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BLACK WOMEN AND THE CONSTITUTION: FINDING OUR PLACE, ASSERTING OUR RIGHTS

*Judy Scales-Trent**

*I woke up this morning, I could see
and I could breathe
Are there any rights I'm entitled to?*¹

Introduction

The economic, political, and social situation of black women in America is bad, and has been bad for a long time. Historically, they have borne both the disabilities of blacks and the disabilities which inhere in their status as women. These two statuses have often combined in ways which are not only additive, but synergistic—that is, they create a condition for black women which is more terrible than the sum of their two constituent parts.² The result is that black women are the lowest paid group in America today when compared to white women, black men or white men. They also face significantly higher unemployment rates than any of those groups. The poverty rates for black women, even controlling for age and education, are higher than the poverty rates for white women and black men. By the beginning of this decade seventy percent of all poor black families were supported by black women.³ Not surprisingly, studies have shown that when compared to whites and

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¹ B. Reagon, "Are There Any Rights I'm Entitled To?" in *Sweet Honey in the Rock* (Flying Fish Music, BMI 1976).

² See Almquist, *Untangling the Effects of Race and Sex: The Disadvantaged Status of Black Women*, 55 Soc. Sci. Q. 129, 135-36 (1975). Almquist demonstrates that the sum of the racial gap in unemployment rates (comparing unemployment rates of white and black men) plus the sexual gap (comparing same rates of white and black women), is not as great as the racial-sexual gap (comparing rates of white men and black women). This suggests that race and sex interact to magnify the effect of each independently.

³ See *infra* text accompanying notes 35-36.

black men, black women lack an overall sense of well-being and satisfaction, while possessing a strong sense of powerlessness and lack of control over their lives.⁴

Despite, or perhaps because of, this dual disability and its negative effects on life opportunities for black women, the problems of black women often go unrecognized. Black women have not been seen as a discrete group with a unique history, unique strengths and unique disabilities. By creating two separate categories for its major social problems—"the race problem," and "the women's issue"—society has ignored the group which stands at the interstices of these two groups, black women in America.⁵ For example, social reformist discussion tends to focus on the need to protect "minorities and women" from the hardships of discrimination. Although this term is intended to be inclusive, in fact, it misleads by overlooking those Americans who are both "minorities" and "women." A more accurate approach would be to use terms such as "male minorities and women," or "minorities and white women." These phrases acknowledge that other groups, including black women, do exist and that their problems can be addressed separately.

The legal system has incorporated the same dichotomous system—"minorities" and "women"—into its way of analyzing problems. Thus, the legal system, which is trying to protect the rights of "blacks" and "women," when faced with the existence of "black women," sometimes has difficulty categorizing this group.⁶ For example, during the debates over the employment discrimination provision of the 1964 Civil Rights Act, legislators discussed whether or not to add a prohibition against sex discrimination to the bill. Since the bill clearly would prohibit discrimination in employment based on race, there was some confusion and disagreement as to whether black women were going to be treated as blacks or as women for the purposes of

⁴ See *infra* text accompanying notes 54–55.

⁵ W.E.B. DuBois alluded to this dual identity in recounting the following conversation: "Wait till the lady passes," said a Nashville white boy. "She's no lady; she's a nigger," answered another. W.E.B. DuBois, *Darkwater: Voices from Within the Veil* 185 (1920).

⁶ Cf. Minow, *Foreword: Justice Engendered*, 101 Harv. L. Rev. 10, 70 (1987) (Chinese labeled "Indian" by 19th-century California authorities to fit them within recognized legal framework).

obtaining the protection of the statute. During the House debates, Rep. Griffiths, a white woman, expressed her concern that black women would be protected by the Act based on their race, whereas white women would have no protection unless sex were added as a prohibited basis of discrimination. She stated: “[I]f you do not add sex to this bill . . . you are going to try to take colored men and colored women and give them equal employment rights, and down at the bottom of the list is going to be a white woman with no rights at all.”⁷ Rep. Celler, a white man, tried to clarify the issue by noting that black women would be protected only on the basis of race, *not* sex. He explained, “if the Negress who applied for the job was disqualified because of the pigmentation of her skin, because she was colored, the act would apply.”⁸ The consensus was, however, that this distinction would not hold up in real employment situations.⁹ The clear distinctions the legislators wanted to make between race and sex discrimination became unclear once black women had to be categorized.

Although the legal system has a framework for analyzing legal issues involving black Americans, and a framework for analyzing legal issues involving American women, the system is not clear on how to analyze issues involving black American women—standing, as they do, with a foot in each camp. This Article discusses how the Constitution defines and protects black women. It then explores how black women should be defined by the Constitution—as women, as blacks, or as a distinct group with a legal identity of its own.

