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THE SUPREME COURT, RACE, AND THE CLASS STRUGGLE

Thomas Kleven*

The "civil rights" era of the 1950's and 1960's was a revolutionary time in our society, as black people struggled to enter the mainstream of American life. As a result of the civil rights movement, it seems fair to say that finally, more than a century after the abolition of slavery, blacks have attained equal legal rights—the right to attend the same schools as whites; the right to participate in the political process; the right not to be discriminated against in public accommodations, housing, and employment. Consequently, blacks can be found today in virtually every walk of life in greater numbers than ever before.

But despite these strides and the visible improvement in status, equality of legal rights has not led to a real opportunity to enjoy the benefits of our society for vast numbers of blacks who still live in segregated and deteriorated neighborhoods, attend segregated and inferior schools, and experience far greater unemployment and under-employment than whites. The disparity be-

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1. That is not to say these legal rights have been fully effectuated, as is illustrated by the multitude of complaints of racial discrimination coming before our courts and administrative agencies.

2. There are, for example, more black politicians, black professionals, black suburbanites, and so on. Nevertheless, blacks are proportionately far underrepresented in these areas. See H. ROSE, BLACK SUBURBANIZATION 1-26 (1976); U.S. BUREAU OF THE CENSUS, PUB. NO. 80, THE SOCIAL AND ECONOMIC STATUS OF THE BLACK POPULATION IN THE UNITED STATES: AN HISTORICAL VIEW, 1790 TO 1978, at Table 109 (Black Elected Officials), Table 55 (Black Persons Employed in Selected Professional Occupations) (Series P-23, 1979) [hereinafter cited as BLACK POPULATION].


4. As of 1972, 63.7% of all black public school pupils still attended schools in which a majority of the students were black, and 45.2% attended schools in which more than 80% of the students were black. UNITED STATES COMMISSION ON CIVIL RIGHTS, TWENTY YEARS AFTER BROWN 48 (1975) (Table 2.1) (equality of educational opportunity).

5. Between 1959 and 1978 the annual average unemployment rate for blacks in
between median family income of white and black families has actually increased over the past two decades. These facts illustrate that what now holds black people back in our society is not the denial of legal rights, but the lack of access to the economic and social resources necessary to the exercise of those rights. As such, the plight of blacks today must be seen as part of a larger class struggle which affects other ethnic minorities and poor whites as well.

The labor force ranged from a low of 6.4% in 1969 to a high of 13.9% in 1975, and during that period was at all times roughly twice the unemployment rate of whites. BLACK POPULATION, supra note 2, at Tables 47 and 154.

6. In 1959 the disparity between median white and black family incomes (adjusted to 1974 dollars) was $4,814. Id. at Table 14. By 1970 the disparity rose to $7,397 (adjusted to 1979 dollars); and in 1979 it was $8,876. U.S. BUREAU OF THE CENSUS, PUB. No. 125, MONEY, INCOME AND POVERTY STATUS OF FAMILIES AND PERSONS IN THE UNITED STATES: 1979, at Table 4 (Series P-60, 1980) [hereinafter cited as MONEY]. Statistics can, of course, be manipulated. Thus, while the absolute gap between white and black family incomes has widened, the gap has narrowed in relative terms. But even these figures do not present a particularly heartening picture. In 1959 the ratio of black to white median family income was .52 (in 1974 dollars). BLACK POPULATION, supra note 2, at Table 14. It increased to .61 in 1970 (in 1979 dollars), but by 1979 had dropped back to .57. MONEY, supra. Of particular relevance to this Article is the status of the very poor. In that regard, the percentage of black persons below the poverty level declined from 55.1% in 1959 to 31.3% in 1977. BLACK POPULATION, supra note 2, at Tables 33 and 146. While that is a substantial decline, it still left 7.7 million blacks in poverty status in 1977 (as compared with 9.9 million in 1959 and only 7.1 million in 1969). Id. And it is tempered significantly when compared with the poverty status of whites which declined from 18.1% to 8.9% (or from 28.3 million persons to 16.4 million) during that same period, and in light of the fact that most of the decline occurred between 1959 and 1969 when the figure for blacks was 32.2%. Id. It may be more than coincidence that the leveling off of overall black economic progress in the 1970's has been paralleled by an increasing reluctance on the part of the Supreme Court to intervene.

7. Every society is structured to some degree along class lines, by which I mean the uneven distribution of society's goods (e.g., wealth, education, employment), one's position in the social hierarchy, and accordingly one's prestige and power being dependent on how much of those goods one possesses. Many commentators have noted the class aspects of American society. See, e.g., L. DUBERMAN, SOCIAL INEQUALITY: CLASS AND CASTE IN AMERICA (1976); D. ROSSIDES, THE AMERICAN CLASS SYSTEM (1976). The term class struggle as used in this Article refers to the efforts of those lower in the social hierarchy to move up and to the inevitable conflicts which arise when those higher in the hierarchy attempt to preserve their positions. The intensity of the struggle is a function of the rigidity of the class structure, i.e., the degree of mobility up and down the social hierarchy. The degree of mobility is in turn related to the proper role of the courts in the class struggle. See note 114 infra and accompanying text.

8. This is not to say the struggles of blacks and poor whites are identical, or that their interests always coincide. In addition to classism, blacks are also held down by the racism which still pervades our society, and sociologists are currently
The civil rights era produced many court battles, and the Supreme Court played a major role in easing the transition to equal legal rights; first by striking down state laws discriminating against blacks, and then by legitimizing federal legislation protecting blacks against discrimination. But as the battle shifted in the 1970's from one of race to one of economics, the Court became less willing to intervene. This Article chronicles and suggests reasons for the change in the Court's attitude, with the goal of assessing what this experience tells us about the judiciary's role in the class struggle.

Arguments for and against judicial intervention in the class struggle were ably made a decade ago by scholars who anticipated the debate that would unfold before the Supreme Court. Now that the Court has taken a stance, it seems worthwhile to reconsider the issue in light of what the recent cases contribute to our understanding. While I will argue for greater judicial involvement than the current Court deems appropriate, my purpose is not to rail against decisions with which I disagree, but to make a reasoned case for an approach to Supreme Court intervention in the future.

In the meantime, class-struggle issues may continue to come before state courts which will be searching for guidance as to how to proceed.

A Hasty Retreat

The Supreme Court's role during the "Warren Era" in helping establish equal legal rights for blacks, and in opening up the possi-

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bility of court intervention in the class struggle as well, has been documented elsewhere. Therefore, I will merely highlight the thrust of the major decisions in order to set the stage for discussing the “Burger Court’s” reluctance to intervene.

The most significant Warren Era decision, of course, was Brown v. Board of Education, in which the Supreme Court outlawed state-mandated school segregation as violative of the equal protection clause. In the process, the Court articulated the profound moral sentiment that “[s]eparate educational facilities are inherently unequal.” In 1955 the Court delayed rapid enforcement of Brown by establishing the “all deliberate speed” doctrine. But by 1964 the Court was ready to begin vigorous enforcement, stating that “the time for mere ‘deliberate speed’ has run out.” That notion was reinforced four years later when the Court held that Brown required segregation to “be eliminated root and branch,” and that “the burden on a school board today is to come forward with a plan that promises realistically to work, and promises realistically to work now.”

Spurred on, no doubt, by the Warren Court’s intervention in the struggle for racial justice, litigants began to attack governmental practices which were alleged to discriminate against poor people. The Court responded favorably with rulings ordering free counsel and transcripts for indigents in criminal proceedings, striking down the poll tax, and invalidating durational residency requirements for welfare recipients. Although these cases were fought on economic grounds, they also had strong racial overtones.

12. Id. at 495. That same sentiment led the Warren Court to strike down government-mandated segregation across the board in a series of per curiam opinions. These cases are collected in L. Tribe, AMERICAN CONSTITUTIONAL LAW § 16-15, at 1020 n.7 (1978).
16. Id. at 439 (emphasis in original).
Poor blacks in our country are subjected to the criminal process in disproportionate numbers; the poll tax was widely used as a means to disenfranchise blacks; and a significant migratory pattern of the 1950's and 1960's was that of blacks, many of whom were dependent on welfare for a new start, moving from the South to the North.

The interventionism of the Warren Era carried over into the initial years of the Burger Court, which upheld busing as a desegregation remedy, 21 held northern de facto school segregation unconstitutional, 22 and overthrew as violative of due process the termination of welfare benefits without a prior hearing. 23 Language such as the following from Goldberg v. Kelly 24 must have given hope to many that the Court could be counted on for continuing support in the class struggle:

> From its founding the Nation’s basic commitment has been to foster the dignity and well-being of all persons within its borders. We have come to recognize that forces not within the control of the poor contribute to their poverty. . . . Welfare, by meeting the basic demands of subsistence, can help bring within the reach of the poor the same opportunities that are available to others to participate meaningfully in the life of the community. 25

But the tune quickly changed as the Burger Court sounded retreat in a series of cases which came before it during the 1970’s. These cases, whether fought on racial or economic grounds, present at heart class-struggle issues arising out of the depressed socio-economic situation in which poor blacks, as well as other minorities and poor whites, now find themselves.

The class-struggle cases of the 1970’s are outgrowths of the dramatic change in living patterns that has occurred in our society over the past few generations. Large numbers of blacks and other minorities have migrated to central cities in both the North and South. Simultaneously, middle- and upper-income whites have left the cities for the suburbs, motivated in part by a desire not to live near blacks and poor people. The impact has been to draw off

24. Id.
25. Id. at 264-65.
much of the central cities' tax base while the demand for governmental services has increased due to the influx of poorer people. The suburbs have been able to maintain healthy tax bases due to the unavailability of suburban-housing opportunities for lower-income people, caused in part by exclusionary zoning. Because suburbs can thus afford to charge lower taxes, industries in many locales have left the central cities for suburbia, thereby exacerbating unemployment among the poor and minorities.\textsuperscript{26}

The overall picture is dismal. Blacks, other minorities, and lower-income whites are trapped in central cities whose declining tax bases make it increasingly difficult to provide governmental services and are unable to escape to the suburbs where better education, housing, and jobs are available. The picture may be overgeneralized a bit—there is some indication that middle- and upper-income whites are starting to move back to the central cities\textsuperscript{27}—but the generalization holds true in varying degrees in many metropolitan areas.

This situation has spawned a number of lawsuits, and a strong case can be made that the Supreme Court's response has facilitated the process of central-city isolation and suburban insulation. Two types of suits have arisen: those directly attacking the poverty problems of locked-in central-city dwellers, and those attempting to open up suburbia to them.

One way of directly attacking poverty problems is to reduce reliance on local taxes to finance public services and have higher levels of government assume greater responsibility. This forces middle- and upper-income suburbanites to share in the cost of urban-poverty problems. \textit{San Antonio Independent School District v. Rodriguez}\textsuperscript{28} is such a case. There lower-income residents of an inner-city (largely Chicano) school district brought a class action against state and local education authorities, claiming that Texas' substantial reliance on local property taxes to finance public education denied them equal protection. They argued that their district, having a poor tax base, would have to tax property owners at a much higher rate than richer districts in order to furnish the same services.

\textsuperscript{26} See Advisory Commission on Intergovernmental Relations, Improving Urban America: A Challenge to Federalism 201-21 (1976). But see note 136 infra and accompanying text.


\textsuperscript{28} 411 U.S. 1 (1973).
per-pupil dollar expenditure as the richer districts provided.29 Had the Court been willing to intervene, the state would have had to devise an alternative method for financing public education yielding a greater degree of equality. Presumably that would require redistributing wealth from richer to poorer school districts. But despite substantial interdistrict disparities in ability to finance education and in educational expenditures, five members of the Court were unwilling to hold lower-income people (or lower-tax-base districts) a suspect class or education a fundamental right.30 Consequently, the state's school-financing scheme was not subjected to the strict-scrutiny test applicable in suspect-class and fundamental-right cases. Instead, because of the state policy of fostering local control of education, the Court found the financing scheme satisfied the more lenient minimum-rationality test applicable in other equal protection cases.31

A second approach to directly attacking poverty is illustrated by Dandridge v. Williams,32 in which welfare recipients challenged Maryland's maximum grant provision imposing an upper limit on the amount of Aid to Families with Dependent Children which any family could receive.33 The provision prevented large families from receiving additional aid. Had the complainants been successful, a wholesale attack on the adequacy of welfare payments would surely have followed. However, although the state's standard-of-need figures showed that families subject to the cut-off would receive inadequate aid to meet their minimum needs,34 the Court held the provision not violative of equal protection in that larger families are not a suspect class and there were valid reasons supporting the cutoff provision, namely, "encouraging employment and avoiding discrimination between welfare families and the families of the working poor."35 Moreover, in analogizing Dandridge to business-

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29. Id. at 11-13.
30. Id. at 17-39.
31. Id. at 40-50.
33. 397 U.S. at 473-75; see note 167 infra.
34. 397 U.S. at 473-75; see note 167 infra.
35. 397 U.S. at 486.
regulation cases in which the Court gives virtually total deference to legislative determinations, the Court signaled its intent to stay out of substantive welfare issues.\textsuperscript{36}

If poverty could not be attacked directly, locked-in central-city dwellers might try to follow departing middle- and upper-income whites to the suburbs, and if successful in so doing might thus deter white flight. Several Supreme Court decisions relate to this approach. The first is \textit{Milliken v. Bradley},\textsuperscript{37} a school-desegregation case. Detroit had engaged in intentional segregation of its public schools. The district court’s ability to formulate an effective remedy was stymied, however, by the fact that as blacks had migrated into the city, so many whites had left or enrolled their children in private schools that roughly 65\% of the school children in Detroit were black and the figure was rising rapidly.\textsuperscript{38} In response, Judge Roth formulated a remedial decree requiring 53 suburban school districts surrounding Detroit to participate in a desegregation plan.\textsuperscript{39} But the Supreme Court overruled on the ground that it was inappropriate to include the suburban districts absent a showing that they had engaged in intentional segregation themselves.\textsuperscript{40} Sus-

\textsuperscript{36} Id. at 484-86. In the words of Justice Stewart, who wrote the majority opinion: “\textit{T}he intractable economic, social, and even philosophical problems presented by public welfare assistance programs are not the business of this Court.” Id. at 487. The Court has since remained true to that pronouncement. In Jefferson v. Hackney, 406 U.S. 535 (1971), the Court upheld Texas’ practice of providing recipients of Aid to Families with Dependent Children only 75\% of their standard of need, while paying 100\% to the aged and 95\% to the disabled and blind. The Court’s seemingly contrary position in Goldberg v. Kelly, 397 U.S. 254 (1970), can be explained on the ground that the case involved a procedural due process issue, the right to a hearing before termination of welfare benefits, with respect to which the Burger Court has been more willing to intervene. It should be noted, however, that procedural issues are not free of economic, social, and philosophical problems. A prior hearing, for example, will mean that pending the hearing’s outcome some people who are no longer eligible for welfare, and who may request a hearing though they know they are no longer eligible, will continue to receive payments which the government will never be able to recoup. That cost, along with the cost of providing the hearings, will result in either higher public expenditures to run the welfare program or lower benefits to eligible recipients.

\textsuperscript{37} 418 U.S. 717 (1974).


