

# LEGITIMACY, AUTHORITY, AND THE RIGHT TO AFFORDABLE BAIL

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## ABSTRACT

Bail reform is hot. Over the past two years, jurisdictions around the country have moved to limit or end money bail practices that discriminate against the poor. Although cheered on by many, bail reform is vehemently opposed by the powerful bail-bond industry. In courts around the country, lawyers representing this industry have argued that reform is unnecessary, and even unconstitutional. One particularly insidious argument advanced by bail-bond apologists is that a “wall of authority” supports the proposition that “bail is not excessive merely because the defendant is unable to pay it.”<sup>1</sup> In other words, authority rejects the right to affordable bail.

This Article critically examines this “wall of authority” and evaluates the true doctrinal standing of the right to affordable bail. After developing a novel rhetorical account of legitimacy in constitutional argument, this Article demonstrates that authority supporting the bail-bond position is illegitimate in two senses—it is formally invalid and normatively “out of bounds.” The authority is formally invalid because it originates from a single implausible constitutional interpretation and is then echoed blindly in the name of following precedent. It is normatively inappropriate because it ignores Supreme Court doctrine that requires equal justice for indigents facing incarceration.

Some walls are obstacles to freedom and justice. To liberate Eastern bloc societies oppressed by totalitarianism, President Ronald Reagan famously implored Mikhail Gorbachev to tear down the Berlin Wall. The metaphorical “wall of authority” endorsed by the bail-bond industry also imperils liberty—so this Article tears it down with original rhetorical theory and robust doctrinal analysis.

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<sup>1</sup> Memorandum from Paul D. Clement et al., Kirkland & Ellis LLP, Constitutionality of Maryland Bail Procedures 6 (Oct. 26, 2016) [hereinafter Clement Memo] (quoting *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966)).

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We are going to build a great border wall . . . .<sup>2</sup>

—Donald Trump, 2016

Mr. Gorbachev, tear down this wall!<sup>3</sup>

—Ronald Reagan, 1987

## INTRODUCTION

A powerful lobby wants you to believe that wealthy Americans have a stronger right to liberty than poor Americans. In courts around the country, this lobby’s lawyers argue that a “wall of authority” supports the proposition that our criminal justice system may constitutionally discriminate against the indigent. Although this may sound far-fetched or even conspiratorial, it is entirely accurate. Consider the following true story.

In early January 2017, the Maryland Court of Appeals—the state’s highest court—held a hearing on a proposed change to judicial rules of procedure governing pretrial detention of accused criminals.<sup>4</sup> One debated provision sought to forbid judges from imposing bail “with financial terms in form or amount that results in the

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<sup>2</sup> CNN, *Donald Trump’s Entire Republican Convention Speech*, YOUTUBE (July 21, 2016), [https://www.youtube.com/watch?v=Fs0pZ\\_GrTy8](https://www.youtube.com/watch?v=Fs0pZ_GrTy8) (at 46:29).

<sup>3</sup> Reagan Foundation, *“Berlin Wall” Speech—President Reagan’s Address at the Brandenburg Gate—6/12/87*, YOUTUBE (Apr. 15, 2009), <https://www.youtube.com/watch?v=5MDFX-dNtsM> (at 11:59).

<sup>4</sup> Ovetta Wiggins, *Jury Still Out on Maryland’s New Bail Rules*, WASH. POST (July 5, 2017), [https://www.washingtonpost.com/local/md-politics/jury-still-out-on-marylands-new-bail-rules/2017/07/03/db57a084-5a8c-11e7-9b7d-14576dc0f39d\\_story.html](https://www.washingtonpost.com/local/md-politics/jury-still-out-on-marylands-new-bail-rules/2017/07/03/db57a084-5a8c-11e7-9b7d-14576dc0f39d_story.html) [<https://perma.cc/6CZP-TNCS>].

pretrial detention of the defendant solely because the defendant is financially incapable of meeting that condition.”<sup>5</sup> Translated from legalese, this provision essentially prohibited unaffordable bails.

At the Court of Appeals hearing, the first two speakers favored the proposed rule. Brian Frosh, Maryland’s Attorney General, led off by advocating for the change to reform a broken money bond system that he said kept too many Marylanders in jail strictly because of their poverty.<sup>6</sup> Former United States Attorney General Eric Holder spoke next and emphasized how the current system discriminated against racial minorities and likely violated equal protection.<sup>7</sup> Then a third speaker stepped to the podium and vociferously opposed the proposed rule. This speaker was Paul Clement, former Solicitor General of the United States and now a partner at a law firm representing the bail-bond industry.<sup>8</sup>

Clement began by conceding that, under existing Maryland rules, “there will be circumstances where the defendant may face a bond amount that they [sic] can’t post.”<sup>9</sup> However, this raised no constitutional issue because “the Constitution does not include a right to affordable bail in every case.”<sup>10</sup> Clement continued:

I don’t think I’m going out on a limb by saying even at the time of the framing, not everybody had the same amount of money, and there were some people who were going to face a bail that they couldn’t afford, but yet the Constitution doesn’t protect against that. What it protects against is excessive bail that prevents somebody from having the option of at least posting a bail. It doesn’t guarantee everyone the means of being able to post the bail, but it does guarantee the option.<sup>11</sup>

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<sup>5</sup> This precise language was subsequently adopted as MD. RULE 4-216.1(e)(1)(A) (West 2017) (effective July 1, 2017).

<sup>6</sup> *Open Meeting to Consider the One Hundred Ninety-Second Report of the Standing Committee on Rules of Practice and Procedure Before the Court of Appeals* (Md. 2017) (testimony of Maryland Att’y Gen. Brian Frosh), <https://mdcourts.gov/sites/default/files/import/coappeals/media/2017openmtgs/20170105rulesmtgpt1.mp4> (at 10:33 to 40:28).

<sup>7</sup> *Id.* (testimony of Eric Holder, Former United States Att’y Gen.) (at 40:35 to 60:00).

<sup>8</sup> Clement is a partner at Kirkland & Ellis LLP. Clement Memo, *supra* note 1. Before joining Kirkland & Ellis, he was a partner at Bancroft PLLC, which represented the American Bail Coalition. *See, e.g.*, Brief for *Amici Curiae* American Bail Coalition et al. in Support of Defendant-Appellant and Reversal of the Preliminary Injunction, *Walker v. City of Calhoun*, 682 Fed. App’x 721 (11th Cir. 2017) (No. 16-10521).

<sup>9</sup> *Open Meeting to Consider the One Hundred Ninety-Second Report of the Standing Committee on Rules of Practice and Procedure Before the Court of Appeals* (Md. 2017) (testimony of Paul Clement, Former United States Solicitor Gen.), <https://mdcourts.gov/sites/default/files/import/coappeals/media/2017openmtgs/20170105rulesmtgpt2.mp4> [hereinafter COA Hearing, Testimony of Paul Clement] (at 3:03–3:13).

<sup>10</sup> *Id.* at 3:29–3:36.

<sup>11</sup> *Id.* at 4:38–5:04.

This startling claim flips traditional equal protection logic on its head. If the Constitution guarantees a bail option only accessible to people with means, the asserted right is to *bail for the wealthy*. In fact, the bail-bond industry is pushing this precise claim in courts around the country.<sup>12</sup>

How does the bail-bond industry justify a constitutional interpretation blessing a transparently two-tiered criminal justice system? Before Maryland's highest court, Paul Clement relied on doctrinal authority.<sup>13</sup> He argued that key equal protection cases "do not extend to the bail situation" and that a "host of cases" have rejected applying equal protection to bail "from the earliest days of the republic through and to the Warren Court."<sup>14</sup> In a prior written submission, he framed the same proposition more precisely: "[C]ourts have consistently held that 'bail is not excessive merely because the defendant is unable to pay it.'"<sup>15</sup> Clement dramatically characterized the purported judicial agreement with his interpretation as a "wall of authority."<sup>16</sup>

This Article critically examines this "wall of authority" and evaluates the true doctrinal standing of the right to affordable bail. After developing a novel account of legitimacy in constitutional argument, this Article demonstrates that authority supporting the bail-bond position is illegitimate. Finally, this Article argues that a legitimate reading of relevant Supreme Court doctrine shows the right to affordable bail is constitutionally mandated.

While the "wall of authority" metaphor suggests that an unbridgeable barrier separates bail from equal protection, closer inspection reveals that great swaths of the so-called wall are as illusory as façades in Hollywood sets. All but one of the courts that have adopted the proposition that "bail is not excessive merely because the defendant is unable to pay" have done so based solely on the authority of prior courts that adopted the same proposition. Yet tracing the proposition back to its origins shows that the first court to reject the right to affordable bail badly misread the law and offered no independent reason to accept its conclusion. Subsequent

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<sup>12</sup> See, e.g., *Pugh v. Rainwater*, 557 F.2d 1189 (5th Cir. 1977) (*Pugh I*), *vacated en banc on other grounds*, 572 F.2d 1053 (5th Cir. 1978) (*Pugh II*); *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2017 WL 2794064 (N.D. Ga. June 16, 2017). These cases are further discussed *infra* notes 174–97 and accompanying text.

<sup>13</sup> See COA Hearing, Testimony of Paul Clement, *supra* note 9, at 4:07–4:14.

<sup>14</sup> See *id.* at 3:53–4:14. Clement also agreed that "in terms of this idea that some of the cases, the *Griffin* line of cases about the imposing penalties for poverty, those lines do not extend to the bail situation." *Id.* at 3:57–4:08 (referencing *Griffin v. Illinois*, 351 U.S. 12 (1956)).

<sup>15</sup> See Clement Memo, *supra* note 1, at 6 (quoting *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966), and citing *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988); *United States v. James*, 674 F.2d 886, 891 (11th Cir. 1982); *United States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980); *United States v. Wright*, 483 F.2d 1068, 1070 (4th Cir. 1973); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968)). This memo was written in response to an opinion letter released by the Maryland Attorney General's Office earlier in October 2016 and was submitted to hearings of the Rules Committee that eventually proposed the rules change ultimately adopted by the Court of Appeals. *Id.* at 1.

<sup>16</sup> See discussion *infra* Part II.

courts then repeated this misstep in the name of following precedent. This renders the “wall of authority” argument formally illegitimate.

To justify this conclusion, this Article must first intervene in ongoing theoretical debates about legitimacy in constitutional argument. Building on recent scholarship, Part I distinguishes between legitimacy as a *formal* concept regarding argument validity and legitimacy as a *rhetorical* concept regarding whether an argument violates the norms of constitutional discourse. After introducing a general framework to assess formal and rhetorical legitimacy, this Part differentiates legitimate from illegitimate *ipse dixit* argumentation in constitutional law.<sup>17</sup>

Part II applies the framework introduced in Part I to test the legitimacy of the constitutional argument that a “wall of authority” supports discrimination against the poor in the pretrial bail context. It shows how the first court holding that there is no right to affordable bail committed a formal *ipse dixit* fallacy. Using innovative visualizations to “map” the relevant doctrine cited in industry briefs, Part III then shows how this fallacy was compounded into an illegitimate “echo chamber.”<sup>18</sup>

Part III argues that the doctrine ostensibly blessing a two-tiered pretrial justice system is normatively flawed and rhetorically illegitimate. Some walls are obstacles to freedom and justice. To liberate Eastern bloc societies oppressed by totalitarianism, President Reagan once implored Mikhail Gorbachev to tear down the Berlin Wall.<sup>19</sup> The metaphorical “wall of authority” endorsed by the bail-bond industry also imperils liberty—and Part III makes the case that this wall, too, needs to be torn down. In place of illegitimate authority, courts should instead follow the overlooked competing lines of precedent that support recognition of a right to affordable bail.

The last Part serves as the Article’s Conclusion. This Part replies to potential objections to recognizing an affordable-bail right.

## I. LEGITIMACY AND APPEALS TO AUTHORITY

A central claim of this Article is that the bail-bond industry’s “wall of authority” argument is formally and rhetorically illegitimate. To justify this claim, this Part builds on existing scholarship on rhetorical theory and constitutional argument legitimacy. After analyzing the difference between formal and rhetorical legitimacy, this Part sets out a new framework to assess each kind of legitimacy, and then uses

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<sup>17</sup> *Ipse dixit* is Latin, meaning “he himself said it.” *Ipse dixit*, BLACK’S LAW DICTIONARY (10th ed. 2014) [hereinafter *Ipse dixit*, BLACK’S LAW]. As shown in Section I.C *infra*, not all *ipse dixit* argumentation is fallacious. Propositions that do not require justification by authority can be proven through *ipse dixit* reasoning. On the other hand, propositions that do require justification by authority are fallacious if supported only by *ipse dixit* argument.

<sup>18</sup> Cf. M. Chris Fabricant & Tucker Carrington, *The Shifted Paradigm: Forensic Science’s Overdue Evolution from Magic to Law*, 4 VA. J. CRIM. L. 1, 37 (2016) (introducing the term “Echo Chamber” to describe the same phenomenon of uncritically repeating doctrinal error in name of following precedent).

<sup>19</sup> See Reagan Foundation, *supra* note 3.

the framework to distinguish between formally legitimate and illegitimate *ipse dixit* arguments in constitutional law.

#### A. Two Senses of Argument “Legitimacy”

When describing arguments, the word “legitimacy” is generally used in two distinct senses. The first sense concerns the “correctness” of an argument. A legitimate argument is one accepted by the relevant audience as “valid” or “justified.”<sup>20</sup> We call this the *formal* sense of legitimacy. The second sense concerns the “appropriateness” of an argument. A legitimate argument is recognized by the relevant audience as one that is “within bounds” to raise, even if the argument is rejected as incomplete, weak, or just-plain-wrong.<sup>21</sup> We call this the *rhetorical* sense of legitimacy.<sup>22</sup>

These two senses of argument legitimacy clearly overlap. Under either sense, the “relevant audience” judges whether a given argument is legitimate or illegitimate.<sup>23</sup> Relevance here is a *discursive* concept—it depends on the *discourse* wherein the debate unfolds.<sup>24</sup> An argument deemed legitimate in one discursive field may be entirely illegitimate in a different field.<sup>25</sup> A mathematical debate is different from a political debate, which is different from a legal debate.<sup>26</sup> Furthermore, both types of

<sup>20</sup> It is possible to distinguish *validity in proof* from *justification in argument*. See, e.g., DAVID ZAREFSKY, *What Does an Argument Culture Look Like?*, RHETORICAL PERSPECTIVES ON ARGUMENTATION: SELECTED ESSAYS BY DAVID ZAREFSKY 37, 41 (2014) (equating “proof” with objective truth and “argument” with subjective justification having admitting degrees of strength). Since our focus is on legal argument, a fundamentally subjective discipline, we do not refer to proof in its objective or analytical sense. Instead, we interchangeably use terms like “valid,” “justified,” “right,” and so on to denote arguments accepted as correct by the relevant audience.

<sup>21</sup> See *id.* at 39.

