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EQUAL PROTECTION OR EQUAL DENIAL? IS IT TIME FOR RACIAL MINORITIES, THE POOR, WOMEN, AND OTHER OPPRESSED PEOPLE TO REGROUP?

by Inez Smith Reid*

Footnotes usually are passed over quickly by those bent on hurrying to the “meat” and substance of an idea. Sometimes they even rest dormant for years until someone imagines they have great import in a struggle for survival, or for victory.

For Blacks, Justice Stone’s 1938 footnote 4 in United States v. Carolene Products Company, in which he called for a “more searching judicial inquiry” when prejudice is exercised against “discrete and insular minorities,” supposedly proved a saving grace as they approached the judicial arena in an intense effort to shed the dregs of misery heaped on them by virtue of society’s callous historical reaction to black pigmented skins. Now, in the decade of the seventies, women and others are attempting to squeeze into the Carolene Products footnote box while Blacks and other racial minorities struggle to retain their position therein.

If the box is stretched to hold women, the poor, the mentally ill, the imprisoned, the elderly, and even others, will the law of equal protection lose its ordered character, assuming such a character can be detected? Moreover, will the gains that the oppressed can eke out from the judicial system be minimized by affirming the elasticity of the suspect classification box?

Women, racial minorities, the poor, and other oppressed peoples might well ponder the value of alternative litigation strategies which highlight either a “fundamental personal rights and interests” approach to equal protection questions, or one which combines the suspect classification-fundamental personal rights

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and interests doctrines along the lines suggested by the “sliding scale” model. These alternative strategies might save years of wasted effort since the Supreme Court seems destined to retain the narrow limits of the suspect classification box. Rather than women and the poor struggling alone year after year to assert themselves separately and neatly into the suspect classification box, their desired gains might be more numerous if they joined forces with racial minorities and other oppressed peoples to shape equal protection litigation into a more potent mold, emphasizing not only the oppressed status involved, but also the fundamental personal right or interest being effectively denied. Admittedly, there is no guarantee that a combined approach would diminish the emanation of decisions deemed inimicable to the interests of the poor, minorities, women, and other oppressed peoples. But at least it might avoid a vicious clash of competing interests, and spare us years of virtually meaningless doctrinal decisions. Indeed, the Carolene Products footnote may represent a trap after all — not a saving grace. At any rate, its singular importance may have been exaggerated in recent years.

The suspect classification approach as it pertains to women, racial minorities, and the poor will be analyzed first in order to determine what gains, if any, have been achieved and lost via this route. Then the utility of an equal protection-fundamental rights approach which may accent more concerns common to women, minorities, the poor, and other oppressed peoples will be examined. Finally, the value of a “sliding-scale” route to equal protection issues as a route which might permit the oppressed to present a more reasoned equal protection package to the Court, and simultaneously make it more uncomfortable for the Supreme Court to disregard the societal injustices heaped upon the poor, racial minorities, and other oppressed peoples, will be considered.

THE SUSPECT CLASSIFICATION BOX

In defining those who should receive special protection from the judiciary, Justice Stone wrote: “[p]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.”

2. For a description of the “sliding scale” model, see notes 177-80 infra and accompanying text.
equal protection theory these “discrete and insular minorities” generally fall into a “suspect classification” requiring close, rigid, or strict judicial scrutiny with a “heavy” or “far heavier” burden being imposed upon the state to justify the classification.4

Thus far, the Court clearly has recognized race,5 nationality,6 and alienage7 as suspect classifications. It has considered, but not yet categorically approved that status by majority vote, for sex,8 poverty (wealth)9 and illegitimacy.10 Even mental illness has been proposed for inclusion in the suspect classification box.11 If mental illness is accepted, why not physical disability, age, imprisonment, and a host of others? It may be true, as at least one commentator suggests, that the suspect classification notion leaves much to be desired in the sense of “consistently applicable standards for choosing which minority groups to protect.”12

We explore now the court-declared status of women, the poor, and racial minorities with respect to the suspect classification box.

Are Women A Discrete and Insular Minority?

If Blacks constitute a discrete and insular minority, some insist, women, too, fall into that status. If suspect classification

4. A traditional equal protection analysis looks first for the purpose of a legislative classification, and second seeks to determine whether all those similarly situated are covered by the classification. Its overall approach is to determine whether there is some rationality in the statute in question. See Developments in the Law — Equal Protection, 82 Harv. L. Rev. 1065 (1969). On the other hand, once the Court concludes that a statutory provision embodies a “suspect classification,” or takes away a “fundamental interest” from certain persons, the equal protection clause requires more than a rational inquiry. Instead, the command is that the statutory provision be subjected to “strict judicial scrutiny.” Once “strict judicial scrutiny” is employed, the statute can be saved only if a compelling state interest is found. Id. See also Ely, Legislative and Administrative Motivation in Constitutional Law, 79 Yale L.J. 1205 (1970); Gunther, The Supreme Court 1971 Term Foreword: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection, 86 Harv. L. Rev. 1 (1972); Tussman and tenBroek, The Equal Protection of the Laws, 37 Calif. L. Rev. 341 (1949); Note, Legislative Purpose, Rationality, and Equal Protection, 82 Yale L. J. 123 (1972).


8. See discussion at note 14 et seq. and accompanying text infra.

9. Griffin v. Illinois, 351 U.S. 12 (1956); Harper v. Virginia Board of Elections, 383 U.S. 663 (1968); Also see discussion at note 75 et seq. and accompanying text infra.


is conferred on racial minorities because race is of a "congenital" and "unalterable" character,12 sex, also representing a biological constant, merits such classification.14 If Blacks can dredge up historical mind-sets and judicial decisions confirming their supposed inferiority, so too can women. Blacks may have been regarded as so much chattel, property, and a mass of inferiority even before Dred Scott v. Sanford15 stamped the "badge of opprobrium" squarely on black shoulders.16 Yet, women were viewed as weak, delicate creatures destined to take orders from superior men and tend the home fires — even before the judicial insult implicit in Bradwell v. Illinois.17


14. Needless to say, the argument overlooks those few cases where a man or woman has undergone surgery for the purpose of changing his or her sex.

15. 60 U.S. (19 How.) 393 (1857).


17. 83 U.S. (16 Wall.) 130 (1872). Bradwell permitted females to be excluded from the legal profession. Women are fond of citing Justice Bradley's concurrence in Bradwell as a prime example of disgraceful attitudes toward the female gender. Justice Bradley remarked:

Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfit it for many of the occupations of civil life. The constitution of the family organization, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which properly belongs to the domain and functions of womanhood.

Id. at 141. Women also have a tendency to lean on Goesaert v. Cleary, 335 U.S. 464 (1948) as being indicative of women's early struggle for job equality. There the Supreme Court upheld a Michigan law which prohibited women, as a general rule, from obtaining bar-tending licenses. The rationale was the need to avoid social and moral problems which might arise from permitting women to tend bars. For other examples of historical discrimination against women see Frontiero v. Richardson, 411 U.S. 677, 684 n.13 (1973); Hoyt v. Florida, 388 U.S. 57 (1961); Muller v. Oregon, 208 U.S. 412 (1908). See Equal Rights For Women: A Symposium on the Proposed Constitutional Amendment, 6 Harv. Civ. Rights-Civ. Lib. L. Rev. 215 (1971); Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 Harv. L. Rev. 1499 (1971).

See also The President's Task Force on Women's Rights and Responsibilities, Report: A Matter of Simple Justice (1970); President's Commission on Status of Women, American Women (1963); L. Kanowitz, Women and the Law (1969); J. Mitchell, Woman's Estate (1971); MS. Reader (1973); Radical Feminism, (E. Levine & A. Rapone eds. 1971); Rebirth of Feminism, (J. Hole & E. Levine eds. 1971); Sisterhood is Powerful, (R. Morgan ed. 1970); Woman in Sexist Society—Studies in Power and Powerlessness,
How far can one push the analogy between sex and race? Is it possible to demonstrate that women have achieved more success in the legislative arena than racial minorities—especially given the pending Equal Rights Amendment, Title IX of the Education Act Amendments of 1972, the Equal Pay Act, and Title VII of the Civil Rights Act of 1964? Are women rapidly becoming the new minority? Maybe a comparison of legislative gains of women and racial minorities is unfair, or at least detrimental to notions of fair play for all. But the Carolene Products footnote may compel that type of comparison.

In a thoughtful analysis of Roe v. Wade, John Hart Ely confesses:

I'm not sure I'd know a discrete and insular minority if I saw one, but confronted with a multiple choice question requiring me to designate (a) women or (b) fetuses as one, I'd expect no credit for the former answer.

The easy choice for advocates of women's rights would be (a) men and (b) women for as Ely tells us, compared with men, women may constitute [a discrete and

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18. One author points to an almost perfect fit: Both classifications create large, natural classes, membership in which is beyond the individual's control; both are highly visible characteristics on which legislators have found it easy to draw gross, stereotypical distinctions. Historically, the legal position of black slaves was justified by analogy to the legal status of women. Both slaves and wives were once subject to the all-encompassing paternalistic power of the male head of house.