The first section of this Article discusses how a new group, with new status—black women—is formed by the combination of multiple statuses in society. This section also addresses how the definitions of a group, within the legal system and within the larger society, interact and reinforce each other. It then

⁷ E.E.O.C., Legislative History of Title VII and IX of the Civil Rights Act of 1964, at 3218 (1968). Rep. Smith of Virginia offered the “sex” amendment to Title VII in an effort to defeat the bill, which extended equal employment opportunity to blacks. Rep. Griffiths’ view, stated above, was strongly supported in debate by Rep. Smith, as well as by other white male representatives from the South: Rep. Andrews (Alabama), Rep. Rivers (South Carolina), Rep. Gathings (Arkansas). *Id.* at 3225–28.

⁸ *Id.* at 3217.

⁹ *See id.* at 3217–26.

discusses claims, brought by black women under Title VII of the 1964 Civil Rights Act, alleging employment discrimination because of race *and* sex, that is, because of their status as black women. This discussion serves both as an example of the problem of addressing "multiple status" discrimination in the law and as a guide as we move into the discussion of the Equal Protection Clause.¹⁰

The second section of this Article explores the question of how the group "black women" should be defined under the Equal Protection Clause of the Constitution. It argues that, whether defined as a subset of women, as a subset of blacks or as a discrete group, black women should be granted the highest level of protection available under the Constitution: the "strict scrutiny" review used for race-based classifications. This section will also consider whether or not the Court should grant black women a higher level of protection than the "strict scrutiny" review it grants to the black group because of the long-standing and egregious nature of the harm inflicted on black women and because of the dual stigma of being black and female.

The third section of the Article addresses two questions raised by the conclusions of the preceding section. The first question relates to the subset theory of formulating a class: if the group "black women" is entitled to "strict scrutiny" protection because its members are a subset of the black group, what of the black aged or the black retarded? Should all subsets of blacks be treated in the same manner? The second question arises from the argument that black women form a discrete group based on their history as black Americans and as female Americans, and that therefore this group is entitled to the highest level of protection currently available under the Equal Protection Clause. What then of other groups of women—Hispanic women or Asian women? Could they not make the same arguments as black women? Does this create problems in terms of the development of the Equal Protection Clause or in terms of factionalizing American society?

¹⁰ Section One of the fourteenth amendment to the U.S. Constitution provides, in pertinent part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."

I. Black Women as a Discrete Group

“Status” is a term which sociologically identifies one’s position in society.¹¹ Each status carries a set of norms, defined as a pattern of behavior expected of persons of that particular status. Status is frequently used as a means of ranking one’s social position or role.¹²

Black women possess two statuses which derive from attributes over which they have no control:¹³ membership in the black race and membership in the female sex. The combination of these two statuses creates a new status,¹⁴ and because it is a combination of two degraded statuses, black and female, the new status is a particularly low-ranking one.¹⁵ In order to support this degraded status, society has created a system of mythology and misinterpretations about black women¹⁶ which further limits the life opportunities of black women.

In a society which sees as powerful both whiteness and maleness, black women possess no characteristic which is associated with power. They are therefore treated by society in a manner which reflects a status different from, and lower than, both black men (who have the status ascribed to maleness) and white women (who enjoy the status ascribed to whiteness).¹⁷ This is in no way inconsistent with the fact that black women

¹¹ L. Duberman, *Social Inequality: Class and Caste in America* 38 (1986).

¹² E. Chinoy, *Society: An Introduction to Sociology* 39–40 (1961).

¹³ See Duberman, *supra* note 11, at 94.

¹⁴ Epstein, *Positive Effects of the Multiple Negative: Explaining the Success of Black Professional Women*, in *Changing Women in a Changing Society* 152 (1973).

¹⁵ See Almquist, *supra* note 2, at 1.

¹⁶ See generally B. Hooks, *Ain’t I a Woman: Black Women and Feminism* 51–86 (1981).