<sup>22</sup> See *id.*

<sup>23</sup> As such, both senses of argument legitimacy are self-justifying concepts grounded in social fact rather than external reality. See Colin Starger, *Constitutional Law and Rhetoric*, 18 U. PA. J. CONST. L. 1347, 1350 n.12 (2016) [hereinafter Starger, *Constitutional Law and Rhetoric*] (“[A] discourse cannot provide independent grounds for its own legitimacy . . .”); cf. H. L. A. HART, *THE CONCEPT OF LAW* 107–08 (2d ed. 1994) (stating that legitimacy of a system’s ultimate rule of recognition is a social fact); THOMAS S. KUHN, *THE STRUCTURE OF SCIENTIFIC REVOLUTIONS* 94 (3d ed. 1996) (“[I]n paradigm choice[,] there is no standard higher than the assent of the relevant community.”).

<sup>24</sup> See Starger, *Constitutional Law and Rhetoric*, *supra* note 23, at 1358–62.

<sup>25</sup> An “argument field” is a technical name for distinct discourse with its own norms. See STEPHEN E. TOULMIN, *THE USES OF ARGUMENT* 14 (updated ed. 2003) (providing technical definition of “argument fields” and explaining that “[t]wo arguments will be said to belong to the same field when the data and conclusions in each of the two arguments are, respectively, of the same logical type”).

<sup>26</sup> As Chaïm Perelman observes: “Each field of thought requires a different type of discourse; it is as inappropriate to be satisfied with merely reasonable arguments from a mathematician as it would be to require scientific proofs from an orator.” CH. PERELMAN, *THE REALM OF RHETORIC* 3 (William Kluback trans., 1982).

legitimacy may be contested by discursive participants.<sup>27</sup> As a discourse evolves, perceived lines of formal and rhetorical legitimacy may shift.<sup>28</sup> Given the shared relationship with audience and discourse, inquiry into both senses of “legitimate” argument falls within the academic jurisdiction of rhetoric.<sup>29</sup>

Though more fuzzy than sharp, the distinction between formal and rhetorical argument legitimacy is useful. Formal legitimacy centers on the idea that an argument’s success is judged according to a discourse’s formal rules.<sup>30</sup> Only formally legitimate arguments should “win” the official debate.<sup>31</sup> Rhetorical legitimacy, on the other hand, focuses on the meta-dynamics of argument discourse—it represents a second-order judgment about the appropriateness of first-order formal argument.<sup>32</sup> A rhetorically legitimate argument may formally “lose” by the written “rules of the game,” but it stays within unwritten bounds.<sup>33</sup> Rhetorical argument legitimacy more directly concerns “norms.”<sup>34</sup> As such, rhetorical legitimacy is more fluid and difficult to define with precision.<sup>35</sup>

<sup>27</sup> All participants in a discourse may agree that certain arguments are valid or appropriate and that other arguments are invalid or inappropriate, but they might also hotly dispute formal and rhetorical legitimacy in borderline cases.

<sup>28</sup> Arguments once deemed legitimate can become unacceptable; and so too the reverse. Consider that appeals to racial superiority were not long ago admitted in mainstream American political discourse while such appeals are now (rightly) beyond the pale.

<sup>29</sup> As an academic discipline, rhetoric is “where the practical art of persuasion collides with the abstract theory of how argument moves discourse.” Colin Starger, *The DNA of an Argument: A Case Study in Legal Logos*, 99 J. CRIM. L. & CRIMINOLOGY 1045, 1051 (2009) [hereinafter Starger, *DNA of an Argument*]. Aristotle, the godfather of all rhetorical inquiry, defined the “art of rhetoric” as “an ability, in each [particular] case, to see the available means of persuasion.” ARISTOTLE, ON RHETORIC: A THEORY OF CIVIC DISCOURSE 37 (George A. Kennedy trans., 2d ed. 2007) (alteration in original).

<sup>30</sup> See Starger, *DNA of an Argument*, *supra* note 29, at 1059–60.

<sup>31</sup> Of course, this does not mean that the loser of a debate had a formally illegitimate argument from a neutral academic perspective. On our account, it is possible to have formally legitimate arguments on both sides of the debate, so long as both arguments are justified by “plausible reasoning” or “credible authority.” See *infra* Section I.B. However, a formally illegitimate argument *should* lose.

<sup>32</sup> See *infra* Section I.B.

<sup>33</sup> Distinguishing the formal and rhetorical “rules of the game” has parallels in academic disciplines beyond rhetoric. For instance, political scientists refer to society’s “rules of the game” as “institutions” and distinguish between formal and informal institutions based respectively on written and unwritten rules. See Julia R. Azari & Jennifer K. Smith, *Unwritten Rules: Informal Institutions in Established Democracies*, 10 PERSP. ON POL. 37, 38–39 (2012) (citing DOUGLASS C. NORTH, INSTITUTIONS, INSTITUTIONAL CHANGE AND ECONOMIC PREFERENCE 3 (1990); Gretchen Helmke & Steven Levitsky, *Informal Institutions and Comparative Politics: A Research Agenda*, 2 PERSP. ON POL. 725, 726–28 (2004)).

<sup>34</sup> Norms are “imprecise and ambient”; they are “customs and principles” that “lay out what ought to be, according to unwritten social expectations.” Emily Bazelon, *Ground Rules*, N.Y. TIMES MAG., July 16, 2017, at 9.

<sup>35</sup> See *id.* at 9–10 (“Norms are entirely up to us—they exist only as long as there’s a

A helpful analogy here comes from basic first-year civil procedure. The difference between formal and rhetorical argument legitimacy is like the difference between dismissal of a claim under Federal Rule of Civil Procedure (FRCP) 12(b)(6) and the imposition of sanctions under FRCP 11(c).<sup>36</sup> Imagine a plaintiff sues a defendant, and the defendant successfully moves to dismiss for “failure to state a claim upon which relief can be granted.”<sup>37</sup> The court has basically determined that the plaintiff did not make a *formally legitimate* argument; the plaintiff’s claim is legally invalid. Yet recognition of formal illegitimacy does not entail judgment that the plaintiff made inappropriate arguments that somehow violated the norms of the federal litigation game. The plaintiff will only be subject to sanctions under Rule 11 if she advanced *rhetorically illegitimate* arguments—ones made with an “improper purpose” and fundamentally unwarranted by law or fact.<sup>38</sup>

Do not interpret this analogy too literally. Though this Article ultimately concludes that the bail-bond industry’s “wall of authority” argument is formally and rhetorically illegitimate, we do not advocate Rule 11 sanctions for lawyers championing the wall argument. Not at all. This is because this Article analyzes formal and rhetorical legitimacy in abstract constitutional doctrine. On the other hand, Rule 11 analyzes potential transgressions of norms of litigation. Adjudicative context always guides a Rule 11 inquiry; this context inevitably includes complicated facts and adversarial relationships. In the rough-and-tumble world of litigation, even highly dubious legal assertions are easily forgiven. Yet, stricter standards apply when assessing pure doctrinal questions outside of litigation. An argument regarded as perfectly “within bounds” in the litigation game may nonetheless transgress the academic norms of our law-review game.<sup>39</sup>

### *B. Legitimacy in Constitutional Argument*

Based on the formal and rhetorical senses of argument legitimacy discussed above, we propose two general frameworks to assess constitutional arguments. First, some additional theoretical background is necessary.

Legal scholars have previously categorized different *types* of arguments accepted as legitimate within constitutional discourse.<sup>40</sup> The most enduring typology

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consensus, even unspoken, to preserve them. . . . Norms [can] erode, slowly, amid argument and equivocation about the significance of a breach, until they’ve been destroyed.”)

<sup>36</sup> Compare FED. R. CIV. P. 12(b)(6), with FED. R. CIV. P. 11(b)–(c).

<sup>37</sup> See FED. R. CIV. P. 12(b)(6).

<sup>38</sup> See FED. R. CIV. P. 11(b).

<sup>39</sup> Of course, professors often hope to influence the courts, and academic debate on law does occasionally affect litigation outcomes. The inverse is more routinely true—court debate inspires academic argument. Yet, though academic and litigation discourses intersect, they nonetheless differ.

<sup>40</sup> See, e.g., Starger, *Constitutional Law and Rhetoric*, *supra* note 23, at 1348.



comes from Philip Bobbitt.<sup>41</sup> Over thirty years ago, Bobbitt introduced the concept of “constitutional modalities” to describe “the ways in which legal propositions are characterized as true from a constitutional point of view.”<sup>42</sup> Bobbitt identified six modalities of constitutional argument as legitimate: textual (appeals to the meanings of words and phrases in the Constitution), historical (appeals to the intentions of framers and ratifiers of the Constitution), structural (appeals to rules based on the relationships between constitutional actors and agents), doctrinal (appeals to precedent), prudential (appeals based on pragmatic policy concerns), and ethical (appeals based on shared constitutional values).<sup>43</sup>

Though some debate persists, subsequent scholars have largely accepted Bobbitt’s basic types of legitimate argument.<sup>44</sup> If a given argument for interpreting constitutional meaning does not fall into one (or more) of his accepted modalities, it will be rejected out of hand by advocates, judges, and theorists alike. As Bobbitt puts it: “One does not see counsel argue, nor a judge purport to base his decision, on arguments of kinship. . . . Nor does one hear overt religious arguments or appeals to let the matter be decided by chance or reading entrails.”<sup>45</sup> Arguments rooted in kinship, religion, chance, or by reading entrails may be formally or rhetorically legitimate in other discourses, but in constitutional law, they are not. Constitutional norms only admit arguments about text, history, structure, doctrine, policy, or values.<sup>46</sup>

While Bobbitt’s modalities provide a good starting point for our framework, they cannot stand alone. This is because inclusion in Bobbitt’s typology only qualifies as a necessary condition for constitutional argument legitimacy—not a

<sup>41</sup> See, e.g., PHILIP BOBBITT, *CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION* (1982) [hereinafter BOBBITT, *CONSTITUTIONAL FATE*]; PHILIP BOBBITT, *CONSTITUTIONAL INTERPRETATION* (1991) [hereinafter BOBBITT, *CONSTITUTIONAL INTERPRETATION*]; Philip Bobbitt, *Is Law Politics?*, 41 STAN. L. REV. 1233 (1989) (book review). Richard Fallon’s very similar typology has also endured. See, e.g., Richard H. Fallon, Jr., *A Constructivist Coherence Theory of Constitutional Interpretation*, 100 HARV. L. REV. 1189 (1987).

<sup>42</sup> BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 41, at 12.

<sup>43</sup> See *id.* at 12–13.

<sup>44</sup> See Starger, *Constitutional Law and Rhetoric*, *supra* note 23, at 1348 n.1 (describing Bobbitt’s enduring influence); see also Lawrence B. Solum, *Originalism and Constitutional Construction*, 82 FORDHAM L. REV. 453, 460 (2013) (a recent citation to Bobbitt’s typology, confirming its enduring influence). Jamal Greene has recently developed a rhetorical framework for understanding constitutional argument that also directly builds on Bobbitt’s typology. See generally Jamal Greene, *Pathetic Argument in Constitutional Law*, 113 COLUM. L. REV. 1389 (2013). It should be noted, however, that Greene only recognizes five (rather than six) legitimate argument types. See *id.* at 1443. On Greene’s account, Bobbitt’s “ethical” category of constitutional values should not be viewed as a legitimate subject, but rather as a mode of persuasion. *Id.* at 1443–45. However, for reasons set out in depth in prior work, the category of “value” argument deserves recognition as a legitimate subject. See Starger, *Constitutional Law and Rhetoric*, *supra* note 23, at 1363–71.

<sup>45</sup> BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 41, at 6.

<sup>46</sup> See BOBBITT, *CONSTITUTIONAL INTERPRETATION*, *supra* note 41, at 12–13.

sufficient one. In other words, one can make *illegitimate* arguments based on text, history, or any of the other categories. Consider this proposition: “The Constitution prohibits the sale of intoxicating liquors.”<sup>47</sup> An argument for the proposition might appeal to the plain text of the Eighteenth Amendment.<sup>48</sup> Yet, despite proceeding through the textual modality, such an argument would be universally rejected as invalid and thus formally illegitimate.<sup>49</sup> The rules of the game simply do not permit analysis of isolated constitutional text independent of context (i.e., a subsequent Amendment repealing prohibition). Appealing to text thus does not *per se* confer legitimacy. One can also imagine similarly invalid arguments based on Bobbitt’s five other types.<sup>50</sup>

What then, beyond inclusion in Bobbitt’s typology, makes a constitutional argument legitimate? The short answer is: *legitimacy requires coherent justification of the asserted proposition*. This builds on scholars’ previous insight that Bobbitt’s types of modalities describe only the *subject-matter* content of constitutional argument—not the rhetorical *mode of proof* employed to justify statements of constitutional meaning.<sup>51</sup> An argument about a legitimate subject matter will become illegitimate if not justified by plausible and credible proof.

With this groundwork in place, we can now state our proposed framework for formal legitimacy in constitutional argument:

*To be formally legitimate, constitutional arguments must (a) state a proposition about constitutional meaning that is (b) justified by plausible reasoning or credible authority that analyzes or discusses (c) one or more legitimate subject of constitutional argument.*

We examine each part of the framework in turn.

Part (a) requires that the argument under review state a proposition about constitutional meaning. This ensures focus on abstract questions of constitutional law rather than on the equities of any concrete controversy. In adjudicative contexts, courts ultimately evaluate whether litigants win or lose lawsuits.<sup>52</sup> Arguments

<sup>47</sup> See U.S. CONST. amend. XVIII, § 1 (prohibiting the “manufacture, sale, or transportation of intoxicating liquors” within the United States).

<sup>48</sup> See *id.*

<sup>49</sup> See U.S. CONST. amend. XXI (repealing the Eighteenth Amendment).

<sup>50</sup> For example, an argument in favor of the proposition “the Constitution prohibits trade with England” might appeal to history—the Framers fought a revolution to break the English yoke. All serious participants in constitutional discourse would recognize this as an invalid argument in favor of that proposition. Without breaking a sweat, one could also come up with formally illegitimate arguments based on structure, doctrine, etc.

<sup>51</sup> This insight forms the crux of Professor Jamal Greene’s recent critique of Bobbitt. See Greene, *supra* note 44, at 1443 (introducing a comparison chart profiling Bobbitt’s modalities); see also Starger, *Constitutional Law and Rhetoric*, *supra* note 23, at 1358–62 (discussing and refining distinctions developed by Professor Greene).

