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Reaction to: Wealth, Poverty, and the Equal Protection Clause

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In his Article titled, *The Fourteenth Amendment Isn't "Broke": Why Wealth Should Be a Suspect Classification under the Equal Protection Clause*, Shayan H. Modarres strikes at the heart of the myth of a so-called "post-racial"[1] America by effectively arguing that poverty has become a proxy for race; thereby creating a de facto economic racism that enjoys none of the protections of the Fourteenth Amendment, which have been traditionally bestowed upon recognized suspect classifications. He concludes that the country is neither "post-racial" nor adequately addressing the dual society that has emerged as a result of the Court's failure to recognize the convergence of race and poverty. Rather, America has devolved into a caste system of sorts based on wealth with African Americans, once again, at the bottom of society.

He further asserts that although America has made attempts to remedy its dark history of racial immorality and inequality, there continues to be a major failure to recognize and remedy the wrongs that have resulted from the fact that economic status has supplanted the racial scheme which existed for centuries. This is especially significant if one accepts the idea that both poverty and wealth are intergenerational and a permanent underclass has been created which offers few opportunities for upward mobility.[2]

Moreover, Modarres effectively articulates the historical context of suspect classifications and the factors formulated by the Court to determine the level of judicial review. Clearly, the poor are and have been a discrete and insular class of the kind Justice Stone spoke of in *Carolene Products*.[3] Surely the poor have met the "requirements"[4] of being devoid of political power,[5] and historically discriminated against.[6]Therefore, these two factors cannot be utilized by the Court as the rationale for denying a higher level of scrutiny.

Rather, it appears that with respect to poverty, the Court has placed much more reliance upon the immutability factor than the other factors mentioned above. The

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1. Michael Selmi, *Understanding Discrimination in a "Post-Racial" World*, 32 CARDOZO L. REV. 833 n.1 (2010-2011).

2. Richard Delgado, *The Myth of Upward Mobility*, 68 U. Pitt L. REV. 879, 879-80 (2006-2007).

3. United States v. Carolene Products, 304 U.S. 144, 153 (1938).

4. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 28 (1972) (describing common traits of those who could be considered a discrete and insular class). Those traits are what the author has deemed "requirements."

5. *Id.* (noting that notwithstanding the election of the first African American president, courts have regularly acknowledged that African Americans have been disenfranchised from the political system thus, fulfilling one of the traits exhibited by a group which will allow strict scrutiny).

6. *Id.* (noting the other trait/requirement articulated in Rodriquez for determining when strict scrutiny shall be applied).

Court reasons that those classes of persons who have a trait that they cannot change are given the highest level of judicial protection, and because one can change his economic status, there is no suspect classification and, therefore, no heightened scrutiny. No doubt, society's reliance on the belief that one can rise above her economic circumstances influences the Court's reluctance to entertain the idea that poverty is indeed a suspect classification; there is, of course, Oprah.[7] However, this blind eye to the immutability of poverty flies in the face of every government statistic produced by government agencies.[8]

Moreover, the failure of the Court to recognize that one of the manifestations of racial equality *is* economic equality results in so-called race-neutral legislation that is both discriminatory in its impact and intent, but without any Constitutional protection. One only need examine recently enacted voting requirement laws that have an economic component[9]and disproportionately impact African Americans to understand what happens when the Court fails to act to protect those who have been relegated to the bottom of the racial and economic heap.

Poverty has become synonymous with race, and it has been demonized in recent years. The idea that you are poor because you either caused it or deserved it has taken a foothold in mainstream America. Likewise, poverty, coupled with a history of racial discrimination, has created a class of Americans who continue to be disenfranchised and disadvantaged based upon both of those "traits."[10] Consequently, because of the convergence of race and poverty, the end result is that African Americans have also been demonized as a race. Clearly, this is suspect.

The issues raised in this article are both provocative and debatable, but Modarres has opened up a space in the discourse to think beyond the currently accepted standards for strict scrutiny and suspect classifications. What is really at issue is determining what kind of society America wants to be with respect to racial equality. In making that determination, both Congress and the Court have to decide that race and poverty have intersected, and the paradigm that has served the judiciary in the past must be rethought and reformulated if true racial and economic equality are ever to be realized.

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7. Oprah Winfrey is an extremely wealthy African American woman who is often used as the example of how in America one can go from rag to riches. However, she is really an "Outlier," a term coined by Malcolm Gladwell to describe those who are exceptions to the rule and outside of the norm.

8. Robin J. Anderson, *Dynamics of Economic Well-Being: Poverty, 2004-2006*, U.S. Census Bureau (Mar. 2011), http://www.census.gov/hhes/www/poverty/publications/dynamics04/P70-123.pdf.

9. ACLU, *2011:Voting Rights Under Attack in State Legislatures*, http://www.aclu.org/maps/2011-voting-rights-under-attack-state-legislatures (last visited Nov. 2, 2011).

10. It is the author's opinion that because of the intergenerational nature of poverty, it should be considered a "trait" by the Court.