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The Present Crisis in American Bail

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ABSTRACT. More than fifty years after a predicted coming federal courts crisis in bail, district courts have begun granting major systemic injunctions against money bail systems. This Essay surveys the constitutional theories and circuit splits that are forming through these litigations. The major point of controversy is the level of federal court scrutiny triggered by allegedly unconstitutional bail regimes, an inquiry complicated by ambiguous Supreme Court precedents on (1) post-conviction fines, (2) preventive detention at the federal level, and (3) the adequacy of probable cause hearings. The Essay argues that the application of strict scrutiny makes the best sense of these precedents while also taking account of the troubled history of American bail, particularly during the Reconstruction Era from which the right to sue state officials in federal court for violations of constitutional rights emerged.

INTRODUCTION

In 1965, the civil rights advocate Caleb Foote foretold a "coming constitutional crisis in bail."[1] Foote was an extraordinary law professor whose research stemmed from the multiple prison terms he served for conscientiously objecting to the draft.[2] To Foote, an opponent of Japanese internment in the 1940s and of wealth-based detention in the 1960s, the crisis in bail seemed clearly imminent. Given the Supreme Court's recent solicitude for defendants' Fourth and Sixth Amendment rights,[3] Foote was sure that American bail regimes were about to

1. Caleb Foote, *The Coming Constitutional Crisis in Bail: I*, 113 U. PA. L. REV. 959 (1965).

2. Douglas Martin, *Caleb Foote, Law Professor and Pacifist Organizer, Dies*, N.Y. TIMES (Apr. 3, 2006), https://www.nytimes.com/2006/04/03/us/03foote.html [https://perma.cc/9JQ9-QCYW].

3. *E.g.*, Gideon v. Wainwright, 372 U.S. 335 (1963) (holding that the Sixth Amendment requires states to appoint attorneys to represent indigent defendants); Mapp v. Ohio, 367 U.S. 643

face intense pressure in the federal courts. And if the states followed a "snail-like pace of reform," the federal courts would have no choice but to "force[] major change down the throats of the states by way of the fourteenth amendment."[4]

But the crisis as Foote foresaw it, one instigated and driven by the federal courts, did not come. As the Warren Court gave way to the retrenchments of the Burger era, strategic litigation in Florida spurred the Supreme Court to establish new procedural rights to prompt probable cause hearings in *Gerstein v. Pugh*.[5] But Pugh's challenge against Miami's money bail system never reached the Court; instead, it resulted in a Delphic pronouncement by the en banc Fifth Circuit.[6] The en banc majority approved of reliance on bail schedules but indicated that in practice the reflexive use of schedules might fail heightened federal court scrutiny.[7] Five separate opinions then followed, disputing each point.[8] The Burger Court subsequently rejected an as-applied challenge to a money bail system in *O'Shea v. Littleton*,[9] now considered a classic case of federal-court restraint.[10] The only time the Supreme Court has addressed bail since was in *United States v. Salerno*,[11] in which the Court upheld the outright denial of bail under the 1984 amendments to the Federal Bail Reform Act.[12]

That is not to say there has been no crisis in bail. As with mass incarceration generally, pretrial incarceration exploded across the law-and-order decades of the 1970s and 1980s.[13] Estimates hold that today around sixty to seventy-five

(1961) (holding that evidence obtained in violation of the Fourth Amendment is inadmissible in state-court prosecutions).

4. Foote, *supra* note 1, at 959.

5. 420 U.S. 103 (1975).

6. Pugh v. Rainwater, 572 F.2d 1053, 1059 (5th Cir. 1978) (en banc) ("[T]he new Florida rule is not facially unconstitutional and we abstain from its further consideration.").

7. *Id.* at 1058.

8. *Id*. at 1059 (Simpson, J. dissenting); *id*. at 1068 (Clark, J., specially concurring); *id*. at 1069 (Coleman, J., specially concurring); *id*. at 1070 (Gee, J., specially concurring); *id*. at 1071 (Rubin, J., concurring).

9. 414 U.S. 488 (1974).

10. *See, e.g.*, RICHARD H. FALLON, JR., ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 227-35 (7th ed. 2015) (discussing the case at length).

11. 481 U.S. 739 (1987).

12. *Id.* at 741; *see* 18 U.S.C. §§ 3141-50 (2018).

13. *See* NAT'L RESEARCH COUNCIL, THE GROWTH OF INCARCERATION IN THE UNITED STATES 35 (Jeremy Travis et al. eds., 2014) (documenting an explosion in the rate of people incarcerated in jails).

percent of all individuals in jails are unconvicted defendants awaiting trial.[14] Although it is difficult to measure with precision, undoubtedly a high proportion of these individuals are detained solely because they cannot afford the money-bail amount set in their cases. Those amounts are commonly set by courts on a slim evidentiary record in "hearings" lasting less than two minutes.[15] Money-bail systems remain the norm in state courts across the country; they are far more common than systems in which judges order a defendant's release or detention based on flight risk and dangerousness, such as in the (comparatively small) federal criminal system.[16] Thus, the vast majority of pretrial detainees in the United States are confined because they cannot afford to post a bail amount set according to a schedule or after a perfunctory hearing. This is a reality made starkly apparent by the widely noted recent suicides of Kalief Browder and Sandra Bland, both detained because of their inability to pay a relatively small money-bail amount.[17] Pretrial incarceration on this scale has drained unfathomable amounts of human and financial capital from already marginalized poor communities and communities of color.[18]

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14. *See* TODD D. MINTON & ZHEN ZENG, BUREAU OF JUSTICE STATISTICS, U.S. DEP'T OF JUSTICE, NCJ 248629, JAIL INMATES AT MIDYEAR 2014, at 3 (2015), https://www.bjs.gov/content/pub/pdf/jim14.pdf [https://perma.cc/J8C7-WH9R] (estimating that sixty percent of jail inmates are unconvicted). For the most up-to-date figures drawn from a variety of sources, see Peter Wagner & Wendy Sawyer, *Mass Incarceration: The Whole Pie 2018*, PRISON POL'Y INITIATIVE (Mar. 14, 2018), https://www.prisonpolicy.org/reports/pie2018.html [https://perma.cc/K8FG-L6CR] (reporting that seventy-five percent of people confined in local jails have not been convicted).

15. See Megan T. Stevenson, Distortion of Justice: How the Inability to Pay Bail Affects Case Outcomes, 34 J.L. ECON. & ORG. 511, 514 & n.5 (2018).

16. *See, e.g.*, *Pretrial Justice in America: A Survey of County Pretrial Release Policies, Practices and Outcomes*, PRETRIAL JUST. INST. 2, 7 (2010), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=d4c7feb2-55be-ccd0-f06a-02802f18eeee&forceDialog=0 [https://perma.cc/P3P9-2UT2] (reporting that 64% of U.S. counties use a secured money bail schedule to determine eligibility for release prior to a first appearance hearing, based on a survey of 112 of the 150 most populous counties in the nation). On the federal system's general aversion to monetary conditions of release, see Thomas H. Cohen, Bureau of Justice Statistics, *Pretrial Release and Misconduct in Federal District Courts, 2008-2010*, U.S. DEP'T JUST. 1, 5 (2012), https://www.bjs.gov/content/pub/pdf/prmfdc0810.pdf [https://perma.cc/V5SF-G8LQ] (showing that of the 36% of federal defendants released pretrial, 27% were released on a monetary condition, and only 8% used a commercial surety to satisfy that condition).

17. Jennifer Gonnerman, *Before the Law*, NEW YORKER (Oct. 6, 2014), https://www.newyorker.com/magazine/2014/10/06/before-the-law [https://perma.cc/9LB2-Z9U7]; Margaret Talbot, *Watching Sandra Bland*, NEW YORKER (July 29, 2015), https://www.newyorker.com/news/daily-comment/watching-sandra-bland [https://perma.cc/HD7M-97UM].

18. *See* CIVIL RIGHTS DIV., U.S. DEP'T OF JUSTICE, INVESTIGATION OF THE FERGUSON POLICE DEPARTMENT 47-62 (2015), https://www.justice.gov/sites/default/files/opa/press-releases

Now, five decades later, we may finally be witnessing the crisis in the federal courts that Foote foretold. In April 2017, Chief Judge Rosenthal of the Southern District of Texas enjoined the misdemeanor bail system of Harris County, Texas – the third-largest jail system in the nation – from engaging in wealth-based detention.[19] Injunctions echoing the opinion and order of the Harris County litigation have since followed elsewhere in the Fifth and Eleventh Circuits.[20] Cases pursuing similar theories are pending in district court in San Francisco and New Orleans.[21] State courts, too, have interpreted the Federal Constitution to reach similar holdings.[22]

This Essay surveys the constitutional terrain of federal court bail litigation in the aftermath of *ODonnell v. Harris County*. Now that local bail systems are under increased federal court scrutiny, what are the key constitutional issues emerging, and where might we expect the courts to go from here?[23] Part I briefly explains three theories driving the challenges – equal protection, substantive due process,

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/attachments/2015/03/04/ferguson_police_department_report.pdf [https://perma.cc/X2QN-8DKB].

19. ODonnell v. Harris County, 251 F. Supp. 3d 1052 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018).

20. Daves v. Dallas County, 341 F. Supp. 3d 688 (N.D. Tex. 2018), *appeal pending,* Daves v. Dallas County, No. 18-11368 (5th Cir. Oct. 23, 2018); Shultz v. Alabama, 330 F. Supp. 3d 1344, 1365 n.23 (N.D. Ala. 2018), *appeal pending sub nom.* Hester v. Gentry, No. 18-13898 (11th Cir. Sept. 13, 2018).