\textsuperscript{40} Milliken v. Bradley, 418 U.S. 717, 741-52 (1974). Again, the majority’s rationale was the sanctity of local control. Id. The Court has ruled that a predominantly white area may not withdraw from a preexisting school district found to have engaged in segregation if the effect would be to impede desegregation efforts. Wright v. Council of City of Emporia, 407 U.S. 451 (1972).
taining such a burden would seem to be extremely difficult. First, intentional segregation must be shown for each school district included in the desegregation plan. Second, having few minority residents, suburban districts could argue that they have not engaged in any segregation of "their" students.\footnote{41}

Then in \textit{Pasadena City Board of Education v. Spangler}\footnote{42} the Court held that once desegregation of an intentionally segregated school system is achieved, there is no obligation to continue desegregation efforts if resegregation occurs as the result of privately initiated changes in the living patterns of blacks and whites.\footnote{43} The clear message of \textit{Milliken} and \textit{Pasadena} to whites wishing to avoid having their children attend school with blacks is that by using their greater economic resources to isolate themselves in suburbia they can do so.\footnote{44} The issue would thus become more one of residential than school segregation. But the residential-segregation issue itself has been before the Burger Court,\footnote{44}

\footnote{41. Interdistrict relief has been ordered by a few lower federal courts after a finding of interdistrict violations consisting of the racial gerrymandering by the state of school-district boundary lines, as well as state-supported housing discrimination. See, e.g., United States v. Bd. of School Comm'rs, 456 F. Supp. 183 (S.D. Ind. 1978), \textit{aff'd in relevant part}, 637 F.2d 1101 (7th Cir.), \textit{cert. denied}, 101 S. Ct. 114 (1980); Evans v. Buchanan, 393 F. Supp. 428 (D. Del.), \textit{aff'd per curiam}, 423 U.S. 963 (1976).}

\footnote{42. 427 U.S. 424 (1976).}

\footnote{43. Id. at 435-37. Presumably what complainants must do is prove new intentional acts of segregation by government officials subsequent to the achievement of desegregation. See \textit{Dayton Bd. of Educ. v. Brinkman}, 433 U.S. 406 (1977) (purposeful and not just effectual discrimination must be shown). But in light of the fact that Pasadena had been desegregated for but one year before resegregation began to occur, the Court could easily have attributed the resegregation to the initial acts of segregation and regarded the new desegregation order as a continuation of the original one. That had been pretty much the Court's approach in \textit{Green v. County School Bd.}, 391 U.S. 430 (1968); see text accompanying note 73 infra.}

\footnote{44. At the same time, in cases like \textit{Dayton Bd. of Educ. v. Brinkman}, 443 U.S. 526 (1979) and \textit{Columbus Bd. of Educ. v. Penick}, 443 U.S. 449 (1979), the Burger Court has insisted that school districts maintaining segregation as of 1954 (whether de jure or de facto) have a continuing obligation to remedy it if they have not already done so, and has upheld remedial orders including such measures as massive intradistrict busing. There is something disturbing in all this, however, since such rulings may well induce the very white flight which the Court refused to deal with in \textit{Milliken} and \textit{Pasadena}, and thus also contribute to the fiscal difficulties of providing quality education which the Court refused to deal with in \textit{Rodriguez}. For discussion of the extent to which intradistrict desegregation plans induce white flight, see Coleman, \textit{Liberty and Equality in School Desegregation}, 6 Sociol. Pol. 9 (1976); Ravitch, \textit{The White Flight Controversy}, 51 Pub. Int. 135 (1978); Rossell, \textit{School Desegregation and Community Social Change}, 42 Law & Contemp. Prob., Summer 1978, at 133, 148-69.}
as lower-income and minority people have attempted to break down the exclusionary-zoning barriers many suburbs have erected. Again the Court has not responded favorably.

First, the Court has made it difficult even to get into court. In Warth v. Seldin the Court denied standing to challenge the zoning ordinance of a Rochester, New York, suburb to low- and moderate-income plaintiffs (who were also racial and ethnic minorities) who alleged they were unable to find housing in the community due to exclusionary practices. A builders' association which alleged that exclusionary practices prevented its members from constructing low- and moderate-income housing there was also denied standing. According to the Court, these plaintiffs lacked a "personal stake" in the outcome of the litigation in that they failed to show a particular excluded housing project in which they might live or which they desired to build. Requiring plaintiffs to specify a particular project substantially hinders their access to the courts. What profit-making builder would be willing to expend the time and money to develop and propose a particular project on the off-chance of winning a lawsuit several years down the road? And how many nonprofit entities could afford to do so? Furthermore, Warth implies that even a successful lawsuit will result at best in an order allowing the particular excluded project to be built, and not in the wholesale revision of zoning necessary to remedy exclusionary practices.

Nor have complainants fared better on the merits once in court. At issue in James v. Valtierra was the validity of a California constitutional provision stipulating that public housing could be built in a community only upon the approval of its electorate. Suburbanites desiring to insulate themselves from the poor could further that result simply by voting down proposed public-

45. 422 U.S. 490 (1975).
46. Id. at 515-16. Also suing in Warth were taxpayers of Rochester who claimed the exclusionary practices of the suburb (Penfield) injured them by forcing them to bear a greater share of the taxation costs of providing for the housing needs of lower-income people, and taxpayers of Penfield itself who claimed deprivation of the opportunity to live in an economically and ethnically balanced community. Standing was denied on the grounds that they were indirectly raising the rights of third parties (i.e., excluded lower-income people). Id. at 508-10. But then the Court went on to deny standing to the low-income plaintiffs as well. Id. at 502-08.
48. See text accompanying notes 200-217 infra.
housing projects. After a few rejections local public officials would likely get the message not to propose more public housing. Yet the Supreme Court denied an equal protection challenge to the provision on the ground that persons eligible for low-income housing are not a suspect class. As a result, the state was not required to show a compelling interest.\(^5\) The Court also held that there was a rational basis for subjecting public housing to more rigorous approval requirements than other housing because of the increased tax burden existing residents might have to bear, and also because of the devotion to democracy which the referendum process reflects.\(^5\)

Then in \textit{Village of Arlington Heights v. Metropolitan Development Housing Corp.},\(^5\) a case involving an equal protection attack against the zoning practices of a Chicago suburb on the basis of racial discrimination, the Supreme Court held that the mere showing of a disparate racial impact was insufficient to make out an equal protection violation, and that discriminatory purpose or motive must be shown before the strict-scrutiny test will be employed.\(^5\)

Taken together, \textit{Valtierra} and \textit{Arlington Heights}, along with the principles articulated in \textit{Rodriguez},\(^5\) make it very difficult to mount an effective exclusionary-zoning challenge in the federal courts. If the suit is based on discrimination against low-income people, the import of \textit{Valtierra} and \textit{Rodriguez} is that the state must only demonstrate a rational basis justifying its approach to zoning. The suburb’s argument is that zoning is entrusted to individual communities in the name of local control and that its zoning is motivated not by animus toward lower-income people but by a

\(^{50}\) \textit{Id.} at 141-43.
\(^{51}\) \textit{Id.} at 142-43.
\(^{52}\) 429 U.S. 252 (1977).
\(^{53}\) Only 25 of Arlington Heights’ 64,000 residents were black according to the 1970 Census. \textit{Id.} at 255. The Supreme Court remanded \textit{Arlington Heights} for a determination as to whether the refusal to rezone the complainant’s property for subsidized housing violated the Fair Housing Act of 1968, 42 U.S.C. § 3601 (1976). 429 U.S. at 271. On remand the Seventh Circuit held that a showing of a racially discriminatory effect will under appropriate circumstances (detailed in the opinion) be enough to make out a Fair Housing Act violation, though discriminatory intent cannot be proved. 558 F.2d 1283 (7th Cir. 1977), \textit{cert. denied}, 434 U.S. 1025 (1978). That holding is consistent with the Supreme Court’s interpretation of other civil rights laws. See, e.g., Griggs v. Duke Power Co., 401 U.S. 424 (1971) (employment discrimination under Title VII of Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 (1976)). But the relief to be obtained for a Fair Housing Act violation is likely to be limited, as with \textit{Warth}, to the required approval of a particular project rather than a wholesale revision of zoning. And even that relief may be thwarted by a community’s showing that other more appropriate sites are available and zoned for subsidized housing.

\(^{54}\) \textit{See} text accompanying notes 28-31 \textit{supra}.
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desire to protect its tax base, prevent environmental problems, and preserve its suburban character. If the suit is based on racial discrimination, the difficulty is that zoning on its face is racially neutral, and as a result of Arlington Heights the fact that few minorities live in a community is not enough to make out a race case. The complainants must presumably submit affirmative proof that the zoning was racially motivated, and that showing may be impossible. While there is evidence that racial prejudice does often underlie zoning, all the proponents of exclusionary zoning must do to protect themselves is to conceal their real purpose and continuously emphasize the rationales enumerated above. Tacit agreements are hard to prove by affirmative evidence.56

Even the occasionally favorable result is illusory. In Hills v. Gautreaux, where the Chicago Housing Authority and the Department of Housing and Urban Development (HUD) were found to have engaged in racial segregation by locating public-housing projects exclusively in black neighborhoods, the Supreme Court upheld a remedial order which required future public housing to be located in white neighborhoods both within Chicago and in outlying suburbs. Milliken v. Bradley was distinguished in that the


56. The proof problem is even more difficult in light of City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976), in which the Court rejected a claim that a city charter provision requiring zoning changes to be ratified by a 55% majority vote of the electorate constituted an improper delegation of legislative authority. Id. at 672-80. As in Valtierra, the Court's decision was based on the devotion to democracy which the referendum process reflects. As a practical matter, the opportunity to build lower-income housing in most suburbs often depends on a developer's ability to obtain a zoning change, most suburban zoning ordinances being more restrictive (particularly with respect to density requirements) than is economically feasible for such housing. A city council deciding on a zoning change will usually have before it written recommendations from the city's planning agencies, and those documents together with the council's public debate could serve as evidence in a claim of purposeful racial discrimination. Such a record is absent when the electorate as a whole makes the decision. The most that might be available would be the public statements of individual citizens or lobbying groups which may or may not reflect the reasons why most voters voted the way they did. If motive is the key, however, it would seem a complainant must show enough voters rejected a zoning change for improper reasons (i.e., racial discrimination) to swing the election. Such proof will be hard to come by. And while few city charters contain a required referendum procedure for zoning changes, permissive referenda at the initiative of a certain percentage of the electorate are common provisions of state constitutions and city charters, and could be used to prevent the construction of lower-income housing while masking the underlying racial motives.


58. Id. at 296-300.
remedial order ran to the Housing Authority and HUD, both of which had jurisdiction beyond Chicago's city limits; whereas in *Milliken* Detroit had no authority to administer schools beyond its borders. Thus the local-control policy underlying *Milliken* was not implicated. However, the Court recognized the potential intrusion on suburban prerogatives and took away with one hand what it gave with the other by holding that in carrying out any remedial order the Housing Authority and HUD would still be bound by local zoning laws and local approval requirements.

As of the end of its first decade, then, the Burger Court has substantially retreated from the Warren Court's commitment to desegregation, and has virtually closed the federal courts to class-struggle issues. It remains to explore the reasons why.

**WHAT WENT WRONG—THE COURT AND THE POLITICAL PROCESS**

It is tempting to place responsibility for the Burger Court's retreat on the Nixon appointees—Burger, Blackmun, Powell, and Rehnquist. These men have consistently come out against the complainants in the class-struggle cases discussed in the preceding section, and they replaced justices—Warren, Fortas, Harlan, and Black, respectively—at least some of whom might at first blush have been expected to be on the opposite side. President Nixon intentionally appointed "strict constructionists," a term which in the political context of the times meant being less solicitous of individual rights and more deferential to legislative actions. He did so because he felt, probably correctly, that the public believed the Court had gone too far in protecting individual rights, particularly in the area of integration.

On closer examination, however, it is not clear just how much...
of a difference the Nixon appointees have made. Several Warren Court members have also expressed reservations about court intervention in class-struggle cases. Warren and Black, for example, were prepared in dissent to uphold the welfare-residency requirement in *Shapiro*, the precursor to the Burger Court cases. Moreover, Stewart and White have usually joined with the Nixon appointees in declining to intervene.

It is obviously impossible to say how justices no longer on the Court, or justices appointed by a more liberal president than Nixon, would have voted. The telling point is, however, that even with different personnel only some of the class-struggle cases of the 1970's would have gone the other way, and at that by rather slim margins. Nowhere near the Warren Court's unanimity on the segregation issue would have been achieved. That fact is significant because a unified Court is important for gaining public acceptance of major decisions, and because it suggests that fundamental questions about the role of the Court were at stake in those cases.

At stake were issues of the legitimacy and competency of the Court to handle class-struggle cases, and of the Court's responsiveness to the public mood in ways more subtle than the appointive process. Because the legislature, being directly responsible to the electorate, is more likely to permit collective concerns to override individual rights, the Court has evolved in our society into the institution primarily charged with protecting individual rights. Although short-term political considerations can impact the Court through the appointive process, the fact that appointments are for life insulates the Court to a degree not the case for legislators. That once appointed the justices are insulated, however, does not mean there are no pressures to be responsive to popular will. The threat of impeachment, though remote, may be enough to temper decisions likely to contradict public opinion. More importantly, the Court must rely heavily on moral suasion to gain acceptance of and compliance with its decisions. To the extent that its decisions are extremely unpopular, the Court's prestige and moral suasion are undercut. In protecting preferred individual rights the Court has played and should play a leadership role, but it is realis-

63. Stewart joined the majority in all of *Rodriguez, Dandridge, Milliken, Pasadena, Warth, Valtierra*, and *Arlington Heights*, while White joined the majority in all but *Rodriguez* and *Milliken*.
64. *Brown, Brown II, Griffin, Green*, and most if not all the other Warren Court segregation decisions were unanimous opinions.
tic to expect the Court to pull back when it encounters massive resistance to its decisions lest it risk loss of public confidence in itself as an institution.

Retreat in the face of resistance is definitely a factor underlying the Court's recent decisions and is an outgrowth of the public's response to the Court's handling of the desegregation cases. During the early part of the civil rights era it was basically the South against the rest of the country. Explicitly mandated segregation existed only in the South, and the civil rights movement made a convincing and demonstrative case of its immorality. Far from going counter to public opinion, the Court's initial segregation decisions, though resisted in the South, were supported by large numbers of people if viewed from a national perspective. But the mood changed as it became apparent that laws mandating segregation were only the tip of the iceberg, that the depressed conditions and segregation rampant in the South were also present throughout the country, and that remedying these evils would intimately affect all our lives. The rest of the country could no longer feel morally superior, and the defensiveness and resistance which marked the southern response spread.

White resistance was accompanied by an attitudinal change within the black community as well. At the start of the civil rights era the prevailing view in the black community, at least the view espoused by black leaders, was integrationist. Integration was seen as the principal means of bringing black people into the mainstream of American life and almost as an end in itself. As the movement progressed, however, many black leaders began to advocate community control over the institutions which affect black people's lives and destinies. It is no longer so clear that integration is the desired goal.


67. See, e.g., S. CARMICHAEL & C. HAMILTON, BLACK POWER, THE POLITICS OF LIBERATION IN AMERICA (1967); CONFRONTATION AT OCEANHILL-BROWNSVILLE (M. Berube & M. Gittell eds. 1969); Lester, The Necessity for Separation, EBONY, Aug. 1970, at 166, 166-69. Ironically, the community-control concept is not dissimilar to the "states' rights" doctrine advanced by southern states during the civil rights era as an argument against Federal intervention with respect to racial discrimination.
It is inconceivable that the Supreme Court would remain unaffected by this shift in public opinion. Nor does the public's conservative mood appear to have abated. In fact, faced with concurrent threats of inflation and recession, we are seeing a new inner-directedness, with people so concerned with protecting their own well-being that they have less occasion to address the inequities which still exist in our society.68 The public's mood goes a long way toward explaining why at least some members of the Court were willing to draw the line on desegregation in Milliken and Pasadena and have been unwilling to intervene at all in such class-struggle cases as Rodriguez, Dandridge, Valtierra, and Arlington Heights.

Public resistance has a further dimension because of the remedial problems raised by many of the recent decisions. It is one thing, for example, to decide that school segregation or school financing or welfare administration or exclusionary zoning is unconstitutional. It is quite another to bring about school desegregation, fair methods of school financing, adequate welfare benefits, or housing integration. The history of the school-desegregation cases after Brown is replete with remedial difficulties, also present in class-struggle cases, which contribute to the Burger Court's retraction in school desegregation and unwillingness to enter the class-struggle arena.

Having decided to intervene in Brown, the Supreme Court was faced with two alternatives. It could declare mandatory segregation unconstitutional and leave the remedy to local authorities, or it could thrust the courts into the position of overseeing desegregation. Given the integrationist philosophy of the times and the likelihood of local resistance to the decision, it is understandable why the Court eventually chose the latter course.

The Court's first recognition of remedial problems, likely resistance, and the need to respond to political realities was in Brown II,69 in which the Court established the "all deliberate speed" formula for desegregation.70 The Court could have ordered immediate desegregation. Its decision not to do so must have reflected a preference for locally developed rather than court-

70. Id. at 301.
mandated solutions, as well as a judgment that a more gradual implementation of desegregation might lessen white resistance.

