

THE PLIGHT OF THE UNDERCLASS: SHOULD THE GOVERNMENT AND THE COURTS PROVIDE EFFECTIVE REMEDY?

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I. INTRODUCTION

With the 1988 presidential elections decided, there is a major predicament that has to be addressed by the Bush administration. This predicament has been developing for the past two decades¹ and has continued to worsen throughout the conservative administration of Ronald Wilson Reagan.² The predicament that must be addressed in this presidential election and that has continually developed throughout the Reagan administration is the plight of the underclass;³ their struggle will be the focus of this Comment.

The purpose of this Comment is threefold. First, it examines the development of the new poverty class that has little or no hope of attaining a decent life for itself or its offspring. This examination will be a synopsis of the overwhelming amount of literature⁴ that has analyzed this situation; it discusses cultural and structural theories that have been advanced to explain how this new class has come to exist and will soon be a burden on all Americans.⁵

1. See generally M. HARRINGTON, *THE OTHER AMERICA* (1962).

2. The Reagan administration has been committed to making deep cutbacks in order to reform the welfare system. "The Reagan administration has relied more on the belief that a 'rising tide lifts all ships' than on programs for the poor or the urban underclass.

"The Center on Budget and Policy Priorities, an advocacy group in Washington, asserted that over the four fiscal years 1982-85, programs for people with low incomes were cut more than twice as much as other social programs." *THE STAFF OF THE CHICAGO TRIBUNE, THE AMERICAN MILLSTONE* 84 (1986) [hereinafter *AMERICAN MILLSTONE*].

3. The term underclass has evolved to describe a sector of the American population which is persistently poor and lacks mobility to make any advances from one generation to the next. This relatively new population has come to be slowly recognized as a distinct social class from that of lower class due to their immobility. The majority of this population is comprised of urban blacks, although small isolated pockets of this poverty class can be found in the mountain valleys of the Appalachia and the rural South. D. GLASGOW, *THE BLACK UNDERCLASS* 3-8 (1980).

4. For a discussion of the underclass see, *AMERICAN MILLSTONE*, *supra* note 2; K. AULETTA, *THE UNDERCLASS* (1982); D. GLASGOW, *supra* note 3; M. HARRINGTON, *supra* note 1; M. HARRINGTON, *THE NEW AMERICAN POVERTY* (1984); F. PIVEN & R. CLOWARD, *REGULATING THE POOR: THE FUNCTIONS OF PUBLIC AMERICA* (1971); W. WILSON, *THE DECLINING SIGNIFICANCE OF RACE* (1978).

5. "The underclass does exact a high cost from society for its maintenance, and this cost is found in wasted manpower, nonproductive citizens, and in the expenditures of the nation's social institutions such as the courts and prisons, which each day devote more and more time to process and maintain this population." D. GLASGOW, *supra* note 3, at 181.

In the North Lawndale area of Chicago alone, each day "\$247,000 is spent in government assistance programs, four times the statewide per capita average. Everyday, more than \$134,000 goes for government payments for medical services, five times the statewide per capita average.

"Each day taxpayers spend about \$14,000 for fire protection and ambulance service in this community. Although police protection costs \$40,000 a day, the murder rate here is 5 times the national average, sexual assault is 6 times the average and other serious assaults are 10 times the average. *AMERICAN MILLSTONE*, *supra* note 2, at 30.

The second purpose of this Comment is to examine the role of the government throughout the development of the underclass. Historically, governments have intervened to contain and isolate their impoverished citizens. In America, the government took an historic posture and interceded to isolate this sector because of the burdens they were suppose to place on the entire society.⁶ In making this examination of the United States government's actions to isolate the impoverished sector, this Comment questions the duty of the government in a democratic republic and the obligation that such a government owes to its citizens. This examination will serve to challenge the government and presidential candidates to make amends so that a brighter future for all Americans can be attained.⁷

Lastly and most importantly, this Comment looks at the judiciary's role in allowing the development of the new underclass to continue. By not giving credence to the government's role in public welfare and the government's obligation to its citizens the Supreme Court of the United States has consistently closed the door on the impoverished, denying them the opportunity to attain the fundamentals of a decent life.⁸ This Comment challenges the Supreme Court's analysis in cases that should have been classified as fundamental interest cases;⁹ it challenges the Court to recognize the government's obligation to the impoverished and to take positive steps to assure that the government fulfills its obligation so that fundamental interests are provided to the impoverished.