21. Buffin v. City & County of San Francisco, Civil No. 15-4959, 2018 WL 424362 (N.D. Cal. Oct. 28, 2015); Cain v. City of New Orleans, Civil No. 15-4479 (E.D. La. Sept. 17, 2015). Recently the *Buffin* court reaffirmed its holdings on the constitutional standard to be applied. *See Buffin*, 2019 WL 1017537, *13-16 (N.D. Cal. Mar. 4, 2019).

22. *In re* Humphrey, 228 Cal. Rptr. 3d 513 (Ct. App. 2018), *appeal pending*, 417 P.3d 769 (Cal. 2018); State v. Brown, 338 P.3d 1276 (N.M. 2014); State v. Pratt, 166 A.3d 600 (Vt. 2017). The remainder of this Essay focuses on federal court litigation. For a recent discussion of state court approaches to bail reform, see Dorothy Weldon, Note, *More Appealing: Reforming Bail Review in State Courts*, 118 COLUM. L. REV. 2401 (2018).

23. To make two things clear at the outset, this Essay is concerned with only the substantive requirements of the Bill of Rights and the Reconstruction Amendments. For these purposes, I take for granted that a bail challenge has achieved federal court review on the merits by getting through the myriad procedural and jurisdictional challenges these cases often confront. That is no light assumption because standing, immunity, and abstention – just to name a few jurisdictional doctrines – present significant barriers, *see, e.g.*, ODonnell v. Harris County, 227 F. Supp. 3d. 706 (S.D. Tex. 2016), *aff'd in part and rev'd in part*, 892 F.3d 147 (ruling on the County's motion to dismiss), which would require a separate volume to resolve. Second, I use "bail" in its colloquial sense of secured money bail – that is, a requirement for cash or collateral upfront to be released from pretrial detention. Bail has not always had that meaning, and for hundreds of years it involved no upfront transfers of money or collateral of any kind. *See* Timothy R. Schnacke et al., *The History of Bail and Pretrial Release*, PRETRIAL JUST. INST. (Sept. 23, 2010), https://cdpsdocs.state.co.us/ccjj/Committees/BailSub/Handouts/HistoryofBail-PreTrialRelease-PJI_2010.pdf [https://perma.cc/V8QM-FYS9].

and procedural due process—and one ground notable for its absence, the Excessive Bail Clause of the Eighth Amendment. Part II then focuses on two related difficulties arising in these bail challenges: the puzzling requirements of federal court scrutiny and the interaction between bail and probable cause standards of review. What is often an abstract legal debate about "tiers of scrutiny" in constitutional law turns out to have dramatic consequences when bail systems are challenged in federal court. As a growing empirical literature demonstrates the catastrophic costs of pretrial detention on both defendants personally and on society at large, the key question in bail litigation—and the possibility for crisis—turns on the degree to which federal courts must take account of these alarming facts. Consonant with the troubled history of bail in our constitutional tradition, arising during the Reconstruction Era at the origins of modern civil rights review in the federal courts, this Essay argues that federal court scrutiny should be strict indeed.

I. CONSTITUTIONAL GROUNDS FOR CHALLENGING MUNICIPAL MONEY-BAIL SYSTEMS

A. Equal Protection

The Fifth Circuit's analysis of Harris County's bail system vividly illustrates why detention on money bail violates the Equal Protection Clause:

> [T]ake two . . . arrestees who are identical in every way—same charge, same criminal backgrounds, same circumstances, etc.—except that one is wealthy and one is indigent . . . . One arrestee is able to post bond, and the other is not. As a result, the wealthy arrestee is less likely to plead guilty, more likely to receive a shorter sentence or be acquitted, and less likely to bear the social costs of incarceration. The poor arrestee, by contrast, must bear the brunt of all of these, simply because he has less money than his wealthy counterpart.[24]

"But wait," a law student cries, "I know this one! Wealth-based discrimination isn't a suspect classification and triggers only rational basis review, and federal courts must defer to whatever rational basis the local government comes up with." No doubt that is the credited answer to many a Con Law 101 exam. But often overlooked is the Supreme Court's single exception in *San Antonio Independent School District v. Rodriguez*, the case establishing the general rule of rational basis for wealth-based discrimination: "an *absolute deprivation*" of liberty

24. *ODonnell*, 892 F.3d at 163.

occasioned by wealth (or indigence) triggers heightened scrutiny.[25] The Court created this exception to take account of a line of post-conviction fines cases, a line that culminated (a decade after *Rodriguez*) in *Bearden v. Georgia*.[26]

Bearden involved the incarceration of a convicted defendant who had failed to pay his fine. The Court had previously held that "the Constitution prohibits the State from imposing a fine as a sentence and then automatically converting it to a jail term solely because the defendant is indigent."[27] But what if the detention was not quite *automatic*? How much process and inquiry must a state engage in before it can impose detention for failure to pay? The *Bearden* Court ruled that only if alternative measures are "not adequate . . . to meet the State's interest[s] . . . may the State imprison a probationer who has made sufficient bona fide efforts to pay."[28] Recognizing the states' broad penological interests, the Court nevertheless required "a careful inquiry" into factors like "the existence of alternative means" for meeting those interests.[29] Only if a defendant engaged in bad faith (i.e., he *could* pay the money but refused to do so) or if there were no other option discovered in the course of this careful inquiry could the state order detention for failure to pay the fine.[30]

While the Supreme Court has not applied *Bearden* or its other postconviction fine cases to the pretrial context, the Fifth and Eleventh Circuits have.[31] And at least some courts are persuaded by the logic that *Bearden*'s rule applies "with special force in the bail context, where . . . arrestees are presumed innocent."[32] Indeed, the Supreme Court's first modern bail opinion observed that unless the right to pretrial liberty was carefully preserved, "the presumption of innocence, secured only after centuries of struggle, would lose its meaning."[33] As the Court

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25. 411 U.S. 1, 20-22 (1973) (emphasis added). On the doctrinal path of wealth classifications under equal protection up to and through *Rodriguez*, see Cary Franklin, *The New Class Blindness*, 128 YALE L.J. 2, 40-46 (2018).

26. 461 U.S. 660 (1983); *see also* Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970).

27. *Tate*, 401 U.S. at 398 (quoting and adopting the reasoning of Morris v. Schoonfield, 399 U.S. 508, 509 (1970)).

28. 461 U.S. at 672.

29. *Id*. at 666-67.

30. *Id*. at 668-69, 672.

31. Both circuits are bound by the former Fifth Circuit's en banc decision in *Pugh v. Rainwater*, 572 F.2d 1053, 1056-57 (5th Cir. 1978) (en banc).

32. Buffin v. City & County of San Francisco, No. 15-CV-4959-YGR, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018); *accord In re* Humphrey, 228 Cal. Rptr. 3d 513, 528 (Ct. App. 2018); *cf.* ODonnell v. Harris County, 892 F.3d 147, 162 n.6 (5th Cir. 2018) ("[T]he distinction between post-conviction detention targeting indigents and pretrial detention targeting indigents is one without a difference").

33. Stack v. Boyle, 342 U.S. 1, 4 (1951).

has elsewhere recognized, a detainee "is hindered in his ability to gather evidence, contact witnesses, or otherwise prepare his defense,"[34] another set of interests that analytically seem to have greater weight pretrial than post-conviction. Nevertheless, some courts apparently think that applying *Bearden* pretrial with "special force" simply means applying *Bearden* pretrial. The Conference of Chief Justices took this position in a recent amicus brief to the Fifth Circuit. The Conference argued that the *Bearden* right applies with greater force pretrial, but its conclusion called for a straightforward application of the *Bearden* rule: "a financial condition of release that operates to detain an indigent defendant must be based on a finding that such condition is necessary to secure the state's interest in ensuring appearance at trial or public safety."[35]

The theory thus runs that equal protection forbids the detention of the indigent (set aside for a moment how that would be defined)[36] while the wealthy can purchase their liberty, unless the state has carefully determined that no other alternative could meet its interests. The state's interests in the pretrial context are ensuring defendants' appearance at future court dates[37] and, as the Supreme Court has more recently held, protecting public safety.[38] Below, I address whether and how often there might conceivably be *no* feasible alternative to secured money bail.

B. Substantive Due Process

For centuries, courts recognized only one legitimate public purpose for setting bail: assuring the defendant's return to court.[39] Under pressure from the rise of organized crime and law-and-order politics, Congress in 1984 amended the federal bail statute to require judges to consider the safety of the public, of alleged victims, and of potential witnesses in setting bail.[40] In addition, Congress expanded the federal courts' power to deny bail outright and order "preventive detention": indefinite incarceration pending trial, no matter how many months

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34. Barker v. Wingo, 407 U.S. 514, 533 (1972).

35. Brief of Conference of Chief Justices as Amicus Curiae in Support of Neither Party, *ODonnell*, 892 F.3d 147 (5th Cir. 2018) (No. 17-20333), 2017 WL 3536467, at *24, *26-27.

36. As Andrew Hammond has recently shown, poverty determinations can be (though he argues they need not be) quite complicated and require an array of data collection from those invoking poverty status. Andrew Hammond, *Pleading Poverty in Federal Court*, 128 YALE L.J. (forthcoming 2019).

37. *Stack*, 342 U.S. at 5.

