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Revisiting Poverty Under Equal Protection in the Wake of COVID-19

Alexis O'Connor

Under the Equal Protection Clause of the Fourteenth Amendment, the Constitution recognizes that systemic discrimination targets some groups of individuals more than others.¹ The Supreme Court of the United States classifies those individuals as belonging to suspect or quasi-suspect classes depending on the characteristics that render them particularly vulnerable. Some characteristics are unequivocally protected, such as race,² nationality,³ and immigrant status.⁴ However, the amount of protection provided for other characteristics, such as gender⁵ and sexual orientation,⁶ continues to develop alongside society's conscience.⁷

The Court has applied certain factors to determine whether a group is considered a suspect class for the purpose of equal protection. If a plaintiff belongs to a suspect class and challenges government action based on their class, then the Court applies greater scrutiny to determine the action's consti-

¹ U.S. CONST. amend. XIV, § 1 (“No state shall . . . deny to any person within its jurisdiction the equal protection of the law”); see also Michael Gentithes, *The Equal Protection Clause and Immutability: The Characteristics of Suspect Classifications*, 40 U. MEMPHIS L. REV. 507, 511–12 (2010) (“Decisions on equal protection grounds are thus not really about whether the law is purely equal but rather about the permissibility of the classifications it creates.”).

² *Korematsu v. United States*, 323 U.S. 214, 215 (1944) (“ . . . [A]ll legal restrictions which curtail the civil rights of a single racial group are immediately suspect.”); see also *Loving v. Virginia*, 388 U.S. 1 (1967) (subjecting an anti-miscegenation law to strict scrutiny because the basis for the law's classification was race).

³ *Korematsu*, 323 U.S. at 215.

⁴ *Graham v. Richardson*, 403 U.S. 365, 371 (1971) (“Aliens are a prime example of a ‘discrete and insular’ minority for whom such heightened judicial solicitude is appropriate.”) (internal citations omitted).

⁵ *Craig v. Boren*, 429 U.S. 190, 218 (1976) (finding a “gender-based differential” unconstitutional under equal protection).

⁶ Daniel J. Galvin, Jr., *There's Nothing Rational About It: Heightened Scrutiny for Sexual Orientation is Long Overdue*, 25 William and Mary J. Race, Gender, and Social Justice 405, 424–31 (2019).

⁷ *But see* *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 313–14 (1976) (finding old age does not constitute a class provided heightened scrutiny under equal protection); *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 450 (1985) (finding that laws affecting people with intellectual disabilities do not receive heightened scrutiny).

tutionality.⁸ A group is more likely to be considered a suspect class if it has been subjected to a long history of discrimination.⁹ A group is also more likely suspect if it is relatively powerless to protect itself through the usual political process.¹⁰ The Court also considers whether the members' shared characteristic is immutable or highly visible.¹¹ Taken in totality, these factors help determine the level of scrutiny the Court applies when analyzing the constitutionality of government action.

Although the vast majority of law professors teach their students that people in poverty do not constitute a suspect, or even quasi-suspect, class under Equal Protection, the controlling case is actually much less definite.¹² In *San Antonio Independent School District v. Rodriguez*, the parents of school children challenged the district's property tax funding scheme because it disproportionately resulted in children in low-income neighborhoods receiving less funding for their education.¹³ The Court recognized that the disparities in education were "largely attributable" to the funding disparities that resulted from the district's tax scheme.¹⁴ However, the Court ultimately sided with the school district and determined that its disparate funding was constitutionally sound since the tax scheme implicated neither a suspect class nor a fundamental right.¹⁵

In its holding, the Court specified that the plaintiffs did not sufficiently establish the existence of a suspect class.¹⁶ The Court analyzed prior cases regarding the indigency of a party and found two necessary characteristics missing from the *San Antonio* case: (1) the indigency of the party rendered them unable to afford a benefit; and (2) the absolute deprivation of the opportunity to enjoy that benefit as a result.¹⁷ Rather than outright denying that indigency can be characteristic of a suspect class, the Court actually indicates that the

⁸ Henry Rose, *The Poor as a Suspect Class Under the Equal Protection Clause: An Open Constitutional Question*, 34(2) *Nova L. Rev.* 407, 410–11 (2010).

⁹ *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973); see also Rose, *supra* note 8, at 417.

¹⁰ *E.g.*, *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938).

¹¹ See Rose, *supra* note 8, at 420.

¹² See generally Rose, *supra* note 8.

¹³ 411 U.S. at 4–5.

¹⁴ *Id.* at 15–16.

¹⁵ *Id.* at 18.

¹⁶ *Id.* at 19 ("The case comes to us with no definitive description of the classifying facts or delineation of the disfavored class.").

