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THE POOR AS A SUSPECT CLASS UNDER THE EQUAL PROTECTION CLAUSE: AN OPEN CONSTITUTIONAL QUESTION

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(ABSTRACT)

Both judges and legal scholars assert that the United States Supreme Court has held that the poor are neither a quasi-suspect nor a suspect class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. They further assert that this issue was decided by the Supreme Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1 (1973).

It is the thesis of this article that the Supreme Court has not yet decided whether the poor are a quasi-suspect or a suspect class under Equal Protection. In fact, the majority in *San Antonio Independent School District v. Rodriquez* found that the case involved no discrete discrimination against the poor. Whether the poor should constitute a quasi-suspect or suspect class under Equal Protection remains an open constitutional question.

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I. INTRODUCTION

It is now blackletter law, taught to thousands of American law students, that the poor are neither a quasi-suspect nor a suspect class under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.[1] The United States Supreme Court has stated that the poor are not a suspect class: "for this Court has held repeatedly that poverty, standing alone, is not a suspect classification."[2]

It is the thesis of this article that the issue of whether the poor are a suspect or quasi-suspect class under traditional Equal Protection jurisprudence has not been decided by the Supreme Court. In fact, language in one majority opinion of the Supreme Court indicates that the poor are a suspect class and classifications based on this status should receive strict scrutiny from the courts: "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[3]

This article will examine the Supreme Court's suspect class analysis under the Equal Protection Clause and will explore its application to indigent persons. The primary contention of this article is that the issue of whether the poor are a quasi-suspect or suspect class under Equal Protection remains an open constitutional question.

II. DEVELOPMENT OF SUSPECT CLASS CATEGORIES IN EQUAL PROTECTION JURISPRUDENCE

The roots of the suspect class categories emerged in 1938 in what has been described as "the most famous footnote in the Court's history"[4]—note four of *United States v. Carolene Products Co.*[5] Reflecting on the new deference that the Supreme Court would apply to judicial review of constitutional challenges to economic regulatory legislation, Justice Stone suggested in note four of his majority opinion in *Carolene Products* that more searching

1. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 786 (3d ed. 2006). Erwin Chemerinsky, a constitutional scholar, states in his constitutional law hornbook that: "In *San Antonio School District v. Rodriguez*, the Supreme Court expressly held that poverty is not a suspect classification and that discrimination against the poor should only receive rational basis review." *Id.*

2. Harris v. McRae, 448 U.S. 297, 323 (1980) (citations omitted).

3. McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969) (citations omitted).

4. JEFFREY TOOBIN, THE NINE: INSIDE THE SECRET WORLD OF THE SUPREME COURT 209 (2007).

5. 304 U.S. 144 (1938).

judicial review should be applied to legislation that, inter alia, reflects "prejudice against discrete and insular minorities" who may be inadequately protected in the majoritarian political process.[6]

In 1944, the Supreme Court began to identify those minority groups that would be entitled to special constitutional protection.[7] In *Korematsu v. United States*,[8] the majority wrote that "all legal restrictions which curtail the civil rights of a single racial group are immediately suspect" and the "courts must subject them to the most rigid scrutiny."[9] Despite the heightened scrutiny, the Court in *Korematsu* went on to uphold the conviction of an American citizen of Japanese descent for violating an order of the U.S. Military excluding all persons of Japanese ancestry from any "military area" in California.[10]

In *Bolling v. Sharpe*,[11] a companion case to *Brown v. Board of Education*,[12] the Supreme Court held that the segregation of school children by race in the public schools in the District of Columbia violated the Fifth Amendment's guarantee against unjustified discrimination.[13] The majority in *Bolling* stated: "Classifications based solely upon race must be scrutinized with particular care, since they are contrary to our traditions and hence constitutionally suspect."[14]

The current Equal Protection test for reviewing governmental classifications on the basis of race began to develop in *McLaughlin v. Florida*[15] in 1964.[16] A Florida statute made it a crime for a Negro and a white person of the opposite sex who were not married to habitually share a nighttime room.[17] A biracial, unmarried couple was convicted under the statute and they argued that the statute violated their Equal Protection rights under the Fourteenth Amendment.[18] The majority in *McLaughlin* concluded that the statute could only be upheld "if it is necessary, and not merely rationally