<sup>52</sup> Above all, judges must decide the case. This is the “judgment imperative.” See Starger,

justifying judgment may appeal directly to facts-on-the-ground without defending a specific proposition about constitutional meaning.<sup>53</sup> Though such arguments are legitimate in litigation, they are formally illegitimate under the framework.<sup>54</sup>

Part (b) works in conjunction with part (c) to capture the necessary relationship between “coherent justification” and “legitimate subject matter” described above. “Legitimate subjects” are simply those named in Bobbitt’s typology.<sup>55</sup> “Coherent justification” refers to proof by reason or proof by authority. For over two thousand years, rhetoricians have recognized appeals to reason (*logos*) or appeals to authority (*ethos*) as the primary modes of rational proof.<sup>56</sup> Legitimate argument about constitutional propositions must also be warranted by one of these rational modes.<sup>57</sup> Constitutional propositions not justified by dint of reason or authority are formally illegitimate. More than this, constitutional arguments backed by *flawed* appeals to reason or authority are also illegitimate. Part (b) of the framework therefore requires “coherent” justification, achieved through “plausible” reasoning or “credible” authority.<sup>58</sup>

Such is this Article’s general framework for assessing formal legitimacy. Quite obviously, a lot rides on what counts as “plausible” reasoning or “credible” authority. Note that the framework does not further provide a metric for assessing plausibility or credibility; it is no self-executing test or deterministic formula. This underscores

*Constitutional Law and Rhetoric*, *supra* note 23, at 1355 n.41 (citing CHAÏM PERELMAN & L. OLBRECHTS-TYTECA, *THE NEW RHETORIC: A TREATISE ON ARGUMENTATION* 131 (John Wilkinson & Purcell Weaver trans., 1969)).

<sup>53</sup> Such appeals “bypass ordinary propositional argument by directly ‘manipulat[ing] the reader’s emotions in order to persuade her as to the ultimate adjudicative outcome.’” *Id.* at 1356 (alteration in original) (quoting Greene, *supra* note 44, at 1394); *see also id.* at 1357 (“Propositions are necessary for legitimacy.”).

<sup>54</sup> As noted above, this framework assesses academic rather than litigation legitimacy. *See supra* note 39 and accompanying text.

<sup>55</sup> *See* BOBBITT, *CONSTITUTIONAL FATE*, *supra* note 41, at 7.

<sup>56</sup> *See generally* Starger, *Constitutional Law and Rhetoric*, *supra* note 23, at 1353–54. Of course, the ancients recognized three types of rhetorical proof—*logos*, *ethos*, and *pathos*. Arguments based on *pathos* (“pathetic arguments”) appeal to emotion rather than reason or authority. *Id.* Though appeals to *pathos* may be legitimate in the context of adjudication, purely emotional argument untethered to reason or authority do not pass academic muster. *Cf. id.* at 1357–58 (standing alone, arguments based on *pathos* are illegitimate).

<sup>57</sup> “Warranted” is often used as a synonym for “justified.” *See, e.g.*, FED. R. CIV. P. 11(b)(2) (requiring that legal contentions be “warranted by existing law”). Argument theorist Stephen Toulmin, however, famously used the word “warrant” to describe the major premise of an argument as distinct from “backing,” which he used to describe the concept of justification. *See* Starger, *DNA of an Argument*, *supra* note 29, at 1083 n.194 (discussing TOULMIN, *supra* note 25, at 87–105). Regardless of words used, the point remains that formal legitimacy requires propositions about constitutional meaning be “grounded,” “backed,” or “justified” by reasons or authority.

<sup>58</sup> Coherence is the fundamental quality of rationality in discourse. *See* Starger, *DNA of an Argument*, *supra* note 29, at 1092 (“Coherence . . . describes whether collections of concepts—sets of ideas, words, propositions, and the like—‘hang together’ or ‘make sense’ as a whole.”).

an important point. In hard constitutional cases, coherent/plausible/credible arguments may exist on both sides.<sup>59</sup> Although formal legitimacy concerns “correctness,” the framework does not assume a single correct answer exists to any constitutional question.<sup>60</sup> Instead, formal legitimacy represents a minimum requirement—a discursive floor—for an argument to win “by the rules.”

Our proposed framework for rhetorical legitimacy in constitutional argument builds directly on its formal counterpart. Given its especially fluid and imprecise nature, rhetorical legitimacy is best framed in the negative:

*To be rhetorically illegitimate, constitutional arguments must (a) not qualify as formally legitimate; and (b) transgress accepted norms of constitutional discourse.*

If pushed for an affirmative version of this framework, we might offer a fuzzy schematic: *rhetorical legitimacy = formal legitimacy + normative wiggle room.*

The fuzziness of the rhetorical inquiry is a feature, not a bug. Analysis of rhetorical legitimacy cannot proceed as a mechanistic affair. Proving an argument formally illegitimate under the framework should be hard—after all, conflicting arguments can be formally legitimate so long as they are plausible. Proving an argument rhetorically illegitimate should be harder.

### C. Legitimate and Illegitimate Ipse Dixit Argument

*Ipse dixit*, Latin for “he himself said it,” is often used as a pejorative term to dismiss arguments.<sup>61</sup> However, *ipse dixit* argumentation is not inherently invalid in legal argument.<sup>62</sup> Formal legitimacy depends on the type of proposition asserted and the type of justification accepted by the specific legal discourse.

<sup>59</sup> What’s more, the case need not be “hard” to have contradictory arguments that are formally legitimate. Indeed, almost any Supreme Court constitutional case involving a dissent will feature dueling formally coherent positions.

<sup>60</sup> It may well be, for example, that a plausible textual analysis points in one direction and a plausible historical analysis points in another. Constitutional argument types are thus said to be “incommensurable.” See Fallon, *supra* note 41, at 1191. In such cases, judges often turn to internal norms to break a formal tie. *Cf. id.* at 1207 (“Confronted with contending theoretical arguments that are equally or nearly equally plausible, judges prefer those that accord with their views of justice or sound policy.”).

<sup>61</sup> See *Ipse dixit*, BLACK’S LAW, *supra* note 17 (defining *ipse dixit*); see also, e.g., Bond v. United States, 134 S. Ct. 2077, 2098 (2014) (Scalia, J., concurring in judgment) (“Petitioner and her amici press us to consider whether there is anything to this *ipse dixit*. The Constitution’s text and structure show that there is not.”).

<sup>62</sup> See, e.g., Nat’l Tire Dealers & Retreaders Ass’n v. Brinegar, 491 F.2d 31, 40 (D.C. Cir. 1974) (implying that the court can accept a “statement of [ ] reasons” on “mere *ipse dixit*” if the statement is “inherently plausible”). We also maintain that justification through *ipse dixit* “plausible reasoning” is formally legitimate.

Our framework for formal legitimacy in constitutional argument distinguishes between proof by “plausible reasoning” and proof by “credible authority.” Some subjects of constitutional argument require proof by authority.<sup>63</sup> Where a proposition about constitutional meaning requires justification by credible authority, *ipse dixit* statements are formally invalid. On the other hand, if a constitutional proposition can be justified by plausible reasoning, then *ipse dixit* arguments may be formally valid.

Hypotheticals help demonstrate the operative distinctions. First imagine a dispute between Spencer and Issa over whether the Constitution allows for the death penalty. Spencer maintains that the Fifth Amendment supports his view that the Constitution permits executions. He argues that the Amendment’s phrase “[n]o person shall be held to answer for a capital . . . crime, unless . . .”<sup>64</sup> necessarily contemplates holding persons to answer for “capital” crimes when the “unless” conditions are met. Spencer cites no authority for this argument. Yet standing alone, his *ipse dixit* assertion meets the criteria from our general framework and qualifies as a formally legitimate argument.

Specifically, Spencer (a) states a proposition about constitutional meaning (the Fifth Amendment allows capital punishment) that is (b) justified by plausible reasoning (implication of an unless condition) that analyzes (c) a legitimate subject of constitutional argument (plain text of the document). Spencer need not cite authority for such analysis. Reason alone suffices—he himself can say it.

Now Issa offers a competing argument. She maintains that the Eighth Amendment supports her view that the Constitution prohibits capital punishment. She argues (i) that the “unusual punishments” prohibited by the Eighth Amendment<sup>65</sup> includes punishments that have become rare; and (ii) capital punishment has become rare. For proposition (i), Issa cites no authority. For proposition (ii), she cites statistics on the death penalty’s decline.

Proposition (i) is supported by a formally legitimate *ipse dixit* argument. Like Spencer, Issa has engaged in plausible reasoning (unusual means rare) about constitutional text. Since proposition (ii) is supported by authority, it is not an *ipse dixit* argument. Whether the death penalty has declined is an empirical question requiring empirical authority. She herself just can’t make up statistics. Had Issa not cited authority, hers would have been a formally illegitimate *ipse dixit* argument.

Of course, a real debate over capital punishment’s constitutionality would involve many more than just Spencer and Issa’s imagined conflicting arguments. Real-world disputants would attack and defend on many fronts, invoking a whole suite of arguments to simultaneously advance their position and to undermine the legitimacy of their opponents’ positions. The point here is theoretical. Formally

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<sup>63</sup> Propositions of constitutional meaning based on appeals to precedent inherently require justification by citation to authority. Propositions of constitutional meaning based on plain text, on the other hand, do not. By definition, plain meaning analysis rests on ordinary understanding rather than special authority.

<sup>64</sup> U.S. CONST. amend. V.

<sup>65</sup> U.S. CONST. amend. VIII.

legitimate *ipse dixit* constitutional arguments are possible, they can involve plausible readings of plain text, and they can exist on both sides of a dispute.

Now let us consider *ipse dixit* dynamics in a hypothetical appeal to precedent. Imagine two colleagues—call them Mr. White and Jesse—are arguing over whether the Constitution guarantees the right to manufacture crystal methamphetamine (aka “crank” or “ice”). Mr. White maintains that it does. Mr. White justifies his claim based on Supreme Court precedent that, he says, stands for the proposition that states may run their own laboratories for making ice. When Jesse shoots Mr. White a skeptical look, Mr. White responds: “Just check out Justice Brandeis’s opinion in *New State Ice Co. v. Liebmann*.<sup>66</sup> It’s all there Jesse, I’m telling you.”

Jesse dutifully looks up the case. He finds the passage Mr. White apparently relies upon. It reads:

Denial of the right to experiment may be fraught with serious consequences to the Nation. 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.<sup>67</sup>

Jesse nods sadly. He accuses Mr. White of making a formally illegitimate *ipse dixit* argument.

Jesse is right. Mr. White does assert a proposition about constitutional meaning (that it grants the right to make meth), and he does ground his argument in a legitimate subject (precedent). Yet Mr. White’s reading of Brandeis in *New Ice* is entirely implausible. Mr. White just says the case stands for his preferred proposition. Because there is no textual basis for his claim—stray references to experiments, labs, and ice notwithstanding—Mr. White’s reading of Brandeis is formally illegitimate *ipse dixit*.<sup>68</sup>

While this hypothetical is outlandish, the type of error it illustrates is all too common. Entirely misstating what a case stands for, and then using that misstatement to prove a proposition about constitutional meaning, is a formally illegitimate *ipse dixit* argument. And it is precisely the kind of argument that stands at the back of the bail-bond industry’s claim that a “wall of authority” rejects the right to affordable bail.<sup>69</sup>

## II. EXCESSIVE BAIL AND AN ILLEGITIMATE WALL

Bail reform efforts have gathered serious momentum over the past year as jurisdictions around the country have moved to limit or end money bail practices.<sup>70</sup> In

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<sup>66</sup> 285 U.S. 262, 280 (1932) (Brandeis, J., dissenting).

<sup>67</sup> *Id.* at 311.

<sup>68</sup> *See id.*

<sup>69</sup> *See infra* Section II.B.

<sup>70</sup> This Article was written in the Summer of 2017. For a survey of current reform efforts and bail-bond industry opposition to it, see generally COLOR OF CHANGE & ACLU’S CAMPAIGN

response to this perceived attack on its livelihood, the bail-bond industry has aggressively opposed reform in courts and legislatures.<sup>71</sup> This is the larger context for the specifically constitutional arguments raised by Paul Clement before the Maryland Court of Appeals, as described in this Article's Introduction.<sup>72</sup> Though they included some Maryland-specific analysis,<sup>73</sup> Clement's arguments on affordable bail are typical and representative of the national debate.<sup>74</sup> The bail debate, like other socially polarizing issues, does not occur in a vacuum. As the role of money bail evolves, so too do the arguments of the bail-bond industry.<sup>75</sup>

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FOR SMART JUSTICE, SELLING OFF OUR FREEDOM: HOW INSURANCE CORPORATIONS HAVE TAKEN OVER OUR BAIL SYSTEM (2017), <https://www.aclu.org/report/selling-our-freedom-how-insurance-corporations-have-taken-over-our-bail-system> [<https://perma.cc/7H37-EF7Q>] [hereinafter SELLING OFF OUR FREEDOM] (explaining how the bail-bond industry works, who is behind it, and who is impacted by it).

<sup>71</sup> See, e.g., Duane "Dog" Chapman & Beth Chapman Take Fight to Protect Crime Victims and Save Bail Industry to Georgia, OFFICIAL DOG NEWS (Feb. 22, 2017), <http://www.officialdognews.com/2017/02/22/duane-dog-chapman-beth-chapman-take-fight-to-protect-crime-victims-and-save-bail-industry-to-georgia/> [<https://perma.cc/P45V-AN88>] (characterizing—on a bail-bond website—reform efforts as “an all-out assault by the criminal lobby to change a 200 year old practice of cash bail”).

<sup>72</sup> See *supra* Introduction.

<sup>73</sup> The Clement Memo cites to an old Maryland appellate case for the proposition that, under Maryland law, “[t]he question of excessive bail is not resolved on the basis of an individual's ability or inability to raise a certain sum.” Clement Memo, *supra* note 1, at 6 (quoting *Simmons v. Warden of Balt. City Jail*, 298 A.2d 199, 200 (Md. Ct. Spec. App. 1973)). Although Maryland law is not a focus of this Article, two problems with this authority deserve mention. First, the *Simmons* case offers no analysis to justify its conclusion and thus appears to be classic illegitimate *ipse dixit*. Second, to the extent that *Simmons* can be read to rely on an earlier case called *Bigley*, see *Simmons*, 298 A.2d at 200 (citing *Bigley v. Warden, Md. Corr. Inst. for Women*, 294 A.2d 141 (Md. Ct. Spec. App. 1972)), it bears emphasis that both *Simmons* and *Bigley* concerned appeals from denial of supersedeas bonds—bonds providing for release after conviction while an appeal is pending. Of course, one who is detained pretrial while presumed innocent has a significantly greater liberty interest than one who has been convicted in a court of law and now seeks appeal. Conclusory reasoning about supersedeas bonds in the appeal context should have no bearing on the pretrial constitutional issue.

<sup>74</sup> See, e.g., *Pugh I*, 557 F.2d 1189 (5th Cir. 1977), *vacated en banc on other grounds*, 572 F.2d 1053 (5th Cir. 1978); *Walker v. City of Calhoun*, No. 4:15-CV-0170-HLM, 2017 WL 2794064 (N.D. Ga. June 16, 2017). These cases are further discussed *infra* notes 174–97 and accompanying text.