Note, Sex Discrimination and Equal Protection: Do We Need a Constitutional Amendment?, 84 HARV. L. REv. 1499, 1507 (1971). A plurality of the Court in Frontiero v. Richardson, 411 U.S. 677 (1973), also noted the resemblance between race and sex discrimination in America. Id. at 684-88.

19. The proposed amendment reads in pertinent part: "Equality of Rights under the law shall not be denied or abridged by the United States or by any State on account of sex." S. J. Res. 61, 91st Cong., 1st Sess. § 1 (1969). It has not yet been ratified by a sufficient number of states.

23. 410 U.S. 113 (1973) (criminal abortion statute of Texas held unconstitutional as violative of the due process clause of the fourteenth amendment).
25. Id. at 934-35.
Suppose the tables were switched leaving the multiple choice between (a) women and (b) Blacks. Would one expect credit for choosing women? Would Black women be considered women, or Blacks? Or, would the stark clash of competing interests be side-stepped as unresolvable in academic credit terms?

The morass of the suspect classification box is becoming clearer. It now behooves us to take a closer look at Supreme Court “feminist-oriented” decisions to see exactly how the Court has reacted to the female application for suspect status classification as a “discrete and insular minority."

Griswold v. Connecticut,26 Eisenstadt v. Baird,27 and Roe v. Wade,28 though based mainly on privacy considerations, may have paved the way for consideration of the female gender as a suspect classification. The opportunity for an equal protection-suspect classification analysis presented itself in Reed v. Reed.29 Chief Justice Burger resisted the “suspect classification” issue, however, and resolved the case, instead, on supposedly traditional equal protection-rationality grounds.30 Confronted with an Idaho statutory provision which preferred males over females as administrators of intestate estates,31 the Court sought to determine whether the sex-based classification was "reasonable, not arbitrary" and whether it "[rested] upon some ground of differ-

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26. 381 U.S. 479 (1965) (Connecticut statute circumscribing the use of contraceptives held unconstitutional on right of privacy grounds).
27. 405 U.S. 438 (1972) (Massachusetts statute which distinguished married from unmarried persons for the purpose of regulating the distribution of contraceptives held violative of the equal protection clause of the fourteenth amendment).
29. 404 U.S. 71 (1971) (Oregon statute proclaiming a mandatory preference for male applicants over female applicants for the purpose of administering estates was held to be violative of the equal protection clause of the fourteenth amendment).
30. It has been argued that Reed cannot be understood or “explained on the basis of the traditional rationality requirement.” Note, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123, 151 (1972). Rather, it must be viewed as employing “a disguised balancing test.” Id. As the proponents of this position maintain:
   An alternative explanation of Reed is that the Court determined that the state’s interest in judicial efficiency was less important than the interest of women in equal treatment with respect to the purpose of choosing qualified administrators of decedents’ estates . . . . The statute did not fall because it could not be shown to be rationally related to a permissible purpose but because the Court determined that the interest of women in equal opportunity outweighed a legitimate objective of the statute.

Id.

31. Idaho Code § 15-314 (1947). Part of the law, however, preferred women. In § 15-312, for example, a woman whose husband had died intestate was preferred over a male offspring, a male sibling, and a male parent.
ence having a fair and substantial relation to the object of the legislation, . . . .” The Idaho statutory provision violated the equal protection clause, the Court declared, by arbitrarily selecting males over females without a sufficient legislative purpose.

On the heels of Reed v. Reed came Frontiero v. Richardson, which called into question provisions conferring benefits on armed services dependents. Under the provisions, a male member of the uniformed services could claim his wife as a dependent, without undergoing any test of his wife’s actual dependency, whereas a female member of the same services could not claim her husband as a dependent without submitting to an actual test of dependency. Since the case involved a federal law, Sharon Frontiero’s equal protection claim was resolved under the due process clause of the fifth amendment. The Court held that “by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.”

Of great interest in Frontiero is the fact that four members of the Court, relying on Reed v. Reed, concluded that sex is a suspect classification and that any sex-based classification “must therefore be subjected to close judicial scrutiny.” Led by Justice Brennan, Justices Douglas, White, and Marshall pressed the point that “classifications based upon sex, like classifications

33. The legislative purpose advanced was “avoiding intrafamily controversy” at hearings designed to determine qualifications of potential administrators. Id. at 76-77.
34. For other comments on Reed v. Reed see Ginsberg, Gender and the Constitution, 170 N.Y.L.J. 100, Nov. 26, 1973, at 1, col. 3.
37. Precedent for resolving an equal protection claim under the due process clause of the fifth amendment may be found in Bolling v. Sharpe, 347 U.S. 497 (1954) and Richardson v. Belcher, 404 U.S. 78 (1971). See also Frontiero v. Richardson, 411 U.S. 677, 680 n.5 (1973) citing Schneider v. Rusk, 377 U.S. 163, 168 (1964): “[w]hile the Fifth Amendment contains no Equal Protection Clause, it does forbid discrimination that is ‘so unjustifiable as to be violative of due process.’”
39. Id. at 682.
based upon race, alienage, or national origin, are inherently sus-
pect...."\textsuperscript{30}

Justice Powell, Chief Justice Burger, and Justice Blackmun protested\textsuperscript{41} that addition of the female gender to the suspect clas-
sification was premature since Reed v. Reed compelled the elimi-
nation of the statutory provisions in question anyway, and a reso-
lution of the issue is in progress through the equal rights amend-ment.\textsuperscript{42}

A curve or digression in its sex-based classification analysis
may have been evident in the Court's treatment of Cleveland
Board of Education v. LaFleur.\textsuperscript{43} Instead of resolving the issue of
the constitutionality of mandatory leaves of absence for pregnant
public school teachers beginning five months before the expected
childbirth in equal protection terms, a majority of the Court
chose the due process clause of the fourteenth amendment as the
appropriate remedial mechanism, despite the fact that the Sixth
Circuit\textsuperscript{44} and the United States District Court of the Eastern
District of Virginia\textsuperscript{45} (with approval from the Fourth Circuit)\textsuperscript{46}
rested their decisions firmly on the equal protection clause of the
fourteenth amendment. Using as precedent Vlandis v. Kline\textsuperscript{47}
and Stanley v. Illinois,\textsuperscript{48} the five man majority slipped into the
thicket of "irrebuttable presumptions" to invalidate rules of the
Cleveland and Chesterfield County School Boards. Wrote Justice
Stewart:\textsuperscript{49}

neither the necessity for continuity of instruction nor the state
interest in keeping physically unfit teachers out of the classroom
can justify the sweeping mandatory leave regulations that the
Cleveland and Chesterfield County School Boards have
adopted. While the regulations no doubt represent a good-faith
attempt to achieve a laudable goal, they cannot pass muster
under the Due Process Clause of the Fourteenth Amendment,

\textsuperscript{30} Id.
\textsuperscript{41} The three justices took issue with the plurality's interpretation of Reed. They
maintained that Reed "did not add sex to the narrowly limited group of classifications
which are inherently suspect." Id. at 692.
\textsuperscript{42} Id. at 691-92.
\textsuperscript{43} 414 U.S. 632 (1974). For comments on LaFleur see Note, The Conclusive Pre-
\textsuperscript{44} LaFleur v. Cleveland Bd. of Educ., 465 F.2d 1184 (6th Cir. 1972).
\textsuperscript{46} Cohen v. Chesterfield County School Bd., 474 F.2d 395 (4th Cir. 1973).
\textsuperscript{47} 412 U.S. 441 (1973).
\textsuperscript{48} 405 U.S. 645 (1972).
because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child.

The majority invoked *Roe v. Wade,* \(^{50}\) *Griswold v. Connecticut,* \(^{61}\) and *Eisenstadt v. Baird* \(^{52}\) at the outset, thus giving the impression that the case might be handled along the same lines as *Reed v. Reed.* Indeed, the majority then proceeded to determine whether the cut-off dates in the regulations in question \(^{53}\) bore some “rational relationship to the valid state interest of preserving continuity of instruction,” \(^{54}\) thus seemingly plunging into a traditional equal protection-rationality analysis, but nonetheless labeling it due process-rationality. No rational relationship to purpose was detected, in one instance, since the legislature might have chosen dates later in pregnancy as a cut-off point and hence imposed “a far lesser burden on the women’s exercise of constitutionally protected freedom.” \(^{55}\)

Even though the five to six month cut-off dates might not have been related rationally to a legislative purpose of “continuity of instruction,” still they may have borne some relationship to a second legislative objective—“keeping physically unfit teachers out of the classroom.” Although the majority admitted that the rules clearly promoted the second legislative objective they felt, nevertheless, than the controlling question remained “whether the rules sweep too broadly.” \(^{56}\) This inquiry pushed the Court into its irrebuttable presumptions web, and set the stage for concluding that: \(^{57}\)

the provisions amount to a conclusive presumption that every pregnant teacher who reaches the fifth or sixth month of pregnancy is physically incapable of continuing. There is not individualized determination by the teacher’s doctor—or the school board’s—as to any particular teacher’s ability to continue at her job. The rules contain an irrebuttable presumption of physical incompetency, and the presumption applies even when the medical evidence as to an individual woman’s physical status might be wholly to the contrary.