That notion proved largely unfounded as southern states took action to avoid the Brown decisions. One approach was to close the public schools (or give localities the option of closing them) and/or to substitute tuition-grant programs under which students attending private schools, which at that time could discriminate based on race,\(^7\) would receive money from the state to apply toward their private school education. Absent a racially discriminatory purpose there is no constitutional compulsion to operate public schools, nor any proscription against tuition-grant and local-option plans. However, since the obvious purpose was to thwart Brown and maintain a segregated system, the Court struck down these avoidance tactics in Griffin v. County School Board.\(^7\)

But that hardly stopped the resistance. If government could not be used directly to circumvent Brown, resisters might be able to do so on their own through freedom-of-choice or neighborhood-school approaches. Under freedom-of-choice parents had the right to select their children’s schools. Whites would obviously select previously all-white schools. Blacks could also select white schools, but pressure from the white community, as well as a hesitancy resulting from years of forced segregation, might well induce them to select previously all-black schools. That proved to be the case in Green v. County School Board\(^7\) and led the Court to strike down freedom-of-choice. Under the neighborhood-school approach children would be assigned to the schools closest to their homes. Given the highly segregated housing patterns in most communities, school authorities could then draw perfectly rational school-attendance lines and still maintain largely segregated schools. The Supreme Court’s response was Swann v. Charlotte-Mecklenburg Board of Education,\(^7\) in which the Court sanctioned busing as a desegregation remedy. Again, absent racial overtones there is nothing constitutionally offensive about freedom-of-choice and neighborhood schools. Implicit, therefore, in Green and Swann is the notion that these ostensibly legitimate approaches are, in the context of a history of racial segregation and a pattern of residential segregation, every bit as much avoidance tactics for which the state

\(^7\) See note 80 infra.
\(^7\) 377 U.S. 218 (1964).
\(^7\) 391 U.S. 430 (1968).
\(^7\) 402 U.S. 1 (1971).
is chargeable as are those in *Griffin*; or the notion that where a segregated system has existed there is an obligation to find a means to integrate it as proof positive that the previous system has been abandoned.

The response was more resistance—the issue now having spread throughout the nation—in the form of federal legislation limiting busing, proposed constitutional amendments prohibiting busing, and white flight to the suburbs or private schools, leaving many central-city schools so heavily minority that integration became an impossibility. Soon thereafter the Nixon appointees joined the Court and in *Milliken* and *Pasadena* the Court pulled back from its earlier commitment to desegregation.

75. In *Keyes v. School Dist. No. 1, Denver, Colorado*, 413 U.S. 189 (1973), the Court held *Brown* applicable to school districts in which segregation exists and is attributable to state action, despite the fact that a statutorily mandated school system does not exist. As subsequent litigation has disclosed, a great many school districts throughout the country have engaged in segregative practices. See notes 37-43 supra and accompanying text.


Had *Milliken* in particular gone the other way and suburbs been required to participate in desegregation plans, whites desirous of avoiding integration could have found still other avoidance techniques. One which suggests itself is the private school alternative. Many suburban middle- and upper-income whites might well have abandoned public education for private schools which, although they cannot now discriminate, would have few minorities because of their cost. Thus, though public school systems might be integrated, they would serve predominantly lower-income people and probably at woefully inadequate funding levels, since the departed middle-class taxpayers would have every incentive to keep public school finances as low as possible.

The upshot is that once the Court decided to become involved in a complex remedial process, it found a resistant public able to devise avoidance tactics to thwart each successive Court decision. Moreover, as resistance spread nationwide, and as it became apparent that many in the black community itself questioned the desirability of integration, the Court’s political support for the *Brown* decision declined dramatically. This undoubtedly helps explain the limits the Court has placed on its desegregation efforts.81

The class-struggle cases—school finance, welfare rights, and exclusionary zoning—pose remedial problems which are at least as difficult as those posed by school desegregation and which likewise contribute to the Burger Court’s reluctance to intervene. The *Rodriguez* case is a good illustration.82 If as a result of white-middle-class flight central cities are left with poorer tax bases than the suburbs,83 the obvious remedy would be some form of statewide school financing to equalize monies available to local

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81. In what could be viewed as an attempt to accommodate white resistance to integration and black demands for quality education, the Court in *Milliken v. Bradley*, 433 U.S. 267 (1977) [hereinafter cited as *Milliken II*], upheld as part of a desegregation order a requirement of compensatory and remedial education programs for children subjected to segregation. Id. at 279-88. But where is the money to come from if as the result of white flight, induced in part by the Court’s own decisions, see note 44 supra, the district’s ability to finance education has deteriorated, and if the Court is unwilling per *Rodriguez* to address the fiscal-disparity issue?


83. See note 26 supra.
districts—in effect some form of wealth redistribution. How this might come about is demonstrated by the following oversimplified example. Assume a state with only two school districts, both having equal numbers of pupils but with District One having a tax base of $40,000 per pupil and District Two a tax base of $20,000 per pupil. Assume also a tax rate of 5% in each district so that District One has $2,000 per pupil to spend while District Two has only $1,000. The situation could be equalized by having the state impose and collect a 5% statewide tax and disburse $1,500 to each district, thus redistributing $500 per pupil from District One to District Two.

But let us further assume that the middle-class people living in District One do not want their educational program diluted by $500 per pupil and have the political power to force the state to develop a scheme which assures them continuation of their $2,000 per pupil. The state would have to "level up" by providing an additional $1,000 per pupil for District Two, in effect spending more money on education than had previously been spent on a statewide basis. The additional money could be raised by increasing the tax rate in both districts to roughly 6.6%, or by some other new tax program which would make all taxpayers, including the hardpressed poor in District Two, pay more taxes. If new taxes were politically unpalatable, the state could redistribute funds from other state-financed programs into education (or forego increases it would otherwise make in such programs). In an era of taxpayer revolt this latter solution seems most likely. In that case, other welfare-type programs which redistribute wealth to the poor might well be the area from which funds are diverted. Unless the Court were then willing to take on the welfare-adequacy issue, the impact would be to elevate education to a higher priority than other redistributitional programs benefiting the poor—itself a complex policy judgment.

Although the welfare-rights and exclusionary-zoning cases raise political and remedial difficulties similar to Brown and Rodriguez, a strong argument can still be made for Supreme Court intervention in the class struggle. Nonetheless, the Burger Court's class-struggle decisions indicate a judicial conviction that wealth redistribution is a policy issue which should be resolved by the political process, and that court intervention is inappropriate because of likely public resistance and remedial constraints. These issues re-

84. See text accompanying notes 187-220 infra.
85. As cases like Goldberg v. Kelly, 397 U.S. 254 (1970), and Milliken II, 433
quire a more thorough examination than the Burger Court has thus far given them.

**A Role for the Court—**

**The Equal Protection Argument**

There is no paucity of legal doctrine on which the Burger Court might have relied had it chosen to enter the class struggle. Equal protection is the obvious candidate. Over the years, equal protection analysis has evolved into two distinct approaches. Where discrimination regarding a suspect class or fundamental right is involved, strict scrutiny is invoked and the burden is on the government to demonstrate a compelling interest justifying the discriminatory treatment. If, on the other hand, no suspect class or fundamental right is involved, minimum rationality is the test and all the government must demonstrate is some rational basis or legitimate purpose justifying its action. Since under strict scrutiny the government usually loses and under minimum rationality the government usually wins, a third line of cases has begun to emerge—so-called middle scrutiny which allows the Court greater flexibility in weighing the competing claims of individuals and government. Sex-discrimination cases fall into this category.

The purpose of this three-tiered approach is to permit the Court to afford special protection in the political process to constitutionally preferred interests, while simultaneously giving appropriate deference to legislative determinations. The classic suspect class, of course, is black people. In light of the purpose of the fourteenth amendment to protect blacks and of the historical bias against them, it makes sense when blacks are singled out for disparate treatment to suspect bias and thus to demand a strong show-

U.S. 267 (1977), demonstrate, however, the Burger Court has not been averse to issuing decisions which may entail substantial expenditure of government money and which may thus raise remedial issues similar to those in *Rodriguez* and the other class-struggle cases. See notes 36 and 81 supra. Indeed both *Goldberg* and *Milliken II* can be viewed as class-struggle cases, and the Court's willingness to intervene there but not in other cases begs a theory explaining when judicial intervention is and is not called for.

86. For a general discussion of the strict-scrutiny and minimum-rationality approaches, see L. Tribe, *supra* note 12, §§ 16-1 to -2, 16-5 to -7. Racial and ancestral minorities are the classic suspect classes. See *id.* §§ 16-14 to -17. Interstate travel, voting, and access to the criminal process have been identified as fundamental rights. See *id.* §§ 16-8 to -10, 16-36 to -40.

87. For a discussion of the middle-scrutiny approach, see *id.* §§ 16-30 to -31.

88. See *id.* §§ 16-25 to -27. In *Frontiero v. Richardson*, 411 U.S. 677 (1973), four members of the Court were prepared to treat women as a suspect class and employ strict-scrutiny review, though as yet a majority has not been willing to do so.
ing of justification from the government. The strict-scrutiny test requires such a showing and is consistent with the approach used by the Court to protect other preferred values.\textsuperscript{89} If, however, no preferred interest is involved, there is no reason for special protection, and the Court defers to the greater public responsiveness and expertise of legislative bodies when weighing the importance of competing concerns. The minimum-rationality test so defers and is consistent with the approach the Court generally applies for like reasons in substantive due process cases.\textsuperscript{90} In developing the middle-scrutiny approach in sex-discrimination cases, the Court has adjudged women deserving of greater protection than minimum rationality affords, but less than that given to blacks under strict scrutiny.

In class-struggle cases the Court could easily label the poor a suspect class or the interests involved fundamental rights, and then invoke whichever of the strict- or middle-scrutiny tests appears more appropriate.\textsuperscript{91} The Warren Court did just that in \textit{Shapiro v. Thompson},\textsuperscript{92} the durational-residency welfare-rights case, treating indigent newcomers as a suspect class and the right to travel as a fundamental right, and then employing strict scrutiny. But the Burger Court quickly retreated in \textit{Dandridge},\textsuperscript{93} \textit{Valtierra},\textsuperscript{94} and \textit{Rodriguez}. In \textit{Dandridge} it declined to find large indigent families a suspect class and the right to travel as a fundamental right, and then employing strict scrutiny. However, the Court did not explain the distinctions between newcomers and large families on the one hand, nor the right to travel and welfare on the other. In \textit{Valtierra} the Court was unwilling to find potential recipients of low-income housing a suspect class or housing (at least inferentially) a fundamental right.\textsuperscript{95} Again it failed to explain the distinctions.

\textsuperscript{89} See L. Tribe, supra note 12, §§ 12-8 to -9 (free speech); id. §§ 13-1 to -21 (voting rights); id. § 14-10 (free exercise of religion).

\textsuperscript{90} See id. § 8-7. The Court does employ heightened scrutiny in the substantive due process area with respect to interests which it deems worthy of special protection—most notably the right of privacy. See id. § 15-1. Sometimes the Court seems to invoke strict scrutiny in these cases, at other times middle scrutiny, depending evidently on its view of the importance of the competing interests involved.

\textsuperscript{91} Generally speaking, middle scrutiny would seem to be the appropriate approach in class-struggle cases. See note 186 infra and text accompanying notes 126-186 infra.

\textsuperscript{92} 394 U.S. 618 (1969).

\textsuperscript{93} Dandridge v. Williams, 397 U.S. 471 (1970).


\textsuperscript{95} 397 U.S. at 483-87.

\textsuperscript{96} 402 U.S. at 142. The Court has since specifically held housing not to be a fundamental right. Lindsey v. Normet, 405 U.S. 56, 73-74 (1972).
The Court did attempt to distinguish its Rodriguez holding from Shapiro, though its argument is far from convincing. While not saying that the poor can never be viewed as a suspect class, it said that on the Rodriguez facts the poor had not been singled out for disparate treatment because there was no correlation between school-district wealth (in terms of property values) and poor people. The data did support the Court's conclusion if viewed from the perspective of school districts with per-pupil property values less than $100,000. In fact, there was an inverse relationship between district wealth and median family income for districts with per-pupil property values between $10,000 and $100,000, that is, the poorer the district the higher the median family income. The inference, of course, is that any redistribution under those circumstances from richer to poorer districts would actually hurt the poor. But if viewed from the perspective of the very poorest school districts, those with per-pupil property values less than $10,000, there was a correlation between district wealth and poor people. Median family income in those districts, as well as school expenditures per pupil, was far below that of the richer districts. The relatively small size of the class would, if anything, strengthen the case for affording suspect-class treatment, yet the Court gave no explanation for its unwillingness to do so.

In Rodriguez the Court also declined to find education a fundamental right, distinguishing earlier fundamental-right cases on the ground that only those rights found explicitly or implicitly in the Constitution are fundamental. But the right to vote in state elections and the right to travel are not explicitly stated in the Constitution; nor for that matter is the right of privacy which the Burger Court has recognized and extended. The Court, however, failed to explain what makes those rights implicit while education is not.

97. 411 U.S. at 22-28.
98. See id. at 15 n.38.
99. Id.
100. Id. at 33-34.
103. See Whalen v. Roe, 429 U.S. 589 (1977) (upholding statutory scheme for maintaining computerized records of prescriptions for dangerous but lawful drugs, while recognizing individual interest in avoiding disclosure of personal matters); Roe v. Wade, 410 U.S. 113 (1973) (limiting government's right to regulate abortions); Eisenstadt v. Baird, 405 U.S. 438 (1972) (invalidating regulation making contraceptives less available to unmarried than to married couples).
The Court's opinions in the class-struggle line of cases provide little insight as to why strict scrutiny is appropriate for blacks and middle scrutiny is appropriate for women, while neither is accorded the poor. Nor do they provide insight into the process and principles by which the Court discovers fundamental rights implicit in the Constitution. Yet should the Court eventually decide to intervene on behalf of the poor, it will have to articulate some theory to defend itself against the charge that it is acting as a super-legislature, imposing its will on the public in an undemocratic fashion. The question is: Can Court intervention be justified, or is it, as Professor Winter believes, "absolutely wrong?""104

**Individual Rights and the Class Struggle**

Our society values majority rule and the making of policy decisions by representatives directly responsible to the people. It does not inexorably follow, however, that adherence to those concepts will produce a just society. In particular, a major threat in a democratic system is that the majority will tread on another strongly held value: individual rights. Thus the Bill of Rights protects individuals by creating certain preferred rights which are supposed to outweigh short-term majoritarian considerations.

Due to its insulation from day-to-day politics, it is appropriate that the role of protecting preferred individual rights should have fallen on the Supreme Court. Most commentators, even those who advocate judicial restraint, believe the framers of the Constitution intended the Court to play that role, and to have the power to overturn governmental acts that infringe the preferred rights.105

Still lively is the debate as to whether the Court, in protecting individual rights, should stick to the originally intended meaning of the constitutional provisions to the extent discoverable, or should allow their meaning to evolve as times change.106 I profess faith in the latter view. If held to the original understanding, the Court would be prevented from helping society solve current problems

104. Winter, supra note 9, at 43.
which were not anticipated in an earlier age or which earlier society was not ready to address. For example, in light of widespread segregation throughout the nation at the time of and after the adoption of the fourteenth amendment, it can be argued that the framers of the equal protection clause never intended to outlaw the practice. But to turn back the clock and uphold school segregation in Brown would be horrendous. By 1954 the idea had come of age. The only questions were how long would desegregation take, and how much would society be torn apart in the process. Surely the Supreme Court helped promote public acceptance of the idea, if not the practice. The civil rights era was violent, but would likely have been more so without the Court's steadying influence and moral leadership.