38. United States v. Salerno, 481 U.S. 739, 750 (1987).

39. Schnacke, *supra* note 23, at 2, 5-9.

40. *See* 18 U.S.C. §§ 3141-3150 (1984).

or years trial took.[41] Many state and local jurisdictions followed Congress's lead.[42]

The test case challenging the federal bail amendment—and the only Supreme Court decision on bail since the 1980s—was *United States v. Salerno*.[43] "Fat Tony" Salerno was probably the least sympathetic defendant to litigate constitutional standards for pretrial detention. The boss of a New York mob family notorious for extortion, illegal gambling, and murder, Salerno was reputed to order hits by uttering a single word over the telephone.[44] If broad segments of American society could agree that anyone ought to be detained pretrial without bail, it was Fat Tony.

The Supreme Court upheld the federal bail act against Salerno's facial challenge. The opinion by Chief Justice Rehnquist provoked stern dissents from Justice Marshall and Justice Stevens,[45] and criticism flowed from progressive quarters at the time.[46] Nevertheless, *Salerno* has more recently provided a powerful

41. Of course, speedy trial rights in theory set outer limits on how long trial may take. But both at the state and federal levels, speedy trial rights have proven ineffective in practice. *See* Malcolm M. Feeley, *How to Think About Criminal Court Reform*, 98 B.U. L. REV. 673, 681 (2018); Shon Hopwood, *The Not So Speedy Trial Act*, 89 WASH. L. REV. 709, 711 (2014); Daniel Hamburg, Note, *A Broken Clock: Fixing New York's Speedy Trial Statute*, 48 COLUM. J.L. & SOC. PROBS. 223 (2015); Editorial, *Total Failure on Speedy Trials in New York*, N.Y. TIMES (Apr. 15, 2015), https://www.nytimes.com/2015/04/16/opinion/total-failure-on-speedy-trials-in-new-york.html [https://perma.cc/3AUJ-KB6Y].

42. *See, e.g.*, CAL. PENAL CODE § 1275(a)(1) (West 2018), *repealed by* California Money Bail Reform Act, S.B. 10, 2018 Leg., Reg. Sess. (Cal. 2018) ("In setting, reducing, or denying bail, a judge or magistrate shall take into consideration the protection of the public . . . . The public safety shall be the primary consideration."); 725 ILL. COMP. STAT. ANN. 5/110-5 (West 2018) ("In determining the amount of monetary bail or conditions of release, if any, which will reasonably assure the appearance of a defendant as required or the safety of any other person or the community and the likelihood of compliance by the defendant with all the conditions of bail, the court shall . . . take into account such matters as the nature and circumstances of the offense charged, [and] whether the evidence shows that as part of the offense there was a use of violence or threatened use of violence . . . ."); LA. CODE CRIM. PROC. ANN. art. 316 (2019) ("The amount of bail shall be fixed . . . having regard to . . . [t]he nature and the seriousness of the danger to any other person or the community that would be posed by the defendant's release.").

43. 481 U.S. 739 (1987).

44. Daniel Richman, United States v. Salerno*: The Constitutionality of Regulatory Detention*, *in* CRIMINAL PROCEDURE STORIES 413, 422-23 (Carol S. Steiker ed., 2006).

45. United States v. Salerno, 481 U.S. 739, 756 (1987) (Marshall, J. dissenting); *id.* at 768 (Stevens, J., dissenting).

46. *See, e.g.*, Albert W. Alschuler, *Preventive Pretrial Detention and the Failure of Interest-Balancing Approaches to Due Process*, 85 MICH. L. REV. 510 (1986); Marc Miller & Martin Guggenheim, *Pretrial Detention and Punishment*, 75 MINN. L. REV. 335, 341 n.44 (1990).

point of attack against money bail systems and the rampant incarceration they have fueled.[47]

Salerno came right up to the precipice of engaging in a substantive due process analysis without explicitly invoking those terms. Conventionally, substantive due process doctrine recognizes that certain rights are so fundamental to the history and traditions of the United States that the Constitution protects against their deprivation unless rigorous requirements are first satisfied.[48] Under this "strict scrutiny," "the Fourteenth Amendment 'forbids the government to infringe . . . "fundamental" liberty interests *at all,* no matter what process is provided, unless the infringement is narrowly tailored to serve a compelling state interest.'"[49] Although never invoking substantive due process or the strict-scrutiny standard by name, the *Salerno* Court acknowledged the "fundamental nature" of pretrial liberty and upheld the federal Bail Reform Act because the Court found it "a carefully limited exception" to the "norm" of pretrial liberty.[50]

Like *Bearden*, *Salerno* suggests substantive limits that careful tailoring may require of a detention order or detention regime. In upholding the preventive-detention provisions of the Federal Bail Reform Act, the *Salerno* Court noted that the regime applied only to those charged with "a specific category of extremely serious offenses," whom Congress had "specifically found" to be especially dangerous.[51] To impose detention, moreover, the Act required a court to find, by clear and convincing evidence, that the defendant presented "an identified and articulable threat to an individual or the community" and that "no conditions of release [could] reasonably assure the safety of the community or any person."[52]

The *Salerno* Court also found several of the Bail Reform Act's procedures highly relevant to its tailoring inquiry. Noting that the Act supplied detained defendants with (1) a hearing, (2) representation by counsel, (3) the ability to present evidence, (4) court findings on the record subject to a clear-and-convincing evidentiary standard, and (5) a right to an expeditious appeal, the Court sustained the Act against Salerno's challenge that it was facially unconstitutional

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47. *See, e.g.*, *In re* Humphrey, 228 Cal. Rptr. 3d 513, 530-35 (Ct. App. 2018); *Criminal Justice Committee Report & Recommendations: Pretrial Decision-Making Practices*, TEX. JUDICIAL COUNCIL 2 (Oct. 2016), https://www.txcourts.gov/media/1436204/criminal-justice-committee-pretrial-recommendations-final.pdf [https://perma.cc/4W9Z-HVL4].

48. Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997).

49. *Id.* at 721 (quoting Reno v. Flores, 507 U.S. 292, 302 (1993)).

50. *Salerno*, 481 U.S. at 750, 755.

51. *Id.* at 750.

52. *Id.* (citing 18 U.S.C. § 3142(f) (2018)).

for denying the right to bail altogether.[53] The Court found those procedures *sufficient* to sustain the federal bail statute. It did not say whether those procedures would be *necessary* for state or municipal systems to pass constitutional muster. One federal court in Louisiana, following what we might call a strong reading of *Salerno*, has ordered declaratory relief against the Orleans Parish Magistrate Judge for denying defendants the procedural safeguards sustained in *Salerno*.[54] The judge's appeal of that decision is pending in the Fifth Circuit.

The other major question of *Salerno*'s reach beyond the federal statutory context is how courts should evaluate unaffordable bail. Salerno was denied release on bail altogether—there was no money amount he could have paid to be released pretrial. What happens when the same kind of detention is accomplished by an unobtainable bail—that is, where bail is theoretically payable, but the amount is out of the defendant's reach? Every circuit court to squarely address the question has held that, when applying the Federal Bail Reform Act, an unaffordable bail is tantamount to a denial of bail altogether, and it requires the same procedures the Act extends to those denied bail outright.[55] Arguably, these holdings are only a straightforward matter of statutory construction, as the drafters of the federal statute were quite clear that this was their intended result.[56] The question thus remains open whether outside the federal context, courts should consider *any* unaffordable bail to be a de facto order of pretrial detention. The district court in Harris County applied that standard, and other trial courts have since followed.[57]

A strong reading of *Salerno* thus means that the substantive due process analysis of a money bail system ends up in much the same place as the equal protection analysis: The government must engage in sufficient process to carefully determine whether there is any other alternative to detention for failure to pay bail. The only significant difference is that equal protection analysis turns on classifications of wealth and, therefore, might require some determination of who falls into an "indigence" classification.[58] Because substantive due process analysis

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53. *Id*. at 750-52.

54. Caliste v. Cantrell, 329 F. Supp. 3d 296, 311-13 (E.D. La. 2018), *appeal pending*, Caliste v. Cantrell, No. 18-30954 (5th Cir. Aug. 21, 2018).

55. *E.g.*, United States v. Mantecon-Zayas, 949 F.2d 548, 550 (1st Cir. 1991); United States v. McConnell, 842 F.2d 105, 108-10 (5th Cir. 1988); United States v. Clark, Crim. No. 12-156 (W.D. Mich. Nov. 20, 2012).

56. *See* S. REP. NO. 98-225, at 16 (1983).

57. ODonnell v. Harris County, 892 F.3d 147, 158 (5th Cir. 2018); Shultz v. Alabama, 330 F. Supp. 3d 1344, 1358 (N.D. Ala. 2018); *Caliste*, 329 F. Supp. 3d at 311-12.

58. *Bearden*'s majority opinion is quite clear that its rule applies only to "the indigent," a word used twenty times in the opinion but nowhere defined. Bearden himself had no assets or income and was unable to pay off a $500 fine. It is not clear that mere inability to pay a more

turns on the fundamental nature of the right involved—pretrial liberty and its related rights to prepare a defense and be presumed innocent pending trial[59]—an unaffordable bail amount may trigger heightened procedures even if the defendant is relatively wealthy.