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51. 381 U.S. 479 (1965).
52. 405 U.S. 438 (1972).
55. Id.
56. Id. at 644.
57. Id.
In the end both legislative objectives—"continuity of instruction" and "keeping physically unfit teachers out of the classroom"—fell before the due process investigation; for "[w]hile the regulations no doubt represent a laudable goad, they cannot pass muster under the Due Process Clause of the Fourteenth Amendment, because they employ irrebuttable presumptions that unduly penalize a female teacher for deciding to bear a child."\(^5\)

After having wrestled with the cut-off dates or "mandatory termination" part of the regulations, the Court moved to those rules concerning return to teaching duties following delivery of the child.\(^6\) The same legislative purposes were advanced to justify the return regulations as for the pre-delivery termination of work rules. While the Cleveland three-month rule was struck down under the "irrebuttable presumptions" doctrine, the Chesterfield County regulation escaped the hatchet, for a woman could return as soon as she submitted "a medical certificate from her physician." At any rate, she enjoyed the possibility of a guaranteed return "no later than the beginning of the next school year following the eligibility determination."\(^7\)

It remained for Justice Powell to suggest in a concurring opinion that the case should be governed by the equal protection clause, under the traditional rational basis inquiry. In his eyes,\(^8\)

*[t]hese cases present precisely the kind of problem susceptible to treatment by classification. Most school teachers are women, a certain percentage of them are pregnant at any given time, and pregnancy is a normal biological function possessing, in the great majority of cases, a fairly well defined term. The constitutional difficulty is not that the boards attempted to deal with this problem by classification. Rather, it is that the boards chose irrational classifications.*

But *LaFleur* proved to be a wasted effort in terms of a majority decision on equal protection grounds.

After the majority of the Court chose not to embrace sex as

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58. *Id.* at 648.

59. Under the Cleveland rule a woman could not return to her teaching duties before "the beginning of the regular school semester which follows the child's age of three (3) months." 414 U.S. 632, 635 n.1. The Chesterfield County rule, less rigid in nature, permitted a woman to regain her position upon submission of a "written notice from her physician that she is physically fit for full-time employment" and upon her "assurance that care of the child will cause minimal interference with job responsibilities." *Id.* at 637 n.5.

60. *Id.* at 650.

61. *Id.*

62. *Id.* at 652-53.
a suspect classification in *Reed*, *Frontiero*, or *LaFleur*, another opportunity arose in *Geduldig v. Aiello*. There the Court was faced with a California unemployment compensation disability insurance provision which disallowed disability benefits for normal pregnancy. Using a traditional equal protection-rationality mode of analysis, Justice Steward, writing for a six man majority, concluded that no invidious discrimination violative of the equal protection clause could be found. Not only was the notion of sex as a suspect classification again rejected by a majority of the Court, but women's rights advocates also lost their battle to bring normal childbirths under disability coverage. In accepting California's desire to keep employee contributions to the disability insurance program at a minimum and to maintain the self-supporting nature of the fund, the Court, with the realization that California guaranteed adequate coverage for statutorily named disabilities, announced that the state bore no obligation to include everyone under coverage at the same time. The Court may have been comforted by the fact that at least some pregnant women were covered due to the fact that abnormal pregnancies fell within the scope of the disability insurance program.

The important point to stress about *Geduldig* is that only three members of the Court (Justices Brennan, Douglas and Marshall) adhered to the belief that "classifications based upon sex, like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny." Justice White, part of the *Frontiero* plurality

64. The dissenters, Justices Brennan, Douglas, and Marshall, rejected monetary considerations as a basis for upholding the California program under a suspect classification-strict judicial scrutiny framework. "[W]hen a statutory classification is subject to strict judicial scrutiny, the State 'must do more than show that denying [benefits to the excluded class] saves money.' Memorial Hospital v. Maricopa County, [415 U.S. 250, 263] (1974). See also Graham v. Richardson, 403 U.S. 365, 374-375 (1971)." ___ U.S. at ___, 94 S.Ct. at 2496.
65. § 2626 of the Cal. Unemp. Ins. Code (West Supp. 1973) provides for payment of benefits to claimants who are disabled "because of an abnormal and involuntary complication of pregnancy, including but not limited to: Puerperal infection, eclampsia, caesarian section delivery, ectopic pregnancy and toxemia." Id. at 2489 n.15.
on the sex as a suspect classification issue, joined the majority in Geduldig, and hence did not regard that case as sufficiently similar to Frontiero to dictate the elevation of women to the suspect classification.

Neither under the rational basis nor the suspect classification-strict judicial scrutiny orientation did Geduldig yield a majority favorable to the interests of women's rights advocates. Thus, for many women, Geduldig clearly represents a setback in terms of efforts to get the Court to regard women as a special class in need of careful judicial protection.8

Prior to Geduldig, the Supreme Court was asked to resolve another alleged sex discrimination case. Somewhat different from previous sex discrimination cases was Kahn v. Shevin,9 involving a male appellant who sought to have a Florida statute ruled unconstitutional as contrary to notions of equal protection. The statute conferred on widows an annual $500 property tax exemption but denied the same exemption to widowers.70 Obviously for

dissenting) citing Frontiero v. Richardson, 411 U.S. 677, 688 (1973). The three justices continued:

[w]hen, as in this case, the State employs a legislative classification that distinguishes between beneficiaries solely by reference to gender-linked disability risks, 'the Court is not . . . free to sustain the statute on the ground that it rationally promotes legitimate governmental interests; rather such suspect classifications can be sustained only when the State bears the burden of demonstrating that the challenged legislation serves overriding or compelling interests that cannot be achieved either by a more carefully tailored legislative classification or by the use of feasible less drastic means.' Kahn v. Shevin, ______ U.S. ______, 94 S.Ct. 1734, 1738 (1974) (Brennan, J., dissenting).

Id. 68. This trend is consistent with the position and prediction of at least one analysis of the equal rights amendment. Professor Emerson and his co-authors wrote in 1971:

[a]n examination of the decisions of the Supreme Court demonstrates that there is no present likelihood that the Court will apply the Equal Protection Clause in a manner that will effectively guarantee equality of rights for women. More important, equal protection doctrines, even in their most progressive form, are ultimately inadequate for that task."

Brown, Emerson, Falk, and Freedman, The Equal Rights Amendment: A Constitutional Basis for Equal Rights For Women, 80 YALE L. J. 871, 875 (1971). Furthermore, the authors bluntly asserted:

[w]ithout a constitutional mandate, women's status will never be accorded the special concern which race now receives because of the history of the Fourteenth Amendment.


70. Fla. Stat. § 196.191 (7) (1971) exempts from property taxation "[p]roperty to the value of five hundred dollars to every widow, and to every person who is a bona fide resident of the State, and has lost a limb or been disabled, in war or military hostilities or by misfortune."
Justice Douglas, one of those comprising the *Frontiero* plurality, *Kahn* reflected a case not classifiable solely in terms of sex discrimination. Not only did it concern a male litigant, but it also touched upon the law of taxation. As Justice Douglas phrased it: "

[t]his is not a case like *Frontiero* v. Richardson [citation omitted], where the Government denied its female employees both substantive and procedural benefits granted males 'solely for administrative convenience.' . . . We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden. We have long held that '[w]here taxation is concerned and no specific federal right, apart from equal protection, is imperilled, the States have large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation.' . . . A state tax law is not arbitrary although it 'discriminate[s] in favor of a certain class . . . if the discrimination is founded upon a reasonable distinction, or difference is state policy,' not in conflict with the Federal Constitution. . . . This principle has weathered nearly a century of Supreme Court adjudication, [footnote omitted] and it applies here as well. The statute before us is well within those limits.

In dissent Justice White made it clear that he has not abandoned the position of regarding sex as a suspect classification—at least in some types of cases. " . . . [G]ender-based classifications are suspect and require more justification than the State has offered," he wrote; moreover, " . . . administrative efficiency is not an adequate justification for discriminations based purely on sex." Echoing Justice White were Justices Brennan and Marshall who consistently have reaffirmed their belief that sex is a suspect classification.

Over the past few terms the Court obviously has toyed with the concept of sex as a suspect classification. A majority almost embraced the notion in *Frontiero*, but as succeeding cases clearly demonstrate, enthusiasm waned quickly. Closer examination of *Geduldig* and *Kahn* may suggest a valuable clue about the Court's attitude toward the utilization of sex as a suspect classification. After *Frontiero*, the Court may have been more sensitized to the economic issues which intruded into some of the sex-labeled cases. One might argue, validly, that where serious eco-

72. Id. at ---, 94 S.Ct. at 1740.
nomic overtones penetrate cases imprinted with a "feminist" label, the Supreme Court has shied away from positively employing the suspect classification doctrine for sex-related cases. In Geduldig, for example, the Court reached a positive conclusion with respect to abnormal pregnancies by ordering disability payments. For normal pregnancies, however, the Court majority stepped away—refusing to rule such benefits applicable. For the Court to have commanded payment of disability benefits for normal pregnancies would have meant an increased financial burden on the state, or the employer, or the employee. Similarly, in Kahn the state would have lost revenue had the property tax exemption been extended to widowers.