¹⁷ The fact that society as a whole sees black women as powerless, however, should not obscure the very real strengths and contributions of black women. For the contributions of black women in American history, see generally J. Jones, *Labor of Love, Labor of Sorrow: Black Women, Work and the Family, from Slavery to the Present* (1985); P. Giddings, *When and Where I Enter: The Impact of Black Women on Race and Sex in America* (1984); *Black Women in Nineteenth Century American Life* (1976); *Black Women in White America: A Documentary History* (1972). In fact, it has been argued that the very perception of the group as powerless has worked to the advantage of certain group members. See, e.g., Epstein, *The Positive Effects of the Multiple Negative*, *supra* note 14, at 7. But see Fulbright, *The Myth of Double Advantage: Black Female Managers in Slipping Through the Cracks: The Status of Black Women* (Simms and Malveaux eds. 1986) (rejecting Epstein’s hypothesis as “mathematically sound but intuitively illogical”).

are often treated badly along with black men solely because of their race; or because of their sex along with white women. A study on wages in New York State, conducted for the National Committee on Pay Equity in 1986, confirms this disparity in the treatment of black women.¹⁸ The researchers found that the wages of white women, minority men and minority women in job categories which were comprised largely of members of those groups, were systematically depressed.¹⁹ The studies further showed that the wages for women of color were depressed further than those of both men of color and white women.²⁰ For example, in New York State, job titles with high concentrations of minority men were devalued by 1.59 salary grades²¹ while those with a high concentration of white women were devalued by 1.95 grades. The devaluation rate for women of color, however, was 2.77 grades.²² Two of the myths supporting the degraded status of black women are that they do not need money and are not worth money. Thus both of these myths are perpetuated by the economic structure of American society.

Since black women share a negative group label imposed from the outside, they feel a need to come together for mutual protection. This "perceived need to band together in defense against domination or hostility" is one major source of cultural identity.²³ Although at one level it seems bizarre to request that

¹⁸ National Committee on Pay Equity, *Pay Equity: An Issue of Race, Ethnicity and Sex* (1987).

¹⁹ *Id.* at 99-100.

²⁰ *Id.* at 100. The women of color in this study were black and Hispanic.

²¹ *Id.* at 99-100. In New York State, an increase of one salary grade yields an increase of approximately five percent in salary.

²² *Id.* at 99-100.

²³ Karst, *Paths to Belonging: The Constitution and Cultural Identity*, 64 N.C.L. Rev. 304 (1986). The early steps in group formation occur when individuals become aware that they are being treated differently by society, and that this difference is based on the group definition. It has been suggested that throughout the 1960's, as black women moved into activities previously reserved for whites, they began to encounter patterns of sex as well as race discrimination. Thus black women began to see themselves as a "special interest group" fighting to overcome both racial and sexual oppression. S. Baxter & M. Lansing, *Women and Politics: The Visible Majority* 108-12 (1983). This may well be the reason for the rise of black feminism in the 1970's and 1980's, but it is merely another cycle in the history of black women. One historian suggests that black women began to organize and develop a consciousness as a group in the mid-nineteenth century with the development of the Negro women's clubs. G. Lerner, *The Majority Finds Its Past: Placing Women in History* 73 (1979). The black women's suffrage movement in the early twentieth century was yet another cycle in this history. See *infra* text accompanying notes 104-26.

“black women” be identified as a group with degraded social status, only through acceptance and utilization of this status will the group be able to work to defeat limitations imposed on its members from the outside.²⁴ The Constitution protects both the choice to turn inward to the cultural group, and the choice to use that group identity to participate fully in the institutions of the wider society.²⁵

One example of how black women have asserted themselves as a group within the legal system is the litigation they have initiated under Title VII of the Civil Rights Act of 1964,²⁶ alleging employment discrimination. We examine these cases in order to show why black women want to bring these claims as a distinct group. We also consider how the courts have addressed the issue of “multiple status” discrimination under this federal statute. We then explore the extent to which issues and

For constitutional purposes, however, it has never been required that there be unanimity among the group members in order for them to be considered a discrete group in American culture. The only requirement is that some group members, purporting to represent the group, persuade a court that they have been denied the equal protection of the laws based on that group status.

²⁴ Minow recognizes the dilemma that occurs when one claims rights founded in difference—that of re-emphasizing stigma, of strengthening the very stereotypes that produced the differences originally. Minow, *When Difference Has its Home: Group Homes for the Mentally Retarded, Equal Protection and Legal Treatment of Difference*, 22 Harv. C.R.-C.L. L. Rev. 111 (1987). Although she suggests an alternate “social relations” approach to equal protection analysis, wherein difference is not located in a group or group member but resides instead as a comparison between groups (*id.* at 138–39), Minow also states that it would be folly to abandon rights analyses at this time, due to the certainty provided by equating sameness of treatment with equality. *Id.* at 188.