C. Procedural Due Process

The unartfully named "procedural due process" analysis follows a different track from substantive due process. Instead of focusing on whether a right is fundamental and therefore requires strict scrutiny protection, courts understand the Due Process Clause to protect ordinary liberty and property interests by balancing the interests of the individual against those of the state. The leading case of *Mathews v. Eldridge* requires courts to consider "three distinct factors": (1) "the private interest that will be affected by the official action"; (2) "the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional safeguards"; and (3) "the Government's interest, including" its "fiscal and administrative" efficiency interests.[60]

The Supreme Court has not given precise direction on which procedures may satisfy this test with respect to pretrial defendants. Moreover, in *Turner v. Rogers*, the Court indicated that a lack of one procedural safeguard—such as the availability of counsel—could be made up for by the presence of others, such as notice, the ability to present evidence, and the relative sophistication of the adversarial

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sizeable bail amount—say, $150,000—would render a middle-class detainee "indigent" for *Bearden* purposes. This would seem a bizarre result, but cases from the *Bearden* era treat "indigence" as a fixed category (like the federal standard for poverty), rather than a relative standard (like inability to pay). *See, e.g.*, Ross v. Moffitt, 417 U.S. 600, 607 (1974) ("[A] state cannot arbitrarily cut off appeal rights for indigents while leaving open avenues of appeal for more affluent persons."); San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 19 (1973) (referring to "functional[] 'indigen[ce]'" as "'poor' persons whose incomes fall below some identifiable level of poverty"); Pugh v. Rainwater, 572 F.2d 1053, 1057 (5th Cir. 1978) (en banc) ("By definition an indigent is incapable of meeting any money bail requirement."); Pugh v. Rainwater, 557 F.2d 1189, 1194 (5th Cir. 1977), *vacated*, 572 F.2d 1053 (5th Cir. 1978) (en banc) ("[W]e are not called upon to decide whether any person is denied equal protection if he can make bail in some amount, but is unable to post the amount of bail set. We are confronted only with the question of the rights of indigents."). In a footnote, the *Bearden* Court recognized that in the context of sentencing "indigency" can be "a relative term rather than a classification," but surmised for that reason that equal protection may not be the proper frame for analyzing detention based on wealth status. 461 U.S. at 666 n.8. That suggestion is difficult to reconcile with the narrow-tailoring approach the Court actually employed to decide the case.

59. *See* Barker v. Wingo, 407 U.S. 514, 532-33 (1972); Stack v. Boyle, 342 U.S. 1, 4 (1951).

60. 424 U.S. 319, 335 (1976).

parties.[61] The closest the Court has come to enunciating a list of pretrial process protections was in *Salerno*, but as recounted above, the procedures reviewed in *Salerno* were mandated by the federal bail statute itself; the Court did not consider whether any or all of the procedures were constitutionally required.

Thus, while a strong reading of *Salerno* could lead to strict scrutiny and demands that state and local governments apply the least restrictive alternative to pretrial detention for inability to pay bail, a weak reading of *Salerno* has led the Eleventh Circuit to conclude that local governments need only meet the *Mathews* balancing test.[62] On this weak reading of *Salerno*, the Supreme Court's emphasis on the Federal Act's procedures was not a substantive due process tailoring analysis, but merely a procedural due process holding in the same mode of analysis as *Mathews*. Nevertheless, some federal courts, including the Fifth Circuit, have found common bail systems to fail even the *Mathews* test because they provide insufficient notice, opportunity to present evidence and be heard, and judicial consideration of evidence on the record.[63] Considering the high costs of pretrial incarceration and the significant risk that incarceration imposes an unnecessary deprivation of liberty, even the relatively slight burdens of the *Mathews* test may pose a significant challenge to typical bail systems.

What is *not* required under procedural due process is a substantive finding that no alternative to detention is available to satisfy the state's pretrial interests. If only procedural due process is in view, a jurisdiction could in theory continue to jail three-quarters of its pretrial population on the basis of wealth, so long as timely hearings and nominal consideration of evidence is provided.[64] For this reason, civil rights litigants tend to emphasize equal protection or substantive due process and their requirements of substantive scrutiny, while federal courts leery of engaging in substantive review seem more willing to stop short at only a procedural due process analysis.

Such courts, however, have been less than clear about the respective roles equal protection, substantive due process, and procedural due process play in their analysis. For example, in paring back the district court's injunction in Harris County to a purely procedural order, the Fifth Circuit reasoned that the injunction "makes some sense if one assumes a fundamental substantive due process right to be free from any form of wealth-based detention. But, as the

61. 564 U.S. 431, 444-46 (2011).

62. Walker v. City of Calhoun, 901 F.3d 1245, 1262-63 (11th Cir. 2018).

63. ODonnell v. Harris County, 892 F.3d 147, 158-59 (5th Cir. 2018).

64. *See* ODonnell v. Goodhart, 900 F.3d 220, 227, 228 (5th Cir. 2018) (reasoning, as a panel deciding a motion to stay the district court's revised injunction following remand, that, under procedural due process, "a procedural violation is subject [only] to procedural relief" and that "[d]etention of indigent arrestees and release of wealthier ones is not constitutionally infirm purely because" indigent defendants are detained longer than wealthier ones).

foregoing analysis establishes, no such right is in view. The sweeping injunction is overbroad."[65] Yet the district court had reasoned from equal protection, not substantive due process.[66] Most importantly, since the Fifth Circuit *affirmed* the district court's equal protection holding in the same opinion, a substantive rather than purely procedural remedy was clearly appropriate.[67]

D. Excessive Bail

In all the recent challenges, the bell that largely hasn't rung is the Eighth Amendment's prohibition on "excessive bail." In the 1951 case *Stack v. Boyle*, the Supreme Court's first major opinion interpreting that clause, the Court held that "excessive" meant only that "bail [had been] set at a figure higher than an amount reasonably calculated" to ensure the defendant's presence at trial.[68] As noted above, the Court later added public safety as a legitimate state interest in the setting of bail,[69] but the effect remains the same: excessiveness is understood in relation to the state's goals, not in relation to what the defendant can afford or the consequences of an amount set beyond the defendant's means. Judges enjoy broad discretion to determine what amount satisfies the state's goals, and following *Stack*, federal courts have routinely held that "bail is not excessive under the Eighth Amendment merely because it is unaffordable."[70]

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65. *ODonnell*, 892 F.3d at 163.

66. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1147 (S.D. Tex. 2017) ("[T]he court's conclusions do not rely on substantive due process."); *id.* at 1147-53 (finding a likelihood of success on the merits of plaintiffs' equal protection claim). Thus, the Fifth Circuit did not consider the requirements of substantive due process either. Instead, the Fifth Circuit analyzed Harris County's bail regime under procedural due process. Further still, in the procedural analysis it only considered the state-created liberty interest generated by Texas state law on pretrial release, not the "fundamental" constitutional right to liberty that *Salerno* could be read to proclaim. Thus, substantive due process was left completely out of the Fifth Circuit's "foregoing analysis." *See ODonnell*, 892 F.3d at 157-61.

67. *See ODonnell*, 892 F.3d at 163; *cf.* Washington v. Harper, 494 U.S. 210, 220 (1990) ("[The] substantive issue involves a definition of th[e] protected constitutional interest, as well as identification of the conditions under which competing state interests might outweigh it. The procedural issue concerns the minimum procedures required by the Constitution for determining that the individual's liberty interest actually is outweighed in a particular instance." (quotation omitted)). In a forthcoming paper, Brandon L. Garrett criticizes the Fifth Circuit's merely procedural remedy on the same ground. *See* Brandon L. Garrett, *Wealth, Equal Protection, and Due Process*, WM. & MARY L. REV. (forthcoming 2019) (manuscript at 21), https://ssrn.com/abstract=3313358.

68. 342 U.S. 1, 5 (1951).

69. United States v. Salerno, 481 U.S. 739, 752 (1987).

70. *E.g.*, Walker v. City of Calhoun, 901 F.3d 1245, 1258 (11th Cir. 2018).

That does not mean that an Eighth Amendment challenge against common municipal bail systems would be doomed to fail. Recent scholarship by Beth Colgan on the Excessive Fines Clause convincingly demonstrates that the original public meaning of "excessive" directly related to the defendant's means and to the consequences that would follow if a defendant could not pay a fine.[71] Colgan's historical work and arguments could inform the interpretation of the Excessive Bail Clause since, as the Court recently noted, the two clauses "place parallel limitations on the power of those entrusted with the criminal-law function of government."[72]

* * *

To summarize, a line of Supreme Court cases about postconviction fines appears ready-made to challenge pretrial bail regimes on equal protection grounds. Applying that line would forbid detaining the indigent when the wealthy could go free unless the state could find no other alternative to assure the presence of the defendant at trial or to protect public safety. Meanwhile, the Supreme Court's due process review of the federal bail statute seems instructive—though courts are currently divided as to what that instruction is. On a strong reading, the Constitution protects the fundamental right of pretrial liberty unless the state can, as required under equal protection, show that there is no alternative to detention available to meet its interests. On a weak reading, the Constitution protects pretrial liberty with certain (as yet undefined) procedures, but if the state offers those procedures, courts may not have to rigorously inquire into whether alternatives to detention are available to meet the state's interest. Under *Salerno*, those procedures may include an adversary hearing, findings on the record by a clear-and-convincing standard, and a right of expeditious appeal.

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71. Beth Colgan, *Reviving the Excessive Fines Clause*, 102 CALIF. L. REV. 277 (2014).