Perhaps Justice White comes closest to seeing the economic overtones of Kahn in asserting:73

I perceive no purpose served by the exemption other than to alleviate current economic necessity, but the State extends the exemption to widows who do not need the help and denies it to widowers who do. .

. . . [E]ven if past discrimination is considered to be the criterion for current tax exemption, the State nevertheless ignores all those widowers who have felt the effects of economic discrimination, whether as a member of a racial group or as one of the many who cannot escape the cycle of poverty.

It may be, then, that the Court is particularly hesitant to resort to the suspect classification for sex where economic considerations intrude. Hence, Frontiero may have been a false alarm for those who deemed the Court ready to place the female gender squarely into the suspect classification box regardless of the "feminist" issue posed for resolution. And while that gender may continue its effort to squeeze into that box, along with race, nationality, and alienage, the Court may be determined to make the fit difficult. Hence, to the original inquiry, "are women a discrete and insular minority?" one can only respond that the Supreme Court does not think so—at least as of 1974. The harder question is: will women continue to press the issue even if the returns seem so negligible?

Are the Poor A Discrete and Insular Minority?

Like women, the poor have struggled to land in the suspect classification box, but generally have had their efforts rejected

73. Id.
rudely. In 1969 Professor Michelman called attention to the optimistic, egalitarian position of certain legal commentators:

A notable feature in the Court's "egalitarian revolution," many commentators suggest, is the emergence of special judicial hostility towards official discrimination, be it de jure or de facto, according to pecuniary circumstance. . . . If the commentators are right, relative impecuniousness appears to be joining race and national ancestry to compose a complex of traits which, if detectible [sic] as a basis of officially sanctioned disadvantage, render such disadvantage "invidious" or "suspect."

These commentators may have been encouraged by the Court's decisions in Griffin v. Illinois75 and Harper v. Virginia Board of Elections,76 which seemed to suggest that " . . . classifications based on the payment of a fee to the state are constitutionally suspect because they adversely affect lower income groups."

But, we are reminded that Harper and Griffin "also involved rights of fundamental importance, such as voting and criminal procedure. Thus, a concern over distinctions based on wealth was strongly reinforced by a desire to protect these important personal interests and it does not appear that distinctions based on payment are always suspect."

After Shapiro v. Thompson77 and Williams v. Illinois,80 the


75. 351 U.S. 12 (1956). Griffin held that Illinois' failure to provide a free transcript to an indigent defendant in a criminal case where the state afforded appellate review as of right was an unconstitutional violation of the equal protection clause of the fourteenth amendment. Justice Black wrote:

In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. Plainly the ability to pay costs in advance bears no rational relationship to a defendant's guilt or innocence and could not be used as an excuse to deprive a defendant of a fair trial.

Id. at 17-18.

76. 383 U.S. 663 (1966). In Harper the Court struck down Virginia's law requiring potential voters to pay an annual poll tax. Justice Douglas asserted for the majority:

We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard. Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.

Id. at 666.


78. Id.

79. 394 U.S. 618 (1969). In Shapiro the Court invalidated statutes which conditioned welfare benefits on length of stay or residence in a given locale, holding that such action
Court quickly proved itself no friend of the poor.\textsuperscript{81} On the heels of \textit{Dandridge v. Williams}\textsuperscript{82} came \textit{Wyman v. James}.\textsuperscript{83} In quick order these two decisions validated Maryland's welfare policy of placing a maximum ceiling on welfare benefits despite the size of the family,\textsuperscript{84} and condoned New York's policy of administrative visitations to determine whether welfare benefits should be continued.\textsuperscript{85} Thus began a crystallization of setbacks for the poor.\textsuperscript{86}

It is true that the Court handed down what might be considered pro-poor decisions in \textit{Boddie v. Connecticut},\textsuperscript{87} \textit{Bullock v. Carter},\textsuperscript{88} \textit{Lindsey v. Normet},\textsuperscript{89} \textit{U.S. Department of Agriculture v. Moreno}\textsuperscript{90} and \textit{Shea v. Vialpando},\textsuperscript{91} but none of those decisions infringed upon the constitutional right to travel interstate while failing to show a compelling governmental interest therefore. \textit{Id.} at 634.

\textsuperscript{80} 399 U.S. 235 (1970). Using \textit{Griffin v. Illinois} as precedent the Court held that: [A]n indigent criminal defendant may not be imprisoned in default of payment of a fine beyond the maximum authorized by the statute regulating the substantive offense. \textit{Id.} at 241.

\textsuperscript{81} After analysis of the Supreme Court's 1972 Term, Professor Tushnet contended that "a majority of the Court was willing to invoke the equal protection clause to invalidate legislation that might harm its friends and neighbors but unwilling to strike down legislation that harmed only the poor." Tushnet, \textit{And Only Wealth Will Buy You Justice - Some Notes On the Supreme Court, 1972 Term.}, 1974 Wis. L. Rev. 177, 180.


\textsuperscript{83} 400 U.S. 309 (1971).

\textsuperscript{84} The Court in \textit{Dandridge} utilized the traditional equal protection-rational basis test, thus maintaining that:

\begin{quote}
In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some "reasonable basis," it does not offend the Constitution simply because the classification "is not made with mathematical nicety or because in practice it results in some inequality." \textit{Lindsley v. Natural Carbonic Gas Co.}, 220 U.S. 61, 78 (1911).
\end{quote}


\textsuperscript{85} \textit{Wyman} was decided under the fourth amendment. No violation of the right to privacy was found by the Court majority, although the dissenters, Justices Douglas, Marshall and Brennan, took strong exception to the Court's analysis.


\textsuperscript{87} 401 U.S. 371 (1971).

\textsuperscript{88} 405 U.S. 134 (1972). \textit{See also} Lubin v. Panish, --- U.S. ---, 94 S.Ct. 1315 (1974), wherein the Court struck down, at the request of an indigent candidate, California election filing fee statutes (with fees ranging from $192-$982) on equal protection grounds.

\textsuperscript{89} 405 U.S. 56 (1972).

\textsuperscript{90} 413 U.S. 528 (1973).

\textsuperscript{91} --- U.S. ---, 94 S.Ct. 1746 (1974).
dealt with wealth or poverty as a suspect classification.\textsuperscript{92} Further-

\textsuperscript{92} Boddie v. Connecticut, 401 U.S. 371 (1971), involving the right of female welfare recipients to file for divorce without paying requisite statutory fees, was resolved under the due process clause of the fourteenth amendment. Viewing marriage as fundamental, and recognizing that the courts were the only vehicle through which a divorce could be granted, the Court considered the fees violative of fourteenth amendment due process. In Bullock v. Carter, 405 U.S. 134 (1972), the Court was confronted with statutory provisions compelling political candidates to pay election filing fees as a condition for their candidacy. The fees ranged from $1000 to $8,900. The Court concluded that the filing fee "system falls with unequal weight on voters, as well as candidates, according to their economic status." 405 U.S. 134, 144 (1972). Since Bullock involved the election-voting area, the Court followed Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966), as precedent and announced that "the laws [in question] must be 'closely scrutinized' and found reasonably necessary to the accomplishment of legitimate state objectives in order to pass constitutional muster." Id. at 144. Thus, the fundamental interest approach, rather than the suspect classification doctrine, brought Bullock under the rubric of "close judicial scrutiny." The Court, too, was careful to delimit the boundaries of its opinion, even under the "close judicial scrutiny" analysis:

[b]y requiring candidates to shoulder the costs of conducting primary elections through filing fees and by providing no reasonable alternative means of access to the ballot, the State of Texas has erected a system that utilizes the criterion of ability to pay as a condition to being on the ballot, thus excluding some candidates otherwise qualified and denying an undetermined number of voters the opportunity to vote for candidates of their choice. These salient features of the Texas system are critical to our determination of constitutional invalidity. Id. at 149.

In Lindsey v. Normet, 405 U.S. 56 (1972), an Oregon statute which forced tenants to post a double-bond to appeal from adverse decisions made under the Oregon FORCIBLE ENTRY AND WRONGFUL DETAINER ACT (FED), ORE. REV. STAT. §§ 105.105-105.160 (1953), was held unconstitutional on equal protection grounds. The Oregon Act required all persons appealing FED decisions to "file an undertaking, with one or more sureties, covering 'all damages, costs and disbursements which may be awarded against him on appeal.'" 405 U.S. 56, 74 (1972). Losers in the lower court had to make an additional guarantee, "with two sureties for the payment of twice the rental value of the premises from the commencement of the action in which the judgment was rendered until final judgment in the action."

The Court felt that "the discrimination against the poor, who could pay their rent pending an appeal but cannot post the double bond, is particularly obvious." Id. at 76. The Court then concluded: [t]he discrimination against the class of FED appellants is arbitrary and irrational, and the double-bond requirement . . . violates the Equal Protection Clause." Id.