<sup>75</sup> Interestingly, several bail-bond companies across the country have lobbied aggressively against bail reform efforts by arguing that defendants accused of crimes and released on non-monetary conditions are being robbed of their constitutionally protected right to bail. Of course, as courts have surmised, this sudden interest in championing the rights of the criminally accused is economically influenced; the less money bail is used, the less commercial bail industries are employed. See generally *Holland v. Rosen*, No. 17-4317 (JBS-KMW), 2017 WL 4180003, at \*27–30 (D.N.J. Sept. 21, 2017) (holding that releasing a defendant on non-monetary conditions of home detention and a GPS anklet, instead of money bail, neither infringed upon

Analysis of the constitutional status of affordable bail begins with the text of the Eighth Amendment, which contains the Constitution's only reference to bail.<sup>76</sup> The Amendment states: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."<sup>77</sup> This deceptively simple text underdetermines the constitutional command on bail. Everything turns on "excessive"—and nowhere within the four corners of the document is the meaning of this word defined, discussed, or otherwise elaborated.<sup>78</sup> Given this, it comes as no surprise that precedent plays an outsized role in understanding what "excessive" does and does not mean.

According to Paul Clement, on behalf of the bail-bond industry, the specific proposition supported by a "wall of authority" is this: *Bail is not excessive merely because the defendant is unable to pay it.*<sup>79</sup> This Part demonstrates how Clement's claim about authority supporting this proposition is formally illegitimate as a matter of constitutional argument.

Section A begins by revealing the so-called wall to be a hollow echo chamber—courts adopting the key proposition did so solely on the authority of prior courts echoing the same proposition based on prior authority tracing back in a chain to an Eighth Circuit case decided in 1964 called *White v. United States*.<sup>80</sup> Section B shows how *White* justified its assertion of the proposition by an implausible reading of prior precedent. *White*'s argument is thus formally illegitimate, rendering the cases relying on it the fruits of an illegitimate tree. Finally, Section C offers an independent argument for finding the wall of cases formally illegitimate en masse. All the cases in Clement's wall came before the Supreme Court authorized pretrial detention on the grounds of dangerousness in *United States v. Salerno*.<sup>81</sup> After *Salerno*, the prior practice of setting an unaffordable bail just to detain dangerous people was no longer necessary or legitimate.<sup>82</sup>

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the Eighth Amendment nor violated due process); *Collins v. Daniel*, No. 1:17-CV-00776-RJ (D.N.M. Sept. 7, 2017) (Order Denying Plaintiffs' Motion for Preliminary Injunction).

<sup>76</sup> See U.S. CONST. amend VIII.

<sup>77</sup> *Id.* Ratified in 1789, the Eighth Amendment is modelled after similar phrasing in the English Bill of Rights. See ENGLISH BILL OF RIGHTS (1689), [http://avalon.law.yale.edu/17th\\_century/england.asp](http://avalon.law.yale.edu/17th_century/england.asp) [<https://perma.cc/UJY7-7U46>] ("That excessive bail ought not to be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted[.]").

<sup>78</sup> Of course, underdetermined text is not a constitutional feature unique to bail. The Eighth Amendment itself prohibits "excessive" fines and "cruel and unusual" punishments without further specifying their meaning. U.S. CONST. amend. VIII. Likewise, constitutional text alone will not answer what makes process "due" or searches and seizures "unreasonable." See U.S. CONST. amends. IV, V, XIV.

<sup>79</sup> Clement Memo, *supra* note 1, at 6 (citations omitted).

<sup>80</sup> 330 F.2d 811, 814 (8th Cir. 1964).

<sup>81</sup> 481 U.S. 739, 750–51 (1987) (holding that a defendant may be detained without bail pretrial only upon a showing of clear and convincing evidence that he is dangerous).

<sup>82</sup> See *id.*



A. Mapping the Wall

The Clement Memo justifies the claim that “bail is not excessive merely because the defendant is unable to pay it” based on a citation to six cases.<sup>83</sup> Internal support for that same proposition within those six cases in turn derives from citations to other cases. The resulting citation network is visualized in Figure 1.<sup>84</sup>

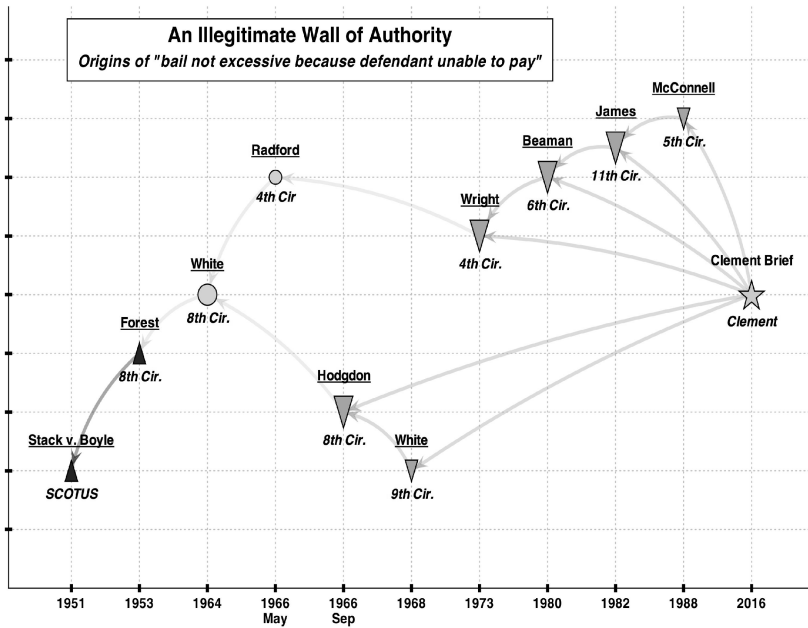


Figure 1<sup>85</sup>

<sup>83</sup> Clement Memo, *supra* note 1, at 6 (quoting *Hodgdon v. United States*, 365 F.2d 679, 687 (8th Cir. 1966) and citing *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988); *United States v. James*, 674 F.2d 886, 891 (11th Cir. 1982); *United States v. Beaman*, 631 F.2d 85, 86 (6th Cir. 1980); *United States v. Wright*, 483 F.2d 1068, 1070 (4th Cir. 1973); *White v. Wilson*, 399 F.2d 596, 598 (9th Cir. 1968)).

<sup>84</sup> In chronological order, the full citations to the cases shown in Figure 1: *Stack v. Boyle*, 342 U.S. 1 (1951); *Forest v. United States*, 203 F.2d 83 (8th Cir. 1953); *White v. United States*, 330 F.2d 811 (8th Cir. 1964), *cert. denied*, 379 U.S. 855 (1964); *United States v. Radford*, 361 F.2d 777 (4th Cir. 1966), *cert. denied*, 385 U.S. 877 (1966); *Hodgdon v. United States*, 365 F.2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967); *White v. Wilson*, 399 F.2d 596 (9th Cir. 1968); *United States v. Wright*, 483 F.2d 1068 (4th Cir. 1973); *United States v. Beaman*, 631 F.2d 85 (6th Cir. 1980); *United States v. James*, 674 F.2d 886 (11th Cir. 1982); *United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988).

<sup>85</sup> To access the interactive version of Figure 1 and Figure 2, please visit [http://wm.billofrightsjournal.org/?page\\_id=525](http://wm.billofrightsjournal.org/?page_id=525) or the *William & Mary Bill of Rights Journal* website at <http://wm.billofrightsjournal.org/>, click on the Digital Supplements tab, and then “Affordable Bail.”

Here is how to read this “doctrinal map”<sup>86</sup>: Circles and triangles represent cases and the star represents the Clement Memo. Arrows pointing back from cases or the memo represent citations. The Clement Memo brief directly cited the cases represented as light downward-facing triangles for the proposition in question—and those cases do state that bail is not excessive because the defendant is unable to pay.<sup>87</sup> The light downward-facing triangle cases, in turn, properly cited dark upward-facing triangle cases (as well as other light down-triangle cases) for the same proposition. Finally, the circle cases are cited by dark upward-facing triangle cases but they *do not* support the proposition. In other words, the circle cases do not state or imply that bail is not excessive merely because the defendant is unable to pay it.

Though Figure 1 distills the essential line of authority for the key proposition, it does not purport to show every case cited or citation in the network. Rather, it presents an accurate schematic picture of the doctrinal relationships. Critically, none of the downward-facing triangle cases engage in any independent analysis of the proposition. Instead, the cases all rely exclusively on prior authority to justify the claim. The 1973 case *United States v. Wright* is typical in this regard.<sup>88</sup> In *Wright*, the court states:

The defendant urges his impecunious financial status as an essential criterion of excessiveness which the Eighth Amendment forbids. We point out, however, that the governing criterion to test the excessiveness of bail is not as the defendant suggests, but whether bail is set at a figure higher than an amount reasonably calculated to insure that the accused will stand trial. *United States v. Radford*, *supra*; *Forest v. United States*, 203 F.2d 83 (8th Cir. 1953).<sup>89</sup>

Note how *Wright* bases its rejection of any relevance to the defendant’s “impecunious financial status” on case law alone.<sup>90</sup> That is it—end of analysis. The other light downward-facing triangle cases resort to the same method.<sup>91</sup>

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<sup>86</sup> This doctrinal mapping technique was introduced and developed in earlier work. See generally Colin Starger, *Exile on Main Street: Competing Traditions and Due Process Dissent*, 95 MARQ. L. REV. 1253, 1258 (2012); Colin Starger, *Expanding Stare Decisis: The Role of Precedent in the Unfolding Dialectic of Brady v. Maryland*, 46 LOY. L.A. L. REV. 77, 107–08 (2012).

<sup>87</sup> Clement Memo, *supra* note 1, at 6.

<sup>88</sup> See 483 F.2d at 1070.

<sup>89</sup> *Id.* (citing *Radford*, 361 F.2d 777; *Forest*, 203 F.2d 83).

<sup>90</sup> Note too how *Wright*’s cite to *Forest* is not shown on the map, but is instead schematically captured by showing its cite to *Radford*, which in turn cited *White*, which in turn (mis)cited *Forest* for the same proposition. All of the cross-citations would unnecessarily complicate the visual and therefore were left out.

<sup>91</sup> See *supra* Figure 1. See generally *United States v. McConnell*, 842 F.2d 105 (5th Cir. 1988); *United States v. James*, 674 F.2d 886 (11th Cir. 1982); *United States v. Beaman*, 631 F.2d 85 (6th Cir. 1980); *Wright*, 483 F.2d 1068; *White v. Wilson*, 399 F.2d 596 (9th Cir. 1968); *Hodgdon v. United States*, 365 F.2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967).

The key point of the map—and of the citation network it represents—is that all roads lead to the 1964 *White* case. This is the first time that a direct statement of the key proposition emerges in the doctrine. All subsequent cases merely echo *White*'s original pronouncement.

### B. *White Makes an Illegitimate Ipse Dixit Argument*

*White* arises out of an appeal of a federal marijuana conviction.<sup>92</sup> Prior to trial, Chester White had unsuccessfully sought release on his own recognizance.<sup>93</sup> Instead, the trial judge set bail at \$5,000—an amount Mr. White could not afford.<sup>94</sup> On appeal, he argued this violated the Eighth Amendment's prohibition on "excessive bail" and "prevented pretrial freedom necessary to the preparation of his defense."<sup>95</sup>

When addressing the propriety of the district court's setting an unaffordable bail, the *White* court began by agreeing that the defendant "was entitled to apply for bail prior to conviction."<sup>96</sup> After summarizing Mr. White's contention that bail unaffordable to an indigent is inherently "excessive" under the Eighth Amendment, the court stated:

No extended discussion . . . is necessary as justification for our agreement with . . . the District Judge under the circumstances of this particular case. We simply point out that the governing criterion adopted by this Circuit to test the excessiveness of bail prescribed by Amendment VIII is, not as defendant suggests, but whether bail is 'set at a figure higher than an amount reasonably calculated to insure that the [defendant] will stand trial and submit to sentence if convicted.' *Forest v. United States*, 203 F.2d 83, 84 (8th Cir. 1953). The mere financial inability of the defendant to post an amount otherwise meeting the aforesaid standard does not automatically indicate excessiveness. The purpose for bail cannot in all instances be served by only accommodating the defendant's pocketbook and his desire to be free pending possible conviction.<sup>97</sup>

The court's logic has two parts. First, it cites *Forest* as providing the test for excessiveness—whether the amount is "reasonably calculated" to ensure appearance at trial.<sup>98</sup> Second, it suggests that implicit in the *Forest* test is the proposition that bail need not be affordable.<sup>99</sup>

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<sup>92</sup> See 330 F.2d at 812.

<sup>93</sup> *Id.*

<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *Id.* at 814.

<sup>97</sup> *Id.*

<sup>98</sup> See *id.*

<sup>99</sup> See *id.* ("The mere financial inability of the defendant to post an amount otherwise meeting the aforesaid standard does not automatically indicate excessiveness.").

The argument's second move—reading the *Forest* test to reject affordability—is not independently justified. The court does not engage in any “extended discussion” (saying none is necessary) of *Forest* or Supreme Court doctrine.<sup>100</sup> Nor does the *White* court ground its conclusion about the permissibility of an unaffordable bail in any other accepted modality like constitutional structure, policy, or so on. Instead, the proposition about affordability is *ipse dixit*. For this *ipse dixit* to be legitimate, it must be based on a plausible reading of *Forest* and preceding Supreme Court case law. Otherwise, it is simply an unjustified assertion tethered to nothing.

A close look at *Forest* as well as the Supreme Court case *Forest* relies on (*Stack v. Boyle*<sup>101</sup>) reveals that *White*'s reading is, in fact, implausible.

*Forest* concerned a consolidated interlocutory appeal in a federal criminal case involving four individuals charged under the Smith Act with conspiracy to overthrow the Government by force and violence.<sup>102</sup> Bail was eventually set at \$15,000 for *Forest* and \$10,000 for his co-defendants.<sup>103</sup> All the alleged conspirators posted this bail and secured release from custody.<sup>104</sup> However, the defendants then moved for a further reduction in bail, arguing that the amount they had posted was excessive.<sup>105</sup> When that motion was denied, the appeal followed.<sup>106</sup>

The *Forest* court upheld the district court's action.<sup>107</sup> Citing the Supreme Court's language from *Stack v. Boyle*, the court first observed that “bail is excessive if set at a figure higher than an amount reasonably calculated to insure that the accused will stand trial and submit to sentence if convicted.”<sup>108</sup> Then comes the kicker. The court approvingly noted the district court's endeavors “to arrive at an amount *which the defendant could obtain*”—and further praised the trial court for “fix[ing] their bail at figures which [the District Court Judge] concluded were not unreasonable and *which would enable the defendants to secure their release from custody.*”<sup>109</sup> The appeal was only denied because \$10,000 to \$15,000 was a reasonable amount given the nature of the charges.<sup>110</sup>

Based on this, it is manifestly clear that *Forest* cannot plausibly be read to stand for the proposition—asserted by the *White* court—that a defendant's inability to pay

<sup>100</sup> *See id.* (“No extended discussion of the formula . . . is necessary as justification for our agreement with the propriety of its application by the District Court Judge under the circumstances of this particular case.”).

<sup>101</sup> 342 U.S. 1 (1951).

<sup>102</sup> 203 F.2d 83, 83 (8th Cir. 1953).

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 83–84.