6. *Id.* at 153 n.4. More searching judicial review under Equal Protection should also be applied to legislation that appears to be facially unconstitutional and legislation that restricts political processes. *Id.* at 152 n.4.
7. *See* Korematsu v. United States, 323 U.S. 214, 219 (1944).
8. *Id.* at 214.
9. *Id.* at 216.
10. *Id.* at 223.
11. 347 U.S. 497 (1954).
12. 347 U.S. 483 (1954).
13. *Bolling*, 347 U.S. at 500.
14. *Id.* at 499.
15. 379 U.S. 184 (1964).
16. *Id.* at 191–92.
17. *Id.* at 186.
18. *Id.* at 187.

related, to the accomplishment of a permissible state policy."[19] The Florida statute failed to satisfy this standard and was invalidated.[20] Later cases announced the current Equal Protection test for racial classifications, strict scrutiny: Governmental classifications on the basis of race will only be upheld if they are justified by a compelling governmental interest and are necessary to the accomplishment of a legitimate governmental purpose.[21] In addition to strict scrutiny being applied to classifications based on national origin and race, it has also been applied to state classifications based on alienage.[22]

The Supreme Court first applied intermediate scrutiny to a quasi-suspect classification based on gender in 1976 and announced that in order for such a classification to satisfy Equal Protection it "must serve important governmental objectives and must be substantially related to . . . those objectives."[23] Intermediate scrutiny was also applied to classifications based on illegitimacy in 1988.[24]

Heightened scrutiny has been rejected in Equal Protection challenges to classifications based on age[25] and mental retardation.[26] These classifications were subjected to minimal scrutiny—the classifications "must be rationally related to a legitimate government purpose" in order to withstand an Equal Protection challenge.[27]

III. POVERTY AND EQUAL PROTECTION

A. *Criminal Law Context*

In *Edwards v. California*,[28] the Supreme Court, in 1941, invalidated a California statute that made it a crime to transport non-resident indigent persons into the state, holding that this statute was outside of the state's police power and was an unconstitutional barrier to interstate commerce.[29] In his concurrence, Justice Jackson opined that a state could limit persons from

19. *Id.* at 196.
20. *McLaughlin*, 379 U.S. at 196.
21. Palmore v. Sidoti, 466 U.S. 429, 432–33 (1984) (quoting *McLaughlin*, 379 U.S. at 196).
22. Graham v. Richardson, 403 U.S. 365, 371–72 (1971).
23. Craig v. Boren, 429 U.S. 190, 197 (1976).
24. Clark v. Jeter, 486 U.S. 456, 461 (1988).
25. Mass. Bd. of Ret. v. Murgia, 427 U.S. 307, 313–14 (1976).
26. City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 450 (1985).
27. *Id.* at 446; *see Murgia*, 427 U.S. at 315.
28. 314 U.S. 160 (1941).
29. *Id.* at 173.

entering the state if, for example, they were fugitives from justice or were carrying a contagion.[30] However, he further opined that indigence was not a legitimate reason to bar a person's entry into a state.[31] "The mere state of being without funds is a neutral fact—constitutionally an irrelevance like race, creed, or color."[32] Justice Jackson was the first Supreme Court justice to suggest the equivalent constitutional status of classifications based on poverty and race.[33]

The Supreme Court first addressed the relationship between poverty and Equal Protection in *Griffin v. Illinois*[34] in 1956.[35] *Griffin* involved indigent persons in Illinois who had been convicted of armed robbery, but who could not pursue an appeal of their convictions because they could not afford to pay for the mandatory trial transcript.[36] The Supreme Court held that it violated Equal Protection to deny an appeal of a criminal conviction to an indigent person who could not afford a transcript, stating "In criminal trials, a State can no more discriminate on account of poverty than on account of religion, race, or color."[37]