The Court wasted little time in striking down § 3(e) of the FOOD STAMP ACT OF 1964 as amended, 84 Stat. 2048, 7 U.S.C. § 2012(e) (1970), which required all members of a household to be related in order to receive food stamps. In U.S. Department of Agriculture v. Moreno, 413 U.S. 528 (1973) (which did not concern payment of fees to obtain a right of access to the political or judicial arena), the Court believed that the food stamp provision was aimed directly at hippies, whom the legislature did not wish to receive food stamps. Applying a traditional equal protection-rational basis test, Justice Brennan maintained that the equal protection clause did not recognize "a bare congressional desire to harm a politically unpopular group" as a "legitimate governmental interest." Id. at 534. Justice Brennan also asserted that "in practical effect, the challenged classification simply does not operate so as rationally to further the prevention of fraud." Id. at 537.

Decided on statutory rather than constitutional grounds was Shea v. Vialpando, — U.S. —, 94 S.Ct. 1746 (1974). There the Court determined that a Colorado rule related

Rodriguez stands as the most bedeviling of the aforementioned decisions. In that case, the Court not only flatly denied that eduction is a fundamental interest, but also claimed that wealth could not be elevated to the suspect classification category in the case because those alleged to be victims of the San Antonio public school finance system could not be identified as a "definable category of 'poor' people." "[I]t is clearly incorrect . . . to contend that the 'poor' live in 'poor' districts." *Rodriguez* is so devastating to the interests of the poor because it levels two crippling blows to the "poverty mid-section". One, asserting that eduction, regarded most often as the mechanism for disentanglement from the web of poverty, is not a fundamental right; the other rejecting the elevation of the poor to a suspect classification entitling them to greater judicial protection.

*Kras, Ortwein* and *Fuller* all imposed burdens on the poor to pay some statutory fees which conditioned the right of judicial access. In all three cases the Court rejected equal protection arguments.

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to AFDC (Aid to Families With Dependent Children) benefits was inconsistent with § 402(a)(7) of the Social Security Act of 1935, as amended, 42 U.S.C. § 602(a)(7) (Supp. II, 1972). The rule had placed a ceiling of $30 on the amount of work-related expenses which a welfare recipient could collect.

100. Id. at 25.


102. At least one suggestion has been made that the first amendment may provide a more suitable theoretical basis under which to decide cases involving indigents' right of access. Note, *A First Amendment Right of Access to the Courts for Indigents*, 82 Yale L. J. 1055 (1973).
In *Kras* a $50 voluntary bankruptcy discharge filing fee was held not to violate the equal protection clause despite Kras' contention that the fee arbitrarily discriminated against the poor. Not only did the Court refuse to follow *Boddie v. Connecticut* on the ground that, unlike marriage, bankruptcy is not a fundamental right, but Justice Blackmun, writing for the five member majority, clearly discarded the suspect classification category as an appropriate avenue for reviewing wealth discrimination.\(^{103}\) While the more affluent may regard $50 small and manageable even to the poor, there is a level of poverty which makes acquisition of even $50 extraordinarily difficult, if not impossible. Moreover, the sum involved in *Boddie* totalled at least $60 and was viewed as an impermissible burden on the welfare mother's access to divorce decrees.

The *Ortwein* fee, $25 to question welfare agency rulings, might be regarded as ludicrously small by some, but as painfully hard to obtain by an elderly welfare recipient. Yet the Court ruled that *Kras*, not *Boddie*, governed. Dismissing equal protection contentions with short shrift, the Court's *per curiam* decision read:\(^{104}\)

> Appellants urge that the filing fee violates the Equal Protection Clause by unconstitutionally discriminating against the poor. As in *Kras*, this litigation, which deals with welfare payments, is in the area of economics and social welfare.

The relegation of *Ortwein* to the "economics and social welfare" area meant that "[n]o suspect classification, such as race, nationality, or alienage, is present," and further that "[t]he applicable standard is that of rational justification."\(^{105}\) Oregon had duly met its burden of showing some rational justification for the $25 filing fee: "The Oregon court system incurs operating costs, and the fee produces some small revenue to assist in offsetting those expenses."\(^{106}\)

It may not be farfetched or unfair to mention an image which immediately pops into mind after reading the majority opinion in *Ortwein*: that of a stooped, poorly dressed, elderly welfare recipient next to a court system equipped with its comfortable chairs for judges and other judicial finery.\(^{107}\) Whose operating

\(^{105}\) *Id.* (citations omitted).
\(^{106}\) *Id.* (citation omitted).
\(^{107}\) Admittedly some state court systems leave much to be desired with respect to physical surroundings.
costs should be preferred if the image is accurate? Justice Douglas' assessment of the Court majority is succinct but telling: "The majority today broadens and fortifies the private 'preserve for the affluent.' The Court upholds a scheme of judicial review whereby justice remains a luxury for the wealthy."  

*Fuller v. Oregon* was somewhat different factually from *Kras* and *Ortwein*. There a convicted defendant deemed financially capable of doing so was compelled to reimburse "expenses specially incurred by the state in prosecuting the defendant."  

Probation was conditioned on repayment of the expenditures. In applying a traditional equal protection-rational basis standard, the Court found the Oregon scheme "wholly noninvidious" with respect to the distinction between the convicted and non-convicted. The Court further found no differential treatment between a civil debtor and a criminal debtor, although Justice Marshall, joined by Justice Brennan, registered a dissent on this issue, believing instead that "[p]etitioner's failure to pay his debt can result in his being sent to prison. In this respect the indigent defendant . . . is treated quite differently from other civil judgment debtors."  

While *Fuller* on its face may not appear detrimental to the interests of the poor, a more in-depth examination may demonstrate that one recently released from poverty may be dragged back by the burden of being required to pay for help received while indigent. Is it too much of an exaggeration, for example, to expect states and the federal government, after *Fuller*, to try to recoup not only the costs of criminal litigation or proceedings against defendants, but also to seek the $7,000 to $12,000 which a poor student may have received in state and federal scholarship grants once a student completes his education and moves into the job market? A graduate who accepts a relatively low-paying job ($5,000 to $10,000) in a field such as social welfare or community development may find him or herself thrown back to the ranks of the indigent by recoupment statutes. Similarly, a released inmate just beginning to get back on his feet through a low level

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110. Id. at ___, 94 S.Ct. at 2123.
111. Id. at ___, 94 S.Ct. at 2128 (Marshall, J., dissenting). Justice Douglas concurred with the majority and thus divorced himself from the dissent of Justices Marshall and Brennan. The basic reasons for the divorce appear grounded in procedural concerns which precluded him from deciding the merits of the equal protection question.
unskilled job, may feel utterly defeated as recoupment statutes take away the little economic gain realized through employment.

The impact of *Eisen v. Carlisle & Jacquelin*\(^{112}\) and *Zahn v. International Paper Co.*\(^{113}\) on the poor must be singled out for mention, even though they do not fit neatly into a wealth/poverty category. Consumer groups, and traditionally disadvantaged groups like the poor and Blacks, have relied upon class actions as a means of curbing widespread injustices.\(^{114}\) In *Eisen* and *Zahn* the Court watered down the class action mechanism by imposing stringent procedural requirements on class action litigation. In *Zahn* the Court held that both named and unnamed plaintiffs must meet the requisite jurisdictional amounts in diversity cases. And in *Eisen* the Court required that reasonable notice be mailed to all reasonably identifiable class action plaintiffs, regardless of the costs involved. In *Eisen* that would have meant $250,000 worth of mailing costs. Needless to say, the disadvantaged who must make certain that each plaintiff has a claim in excess of $10,000 in diversity actions, as well as bear the costs of notice requirements under the Federal Rules of Civil Procedure, can, in effect, be shut out from the judicial process. If the property owners in *Zahn* and the purchasers of odd-lot stock in *Eisen* felt pinched by the Court's rulings, racial and economic minorities must have been crushed.\(^{115}\)

For the poor, then, Supreme Court decisions have not been particularly rewarding in terms of chipping away at fundamental injustices based on how much money one controls. Certainly poverty (wealth) has not been placed squarely alongside race as a


\(^{115}\) As Justice Douglas, joined by Justices Brennan and Marshall, put it: The class action is one of the few legal remedies the small claimant has against those who command the status quo. I would strengthen his hand with the view of creating a system of law that dispenses justice to the lowly as well as to those liberally endowed with power and wealth.


Bills have been introduced in Congress to counteract the effect of *Eisen*. H.R. 16153, 93rd Cong., 2d Sess. (1974), H.R. 16153, 93rd Cong., 2d Sess. (1974), sponsored by Congressman Charles A. Vanik of Ohio, allows district courts to fashion orders deemed necessary to create manageable sub-classes. H.R. 16152, 93rd Cong., 2d Sess. (1974), also sponsored by Congressman Vanik, sanctions aggregation of plaintiffs amounts in controversy to ascertain if the $10,000 jurisdictional requirement has been met.
suspect classification. This of course means that strong legisla-
tion which in fact heaps unwarranted burdens on the poor can be
stamped consistent with notions of equal protection and due pro-
cess.

Will Blacks Continue to Be Regarded As A Discrete and Insular
Minority?