This is not to say, however, that the Court can or should arbitrarily decide what is best for the country. As a judicial body it must rely on the willingness of the more politically responsive branches to carry out its rulings. Consequently, it must rely ultimately on its ability to persuade the public of the rightness of its decisions. To do so, the Court must base its decisions on principles the public is prepared to accept, if somewhat begrudgingly. Principles which can be found at least implicitly in the Constitution are much more likely to gain acceptance than principles which are thought to originate in some judge's head. While judges obviously do decide cases in accordance with their own predilections, requiring them to rationalize their decisions according to constitu-

107. Compare R. Burger, supra note 105, at 117-33 with Bickel, The Original Understanding and the Segregation Decision, 69 Harv. L. Rev. 1, 56-65 (1955). The question of the originally intended meaning of the equal protection clause can be addressed on more than one level. On a nonabstract level, one might attempt to discover the specific fact situations to which the clause was meant to apply. If the intended coverage were uncertain in a specific case, one might try to develop an abstract principle which explains known cases and against which the uncertain case could be tested. In light of the obvious purpose of protecting blacks, a plausible abstraction underlying equal protection is that individuals are not to be disadvantaged because of their race. It is conceivable that the framers of the fourteenth amendment adhered to this abstract concept but did not believe it violated by enforced segregation. (Or were they just unwilling to abide by their own principle?) However, now that social science and moral thinking have developed to the point that enforced segregation is widely viewed as disadvantageous to blacks, adherence to the original understanding on both levels would produce an irreconcilable conflict. At a minimum, allowing evolution in the meaning of equal protection on the nonabstract level is consistent with continued adherence to the originally intended general principle against racial discrimination. See R. Dworkin, supra note 61, at 93, 134-36 (genesis of this argument). For a discussion of an even more abstract conception of equal protection in the context of the class struggle, see note 110 infra and accompanying text.
tional principles is some safeguard against their wandering too far afield.

Thus, if the Constitution specifically exempted segregation from the operation of the fourteenth amendment, the Court would have no choice but to go along. But the fourteenth amendment speaks in general terms—denial of equal protection—and that concept has room to grow in accordance with evolving notions of what equality means. Perhaps separate but equal satisfied post-Civil War notions of equality, but it did not suffice in 1954, at least not on a nationwide basis.\textsuperscript{108}

Moreover, because the Court is the final arbiter and because its decisions are based on the Constitution, a Court ruling carries great moral weight. When the Court rules, it says that a governmental action does or does not conform with our most fundamental ideals. So to have upheld segregation in \textit{Brown} would have put a moral stamp of approval on a practice which is obviously unjust, even to those favoring the original-understanding approach to constitutional construction.\textsuperscript{109} Court inaction could only have made the transition to a nonsegregated society all the more difficult and

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\item[\textsuperscript{108}.] I am advocating a “living law” approach to constitutional decisionmaking. A court’s rulings should reflect the times in terms of such social factors as the role society wishes courts to play, the mores of society as evidenced by the principles people espouse as well as live by, and the social implications of judicial rulings. That does not mean a court is merely to discern and implement majority will. It may be assigned an antimajoritarian function in some cases, as in the protection of individual rights. Moreover, the principles people actually live by may be inconsistent with the higher ideals which they espouse and of which they wish courts to remind them periodically. It does mean, however, that the public mood is relevant to how far a court can go in articulating and effectuating new principles. Also relevant is empirical data concerning the contexts out of which cases arise and the consequences of their resolution. Underlying many, if not most, court decisions are empirical judgments (often unstated) regarding human behavior and social dynamics. Examining available empirical data can help courts avoid making incorrect judgments and at a minimum will force them to articulate the behavioral assumptions underlying their decisions. All too often, as I shall attempt to demonstrate, the Burger Court has been remiss in articulating its assumptions in class-struggle cases. See note 115 and text accompanying notes 152-186 infra. For general discussions on the living-law approach, see Littlefield, \textit{Eugen Ehrlich’s Fundamental Principles of the Sociology of Law}, 19 ME. L. REV. 1 (1967); O’Day, \textit{Ehrlich’s Living Law Revisited—Further Vindications for a Prophet Without Honor}, 18 CASE W. RES. L. REV. 210 (1966). For discussions of the relevancy of social-science data to judicial decisionmaking, see Dworkin, \textit{Social Sciences and Constitutional Rights—The Consequences of Uncertainty}, in \textit{EDUCATION, SOCIAL SCIENCE AND THE JUDICIAL PROCESS} 19 (R. Rist & R. Anson eds. 1976); Yudof, \textit{School Desegregation: Legal Realism, Reasoned Elaboration, and Social Science Research in the Supreme Court}, 42 LAW & CONTEMP. PROB., Autumn 1978, at 57.
\item[\textsuperscript{109}.] \textit{R. Burger}, \textit{supra} note 105, at 407, 412-13.
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disruptive. In addition, it would have undercut public respect for the Court and consequently the Court's ability to operate in areas which even strict constructionists recognize as legitimate.

I have yet to explicate the underlying constitutional principle that explains why mandatory segregation is obviously unjust, and it is necessary to do so in order to explore the use of equal protection in the class struggle. Segregation is unjust because it offends human dignity by imposing a badge of inferiority akin to that of slavery. Whatever specific acts the framers of the fourteenth amendment sought to prohibit, they all related to elemental human dignity. If there is any candidate for a universally held moral principle underlying the concept of equal protection, it must be that every human being is as equally worthy as a human being as every other human being. That may be a somewhat nebulous concept, but it is clearly violated by enforced segregation based on race alone.

Other factors related to human dignity support the protective treatment accorded blacks by the Supreme Court under the equal protection clause. Blacks have historically been subjected to discriminatory treatment; skin color is a permanent and involuntary feature which permits no ability to opt out; to disadvantage someone solely because of race is morally repugnant; race is irrelevant as a means of determining an individual's competence; and being a numerical minority makes it difficult to rectify injustices through the political process. Since these factors have also been present

110. Other writers have advanced essentially the same concept in different terms. Professor Dworkin calls it the right to "treatment as an equal." R. DWORKIN, supra note 61, at 227. Professor Baker calls it the right to "equality of respect." Baker, Neutrality, Process, and Rationality: Flawed Interpretations of Equal Protection, 58 TEX. L. REV. 1029, 1030-31 (1980). The concept of human dignity is an even higher level of abstraction than the principle against racial discrimination. See note 107 supra. It would not be possible to adhere to the principle against racial discrimination without also adhering to the human-dignity concept. I therefore view the extension of the equal protection clause to class-struggle cases in the name of human dignity as still complying with the original understanding of the framers on its most abstract level. My purpose in this Article is to justify that extension by showing the close analogy between racial discrimination and the class struggle.

111. The right-of-privacy cases, see note 90 supra, could also be said to flow from some notion of the importance of personal privacy to human dignity. So too could the cases according criminal defendants what might be called a principle of fair access to the judicial process be said to relate to preserving human dignity. See L. TRIBE, supra note 12, §§ 16-36 to -38.

112. Indeed, blacks were denied access altogether to the political process. See D. BELL, JR., RACE, RACISM AND AMERICAN LAW 126-48 (1980). Also relevant as a
to some degree with respect to other ethnic minorities, it is understand-able why the Court has also accorded them protective treat-ment.\textsuperscript{113} As for women, some of the factors are clearly present, others less so. For example, although women have been treated as second-class citizens, due to their greater numbers they arguably have greater opportunity to rectify injustices through the political process. Perhaps that explains why the Court has been unwilling to label women a suspect class, but has subjected governmental ac-tions treating women differently to so-called middle scrutiny.

Human dignity is at stake in the class struggle as well. Admit-tedly, the mere fact that someone is poorer than someone else, or even very poor, does not necessarily indicate a breach of human dignity. An individual might, for instance, consciously choose pov-erty, abjuring the benefits of modern life; another might be unwilling to work hard though well-educated and physically able. The poorness of such individuals, without more, would not offend the sensibilities of most people in a society which values freedom of choice and economic incentives as an inducement to productivity.

But were a person destitute for reasons beyond his or her con-trol, most people’s sensibilities probably would be offended if soci-ety did nothing to help. It is therefore relevant to inquire about poor people’s ability to opt out. While a black person or a woman cannot change race or sex, arguably a poor person can change status by earning more money; and there obviously are instances where people work their way out of poverty or slide up and down the scale of relative affluence or deprivation. A related argument is that while race or sex is ordinarily viewed as an invalid basis for judging someone’s moral worthiness or competence, poverty can result from lack of effort. Thus nonaccess to a good because of in-ability to pay can be rationalized as ethically sound.

\footnotesize buttress to the Court’s decision to strike down enforced segregation was the social-science data (relied on in Brown, for example) suggesting that segregation was psycholog-ically damaging to black people. See note 108 supra. Though that issue may now seem more debatable, see note 79 supra, it was the best available data at the time and tended to point in the same direction as the other social factors supporting the decision. The current uncertainty may help explain the Burger Court’s unwillingness to espouse integrationism as strongly as the Warren Court seemed to do and might even justify the Burger Court’s stance to some degree were it prepared to deal with the financing issue in cases like Rodriguez.

\textsuperscript{113} See, e.g., Hernandez v. Texas, 347 U.S. 475 (1954) (Mexican-Americans as suspect class); Yick Wo v. Hopkins, 118 U.S. 356 (1886) (Chinese as suspect class); cf. Frontiero v. Richardson, 411 U.S. 677, 682-88 (1973) (Justice Brennan’s argument for treating women as suspect class).
The weight of the incentive argument depends on the degree of mobility that poor people have in our society. To the extent that during an individual’s lifetime, or from one generation to the next, there is substantial mobility into and out of low-income status, the case for court protection is weaker. However, to the extent that we have a permanent underclass relegated to low-income status generation after generation, there is little ability to opt out; and the implication is, or ought to be, that low-income status is often beyond the control of the poor, and is not a function of lack of incentive or merit but of the way the system is organized or operated. Particularly for the poorest of the poor, and more particularly for poor who are also racial minorities, a strong case can be made that we do have a permanent underclass, or that at a minimum there are substantial structural obstacles to mobility which inhibit their life chances.\footnote{There have been only a few empirically rigorous mobility studies, and as with most sociological issues the data are subject to conflicting interpretations. No society, of course, is perfectly mobile or immobile, so the question of the rigidity of the class structure is one of degree. S. Lipset and R. Bendix in their classic study of occupational mobility lent support to the cycle-of-poverty theory by concluding that: Occupational and social status are to an important extent self-perpetuating. They are associated with many factors which make it difficult for individuals to modify their status. Position in the social structure is usually associated with a certain level of income, education, family structure, community reputation, and so forth. These become part of a vicious circle in which each factor acts on the other in such a way as to preserve the social structure in its present form as well as the individual family’s position in that structure. S. LIPSET & R. BENDIX, SOCIAL MOBILITY IN INDUSTRIAL SOCIETY 198 (1959). In what is generally regarded as the most comprehensive study of its kind, P. BLAU & O. DUNCAN, THE AMERICAN OCCUPATIONAL STRUCTURE (1967), the authors quarreled with Lipset’s and Bendix’s conclusion with such statements as: [The] relationship of background factors and status of origin to subsequent achievement . . . is not trivial, nor is it, on the other hand, great enough to justify the conception of a system that insures the “inheritance of poverty” or otherwise renders wholly ineffectual the operation of institutions supposedly based on universalistic principles. Id. at 203. But Blau and Duncan’s study itself still lends substantial support to the notion that the poor, and especially the poorest of the poor, face substantial structural obstacles to mobility with such findings as that “the working class has poorer chances of upward mobility than the middle class,” id. at 423; that “[t]he highest white-collar strata and the lowest strata of unskilled workers and farm workers are less varied in social origin than the intermediate occupational groups,” id. at 77; and that the four factors of father’s occupation, father’s education, individual’s education, and individual’s first job (the latter two of which are themselves dependent on social origin) explain “somewhat less than half” of an individual’s occupational achievement. Id. at 402-03. Moreover, the upward mobility found in the study may well reflect an abso-
and at least the poorest of the poor in terms of the reasons for affording suspect-class treatment under the equal protection clause. The Burger Court has been too quick to overlook this parallel.\footnote{115}

Moreover, the very poor comprise only a small segment of the population, so access to the political process is not likely to be a viable alternative to rigorous judicial protection. In addition, the very poor are likely to have less sophistication in using the political process, to be less articulate in presenting their case, and to lack the funds so necessary to an effective political appeal.\footnote{116} Where the Court finds that a fairly small low-income segment of the populace is involved—whether it be migrant indigents, large indigent families, families eligible for low-income housing, or families living in the poorest school districts—the case for heightened judicial scrutiny is therefore strong.\footnote{117}
The Fair-Opportunity and Fair-Share Principles

That poor people are deserving of judicial protection, however, does not tell us in what circumstances. Advocates of judicial intervention frequently repair to the fundamental-rights doctrine as a test for determining when intervention is appropriate. But absent underlying principles consistent with contemporary notions of the meaning of equal protection, it is impossible to say what are and what are not fundamental rights, or what is the extent of society's obligation when a fundamental right is involved. If education is a fundamental right, then are other governmental services? If not, why not? Are food, clothing, and shelter fundamental rights? If so, what quantity of these items must be provided?

While equal protection has something to do with human dignity, that concept is too abstract for direct application in concrete class-struggle cases. There are, however, more specific principles of equality, all derived from human dignity, from which a court could choose if it saw fit. The succeeding pages will focus on four such principles, none of which is original to me and all of which can be found in American historical and philosophical writings. The principles are equal rights, equal wealth, fair opportunity, and fair share.

Equal rights.—The equal-rights principle requires that poor people be accorded the same legal rights accorded others in society. Class-struggle cases based on this principle are likely to be protect "disadvantaged groups." Fiss, Groups and the Equal Protection Clause, 5 Phil. & Pub. Aff. 107, 147-77 (1976). The poor may not strictly fall within his definition of a "group" as an entity with a "distinct existence apart from its members," and linked by "a condition of interdependence." Id. at 148. However, to a great degree they would (or at least the very poor would) seem to satisfy his criteria for affording other groups the kind of protective treatment that has been accorded blacks—namely, "perpetual subordination and circumscribed political power." Id. at 155.

118. See, e.g., Dienes, To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication, 58 Calif. L. Rev. 555, 593-600 (1970); Levy, The Supreme Court in Retreat: Wealth Discrimination and Mr. Justice Marshall, 4 Tex. S.U.L. Rev. 209, 230-35 (1976). Professor Michelman has even shown us that the fundamental right is the key to the case, and not the suspectness of the class, since if the right is fundamental everyone is entitled to it. Michelman, supra note 9, at 22-23, 31. However, it does still seem relevant to me to identify the poor as the class on whose behalf the Court should intervene, since its willingness to intervene (even to vindicate fundamental rights) may depend on its perception of the ability of a group to obtain redress through the political process. See Fiss, supra note 117.

rare, but if they were to arise (if, for example, a state or local government were to bar people with incomes below a certain level from living there or from going to school), they would present classic equal protection situations closely analogous to racial discrimination and demanding a very strong showing of justification. The denial of rights based on low-income status is the kind of disparate treatment that suggests invidious motives and undercuts the ability to opt out which is at the heart of the rationale for affording poor people protection under the equal protection clause. In those instances the traditional suspect-class/strict-scrutiny/compelling-interest doctrine seems appropriate.

_Edwards v. California_, 120 in which the Supreme Court struck down (as a commerce clause violation rather than on equal protection grounds) a California law making it a crime to knowingly assist an indigent person to enter the state, is close to an equal-rights case. Although the statute did not forbid indigents themselves from entering the state, it prevented indigents from obtaining the kind of assistance which nonindigents could rightfully procure. _Shapiro v. Thompson_ 121 can also be analyzed as an equal-rights case. There the Court employed strict-scrutiny review to prevent the government from denying the right to receive welfare to a discrete segment of its poor, that is, those in residence less than one year.