<sup>105</sup> *Id.*

<sup>106</sup> *Id.* at 83.

<sup>107</sup> *Id.* at 84.

<sup>108</sup> *Id.* (citing *Stack v. Boyle*, 342 U.S. 1, 5 (1951)).

<sup>109</sup> *Id.* (emphases added).

<sup>110</sup> *See id.* (“The bail required of and given by the defendants is, in our opinion, not so high as to require a reversal . . .”).

does not make a bail excessive. In fact, the *Forest* defendants made bail and the reviewing court highlighted the trial court's efforts to ensure that result.<sup>111</sup> Even if the *Forest* court's explicit language falls shy of affirmatively recognizing a right to affordable bail, there is no plausible way to read the language as rejecting the possibility. The *White* court, therefore, pulled that implication from *Forest* in contradiction of its text and result.

The enormity of the *White* court's error becomes even clearer upon examination of *Stack v. Boyle*, the Supreme Court case that announced the test for excessiveness—whether the “amount [is] reasonably calculated” to ensure that the accused will stand trial.<sup>112</sup> Like *Forest*, *Stack* concerned a Smith Act prosecution in which a defendant sought to reduce bail.<sup>113</sup> However, unlike in *Forest*, the *Stack* defendant had failed to secure his release and sought relief by filing a habeas corpus petition.<sup>114</sup> Writing for the Court, Chief Justice Vinson ultimately held that habeas corpus was the wrong procedural vehicle and directed the defendant to file a motion to reduce bail in district court.<sup>115</sup>

In arriving at this procedural judgment, Chief Justice Vinson offered vital dicta.<sup>116</sup> First, he stressed that the “traditional right to freedom before conviction permits the unhampered preparation of a defense, and serves to prevent the infliction of punishment prior to conviction.”<sup>117</sup> Second, he opined that “[u]nless this right to bail before trial is preserved, the presumption of innocence, secured only after centuries of struggle, would lose its meaning.”<sup>118</sup> Third, Vinson articulated what became a famous test: “Bail set at a figure higher than an amount reasonably calculated [to ensure the defendant's presence at trial] is ‘excessive’ under the Eighth Amendment.”<sup>119</sup> Finally, Vinson criticized the lower court for setting a bail amount without an individualized, evidence-based inquiry into what was necessary to ensure the presence of the defendant at trial.<sup>120</sup>

The overall tenor of these comments assumes that defendants will secure release.<sup>121</sup> Bail is framed as a right necessary to preserve the presumption of innocence

<sup>111</sup> See *id.* at 83–84 (noting that the bail amount could be obtained by the defendants while still ensuring their appearance at trial).

<sup>112</sup> *Stack*, 342 U.S. at 5 (citing *United States v. Motlow*, 10 F.2d 657 (7th Cir. 1926)).

<sup>113</sup> *Id.* at 3.

<sup>114</sup> *Id.* at 3–4.

<sup>115</sup> *Id.* at 6–7 (noting that procedurally, the defendant should have appealed the district court's decision to deny his motion to reduce bail before filing a habeas corpus petition).

<sup>116</sup> See *id.* at 4–5.

<sup>117</sup> *Id.* at 4 (citing *Hudson v. Parker*, 156 U.S. 277, 285 (1895)).

<sup>118</sup> *Id.*

<sup>119</sup> *Id.* at 5.

<sup>120</sup> *Id.* at 6 (“To infer from the fact of indictment alone a need for bail in an unusually high amount is an arbitrary act [that] would inject into our own system of government the very principles of totalitarianism which Congress was seeking to guard against . . .”).

<sup>121</sup> As stated in Justice Jackson's concurrence:

and to ensure that defendants are free when preparing for trial.<sup>122</sup> High bail amounts are inherently suspect under the Court's view unless they represent individualized judgments about what is necessary to ensure that a released defendant shows up for trial. Anything higher than what is required to make the defendant show up after release is excessive.

Nothing in Chief Justice Vinson's analysis remotely supports the idea that it is permissible to keep a defendant detained pretrial merely because he is unable to afford bail. Indeed, the underlying logic of the opinion suggests the opposite. After all, a poor defendant is cloaked in the same presumption of innocence as a rich defendant. A poor defendant also shares the same need to prepare her own defense and claims the same right to not be subject to arbitrary pretrial punishment because of a high bail amount.

Once again, even if *Stack* does not unambiguously announce a right to affordable bail, there is no way it can be plausibly interpreted to support the proposition that no such right exists. Yet that is precisely how the *White* court read *Stack* and *Forest*.<sup>123</sup> Given the framework outlined in Sections I.B–C, we can now confidently conclude that *White*'s statement that the “mere financial inability of the defendant to post [a bail] does not automatically indicate excessiveness” is formally illegitimate *ipse dixit*.<sup>124</sup>

Since *White* is illegitimate authority for its key proposition, all the cases that cite *White* as authority for that proposition are also illegitimate. Without independent analysis, the subsequent cases are as tainted as the fruit of a poisonous tree.<sup>125</sup> The echo chamber illustrated in Figure 1 merely repeated *White*'s original sin in the name of honoring precedent. Clement's entire “wall of authority” is therefore a formally illegitimate constitutional argument.

### C. *En Masse Illegitimacy for Pre-Salerno Cases*

Besides its fatal echo-chamber defect, the authority of the “wall” suffers from another formal flaw rendering it illegitimate. This flaw turns on the change to pretrial

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The practice of admission to bail, as it has evolved in Anglo-American law, is not a device for keeping persons in jail upon mere accusation until it is found convenient to give them a trial. On the contrary, the spirit of the procedure is to enable them to stay out of jail until a trial has found them guilty.

*Id.* at 7–8 (Jackson, J., concurring).

<sup>122</sup> See *id.* at 8.

<sup>123</sup> See *White v. United States*, 330 F.2d 811, 814 (8th Cir. 1964) (“The mere financial inability of the defendant to post an amount otherwise meeting the aforesaid standard does not automatically indicate excessiveness.”).

<sup>124</sup> See *id.*; *supra* Sections I.B–C.

<sup>125</sup> Cf. *Wong Sun v. United States*, 371 U.S. 471, 487–88 (1963) (discussing “fruit of the poisonous tree” doctrine in the Fourth Amendment context—evidence that “would not have come to light but for the illegal actions of the police” is considered fruit of the poisonous tree).

detention doctrine wrought by the seminal 1987 Supreme Court case, *United States v. Salerno*.<sup>126</sup> Prior to *Salerno*, it was theoretically illegal to subject a non-capital defendant to pretrial detention on the grounds of dangerousness—the idea that the defendant presented such a threat to the community at large that she should not be freed.<sup>127</sup> Yet courts frequently overcame this theoretical barrier in practice through the fiction of setting impossibly high bails to “ensure appearance at trial.”<sup>128</sup> By authorizing outright pretrial detention, *Salerno* blew up this fiction and undermined the legitimacy of earlier cases.

The illicit pre-*Salerno* practice of securing pretrial detention through out-of-reach bail bubbles beneath the surface of key “wall” cases. Consider *Hodgdon v. United States*,<sup>129</sup> the case directly quoted by Clement for the unaffordable bail proposition.<sup>130</sup> The defendant was a young man with a history of schizophrenia and other mental illness; he assaulted a United States Commissioner with a .9 mm handgun and then shot a United States Deputy Marshal during his arrest.<sup>131</sup> In upholding a bail that the defendant could not pay, the *Hodgdon* court explicitly noted the defendant’s “unpredictable nature and . . . penchant for carrying firearms” and the violent nature of his charges.<sup>132</sup> These considerations framed the court’s conclusion that “bail is not excessive merely because the defendant is unable to pay.”<sup>133</sup>

Under contemporary practice, Mr. Hodgdon would have been detained on the grounds of dangerousness. Alas, this practice was not constitutional pre-*Salerno*.<sup>134</sup> At that time, the test from *Stack* still governed—“[b]ail set at a figure higher than an amount reasonably calculated [to ensure the defendant’s presence at trial] is ‘excessive’ under the Eighth Amendment.”<sup>135</sup> The bail amount in *Hodgdon* clearly was not set to ensure appearance, but rather to make sure the unstable and violent

<sup>126</sup> 481 U.S. 739 (1987).

<sup>127</sup> *Salerno* changed this and explicitly authorized pretrial detention so long as due process is provided. *Id.* at 751 (“When the Government proves by clear and convincing evidence that an arrestee presents an identified and articulable threat to an individual or the community, we believe that, consistent with the Due Process Clause, a court may disable the arrestee from executing that threat.”).

<sup>128</sup> The “ensure appearance at trial” test comes from *Stack* and remains the only legitimate purpose for bail consistent with the Eighth Amendment. See *Stack v. Boyle*, 342 U.S. 1, 5 (1951).

<sup>129</sup> 365 F.2d 679 (8th Cir. 1966), *cert. denied*, 385 U.S. 1029 (1967).

<sup>130</sup> See *supra* Figure 1; see also Clement Memo, *supra* note 1, at 6 (noting that “courts have consistently held that ‘bail is not excessive merely because the defendant is unable to pay it.’” (quoting *Hodgdon*, 365 F.2d at 687)).

<sup>131</sup> *Hodgdon*, 365 F.2d at 681–83.

<sup>132</sup> *Id.* at 687.

<sup>133</sup> *Id.*

<sup>134</sup> See *supra* notes 125–28 and accompanying text (explaining that *Salerno* served as a watershed, making pretrial detention on the grounds of dangerousness permissible).

<sup>135</sup> See *United States v. Salerno*, 481 U.S. 739, 752 (1987) (alteration in original) (quoting *Stack v. Boyle*, 342 U.S. 1, 5 (1951)).

Mr. Hodgdon would not get out and hurt anybody before he faced trial. Facing an indigency-based appeal, the *Hodgdon* court simply did not respond by denying admission to bail outright. Its hands tied by *Stack*, the court instead rejected a right to affordable bail.<sup>136</sup> The same dilemma infects most<sup>137</sup> of the wall's body of authority.<sup>138</sup>

Perceived problems of violent crime committed by defendants on pretrial release led Congress to pass the Bail Reform Act of 1984 (BRA).<sup>139</sup> By blessing pretrial detention solely on the grounds of dangerousness, the BRA represented a major break from tradition.<sup>140</sup> Nonetheless, *Salerno* upheld the BRA's constitutionality, flatly rejecting the argument that the Constitution required all defendants have access to bail.<sup>141</sup> Rather, the Court noted that the Eighth Amendment "has never

<sup>136</sup> See *Hodgdon*, 365 F.2d at 687 ("[B]ail is not excessive merely because the defendant is unable to pay it.").

<sup>137</sup> Only one case cited in the wall of authority was decided after *Salerno*. See Clement Memo, *supra* note 1, at 6 (citing *United States v. McConnell*, 842 F.2d 105, 107 (5th Cir. 1988)). *McConnell* actually cited *Salerno* for the proposition that "bail is excessive under the eighth amendment when set in an amount greater than that required for reasonable assurance of the presence of the defendant." *McConnell*, 842 F.2d at 107 (footnote omitted) (citing *Salerno*, 481 U.S. 739). *McConnell* also cited "wall" cases for the proposition that bails are not automatically excessive because a defendant is unable to pay. *Id.* (citing, *inter alia*, *United States v. James*, 674 F.2d 886 (11th Cir. 1982); *United States v. Beaman*, 631 F.2d 85 (6th Cir. 1980)). At first blush, these cites seem to cut against the idea that *Salerno* changed a prior fiction. However, closer examination reveals that the *McConnell* court explicitly recognized that provisions of the Bail Reform Act were enacted to prevent the "sub rosa use of money bond to detain dangerous defendants." *Id.* at 108 (citation omitted). Moreover, the defendant, Mr. McConnell, presented an extreme flight risk—he was a rich person (charged with bank fraud) who had been apprehended after fleeing to Mexico. *Id.* at 106. There was an evidentiary dispute about what resources he actually had. *Id.* at 107. Approving a high bail amount for a rich flight risk should not be read to imply approval of bails unaffordable on the grounds of indigency.

<sup>138</sup> See, e.g., *United States v. James*, 674 F.2d 886 (11th Cir. 1982) (bail not found excessive in RICO prosecution of a multimillion-dollar marijuana smuggling operation that operated for nearly four years); *United States v. Wright*, 483 F.2d 1068, 1069–70 (4th Cir. 1973) (approving high bail in a case involving "the largest shipment of cocaine ever seized in the Harbor of Baltimore"); *White v. Wilson*, 399 F.2d 596 (9th Cir. 1968) (holding that bail was not excessive in a case with charges of deadly-weapon assault with intent to commit murder, where the defendant had a prior manslaughter conviction).

<sup>139</sup> Congress enacted the law to respond to "the alarming problem of crimes committed by persons on release." See *Salerno*, 481 U.S. at 742 (quoting S. REP. NO. 98-225, at 3 (1983)).

<sup>140</sup> See *id.* at 755 (Marshall, J., dissenting) ("This case brings before the Court for the first time a statute in which Congress declares that a person innocent of any crime may be jailed indefinitely, pending the trial of allegations which are legally presumed to be untrue, if the Government shows to the satisfaction of a judge that the accused is likely to commit crimes, unrelated to the pending charges, at any time in the future.").

<sup>141</sup> See *id.* at 755 (majority opinion) (holding that "[w]e are unwilling to say that [the Bail Reform Act of 1984] . . . on its face violates either the Due Process Clause of the Fifth Amendment or the Excessive Bail Clause of the Eighth Amendment.").



been thought to accord a right to bail in all cases, but merely to provide that bail shall not be excessive in those cases where it is proper to grant bail.”<sup>142</sup> Accordingly, the Court concluded that “when Congress has mandated detention on the basis of a compelling interest other than prevention of flight, as it has here, the Eighth Amendment does not require release on bail.”<sup>143</sup>

*Salerno* thus clarified two propositions about constitutional meaning. First, no inherent “right to bail” exists for all criminal cases.<sup>144</sup> Second, only when bail is granted does a “right to non-excessive bail” kick in.<sup>145</sup> Whether a “right to affordable bail” exists turns exclusively on further inquiry into the second proposition; a bail denied outright need not be affordable. Put differently, *Salerno* established that it is constitutionally acceptable to detain a person pretrial because she is dangerous—but it does not authorize setting a deliberately unaffordable bail to achieve the same detention result. Post-*Salerno*, bails should only be set to facilitate release of nondangerous defendants and to genuinely ensure their return to court for trial.

In its “wall of authority” argument, the bail-bond industry obfuscates the impact of *Salerno* and elides its distinction between “no right to bail” and “right to non-excessive bail.” Per the Clement Memo:

[W]here a defendant is a flight risk or poses a substantial threat to the community, the State is justified in setting a high bail amount or declining bail altogether. That is the point of the Supreme Court’s decision in *Salerno*, which held that federal defendants who pose a serious risk to the community may constitutionally be detained with *no bail at all*. . . . So long as the bail amount is calculated to secure the defendant’s appearance and protect the public, it is constitutional . . . .<sup>146</sup>

Despite Clement’s *ipse dixit* assertion, the point of *Salerno* had nothing to do with setting bail amounts to “protect the public.”<sup>147</sup> Clement’s argument here falsely equates “high bail amounts” with “no bail at all” under *Salerno*.