We have known since the days of Korematsu v. United
States\textsuperscript{116} that race is a suspect classification. As such, it requires
"a far heavier burden of justification,\textsuperscript{117}" and is valid only if re-
quired for some "overriding purpose."\textsuperscript{118} Occasionally, some have
argued that while governments must be neutral with reference to
race, some classifications based on race may be tolerable if they
in fact favor a disadvantaged minority.\textsuperscript{119}

While racial minorities may seem constitutionally secure in
the suspect classification box, the Court often does not clearly
recognize the pernicious interplay of racial considerations in some
legislative and administrative rulings, nor in crucial state cases.
This is true particularly in three critical cases, decided contrary
to the interests of some Blacks: \textit{San Antonio Independent School
District v. Rodriguez},\textsuperscript{120} \textit{Milliken v. Bradley},\textsuperscript{121} and \textit{DeFunis v.
Odegaard}.\textsuperscript{122} It is also true in other cases such as \textit{James v.
Valtierra},\textsuperscript{123} \textit{Dandridge v. Williams},\textsuperscript{124} \textit{Palmer v. Thompson},\textsuperscript{125}
and \textit{Mayor of Philadelphia v. Educational Equity League}.\textsuperscript{126}

Blacks have been damaged, perhaps permanently, by the
combined impact of \textit{Rodriguez}, \textit{Milliken} and \textit{DeFunis}. At the
close of the 1972-73 Term the Supreme Court left many pressing
educational problems unresolved. Perhaps the Justices felt that

\begin{itemize}
  \item \textsuperscript{116} 323 U.S. 214 (1944).
  \item \textsuperscript{117} McLaughlin v. Florida, 379 U.S. 184, 194 (1964).
  \item \textsuperscript{118} Loving v. Virginia, 388 U.S. 1, 11 (1967).
  \item \textsuperscript{119} See Freund, \textit{Constitutional Dilemmas}, 45 B.U.L. Rev. 13 (1965); Kaplan, \textit{Equal
  Justice in an Unequal World: Equality for the Negro—The Problem of Special Treatment},
  Rev. 629 (1970). The same kind of favoritism argument has been advanced as a means of
  eliminating sex discrimination. See Brown, Emerson, Falk & Freedman, \textit{The Equal Rights
  It is interesting to note, though, that the authors believe that the equal rights amendment
  will not permit such beneficial use of sex as a classification. \textit{Id.} at 904.
  \item \textsuperscript{120} 411 U.S. 1 (1973).
  \item \textsuperscript{121} \textit{U.S.} \textit{____}, 94 S.Ct. 3112 (1974).
  \item \textsuperscript{122} \textit{U.S.} \textit{____}, 94 S.Ct. 1704 (1974).
  \item \textsuperscript{123} 402 U.S. 137 (1971).
  \item \textsuperscript{124} 397 U.S. 471 (1970).
  \item \textsuperscript{125} 403 U.S. 217 (1971).
  \item \textsuperscript{126} \textit{U.S.} \textit{____}, 94 S.Ct. 1323 (1974).
\end{itemize}
the full impact of *Rodriguez* should be allowed to explode and filter throughout the society before other equally controversial decisions were released. Hence the decision to affirm *Bradley v. School Board of City of Richmond*\textsuperscript{127} without comment on the issue of desegregation (which gave rise to the original controversy) might have been an intentional effort to avoid too many fireworks in one term. The flame of school consolidation was approached and extinguished in the 1973-74 Term by way of *Milliken v. Bradley*.\textsuperscript{128} If there were any doubt about the demise of *Brown v. Board of Education*\textsuperscript{129} after *Rodriguez*, it quickly dissipated with *Milliken*. *Milliken* might best be described as a cold, insensitive, stilted opinion mirroring absolutely no feel or appreciation for the plight of the urban ghetto segregated school pupil hungering for the kind of education which can open new vistas for him or her—but knowing full well that those vistas cannot possibly appear in blighted, depressed inner city schools where many teachers and principals simply have abandoned the mission to educate, and where peer stimulation is at a minimum given the common depressed experiences. An examination of *Milliken* leaves one to ponder whether the Burger majority even sensed they were deciding the fate of numerous pupils who actually live: pupils who laugh, run, cry, study, explore, think, dream, and plan for the future.

Chief Justice Burger commenced his opinion, appropriately enough, with *Brown v. Board of Education*. His interpretation of *Brown*, however, is indicative of the majority's assessment of the total problem surrounding school segregation. "The target of the *Brown* holding was clear and forthright," wrote the Chief Justice for a five-man majority: "the elimination of state mandated or deliberately maintained dual school systems with certain schools for Negro pupils and others for white pupils."\textsuperscript{130} There was not even a nod to *Brown's* emphasis on the deeply pernicious effects of school segregation on minority children;\textsuperscript{131} nor, as the opinion developed, was there any cogent analysis of the extent to which the Detroit system had imposed segregation in the schools.

From his narrow perspective of *Brown*, Chief Justice Burger

\textsuperscript{128} U.S. 94, 94 S.Ct. 3112 (1974).
\textsuperscript{129} 347 U.S. 483 (1954).
\textsuperscript{130} U.S. 94, 94 S.Ct. 3112, 3123 (1974).
then asserted that the corrective powers of the courts may only be invoked when a constitutional violation has been demonstrated, and any remedy fashioned must be tailored to that specific violation:132

A federal remedial power may be exercised 'only on the basis of a constitutional violation' and, '[a]s with any equity case, the nature of the violation determines the scope of the remedy.'

Eventually the majority opinion insisted that, since the evil existed in Detroit, any remedy must be applicable only to the Detroit situation. As Chief Justice Burger put it in rejecting the consolidation of school districts plan, the "scope of the remedy is determined by the nature and extent of the constitutional violation;"133 and "without an inter-district violation and inter-district effect, there is no constitutional wrong calling for an inter-district remedy."134

Great emphasis was placed on the principle of local control—the need for local school districts to exercise autonomy over the operation of their schools.135 That principle of local autonomy, the majority felt, would be violated through consolidation. Moreover, consolidation would produce too many problems such as "large-scale transportation of students," and operational and financial headaches.136 Furthermore, the Michigan District Court somehow would emerge first as a "de facto 'legislative authority'" and ultimately become "school superintendent" for all the districts in question.137 Thus did the majority sound the death knell of consolidation and propel the country into attendance at the "wake" for Brown v. Board of Education. Justice Stewart's concurring assertion that, "[i]f reversing the decision of the Court of Appeals this Court is in no way turning its back on the proscription of state-imposed segregation first voiced in Brown v. Board of Education"138 is simply unconvincing.

It remained for dissenting Justices Douglas, White, Brennan, and Marshall to give Milliken the life and perspective it commands, with all its ramifications for the future nature of Ameri-

133. Id. at ___, 94 S.Ct. at 3127.
134. Id.
135. Id. at ___, 94 S.Ct. at 3125-26.
136. Id. at ___, 94 S.Ct. at 3126.
137. Id. at ___, 94 S.Ct. at 3126-27.
138. Id. at ___, 94 S.Ct. at 3133 (Stewart, J., concurring).
can society and the ideals and principles which supposedly govern it. Justice Douglas remarked bluntly:139

[w]hen we rule against the metropolitan remedy we take a step that will likely put the problems of Blacks and our society back to the period that antedated the separate but equal regime of Plessy v. Ferguson. . . .

He then carefully spells out the demoralizing and devastating impact which Rodriguez and Milliken, combined, have on poor inner city youth:140

[t]he inner core of Detroit is now rather solidly black; and the blacks, we know, in many instances are likely to be poorer, just as were the Chicanos in San Antonio Independent School District v. Rodriguez. . . . By that decision the poorer school districts must pay their own way. It is therefore a foregone conclusion that we have now given the States a formula whereby the poor must pay their own way.

Today's decision given Rodriguez means that there is no violation of the Equal Protection Clause though the schools are segregated by race and though the Black schools are not only 'separate' but 'inferior.'

So far as equal protection is concerned we are now in a dramatic retreat from the 8-1 decision in 1896 that Blacks could be segregated in public facilities provided they received equal treatment.

Justice White, another dissenter, touched on the majority's "license" to states to ignore questions of school segregation, even where deliberate acts produced the segregation:141

[t]he core of my disagreement is that deliberate acts of segregation and their consequences will go unremedied, not because a remedy would be infeasible or unreasonable in terms of the usual criteria governing school desegregation cases, but because an effective remedy would cause what the Court considers to be undue administrative inconvenience to the State. The result is that the State of Michigan, the entity at which the Fourteenth Amendment is directed, has successfully insulated itself from its duty to provide effective desegregation remedies by vesting sufficient power over its public schools in its local

139. Id. at ____ , 94 S.Ct. at 3134 (Douglas, J., dissenting).
140. Id. at ____ , 94 S.Ct. at 3134-35 (Douglas, J., dissenting). See also Note, Consolidation For Desegregation: The Unresolved Issue of the Inevitable Sequel, 82 YALE L. J. 1691 (1973).
141. ____ U.S. at ____ , 94 S.Ct. at 3136 (White, J., dissenting).
school districts. If this is the case in Michigan, it will be the case in most states.