Similarly, the Supreme Court held in 1963 in *Douglas v. California*[38] that it violated Equal Protection for a state to deny counsel to indigent criminal defendants in the appeals of their convictions.[39] The Court in *Douglas* found that, like *Griffin*, the "evil" that offended Equal Protection was the same: "discrimination against the indigent."[40]

Finding Equal Protection violations in situations where states offered fewer procedural protections to indigent criminal defendants does not necessarily apply with equal force to non-criminal matters. The Supreme Court has stated that the *Griffin* and *Douglas* holdings are limited to criminal cases because they involve a government monopoly on prosecution in which participation of defendants is compelled, and they "do not extend to legislative classifications generally."[41] Moreover, the Supreme Court has not applied suspect class analysis or the tri-levels of scrutiny—strict scrutiny, interme-

30. *Id.* at 184 (Jackson, J., concurring).
31. *Id.*
32. *Id.* at 184–85.
33. *See Edwards*, 314 U.S. at 185 (Jackson, J., concurring).
34. 351 U.S. 12 (1956).
35. *Id.* at 12.
36. *Id.*
37. *Id.* at 17.
38. 372 U.S. 353 (1963).
39. *Id.* at 357–58.
40. *Id.* at 355.
41. Maher v. Roe, 432 U.S. 464, 471 n.6 (1977).

diate scrutiny, or minimal scrutiny—in its application of Equal Protection to cases like *Griffin* and *Douglas* that arise in the criminal procedure context.

B. *Civil Law Context*

1. Pre-*Rodriguez* Cases

The significance of poverty in an Equal Protection case outside of the criminal law context was first addressed by the Supreme Court in 1966 in *Harper v. Virginia Board of Elections*.[42] In *Harper*, Virginia residents challenged the constitutionality of a $1.50 poll tax on Virginia residents, the payment of which was a precondition to voting in state elections.[43] The majority in *Harper* found that a state's interest in this area is limited to the power to determine the qualifications of voters.[44] However, as to wealth as a voter qualification, the Court stated, "Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[45] The Court went on to hold that the payment of a fee as a condition of voting in a state election violated the Equal Protection Clause.[46] *Harper* suggested that classifications on the basis of wealth, like classifications on the basis of race, should receive heightened scrutiny under Equal Protection.[47] However, *Harper* also involved a factor that independently leads to heightened scrutiny, an infringement of a fundamental interest: the right to vote in state elections.[48] Consequently, the strict scrutiny analysis in *Harper* does not rest exclusively on the indigent status of the plaintiffs, but was also triggered by their fundamental interest in being able to vote in state elections.[49]

The Supreme Court again commented on the role of indigency in Equal Protection analysis in 1969 in *McDonald v. Board of Election Commissioners*.[50] *McDonald* involved an Equal Protection challenge to Illinois' failure to allow incarcerated criminal defendants who were awaiting trial to participate in elections as absentee voters.[51] In assessing whether the state policy of

42. 383 U.S. 663 (1966).
43. *Id.* at 664 & n.1.
44. *Id.* at 668.
45. *Id.* (citation omitted).
46. *Id.*
47. *Harper*, 383 U.S. at 668.
48. *See id.* at 670.
49. *Id.* at 668.
50. 394 U.S. 802 (1969).
51. *Id.* at 803, 806.

not allowing inmates to vote absentee must be justified by a compelling state interest, the majority stated: "And a careful examination on our part is especially warranted where lines are drawn on the basis of wealth or race, two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[52] The Court in *McDonald* concluded that the limitations in Illinois' absentee voting procedures were "not drawn on the basis of wealth or race"[53] and rejected the Equal Protection challenge to them.[54] However, the clear implication of the majority opinion in *McDonald* was that if the plaintiffs' inability to participate in absentee voting had been based on their poverty, the Illinois' scheme would have faced strict scrutiny under Equal Protection.[55]

