *Lassiter* and *Santosky* decisions, recognizing that parental termination decrees are among the most severe forms of state action, have not served as precedent in other areas. We are therefore satisfied that the label 'civil' should not entice us to leave undisturbed the Mississippi courts' disposition of this case." *Id.* (citations omitted).

216. *See* Meltzer v. C. Buck LeCraw & Co., 402 U.S. 954, 955-56 (1971) (Black, J., dissenting from denial of certiorari) (arguing that courts should be accessible to all litigants); Pankratz, *supra* note 119, at 1109 (maintaining that a right of access to the courts is meaningless without access to counsel); Austin, *supra* note 160, at 803 (arguing that civil litigants should have a right of access when appealing an administrative decision on constitutional grounds to reduce their welfare benefits).

217. *Meltzer*, 402 U.S. at 959 (Black, J., dissenting from denial of certiorari) (citations

One commentator has argued that "[c]ounsel at affordable fees should be available to indigents and to poor but nonindigent persons with the assistance, when needed, of partial public subsidy."[218] Therefore, while certainly expansive when compared to its previous decisions, the majority's approach in *M.L.B.* is far from revolutionary.

Despite several weaknesses, the majority's decision achieves justice. Although Mississippi's fee requirement is not arbitrary, there is no good reason that it should impede parents from protecting their rights in their children, either. The right to parent should not depend in any way on how much money a person has. Justice Thomas's assertion that this fee resembles payment of university tuition fees[219] is inapposite because there are other means to afford an education. When the state steps in to remove a child, however, parents who wish to keep their children have no choice but to defend their rights in court.[220] Certainly the parents should pay for their court costs when they are able, but not allowing them to defend their rights—even in an appeal—is an affront to equal justice.[221]

The problem may lie less with the Court's reasoning than with the very nature of parental termination adjudications.[222] Because the state usually intervenes to remove the child, because the result is final and irrevocable, and because presumably there is a vast difference in the resources available to the state and to individual litigants, affording parents the utmost protections under the Constitution is only fair. Perhaps a better solution would be for states to change the termination process to make the consequences less disheartening,[223]

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omitted).

218. LOIS G. FORER, MONEY AND JUSTICE: WHO OWNS THE COURTS? 206 (1984).

219. *See M.L.B.*, 117 S. Ct. at 573 (Thomas, J., dissenting). Justice Thomas analogized the filing fee required by the statute in Mississippi to a university's tuition charges, arguing that in both situations the state is merely recovering the costs of a service it chooses to provide. *See id.* at 574 (Thomas, J., dissenting).

220. *Cf.* Santosky v. Kramer, 455 U.S. 745, 759-61 (1982) (explaining how the termination proceeding pits the state directly against the parents).

221. *Cf.* Mayer v. City of Chicago, 404 U.S. 189, 198 (1971) (determining that indigent defendants threatened with fines instead of imprisonment were still entitled to a free transcript). In *Mayer*, the Court remarked that *Griffin v. Illinois*, 351 U.S. 12 (1956) (plurality opinion), stood for a "flat prohibition against pricing indigent defendants out of as effective an appeal as would be available to others able to pay their own way." *Mayer*, 404 U.S. at 196-97.

222. *Cf. In re* Gault, 387 U.S. 1, 50 (1967) (arguing that the civil "label-of-convenience" should not be determinative in juvenile court proceedings).

223. *See* HARDIN & LANCOUR, *supra* note 203, at 3-4. The authors suggest several alternatives to termination of parental rights: (1) guardianship by close relatives, presumably allowing the biological parents to remain in contact with their children, and

but the Court cannot effect such changes on its own. Also, states face difficulties in changing the parental termination process because such changes could do more harm than good—making termination reversible, for example, could lead to a more unsettled life for adopted children.[224]

That the Chancellor failed to give M.L.B. any explanation for his decision seems to have troubled the Court greatly.[225] In a footnote, the Court detailed that the Chancellor found serious abuse,[226] but S.L.J. did not allege abuse in his complaint or in the proceedings.[227] For those who argue that the Court went too far in requiring a transcript, perhaps the state should at least be required to provide parents with an explanation of the evidence against them. Before destroying such a close relationship, a court should be required to give parents its reasons for doing so.

While it is easy to disapprove of parents who neglect and abuse their children, it is also important to remember that false accusations are possible.[228] Just as our society requires evidence beyond a reasonable doubt to convict a criminal, so should it take extra care before "convicting" a parent. While allowing M.L.B. and other parents like her a free transcript is a financial burden on the state, in the end everyone's interests are served when the right decision is made. In coming to the right decision, there should be no difference between those who can afford a transcript and those who cannot.

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(2) "open adoption," a possibility available in several states, whereby parents retain limited rights to information, contacts, or visits with their children. *See id.*

224. *See* JOSEPH GOLDSTEIN ET AL., IN THE BEST INTERESTS OF THE CHILD 56-57 n.4 (1986). The authors explain that while the usual remedy for a due process violation in a termination proceeding is to return the child to the parent, in one case the district court and the appellate court were inclined to favor the foster parents in fear of uprooting the child. *See id*; *see also* 2 ANN M. HARALAMBIE, HANDLING CHILD CUSTODY, ABUSE AND ADOPTION CASES 13 (1993) (discussing bonding between foster parents and children, especially when termination proceedings are lengthy).

225. *See M.L.B.*, 117 S. Ct. at 559-60.

226. *See id.* at 559 n.1.

227. *See id.*

228. *See* Shaun Assael, *Child Abuse: Guilty Until Proven Innocent?*, PARENTS MAG., July 1995, at 36, 36 (describing one mother's ordeal when a neighbor with a grudge accused her of child abuse and a termination proceeding was brought against her and eventually dismissed); Douglas J. Besharov & Lisa A. Laumann, *Child Abuse Reporting*, SOCIETY, May-June 1996, at 40, 42 (discussing the large number of unfounded child abuse and neglect reports).