72. Timbs v. Indiana, No. 17-1091, slip op. at 3 (U.S. Feb. 20, 2019) (majority opinion) (internal quotation marks and citation omitted). Even if *Stack* remains the dominant interpretation of "excessive" bail, the test for evaluating whether a bail amount is disproportionate to meeting the state's interests may well turn out to be functionally the same analysis as the due process or equal protection inquiry. For instance, the Sixth Circuit, in *Fields v. Henry County*, 701 F.3d 180 (6th Cir. 2012), indicated that bail may be "excessive" if (1) the bail set is "grossly disproportional to the gravity" of a charged offense, *id*. at 184 (quoting *United States v. Bajakajian*, 524 U.S. 321, 334 (1998)); (2) the evidence produced at a bail hearing "was too weak to justify the amount," *id.* at 185 (citing *United States v. Leisure*, 710 F.2d 422, 428 (8th Cir. 1983)); or (3) the bail "was much higher than normal for such charges or . . . the judge relied upon impermissible factors," *id*. (citing *Wagenmann v. Adams*, 829 F.2d 196, 213 (1st Cir. 1987)). Taken together, such factors tend to mimic a tailoring standard similar to heightened scrutiny, especially if a court were to inform its sense of proportionality based on recent empirical work on the relative ineffectiveness of money bail at meeting the state interests at stake. *See infra* notes 81-89 and accompanying text. That is, the Eighth Amendment is not meaningless under *Stack*; it just may not have much independent meaning beyond what the other clauses already require, substantively and procedurally.

To be sure, this survey does not exhaust potential theories for how the Federal Constitution may govern the municipal regulation of bail. The Supreme Court has, for instance, applied due process and equal protection principles expansively in cases that Judith Resnik characterizes as involving "[a]symmetrical power and high stakes," such as when striking down filing fees to access divorce proceedings in *Boddie v. Connecticut*.[73] Perhaps even more surprising than the absence of the Eighth Amendment in recent bail challenges is the absence of racial discrimination claims, given the wildly disproportionate impact of mass pretrial detention on communities of color.[74] This survey, however, focuses on the arguments litigants are making in federal courts, which are necessarily more limited in imaginative range. So long as the Court disfavors racial discrimination claims based on disparate impact without ironclad proof of intentional animus,[75] litigators have steered their arguments towards the more favorable precedents on discrimination based on wealth and class. The Supreme Court has largely foreclosed the use of statistical evidence to establish racial discrimination,[76] while statistics on wealth discrimination have managed to have more sway in federal courts so far.[77]

Applying equal protection and due process standards in recent challenges to state and municipal bail systems has raised two particularly thorny issues. How those issues are ultimately resolved in the federal courts will dramatically affect the trend of modern bail reform and will largely determine whether or not bail reformers can continue to proceed in federal court challenges.

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73. 401 U.S. 371 (1971); *see* Judith Resnik, *Courts* and *Economic and Social Rights/Courts* as *Economic and Social Rights*, *in* THE FUTURE OF ECONOMIC AND SOCIAL RIGHTS 259, 277 (Katharine G. Young ed., forthcoming 2019).

74. *See, e.g.*, Brief for Amici Curiae NAACP Legal Defense and Educational Fund in Support of Plaintiffs' Motion for Preliminary Injunction, ODonnell v. Harris County, Civil No. 16-1414 (S.D. Tex. 2017) ("African Americans make up 18% of Harris County's adult population, but account for 48% of the adult prison population in Harris County.").

75. *See, e.g.*, McCleskey v. Kemp, 481 U.S. 279 (1987); Washington v. Davis, 426 U.S. 229 (1976).

76. *See* Reva B. Siegel, *Blind Justice: Why the Court Refused to Accept Statistical Evidence of Discriminatory Purpose in* McCleskey v. Kemp *— and Some Pathways for Change*, 112 NW. U. L. REV. 1269 (2018).

77. *See infra* Section II.A (discussing federal courts' consideration of statistical evidence in the Harris County case).

II. THE CENTRAL DIFFICULTY: A CRISIS OF SCRUTINY

A. Federal Court Scrutiny

The first puzzle is what level of scrutiny federal courts must use to review challenges to state and local bail systems, since the standard is far from clear in the case law. By this point, the general reader may be getting frustrated. Levels of review have not been a fashionable academic topic for some time.[78] After all, what practical difference does any of this make? When do we actually start talking about the substantive justice of pretrial incarceration?

To answer, we must turn away from the cases for a moment and consider both a truly astounding literature on pretrial bail and detention emerging in the social sciences and impressively broad-based social movements to reform bail. In the last half-decade, an unprecedented number of rigorously controlled, scientific analyses of pretrial bail systems have appeared in both social science journals and law reviews (in fact, the *Yale Law Journal* has published three articles on the implications of this research for pretrial detention in recent years).[79]

Taken together, this literature helps to quantify just how devastating pretrial detention is for defendants. Controlling for relevant factors, detained misdemeanor defendants in Harris County, for instance, are twenty-five percent more likely to be convicted and forty-three percent more likely to be sentenced to jail than their counterparts who were released pretrial.[80] Detained defendants are more likely to lose jobs, apartments, and child custody, and some studies have suggested that pretrial detention is itself substantially criminogenic.[81] Importantly, the research indicates that all of these adverse effects are triggered by as little as two or three days of detention.[82]

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78. *But see* Emma Kauffman, *Segregation by Citizenship*, 132 HARV. L. REV. 1379 (2019) (documenting the rise of the all-foreign prison and arguing that federal penal segregation by citizenship status should trigger strict scrutiny).

79. Sandra G. Mayson, *Bias In, Bias Out*, 128 YALE L.J. (forthcoming 2019); Sandra G. Mayson, *Dangerous Defendants*, 127 YALE L.J. 490 (2018); Samuel R. Wiseman, *Pretrial Detention and the Right to Be Monitored*, 123 YALE L.J. 1344 (2014).

80. Paul Heaton et al., *The Downstream Consequences of Misdemeanor Pretrial Detention*, 69 STAN. L. REV. 711, 741-59, 787 (2017).

81. Will Dobbie et al., *The Effects of Pre-Trial Detention on Conviction, Future Crime, and Employment: Evidence from Randomly Assigned Judges*, 108 AM. ECON. REV. 201, 224-26 (2018); Heaton et al., *supra* note 80, at 718; *see also id.* at 760 (considering possible causes of pretrial detention's criminogenic effect).

82. CHRISTOPHER T. LOWENKAMP ET AL., LAURA & JOHN ARNOLD FOUND., THE HIDDEN COSTS OF PRETRIAL DETENTION 10-11 (2013).

Moreover, recent work on the operation of incentives in the pretrial phase indicates that these costs are not only devastating but unnecessary. Charitable bail funds—which demand no cash from and therefore impose no financial incentives on their bailees—have achieved promising appearance rates with little more than low-cost text-message reminders and transportation subsidies.[83] Other empirical work shows that risks of dangerousness and flight can be successfully managed at significantly lower cost than pretrial incarceration.[84]

Here, then, is the fundamental crisis of bail: If these studies make their way into the factual record of a federal court applying a searching level of review, the most common American bail systems, which casually impose detention for failure to put up secured money, are almost certain to fall. The common assumption that secured money bail incentivizes appearance in some way that other public assistance or sanctions could not completely collapses under their weight.[85] Although municipalities have employed these systems for decades all across the country, no federal court that has reached the merits under heightened scrutiny has yet sustained these systems against challenges demanding extensive remediation by the trial courts.

Harris County is the model case here. In an extensive opinion—193 pages as docketed—Judge Rosenthal reviewed not only the secondary literature discussed

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83. Jason Tashea, *Text-Message Reminders Are a Cheap and Effective Way to Reduce Pretrial Detention*, A.B.A. J. (July 17, 2018, 7:10 AM CDT), http://www.abajournal.com/lawscribbler/article/text_messages_can_keep_people_out_of_jail [https://perma.cc/A3FP-GY6B]; *see also* PRETRIAL SERVS. AGENCY FOR D.C., CONGRESSIONAL BUDGET JUSTIFICATION AND PERFORMANCE BUDGET REQUEST, FY 2019, at 27 (2018). As Jocelyn Simonson has argued, charitable bail funds not only call into question the incentive argument, but also suggest reconceiving the social costs weighed in a pretrial detention decision. Instead of assuming that the public's interest is secured only by pretrial detention, *community* bail funds show the public interest in release and restoration of defendants to jobs and homes. Jocelyn Simonson, *Bail Nullification*, 115 MICH. L. REV. 585, 612-21 (2017); *see also* Crystal S. Yang, *Toward an Optimal Bail System*, 92 N.Y.U. L. REV. 1399, 1417-29 (2017) (arguing that in a cost-benefit analysis of pretrial detention, various community interests are a *cost* of pretrial detention).

84. Shima Baradaran & Frank L. McIntyre, *Predicting Violence*, 90 TEX. L. REV. 497, 528-29 (2012); Lauryn P. Gouldin, *Defining Flight Risk*, 85 U. CHI. L. REV. 677, 729-35 (2018).