In *Boddie v. Connecticut*,[56] the Supreme Court in 1971 held that filing fees in divorce cases, as they were applied to low income persons who could not afford to pay them, violated the Due Process Clause of the Fourteenth Amendment.[57] In his concurring opinion, Justice Douglas asserted that the poor are a suspect class and the filing fees, as applied to them, violated Equal Protection.[58]

In 1971, the Supreme Court in *James v. Valtierra*[59] upheld the constitutionality of a California requirement that all low income housing projects be approved by public referendum.[60] In a dissenting opinion in *James*, Justices Brennan, Blackmun, and Marshall asserted that the poor were a suspect class under the Equal Protection Clause.[61] Significantly, the Solicitor General of the United States[62] also argued, in his Amicus Curiae Memorandum in *James*, that classifications on the basis of wealth are suspect.[63] The majority

52. *Id.* at 807 (citation omitted).
53. *Id.*
54. *Id.* at 810.
55. *McDonald*, 394 U.S. at 807.
56. 401 U.S. 371 (1971).
57. *Id.* at 372, 383.
58. *See id.* at 385–86 (Douglas, J., concurring).
59. 402 U.S. 137 (1971).
60. *Id.* at 142–43.
61. *Id.* at 144–45 (Marshall, J., dissenting).
62. *See id.* at 145. *See generally* Memorandum for the United States et al. as Amicus Curiae, James v. Valtierra, 402 U.S. 137 (1971) (No. 154) [hereinafter Amicus Curiae Memorandum]. The Solicitor General who appeared as Amicus Curiae in *James* was Erwin Griswold, who was appointed Solicitor General by President Lyndon Johnson. Dep't of Justice, Office of the Solicitor General, http://www.justice.gov/osg/aboutosg/griswolderwinbio.htm (last visited Feb. 21, 2010).
63. Amicus Curiae Memorandum, *supra* note 62, at 15; *see also James*, 402 U.S. at 145 (Marshall, J., dissenting).

opinion in *James* did not address whether the poor are a suspect class under Equal Protection.[64]

Also in 1971, the systems by which both California and Minnesota fund elementary and secondary public schools were found to violate Equal Protection by the Supreme Court of California and a federal district court respectively.[65] In both cases, the Courts relied, *inter alia*, on Supreme Court precedent to hold that the poor were a suspect class and the school funding systems, in disadvantaging poor students, did not withstand strict scrutiny under the Equal Protection Clause of the Fourteenth Amendment.[66]

In *Bullock v. Carter*,[67] several persons were not allowed to run in Texas county primary elections because they could not afford to pay election filing fees required by state law.[68] These persons challenged the mandatory filing fees on Equal Protection grounds.[69] A unanimous Supreme Court found, in 1972, that since the filing fees likely impact voting rights—by limiting the pool of candidates—and the impact is related to the financial resources of voters, the filing fees would be subjected to strict scrutiny.[70] The Court held that the filing fees violated Equal Protection because they were not necessary to achieve the State's legitimate objectives in running efficient primary elections.[71] The Court concluded that critical to its finding of constitutional invalidity is that "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."[72]

2. *San Antonio Independent School District v. Rodriguez*

In 1971, in *Rodriguez v. San Antonio Independent School District*,[73] the Texas system of funding public elementary and secondary schools was found

64. *See James*, 402 U.S. at 145 (Marshall, J., dissenting).

65. Van Dusartz v. Hatfield, 334 F. Supp. 870, 877 (D. Minn. 1971); Serrano v. Priest, 487 P.2d 1241, 1263 (Cal. 1971), *superseded by statute*, CAL. CONST. art. 1, § 31 (2009), *as recognized in* Crawford v. Huntington Beach Union High Sch. Dist., 121 Cal. Rptr. 2d 96, 104 (Ct. App. 2002). In *Serrano* the Supreme Court of California only found that the California system violated Equal Protection based on the allegations presented by the plaintiff and remanded the case to the trial court for final judgment. *Serrano*, 487 P.2d at 1263, 1266.

66. *Van Dusartz*, 334 F. Supp. at 875–76; *Serrano*, 487 P.2d at 1250, 1263, 1265.

67. 405 U.S. 134 (1972).