Although the majority found it impossible to sanction consolidation under the fourteenth amendment, Justice White easily fashioned a fourteenth amendment analysis ruling constitutional the inter-district remedy deemed so necessary (by the Michigan Courts and others) to the eradication of pernicious school segregation:\footnote{142. \textit{Id.} at \_\_\_, 94 S.Ct. at 3140-41 (White, J., dissenting).}

[t]he \textit{State} denies equal protection of the laws when its public agencies, acting in its behalf, invidiously discriminate. The State's default is 'the condition that offends the Constitution,' . . . and State officials may therefore be ordered to take the necessary measures to completely eliminate from the Detroit public schools 'all vestiges of state-imposed segregation.' . . . I cannot understand, nor does the majority satisfactorily explain, why a federal court may not order an appropriate inter-district remedy, if this is necessary or more effective to accomplish this constitutionally mandated task. As the Court unanimously observed in \textit{Swann}: 'Once a right and a violation have been shown, the scope of a district court's equitable power to remedy past wrongs is broad, for breadth and flexibility are inherent in equitable remedies.' . . . In this case, both the right and the State's Fourteenth Amendment violation have concededly been fully established, and there is no acceptable reason for permitting the party responsible for the constitutional violation to contain the remedial powers of the federal court within administrative boundaries over which the transgressor itself has plenary power.

Finally, Justice Marshall, whose interest in school desegregation is long-standing, registered a stinging, emotional but nonetheless reasoned dissent. He characterized the majority opinion as "a giant step backwards" and an "emasculating of our constitutional guarantee of equal protection of the laws."\footnote{143. \textit{Id.} at \_\_\_, 94 S.Ct. at 3145-46 (Marshall, J., dissenting).} After \textit{Milliken}, he felt, Detroit's Black pupils (and others in various cities across the country) will be exposed to "the same separate and inherently unequal education in the future as they have been unconstitutionally afforded in that past."\footnote{144. \textit{Id.} at \_\_\_, 94 S.Ct. at 3145.} The majority's mandate that Detroit proceed to desegregate its schools represents a total farce. How are Blacks to racially integrate with Blacks in a predominantly Black school district?\footnote{145. \textit{Id.} at \_\_\_, 94 S.Ct. at 3155.}
Justice Marshall also pierced the majority's emphasis on the principle of local control. In pointing out that that principle is mythical in Detroit, Justice Marshall observed:

[w]hatever may be the history of public education in other parts of our Nation, it simply flies in the face of reality to say, as does the majority, that in Michigan, 'No single tradition in public education is more deeply rooted than local control over the operation of schools. . . .' As the State's supreme court has said: 'We have repeatedly held that education in this State is not a matter of local concern, but belongs to the state at large.'

Justice Marshall ended his lengthy dissent on a plea, an accusation, and a prediction:

Desegregation is not and was never expected to be an easy task. Racial attitudes ingrained in our Nation's childhood and adolescence are not quickly thrown aside in its middle years. But just as the inconvenience of some cannot be allowed to stand in the way of the rights of others, so public opposition, no matter how strident, cannot be permitted to divert this Court from the enforcement of the constitutional principles at issue in this case. Today's holding, I fear, is more a reflection of a perceived public mood that we have gone far enough in enforcing the Constitution's guarantee of equal justice than it is the product of neutral principles of law. In the short run, it may seem to be the easier course to allow our great metropolitan areas to be divided up each into two cities—one white, the other black—but it is a course, I predict, our people will ultimately regret.

The widely publicized DeFunis v. Odegaard decision represented a clear threat to the interests of those bent on making certain that Blacks and other racial minorities gained access to valuable educational opportunities. The threat was double-edged—if the Court rendered a decision on the merits, that decision in all probability would reject the constitutional permissibility of minority admissions programs. On the other hand, if the Court "released" DeFunis on procedural grounds of mootness, as it

146. Id. at ___, 94 S.Ct. at 3152.
147. Id. at ___, 94 S.Ct. at 3161.
149. If the Court's opinions in San Antonio Independent School District v. Rodriguez and Milliken v. Bradley are indicative of a trend toward decisions contrary to the interests of Blacks and other minorities in education, DeFunis, too, would have been resolved in favor of DeFunis, not the minorities covered by the University of Washington minority admission program.
did, educational institutions left hanging in terms of the constitutional validity of minority admissions programs and procedures no doubt would exercise caution and proceed to dismantle such programs and procedures.

One cannot be labeled hysterical or engaged in distortions for concluding that after Rodriguez, Milliken, and DeFunis, education for minorities is in shambles. The inner-city racial minority now know that education is not a fundamental interest, that inequitable educational financing schemes may be sanctioned even where the monetary expenditures for the affluent and the white pupil far exceed those for the poor and minority in the same school districts; and that universities and other educational institutions, trying to close the gap between whites and minorities in terms of the educational experience, may be slapped in the face on allegedly constitutional grounds. Finally, the inner-city youth and his advocates, may be left with the empty, ulcer-like feeling that after all the soul-searching and risk-generated behavior connected to Plessy v. Ferguson's progeny in the graduate and professional school field, and Brown v. Board of Education, racially segregated and unequal educational facilities now are deemed perfectly acceptable.

As if the educational trilogy of Rodriguez, Milliken, and DeFunis were not enough, racial minorities, supposedly protected by suspect classification status, must ponder other Supreme Court decisions which have reduced Blacks, other minorities and the poor to an even greater inferior status. Take, for example, James v. Valtierra, involving the construction of a low-rent housing project, customarily reserved for the poor—especially the minority poor. In that case, the Supreme Court refused to recognize the presence of any racial considerations. Justice Black, writing for the Valtierra majority, bluntly stated: "[t]he record . . . [did not] support any claim that a law seemingly neutral (with

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151. Although there has not been time to make a statistical determination or a qualitative inquiry, the author's impression is that the DeFunis furor has led some universities to abandon minority admissions programs, and others to proceed with the kind of caution that is bound to reduce the number of minority students accepted for admission. Add this probable abandonment and caution to an economy burdened by inflation and hence stingy with educational grants, and the prognosis for the Black and minority student becomes gloomy and cast in terms of terminal illness.

consideration, and the Court should not be willing to endorse practices that run against the Bill of Rights.

On its face, Mayor of Philadelphia appears to be a weak case in light of questions as to whether the mayor in fact said publicly that he would not appoint any more Blacks to the school board, and given the change in administrations. Yet the case presents the kind of subtle, slippery discrimination that is hard to pinpoint, thus seemingly necessitating an even more serious judicial scrutiny. Moreover, it squarely presents the issue of the right of


156. But see Gilmore v. City of Montgomery, 417 U.S. 556 (1974), which concerned efforts by Blacks to gain access to public parks and recreational facilities, which first started in 1958. The Supreme Court ruled that the use — especially exclusive use — of these public facilities by private segregated entities contravened the fourteenth amendment through a denial of equal protection.


158. Under the Philadelphia procedure, the Mayor appoints a 13 member Educational Nominating Panel which in turn recommends persons for the school board. Nine members, by law, of generally specified “city-wide organizations or institutions;” the other four are designated by the Mayor. The procedure had produced 11 whites and 2 Blacks in 1967, 12 whites and 1 Black in 1969, and 11 whites and 2 Blacks in 1971 (originally the break-down for 1971 was 12 whites and 1 Black until a black person assumed the helm of one of the city organizations tapped for automatic membership on the panel.

159. Mayor Tate was succeeded by Mayor Rizzo in 1972 while the present litigation was still pending.

160. 415 U.S. 605 (1974) and footnotes 15, 17, 18, 19 of the majority opinion.

161. 415 U.S. at 623.
racial minorities to participate in decision-making institutions at the policy level, especially in public institutions where the constituency is predominantly minority. In other words, it raises the sticky and perplexing issue of how to circumvent the discretionary powers of public officials who may ignore a minority need or interest in order to cater to other constituency demands. Dissenters White, Brennan, Marshall, and Douglas no doubt appreciated the subtle discrimination involved when they deferred to the ruling of the Court of Appeals that the Constitution had been violated on racial grounds.

Glimpses into all of the above-mentioned decisions leave a stark question: will Blacks continue to be regarded as a discrete and insular minority — in practice? Recent Supreme Court cases raise serious doubts about Blacks in fact (as opposed to in theory) continuing as a recognized suspect classification.

As a result of our peek into the Court's treatment of suspect classification for women, the poor, and racial minorities, it is tempting to give up hope and to admit that the present Court intends no gains for the oppressed. Some would argue that the admission is premature, and the analysis incomplete, for strict judicial scrutiny also is invoked where fundamental personal rights and interests are at stake. We move next, therefore to an analysis of whether that approach is more fruitful in terms of the objectives of the poor, racial minorities, women, and other oppressed people.

**The Fundamental Personal Rights and Interests Box**

Does the fundamental personal rights and interests approach generate greater hope for the oppressed in their quest for justice? If so, can minorities, the poor, women, and other oppressed persons agree on a common listing which ought to be pressed before the Courts?