Most situations in which poor people claim unfair treatment are not of this ilk, however. More typically the government is providing some service as a uniform fee which is charged to all, but which because of their lower incomes poor people find harder to afford. One could argue there is no unequal treatment since everyone has the right to the service and everyone pays the same price. 122 On the other hand, one could argue inequality in that the poor must pay a higher percentage of their incomes for the service. Which should control—the dollar amount or the percentage of in-

120. 314 U.S. 160 (1941).
122. Both the school-finance and exclusionary-zoning issues can be viewed as service-access, as opposed to equal-rights, cases. With respect to schools, everyone has the right to go to school, and residents of poor districts have the right to spend as much per pupil as wealthy districts albeit by taxing themselves at a higher rate. An analogy would be to the financing of public education on a pay-as-you-go basis with all children charged the same tuition, thereby requiring poor families to pay out a greater portion of their incomes than rich families. Similarly, the added cost of housing resulting from exclusionary zoning could be viewed as the fee to be paid for the amenities available in suburbia. Everyone has the right to live there provided they can afford the fee.
come? To answer that question it is important to recognize that any departure from a strict equal-rights/pay-as-you-go principle will demand some governmental redistribution of wealth, thus raising the issue of when it is appropriate for a court to find wealth redistribution constitutionally compelled. The other three proposed principles—equal wealth, fair opportunity, fair share—speak to that issue.

**Equal wealth.**—The equal-wealth principle, raised here solely for analytical purposes, represents the other end of the spectrum from equal rights. Under an equal-wealth approach the government would be deemed responsible for any wealth disparities in society and would be obligated to correct them. As farfetched as the notion might seem, it is possible to construct an ethical argument for it—"to each according to his needs" may come close.123

An initial problem for equal wealth is the technical requirement of affirmative "state action" which has developed in equal protection cases.124 With respect to education and exclusionary zoning there is no difficulty in finding state action. Yet many goods which constitute items of wealth in our society are provided through private market processes, and one's lack of those goods could thus be said not to flow from governmental action. However, as other commentators have shown, it would be easy for a court to circumvent the state-action requirement.125 Inaction can be regarded as action, for example, especially where there is a duty to act. Furthermore, there is always governmental action in the sense that the government has affirmatively established the economic system, and the rules governing it, which makes unequal distribution of goods possible. At times, the government even executes policies designed to decrease some people's ability to acquire goods, such as raising the unemployment rate to combat inflation.

Nevertheless, equal wealth is obviously not a good candidate for court adoption. It would be impossible for the government periodically to revalue all items of wealth owned by every individual and to tax and redistribute wealth accordingly. Even if it were possible, the equal-wealth approach would produce such tremendous disincentives to productivity for both those making and those

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123. See also Winter, supra note 9, at 62-66.
124. See L. TRIBE, supra note 12, § 18-1 to -2.
125. See, e.g., Winter, supra note 9, at 44-45. Nevertheless, the state-action doctrine continues to have vitality before the Supreme Court. See Flagg Bros. v. Brooks, 436 U.S. 149 (1978).
receiving redistribution payments that total societal wealth would be diminished to a point where everyone was worse off. Most important, equal wealth is far from contemporary notions of equality and could not begin to command public consensus.

Critical questions, therefore, are how strong a case can be made for interpreting the equal protection clause to require that the government at times redistribute wealth; and to the extent a case can be made, when and how much redistribution is required? The remaining two principles, fair opportunity and fair share, represent points somewhere between equal rights/pay-as-you-go and equal wealth, and flow from ethical notions which make them worthy of judicial consideration.126

Fair opportunity and fair share.—Implicit in the concept of fair opportunity is the notion that individuals born with similar innate capacities and drives should have comparable opportunities to

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126. Both the fair-opportunity and fair-share principles derive from Rawls's second principle of justice which reads as follows: "Social and economic inequalities are to be arranged so that they are both (a) to the greatest benefit of the least advantaged and (b) attached to offices and positions open to all under conditions of fair equality of opportunity." J. Rawls, supra note 119, at 83. The fair-share principle may be no different from Professor Michelman's "just wants" concept; I have chosen the fair-share label in order to contrast it with the fair-opportunity principle. See Michelman, supra note 9, at 13-16. It is not my contention that the Constitution incorporates in toto the Rawlsian theory of justice any more than it totally incorporates any other philosophical approach. I do think, however, that Rawls has advanced principles which do underlie to one degree or another our democratic constitutional system and which are therefore appropriate for judicial consideration in applying the Constitution to contemporary problems. By the same token, there is a strong strain of libertarianism in our society (in the sense of the right of an individual to live one's life as one chooses, subject to everyone else's right to do the same). A libertarian principle could easily be engrafted onto the due process clauses as a substantive prohibition against the government's depriving someone of liberty (the right-of-privacy cases?), and at the most abstract level the framers of the clauses probably did understand them to flow from some such principle. Nozick has argued that libertarian principles demonstrate the injustice of a society's engaging in the kind of redistributational efforts which the fair-opportunity and fair-share principles would mandate. R. Nozick, Anarchy, State, and Utopia (1974). The task of our society, with the aid of the courts I would argue, is somehow to balance these competing strains, neither of which we have as yet seen fit to adopt in toto. Is it possible that these seemingly inconsistent concepts can somehow be seen to fit into one overarching philosophy? The concept of liberty also plays a prominent part in Rawls' philosophy, representing his first principle of justice—"[e]ach person is to have an equal right to the most extensive total system of equal basic liberties compatible with a similar system of liberty for all"—which takes priority over the second principle. J. Rawls, supra, at 302. And even Nozick recognizes that redistributational efforts may be called for in order to rectify injustices resulting from past violations of his libertarian principle. R. Nozick, supra, at 230-31. Perhaps the fair-opportunity and fair-share principles could be justified on that ground as well as those set forth herein.
succeed in life. To put it another way, the fortuitousness of being born into favorable environmental circumstances does not entitle a person to greater life chances, and vice versa. In its pure form one might call this concept equal abilities-equal chances. Implicit in the concept of fair share is the notion that every individual, regardless of innate ability and drive, is entitled to some fair share of society’s goods.\textsuperscript{127} More specifically, the fair-share concept means that the fortuitousness of being born with superior innate abilities entitles one to greater life chances only to the extent that less well-endowed people also benefit thereby. The fair-share principle clearly contemplates that some people will be better off than others, in recognition of the fact that economic incentives may be necessary to encourage individuals to use their abilities and that their productivity may also create benefits for the rest of society. But the fair-share principle has a limiting factor as well in that it would prevent the better-endowed from taking advantage of that fact to the detriment of less well-endowed people.

Either principle could probably elicit a degree of public consensus, though my sense is that fair opportunity is the more widely held notion. Fair opportunity is meritocratic and justifies leaving the less well-endowed behind, so long as those of comparable abilities have comparable chances. Throughout this country’s history reward based on merit has been a fundamental tenet of our economic system and its underlying utilitarian philosophy.

Fair share is more egalitarian in that it limits the advantages the more well-endowed may obtain. Egalitarianism does have some public support. There is probably a fairly widely shared feeling that certain categories of people, like the retarded, for example, or the disabled, do deserve some share of society’s goods, though they are unable to make a significant contribution. On the other hand, egalitarianism has definite limitations to its appeal. There would likely be a fair number of objectors, for example, should someone suggest that a person born into the “best” of families and educated at the “best” of schools, but who does not want to work, is nevertheless entitled to a fair share.

To a court desirous of intervening, the fair-opportunity and fair-share principles seem sufficiently widely held to command public acceptance in appropriate cases as being implicit in our

\textsuperscript{127} See note 126 supra. I am using the term “goods” here in its broadest sense to refer to whatever material or nonmaterial rewards an individual might value.
democratic constitutional system, and sufficiently specific to enable a court to identify those goods with respect to which intervention might be appropriate. Food, clothing, shelter, health care, and education would have to be high on the list of anyone who adhered to either principle.

At this point, however, advocates of judicial intervention in the class struggle will have to admit the task becomes somewhat difficult. Though the fundamental goods have been identified, how is a court to determine how much of those goods are required by the two principles? For example, at first blush it might appear that the fair-opportunity principle tolerates rather wide disparities in the allocation of educational resources in favor of those who perform better in school, and thus in favor of the children of the well-to-do who tend to perform better. But fair opportunity derives from the notion of equal abilities—equal chances, and unless one indulges in the assumption that the children of the poor are inherently inferior, the success of well-to-do children would seem attributable more to their advantageous environmental circumstances than to their innate characteristics. Fair opportunity, then, would arguably require a greater allocation of educational resources to the poor than to the well-off in order to counterbalance the disadvantages of adverse environment.

128. The constitutional principle might be stated as follows: The government may not affirmatively deprive, or so structure society as to deprive, a person of access to a fair opportunity to succeed in life or to a fair share of society's goods.

129. The designation of particular goods as fundamental would thus key a court's inquiry. The more related a good is to fair opportunity and fair share, the more searching would be a court's inquiry into the degree of disparity in access to the good and into the government's justifications for the disparity. The less related a good is to those principles, the greater would be a court's deference to the government's determination. See notes 160 & 186 infra. Admittedly, identifying fundamental goods would entail the exercise of judicial discretion. But that discretion would be constrained by the necessity of selecting goods as to which there is a high degree of public consensus regarding their relatedness to fair opportunity and fair share. Moreover, the alternative approach of no court intervention at all in the class struggle would be worse in light of the disadvantages already constraining poor people in terms of the opportunity for mobility and of access to the political process.


131. In case of doubt, the moral approach would certainly seem to be to assume people are born with roughly comparable innate abilities unless fairly conclusively shown otherwise on an individual basis.

132. The disadvantage of being poor in terms of the opportunity for an education and of the ability to get ahead in life has been widely documented: "The family into which a man is born exerts a profound influence on his career, because his oc-
But how much more would be necessary, and could any amount of education totally make up for an adverse environment? We are not yet capable of answering those questions precisely. An interventionist court might thus be tempted to adopt equal per-pupil expenditures as a rough approximation of what the fair-opportunity principle requires, realizing all the while that life chances may still not have been equalized. But that is not the end of the matter, since educational quality is a function of many factors in addition to the amount of money spent, in particular the quality of instruction. The difficulty ghetto schools have in attracting competent and sensitive teachers is well known, yet how is a court to deal with the problem except again by approximation?

Equal money for education is better than less money would doubtless be the response from the poor. Yet there are studies in-
indicating that in some states equal per-pupil expenditures would result in loss of revenue to central-city school districts which still have relatively high tax bases, despite large numbers of poor people, due to their industrial and commercial taxpayers. Furthermore, it may be cheaper to provide identical services in some areas of a state than others; the cost of teachers may be less in rural areas, for example, because of lower costs of living. Equal per-pupil expenditures would not respond to these factors.

Such considerations have led commentators to suggest other acceptable methods of equalization, notably district-power equalization and family-power equalization. Under district-power equalization, the amount of money available to school districts would depend not on their tax bases but on their tax rates. Districts wishing to spend more money on education could do so by imposing higher rates, but all districts imposing the same rate would get the same amount of money per pupil. The amounts at various tax rates would be predetermined by the state. Districts whose tax rates yielded more than the predetermined amount would have to turn the excess over to the state, while districts whose tax rates yielded less would receive money from the state to make up the difference. Still, this would be an imperfect scheme according to the fair-opportunity principle, since districts with poor tax bases and large numbers of poor people might well decide on low tax rates for education because of the financial hardship of high rates on poor people, as well as the demand for other governmental services as to which there may be no equalization.

Under family-power equalization, the amount of money avail-


138. In the Rodriguez case, though, the poor Edgewood School District did have a higher equalized tax rate than the well-to-do Alamo Heights District and would thus have received more funds than Alamo Heights under a district-power equalization scheme, as contrasted with the far lower funding level it actually did have. 411 U.S. at 12-13. Moreover, poorer districts apparently tax themselves more heavily for education quite frequently. See J. Coons, W. Clune & S. Sugarman, supra note 137, at 83, 94, 140-44. That fact may reflect poorer people’s having to spend relatively larger shares of their incomes on the necessities of life.
able for education would depend on each family's willingness to tax itself, with funds being redistributed among families in much the same fashion as under district power-equalization. This has the advantage of divorcing the amount of education available to a child from the collective whims of the people in the child's district. However, it still leaves the amount of education at the discretion of a child's parents, and it seems likely that many poor people who may not value education as highly as richer people, or who are otherwise financially hardpressed, would decide on low tax rates for education. Yet the basic ethical notion underlying the fair-opportunity principle is that such fortuitous environmental factors should not stand in the way of one's life chances. In addition, family-power equalization would entail such a drastic restructuring of the administration of education (each district would have to provide a range of schools for families choosing differing tax rates) that even the most interventionist court would likely be unwilling to mandate it as a solution.

Realizing all this, a court committed to the fair-opportunity principle might be tempted to return to equal per-pupil expenditures as the best available solution. But there is yet another potential problem—that relatively well-to-do families may try to avoid the financial impact of equal per-pupil expenditures by abandoning public schools for private schools, as is their constitutional right. Full equalization would then be technically impossible to achieve. In the long run the result might well be private schools for families with above-average incomes and public schools for below-average-income families. Equalization might exist for public schools, but the funds available for equalization would be small if the children of the more affluent taxpayers no longer attended. Such consequences are not farfetched. The Supreme Court's desegregation rulings have induced many white families to move to private schools. While courts are obliged to resolve fairly the dispute at hand, not to consider the spillover impacts of their decisions would be foolhardy.

The ability of parents to defeat attempts at achieving fair opportunity in education in the family-power equalization and private school contexts suggests a further problem in implementing the principle—conflicts with other constitutionally significant values.

140. See sources cited note 44 supra.
Fair opportunity is an individualistic principle in that it seeks to compensate children for the disadvantages of unfavorable family environments. Yet our society places a high value on the family, and sometimes views the individual rights of children as subordinate to family values and the fate of children as deservedly dependent on the fate of the family. These competing values must be balanced, but there is no clearcut answer as to what the proper balance is.

Similar problems arise under the fair-share principle. Once a court has identified food, clothing, and shelter, for example, as goods to which at least some people are entitled regardless of innate abilities, the question of minimum quantity must still be answered. The fair-share principle does tell us what the minimum is in theory. It would have society redistribute wealth from richer to poorer until the point is reached where poorer people would be made worse off by further redistribution. This could occur if further redistributions so destroy the incentive of poorer people to work that they become unproductive wards of the state, or so demoralize richer people that they too become unwilling to work. Unfortunately, it is probably impossible to determine what that point is.

Furthermore, as with education, family values may conflict with the ability to ensure individuals their fair share of food, clothing, and shelter. In a society which values parental childrearing, redistributions designed to provide children with their fair share will have to be administered by their parents. At times society may feel that parents are squandering the money, using it for their own support instead of working, or are irresponsibly imposing on society the cost of providing for more and more of their children. In that situation, steps designed to prevent parents from receiving more than their fair share may well be inconsistent with what the fair-share principle would require for their children.

The point of the foregoing discussion is not to present the parade of horribles which shows why court intervention in the class struggle is unwarranted. Rather, in light of the line drawing and value judgments which the achievement of economic justice entails, it is to gain a perspective on what can realistically be expected of the courts.

141. Since disincentive/demoralization effects are likely to be much greater when “able-bodied” adults are involved than “disadvantaged” people (such as children, the retarded, the disabled, and the infirm), even an activist court would likely be more willing to intervene on fair-share grounds on behalf of the latter.
Some commentators argue that line drawing and value judgments are functions for the legislative process, and not the courts. Why, they might ask, if society accepts the fair-opportunity principle, has it not voluntarily done what is necessary to ensure comparable life chances for individuals of comparable ability? Does not the welfare system’s designation of eligible recipients reflect the extent to which society accepts the fair-share principle? Does not the amount of welfare provided reflect society’s determination of the point at which disincentive effects outweigh the benefits of more redistribution?

The answers lie in the divergence between moral conceptions and self-interest on the one hand, and in the tendency to undervalue the other person on the other hand. It is easier to profess adherence in principle to fair opportunity or fair share than to acknowledge the injustice of the existing distribution, or to voluntarily give up some of what one has in the name of the principle. Furthermore, if the disadvantaged lack fair access to the political process, their interests are not likely to receive fair weight when the decisions are made. There is thus a need for some independent, disinterested body, such as the Supreme Court, to point out those situations when self-interest is obviously running counter to the moral underpinnings of the society, and to ensure that the interests of the disadvantaged are not discounted by the political process. The latter would seem to be the rationale for Harper v. Virginia Board of Elections, the poll-tax case, and both underly Brown. If, then, the contention that poor people cannot opt out


143. Most people today, for instance, would probably find enforced segregation morally offensive, though self-interest may still lead many whites to try to avoid integration. Adherence to the underlying principle, however, might well make one more willing to accept an adverse political or judicial decision. This lends support to the notion that Supreme Court decisions, if they are to be effective, must be based on principles which are rather widely shared by, or at least acceptable to, the public.