85. Arpit Gupta, Christopher Hansman & Ethan Frenchman, *The Heavy Costs of High Bail: Evidence from Judge Randomization*, 45 J. LEGAL STUD. 471, 476 (2016); Michael R. Jones, *Unsecured Bonds: The As Effective and Most Efficient Pretrial Release Option*, PRETRIAL J. INST. (Oct. 2013). See also the recently released study of Philadelphia's reduction in cash-bail requirements since District Attorney Larry Krasner instituted an office policy against requesting bail for a range of offenses. Aurelie Ouss & Megan T. Stevenson, *Evaluating the Impacts of Eliminating Prosecutorial Requests for Cash Bail* 1 (George Mason Legal Studies Research Paper No. LS 19-08, Feb. 17, 2019), https://ssrn.com/abstract=3335138 (finding that the percentage of defendants released on their own recognizance—rather than on monetary or other conditions—increased by twelve points following the policy while appearance rates remained stable).

above, but also made-to-order studies conducted by expert sociologists and data scientists retained by the parties. She concluded that "release on secured financial conditions does not assure better rates of appearance or of law-abiding conduct before trial compared to release on unsecured bonds or nonfinancial conditions of supervision."[86] The Fifth Circuit affirmed the district court's factual findings,[87] and other courts are now relying on those findings as they scrutinize other municipal bail systems.[88]

Judge Rosenthal's opinion also scrutinized the record of recent bail reform occurring across the country, most of it in response to social and political movements marshalling constitutional arguments not in federal court cases but in local legislatures and other rulemaking bodies.[89] The court considered, for instance, statutory changes prioritizing release and procedurally protected and transparent detention orders over money bail in Washington, D.C., New Mexico, and New Jersey, as well as court administrative rules forbidding pretrial detention based solely on indigence in Maryland and New Orleans.[90] If the decision were written today, it could have listed even more jurisdictions with recent significant political change, including Atlanta, Chicago, and California.[91]

Although it carefully stressed that "it is not a federal court's role in any way to make policy judgments," the district court in Harris County noted that there is a "clear and growing movement" toward questioning historical bail practices on *constitutional*—and not just *political*—grounds.[92] The court observed that reforming jurisdictions broadly divided into two camps[93]: those that anchored their reforms in the constitutional logic of the American Bar Association's *Standards for Pretrial Release*, which argues that bail "must be within the reach of the defendant"[94] and those that tracked the reasoning of the Obama-era Department

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86. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1118 (S.D. Tex. 2017).

87. ODonnell v. Harris County, 892 F.3d 147, 162-63 (5th Cir. 2018).

88. *E.g.*, Shultz v. State, 330 F. Supp. 3d 1344, 1367-68 (N.D. Ala. 2018); Daves v. Dallas County, 341 F. Supp. 3d 688, 696-97 (N.D. Tex. 2018).

89. *ODonnell*, 251 F. Supp. 3d at 1078-84.

90. *See id*.

91. *See* S.B. 10, 2017-2018 Reg. Sess. (Cal. 2018); Atlanta, Ga., Ordinance 18-O-1045 (Feb. 5, 2018), http://citycouncil.atlantaga.gov/Home/ShowDocument?id=983 [https://perma.cc/J9Y9-56QW]; Cook County, Ill., Gen. Order No. 18.8A(Ill. Cir. Ct. July 17, 2017), http://www.cookcountycourt.org/Portals/0/Orders/General%20Order%20No.%2018.8a.pdf [https://perma.cc/NS8M-AKGP].

92. *ODonnell*, 251 F. Supp. 3d at 1084.

93. *Id*. at 1083-84.

94. *Id.* at 1083; ABA STANDARDS FOR CRIMINAL JUSTICE, PRETRIAL RELEASE, Standard 10-1.4 (AM. BAR ASS'N, 3d ed. 2007).

of Justice,[95] which argued that unaffordable bail is permissible only when a court finds that release on any other conditions would not reasonably assure the individual's appearance. The constitutional pronouncements of the ABA, the Department of Justice, and state supreme courts and legislatures helped supply the case law, so to speak, that never developed as Foote and other reformers expected over the last five decades. The recognition in a federal court that social and political movements toward bail reform are relevant to constitutional analysis opens up room for other judges (and advocates) to also draw on political change in their constitutional analysis.[96] It also makes it easier for courts to forge new constitutional understandings in the face of decades of Supreme Court silence on the issue. In short, social movements fuel the current crisis of bail as much as the empirical studies.

Some courts appear reluctant to find that such a widespread and longstanding system of practice could have been unconstitutional and in need of the kind of strict federal court supervision required in, for instance, the desegregation cases. But given the factual findings of the federal trial courts and the widely accepted and broadly mobilized studies on which they rely, there is very little ground on which to sustain common municipal bail systems on the merits—unless the federal courts cannot develop these records in the first place. This is why, going forward, the standard of scrutiny will be critically important. The Supreme Court declined the opportunity to take up the question this term.[97] Whether or not it addresses these issues soon, it will have to do so in the years ahead. A $2 billion commercial bail-bond industry and the federal supervision of a thousand local regimes depend on it.

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95. Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellee and Urging Affirmance on the Issue Addressed Herein, Walker v. City of Calhoun, 682 Fed. Appx. 721 (11th Cir. 2017), 2016 WL 4417421.

96. The story of recent social movements towards bail reform has yet to be told. For a partial list of what organizers, lawyers, faith leaders, and academics have recently accomplished to dismantle pre- and post-trial incarceration, see Alec Karakatsanis, *The Punishment Bureaucracy: How to Think About "Criminal Justice Reform,"* 128 YALE L.J.F. 848, 932-35 (2019). For various articulations of how social and political mobilization can inform constitutional jurisprudence, see Jack M. Balkin, *How Social Movements Change (or Fail to Change) the Constitution: The Case of the New Departure*, 39 SUFFOLK U. L. REV. 27 (2005); Lani Guinier & Gerald Torres, *Changing the Wind: Notes Towards a Demosprudence of Law and Social Movements*, 123 YALE L.J. 2740 (2014); Martha Minow, *Law and Social Change*, 62 UMKC L. REV. 171 (1993); Reva B. Siegel, *Constitutional Culture, Social Movement Conflict and Constitutional Change: The Case of the De Facto ERA*, 94 CALIF. L. REV. 1323 (2006).

97. *See* Walker v. City of Calhoun, 901 F.3d 1245 (11th Cir. 2018*), cert. denied, Walker*, No. 18-814 (U.S. Apr. 1, 2019).

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As noted above, the Eleventh Circuit has read *Salerno* as requiring only a procedural due process balancing of state and individual interests and therefore does not demand particularly rigorous procedural protections.[98] On the other hand, the Ninth Circuit, sitting en banc, is adamant that *Salerno* requires strict scrutiny of pretrial detention regimes.[99] The Supreme Court itself has given some indication that it views *Salerno* as among its strict-scrutiny cases,[100] but it has not definitively ruled so.

The Court has been even more circumspect about the equal protection analysis in *Bearden*. Although the parties in *Bearden* debated strict scrutiny in their briefing,[101] the *Bearden* Court refused to declare a level of review, rejecting what it called a "resort to easy slogans or pigeonhole analysis."[102] The Court noted that in its precedents on wealth-based detention, "[d]ue process and equal protection principles converge in the Court's analysis," and it largely left the matter there.[103] By focusing on wealth classifications and by demanding that the state use the least restrictive alternative available to meet its interests, *Bearden* seems to have functionally applied strict scrutiny while adamantly refusing to say so.

Accordingly, lower federal courts have come out all over on the question of scrutiny. Some have applied "heightened" scrutiny while attempting to dodge specifying how that differs from strict scrutiny.[104] A district court in California, and now the Eleventh Circuit, found that *Bearden* requires only rational basis

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98. *Walker*, 901 F.3d at 1262-65; *see also* Woods v. City of Michigan City, 940 F.2d 275, 283-86 (7th Cir. 1991) (Will, J., concurring); Katona v. City of Cheyenne, 686 F. Supp. 289, 293 (D. Wyo. 1988).

99. Lopez-Valenzuela v. Arpaio, 770 F.3d 772, 780-81 (9th Cir. 2014) (en banc). The highest courts of Arizona and Massachusetts and a California Court of Appeals have taken the same view of *Salerno*. *See* Simpson v. Miller, 387 P.3d 1270 (Ariz. 2017); Brangan v. Commonwealth, 80 N.E.3d 949 (Mass. 2017); *In re* Humphrey, 228 Cal. Rptr. 3d 513 (Ct. App. 2018).

100. In *Foucha v. Louisiana*, for instance, the Court held that the detention of defendants acquitted on insanity grounds violated substantive due process on the basis that "unlike the sharply focused scheme at issue in *Salerno*, the Louisiana scheme of confinement is not carefully limited." 504 U.S. 71, 81 (1992); *see also* Reno v. Flores, 507 U.S. 292, 302 (1993); *id*. at 316 (O'Connor, J., concurring).

101. Brief for Petitioner at 24-32, Bearden v. Georgia, 461 U.S. 660 (1983) (No. 81-6633); Brief for Respondent at 22-29, *Bearden*, 461 U.S. 660 (No. 81-6633).

102. *Bearden*, 461 U.S. at 666-67.

103. *Id.* at 665. For an argument that *Bearden* provides a sound intersectional theory of "equal process," see Garrett, *supra* note 67.

104. *See, e.g.*, Buffin v. City & County of San Francisco, No. 15-CV-04959-YGR, 2018 WL 424362, at *9 (N.D. Cal. Jan. 16, 2018).

review of bail systems.[105] The district court in Harris County applied "intermediate scrutiny," which has the advantage of compromise, applying heightened (but not the highest) scrutiny. Nevertheless, the choice is somewhat awkward since intermediate scrutiny to this point has only applied to gender discrimination and certain free speech claims.[106] In affirming the Harris County order, the Fifth Circuit ruled only that the application of intermediate scrutiny "was not in error," given that the en banc Fifth Circuit had previously applied the *Bearden* predecessor cases to pretrial detention.[107] Thus, the Eleventh and Ninth Circuits have divided over the question of scrutiny under *Salerno*, while the Fifth and Eleventh have divided over the question of scrutiny under *Bearden*.[108]

There are a number of good reasons to conclude that strict, or at least heightened scrutiny, makes the best sense of the Supreme Court's precedents. If heightened scrutiny, narrow tailoring, and a substantive finding of necessity protect convicted indigent defendants, they surely ought to apply in the pretrial context, where the presumption of innocence and a defendant's ability to prepare for trial are most vulnerable.[109] If Congress's bail statute was constitutional because it "careful[ly] delineat[ed]" the circumstances in which detention was authorized, and these were limited to cases involving "extremely serious offenses,"[110] municipal systems that detain forty percent of misdemeanor defendants until the termination of their proceedings—as Harris County did—should at a minimum be subjected to heightened review.[111]

The trial court in Harris County hinted that there may be another good reason to read the Supreme Court's precedents in favor of searching review of municipal bail systems in the federal courts. In its conclusion on Harris County's motion to dismiss, the court recalled the 1871 origins of 42 U.S.C. § 1983.[112] Now

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105. Walker v. City of Calhoun, 901 F.3d 1245, 1262 (11th Cir. 2018); Welchen v. County of Sacramento, No. 2:16-cv-00185-TLN-KJN, 2016 WL 5930563, at *11 (E.D. Cal. Oct. 10, 2016). Notably, the *Schultz* court, bound by *Walker*, nevertheless found Cullman County's bail system failed rational basis review. Shultz v. State, 330 F. Supp. 3d 1344, 1358, 1365 n.23 (N.D. Ala. 2018).