II. DEVELOPMENT OF THE NEW POVERTY CLASS

The development of the new poverty class, which is euphemistically referred to as the underclass, has been an ongoing process for the last two decades. In 1962, Michael Harrington's *The Other America*¹⁰ brought to light the struggle of minorities trapped in the ghettos of America. President John F. Kennedy became more familiar with this struggle by reading *The Other America* and, with the assistance of other circumstances, subsequently decided to make poverty a major issue in his presidential campaign. Unfortunately, Kennedy's assassination prevented him from pursuing the issue, but President Lyndon B. Johnson addressed it in his administration. Despite Johnson's

6. See generally F. PIVEN & R. CLOWARD, *supra* note 4.

7. The government's continued failure in providing for the general welfare of the underclass suggests that judicial interference is the only way effective remedy for the underclass will come about. The government's failure has been due partly to the judiciary's attitude that government has no affirmative duty to provide for the general welfare of the underclass. As a result, the judiciary has failed to hold the government accountable for its role in public welfare.

8. This Comment argues that the Supreme Court, as the conscience of the United States, must take an affirmative posture, as it did in *Brown v. Board of Education*, 347 U.S. 483 (1954), to effect change. This Comment therefore limits its scope to possible remedies that could stem from the judiciary (see note 7) rather than focussing on measures that could be advanced by the government and legislatures.

9. Fundamental interests have become rights that have been gleaned from the Constitution through the fourteenth amendment's equal protection clause; they include the right to vote, right to marriage and procreation. This comment attempts to argue that providing for the general welfare can be gleaned from the preamble of the Constitution and therefore an additional fundamental interest should be the right to one's general welfare, furthermore, in the late 20th century, that right should include equal access to education and housing, essentials to securing one's general welfare.

10. M. HARRINGTON, *supra* note 1.

“War on Poverty”¹¹ no improvements were noticed which led to the questioning of the programs. As a result of this questioning social analysts engendered different theories to explain the plight of the minorities trapped in the ghettos.

A. *Sociological Theories*

Social scientists have advanced many theories to explain the development of the new social class that is hampered by terminal immobility. The bulk of these theories can be classified as fitting into one of two categories: cultural or structural. Respectively, these arguments look to either the Black American culture (individual cultural factors) or the American structure (structural racism) to explain this sector’s inability to make advances. In reality, a combination of these theories would better explain the birth of the new social class. The American structure has helped to create a class which has a culture of dependency, lack of ambition and little or no work ethics.¹² At this point to argue cultural or structural is to argue about which came first, the chicken or the egg; assistance in some manner is what is needed. This assistance could come in the form of the judiciary interceding to insure that the rights of the underclass do not go unheeded.

1. *Cultural Arguments*

The theories that are classified under the rubric of cultural arguments have their focus on the Black American culture as the reason for the failure of public assistance programs and subsequently the cause of the underclass. These theories posed “that the condition of Blacks was due to individual deficits—Blacks did not have the capacity to do better, but more important[ly] they did not have the motivation to ‘succeed.’ That condition was further said to stem from a culture and a family system whose values and organization were in disarray.”¹³

The weakness in these arguments is that Black Americans have been stripped of “their” culture through slavery. Instead, they have been forced to accept the majority’s culture and work ethics, on the one hand, but, have been closed off by the majority from participating wholly, on the other hand. The result of this asymmetry is confusion which in turn can lead to rejection of the

11. “Lyndon Johnson’s War on Poverty programs intended to acculturate poor Blacks, in line with social analysts’ emphasis on undoing the effects of cultural deprivation, and to train them to meet occupational challenges of the Great Society. The latter programs, which included giving federal support to private industry to train and absorb some of the untrained-unemployed poor, had only limited impact, however. Part of the problem was that private business did not become very involved, and the government training efforts were directed at such low-level jobs they would not have obtained adequate incomes or jobs with career lines. But basically the trouble was the same as always: These programs did not come to grips with the discriminatory practices that barred poor Blacks from equal employment opportunity, and therefore they were unable to move large numbers from poverty and underclass stagnation to the status of income-earning, productive citizens. Although the Civil Rights Act of 1964 and the affirmative action programs that flowed from it was a sweeping attempt to prevent discrimination against minorities, its implementation has been troubled and sketchy. The affirmative action thrust has provided some upward movement for a limited number, but it certainly has not enabled large numbers of inner-city Blacks to obtain steady work, much less to enter upward mobile paths. And in the past few years affirmative action programs increasingly being referred to as ‘reverse discrimination,’ have foundered on the shoals of recession, white backlash and ineffective enforcement.” D. GLASGOW, *supra* note 3, at 74.

12. K. AULETTA, *supra* note 4, at 34.

13. D. GLASGOW, *supra* note 3, at viii.

majority's culture. This rejection can manifest itself as dependency or a lack of "motivation to 'succeed.'" The Black American culture is therefore a direct result of the majority's incongruous axioms.