145. Many cases, in addition to Harper and Brown, are reflective of what might be called a principle of fair access to the political process. See L. Tribe, supra note 12, §§ 13-1 to -12, 16-44 to -47 and cases cited therein. If the Court is to give deference to legislative decisions, assuring that the political process is open and operates fairly would certainly seem to be an appropriate role for the Court. In fact, in light of the value judgments entailed in articulating substantive legal rights, several commentators have suggested that the Court focus primarily on issues of the malfunctioning of the political process where the Constitution does not explicitly set
and do not have fair access to the political process is correct, the argument for Supreme Court intervention is still strong despite the value-judgment and line-drawing problems.

Where proponents of judicial restraint in class-struggle cases go wrong is in tying their assessment of the validity of court intervention to the need to draw exact lines as to how much redistribution is appropriate in particular cases. Due to the difficulty of showing that a specific outcome is compelled by underlying principles, courts sometimes appear arbitrary when making particularized judgments.146 Thus, since any principle sufficiently abstract to be worthy of constitutional stature must be able to tolerate a range of particular outcomes, there is reason for court deference to legislative responsiveness and expertise so long as a decision is within the tolerable range.

Deference to legislative judgments, however, is not inconsis-

forth substantive rights. See, e.g., Ely, supra note 142; Sandalow, supra note 61. However, Professor Baker has effectively demonstrated the inadequacy of a theory of judicial review which focuses entirely on process issues (what he calls the “neutrality” model): the principal ones being that it favors the rich and powerful who have more political influence; that assuring everyone an effective voice in the process demands dealing with the very substantive issues which the process approach seeks to avoid, i.e., the inequalities which inhibit effective political participation of the disadvantaged in the first place; and that it would permit the continual subordination of particular groups in society so long as they have an effective voice in the process. Baker, supra note 110, at 1055-61. Professor Baker suggests two alternative models of equal protection analysis: an “outcome equality” model which in its pure form would require equal treatment of everybody; and an “equality of respect” model which would mandate the political order to respect “the equality of worth of all citizens.” Id. at 1030-31. The dichotomy herein between equal rights/equal wealth and fair opportunity/fair share roughly parallels the outcome-equality and equality-of-respect models. Being concerned primarily to criticize the neutrality model, Professor Baker tentatively concludes that the equality-of-respect model is the most ethically satisfying approach, id. at 1096, a conclusion which my argument for fair opportunity/fair share supports. That approach, which would find certain substantive outcomes constitutionally compelled even though a political process guaranteeing everyone an equally effective voice would decide otherwise, has its own difficulties; notably, the problem of determining what outcomes are compelled by abstract standards like equal protection. This Article is an attempt to tackle that problem.

146. An example may be the Supreme Court’s attempt in the abortion context to accommodate two strongly held values—a woman’s privacy interest and society’s interest in protecting fetal life—by drawing the line beyond which the society’s interest predominates at viability. See Roe v. Wade, 410 U.S. 113, 163 (1973). Since the line might just as well have been drawn at conception or at birth, some commentators have criticized the Court’s decision as overly legislative. See, e.g., Ely, The Wages of Crying Wolf: A Comment on Roe v. Wade, 82 Yale L.J. 920, 923-37 (1973). But if a woman’s privacy interest is a principle worthy of protection, a line had to be drawn somewhere.
tent with judicial intervention in those instances where the treatment of the poor is obviously beyond the range of permissible outcomes. Of course, that determination is itself a line-drawing process, and I can offer no precise formula for setting outer boundaries. Depending on the case, there are factors to which a court can look for aid. In exclusionary-zoning cases a demographic study comparing building costs and the numbers of lower-income people in communities within the region may be helpful, though some suburbs may be less desirable than others for lower-priced housing in terms of the availability of transportation and other services. In school-finance cases studies comparing the educational attainment of children in poorer and richer districts may be relevant, though it may be difficult to make causal connections between money spent and quality of education.\textsuperscript{147} In welfare cases government studies of the cost of a minimum standard of living may be useful, though they are subjective judgments and there may be valid freeloader and incentive arguments for providing less than the minimum.\textsuperscript{148}

Ultimately factual determinations of this type often come down to Justice Stewart's "I know it when I see it" approach.\textsuperscript{149} Perhaps this is the most one can expect from the courts in class-struggle cases. Yet, while it does lead to unpredictable results, it is not unprincipled, being tied to fair opportunity and fair share. Nor is it mere judicial hunching, so long as relevant social factors are taken into account.\textsuperscript{150} Finally, this approach seems no more discretionary than the factual determinations being made in virtually every area of constitutional law. How does one really know when there is a "clear and present danger" justifying infringement of free speech, or when a search is "unreasonable," or whether punishment is "cruel and unusual," except "I know when I see it?"\textsuperscript{151}

\textsuperscript{147} See note 133 \textit{supra}. At some point money must make a difference—the extreme case being none at all.  
\textsuperscript{148} See text accompanying notes 165-167 \textit{infra}.  
\textsuperscript{149} Jacobellis v. Ohio, 378 U.S. 184, 197 (1964) (Stewart, J., concurring). In concurring in the Court's judgment that a French film entitled "Les Amants" was not obscene, Justice Stewart wrote:  
I shall not today attempt further to define the kinds of material I understand to be embraced within that shorthand description [i.e., hard-core pornography]; and perhaps I could never succeed in intelligibly doing so. But I know it when I see it, and the motion picture involved in this case is not that.  
\textit{Id.} (Stewart, J., concurring).  
\textsuperscript{150} See note 108 \textit{supra}.  
\textsuperscript{151} 378 U.S. at 197 (Stewart, J., concurring). Such decisions ultimately depend
The Principles Applied

My greatest criticism of the way in which the Burger Court has handled the class-struggle question has more to do with its approach than the results of cases. School finance, welfare rights, and exclusionary zoning all raise issues which implicate the fair-opportunity and fair-share principles. Yet in none of the cases has the Court adequately indicated that there are limits, and constitutional principles underlying those limits, beyond which government may not go.

Justice Powell, who wrote the majority opinion upholding Texas' school-financing system in Rodriguez, gave us a hint of his limit almost in passing when he suggested the result might be otherwise had poor children been totally denied the opportunity for an education. Total deprivation could easily happen if the government were to shift to a tuition-fee method of financing public education. But why would that offend Justice Powell to the point of causing him to bring the power of the Court to bear? Would he be similarly offended if a poor person could not afford other items for which user fees are charged—a telephone, for example? If not, there must be something special to him about education. In short, there must be some constitutional principle he feels would be violated if poor children were completely deprived of the opportunity for an education.

One might suspect that at some level Justice Powell adheres to the fair-opportunity and fair-share principles. If he does, he should have said so. As it is, his reticence has left us with no principled basis for distinguishing between the relative deprivation in Rodriguez and his hypothetical total deprivation. In addition, dictum plays an important role in this area of the law in informing government that there are limits. Even a case adjudged by the

152. "Whatever merit appellees' argument might have if a State's financing system occasioned an absolute denial of educational opportunities to any of its children, that argument provides no basis for finding an interference with fundamental rights where only relative differences in spending levels are involved..." 411 U.S. at 37.

153. The tuition-fee approach is, of course, often used for higher public education which might be distinguished from elementary and secondary education on the grounds that college-age students are capable of working their way through school or borrowing money based on future earning potential.
Court to fall within the broad range of constitutionally permissible outcomes could aid the poor in overcoming their relative lack of political power, if couched in terms which encourage the government to deal with the problem of school finance.

At this juncture one might ask Justice Powell whether there are not points short of total deprivation, but still so disparate as to cause serious educational disadvantage, that would trigger his sense of injustice. Powell went out of his way to praise Texas' Minimum Foundation Program under which the state provided money to local school districts and which could be viewed as an equalizing factor. But suppose Texas had no state equalization of any kind, and made local school districts rely entirely on their own fiscal resources. On the Rodriguez facts that would have resulted in 1967-1968 in a $26 per-pupil expenditure in the largely Chicano Edgewood District, as compared with $333 per pupil in the well-to-do Alamo Heights District. Would that be sufficient deprivation to move Justice Powell to intervene? One cannot know, of course, and one certainly would not expect or want a judge to decide in dictum all possible future cases. But if it would be enough, then Justice Powell has been overly generous to the government with his total-deprivation dictum.

Something considerably short of total deprivation ought to


155. Justice Powell's discussion of the Minimum Foundation Program appears at 411 U.S. at 6-13. As between the two districts used for purposes of comparison in the case, the state actually provided more money per pupil over and above local revenues to the richer Alamo Heights District than to the poorer Edgewood District. For example, in the 1967-68 school year Alamo Heights raised $333 per pupil through local taxes and received $225 from the state for a total of $558, while Edgewood raised only $26 locally and received $222 from the state for a total of $248. In 1970-71 the state furnished $491 to Alamo Heights as compared with only $356 to Edgewood. Id. at 12-13. The Minimum Foundation Program could thus be said to have increased the disparity between the districts in an absolute sense. On a percentage basis, however, the Foundation Program brought the districts closer together.

156. And with a higher tax rate in the Edgewood District at that. Id. at 12-13.

157. Perhaps Justice Powell would not quite require total deprivation before intervening, as indicated by the following statement which concludes the quote, see note 152 supra: "[N]o charge fairly could be made that the [state's financing] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." 411 U.S. at 37. One gets the impression, though, that the minimal skill level to which Powell refers is not far removed from complete illiteracy, even though students at the minimal level might have nowhere near the chance to succeed in life as those receiving more education.
trigger the Court's sense of injustice. The survey submitted in Rodriguez of roughly 10% of the school districts in Texas showed that the very poorest districts, both in terms of property value and family income, were heavily populated by minorities and had average combined state and local revenues of only $305 per pupil. That compared with $815 per pupil in the very richest districts and $483 per pupil in the median district.\textsuperscript{158}

Perhaps the variations in per-pupil expenditures as compared with district and family wealth in the great majority of Texas' school districts is constitutionally permissible.\textsuperscript{159} Perhaps even the far greater than average expenditures in the very richest districts should be allowed. But when the very poorest districts are as far below average as was the case in Rodriguez, it is doubtful that the education received by children in those districts will provide them with anywhere near the opportunity to succeed in and enjoy life as will the education furnished the vast majority of students.\textsuperscript{160} To that extent the school-financing system in Texas should have been invalidated and the legislature required to devise some means of rectifying the situation. While still giving deference if it chose to do so to the legislative solution, the Court would have forced the issue to be dealt with by a level of government having the capacity

\textsuperscript{158} 411 U.S. at 15 n.38. Moreover, the very richest districts had average tax rates less than half that of the very poorest districts. See Rodriguez v. San Antonio Indep. School Dist., 337 F. Supp. 280, 282 (W.D. Tex. 1971).

\textsuperscript{159} Excluding the ten richest and four poorest districts in the survey, average state and local per-pupil expenditures in the remaining 96 districts ranged from $462 in districts with taxable property per pupil of $10,000-$30,000 to $544 in districts with taxable property of $50,000-$100,000. See note 158 supra.

\textsuperscript{160} The relatedness of education to success in and enjoyment of life is what distinguishes it from cases involving other public services. See note 129 supra. Consider, for example, municipal services other than education. In all respects except the nature of the service the case may be on all fours with Rodriguez. Thus poor residents of a poor community might claim that reliance on local property taxes prevents their affording services (such as streets, sewers, and police) comparable to richer communities. They might argue that these services are as related to mobility as education in that inferior municipal services contribute to neighborhood decline, which in turn engenders feelings of inferiority and apathy, which in turn inhibit the desire to learn, work hard, participate in the political process, and so on. It would probably not be too hard to find professional support for these contentions. Yet the connection between other municipal services and mobility/access to the political process does seem more attenuated than with respect to education, and that difference may justify saying that no fundamental good is involved and that reliance on local taxes is justifiable in order to foster local control. Still, cases are conceivable in which a community might be so poor that the level of municipal services it can afford is so inferior to other communities that a court should intervene.
to redistribute wealth, and perhaps thereby would have strengthened the hand of the poor in the political process.

Turning to *Dandridge*, in which the Court upheld \(^{161}\) the maximum grant provision under Aid to Families with Dependent Children \(^{162}\) (AFDC), my quarrel here is mainly with approach since I am reluctantly prepared to go along with the result. As noted earlier, \(^{163}\) by analogizing welfare rights to business-regulation cases, the Court implied it would give total deference to governmental welfare determinations. Business regulations, however, tend to affect people with a weaker claim for court protection than the poor in terms of access to the political process, the ability to opt out, and the harshness of the regulatory impact. \(^{164}\) The effect of Maryland’s maximum grant provision in *Dandridge* was to cut off most families from additional aid at about six children. \(^{165}\) Suppose, instead, the government cut off welfare benefits entirely for families with more than six children. Would not one want the Court to consider the impact such action would have on the welfare of affected children in regard to their ability to obtain food, clothing, and shelter? One could, of course, go on to ask how close to total deprivation the government could go before the Court’s sense of injustice would (or should) be moved. As with *Rodriguez*, my basic criticism of the Court’s approach in *Dandridge* is that it was overly generous to the government with its economic-regulation dictum.

The Court should have said in *Dandridge* that AFDC provides poor children with the basic necessities of life, without some minimum quantity of which the fair-opportunity and fair-share principles are violated. The Court could then have indicated that it would give great deference to governmental welfare determinations as long as such determinations are within the permissible range. Not to indicate, though, that at some point the Court would intervene is probably not accurate—and if it is, the Court misperceives its function—and weights the political process even more heavily against the poor.

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163. See note 36 supra and accompanying text.
164. The Court evidently perceived these distinctions but was unwilling to let the case turn on them for reasons it did not make clear: “We recognize the dramatically real factual difference between the [state regulation of business or industry] cases and this one, but we can find no basis for applying a different constitutional standard.” 397 U.S. at 485 (footnote omitted).
So approached, *Dandridge* is a reasonably close case on the merits. Cutting against the government were the facts that the maximum grant provision left larger families with less money than was necessary for a minimum standard of living, that by the government's admission most AFDC parents were unemployable so that encouraging recipients to work could not stand as a justification for the provision, and that the fiscal impact of requiring more aid to large families would probably be relatively minor. On the other side, however, since AFDC, though technically aid to children, is widely regarded as money provided to parents to enable them to support themselves and their families, the government might argue that a cut-off is needed to deter parents from having large families in order to increase their own lifestyles, or to prevent irresponsible parents from imposing their obligations on the rest of society. The government might also argue that the cut-off is needed to keep the incomes of welfare families below those of wage-earning families so as not to discourage the latter from working. Such arguments could be used to justify not just cut-off points for larger families, but also provision for less than minimum needs across the board. Nor are they totally devoid of merit in a society which relies heavily on the family to raise children, and on economic incentives as a means of encouraging productivity.

The result in *Dandridge* would thus seem to be within acceptable bounds, even though the financial impact of the maximum grant provision on the complainants was substantial. Similarly,

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166. As of March 1977, only 3.6% of all AFDC families nationwide had more than five children. In fact, 83.7% had three children or less. H. OBERHEU, *supra* note 33, at 4-5.

167. The complainants in the case consisted of two families: one a mother and eight children; the other a disabled man, his wife, and eight children. The standard of need for the families was $296.15 and $331.50 per month, respectively. The maximum grant provision limited both families to $250.00 per month. *Williams v. Dandridge*, 297 F. Supp. 450, 453 (D. Md. 1968).