106. ODonnell v. Harris County, 251 F. Supp. 3d 1052, 1138-39 (S.D. Tex. 2017), *aff'd as modified*, 892 F.3d 147 (5th Cir. 2018); *see* Ward v. Rock Against Racism, 491 U.S. 781, 798-99 (1989); Craig v. Boren, 429 U.S. 190, 197 (1976).

107. *ODonnell*, 892 F.3d at 161-62.

108. The *Buffin* court in the Northern District of California has also squarely disagreed with the Eleventh Circuit's ruling in *Walker*. *See Buffin*, 2019 WL 1017537, at *15 ("Ultimately, this Court does not share the same view on the principle of liberty as the *Walker* court.").

109. *See supra* notes 32-35 and accompanying text.

110. United States v. Salerno, 481 U.S. 739, 750-51 (1987).

111. *See ODonnell*, 251 F. Supp. 3d at 1105.

112. ODonnell v. Harris County, 227 F. Supp. 3d 706, 759 (S.D. Tex. 2016), *aff'd in part, rev'd in part*, 892 F.3d 147 (5th Cir. 2018).

the main vehicle for litigating violations of constitutional rights by state actors, § 1983 arose from the Reconstruction Congress's effort "to enforce provisions of the Fourteenth Amendment against those who carry a badge of authority of a State and represent it in some capacity, whether they act in accordance with their authority or misuse it."[113] The federal district court applied this history by cutting through the myriad procedural and jurisdictional challenges raised by the defendant county, reasoning that although

> [m]ultiple and overlapping authorities may contribute to a policy of denying freedom from pretrial detention to those accused in misdemeanor cases solely because they are too poor to pay a bail bond, . . . the existence of multiple and overlapping authorities cannot, on its own, shield officers or official bodies from liability.[114]

Indeed, the Reconstruction Era origins of modern civil rights law may likewise counsel strict scrutiny and a substantive finding of necessity before defendants can be jailed for inability to pay bail.

The need for federal oversight of state and municipal bail regimes was a critical spur—perhaps *the* critical spur—to the passage of the Reconstruction Amendments, the Civil Rights Act of 1866, and the Ku Klux Klan Act of 1871 (now more familiar to us as 42 U.S.C. § 1983). Legal historians often overlook the role of bail in southern resistance to Reconstruction. A full account lies beyond the scope of this Essay, but a couple of examples can illustrate the key point. The black codes' infamous ban on African American ownership of firearms, for instance, was enforced by holding violators "in default of bail," or under preventive detention as we would now call it.[115] The economic historian Jennifer Roback notes that bail was crucial to the debt peonage system erected by the southern black codes.[116] Former masters would stand surety to freedmen incarcerated on manufactured criminal charges. Freedmen were then bound by the black codes to work off their bail debt in service to their former masters.[117] The South's postbellum attempt to reinstitute slavery, working hand in hand with its reinscription of racial hierarchy, was thus primarily a function of bail law.

In countermanding the black codes and empowering federal courts to guard against their reinstitution, the Reconstruction Congress was centrally concerned

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113. *Id.* (citing Hafer v. Melo, 502 U.S. 21, 28 (1991)).

114. *ODonnell*, 227 F. Supp. 3d at 759.

115. 1866 Miss. Laws 165. On the expansion of this prohibition across the postbellum South, see *District of Columbia v. Heller*, 554 U.S. 570, 614-16 (2008).

116. Jennifer Roback, *Southern Labor Law in the Jim Crow Era: Exploitative or Competitive?*, 51 U. CHI. L. REV. 1161, 1175-76 (1984).

117. *Id.*

with federal scrutiny of state practices, both written and unwritten.[118] These of course included practices of bailing or detaining freedmen.[119] Anthony Amsterdam argues that, properly understood in context, the major Reconstruction acts were meant to grant freedmen broad rights of removal to federal court in order to bring as-applied challenges to the unequal enforcement of state criminal law, including discriminatory pretrial proceedings.[120] From 1880 to the turn of the century, the Supreme Court eroded the power of removal in state criminal proceedings.[121] Nevertheless, the centrality of bail to the Reconstruction legacy, including our modern § 1983, ought to stand for *something* more than federal court deference to any proposed rationality of unequal bail regimes that afford minimal process to defendants. One key way to uphold this legacy is to read the Supreme Court's precedents in *Bearden* and *Salerno* straightforwardly to require heightened federal court review of allegedly unequal and arbitrary municipal bail regimes.

B. Probable Cause

A final difficulty lies in figuring out where probable cause properly fits into the system of pretrial arrest and bail, or more succinctly, what the Fourth Amendment has to do with the Fourteenth. In *Gerstein*, the Supreme Court ruled that the Fourth Amendment requires that a defendant arrested without a warrant appear before a neutral magistrate for a finding of probable cause "promptly" after arrest.[122] A later case defined promptness as within forty-eight

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118. The debates surrounding the Civil Rights Act of 1866, for example, emphasize the need for federal oversight over racially oppressive state policy. For the Senate debates, see CONG. GLOBE, 39th Cong., 1st Sess. 474 (Jan. 29, 1866) (statement of Sen. Trumbull); *id*. at 602 (Feb. 2, 1866) (statement of Sen. Lane); *id.* at 603 (statement of Sen. Wilson); *id.* at 605 (statement of Sen. Trumbull); *id.* at 1759 (April 4, 1866) (statement of Sen. Trumbull). And for the House debates, see *id*. at 1118 (March 1, 1866) (statement of Rep. Wilson); *id*. at 1123-24 (statement of Rep. Cook); *id*. at 1151 (March 2, 1866) (statement of Rep. Thayer); *id.* at 1160 (statement of Rep. Windom); *id*. at 1267 (March 8, 1866) (statement of Rep. Raymond); *see also id*. at 340 (Jan. 22, 1866) (statement of Sen. Wilson on the amendatory freedmen's bureau bill) (emphasizing the need for federal oversight).

119. For a vivid example of the way southern sheriffs could wield bail to coerce sale of freedmen's property, see the Radical Republican Albion Tourgée's semi-autobiographical account of his time as a state judge in Reconstruction North Carolina. ALBION TOURGÉE, BRICKS WITHOUT STRAW: A NOVEL 261-65 (1880).

120. Anthony G. Amsterdam, *Criminal Prosecutions Affecting Federally Guaranteed Civil Rights: Federal Removal and Habeas Corpus Jurisdiction To Abort State Court Trial*, 113 U. PA. L. REV. 793 (1965).

121. *See, e.g.*, Kentucky v. Powers, 201 U.S. 1 (1906); Neal v. Delaware, 103 U.S. 370 (1881); Virginia v. Rives, 100 U.S. 313 (1880).

122. Gerstein v. Pugh, 420 U.S. 103, 125 (1975).

hours after arrest.[123] The *Gerstein* Court ruled that these hearings did not require representation by counsel under the slight procedural requirements of the Fourth Amendment. In a separate passage, the Court encouraged states to experiment with how they fulfilled their various constitutional obligations before trial, noting that states could choose to combine the probable-cause hearing with other preliminary matters, such as the setting of bail.[124] The difficult question is whether the Supreme Court foreclosed the application of heightened scrutiny to pretrial detention by substituting only Fourth Amendment protections instead.

Gerstein is open to two entirely different readings. *Gerstein* could be read to say that only minimal process flows from the Fourth Amendment right against unreasonable seizure, because *other rights* are protected by *other requirements*, including due process and equal protection. After all, the Court majority in response to the dissent considered the finding of probable cause "a threshold right" and noted it was "in fact only the *first* stage of an elaborate system, unique in jurisprudence, designed to safeguard the rights of those accused of criminal conduct."[125] On this reading, a probable-cause determination may be combined with bail setting or any other proceeding, but only if those proceedings continue to satisfy the heighted requirements the Constitution places on them, not the lower "threshold" standards of probable cause. For instance, a jurisdiction that combined the finding of probable cause with an actual arraignment would surely have to provide counsel, since the Court has long considered arraignment a "critical stage" of criminal proceedings.[126]

But there is another possible reading of *Gerstein*. Several times in its decision the Court incautiously switched from speaking about probable cause *for the arrest* to probable cause *for the detention* without considering whether different standards ought to apply in the days and weeks after an arrest. Even as it declared the Fourth Amendment only a "threshold right," the Court implied that this threshold right might govern the balance of interests between the state and the individual through the entire pretrial phase, "including the detention of suspects pending trial."[127] Just two terms ago, the Court declared, citing *Gerstein*, that

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123. County of Riverside v. McLaughlin, 500 U.S. 44, 56 (1991). Technically, *McLaughlin* established that administrative processing delays up to forty-eight hours are presumptively reasonable, not that they are entirely immune from challenge.