¹⁷ *Id.* at 20–21.

families in *San Antonio* merely failed to establish a suspect class in their particular case.¹⁸

This past year, COVID-19 has revealed and exacerbated significant structural issues within the U.S. economy and its welfare systems. The people who suffer the greatest consequence of these issues are not those promulgating safety regulations or setting unemployment eligibility standards.¹⁹ Rather, the people suffering are those already predisposed to the greatest financial and health risks.²⁰ Instead of using *San Antonio* to deny the existence of a suspect class, the Court could use its framework to establish such a class. The exacerbation of poverty during COVID-19 presents even more situations where a party's indigency could result in the absolute deprivation of a benefit.

Considering the substantial wealth gap that currently exists between rich and poor Americans, people living in poverty should constitute a class afforded heightened scrutiny under equal protection.²¹ Unlike the American dream of pulling oneself up by the bootstraps, the American reality depicts poverty as a nearly unshakeable condition. Moreover, although an individual may find a way out of poverty, there is always a class of people who live in poverty. The characteristic may be immutable to the individual, but poverty continues to exist as a significant social stigma.

It is reasonable for judges to treat people in poverty as members of a suspect class where the law appears to target them because history proves that laws have often been written to diminish their power and agency. Even in the

¹⁸ *Id.* at 22–23 (“... [I]n support of their charge that the system discriminates against the “poor,” appellees have made no effort to demonstrate that it operates to the peculiar disadvantage of any class fairly definable as indigent, or as composed of persons whose incomes are beneath any designated poverty level.”); *see also id.* at 23 (“... [N]either appellees nor the District Court addressed the fact that, unlike each of the foregoing cases, lack of personal resources has not occasioned an absolute deprivation of the desired benefit.”); *see also* Rose, *supra* note 8, at 416–17.

¹⁹ Brian Root & Lena Simet, *United States: Pandemic Impact on People in Poverty*, HUMAN RIGHTS WATCH (Mar. 2, 2021, 6:00 AM), <https://www.hrw.org/news/2021/03/02/united-states-pandemic-impact-people-poverty> (illustrating how four percent of households with income at or above \$150,000 are behind on housing payments in comparison to forty-seven percent of households with income less than \$34,999).

²⁰ Emma Mehrabi, *Poverty in the U.S. Will Reach Drastic Levels Because of COVID-19*, CHILDREN'S DEFENSE FUND (Apr. 21, 2020), <https://www.childrensdefense.org/blog/poverty-in-the-u-s-will-reach-drastic-levels-because-of-covid-19/> (noting that children and people of color are already at the greatest risk of poverty).

²¹ *E.g.*, Juliana Menasce, et al., *Trends in Income and Wealth Inequality*, PEW RESEARCH CENTER (Jan. 9, 2020), <https://www.pewresearch.org/social-trends/2020/01/09/trends-in-income-and-wealth-inequality/>.

1960s, the Court expressed distaste for laws that distinguish on the basis of wealth.²² In a series of criminal cases, the Court has expressed even greater concern for the equal protection rights of indigent criminal defendants whose freedom may be directly implicated by their ability to afford a defense.²³ On the civil side, in *Harper v. Virginia Board of Elections*, the Court struck down payment fees to vote in a state election as an infringement on indigent citizens' right to vote.²⁴

Although government efforts including the CARES Act, the eviction moratorium, and stimulus checks have blunted the most severe effect of COVID-19 on people living in poverty, each effort appears to be near its end.²⁵ Providing stronger legal protections to those who are vulnerable to disparate treatment is particularly significant as the country sits upon the precipice of a post-pandemic era. With the knowledge of how the system fails people living in poverty, and the awareness of how these failures can crumble a society in crisis, it would be irresponsible to not ensure greater legal protections for those most effected. With the hope that legislators address inequalities perpetuated by law, judges should ensure that those most affected by those inequalities receive the most stringent protection.²⁶

²² *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 668 (1966); see Rose, *supra* note 8, at 412.

²³ See *Draper v. Washington*, 372 U.S. 353 (1963) (allowing indigent criminal defendants to receive free court transcripts); see *Lane v. Brown* 372 U.S. 477 (1963) (mandating free counsel on criminal appeal for indigent defendants); see *Burns v. Ohio* 360 U.S. 252 (1959) (waiving filing fees for habeas corpus applications and appeals for indigent defendants); see also Alan W. Houseman, *Equal Protection and the Poor*, 30 RUTGERS L. REV. 887, 891 (1976–77) (discussing aforementioned cases).

²⁴ *Harper*, 383 U.S. at 668; see Rose, *supra* note 8, at 412 (explaining that the Court also considered the plaintiffs' right to vote to strike down the law).

²⁵ Priyanka Boghani, *How COVID Has Impacted Poverty in America*, FRONTLINE (Dec. 8, 2020), <https://www.pbs.org/wgbh/frontline/article/covid-poverty-america/>.

²⁶ See Houseman, *supra* note 23, at 887–88 (“Equal justice requires much more [than equal access to legal representation]: substantive laws that do not have a discriminatory effect on the poor, a system of dispute resolution that assures at least minimum equality between the parties, and an end to arbitrary governmental and private actions.”).