Likewise, the decision in *Jefferson v. Hackney*, 406 U.S. 535 (1971), in which the Court upheld Texas' practice of paying AFDC recipients only 75% of their standard of need, seems acceptable, assuming Texas' standard-of-need determination was not so unreasonable as to negate deferential treatment. See note 36 supra. It should be noted, however, that 87% of the AFDC recipients in Texas were black and Mexican-American; whereas only 39.8% were minorities in the old-age assistance program under which Texas provided 100% of standard of need, and only 46.9% and 55.7% were minorities in the two programs providing aid to the disabled under which Texas provided 95% of standard of need. 406 U.S. at 548 n.17. That fact raises an inference of possible racial discrimination which merits closer scrutiny than Justice Rehnquist's statement that "[s]ince budgetary constraints do not allow the pay-
court deference to the overall level of benefits under AFDC (and other welfare programs) seems justifiable though they fall below governmentally determined minimum needs. Perhaps somewhat greater deference to governmental welfare determinations than to school-finance schemes is called for in light of the more controversial nature of welfare, the fact that welfare determinations are already made at levels of government which have the capacity for redistribution, and the greater potential interference with the functioning of the economic system. At some point, however, aid to poor families could be so low that poor children would have no reasonable opportunity to develop their innate abilities, or that one's sensibilities would (or should) be offended when individuals with no control over their destinies are allowed to live in degradation regardless of innate ability. It may not be possible to identify that point on any basis other than "I know it when I see it," but when it becomes patently obvious the Court should intervene.

It is harder to criticize the results of exclusionary-zoning cases since a full-blown exclusionary suit has not yet been heard by the Court on the merits. Valtierra, for instance, entailed a general attack on California's public-housing-referendum provision, and in that context there may be reason to defer to California's devotion to democracy. But suppose public-housing referenda, or zoning referenda as in Eastlake,170 were used as part of an exclusionary pattern. Consider, for example, the facts in Hills v. Gautreaux,171 the cross-district public-housing case. The Chicago Housing Au-

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168. That point may well have been reached in Texas. Since 1969, Texas has not increased at all its level of benefits under AFDC. Today a typical family of four (a mother and three minor children) with no other income is entitled to $140 a month under AFDC and to food stamps worth about $200 per month, for total benefits of roughly $340. Telephone conversation with Charles Ternes, Public Information Officer, Region 11, Texas Department of Human Resources (May 5, 1981). It is hard to imagine how such a family could maintain anything approaching a decent standard of living.


170. City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668 (1976); see note 56 supra.

authority's practice (condoned by HUD) of allowing city aldermen to informally veto public-housing projects in their districts led to the controversy. As a result of this practice, virtually all family public-housing projects were located in black neighborhoods, and the district court had little difficulty finding the practice racially discriminatory.\textsuperscript{172} But what if the same result had been achieved through a referendum process? Can the electorate itself do what its representatives cannot? There are precedents to the contrary,\textsuperscript{173} but before one is too quick to answer no, recall Arlington Heights,\textsuperscript{174} the racial exclusionary-zoning case, which stands for the principle that racially disparate effect is not enough to make a case under equal protection and that a racially discriminatory purpose must be shown.\textsuperscript{175} How is that to be done in the context of voters casting secret ballots? Again in Valtierra the Court was overly generous to the government in not indicating that there may be limits to the ways in which even racially colorblind referenda may be used.

Nor did Arlington Heights mount much of a challenge to that community's overall land-use practices. The complainants rested their case on the racially disparate impact of the refusal to rezone a particular parcel in a single-family area for multifamily subsidized housing.\textsuperscript{176} Since zoning is on its face racially neutral, they might have attacked the entire scheme on economic grounds. However, the complainants obviously felt an economic argument offered little chance of success in light of Valtierra's other prong (that is, low-income housing is not a suspect class), the Court's refusal to find housing a fundamental right in Lindsey v. Normet,\textsuperscript{177} and Warth's\textsuperscript{178} requirement of a particular project to obtain standing.

Warth, in fact, presented the best facts of any of the land-use cases—a claim of overall economic exclusion by a wealthy suburb

\begin{itemize}
\item \textsuperscript{172} Gautreaux v. Chicago Hous. Auth., 296 F. Supp. 907 (N.D. Ill. 1969).
\item \textsuperscript{173} See Hunter v. Erickson, 393 U.S. 385, 392 (1969) (striking down as violative of equal protection voter-enacted city-charter provision which required voter approval of any local fair-housing ordinance).
\item \textsuperscript{175} Id. at 265. For a discussion of the purpose-versus-effect issue, which is beyond the scope of this Article, see Clark, Legislative Motivation and Fundamental Rights in Constitutional Law, 15 SAN DIEGO L. REV. 853 (1978); Simon, Racially Prejudiced Governmental Actions: A Motivation Theory of the Constitutional Ban Against Racial Discrimination, 15 SAN DIEGO L. REV. 1041 (1978).
\item \textsuperscript{176} 429 U.S. at 268.
\item \textsuperscript{177} 405 U.S. 56, 73-74 (1972).
\item \textsuperscript{178} Warth v. Seldin, 422 U.S. 490 (1975).
\end{itemize}
of Rochester, New York, in which 98% of the community was zoned for detached single-family homes. But the merits were never reached due to the Court's imposition of the unduly restrictive standing requirements. One gets the distinct impression the Court does not want to decide a full-blown economic-exclusion case. But why?

Perhaps, as some commentators have suggested, the Court wants exclusionary zoning handled by state courts. If so, it should say so, and say why. There may be some merit in deferring to state courts. Not only would it spread out the work load, but state courts are also more likely to be in tune with state and local politics, and therefore arguably in a better position to handle the complexities of the remedial process. However, the notion that exclusionary zoning should be left exclusively to the states because it is a local problem does not seem valid. If I am a poor person contemplating a move to another state in order to better my lot, my decision to make the move will be affected if I can find housing only in a low-income or minority central-city ghetto with few job opportunities, underfunded schools, and a high crime rate. Deferral to state courts thus seems justifiable only when state courts are willing to intervene. In such instances, the Supreme Court could easily develop a deferral doctrine, even after federal courts have entered the field. If state courts are unwilling to intervene, however, federal courts still have the obligation to correct constitutional violations.

179. Id. at 495.
180. For a discussion of the particular project issue, see Sager, supra note 169, at 1389-92.
182. The local-problem argument could also be made regarding school finance, as evidenced by Justice Powell's concern in Rodriguez for maintaining federalism. 411 U.S. at 44. The argument is not dissimilar to the states' rights argument advanced by southern states to try to combat federal interference with segregation. But where constitutionally protected federal rights are involved, the issue is no longer local.
183. In other contexts, the Supreme Court has recognized its obligation to intervene when exclusionary practices impact federal rights. See Moore v. City of East Cleveland, Ohio, 431 U.S. 494 (1977) (overthrowing ordinance which effectively barred minor child from residing with his grandparent). But see Village of Belle Terre v. Boraas, 416 U.S. 1 (1974) (upholding similar ordinance as applied to unrelated persons). Even commentators who want the issue left to the state courts believe some kind of sanction should be brought to bear against overly parochial suburbs who are able to enjoy the advantages of proximity to a major city while avoiding sharing in its costs. See, e.g., Ellickson, supra note 181.
Perhaps, then, the Court is not prepared to find a classic case of exclusionary zoning a constitutional violation. If so, it should say so, and say why. Is it because the fair-opportunity and fair-share principles are not implicated, as they would seem to be in a case of total deprivation of the opportunity for education? Many would contend that the opportunity to live in suburbia is the reward for working one's way out, and that for courts to force open the doors to lower-income people would remove that incentive to productivity. Against that claim must be weighed the effect of being locked inside central cities on the ability of poor people to find jobs, finance the education of their children, and enjoy a decent living environment. Moreover, those excluded have no direct access to the local political processes where the exclusionary decisions are made, so that as with education court intervention can be seen as a means of forcing the issue to a higher level of government where the spillover impacts of exclusionary zoning are more likely to be taken into account.\textsuperscript{184}

In some respects the case for Supreme Court intervention in exclusionary zoning may be even stronger than for school finance and welfare rights. Racially segregated housing patterns are what stand in the way of efforts to integrate schools. Economically segregated housing patterns are the root cause of the fiscal imbalance underlying the school-finance issue and contribute to poverty problems generally. So eliminating exclusionary-zoning practices may do more in the long run to alleviate those problems than attacking them directly. In addition, the line-drawing problem in determining when a community has gone too far is somewhat easier than in the school-finance and welfare contexts. Some interventionist state courts have developed the "fair share" approach, under which a community is obligated to make it possible for lower-income hous-

\textsuperscript{184} Professor Tribe has suggested that in areas of moral flux (i.e., when issues are being widely debated in society, and there does not yet seem to be any widespread consensus) an appropriate role for the courts would be to rule in ways which keep the debate going rather than in ways which tend to foreclose debate. \textit{See} Tribe, \textit{supra} note 61, at 298-303. There is much, I think, to be said for that suggestion, and the approach I am recommending here is quite consistent with it. It seems fair to say that class-struggle issues are in a state of flux in our society and perhaps always will be. And the fact that major decisionmaking responsibility with respect to several class-struggle issues (notably school financing and zoning) has been put in the hands of local government, coupled with economic segregation on the local level, tends to exclude the poor from participating in the debate regarding those issues. By deciding cases so as to force higher levels of government, which have the capacity to redistribute wealth and to which the poor have greater access, to deal with these issues, the Supreme Court would thus contribute to keeping the debate open.
ing to be built there in numbers equivalent to its fair share of the regional need for such housing.\textsuperscript{185} Regional need can be determined by planning studies. A community’s fair share of that need could be based on such factors as population, tax base, land availability, access to transportation and jobs relative to other communities in the region; and the impact of a community’s land-use practices on the availability of lower-income housing could be judged by comparing its practices with those of other nonexclusionary communities. The Court might want to defer to the political branches for a precise determination of a community’s fair share, but if it is at least willing to step in when communities have been overly exclusionary, fair share would seem to be a manageable standard for identifying the “I know it when I see it” case.\textsuperscript{186} Finally, the remedial constraints may be somewhat less serious for exclusionary zoning than for other class-struggle issues.

\textbf{Remedial Constraints}

As with school desegregation, class-struggle cases would present the Court with substantial remedial problems should it decide to intervene. The simplest judicial remedy, that which entails the least intrusion into the political process, is to strike down the offending governmental action. Just as the Court could have outlawed mandatory segregation without doing more, so in class-struggle cases it could strike down practices which violate the fair-opportunity and fair-share principles, leaving remedial action to the political process. For several reasons, however, merely striking down the offending practices is unlikely to cure the problem; so the issue of court involvement in the political process must be addressed.

First, since the political factors which led to the practice are likely still to be at play, there may well be recalcitrance on the part of the political process to effect a cure. After \textit{Brown v. Board of Education},\textsuperscript{187} for example, the southern states tried to devise

\textsuperscript{185} See text accompanying note 204 infra.

\textsuperscript{186} The line drawing and balancing of interests in which a court willing to intervene must engage in exclusionary-zoning cases, and in other class-struggle cases as well, would seem to point toward middle scrutiny as the appropriate standard of review. See Wilkinson, \textit{supra} note 9, at 989-98; San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 97-110 (1972) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-30 (1969) (Marshall, J., dissenting); notes 86-91 \textit{supra} and accompanying text.

\textsuperscript{187} 347 U.S. 483 (1954).
schemes designed to achieve the same result as mandatory segregation. Similarly, in the class-struggle context an unconstitutional school-finance scheme, welfare regulation, or zoning ordinance might well be replaced with a different though equally offensive approach. Conceivably the Court could order a specific approach, but because of its fear of intruding too deeply into the political process we should expect it to be reluctant to do so except as a last resort. 188

The history of the school-finance issue before the New Jersey Supreme Court is enlightening in this regard. In Robinson v. Cahill, 189 the New Jersey court struck down New Jersey's method of financing public schools (which relied heavily on local property taxes and thus produced great inequalities in financing capacity and educational expenditures) as violative of the state constitution's requirement that the state provide a "thorough and efficient" system of free public education. 190 The court did not, however, specify a remedy, and it permitted the existing scheme to be continued in order to give the legislative process time to develop an alternative approach.

Almost three years later, after a series of interim rulings, the legislature finally enacted a new financing scheme which the New Jersey Supreme Court upheld in Robinson v. Cahill. 191 Although the bill called for substantially increased state funding and substantially reduced the fiscal disparities among school districts, it did not totally equalize school-district fiscal capacity or per-pupil expenditures. 192 In none of its Robinson opinions did the court ever articu-

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188. By way of comparison, in the reapportionment and school-desegregation cases the standard approach of the courts has been to allow the government an opportunity to come up with a valid apportionment scheme or an acceptable desegregation plan, and to specify a particular approach only upon the failure of the government to do so. See Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 6-16 (1971); Brown II, 349 U.S. 294, 299-300 (1955); cf. Reynolds v. Sims, 377 U.S. 533, 586 (1964) (reapportionment).


190. Id. at 516, 303 A.2d at 295-96.


192. Public School Education Act of 1975, N.J. STAT. ANN. § 18A:7A-1 (West Supp. 1980). The financing scheme is a modified district-power equalization approach, see text accompanying note 137 supra, whose full impact cannot be judged until put into operation. Nor is there adequate data to make a thorough comparison of the New Jersey approach to that of other states; for example, to the Texas' plan upheld in Rodriguez. Suffice it to say that under the New Jersey scheme the poorer a district the more state aid it gets, thus closing the gap between poorer and richer
late precise standards for determining when the disparities would be so great as to render a school-financing scheme unconstitutional. Evidently the court was content with the "I know it when I see it" approach and with impelling the legislature to take significant steps to rectify the drastic disparities which existed under the prior scheme.\footnote{193}

Robinson V was not the end of the matter, however, since financing for the new scheme depended on the enactment, for the first time in New Jersey history, of a state income tax. When the legislature was unable to agree on a bill, the court\footnote{194} ordered the public schools in New Jersey closed. The decision was timed to take effect during the summer session and thus to minimize the political reverberations which could be expected to, and did, follow. The potential confrontation was mooted when the legislature finally enacted a state income tax.\footnote{195}

The New Jersey Supreme Court was able to go to the brink and cause the creation of a new school-financing system.\footnote{196} But

districts in absolute terms, 69 N.J. at 482-84, 539-42, 355 A.2d at 146-47, 177-78; whereas in Rodriguez state aid actually made the gap larger. \textit{See} note 155 \textit{supra}.

\footnote{193} Even though the legislature's new financing scheme was upheld, the possibility of future court intervention remains after Robinson V, thus continuing the judicial pressure for reform. Two of the seven justices (Pashman and Conford) clearly felt the legislature had not moved far enough toward equalization and were prepared to reject the new scheme. 69 N.J. at 476-512, 355 A.2d at 143-55 (Conford, J., concurring and dissenting); \textit{id.} at 527-57, 355 A.2d at 171-86 (Pashman, J., dissenting). Chief Justice Hughes concurred in the result, though he had reservations as to whether the new scheme complied fully with the state constitution, on the ground that the legislature, having made strides toward equalization, should be given additional time. \textit{id.} at 468-75, 355 A.2d at 139-43 (Hughes, C.J., concurring). And the majority opinion itself emphasized that it was upholding the new scheme only on its face, \textit{id.} at 454-57, 355 A.2d at 131-32, thus implicitly holding open the possibility of judicial intervention should the scheme, once operational, prove less equalizing than it might appear on paper. That could happen if, for example, richer districts use their greater revenue-raising capacity to counterbalance the equalizing tendency of the state aid.

\footnote{194} Robinson v. Cahill, 70 N.J. 155, 358 A.2d 457 (1976) (Robinson VI).