Another weakness of these arguments is that they do not explain why the "majority of the poor in America are white, although the nonwhite minorities suffer from the most intense and concentrated impoverishment of any single group."¹⁴

2. *Structural Arguments*

The theories that are classified as structural arguments lay the blame on the American society for the creation of the underclass. These social scientists' views range from espousing Marxist ideology, which explains that the underclass is a natural product of a capitalist system, to those who say that the "underclass is a product of the mass migration from the rural South to northern cities, of sometimes stupid government policies, of generations of economic deprivation."¹⁵ The majority of these social scientists see racism in the American society as being the core of the problem.

The weakness in these arguments is that they deny the racism faced by other minority groups. Asians have been able to overcome this racism to achieve economic power and then political power; this is equally true of Arabs, the Irish and Jews. Furthermore, these arguments, as do the cultural arguments, also overlook the poor rural whites.

The final reality is that the development of the underclass has been due to a combination of a bad home environment or individual cultural factors as well as a bad overall environment or structurally racist factors.¹⁶ "The chief concern of many on the left [structural theorists] is that the focus on family dissolution as a *cause* of the underclass rather than as an *effect* of unemployment, racism and economic inequality shifts blame to the victim and relieves American society of its responsibility for the downtrodden. Those on the right, [cultural theorists] on the other hand, don't want government to accept that responsibility, believing that governments' efforts undermine individual initiative."¹⁷ Given that the underclass cannot assist itself, lacks initiative to do so and is continuing to be a burden on the entire American society the one factor that contributes to the development of this group and that can be effectively changed, the overall environment, should be changed to encourage independence, instill initiative, and lessen the burden on the American society. The American society has the responsibility to, at the very least, revise its welfare system, which presently only encourages dependence. The American society must assist the underclass in attaining the fundamentals of a decent life, such as education and housing. Inevitably, this calls for change to be effected by government and the judiciary.

B. *Government Programs*

Government programs for the impoverished throughout the years have been established to provide stability in economically depressed times. These

14. M. HARRINGTON, *supra* note 1, at 190.

15. K. AULETTA, *supra* note 4, at 32.

16. *See id.* at 36.

17. *Id.* at 42 (emphasis in original).

programs were established with the goal of giving relief to the sector of the population which was destitute. This goal was accomplished by regulating the labor force to lessen turmoil and restore order in the greater society.

Endemic to the capitalist system is that labor is available conditional to market necessities. As a result, there is always a percentage of unemployment to be found in the population.¹⁸ The government intercedes to respond to the unemployed and provide for the needs of the temporarily displaced and the permanently displaced (i.e., the aged, the disabled, and the insane). The objective of government relief programs was to sustain the temporarily displaced, providing assistance and training so that they could be inserted into the labor force again. As for the permanently displaced, the government evolved to the point where, in its enlightenment, it sought to take care of them; the true impetus for the care was to maintain civil order through social control.¹⁹ Government had not evolved to the point where it recognized that it had a responsibility to this sector of the population, and some say still has not.²⁰

1. *Function of Government*

The function of government in a democratic republic has been constantly evolving. In the United States the role of government was established "to form a more perfect Union . . . promote the general Welfare and secure the Blessings of Liberty to ourselves."²¹ There was a recognition that certain liberties were to be guaranteed to all citizens and that government was to insure that these liberties were provided. Despite the ideological and prophetic words, the capitalist system and an American "do-it-yourself" attitude²² have often diluted the rights of some of its citizens. The establishment of the government was done so that it would have the responsibility of preventing this dilution; again, the objective was to provide its citizens with the fundamental and essential liberties.

With the constant evolution of society and economically complex circumstances, the role of government also evolved, necessitating the expansion of its power and authority to regulate commerce and the labor force.²³ Again, the goal behind the expansion was to provide for its citizens so that no sector of the population would be left totally destitute.

In 1932, President Franklin D. Roosevelt advanced government further by establishing government relief programs for the depressed nation. On June 8, 1934, Roosevelt told the Congress that "if, as our Constitution tells us, our federal government was established, among other things, 'to promote the general welfare,' it is our plain duty to provide for that security upon which welfare depends."²⁴ Roosevelt realized that there was a constitutional duty for the government to respond to the "welfare" needs of its citizens. In 1964, President Lyndon B. Johnson also realized that government had a responsibility to provide for its citizens. He, therefore, declared and initiated a "War on Poverty," with emphasis on revising the existing welfare programs and install-

18. F. PIVEN & R. CLOWARD, *supra* note 4, at 33.

19. *See generally id.*

20. *See generally id.*

21. U.S. Const. preamble.

22. F. PIVEN & R. CLOWARD, *supra* note 4, at 46.

23. *Id.* at 38-39.