68. *Id.* at 135–36.

69. *See id.* at 136.

70. *See id.* at 144 (Justices Powell and Rehnquist did not take part in the decision).

71. *See id.* at 147.

72. *Bullock*, 405 U.S. at 149.

73. 337 F. Supp. 280 (W.D. Tex. 1971) (per curiam), *rev'd*, 411 U.S. 1 (1973).

by a three-judge district court to violate the Equal Protection Clause of the Fourteenth Amendment because, *inter alia*, it disadvantaged students from indigent families.[74] The three-judge court's per curiam opinion found that wealth classifications, as well as the fundamental interest in education, each necessitated that Texas justify its funding system by demonstrating that a compelling state interest supported it; a test that Texas failed to meet.[75] A year later, the Supreme Court accepted Texas' appeal from the decision of the three-judge district court.[76]

The Supreme Court's majority opinion in *San Antonio Independent School District v. Rodriguez*[77] initially found that the Texas system for funding public elementary and secondary education results in "substantial interdistrict disparities in school expenditures" and that these disparities are "largely attributable to differences in the amounts of money collected through local property taxation."[78] The Court also noted that "Texas virtually concedes that its historically rooted dual system of financing education could not withstand the strict judicial scrutiny that this Court has found appropriate in reviewing legislative judgments that interfere with fundamental constitutional rights or that involve suspect classifications."[79] The Court further stated that the judgment of the district court should be affirmed if "the Texas system of financing public education operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution."[80]

In determining whether it should apply strict scrutiny in its review of the Texas school funding system, the Court conducted a lengthy yet ultimately inconclusive analysis of whether the poor constitute a suspect class under Equal Protection.[81] The Court described the district court's finding of wealth discrimination as based on "a simplistic process of analysis: since, under the traditional systems of financing public schools, some poorer people receive less expensive educations than other more affluent people, these systems discriminate on the basis of wealth."[82] The Court further stated that certain "threshold questions" were largely ignored by the district court and must be analyzed more closely here: What is the constitutional significance "that the

74. *See id.* at 281, 285–86.
75. *Id.* at 283, 285–86.
76. San Antonio Indep. Sch. Dist. v. Rodriguez, 406 U.S. 966, 966 (1972), *prob. juris. noted*, 337 F. Supp. 280 (W.D. Tex. 1971).
77. 411 U.S. 1 (1973).
78. *Id.* at 15–16.
79. *Id.* at 16 (internal footnotes omitted).
80. *Id.* at 17.
81. *See id.* at 15–18.
82. *Rodriguez*, 411 U.S. at 19.

class of disadvantaged 'poor' cannot be identified or defined in customary Equal Protection terms?"[83] What is the constitutional significance of "the relative—rather than absolute—nature of the [alleged] deprivation"?[84]

The Court found that the district court provided "no definitive description of the classifying facts or . . . disfavored class."[85] The Court opined that the disfavored class could possibly include at least three groups: (1) "persons whose incomes fall below some identifiable level of poverty," (2) persons who are disadvantaged due to a correlation between lower family income and lower educational expenditures on their behalf, and (3) all persons who, regardless of income, live in school districts with lower property valuations.[86] The Court then sought to compare each of these three possible classes to the two distinguishing characteristics of persons who prior decisions of the Court have found to be victims of unconstitutional wealth discrimination: persons who were "unable to pay for [a] desired benefit, and as a consequence, they sustained an absolute deprivation of" the benefit.[87]

As to the first possible description of the disadvantaged class—persons whose income falls below an identifiable level of poverty—the Court found that "neither of the two distinguishing characteristics of wealth classifications" apply.[88] First, the plaintiffs offered no evidence that the Texas school funding system "discriminates against any definable category of 'poor' people."[89] Second, plaintiffs failed to establish that any disadvantaged class experienced an absolute deprivation since all students were receiving a public education, even if educational expenditures varied by school district.[90] Moreover, plaintiffs offered no proof that refuted the assertion of Texas that its school funding system provided an adequate education to all children, regardless of their school district.[91] The Court concluded that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages."[92]