124. 420 U.S. at 120-21, 123-24.

125. *Id*. at 125 n.27.

126. Rothgery v. Gillespie County, 554 U.S. 191, 212-13 (2008); Michigan v. Jackson, 475 U.S. 625, 629-30 n.3 (1986); Brewer v. Williams, 430 U.S. 387, 398-99 (1977).

127. 420 U.S. at 125 n.27.

"[t]he Fourth Amendment . . . establishes the standards and procedures governing pretrial detention."[128] In that case, Justice Kagan's opinion for the Court *expanded* a right of action by a defendant arrested on false pretenses. It would be a perverse result to read the statement as a retraction of pretrial due process down to the minimal standards of the probable cause hearing, but that reading is at least theoretically available.

Indeed, the Eleventh Circuit has adopted just that reading. Viewing *Salerno* and *Bearden* through the lens of *Gerstein*, rather than the other way around, the Eleventh Circuit panel decided that, at least for the first forty-eight hours after arrest, pretrial detention regimes are subject only to rational basis review, and that review is presumptively satisfied if the regime meets the minimal standards of the Fourth Amendment.[129] The panel ruled that the Equal Protection Clause had no independent force in such a case, because detention within the first forty-eight hours after arrest was not an "absolute deprivation" of liberty such that the heightened standards of *Rodriguez* and *Bearden* would apply.[130]

The Eleventh Circuit's reading of *Gerstein* may be plausible, but *Gerstein*'s post-arrest procedures scarcely provide a proper assessment for a detention that may last months or years. The *Gerstein* Court said little directly about duration, yet it did seem to imagine that the standards it was announcing were to apply to a relatively short period of post-arrest confinement—or as the Court put it, "a brief period of detention to take the administrative steps incident to arrest."[131] And although it may seem intuitive that only limited due process can be provided in the hours after arrest as the state conducts its initial investigation, a categorical rule limiting due process during the first forty-eight hours after *all* arrests is overbroad.[132] *Salerno* indicated that pretrial detention should be limited to "extremely serious offenses," a substantive limitation that can be applied immediately upon arrest and determination of the charge.[133] In fact, in practice, most regimes identify the charge and release a defendant within minutes, hours, or at most a day *if the defendant can pay* a prescheduled bail amount.[134] The practical

128. Manuel v. City of Joliet, 137 S. Ct. 911, 914 (2017).

129. Walker v. City of Calhoun, 901 F.3d 1245, 1262, 1266 (11th Cir. 2018).

130. *Id.* at 1261.

131. 420 U.S. at 113-14.

132. One root of the problem is the Court's subsequent definition of forty-eight hours as "prompt," a serious misstep. *See* County of Riverside v. McLaughlin, 500 U.S. 44, 57 (1991). This misstep is made all the more unfortunate by the fact it was rendered in 1991, right before networked computing and digital telephony dramatically changed the technological timeframe of administrating arrest.

133. United States v. Salerno, 481 U.S. 739, 750 (1987).

134. *See* Lindsay Carlson, *Bail Schedules: A Violation of Judicial Discretion?*, PRETRIAL JUST. INST. 3 (2010), https://university.pretrial.org/HigherLogic/System/DownloadDocumentFile.ashx

reality that many wealthy defendants are able to bail out so promptly suggests that the state's interest in administrative detention cannot be so high as to defeat equal protection challenges, even those challenging brief or early periods of post-arrest detention. After all, the adverse consequences of discriminatory pretrial detention—including its criminogenic effects—begin to mount as soon as the second day of detention.[135]

The Eleventh Circuit's crabbed reading of *Gerstein* has been replicated by a Fifth Circuit motions panel.[136] Yet while some federal courts may be willing to dodge the requirements of the Fourteenth Amendment by looking only at the Fourth, the Eleventh Circuit's reading of *Rodriguez* is completely untenable. The "absolute" quality of a liberty deprivation cannot turn on temporality. If it did, only life imprisonment without parole would constitute an absolute deprivation of liberty; yet that was clearly not what the Court had in mind in *Rodriguez* or in its post-conviction fine cases, all of which involved imprisonment of limited duration. Rather, as the Court has long held in its habeas jurisprudence, "absolute" turns on the degree of confinement, and incarceration in a jail is the absolute height of depriving a person of bodily liberty.[137] In sum, despite the Supreme Court's inattentive generalizations implying that only the Fourth Amendment governs pretrial detention, federal courts must continue to apply the full range of constitutional protections to their review of state and municipal detention regimes, as in fact the Court *itself* did in both *Bearden* (when evaluating a probationer's arrest and detention under equal protection and due process) and *Salerno* (when evaluating a defendant's pretrial detention under due process and the Eighth Amendment).

CONCLUSION

Where may the present crisis end? As the devastation of mass pretrial incarceration increasingly works its way into the public record, the federal courts find themselves at the head of a path that could lead to federal court supervision of municipal regimes that is every bit as extensive and disruptive as the desegregation dockets after *Brown v. Board of Education*.[138] Whether the courts will rise to

?DocumentFileKey=b646a57f-6399-2fe4-5683-021480c3634a [https://perma.cc/XPL9-JRZH] (noting that many jurisdictions, including Los Angeles County, use bail schedules to permit "automatic release at the jail door" for defendants who can pay, while those who cannot must await a hearing to determine their eligibility for nonmonetary or affordable conditions of release).

135. Lowenkamp et al., *supra* note 83, at 10-11.

136. ODonnell v. Goodhart, 900 F.3d 220, 226-28 (5th Cir. 2018).

137. *See* Rosales-Mireles v. United States, 138 S. Ct. 1897, 1907 (2018).

138. 347 U.S. 483 (1954).

meet this crisis and carry out their role as guardians of equal protection and due process against local oppression of the most politically powerless classes is perhaps doubtful.[139] Already, appellate courts are finding ways to look past the mounting evidence of rampant inequality and human rights violations in pretrial incarceration in the name of "flexibility and experimentation" and "deference to the demands of federalism."[140]

But the crisis touched off in Harris County may find another template for its resolution there. In the wake of the federal court injunction, a slate of political challengers campaigned against the defendant judges on a platform of settling the federal case and reforming the misdemeanor bail system. In November 2018, the challengers won across the board.[141] In January 2018, the new defendants dropped all further appeals and reformed their system legislatively.[142] Harris County had paid elite national law firms over nine million dollars to defend the bail suit.[143] Ultimately that money bought the county nothing more than a slight reprieve until election day.

A number of federal appellate courts will soon face the present crisis "'twixt old systems and the Word."[144] They must respond by enforcing clear constitutional boundaries on local discretion without reference to docket pressures or an

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139. However, federal court intervention in municipal bail regimes would appear to be a prime candidate for the model of "destabilizing" public rights litigation. *See* Charles F. Sabel & William H. Simon, *Destabilization Rights: How Public Law Litigation Succeeds*, 117 HARV. L. REV. 1016 (2004).

140. Walker v. City of Calhoun, 901 F.3d 1245, 1268 (11th Cir. 2018) (quoting Gerstein v. Pugh, 420 U.S. 103, 123 (1975)).

141. Brian Rogers, *Republican Judges Swept Out by Voters in Harris County Election*, HOUS. CHRON. (Nov. 10, 2018), https://www.chron.com/news/houston-texas/houston/article/GOP-Free-Zone-Republican-judges-swept-out-by-13376806.php.

142. Gabrielle Banks, *Harris County Judges Unveil Drastic New Plan for Releasing Defendants on No-Cash Bail*, HOUS. CHRON. (Jan. 18, 2019), https://www.chron.com/news/houston-texas/houston/article/Harris-County-judges-to-unveil-drastic-new-plan-13541189.php; Keri Blakinger & Gabrielle Banks, *Newly Elected Misdemeanor Judges Drop Appeal in Landmark Harris County Bail Lawsuit,* HOUS. CHRON. (Jan. 17, 2019), https://www.chron.com/news/houston-texas/article/Newly-elected-misdemeanor-judges-move-to-end-13502897.php.

143. Banks, *supra* note 142.

144. JAMES RUSSELL LOWELL, THE PRESENT CRISIS (1845). Lowell's poem about the abolition crisis became a favorite of civil rights activists in the twentieth century, and the NAACP named its publication *The Crisis* after it. *See* Amy Helene Kirschke & Phillip Luke Sinitiere, *W. E. B. Du Bois as Print Propagandist*, *in* PROTEST AND PROPAGANDA: W.E.B. DU BOIS, THE CRISIS, AND AMERICAN HISTORY 28, 34 (Amy Helene Kirschke & Phillip Luke Sinitiere eds., 2014). I cite this line having in mind Robert Cover's meditation on the act of appellate judging—an act he broadly termed "the word"—with its solemn reminder that even in the mundane exercise of pronouncing levels of scrutiny, "[l]egal interpretation is either played out on the field of pain and death or it is something less (or more) than law." Robert M. Cover, *Violence and the Word*, 95 YALE L.J. 1601, 1606-07, 1622 (1986).

undue regard for federalism. If the Reconstruction-era landmark § 1983 doesn't give federal courts power to supervise and, if necessary, disrupt the jailing of impoverished minorities based on mere accusations, one of the key purposes for erecting the modern federal courts system will be thwarted.[145] But if the federal appellate courts disappoint, the fact that the lower courts have succeeded in reaching the constitutional merits against America's modern money bail system has already blazed a trail toward building political power at the local level, even in the most recalcitrant of municipalities.

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145. *See* Hafer v. Melo, 502 U.S. 21, 28 (1991).