24. *Id.* at 76.

ing new programs that would provide citizens with skills, ability and opportunity to assist themselves to return to the work force.

Though his program was not a complete success, due to the lack of corporate cooperation as well as racial tensions,²⁵ there was a recognition that the Constitution required that government provide for the welfare of its citizens. Given the behavior of both Roosevelt and Johnson, there was government evolution in the United States to the point where the duty to provide for the welfare of citizens was almost accepted. Nonetheless, there has been a movement away from accepting this responsibility which has only served to irritate the situation more. Providing for the welfare can be accomplished easily by regressing to the objective of original welfare programs, which has been to reinforce work ethics by preparing the participants to develop skills that the labor market demanded.²⁶ The present welfare programs do not accomplish this but rather they encourage dependency and the destruction of the family unit.²⁷ Instead of revising the welfare programs, we see that in 1987, the government is making a digression in its evolution by decreasing the strength of public welfare programs; while this occurs the underclass population increases. We see that the government's duty to insure the welfare of the underclass, by protecting its fundamental interests,²⁸ is being curbed by the government itself, and in so doing the government contributes to the development of the underclass, a sector that taxes all Americans.

2. *Aid to Families with Dependent Children*

Initially called Aid to Dependent Children (ADC), Aid to Families with Dependent Children (AFDC) was established to provide assistance to families lacking fathers. This program served to encourage mothers to nurture their children and not to preoccupy themselves with working. While doing this it was also the practice not to proffer any aid to unemployed able-bodied men, "to deny aid to unemployed men may not, however, prevent them from obtaining it via their women and children. But the states have traditionally denied aid to a mother who is any way associated with a man, especially if the man lives in her house. These provisions—often called 'man-in-the-house' rules—are sometimes condemned on the ground that they drive unemployed fathers away from their families."²⁹ Though the government's intent was to encourage men to work and women to raise their children it has effectively contributed to the demise of the family unit and the rise of teenage pregnancy.³⁰ Senator Patrick Moynihan (D.-NY) states that "poverty is now inextricably associated with family structure. Half of all poor persons live in female-headed households."³¹ Further statistics confirm Sen. Moynihan's comment by stating that "nearly half of the 25 million Americans classified as poor in 1979—12.8 million people—lived in female-headed homes; about 60 percent of all women on welfare are heads of households."³²

25. See note 11.

26. See generally *id.*

27. See generally AMERICAN MILLSTONE, *supra* note 2.

28. See note 9.

29. F. PIVEN & R. CLOWARD, *supra* note 4, at 127.

30. K. AULETTA, *supra* note 4, at 39.

31. AMERICAN MILLSTONE, *supra* note 2, at 102-03.

32. K. AULETTA, *supra* note 4, at 39.

These statistics are discussed to illustrate the failure of government's assistance to date; they point to the fact that due to the inadequacy of welfare programs those that are to be assisted fall deeper and deeper into poverty. The government assistance programs promote a situation where the children of these female-headed homes know no work ethics because they are raised in an environment devoid of work ethics, namely in a dependent female-headed household.

3. *Employment Training Programs*

Another area of the welfare programs in which the government has failed has been employment training. Publicly funded training programs have manifested a terrible track record; they fail to train the participants for jobs with career lines. Furthermore, they do not provide the essential skills to maintain a job though their intent is to endow their recipients with work habits that will ease the way into the work force. An example of such a program was the discredited Comprehensive Employment Training Act (CETA), which had a fundamental problem in that it targeted people who had job experience and who would have found jobs despite the government assistance.³³ Those that lacked job experience received no benefits and fell even further behind in the race for independence.

Another irritant came as the result of the Civil Rights movement. Those Blacks who had some skills and education were in the appropriate position to take advantage of the new-found rights springing from the movement. Hence, they were able to advance³⁴ but the American society looked at this as an advancement of the entire Black population. Though far from true, this took eyes, as well as financial and employment assistance, away from the steadily developing underclass. The ultimate result was that those with no skills or education were left even further behind and this went unnoticed.

With this discussion of government assistance programs, AFDC and publicly funded training programs, I have attempted to illustrate that the government has consciously taken steps to intervene on behalf of the underclass; this reflects a sense of responsibility on the part of the government. Whether the true purpose of government assistance was to isolate a sector of the population or insure the general welfare of this sector (of course, this should be the true purpose), the fact is that once the government acted it must be responsible and held accountable for its actions. Furthermore, since it has been shown that the result of this government assistance was to complicate matters to the point where the structure and culture were inextricably linked to the development of the underclass, the government has a duty to assist in redressing the exacerbated situation.