\footnote{196} The California Supreme Court, which has also been interventionist in the school-finance area, has gone somewhat further than the New Jersey Supreme Court. In Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971) [hereinafter cited as Serrano I], it upheld the sufficiency of a complaint alleging that the state's substantial reliance on local taxes to finance education, and consequent disparity in school-district fiscal capacity, was a violation of the federal and state equal protection clauses. In response, the legislature enacted new financing legislation which like the New Jersey plan in Robinson V provided for increased state funding and fewer disparities than before, though not full equality in fiscal capacity. \textit{See} Sen-
what if no income tax bill had been forthcoming or no new financing scheme? To have left the schools closed indefinitely would have hurt the very people the court was trying to help. Should the court then order a particular financing scheme and the imposition, collection, and distribution of a state income tax?\footnote{197} Quite obviously we are talking about functions which have traditionally been regarded as legislative and executive, and about the potential for a constitutional crisis similar to that which led to the court-packing fight during the New Deal Era.\footnote{198}

The lesson of this exercise is that at some point the courts will ultimately have to back down in the face of an overly recalcitrant political process. The New Jersey Supreme Court’s willingness to push the legislature was undoubtedly affected by the fact that the state’s governor supported state equalization.\footnote{199} Without that political support, it is questionable whether the court would have been willing to go as far as it did. But even if it had done nothing more than invalidate the prior financing scheme, at least the court would have taken a moral stand against inequitable school financing, for-

\footnote{197} In Robinson v. Cahill, 69 N.J. 133, 351 A.2d 713 (1975) [hereinafter cited as Robinson IV], the New Jersey Supreme Court did take a guarded step in this direction. Since the legislature had not been able to agree on a bill responding to the court’s objections in Robinson I, the court in Robinson IV ordered state funds appropriated for the 1976-1977 school year under certain sections of the existing state law to be disbursed not under those sections, but in accordance with another section of the law which provided for a greater degree of equalization. It is quite clear from the opinion, however, that the court was uncomfortable in so doing; and that the next step if the legislature still did not act would be to enjoin the expenditure of state funds or to close the schools altogether, rather than continue to perform what the court regarded as a legislative function.


\footnote{199} D. Mandelker & D. Netsch, supra note 195.
cing the issue to be dealt with on the state level where the capacity to redistribute wealth exists, and perhaps thereby strengthening the hand of the poor in the political process.200

A second remedial constraint is that remediying class-struggle violations almost always requires some affirmative governmental action. In the case of school finance in New Jersey, it was a new financing system supported by a state income tax. Exclusionary zoning also presents a good example, since even without zoning high land and construction costs stand in the way of building housing for lower-income people in most developing suburbs. Subsidies are needed to put such housing on the ground. However, courts are likely to be wary of ordering that kind of affirmative governmental action for fear of intruding on traditional legislative policy-making prerogatives.

An argument against requiring affirmative action in the exclusionary-zoning context is that government will have satisfied constitutional mandates by removing the offending practice. What this argument overlooks, however, is the contribution past exclusionary practices may have made to the current state of affairs. Just as a history of mandated segregation helps create the prejudicial attitude which makes whites unwilling to accept integration, so a history of exclusionary zoning sets the tone of an elite community, thereby driving up land prices and deterring developers from attempting low-cost housing projects.

The lingering impact of mandated segregation was undoubt-

200. The ongoing interaction between the legislature and court in cases like Robinson and Serrano may well give the political process time to have an impact on a court's posture in much the same way as the Supreme Court has been affected by the political process in its handling of the desegregation and class-struggle issues. See text accompanying notes 61-85 supra. For example, in Serrano I, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), the initial ruling was a 6-1 decision, whereas Serrano II, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1977), was decided by a much more tenuous 4-3 decision. In the interim between the two cases the Rodriguez case was decided, thereby positioning the United States Supreme Court against the California court which had relied largely on the federal equal protection clause in Serrano I. That forced the majority in Serrano II to base its decision on the state constitution's equal protection clause, and may well have been a factor influencing the dissenters' reluctance to intervene. Also in the interim two new justices were selected for the California Supreme Court (Justices Richardson and Clark), and both dissented in Serrano II. The selection process may well have been affected by Serrano I. In light of the intrusiveness of such decisions into the state legislative process there may be something to be said for that, and thus also for having such issues dealt with by state courts who are likely to be more attuned to state politics—but only, again, if state courts are willing to intervene. See text accompanying notes 177-183 supra.
edly a factor in the Supreme Court’s willingness in cases like *Griffin*,\(^{201}\) *Green*,\(^{202}\) and *Swann*\(^{203}\) to demand not only that mandated segregation be abandoned, but that some affirmative action (such as busing) be undertaken to bring about integration. Affirmative action may also be necessary to remedy economic segregation. Yet even the interventionist New Jersey Supreme Court has been unwilling to go very far in this regard, as illustrated by its handling of the exclusionary-zoning issue.

The New Jersey Supreme Court has been one of the leaders in attacking exclusionary zoning. In *Southern Burlington County N.A.A.C.P. v. Township of Mt. Laurel*\(^{204}\) the court held unconstitutional a local zoning ordinance which forbade multifamily housing and established large minimum lot-size, frontage, and building-size requirements. It ruled that local land-use regulations may not “foreclose” and must “affirmatively afford” the opportunity for low- and moderate-income housing to be built in accordance with the municipality’s “fair share” of the regional need for such housing.\(^{205}\) Further defining its ruling, the court stated that zoning must permit multifamily housing, small dwellings on very small lots, low-cost housing and high-density zoning in general.\(^{206}\) When it came to the remedy, however, the court reversed the trial court’s order which nullified the entire zoning ordinance and required the community to submit to it “a plan of affirmative public action.”\(^{207}\) Instead, the New Jersey Supreme Court left it up to the municipality to amend its zoning ordinance to bring it into compliance with the court’s ruling.\(^{208}\)

Two years later, in *Oakwood at Madison, Inc. v. Township of Madison*,\(^{209}\) the court was willing to take the small additional step of authorizing the trial court to retain jurisdiction in the case of a municipality whose zoning was held exclusionary in the initial trial and which had developed an amended ordinance which was also challenged and found unacceptable. Still, the trial court was di-

\(^{201}\) Griffin v. County Bd., 377 U.S. 218 (1964).
\(^{205}\) Id. at 174, 336 A.2d at 724.
\(^{206}\) Id. at 187, 336 A.2d at 732.
\(^{207}\) Id. at 192, 336 A.2d at 734.
\(^{208}\) Id.
rected to allow the municipality time to develop its own non-exclusionary zoning ordinance, and only upon the municipality’s failure to do so was the trial court to appoint its own experts to develop a remedial plan. 210 Moreover, the court refused to allow the trial court to set a specific number of lower-cost units for which the ordinance must provide. 211 Finally, the court specifically declined to order the affirmative relief pressed for by public-interest advocates in amicus briefs and supported by Justice Pashman in his separate opinion. 212

Even if developed, however, new nonexclusionary zoning ordinances are unlikely to result in low-cost housing in communities like Mt. Laurel and Madison Township. First, private developers may be unwilling to build such housing in the face of high land and construction costs, as well as the demand for more profitable high-income housing. Should a court order a community to adopt an inclusionary ordinance mandating private developers to include low-cost or subsidized housing in their projects? Such ordinances raise tricky legal and policy issues which make judicial reluctance to mandate them understandable. 213

Even with an inclusionary ordinance, suburban housing within the means of most lower-income people depends on the existence of subsidy programs which have traditionally been funded at the federal and state levels. Suppose subsidy funds are unavailable due to lack of appropriations or administrative decisions that particular communities are inappropriate sites for subsidized housing or that particular developers are not competent to build it. Should a court order appropriations by legislative bodies not a party to the exclusionary-zoning suit, or remake administrative decisions regarding siting and developer competence? In so doing, a court would obviously be invading areas traditionally reserved to other

210. Id. at 552-53, 371 A.2d at 1227-28.
211. Id. at 531, 371 A.2d at 1213.
212. Justice Pashman would have had the trial court join all municipalities in the housing region; require them to make studies identifying local and regional housing needs; specify a fair share for each municipality based on the municipality’s own recommendation as well as data developed by court-appointed experts; and require each municipality to submit a remedial plan to meet its fair share and to include necessary zoning changes and “affirmative programs” such as the establishment of a housing authority, density bonuses, and inclusionary conditions on subdivision. Id. at 582, 371 A.2d at 1243-44 (Pashman, J., concurring).
branches of government more responsive to public will and possessing greater expertise.

Fortunately, less intrusive affirmative-action remedies are available to courts. In fact, federal subsidies are now available, and there is a federal policy of dispersing subsidized housing into suburbia. In addition, subsidized housing can be developed by public as well as private entities. Consequently, a court might order an exclusionary community to create a housing authority and take advantage of available subsidy programs. That could be done utilizing existing resources and without requiring the direct expenditure of money by the community. Such relief would be modest at best, the amount of subsidies available nationwide being only a fraction of the number of families eligible for subsidies. But at least it would be a start toward putting housing for lower-income people on the ground in exclusionary communities.

Yet, while indicating that a community may have a moral obligation to have a public-housing authority, the New Jersey Supreme Court was unwilling in Mt. Laurel and Oakwood at Madison to make that a legal obligation. That these cases represent the limit of court intervention in New Jersey, for the time being at least, was indicated in Pascack Association, Ltd. v. Mayor and Council of Township of Washington, in which the New Jersey Supreme Court refused to extend Mt. Laurel and Oakwood at Madison to a fully developed community which completely excluded multifamily housing. The court stated quite clearly how it views its role:

[I]t would be a mistake to interpret Mt. Laurel as a comprehensive displacement of sound and long established principles concerning judicial respect for local policy decisions in the zoning field.

... The sociological problems presented by this and similar cases... call for legislation vesting appropriate developmental control in State or regional administrative agencies. The problem is not an appropriate subject of judicial superintendence.

Those who favor judicial intervention with respect to exclusionary zoning might hope for greater affirmative relief than the

216. Id. at 481, 379 A.2d at 11.
217. Id. at 488, 379 A.2d at 15 (citations omitted).
New Jersey Supreme Court was inclined to give. But they should recognize that reluctance to intrude on legislative responsiveness and administrative expertise will inevitably limit how far courts will be willing to go. Political battles must still be fought. At least the New Jersey Supreme Court has taken a moral stand against exclusionary zoning, thereby encouraging state legislative action to supervise local zoning and perhaps enhancing the political power of the poor.

Finally, class-struggle issues interrelate with the political process in ways that can undercut the effectiveness of court intervention or even cause more harm than good. Courts are sensitive to the spillover impacts of their decisions, and may thus be less willing to intervene when they perceive potentially adverse impacts. For example, adverse spillover effects may explain the Burger Court's retreat in the desegregation cases.218

Similar considerations are likely to limit the relief interventionist courts would be willing to grant in class-struggle cases. In this regard exclusionary zoning seems to pose fewer adverse spillover problems than school finance or welfare rights. If anything, requiring suburban communities to open their doors to lower-income people and minorities should deter the flight to the suburbs which has led to central-city racial and economic segregation.

Moreover, the economic and social impacts on suburbs should be relatively minor, even if a court orders affirmative relief. The construction of lower-priced housing may cause some increased property tax burden on more affluent residents, but such housing will likely represent a small share of the total housing stock in developing suburbs. The construction of housing within the means of low- and moderate-income people will depend on the existence of subsidies which may be limited in supply.219 It is unlikely a court would order a suburban community to directly subsidize lower-cost housing itself, so compliance would be possible through the use of existing resources. At most, the fair-share approach would result in

218. See text accompanying notes 69-81 supra.
219. Even with subsidized housing, most housing in developing suburbs (those most likely to face exclusionary-zoning suits) is new or relatively new and thus beyond the means of a large segment of the population whose incomes are too high to be eligible for subsidies and too low to afford anything but the older, used housing available in greatest quantity in the central cities and older suburbs. It will take many years before the used housing in many suburban communities trickles down to these lower-middle-income people.
modest inroads for lower-income people into suburbia, and would take years to make a significant impact. The gradualness of the process should make it more palatable to suburbanites, though it does suggest limits to the ability of courts to rectify the problem.

The school-finance and welfare-rights issues are more troublesome since they raise the spectre of massive court-ordered redistribution of wealth. Suppose in a school-finance case a court were to order equal per-pupil expenditures. That would require the state either to reallocate current educational funds by taking from richer and giving to poorer districts, or to come up with additional funds to bring the poorer districts up to the level of the richer ones. If the state chooses to level up, instead of increasing taxes it might well reallocate monies from other welfare programs. It might, for example, provide less generous subsidies for food, clothing, and housing. Given the deference even an interventionist court is likely to give to the level of welfare benefits fixed by a state, a court would be hardpressed to prevent the reallocation.

To conclude, however, that the question of wealth redistribution should be left totally up to the government's discretion is unacceptable. That would mean that courts are bound not to intervene when the impact of their decisions might be to require anything more than a minor redistribution. Yet a major premise of this Article is that our society is so structured, politically and economically, that a significant discrete minority will be relegated to low-income status for the foreseeable future if the poverty problem is left entirely to the political process.

The resolution, then, ought not to be nonintervention, but a recognition that remedial difficulties may require give and take between the courts and the political branches. Only as a last resort, and in some instances not even then, should courts mandate solutions. Instead, they should prod legislatures to act, requiring legislatures to remedy violations on their own and rejecting solutions that are obviously inadequate. Admittedly, such an approach has drawbacks. Some recalcitrant legislatures may never be prodded into action. However, as the school-desegregation experience dem-

220. In fact, one could read the Supreme Court's handling of the class-struggle cases as evidencing less of a willingness to intervene as the potential redistributational impact of intervention increases. Eliminating the poll tax in Harper and requiring free transcripts and counsel on appeal in Griffin/Douglas do have some, though minor, redistributational impact. The impact of striking down durational residency requirements for welfare in Shapiro is greater. But those cases pale in comparison with the potential impact had the Court been willing to intervene in the school-financing (Rodriguez) and welfare-benefits (Dandridge) contexts.
onstrates, court-mandated solutions can be circumvented as well. Court intervention may not be a panacea, but it helps keep the class-struggle issue before the public, forces the public to grapple with it, and (a point made here several times for emphasis) perhaps strengthens the political position of the poor. This seems a proper and circumspect role for the courts. In that regard the New Jersey Supreme Court's handling of the school-finance and exclusionary-zoning issues is commendable, while the United States Supreme Court's decision to stay out of class-struggle issues is unfortunate.

CONCLUSION

The issue is one of legitimacy and competency. Are the courts the proper place to fight battles over the justice of our economic system, or do such issues more properly belong in the legislative arena? To a great degree, the answer is that questions of wealth redistribution are more appropriately dealt with by our more politically responsive bodies. However, to the extent a caste-like system exists in our society—and for many low-income people, particularly poor blacks and other racial and ethnic minorities, a caste-like system does exist—the case for court intervention is strong.

I can think of no theory of justice, consistent with democratic principles, which would condone a caste system. When the Supreme Court upholds the constitutionality of governmental action (or inaction), it is in effect saying that such action is not inconsistent with our most fundamental democratic ideals. Thus in Rodriguez the Court has put its stamp of approval on a system of financing public education which makes it impossible for the children of the very poor to get an education comparable to what more affluent children have access to. In declining to tackle the exclusionary-zoning issue, it has put its stamp of approval on a system of land-use planning which ensures that the poor will remain segregated in lower-class ghettos. And, in giving total deference to governmental welfare determinations, the Court has opened the door to imposing on the poor a disproportionate share of the costs of the inflationary-recessionary era we now face. We should expect more from the Court. We should expect a statement of its willingness to intervene in an appropriate case and of its moral disapproval when such a case is at hand.

An analogy to racial segregation seems appropriate. In Plessy v. Ferguson, the Court sanctioned mandated segregation. As a

221. 163 U.S. 537 (1896).
result, segregation thrived in our society until the Court declared it unconstitutional in *Brown*. This is not to say that mandatory segregation would still exist in this country were it not for the Supreme Court. It probably would not, since for political and economic reasons the country was ready to be rid of legally mandated segregation. But the Court’s condemnation of segregation was undoubtedly a factor in hastening and gaining public acceptance of desegregation. While racial discrimination and the use of the government in subtle ways to foster racial discrimination is still widespread in our country, at least the Court has taken a stand against it. Hopefully, in the long run, the Court’s stand will contribute to the realization of racial equality. Similarly, the Court should take a stand supportive of the disadvantaged poor (a disproportionate share of whom are racial minorities) and against our developing caste system.

We must acknowledge, however, that the Court would have difficulty remedying class-struggle violations if it were to intervene, just as it has had difficulty remedying school segregation. But that is not an argument against intervention. Few would have the Supreme Court reverse *Brown v. Board of Education* simply because the Court cannot fully or adequately remedy the situation. If political constraints make formulating remedies difficult, let the Court tread lightly in that area, but not in expressing disapproval of unjust treatment. There is room for give and take between the Court and the political branches on the remedial front, and much of the struggle for class equality will be a political battle in any event. But since the political process is already weighted against poor people, the Court should use its considerable moral suasion in their behalf. This is the great role it has come to play in our society, and this is the role it now abdicates.