Champions of the fundamental interests approach are beginning to emerge. One commentator believes that approach less arbitrary and hence, superior to the suspect classification doctrine. Another terms it perhaps "the most sensible way to provide every citizen with a minimum level of those things essential

162. This is the thrust of this author's earlier writings. See Reid, *The Burger Court and the Civil Rights Movement: The Supreme Court Giveth and the Supreme Court Taketh Away*, 3 Rutgers-Camden L. J. 410 (1972); Reid, *Cast Aside By the Burger Court: Blacks in Quest of Justice and Education*, 49 Notre Dame Lawyer 105 (1973).

to upward social and economic mobility.”164 Still another imagines it the soundest path to more just and ethical decisions.165

A glimpse at the shopping list of fundamental rights reveals that the Court has embraced procreation,166 marriage and divorce,167 voting,168 travel,169 certain criminal procedural guarantees,170 and some aspects of privacy.171 It has yet to envelope housing, welfare payments, the elimination of a debt burden, and starting a new life. In fact, though housing may be looked upon as “a matter of special judicial concern,”172 the Court’s resolution of James v. Valtierra173 leaves a huge question mark regarding housing’s ascendance to the fundamental interest category. Welfare payments,174 elimination of debt burden and starting a new life:175 all have been found wanting when compared with marital interests, and hence not proper or sufficiently significant for treatment as fundamental interests. Education has been soundly and categorically rejected as a fundamental interest.176 Employment, too, has yet to be designated as a fundamental interest. Outside of the domestic relations-privacy arena in which women have expressed great interest, the panoply of fundamental rights is far from fortified.

Perhaps the poor, minorities, women, and other oppressed people would acquire a more powerful voice in the determination of which rights are to be deemed fundamental if they could agree on the kinds of rights which should be pushed before the Court during the next five years. Do marriage, divorce and procreation occupy the same level of significance in a battery of human rights as the right to decent housing, employment, education, and penal

justice? Can the same objectives of the feminist movement be achieved by leaving changes in marital status to political and legislative pressures and actions, while concentrating instead on issues of employment, education, housing, and penal justice in the judicial arena?

Even if the poor, racial minorities, and women could agree on fundamental interests which should be pushed before the courts, there is a limitation to the fundamental personal rights and interests approach. The greatest drawback to reliance on the fundamental interests approach is the tendency of the Supreme Court to bow to state legislatures on economic and social concerns. That is, the Court distinguishes between the personal interests, which it feels equipped to protect first and foremost in the judicial arena, and economic concerns which it considers better earmarked for the province of states since they are viewed as more capable of understanding local conditions. Thus, the judiciary may represent a protective force for personal interests like marriage and procreation while the state is left to assert its wisdom relative to social and economic interests such as the right to earn a living. For example, by reading "welfare payments" and "elimination of a debt burden" or "obtaining a new start in life" as social and economic concerns, the Court in *Ortwein* and *Kras* rejected the request of plaintiffs in those cases to place those items into the fundamental rights and interests box.

Thus, sole reliance on the fundamental interests approach will not enable one to reach the roots of the poverty-discrimination syndrome as long as the Supreme Court insists that certain social and economic concerns are not eligible for the fundamental interests box. This realization takes us into our final area in inquiry.

**The Sliding Scale Approach: A Remedy for the Suspect Classification and Fundamental Interests Limitations?**

If the suspect classification and fundamental interests approaches individually cannot have solid impact on discrimination against the poor, racial minorities, women, and other oppressed peoples, is there another approach which might be more potent?

Professor Cox has called attention to the interaction between the suspect class idea and the fundamental interests or subject matter involved in particular litigation. He suggests that we might examine "the relative invidiousness of the particular differentiation" and "the relative importance of the subject with
respect to which equality is sought.”

This process necessitates the assignment of weights, or at least the adoption of some system of evaluation under which the degree of judicial scrutiny becomes dependent on the value of the interests rising to the “suspect” or “fundamental” level.

The interaction of the factors about which Professor Cox speaks can be visualized by imagining two gradients. Along the first of these gradients is a hierarchy of classifications, with those which are most invidious—suspect classifications based on traits such as race at the top. Along the second, arranged in ascending order of importance, are interests such as employment, education, and voting. When the classification drawn lies at the top of the first gradient, it will be subject to strict review when the interest if affects ranks low on the second gradient—for example, the denial of a driver’s license on the basis of race. As the nature of the classification becomes less invidious (descending on the first gradient) the measure will continue to elicit strict review only as it affects interests progressively more important (ascending on the second gradient). Thus, restrained review might be applied when a State disqualifies indigents by requiring a fee from all person’s desiring a driver’s license or a university education, whereas strict review is applied when indigents are disqualified from voting through a fee imposed on the exercise of that right.

This is the “sliding scale” model.

The “sliding scale” model does seem to have some virtue provided agreement can be reached on the ordering of suspect classifications and personal interests. The following (necessarily incomplete) schedule is suggested:

<table>
<thead>
<tr>
<th>Suspect Classification</th>
<th>Fundamental Interest</th>
</tr>
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<tbody>
<tr>
<td>Wealth</td>
<td>Employment</td>
</tr>
<tr>
<td>Race</td>
<td>Education</td>
</tr>
<tr>
<td>Sex</td>
<td>Housing</td>
</tr>
<tr>
<td></td>
<td>Voting</td>
</tr>
<tr>
<td></td>
<td>Marriage</td>
</tr>
<tr>
<td></td>
<td>Procreation</td>
</tr>
</tbody>
</table>


179. Added to the list after sex might be imprisonment, as well as some other designa-
The greatest weight ought to be given to wealth as a suspect classification. This is true despite the fact that wealth is sometimes a transitory state for some—that is, one may be poor today and comfortable tomorrow. There is, however, a sufficient degree of generational poverty to counteract the transitory nature of poverty cases. Furthermore, the wealth classification would enable society to tackle serious discrimination against both racial minorities and women, without overlooking the grass roots poor. The danger of assigning top weight either to racial minorities or women is that middle class racial minorities and women may tend to receive the conferred judicial benefits to the exclusion of the poorer racial minorities and females.

The second greatest weight should be assigned to race as a suspect classification. Although, as was suggested earlier, there are dangers in comparing degree of discrimination against women with that against racial minorities—especially Blacks, this author feels confident in asserting that the evil remains more pernicious on the side of race than gender. The supposed economic and educational gains of Blacks, believed to be evident in the late sixties and early seventies, may be mythical while women actually may have achieved appreciable real gains.181

Ordering fundamental interests is not an easy task because virtually all of those interests considered important in our society are essential to wipe out a syndrome of discrimination against the poor, racial minorities, and women. It is posited, however, that employment is most fundamental and voting less fundamental. While voting once was viewed as a potential salvation for racial minorities, it is becoming increasingly clear that political power
in urban centers, wracked by years of stifled growth and vicious loss or reduction of social services, may prove empty power incapable of helping any economic poor or racial minority.\footnote{182}

Education is listed as second in weight on the fundamental interest gradient, despite Rodriguez, because many of the poor, racial minorities, and female gender still consider education as an avenue of escape from odious discrimination. Certainly without a masters degree, bachelors degree, or high school diploma there is little hope that racial minorities, the poor, and females can advance even minimally in this society. Thus the error of Rodriguez urgently awaits correction. Housing is listed third on the supposition that decent employment and education can lead to decent housing whereas decent housing may not necessarily lead to employment and educational opportunities.

Under the "sliding scale" approach, then, cases involving wealth classifications and interests like employment and education would be subjected to the strictest judicial scrutiny whereas cases involving sex and marriage would receive the least degree of scrutiny.

For many women our suggested adoption of the "sliding scale" approach might appear unappetizing since it would detract from the domestic relations type decision with which that gender seems to have had its greatest success. Yet, if women could be made to see that marital type issues such as pregnancy leaves have virtually no impact on erasing fundamental discrimination against the poor, racial minorities, and women, then perhaps their litigation strategies could be altered for the sake of the common good.\footnote{183}

If we start with the realization that law in and of itself is a conservative tool, and that the gains to be extracted from the judicial system amount to no more than "crumbs," those "crumbs" may become more delectable and filling with a con-
certed approach concentrating on wealth and race and fundamental interests like employment, education, and housing. This orientation at least would center the attack on alleviating gross conditions affecting the social status of poor women and poor men, as well as racial minorities of both sexes. The more affluent of the female and male sex would still have the administrative and political arena option open to tackle the kinds of discrimination deemed appalling. The more affluent can afford an intensive and sustained lobbying effort; the poor and Black as yet have not been able to raise the sums necessary for a significant lobbying endeavor. The more affluent may use the tool of intimidation to worm their way out of potentially discriminating experiences but few are intimidated now by the poor and racial minorities.

If we are to balance the inequities, then, this scale would come down heavily on the side of the poor first, then the racial minority, then the female sex. This balance in turn would launch us on a course destined to latch securely, in behalf of the poor and racial minorities, those fundamental interests of employment, education, and housing. If these inequities are not balanced and subjected to some weighting system, then we can predict that the poor, minorities, and females will continue thrashing around in an uncontrolled sea of litigation with no visible island bearing the fruit of hope, survival, and extrication from the strong arm of societal injustice.