There is also an economic argument, which seems to always be a focal point of American politics and American society. It can be easily stated that this sector of the population is consuming a large amount of taxes in order to be sustained and held at bay. The result of this consumption is that it effects

33. AMERICAN MILLSTONE, *supra* note 2, at 174.

34. "Blacks with a good education and skills moved more or less smoothly into the growing service and information economy. It was a time of unprecedented opportunities for Blacks, and millions of them, in Chicago and elsewhere, seized them. But the poorest, the former lower class, were left behind, trapped by bad education, semiliteracy and lack of skills." *Id.*

all Americans in one facet or another and is reflected in our economy. Economically, the underclass represents a large waste of manpower and resources that must be placed back into the labor market for the best interests of the underclass and the entire American population. For the underclass this would be the beginning of independence and acceptance into the majority's culture while for the rest it would represent the revitalization of the American economy. Ultimately, the government must take an active role in this or the exacerbated situation will persist.³⁵ In the effort to infuse the underclass back into the labor market, its members must have access to education.³⁶

It is the opinion of some sociologists that racism, though it still exists, is a declining factor in the explanation for the lack of advancement by Blacks in the underclass.³⁷ In the remainder of this article I will focus on education and the judiciary's role in insuring equal access to this fundamental interest.

C. *Judicial Input*

In the previous two sections I have described the sociological theories that explain the development of the underclass and the role government has played in this development in order to lay the foundation of factors that the judiciary must consider when examining cases that effect the underclass. This is to say that it is not sufficient to examine a small microcosm of the dilemma of the underclass, but instead the dilemma must be examined in terms of the entire context in which it is found. By reviewing the entirety a better perspective can be grasped and a more equitable decision can be reached.

The judiciary has the responsibility of being the conscience of the nation; it must strive down the path of truth, justice, and goodness. In so doing it must give equal protection to all its citizens. It must insure that all those that are similarly situated are treated in a like manner. But for those that are not similarly situated it must examine actions and policies that effect them with a closer eye. The judiciary must, in the interest of truth, justice, and goodness, insure that those who are underrepresented throughout society are not abused by those with power.

Since *Marbury v. Madison*³⁸ the Supreme Court has established its right to judicial review and to interpret the Constitution. As the American society evolved so did the Court; throughout this evolution the Court has had a symbiotic relationship with society such that the Court has been allowed to

35. An active role does not mean isolating this sector which cannot be done, as witnessed from the consumption of taxes. Nor does it mean the eradication of the welfare system because the underclass cannot sustain itself. The result of eradication would be that the underclass would subsist through an underground economy (crime, drug dealing and other illegal acts) which, ultimately, would be felt throughout the population.

36. Arthur Brimmer, a private financial consultant and former member of the Board of Governors of the Federal Reserve System states: "We do need to spend money on these people—not giving them dole. We need to spend money to train them.

"There's one thing that stands out. The lack of employment today is due far more to a lack of skills than to discrimination. Race discrimination still exists, but it's far outweighed by a lack of skills. If you're looking for a pressure point, somewhere to break into this vicious cycle, it has to be education.

"The improvements that we see in jobs and income is nearly entirely in the [Black] middle class and above. They are the ones with the marketable skills, and they are the ones with two-earner families." AMERICAN MILLSTONE, *supra* note 2, at 273.

37. See generally W. WILSON, *supra* note 4.

38. 5 U.S. (1 Cranch) 137 (1803).

sculpture society and society gave it the input necessary to sculpt. Presently, the Court is receiving input from the American society and its new poverty class. It is now necessary for the Court to take that information and put it into context so that an equitable policy can be reached for the treatment of the underclass.

For the remainder of this Comment I will argue that the underclass is not similarly situated to the rest of American society and that it is under-represented throughout the American society. As such it should receive deference and protection from the court system, the conscience of the nation.

1. *San Antonio Ind. School Dist. v. Rodriguez*

In discussing *San Antonio Ind. School Dist. v. Rodriguez*³⁹ I will examine two aspects of the case that are inherently linked to the plight of the underclass: wealth and education. The purpose of this discussion will be to illustrate how the Supreme Court continues to deny any obligation to this class and as a result we see that the underclass is falling deeper into deprivation. The vehicle for this illustration will be to compare the Court's analysis to the reality of the situation; again emphasizing that the Court cannot make an equitable decision without looking at the entirety.

In *Rodriguez*,⁴⁰ the Court in an opinion written by Justice Powell held that wealth was not a suspect classification and that education was not a fundamental interest. Thus, the appellees were denied any redress; this holding was contrary to that of the District Court.⁴¹ The final rationale of the Court was that appellees warranted no deference because they had "made no efforts to demonstrate that the [Texas school-financing system] operate[d] to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any poverty level."⁴² Secondly, as to education, the Court held that despite education being important it could not be

39. 411 U.S. 1 (1973).