²⁵ Karst, *supra* note 23 at 10. Karst’s thesis is that constitutional decisions about equal citizenship promote a sense of belonging in two ways. First, they weaken the caste system, thus providing more opportunity for those formerly excluded to move into mainstream culture, and second, they eliminate the stigma placed on certain groups, thereby making the group, and group membership, more attractive and valuable. *Id.* at 337–38. Thus one may both retain a strong connection to a particular cultural group, and still belong to America. *Id.* at 361. For example, the Court’s decision in *Lau v. Nichols*, 414 U.S. 563 (1974), upholding agency guidelines requiring, *inter alia*, bilingual education, both supports the right of Hispanic and Asian Americans to turn inward toward their cultural group and simultaneously encourages them to assimilate into the wider American society by providing more accessible education. Karst, *supra*, at 335. Similarly, decisions which protect the right of religious outsiders to practice their beliefs free of religious domination by the government allow them to maintain their cultural identity and still participate fully in the wider community. *See, e.g.*, *Torcaso v. Watkins*, 367 U.S. 488 (1961) (religious test for public office held unconstitutional). Karst *supra* at 358.

²⁶ 42 U.S.C. § 2000e.

problems raised under Title VII are transferable to the context of the Constitution.

A. *Claims of Race/Sex (Dual Status) Discrimination Under Title VII*

Title VII of the Civil Rights Act of 1964 prohibits discrimination in employment based on race, sex, religion, national origin or color.²⁷ All public and private employers with more than fifteen employees are required to treat all present and prospective employees in a non-discriminatory manner.²⁸ An aggrieved individual proves a case of individual or class disparate treatment by comparing herself to similarly situated employees of a different race, sex, or national origin, and by showing that she received less favorable treatment than that person (or class of persons) due to her group status.²⁹ A group of employees may also prove discrimination under Title VII by showing that a facially neutral employment practice has an adverse impact on that group and cannot be justified as a business necessity.³⁰

When groups allege employment discrimination based upon group status, often that discrimination is based upon one characteristic, such as religion, sex, or race. However, employers who discriminate do not always do so in such neat categories. Just as widespread discrimination against black women as a class has always existed in American society,³¹ widespread employment discrimination against the class has existed as well. Since the enactment of Title VII, black women have gone to court claiming discrimination, as individuals and as a group, based on their distinct identity as black women. In 1980, the Fifth Circuit became the first court of appeals to rule on the issue of whether black women are protected as a discrete class

²⁷ See Civil Rights Act of 1964 § 703, as amended, 42 U.S.C. §§ 2000-2002 (1983).

²⁸ See Civil Rights Act of 1964 § 701, 42 U.S.C. § 2000e (1983).

²⁹ See, e.g., *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248 (1981) (individual disparate treatment); *Teamsters v. United States*, 431 U.S. 324 (1977) (class-wide disparate treatment); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

³⁰ See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971). For a discussion of the Supreme Court's recent application of disparate impact theory to subjective employment decisionmaking, see *Recent Developments*, 24 Harv. C.R.-C.L. L. Rev. 264 (1989).

³¹ See *infra* text accompanying notes 39-44.

under Title VII, in *Jefferies v. Harris Cty. Community Action Association*.³² The court held that they are so protected, noting that discrimination against black females can exist even in the absence of discrimination against black men or white women.³³ The court further stated:

In the absence of a clear expression by Congress that it did not intend to provide protection against discrimination directed especially toward black women as a class separate and distinct from the class of women and the class of blacks, we cannot condone a result which leaves black women without a viable Title VII remedy.³⁴

The *Jefferies* court found further support for this position in the Supreme Court's holdings and analysis in the "sex plus" cases. In those cases the Court found that discrimination against certain subclasses of women violated Title VII.³⁵ Since then, every court which has ruled on the issue has agreed that black women can claim, as a distinct group, Title VII protection against discrimination based on the race/sex dual status.³⁶

While so holding, several courts nonetheless expressed concern as to how such claims would be proved and defended within the traditional evidentiary framework.³⁷ As one district court noted, "the prospect of the creation of new classes of protected

³² 615 F.2d 1025 (5th Cir. 1980).

³³ *Id.* at 1032.

³⁴ *Id.* at 1032.

³⁵ *Id.* at 1033. *See, e.g.*, *Phillips v. Martin Marietta Corp.*, 400 U.S. 542, 544 (1971) (policy which discriminates against women with pre-school age children violates Title VII's ban against sex discrimination).