In the end, the Clement Memo fails in its attempt to resuscitate the pre-*Salerno* illicit fiction that used unaffordable bail to control for dangerousness. The pre-*Salerno* cases that employed this practice no longer qualify as credible authority.

<sup>142</sup> See *id.* at 754 (quoting *Carlson v. Landon*, 342 U.S. 524, 545–46 (1952)).

<sup>143</sup> *Id.* at 754–55.

<sup>144</sup> See *id.* at 754 (quoting *Carlson*, 342 U.S. at 545–46, in support of the argument that the Eighth Amendment’s Bail Clause does not “accord a right to bail in all cases”).

<sup>145</sup> See *id.* (“The [Eighth Amendment] bail clause . . . merely . . . provide[s] that bail shall not be excessive in those cases where it is proper to grant bail.” (quoting *Carlson*, 342 U.S. at 545–46)).

<sup>146</sup> Clement Memo, *supra* note 1, at 7.

<sup>147</sup> See *Salerno*, 481 U.S. 739.

And, interpreting *Salerno* itself to justify high bails to “protect the public” is implausible. Thus, the claim that a “wall of authority” supports the no-right-to-affordable-bail proposition rests on either noncredible authority (pre-*Salerno* cases) or implausible reasoning about authority (the flawed interpretation of *Salerno*). Employing the framework from Part I, the claim is formally illegitimate.

### III. THE NORMATIVE CASE FOR AN AFFORDABLE BAIL RIGHT

Having established the formal illegitimacy of the idea that precedent endorses the no-right-to-affordable-bail proposition, we now press the case that the doctrine is also normatively flawed and rhetorically illegitimate. The crux of the argument here is that the “wall” cases effectively endorse a two-tiered criminal justice system that discriminates against the poor in favor of the rich. Such discrimination transgresses fundamental norms of constitutional discourse by running afoul of the Constitution’s core commitment to equal justice.

For this argument to succeed, we must prove that equal protection applies to the Eighth Amendment bail context. This may seem a steep hill to climb since Supreme Court doctrine does not recognize the poor as a “suspect class” under traditional equal protection analysis.<sup>148</sup> However, this Part demonstrates that traditional equal protection analysis does not govern when it comes to securing the access-to-justice rights of indigent defendants. As it happens, the Supreme Court has carved out a special line of cases to deal with the “age-old problem” of “[p]roviding equal justice for poor and rich, weak and powerful alike.”<sup>149</sup>

Section A introduces this special line of cases, which begins with the 1956 *Griffin v. Illinois* decision.<sup>150</sup> As will be shown, *Griffin* drew upon due process and equal protection to guarantee indigent defendants access to justice—and Court members immediately recognized the case’s implication for an affordable bail right.<sup>151</sup> Section B examines how *Griffin*’s equal justice principle evolved. As visualized by another “doctrinal map,” a long-standing countertradition trumps the illegitimate “wall” cases and establishes the affordable bail right. Based on this doctrinal survey, Section C shows why the discrimination against the poor advocated by the “wall” is normatively and rhetorically illegitimate.

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<sup>148</sup> See Ann Cammett, *Shadow Citizens: Felony Disenfranchisement and the Criminalization of Debt*, 117 PENN ST. L. REV. 349, 398 n.269 (2012) (citing ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 806 (4th ed. 2012) (“In *San Antonio School Dist. v. Rodriguez*, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review.”)); see also *Harris v. McRae*, 448 U.S. 297, 323 (1980) (“[T]his Court has held repeatedly that poverty, standing alone, is not a suspect classification.”).

<sup>149</sup> *Griffin v. Illinois*, 351 U.S. 12, 16 (1956).

<sup>150</sup> *Id.*

<sup>151</sup> See *id.* at 28–29 (Burton, J., dissenting) (after declaring that “Illinois is not bound to make the defendants economically equal before its bar of justice,” Justice Burton’s dissent asked: “Why fix bail at any reasonable sum if a poor man can’t make it?”).

*A. A Special Line to Protect the Poor: Griffin and Bail*

Decided in 1956, *Griffin v. Illinois* confronted an Illinois law that required criminal defendants to pay for trial transcripts before they could appeal their convictions.<sup>152</sup> In effect, the law was discriminatory—only those wealthy enough to buy a transcript could appeal their cases.<sup>153</sup> Drawing on both equal protection and due process—but not differentiating between the two<sup>154</sup>—Justice Black proclaimed on behalf of the Court that “[i]n criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color.”<sup>155</sup> Further declaring that “[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has,” the majority ordered the Illinois courts to provide transcripts or “find other means of affording adequate and effective appellate review to indigent defendants.”<sup>156</sup>

In reaching its holding, the *Griffin* Court made a key observation about when equal protection kicks in. The State of Illinois had argued that since the Constitution does not guarantee a right to appeal criminal cases, charging defendants to defray (nonobligatory) appeal expenses was fair.<sup>157</sup> The plurality responded that though the State could deny appeal altogether,

that is not to say that a State that does grant appellate review can do  
so in a way that discriminates against some convicted defendants

<sup>152</sup> The law actually provided free transcripts for indigents convicted of capital crimes; a “companion state act” further provided free transcripts for indigents raising constitutional challenges to their convictions. *See id.* at 13–15 (plurality opinion) (“The effect is that indigents may obtain a free transcript to obtain appellate review of constitutional questions but not of other alleged trial errors such as admissibility and sufficiency of evidence.”).

<sup>153</sup> As explained by Justice Frankfurter in his concurring opinion, the State in *Griffin* “said, in effect, that the Supreme Court of Illinois can consider alleged errors occurring in a criminal trial only if the basis for determining whether there were errors is brought before it by a bill of exceptions and not otherwise. From this it follows that Illinois has decreed that only defendants who can afford to pay for the stenographic minutes of a trial may have trial errors reviewed on appeal by the Illinois Supreme Court.” *Id.* at 22 (Frankfurter, J., concurring) (footnote omitted).

<sup>154</sup> *See, e.g., id.* at 17 (plurality opinion) (“Both equal protection and due process emphasize the central aim of our entire judicial system—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.’” (quoting *Chambers v. Florida*, 309 U.S. 227, 241 (1940))); *see also* *M.L.B. v. S.L.J.*, 519 U.S. 102, 120 (1996) (“[I]n the Court’s *Griffin*-line cases, ‘[d]ue process and equal protection principles converge.’” (second alteration in original) (quoting *Bearden v. Georgia*, 461 U.S. 660, 665 (1983))).

<sup>155</sup> *Griffin*, 351 U.S. at 17.

<sup>156</sup> *Id.* at 19, 20.

<sup>157</sup> *See id.* at 18 (“It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all.” (citing *McKane v. Durston*, 153 U.S. 684, 687–88 (1894))); *see also id.* at 37 (Harlan, J., dissenting) (“But whatever else may be said of Illinois’ reluctance to expend public funds in perfecting appeals for indigents, it can hardly be said to be arbitrary.”).

on account of their poverty. Appellate review has now become an integral part of the Illinois trial system for finally adjudicating the guilt or innocence of a defendant. Consequently at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discriminations.<sup>158</sup>

In other words, although the state need not offer appeals, once it does, the principle of equal justice kicks in. Rich and poor alike must have equal access to processes that determine liberty or incarceration.<sup>159</sup>

This equal-justice principle has obvious relevance to the money bail context since an indigent's inability to pay a bond results in incarceration. As it happens, this fact caught the attention of the *Griffin* dissenters. Specifically, Justice Burton complained:

Illinois is not bound to make the defendants economically equal before its bar of justice. . . . Persons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot. Why fix bail at any reasonable sum if a poor man can't make it?<sup>160</sup>

Why indeed. Though Justice Burton framed his retort as a critique of the *Griffin* result, his rhetoric reveals a logical consequence of *Griffin*'s holding. Unaffordable bail seems to violate *Griffin*'s equal-justice principle.<sup>161</sup>

This interpretation only seemed further confirmed by *Bandy v. United States I* (*Bandy I*)<sup>162</sup> and *Bandy v. United States II* (*Bandy II*),<sup>163</sup> two Justice Douglas opinions

<sup>158</sup> *Id.* at 18 (plurality opinion) (citations omitted).

<sup>159</sup> Of course, "*Griffin*'s principle has not been confined to cases in which imprisonment is at stake." *M.L.B.*, 519 U.S. at 111 (discussing *Mayer v. Chicago*, 404 U.S. 189 (1971), and progeny). However, cases where imprisonment is at stake occupy the heart of the *Griffin* line. See generally *Bearden v. Georgia*, 461 U.S. 660, 667 (1983) ("[A] State cannot 'impos[e] a fine as a sentence and then automatically conver[t] it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.'" (alterations in original) (quoting *Tate v. Short*, 401 U.S. 395, 398 (1971))).

<sup>160</sup> *Griffin*, 351 U.S. at 28–29 (Burton, J., dissenting).

<sup>161</sup> Though less prophetic in tone, Justice Burton's dissent functions in a similar way to Justice Scalia's famous dissent in *Windsor*. See *United States v. Windsor*, 133 S. Ct. 2675, 2710 (2013) (Scalia, J., dissenting) ("[N]o one should be fooled; it is just a matter of listening and waiting for the other shoe."). Famously, Justice Scalia's scathing critique became a self-fulfilling prophesy when *Obergefell* recognized a state right to same-sex marriage. See *Obergefell v. Hodges*, 135 S. Ct. 2584 (2015); see also Garrett Epps, *The Twilight of Antonin Scalia*, ATLANTIC (Aug. 21, 2014), <https://www.theatlantic.com/politics/archive/2014/08/the-twilight-of-antonin-scalia/378884/> [<https://perma.cc/FNG5-PAED>].

<sup>162</sup> 81 S. Ct. 197 (Douglas, Circuit Justice 1960).

<sup>163</sup> 82 S. Ct. 11 (Douglas, Circuit Justice 1961).

handed down in 1960 and 1961.<sup>164</sup> In both cases, Justice Douglas acted as a Circuit Court judge deciding Mr. Bandy's application for bail made as direct appellate litigation proceeded in front of the Supreme Court.<sup>165</sup> While Justice Douglas twice denied the application on technical procedural grounds, he nonetheless opined on the affordability question in thoughtful dicta.<sup>166</sup>

In *Bandy I*, Justice Douglas observed that “to demand a substantial bond which the defendant is unable to secure raises considerable problems for the equal administration of the law.”<sup>167</sup> He then discussed constitutional and practical problems. Constitutionally, he cited *Griffin* for the proposition that denial of an indigent defendant's appeal violates equal protection and *Stack* for the proposition that excessive bail cannot be used to deny freedom.<sup>168</sup> Practically, he noted that pretrial incarceration hampers the preparation of a defense or the ability to earn money to pay a lawyer.<sup>169</sup> Justice Douglas asked dramatically: “Can an indigent be denied freedom, where a wealthy man would not, because he does not happen to have enough property to pledge for his freedom?”<sup>170</sup>

In *Bandy II*, Justice Douglas decided to answer this question. After quoting five full paragraphs from *Bandy I*, he pronounced:

Further reflection has led me to conclude that no man should be denied release because of indigence. Instead, under our constitutional system, a man is entitled to be released on “personal recognizance” where other relevant factors make it reasonable to believe that he will comply with the orders of the Court.<sup>171</sup>

Once again, Justice Douglas came to this conclusion based on principles of equal justice and the inexorable logic of *Griffin* and *Stack*. Though Justice Douglas's

<sup>164</sup> See *Bandy I*, 81 S. Ct. 197; *Bandy II*, 82 S. Ct. 11.

<sup>165</sup> Justice Douglas was assigned to the Eighth Circuit and *Bandy I* was decided pendant to the Supreme Court's disposition of Mr. Bandy's petition for a writ of certiorari to the Eighth Circuit. The full Court remanded Mr. Bandy's case back to the Circuit. *Bandy v. United States*, 364 U.S. 477 (1960) (per curiam). *Bandy II* was a subsequent application for release on recognizance made while the Eighth Circuit's decision on remand was still pending. 82 S. Ct. at 12.

<sup>166</sup> In *Bandy I*, Justice Douglas essentially found the application moot in light of the main case's remand. See 81 S. Ct. at 198 (“I do not reach a decision on the matter. The Court today holds that the Court of Appeals should hear the appeal.”). In *Bandy II*, he noted that the question of “whether or not a single Justice or Circuit Justice ha[s] the power to fix bail pending disposition of a petition for certiorari” had not been decided and he declined to get ahead of the Court while acting alone. 82 S. Ct. at 13.

<sup>167</sup> 81 S. Ct. at 197.

<sup>168</sup> *Id.* at 197–98 (citing *Griffin v. Illinois*, 351 U.S. 12 (1956); *Stack v. Boyle*, 342 U.S. 1 (1951)).

<sup>169</sup> *Id.* at 198.

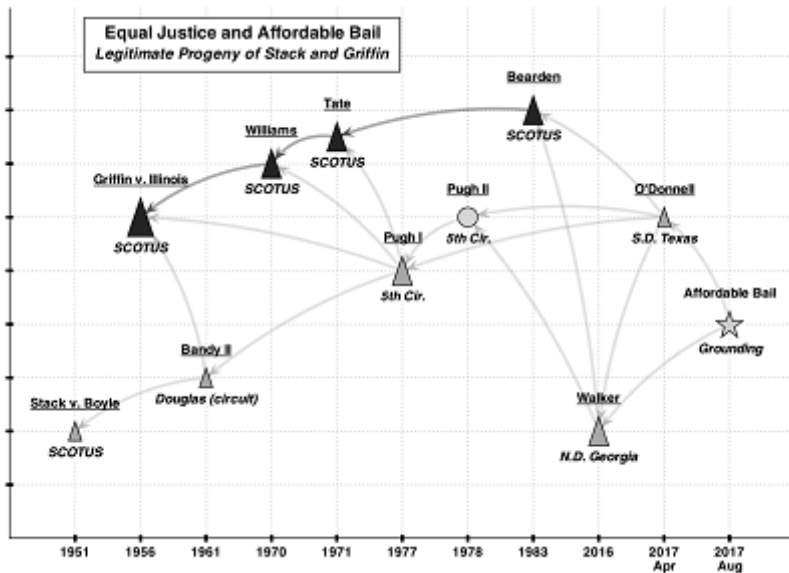
<sup>170</sup> *Id.*

<sup>171</sup> *Bandy II*, 82 S. Ct. at 13.

analysis is non-binding under accepted rules of precedent, it does provide persuasive authority for the proposition that unaffordable money bail violates the Constitution.

Contemporary academic commentators recognized this implication of Justice Douglas's *Bandy* reasoning.<sup>172</sup> Of course, it must be admitted that in the fifty-seven years since *Bandy II*, the Supreme Court has not applied *Griffin* to interpret the Excessive Bail Clause. At the same time, neither has the Court disavowed the possibility. The question thus remains unanswered at the highest level. However, as previously shown in Part II, the lower court precedent that rejects the affordable bail right is formally illegitimate.<sup>173</sup> Now we turn to the competing doctrinal tradition that grounds this right: the legitimate progeny of *Stack* and *Griffin*.