40. This case was brought as an attack against the Texas school-financing system for public education based upon local property taxes. The formula was "designed to reflect each [school] district's relative taxpaying ability." *Id.* at 10. Since its inception in 1949 there had been an increasing disparate assessed property value throughout the San Antonio school district. In the Edgewood district, "the average assessed property value per pupil is \$5,960—the lowest in the metropolitan area—and the median family income (\$4,686) is also the lowest. At an equalized tax rate of \$1.05 per \$100 of assessed property—the highest in the metropolitan area—the district contributed \$26 to the education of each child for the 1967-1968 school year above its Local Fund Assignment for the Minimum Foundation Program. The Foundation Program contributed \$222 per pupil for a state-local total of \$248. Federal funds added another \$108 for a total of \$356 per pupil."

"Alamo Heights is the most affluent school district in San Antonio. Its six schools, housing approximately 5,000 students, are situated in a residential community quite unlike the Edgewood District. The school population is predominantly 'Anglo,' having only 18% Mexican-Americans and less than 1% Negroes. The assessed property value per pupil exceeds \$49,000, and the median family income is \$8,001. In 1967-1968 the local tax rate of \$.85 per \$100 of valuation yielded \$333 per pupil over and above its contribution to the Foundation Program. Coupled with the \$225 provided from that Program, the district was able to supply \$558 per student. Supplemented by a \$36 per-pupil grant from federal sources, Alamo Heights spent \$594 per pupil." *Id.* at 12-13 (emphasis added).

41. "The District Court held that the Texas system discriminates on the basis of wealth in the manner in which education is provided for its people. 337 F. Supp., at 282. Finding that wealth is a 'suspect' classification and that education is a 'fundamental' interest, the District Court held that the Texas system could be sustained only if the State could show that it was premised upon some compelling state interest." *Rodriguez*, 411 U.S. at 16.

42. *Rodriguez*, 411 U.S. at 22-23.

considered “fundamental” because there was no “right to education” explicitly or implicitly guaranteed by the Constitution.⁴³

2. *Wealth as Suspect Classification*

When discussing the wealth issue the Court was sure to distinguish its previous cases that examined wealth discrimination⁴⁴ from the present case. In the end the distinction amounted to one of semantics rather than substance. The Court states that the “individuals, or groups of individuals, who constituted the class discriminated against in our prior cases shared two distinguishing characteristics: because of their impecunity they were *completely* unable to pay for some desired benefit, and as a consequence, they sustained an *absolute* deprivation of a meaningful opportunity to enjoy that benefit.”⁴⁵

From the first distinguishing characteristic the intended reasoning is that, despite one’s impecunity, if one has the ability to pay for a “desired benefit” no deference is forthcoming. Of course, because one can pay for a benefit does not necessarily mean that the benefit received is adequate or sufficient. The Court fails to go that one step further in its analysis, resulting in a myopic view of the case.

Nonetheless, it is rather odd that the Court would phrase the issue in terms of “paying” when discussing public education. In fact this is exactly the point that appellees argue, though the benefit is supposedly given freely to the state’s children the Texas school-financing system is devised to “reflect each district’s relative taxpaying ability.”⁴⁶ It makes no sense that one’s wealth or lack of wealth should play into the equation of how “public” education will be dispersed to the students. The Court can be accused of only examining a minuscule component of the situation by focussing on the process of raising funds for the public education system rather than also taking into account the effects of this process on the interests of the children who will be attending these schools.

If the system was truly designed to reflect the taxpayer’s ability, it is even more strange that the poorest district in the metropolitan area paid the highest tax rate, while it was completely the opposite for the richest district.⁴⁷ Despite the Court laying out this elaborate description of the system and pointing out the incongruities, it moved to focus on the poor’s ability to pay for a benefit that should be almost cost free.

The Court should have started its examination with the definition of public education. If it decided that public education was not free, but was ultimately coming from taxes that were raised from the public, it would still have to explain why the rich and poor were treated differently in terms of dispensing education to the children. It could claim that those who paid more taxes were entitled to better education (though this was not the case with Alamo Heights) but it would never proffer such a theory because it would amount to

43. *Id.* at 33-34.

44. See *Griffin v. Illinois*, 351 U.S. 12 (1956); *Douglas v. California*, 372 U.S. 353 (1963); *Williams v. Illinois*, 399 U.S. 235 (1970); *Bullock v. Carter*, 405 U.S. 134 (1972).