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83. *Id.*
84. *Id.*
85. *Id.*
86. *Id.* at 19–20 & n.50.
87. *Rodriguez*, 411 U.S. at 20–21.
88. *Id.* at 22.
89. *Id.* at 25.
90. *Id.* at 23–24.
91. *Id.* at 24.
92. *Rodriguez*, 411 U.S. at 24. The Court, in footnote 57 of its majority opinion, cited four prior Supreme Court decisions for the proposition that, as to wealth, Equal Protection does not require absolute equality. *Id.* at 24 & n.57. Illustrative of these decisions is *Draper v. Washington*, 372 U.S. 487 (1963), in which the Supreme Court stated that although an indigent person who is convicted of a crime is entitled to a free record on appeal, the record need not be a verbatim transcript of all trial court proceedings that could be purchased by a

The second possible description of the disadvantaged class is those persons who experience relative discrimination because the Texas school funding system resulted in a correlation between lower family income levels and lower educational expenditures.[93] However, the Court concluded that the plaintiffs failed to prove the existence of such a correlation.[94]

The third possible description of the disadvantaged class is based on district wealth discrimination, i.e. persons, regardless of income, who live in school districts with lower property valuations.[95] The Court found that the evidence presented below did establish a correlation between lower district property valuations and lower educational expenditures, "without regard to the individual income characteristics of [the] district['s] residents."[96] The Court described the students in the school districts with the lower property values as "a large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[97] The Court also asserted that this third class had "none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."[98] The Court concluded its analysis of the suspect class issue by stating that "the Texas system does not operate to the peculiar disadvantage of any suspect class."[99]

The Court further held that education is not a fundamental right under the Constitution and, therefore, strict scrutiny of the Texas school funding system was not required.[100] Finally, the Court concluded that the Texas school funding system, with a commitment to adequate funding for all students, is rationally related to a legitimate state interest and, therefore, satisfies the Equal Protection Clause of the Fourteenth Amendment.[101]

As to whether the poor are a suspect class under Equal Protection, the majority in *Rodriguez* made several key findings. First, they found that there

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non-indigent person but rather a lesser record that is adequate and effective at presenting the issues on appeal is constitutionally acceptable. *Draper*, 372 U.S. at 495–96. For example, if the defendant is only attacking the validity of the underlying criminal statute, no transcript need be provided by the state. *See id.*

93. *Rodriguez*, 411 U.S. at 25.
94. *See id.* at 27.
95. *Id.* at 27–28.
96. *Id.* at 27.
97. *Id.* at 28.
98. *Rodriguez*, 411 U.S. at 28.
99. *Id.*
100. *See id.* at 35–37.
101. *Id.* at 54–55.

was no evidence that the Texas school funding system discriminated against the poor in any discrete way.[102] Second, they found that the group that was disadvantaged by the Texas school funding system was the students living in school districts with lower property values and these students shared no common income characteristics.[103] Finally, they found that this latter disadvantaged group did not possess the characteristics of a suspect class under Equal Protection.[104] Thus, the issue of whether the poor are or are not a suspect class under Equal Protection was not answered by the majority in *Rodriguez*. Nevertheless, the *Rodriguez* holding on the suspect class issue took on a mythical life of its own in future Supreme Court decisions.

3. Medicaid Abortion Prohibition Cases

Medicaid is a joint federal-state program that provides health insurance to low-income persons.[105] In 1975, Connecticut promulgated a regulation that limited Medicaid reimbursement "for first trimester abortions to those that are 'medically necessary.'"[106] Two indigent women who were unable to obtain Medicaid-reimbursed abortions in Connecticut challenged the state's imposition of the medically necessary limitation on, *inter alia*, Equal Protection grounds,[107] and their case reached the Supreme Court in *Maher v. Roe*.[108] The Supreme Court recognized in *Maher* that if the limitation operated to the disadvantage of a suspect class it would require strict judicial scrutiny.[109] The Court also recognized that the Connecticut limitation denied the indigent a medical service based on a wealth classification.[110] However, the Court concluded that this case involved no discrimination against a suspect class because "this Court has never held that financial need alone identifies a suspect class for purposes of equal protection analysis."[111] Thus, the Court in *Maher* concluded that the poor are not a suspect class because the Supreme Court has not previously recognized them to be a suspect class.[112] While the