### B. Legitimate Progeny of Stack and Griffin



**Figure 2**

<sup>172</sup> See Caleb Foote, *The Coming Constitutional Crisis in Bail: II*, 113 U. PA. L. REV. 1125, 1153 (1965) (“[T]he principle authority to date for the proposition that *Griffin* might have application in the bail field is a pair of dicta of Mr. Justice Douglas in the *Bandy* case.”); Alan R. Sachs, *Indigent Court Costs and Bail: Charge Them to Equal Protection*, 27 MD. L. REV. 154, 166 (1967) (“The best indication to date that the *Griffin* rule might apply in the field of bail is the dictum expounded by Mr. Justice Douglas while serving as circuit justice in the cases of *Bandy v. United States*.”).

<sup>173</sup> See *supra* Part II (concluding that the “wall of authority” is based on either noncredible authority (pre-*Salerno* cases) or an “implausible” reading of *Salerno*).

Figure 2 shows existing federal authority warranting recognition of the affordable bail right. Once again, triangles represent cases and arrows pointing back from triangles represent citations. The *Griffin* line of Supreme Court cases are dark-upward-facing triangles. While dark up-triangle cases do not directly concern bail, they prohibit incarceration of indigents solely because of their poverty and affirm the equal-justice principle. Light up-triangle cases explicitly embrace affordable bail. The single circle case is neutral on the affordability question but completes the doctrinal picture. Our focus is on the light up-triangle cases, the line proceeding from *Stack* and *Bandy II*.

The earliest case not already discussed in this line is the critical 1977 Fifth Circuit opinion—*Pugh v. Rainwater (Pugh I)*.<sup>174</sup> This decision arose from a 1971 class-action lawsuit where plaintiffs sought to enjoin two Florida practices: “(1) pretrial detention of arrestees without a judicial determination of probable cause, and (2) pretrial detention of indigent defendants solely because they were unable to post money bail as a condition of release.”<sup>175</sup> The claims were bifurcated and litigation on the first claim ultimately led to the landmark 1975 Supreme Court decision *Gerstein v. Pugh*, which held that “the Fourth Amendment requires a judicial determination of probable cause as a prerequisite to [detention].”<sup>176</sup> Litigation on the second claim culminated in *Pugh I* and *Pugh II*.<sup>177</sup>

The unanimous panel in *Pugh I* found that the Florida Rules of Criminal Procedure regarding bail invidiously discriminated against indigent defendants.<sup>178</sup> Drawing on the equal justice framework of *Griffin* and its successor cases *Williams v. Illinois*<sup>179</sup> and *Tate v. Short*,<sup>180</sup> the panel held “money bail may never be imposed on an indigent defendant.”<sup>181</sup> Summing up its moral and doctrinal analysis, the court stated “equal protection standards require a presumption against money bail and in favor of those forms of release which do not condition pretrial freedom on an ability to pay.”<sup>182</sup>

In arriving at this conclusion, the court initially noted that the case did not involve the “right to bail per se.”<sup>183</sup> Since Florida guaranteed bail to its citizens in all non-capital cases, the issue became whether there existed “invidious[ ] discriminati[on]”

<sup>174</sup> 557 F.2d 1189 (5th Cir. 1977) (*Pugh I*), vacated en banc on other grounds, 572 F.2d 1053 (5th Cir. 1978) (*Pugh II*).

<sup>175</sup> *Id.* at 1193.

<sup>176</sup> *Gerstein v. Pugh*, 420 U.S. 103, 114 (1975).

<sup>177</sup> See *Pugh I*, 557 F.2d at 1193–94 (describing *Pugh I*’s procedural history); see also *Pugh II*, 572 F.2d at 1059 (Simpson, J., dissenting) (describing panel’s conclusion in predecessor case, *Pugh I*).

<sup>178</sup> See *Pugh I*, 557 F.2d at 1193 n.11 (describing FLA. R. CRIM. P. 3.130); see also *id.* at 1202 (“Florida’s current bail system discriminates invidiously against indigents charged with crime.”).

<sup>179</sup> 399 U.S. 235 (1970).

<sup>180</sup> 401 U.S. 395 (1971).

<sup>181</sup> *Pugh I*, 557 F.2d at 1202.

<sup>182</sup> *Id.*

<sup>183</sup> *Id.* at 1194.

in the administration of the “right . . . conferred.”<sup>184</sup> Of course, this perfectly tracks *Griffin*’s analysis of when the equal-justice principle kicks in.<sup>185</sup> The *Pugh I* court then noted how even though the Supreme Court had not recognized wealth as a “suspect criterion,” it was “extremely sensitive” to wealth-based classifications “in the context of criminal prosecutions,” as shown by *Williams* and *Tate*.<sup>186</sup> Specifically, *Tate* “extended” the equal-justice principle to the “situation where the amount of money a man has determines whether he is imprisoned for an offense.”<sup>187</sup> Based on *Tate*, the *Pugh I* court deemed that strict scrutiny of Florida’s bail system was appropriate.<sup>188</sup>

*Pugh I* was formally vacated a year later by *Pugh II*, which held that the panel’s decision was moot because of an intervening amendment to the rules.<sup>189</sup> However, the en banc court largely embraced and echoed the panel’s moral as well as constitutional analysis.<sup>190</sup> For example, the majority announced “[a]t the outset,” that it “accept[ed] the principle that imprisonment solely because of indigent status is invidious discrimination and not constitutionally permissible.”<sup>191</sup> Furthermore, the majority stated that it “ha[d] no doubt that in the case of an indigent, whose appearance at trial could reasonably be assured by one of the alternate forms of release, pretrial confinement for inability to post money bail would constitute imposition of an excessive restraint.”<sup>192</sup> These statements show that *Pugh II* embraces, rather than rejects, the right to affordable bail.<sup>193</sup> It is only because *Pugh II* ultimately shut down the Florida class-action lawsuit on fact-intensive grounds that it is represented as a circle in Figure 2.

The final two light up-triangles on Figure 2 represent federal district court decisions in ongoing court battles. Money bail systems in states across the nation are the subject of intense public attention and widespread litigation.<sup>194</sup> For example,

<sup>184</sup> *Id.*

<sup>185</sup> See discussion *supra* Part II.

<sup>186</sup> *Pugh I*, 557 F.2d at 1196. To make this point, the court quoted Chief Justice Burger’s observation from *Williams* that “the passage of time has heightened rather than weakened the attempts to mitigate the disparate treatment of indigents in the criminal process.” *Id.* at 1197 (quoting *Williams v. Illinois*, 399 U.S. 235, 241 (1970)).

<sup>187</sup> *Id.* (“[T]he Constitution prohibits a State from imposing a fine as a sentence and then automatically converting it into a jail term solely because the defendant is indigent and cannot forthwith pay the fine in full.” (alteration in original) (quoting *Tate v. Short*, 401 U.S. 395, 398 (1971))).

<sup>188</sup> *Id.*

<sup>189</sup> *Pugh II*, 572 F.2d 1053, 1058–59 (5th Cir. 1978); see also *O’Donnell v. Harris County*, 251 F. Supp. 3d 1052, 1071 (S.D. Tex. 2017) (“The en banc court vacated as moot the panel decision finding the system unconstitutional, because Florida had amended its rules while the appeal was pending.”).

<sup>190</sup> See *Pugh II*, 572 F.2d at 1056.

<sup>191</sup> *Id.* (citing *Williams*, 399 U.S. 235; *Tate*, 401 U.S. 395).

<sup>192</sup> *Id.* at 1058.

<sup>193</sup> The difference with the panel decision was between the facts-on-the-ground and what the Florida system actually did or did not do.

<sup>194</sup> See *Ending American Money Bail*, EQUAL JUST. UNDER L., <http://www.equaljustice>



*Walker v. City of Calhoun*<sup>195</sup> arises from a challenge to the practice of the City of Calhoun, Georgia, of using a bail schedule to condition pretrial release on predetermined money amounts linked to the charged offense.<sup>196</sup> While Calhoun, Georgia, still employs a bail schedule, its form has slightly changed in light of pending litigation.<sup>197</sup> *O'Donnell v. Harris County*<sup>198</sup> arises from a challenge to the misdemeanor bail system of Harris County, Texas.<sup>199</sup> Both lawsuits assert that indigents are unconstitutionally incarcerated pretrial because of their inability to afford money bail.<sup>200</sup> And, district courts in both cases issued preliminary injunctions on the grounds that jailing indigents solely on account of their poverty violates the Fourteenth Amendment.<sup>201</sup>

As shown in Figure 2, the precedent relied upon by these courts to justify their injunctions is familiar. The primary authority relied upon is the *Griffin* line. In addition to the cases already discussed, *Walker* and *O'Donnell* both invoke *Bearden*

underlaw.org/wp/current-cases/ending-the-american-money-bail-system/ [https://perma.cc/N4VE-3V7N] (last visited Feb. 21, 2018).

<sup>195</sup> No. 4:15-CV-0170-HLM, 2016 WL 361612 (N.D. Ga. Jan. 28, 2016).

<sup>196</sup> See *id.* at \*5. The initial injunction in *Walker* was vacated for lack of specificity. *Walker v. City of Calhoun*, 682 Fed. App'x 721 (11th Cir. 2017). The district court then reinstated the injunction for the same substantive reasons, using more specific language. *Walker v. City of Calhoun*, No. 4:15-cv-0170-HLM, 2017 WL 2794064 (N.D. Ga. June 16, 2017). The case appeared again on appeal before the Eleventh Circuit. For the purposes of Figure 2, "*Walker*" refers to the first substantive decision, which was effectively reinstated. *Id.* at \*2.

<sup>197</sup> After the case was filed, but while the suit was still pending, the chief judge of the city's municipal court issued a "Standing Order" that required an appearance within forty-eight hours for all citizens accused of a traffic violation or misdemeanor so that an indigency-based objection could be made. *Walker* challenged this new schedule as unconstitutional, arguing that the forty-eight hour detention was a *per se* punishment for his indigent status. The United States Department of Justice recently took an interest in this litigation, filing an amicus brief in support of neither party and arguing that while the use of bail schedules are presumptively unconstitutional, a forty-eight hour detention is permissible, drawing an inference between a probable cause determination and an indigency determination. Brief for the United States as *Amicus Curiae* in Support of Neither Party at 7–10, 22–26, *Walker*, 682 Fed. App'x 721 (No. 17-13139-GG).

<sup>198</sup> 251 F. Supp. 3d 1052 (S.D. Tex. 2017).

<sup>199</sup> *Id.* at 1063–64.

<sup>200</sup> See *Walker*, 2016 WL 361612, at \*3 ("Plaintiff alleges that Defendant violated his Fourteenth Amendment rights by jailing him because he cannot afford to pay the cash bond."); *O'Donnell*, 251 F. Supp. 3d at 1067 ("[A]n order imposing secured money bail is effectively a pretrial preventive detention order only against those who cannot afford to pay."). These lawsuits were both initiated by Civil Rights Corps (formerly Equal Justice Under Law), a Washington-based public interest legal organization. See *Ending Wealth-Based Pretrial Detention*, C.R. CORPS, <http://www.civilrightscorps.org/ending-wealth-based-pretrial-detention> [https://perma.cc/PM6R-REM4] (last visited Feb. 21, 2018).

<sup>201</sup> See *Walker*, 2016 WL 361612, at \*11 ("[A]ny detention based solely on financial status or ability to pay is impermissible."); *O'Donnell*, 251 F. Supp. 3d at 1167 (stating that defendants "cannot, consistent with the federal Constitution . . . convert[] the inability to pay into an automatic order of detention without due process and in violation of equal protection.").

v. *Georgia*,<sup>202</sup> the most recent case from this line specifically regarding indigent incarceration.<sup>203</sup> The *Bearden* Court held that jailing a poor defendant for failure to pay a fine violated the equal-justice principle, unless the defendant “failed to make sufficient bona fide efforts legally to acquire the resources to pay.”<sup>204</sup> Unsurprisingly, both district courts also cited the *Pugh* cases as on-point authority regarding the unaffordable bail problem.<sup>205</sup>

As *Walker* and *O’Donnell* proceed on appeal, it is possible that their interpretation of authority will be repudiated by reviewing courts. Yet this does not seem likely. As the *O’Donnell* court observed, the *Griffin*-line cases and *Pugh* “remain good law, neither overruled nor limited.”<sup>206</sup> Contrary to the assertions of the bail-bond industry, the weight of federal authority supports the proposition that it is unconstitutional to imprison legally innocent defendants pretrial solely because of their inability to afford a bail.<sup>207</sup>

Bail-bond industry proponents turn a blind eye to this doctrinal tradition or contest its applicability to the bail context.<sup>208</sup> However, it is the fundamental equal-justice principle underlying the precedent pictured in Figure 2 that ultimately tears down the “wall of authority” touted by Clement and company as a normative and rhetorical matter.

### C. Discrimination Against the Poor Is Rhetorically Illegitimate

Recall from Part I that rhetorically illegitimate arguments are “out of bounds” or inappropriate to the discourse.<sup>209</sup> Per the framework of Part I, a rhetorically

<sup>202</sup> 461 U.S. 660 (1983).

<sup>203</sup> See *Walker*, 2016 WL 361612, at \*11 (“The Equal Protection Clause of the Fourteenth Amendment generally prohibits ‘punishing . . . poverty.’” (quoting *Bearden*, 461 U.S. at 671)); *O’Donnell*, 251 F. Supp. 3d at 1135 (citing *Bearden*, 461 U.S. at 667–68).

<sup>204</sup> *Bearden*, 461 U.S. at 672.

<sup>205</sup> See *Walker*, 2016 WL 361612, at \*11 (citing *Pugh II*); *O’Donnell*, 251 F. Supp. 3d at 1136 (citing *Pugh I* and *Pugh II*).

<sup>206</sup> *O’Donnell*, 251 F. Supp. 3d at 1136–37 (noting that (1) “The Supreme Court in *San Antonio Indep. School District v. Rodriguez* specifically excepted *Williams* and *Tate* from the general rule that wealth-classifications are reviewed under a rational basis standard”; (2) *Bearden* confirmed this approach; and (3) *Pugh* applied the *Griffin* approach to the pretrial bail context (internal citations omitted)).

<sup>207</sup> While our focus is on federal precedent, prominent state authority also supports our analysis. For example, the Mississippi Supreme Court has noted that “[a] consideration of the equal protection and due process rights of indigent pretrial detainees leads us to the inescapable conclusion that a bail system based on monetary bail alone would be unconstitutional.” *Lee v. Lawson*, 375 So. 2d 1019, 1023 (Miss. 1979) (further noting that the Mississippi system does allow for non-monetary release conditions).