45. *Rodriguez*, 411 U.S. at 20 (emphasis added).

46. *Id.* at 10.

47. See note 40.

state discrimination which is forbidden under the fourteenth amendment.⁴⁸

To argue that the state was not involved in any discrimination because it disbursed an equal amount throughout the state and then allowed the local districts to take control of how the balance of funds would be raised is contrary to fact. It was shown that in turning control over to the local districts the state limited the choice for financing education to real property tax and put a limit on how much could be assessed.⁴⁹ Justice White's dissent demonstrates how the Texas school-financing system fails the rational basis test of the Equal Protection Clause by stating that if the "State aims at maximizing local initiative and local choice, by permitting school districts to resort to the real property tax if they choose to do so, it utterly fails in achieving its purpose in districts with property tax bases so low that there is little if any opportunity for interested parents, rich or poor, to augment school district revenues."⁵⁰ His opinion re-enforces the fact that the state does not have to guarantee an equal per pupil allowance, but it cannot limit the opportunity for local control to finance its district.

Ultimately, to legitimize a higher per pupil allowance based on property taxes or wealth is to go against *Sweatt v. Painter*⁵¹, which held that it is unconstitutional to deny blacks specific benefits enjoyed by whites. This continued to be a concern in *Brown v. Board of Education*⁵² which stated rather skeptically, "there are findings below that the Negro and white schools involved have been equalized with respect to buildings, curricula, qualifications and salaries of teachers, and other 'tangible' factors. Our decision, therefore, cannot turn on merely a comparison of these tangible factors in the Negro and white schools involved in each of the cases. We must look instead to the effect of segregation on public education."⁵³ There was a subtle realization in these cases that intrinsically tied to the quality of education one receives is the amount of expenditures that are allocated to the schools.

The second distinguishing characteristic is that an "absolute deprivation" must result from not getting the "desired benefit." Again, the Court reviews this situation with an undiscerning eye. It would have us believe that a deprivation merits no special consideration but an "absolute deprivation" does. This makes no sense and only amounts to rationalization and semantics. If closely examined it will be realized that in the long run a deprivation will amount to an "absolute deprivation." This is especially true in the area of education; the quality and amount of education one receives is directly related to the type of lifestyle one will live. It is unfathomable that the Court could be so narrow as to hold that a deprivation placed on a child in his formative years could not lead to an "absolute deprivation" that would eventually merit the Court granting the right to counsel, transcript and other vestiges of a criminal procedure.

Despite the Equal Protection Clause not requiring absolute equality or precisely equal advantages, it does guarantee equal treatment to those who are

48. The equal protection clause of the fourteenth amendment prohibits the state from discriminating or participating in any discriminatory activity.

49. *Rodriguez*, 411 U.S. at 65-67.

50. *Id.* at 68.

51. 339 U.S. 629 (1950).

52. 347 U.S. 483 (1954).

53. *Id.* at 492.

similarly situated. In the present case the starting point for the school children is not the same and therefore the Court should approach the case with a heightened scrutiny. The deprivation that is placed on the poor child will only broaden the gap between himself and the rich child, again increasing the possibilities of suffering from "absolute deprivation."

In conclusion, I would argue that the Court must approach wealth discrimination with a heightened scrutiny. The reason for this is that an activity or policy may overly tax the impoverished sector when the tax has no bearing on the objective or the activity. This is apparent in the present case where the Court allows the poor to bear the brunt of a system designed to raise funds for an activity, which should be almost cost free, by using the guise of local autonomy. This effectively creates a private school system within a public school system.

Another reason for the heightened scrutiny is the adverse effects activities or policies may have on the poor due to a disparity between the two groups' starting point. The Equal Protection Clause does not assume that we all remain equal but it does presume that we all should start off equally.⁵⁴ It is simple logic that a person will suffer greatly if he starts off behind and receives worse treatment throughout.

3. *Education as a Fundamental Interest*

In discussing education as a fundamental interest Justice Powell first points to and quotes the vital function language found in *Brown*. He fully admits that education is important in every facet of exercising a person's civic duty in a democratic society. Nonetheless, he then concludes: "nothing this Court holds today in any way detracts from our historic dedication to public education. We are in complete agreement with the conclusion of the three-judge panel below that the grave significance of education both to the individual and to our society' cannot be doubted. But the importance of a service performed by a State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause."⁵⁵

First of all, despite the disclaimer that the opinion is not to detract from the Court's historic support of education, it effectively sends out a signal to States that they are not under any obligation by the Constitution to provide an essential ingredient to fulfilling civic duties, and, ultimately, to achieving any type of status in a capitalist nation. The Court, again, takes a myopic view and does not go the extra step in its analysis to see what the ramifications of its decision will be.