102. *Id.* at 25.
103. *Rodriguez*, 411 U.S. at 23, 27.
104. *Id.* at 28.
105. *See* 42 U.S.C. § 1396 (2006).
106. Maher v. Roe, 432 U.S. 464, 466 (1977) (internal footnotes omitted).
107. *Id.* at 466–67.
108. *See id.* at 464.
109. *Id.* at 470 (quoting *Rodriguez*, 411 U.S. at 17).
110. *See id.* at 471.
111. *Maher*, 432 U.S. at 470–71 (citing *Rodriquez II*, 411 U.S. at 29; Dandridge v. Williams, 397 U.S. 471 (1970)). The Supreme Court majority in *Dandridge* did not address whether the poor are a suspect class. *See Dandridge*, 397 U.S. at 471.
112. *See Maher*, 432 U.S. at 471.

Maher Court accurately stated that no prior Supreme Court decision had found the poor to be a suspect class,[113] it does not follow that the obverse is true, i.e. that this history means the poor are not a suspect class. Rather, it simply means that the Supreme Court had not previously decided whether the poor are a quasi-suspect or suspect class under Equal Protection.

A later Supreme Court case, *Harris v. McRae*,[114] addressed whether the Hyde Amendment, a federal prohibition on Medicaid reimbursement for abortions unless the mother's life is threatened by the pregnancy or the conception resulted from incest or rape, violates Equal Protection.[115] The Court in *Harris* acknowledged that "the principal impact of the Hyde Amendment" fell on the indigent.[116] However, the Court relied on *Maher* to conclude that limitations on Medicaid-funded abortions affect no suspect class of indigent persons.[117] The *Harris* Court went further to state that "this Court has held repeatedly that poverty, standing alone, is not a suspect classification."[118] Thus, the Supreme Court inaccurately asserted in *Harris* that it had consistently found that the poor are not a suspect class.[119] In fact, none of its prior decisions had so held.

4. Status of the Poor Under Equal Protection

The creation of quasi-suspect and suspect classes in Equal Protection jurisprudence is based on a judicial recognition that certain groups have suffered historical discrimination under American law and need special constitutional protection from the majoritarian political processes that may continue to disfavor them.[120] As a result, any government classifications that disadvantage these groups and are challenged on Equal Protection grounds will receive heightened scrutiny from the courts to ensure that the classifications are carefully drawn to achieve important governmental objectives.[121]

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113. *Id.*
114. 448 U.S. 297 (1980).
115. *Id.* at 301–02.
116. *Id.* at 323.
117. *Id.*
118. *Id.* (citing James v. Valtierra, 402 U.S. 137, 145 (1971)). The Supreme Court majority in *James* did not address whether the poor are a suspect class.
119. *See Harris*, 448 U.S. at 323. In a later Equal Protection case, the Supreme Court cited *Harris* for the proposition that state statutes should not be subjected to strict scrutiny even if they affect the poor and the wealthy differently. Kadrmas v. Dickinson Pub. Sch., 487 U.S. 450, 458 (1988).
120. *See* City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 442–45 (1985).
121. *See id.*

The courts will consider several factors in determining whether a particular group should be treated as a quasi-suspect or suspect class under Equal Protection.[122] These factors include: whether there are legitimate reasons for the government to treat members of the group differently than other persons; whether members of the group have immutable characteristics; whether federal and state legislation reflects a continuing antipathy or prejudice against the group; whether the group is politically powerless in its ability to attract the attention of lawmakers; and whether there are principled ways to distinguish the group from other similar groups who might seek heightened scrutiny under Equal Protection.[123] The Supreme Court has never applied these factors to the consideration of whether the poor as a group are or are not a suspect class under Equal Protection.