<sup>208</sup> See generally *SELLING OFF OUR FREEDOM*, *supra* note 70 (explaining how the bail industry funds lawmakers and lobbyists to keep them embedded in the criminal justice system and resist change).

<sup>209</sup> See discussion *supra* Section I.A.

illegitimate constitutional claim must be formally invalid and transgress accepted norms of constitutional discourse.<sup>210</sup> The argument that a wall of authority supports unaffordable bail is rhetorically illegitimate. Beyond its formal invalidity as shown in Part II, the wall argument sanctions discrimination against the poor and is as offensive to contemporary constitutional norms as sanctioning discrimination against African Americans.

It bears emphasis that the discourse in which this illegitimacy charge is made is academic or “law review” constitutional discourse. Identifying the formal *ipse dixit* flaw in the “wall” argument required a depth of citation tracking and textual analysis uncommon in ordinary litigation and unrealistic to expect from lawyers seeking partisan advantage. On the other hand, the normative problem with the bail-bond industry’s position is much clearer. Regardless of precedent, it offends basic decency to suggest that equal justice does not apply to pretrial defendants or that it is perfectly acceptable for poor, legally innocent defendants to languish in jail when similarly situated rich defendants would enjoy freedom.

Yet lawyers employed by the bail-bond industry must press such morally challenged arguments precisely because they comport with their clients’ interests. Alas, the predatory nature of commercial bail practice is notorious and long-lamented.<sup>211</sup> In 1964, for example, Judge Skelly Wright opened an opinion passionately appealing for bail reform with a critique of the practice:

Certainly the professional bondsman system as used in this District is odious at best. The effect of such a system is that the professional bondsmen hold the keys to the jail in their pockets. They determine for whom they will act as surety—who in their judgment is a good risk. The bad risks, in the bondsmen’s judgment, *and the ones who are unable to pay the bondsmen’s fees*, remain in jail. The court and the commissioner are relegated to the relatively unimportant chore of fixing the amount of bail.<sup>212</sup>

Years later, Justice Blackmun echoed Judge Wright when he described “the professional bail bondsman system with all its abuses . . . in full and odorous bloom.”<sup>213</sup> As Justice Blackmun noted, the traditional system sees bondsmen collect a non-refundable fee of ten percent of the bond from defendants, which creates “a heavy and irretrievable burden . . . upon the accused, to the excellent profit of the bondsman.”<sup>214</sup>

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<sup>210</sup> See discussion *supra* Section I.B.

<sup>211</sup> See generally SELLING OFF OUR FREEDOM, *supra* note 70.

<sup>212</sup> Pannell v. United States, 320 F.2d 698, 699 (D.C. Cir. 1963) (Wright, J., concurring).

<sup>213</sup> Schilb v. Kuebel, 404 U.S. 357, 359 (1971) (footnote omitted) (describing the Illinois bail system prior to reform).

<sup>214</sup> *Id.* at 359–60. Writing in dissent in the same case, Justice Douglas was even harsher in his assessment of the commercial bail bond practice. See *id.* at 373–74 (Douglas, J., dissenting)

Though a few jurisdictions have reformed their bail systems to limit commercial bond practice, the “odious” and “odorous” system unfortunately remains in place across most of the country.<sup>215</sup> In May 2017, for example, the ACLU released a report documenting how “[c]orporate opportunists have hijacked public authority and created an unnecessary and largely unaccountable \$2 billion bail industry that profits from trapping people both inside and out of jail.”<sup>216</sup> The ACLU report concludes that “the bail industry has corrupted our constitutional freedoms for profit.”<sup>217</sup> This conclusion is buttressed by empirical studies of the bond industry<sup>218</sup> as well as by anecdotal tales of its abuse.<sup>219</sup> Our over-reliance on money bail has also created a well-documented trap for poor defendants accused of minor offenses. Years of using corporate bail companies as a judicial crutch has created huge swaths of individuals who are incarcerated simply because they cannot obtain a corporate-backed surety or afford a nominal bond.<sup>220</sup>

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(“The commercial bail bondsman has long been an anathema to the criminal defendant seeking to exercise his right to pretrial release. . . . Those who [do] not have the resources to post their own bond [are] at the mercy of the bondsman who [can] exact exorbitant fees and unconscionable conditions for acting as surety.” (citation omitted)).

<sup>215</sup> See Adam Liptak, *Illegal Globally, Bail for Profit Remains in U.S.*, N.Y. TIMES (Jan. 29, 2008), <https://nyti.ms/2onSW3u> (noting that only Kentucky, Illinois, Wisconsin, and Oregon prohibit commercial bonds). Liptak’s article stresses how isolated the United States is in countenancing this practice, as well as how most of the legal profession similarly abhors the practice. See *id.* (“Most of the legal establishment, including the American Bar Association and the National District Attorneys Association, hates the bail bond business, saying it discriminates against poor and middle-class defendants, does nothing for public safety, and usurps decisions that ought to be made by the justice system.”).

<sup>216</sup> See SELLING OFF OUR FREEDOM, *supra* note 70, at 1.

<sup>217</sup> *Id.*

<sup>218</sup> See, e.g., ARPIT GUPTA ET AL., MD. OFFICE OF THE PUB. DEF., THE HIGH COST OF BAIL: HOW MARYLAND’S RELIANCE ON MONEY BAIL JAILS THE POOR AND COSTS THE COMMUNITY MILLIONS 4 (2016), <http://www.opd.state.md.us/Portals/0/Downloads/High%20Cost%20of%20Bail.pdf> [<https://perma.cc/T5MV-AZCD>] (finding Maryland communities were charged more than \$256 million in non-refundable corporate bail premiums from 2011 to 2015 and noting that more than \$75 million in premiums were collected in cases that were resolved without any finding of wrongdoing); see also JUSTICE POLICY INST., FOR BETTER OR FOR PROFIT: HOW THE BAIL BONDING INDUSTRY STANDS IN THE WAY OF FAIR AND EFFECTIVE PRETRIAL JUSTICE (2012), [http://www.justicepolicy.org/uploads/justicepolicy/documents/\\_for\\_better\\_or\\_for\\_profit\\_.pdf](http://www.justicepolicy.org/uploads/justicepolicy/documents/_for_better_or_for_profit_.pdf) [<https://perma.cc/B2X8-L3VX>].

<sup>219</sup> See Annalies Winny, *Demorrea Tarver’s Charges Were Dropped, but the 10 Percent Fee He Promised a Bail Bondsman on His \$275,000 Bail Has Him Drowning in Debt*, BALT. CITY PAPER (July 20, 2016), <http://www.citypaper.com/news/mobtownbeat/bcp-072016-mob-bail-20160720-story.html>; see also Douglas L. Colbert, *The Maryland Access to Justice Story: Indigent Defendants’ Right to Counsel at First Appearance*, 15 U. MD. L.J. RACE RELIG. GENDER & CLASS 1, 21 (2015) (documenting the “powerful bail bond industry[’s]” opposition to bail reform).

<sup>220</sup> See MARIE VANNOSTRAND, NEW JERSEY JAIL POPULATION ANALYSIS: IDENTIFYING OPPORTUNITIES TO SAFELY AND RESPONSIBLY REDUCE THE JAIL POPULATION 13 (2013)

This, then, provides the ultimate context for Paul Clement’s argument before the Maryland Court of Appeals—made on behalf of the bail-bond industry—against a constitutional right to affordable bail. When Clement argued no right exists because “even at the time of the framing, not everybody had the same amount of money, and there were some people who were going to face a bail that they couldn’t afford,”<sup>221</sup> he abandoned basic constitutional norms. Perhaps *at the time of the framing*, unaffordable bail *was* tolerated.<sup>222</sup> But so too was slavery tolerated. The Thirteenth and Fourteenth Amendments changed the law and discursive norms. Under our amended Constitution, the one that governs us *now*, unequal justice is as abhorrent as involuntary servitude. To argue otherwise is beyond the pale and illegitimate.

The bail-bond industry’s answer—that unequal justice is irrelevant here because the *Griffin*-line cases do not extend to the bail situation—is also illegitimate. From the moment *Griffin* was announced, jurists recognized its equal justice principle did apply to bail. Pretrial, an indigent defendant is as legally innocent and as entitled to freedom as a rich defendant. If the *Griffin*-line of criminal cases stand for anything, it is for an outright constitutional prohibition on incarcerating indigents *solely because of their indigency*.<sup>223</sup> The entirely legitimate authority surveyed in this Part puts this proposition beyond cavil. To contend otherwise sanctions intolerable discrimination.

#### CONCLUSION

This Article has argued on behalf of a constitutional right to affordable bail. Having shown that legitimate precedent favors the right and proven the illegitimacy of the so-called “wall of authority” rejecting it, we conclude by briefly reviewing and answering other possible objections.

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(tracking the amount of accused individuals in New Jersey prisons on an average day). The report found that 1,547 inmates (twelve percent of the entire population) were held in custody due to an inability to pay \$2,500 or less. Nearly 800 inmates could not afford to post a bail under \$500. *Id.*

<sup>221</sup> See COA Hearing, Testimony of Paul Clement, *supra* note 9, at 4:38–4:50.

<sup>222</sup> Unaffordable bail at the time of the framing of the Constitution was only tolerated in extremely rare situations, where a “personal surety” was not sufficient to cover what the reviewing court believed was appropriate for the specific defendant. A “personal surety” during this time period was akin to what we consider an unsecured bond: a promise to pay in the event of a non-appearance at trial. See TIMOTHY R. SCHNACKE, NAT’L INST. OF CORR., MONEY AS A CRIMINAL JUSTICE STAKEHOLDER: THE JUDGE’S DECISION TO RELEASE OR DETAIN A DEFENDANT PRETRIAL 19–22 (2014), <https://www.pretrial.org/download/research/Money%20as%20a%20Criminal%20Justice%20Stakeholder.pdf> [<https://perma.cc/M2RU-WY5U>].

<sup>223</sup> *Cf. Williams v. Illinois*, 399 U.S. 235, 241–42 (1970) (“[O]nce the State has defined the outer limits of incarceration necessary to satisfy its penological interests and policies, it may not then subject a certain class of convicted defendants to a period of imprisonment . . . solely by reason of their indigency.”).

Critics of the affordable bail right could assert that accepting its recognition would improperly require release for all pretrial detainees. Throwing jail doors open, the critique continues, will result in defendants skipping court and avoiding justice, and will end in increased crime and violence. Luckily, no such parade of horrors will ever occur because the release-for-all argument starts from a false premise.

The right to *affordable* bail does not entail a right to bail *in all cases*. Indeed, bail can be denied altogether on proof of potential dangerousness or flight risk.<sup>224</sup> *Salerno* remains the law. The equal-justice principle therefore does not require bail for all or universal release. Rather, consistent with *Griffin* and its progeny, it only requires affordable bail once bail is on the table.<sup>225</sup> The right to bail can be denied altogether, but once offered, it cannot offend equal justice.<sup>226</sup>

Another potential objection is that recognizing an affordable bail right will leave the system vulnerable to gaming and manipulation. Defendants will claim they cannot afford to pay bail and secure improper release as a practical matter. First, this objection only applies to defendants not deemed too dangerous under *Salerno*.<sup>227</sup> Second, the concern itself is overblown.

Abstract endorsement of the affordable-bail right does not require judges to accept every defendant's proffer regarding his or her available means. In concrete cases, judges may reject assertions that bail amounts cannot be met. High bail amounts for wealthy accused criminals who pose a flight risk, for example, may be justified. Some wealthy defendants might complain that their assets are tied up and unavailable, but judges facing such complaints would not have to automatically release them. In the end, affordability is a question of fact, and fact-finding remains an individualized inquiry based on evidence.<sup>228</sup> Appellate review of affordability determinations insulates against miscarriages of justice.

A final objection is philosophical, and goes to the role of constitutional law in American society. Justice Burton captured the sentiment in his *Griffin* dissent when he noted that "[p]ersons charged with crimes stand before the law with varying degrees of economic and social advantage. Some can afford better lawyers and better investigations of their cases. Some can afford bail, some cannot."<sup>229</sup> The role of the courts, he insisted, is not to make every defendant "economically equal before [the State's] bar of justice."<sup>230</sup>

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<sup>224</sup> United States v. Salerno, 481 U.S. 739, 748–49 (1987).

<sup>225</sup> See *id.* at 753–54.

<sup>226</sup> Of course, this is precisely opposite to the bail-industry's view, voiced by Paul Clement, that the Constitution guarantees the option of bail, but not that everyone will have the means to make it. See COA Hearing, Testimony of Paul Clement, *supra* note 9 and accompanying text.

<sup>227</sup> See 481 U.S. at 748–49.

<sup>228</sup> This system thus does not do away with the idea that defendants need "skin in the game" to show up for court. However, defendants are only required to offer up such skin as they actually can based on an evidence-based inquiry into their means.

<sup>229</sup> *Griffin v. Illinois*, 351 U.S. 12, 28–29 (1956) (Burton, J., dissenting).

<sup>230</sup> *Id.* at 28.

The response here begins by noting that Justice Burton's dissent came in 1956, five years before *Gideon v. Wainwright*<sup>231</sup> held that the Constitution requires courts to appoint counsel in criminal cases for defendants that could not afford to hire their own.<sup>232</sup> Writing for a unanimous Court in *Gideon*, Justice Black observed:

From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.<sup>233</sup>

The Constitution may not require social and economic equality, but it does require equal justice. When Justice Burton wrote his dissent in *Griffin*, the Supreme Court had not yet established that the Constitution requires affordable lawyers.<sup>234</sup> Naturally, his dissent in *Griffin* therefore reasoned that it did not require affordable bail.<sup>235</sup>

Thankfully, times have changed. We now live in an era where inequality demands redress. Some may seek to build walls to keep out the poor, but many more wish to tear down such walls and let freedom reign. The fight for equal justice, as history has shown time and time again, is often regrettably a slow-moving, tumultuous, and unpredictable battle. While these walls may not be demolished in a single swoop, an increasing number of jurisdictions are beginning to shed light on the disparate effects that the bail industry wreaks on poorer defendants.<sup>236</sup> Recognizing a right to affordable bail may not bring full justice for the 99% against the 1%, but it is an important step in the right direction.

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<sup>231</sup> 372 U.S. 335 (1963).

<sup>232</sup> *Id.* at 344.

<sup>233</sup> *Id.*

<sup>234</sup> *Griffin*, 351 U.S. at 28–29 (Burton, J., dissenting).

<sup>235</sup> *Id.*

<sup>236</sup> See *Brangan v. Commonwealth*, 80 N.E.3d 949, 963 (Mass. 2017). While the Massachusetts Supreme Court declined to rule that all defendants have a right to affordable bail, it did note that when

a judge sets bail in an amount so far beyond a defendant's ability to pay that it is likely to result in long-term pretrial detention, it is the functional equivalent of an order for pretrial detention, and the judge's decision must be evaluated in light of the same due process requirements applicable to such a deprivation of liberty.

*Id.* In this sense, any bail amount that is unattainable for a particular defendant is to be viewed with strict scrutiny, and checked with the same rigorous standards that *Salerno* created in situations when bail is revoked.