The Court looks at the appellees' argument that education is inherently linked to "effective exercise of First Amendment freedoms and to intelligent utilization of the right to vote"⁵⁶ and disregards the argument through semantics. The Court's rebuttal is that it "never presumed to possess either the abil-

54. The preamble to the Constitution states that we are all created equal. In addition to this Justice Marshall states in his dissent: "In my judgement, the right of every American to an equal start in life, so far as the provision of a state service as important as education is concerned, is far too vital to permit state discrimination on grounds as tenuous as those presented by this record." *Rodriguez*, 411 U.S. at 71 (Marshall, J., dissenting).

55. *Rodriguez*, 411 U.S. at 30.

56. *Id.* at 35.

ity or the authority to guarantee to the citizenry the most *effective* speech or the most *informed* electoral choice."⁵⁷ In other words, the Court has a duty to protect the exercise of the First Amendment and the right to vote, but absolutely none to protect the right to effective and intelligent use of these rights. Again, not taking the analysis to its logical conclusion, the Court does not reason that without effective and intelligent use the citizenry would essentially be going through the motions. That would amount to not exercising First Amendment freedoms and the right to vote. The opinion is enveloped in a pedantic word play in which it effectively states that "exercising" a right only entails the physical action. To the layman "exercising" would mean an effective and intelligent use of a right and the physical action was only a means to achieving this goal.

Next the Court tries to say that the right to education cannot be "explicitly or implicitly guaranteed by the Constitution"⁵⁸ and therefore it is not fundamental nor does it merit strict scrutiny. In making this claim the opinion points to cases which have denied this right because they were not explicitly or implicitly found in the Constitution.⁵⁹ It states the Court's duty is not to create substantive constitutional rights, this goes against the holdings of the right to privacy cases and the right to travel cases.⁶⁰

In any event, when education is so inherently related to First Amendment freedoms and the right to vote, it is very difficult to see how one would say that there is no implicit guarantee of the right. I would therefore argue that education should be qualified as a fundamental interest citing the rationale in *Brown*. In coming to a decision on segregation of the schools the *Brown* Court stated that education is a necessary tool to be disbursed equally.

III. CONCLUSION

The Court has the ability to change the atmosphere of the underclass and the American society. In fact, this should be its main function. Instead, we see that the Court fails to achieve this because it is engrossed in myopic and semantical reasoning. It is so enveloped in logic and reasoning that often it forgets that its decision effects lives.

We have seen that there are ample reasons why wealth should be categorized as an suspect classification to receive a heightened scrutiny rather than a strict scrutiny. In addition, we have seen that education should be qualified as a fundamental interest such that it merits strict scrutiny. The combination of the two in one case surely should merit the Court examining the objective of statutes or provision with a discerning eye, placing the burden on the state to justify its interest. In its examination the Court has to look at the entire context and framework rather than a solitary facet, in order to grasp the objective and whether the means of achieving the objective is just and equitable.

The Court should not be timid in taking stands. The end result of being

57. *Id.* at 36 (emphasis in original).

58. *But see* cases cited at note 44.

59. *Shapiro v. Thompson*, 394 U.S. 618, 655 (1969) (Harlan, J., dissenting); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Dandridge v. Williams*, 397 U.S. 471 (1970); *Jefferson v. Hackney*, 406 U.S. 535 (1972) and; *Richardson v. Belcher*, 404 U.S. 78 (1971).

60. The right to privacy sprung from *Griswold v. Connecticut*, 381 U.S. 479 (1965). The right to travel cases flowed from *Shapiro v. Thompson*, 394 U.S. 618 (1969).

decisive is to lay down policies that are provincial in view and effectively half-step, such that all rights hinge on semantics and degrees. These policies then signal to the government that they can curtail or continue in doling out just adequate amounts. At the present time the Supreme Court is engaged in maintaining the status quo rather than taking the inputs from society and sculpting society.

The underclass manifests the four elements that have been used to define a suspect classification: immutable characteristics; highly visible characteristics; historical disadvantage and; relative lack of political representation. The underclass is plagued by the inability to change its circumstances and to get the skills necessary to effect a change. It is highly visible in that its dependence (generations of families on welfare) and lack of mobility sets it apart from the mainstream of American society and culture. It has suffered historic disadvantages which are partly the blame for the dilemma that has occurred to its members. Lastly, it possesses no finances and therefore lacks access to political influence. Overall the underclass is enveloped in a swirling vicious cycle that seems to have no end. Short of intervention by government or the Court the cycle will continue until its plight begins to really effect the mainstream American society. But the question is why should its suffering persist until it substantially effects all of America?