The treatment of the poor under the Equal Protection Clause has been uneven.[124] In the context of criminal prosecution, it is now well established that to deny the poor basic procedural protections because of their inability to pay for them violates Equal Protection.[125] In the civil context, the Supreme Court has offered dicta indicating that classifications based on wealth, like those based on race, involve suspect classifications that should trigger strict scrutiny.[126] However, the Supreme Court has never directly so held.[127]

In *San Antonio Independent School District v. Rodriguez*,[128] the issue of the poor as a suspect class was considered by the Supreme Court.[129] However, the Court majority found that the plaintiffs failed to establish any discrimination against the poor as a group.[130] Moreover, they found that the plaintiffs in *Rodriguez* only established a single correlation between lower district property values and lower educational expenditures.[131] The Court further found that the group who was disadvantaged as a result of this correlation was "a large, diverse, and amorphous class, [who was] unified only by the

122. *See id.*

123. *Id.* In *City of Cleburne*, the Supreme Court rejected quasi-suspect or suspect class status for the mentally retarded. *Id.*

124. *See* Douglas v. California, 372 U.S. 353, 357–58 (1963); Griffin v. Illinois, 351 U.S. 12, 17–20 (1956).

125. *See Douglas*, 372 U.S. at 357–58; *Griffin*, 351 U.S. at 17–18.

126. Harris v. McRae, 448 U.S. 297, 323 (1980); McDonald v. Bd. of Election Comm'rs, 394 U.S. 802, 807 (1969).

127. The Supreme Court's best opportunity to decide whether the poor are a quasi-suspect or suspect class under Equal Protection arose in *James v. Valtierra*, but the majority did not address the issue. *See* James v. Valtierra, 402 U.S. 137, 143–45 (1971) (Marshall, J., dissenting).

128. 411 U.S. 1 (1973).

129. *Id.* at 17–18.

130. *Id.* at 22.

131. *Id.* at 25–27.

common factor of residence in districts that happen[ed] to have less taxable wealth than other districts" and that this group did not share any common income characteristics.[132] The Court concluded that this indistinct class that shared no common income characteristics had "none of the traditional indicia of suspectness."[133] Accordingly, the Court concluded that the "Texas system does not operate to the peculiar disadvantage of any suspect class."[134] Despite the narrowness of the Court's holding on the suspect class issue in *Rodriguez*, the case has been cited inappropriately for the broad proposition that the poor are not a suspect class under the Equal Protection Clause.[135]

The Supreme Court's holding in *Rodriguez* on the suspect class issue can only fairly be described as the Court finding that the plaintiffs failed to establish that the poor as a group were disadvantaged by the way that Texas funded its schools.[136] The Supreme Court in *Rodriguez* did not address whether poor persons as a group have any of the traditional indicia of suspectness[137]—e.g., whether they have been subjected to a history of purposeful unequal treatment or have been relegated to a position of political powerlessness—that would trigger strict scrutiny. *Rodriguez* did not decide whether the poor as a group are a quasi-suspect or suspect class under the Equal Protection Clause.

The issue of whether the poor are a quasi-suspect or a suspect class under Equal Protection has not yet been decided by the United States Supreme Court. To properly decide this issue, the Court would need to carefully assess whether the indicia of suspectness apply to the poor in America.[138] Until such an assessment is done by the Supreme Court, the status of the poor under the Equal Protection Clause of the Fourteenth Amendment remains an open constitutional question.

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132. *Id.* at 28.
133. *Rodriguez*, 411 U.S. at 28.
134. *Id.*
135. *See* Maher v. Roe, 432 U.S. 464, 470–71 (1977).
136. *Rodriguez*, 411 U.S. at 28.
137. *Id.*
138. *Id.* The best example of the Supreme Court's application of the "indicia of suspectness" to a particular group occurred in *City of Cleburne v. Cleburne Living Center, Inc.*, 473 U.S. 432, 442–46 (1985). In *City of Cleburne*, the Court held that the mentally retarded constituted neither a quasi-suspect nor a suspect class. *Id.*