³⁶ *Hicks v. Gates Rubber Co.*, 833 F.2d 1406 (10th Cir. 1987); *Judge v. Marsh*, 649 F. Supp. 770, 779-80 (D.D.C. 1986); *Chambers v. Omaha Girls' Club*, 629 F. Supp. 925, *aff'd* 834 F.2d 697 (8th Cir. 1987); *Graham v. Bendix*, 585 F. Supp. 1036, 1047 (D. Ind. 1984); *Carter v. Dialysis Clinic*, 28 FEP Cases 268, 269 (D. Ga. 1981). Other courts have accepted the class claims put forward by black women without specifically addressing the issue. *See, e.g.*, *Lewis v. Bloomsburg Mills*, 773 F.2d 561 (4th Cir. 1985); *Wright v. Missouri Dept.*, 512 F. Supp. 729 (E.D. Mo. 1981). *But see DeGraffenreid v. General Motors Corp.*, 413 F. Supp. 142, 143 (E.D. Mo. 1976) (black women not special Title VII class), *aff'd in part, rev'd in part on other grounds*, 558 F.2d 480, 484 (8th Cir. 1977) (suggesting disagreement with district court's reasoning rejecting claim of race/sex discrimination).

³⁷ *See, e.g.*, *Jefferies v. Harris Cty. Community Association*, 615 F.2d 1025, 1034 (5th Cir. 1980).

minorities, governed only by the mathematical principles of permutation and combination, clearly raises the prospect of opening the hackneyed Pandora's box."³⁸ For this reason, the court in *Judge v. Marsh* interpreted the *Jefferies* holding as limited to employment decisions based on two protected characteristics such as race and sex.³⁹ Such a limitation would, of course, permit black women to press their group claims under Title VII.

Black women have sought to claim this distinct status in court because it is often the only way that they can prove that they have been victims of remediable harm. The facts of the *Jefferies* case provide one example of the importance of how the claimant presents herself and her claim. In that case, Jefferies alleged that the employer discriminated in failing to promote her to the position of Field Representative in a county agency. The person who was promoted into the job she sought was a black man.⁴⁰ Jefferies was therefore not able to prove race discrimination. Moreover, since statistical proof showed that one of the previous Field Representatives had been a woman, and that almost half of the supervisory positions within the agency were held by women,⁴¹ the plaintiff could not prove sex discrimination. However, the evidence showed that every position for which she had applied had been filled either by men or white women.⁴² Therefore, she could logically claim that the employer had been discriminating against black women as a class. Thus Jefferies was able to focus the proof of discrimination on the harm committed against her as a black woman. Similarly, in *Lewis v. Bloomsburg Mills*,⁴³ the plaintiffs were able to show a hiring rate of black women in the range of five to eight standard deviations below the "expected" level.⁴⁴ They were able, there-

³⁸ *DeGraffenreid*, 413 F. Supp. at 145.

³⁹ 649 F. Supp. at 780. See also Shoben, *Compound Discrimination: The Interaction of Race and Sex in Employment Discrimination*, 55 N.Y.U. L. Rev. 793, 821 (1980) (suggesting courts should reduce the danger of statistical manipulation in compound discrimination cases by limiting the "compounding" to two protected characteristics).

⁴⁰ *Jefferies*, 615 F.2d at 1029.

⁴¹ *Id.* at 1030-31.

⁴² *Id.* at 1029.

⁴³ 773 F.2d 561 (4th Cir. 1985).

⁴⁴ *Id.* at 568-69. The probability that such a disparity could be explained by chance alone is approximately one in a thousand.

The Lawyer's Committee for Civil Rights Under Law has filed numerous lawsuits

fore, to make a *prima facie* showing of discrimination. If, however, they had been required to commingle their statistical hiring data with the hiring data for either black men or white women, the standard deviation might well have been lower, thereby masking the harm they had suffered, and making their argument weaker.

Title VII and the Equal Protection Clause of the fourteenth amendment to the United States Constitution are similar in that both are used by disfavored groups to gain equal treatment by society. Title VII and the Constitution are dissimilar, however, in many ways, such as coverage, burden of proof and remedies. The major difference, for the purposes of this Article, between Title VII and the Constitution is that under Title VII, protected groups are always treated in the same manner. Whether alleging discrimination because they are Jews, Mexican Americans, women or Asians, those covered by the statute receive the same level of protection, regardless of their group affiliation. A failure to hire claim raised by a group of women (sex discrimination) is assessed in the same way as one raised by a group of Mexican Americans (national origin discrimination). Even a group which presents itself with a race and sex claim under Title VII, for example black women, receives the same level of protection as all other groups covered by the statute.⁴⁵ The Equal Protection Clause differs from Title VII in that the level of protection changes depending upon which group is presenting the equal protection claim, and depending upon how much protection the Court thinks is warranted based on that group's social and historical status.⁴⁶ Thus, under Title VII, black women assert their rights as a separate group in order to focus the evidence on the particular harm where that harm is to black women as a

against southern textiles companies, such as Bloomsburg Mills, alleging failure to hire black women. Seymour, *A Point of View: Why Executive Order 11246 Should Be Preserved*, 11 Emp. Rel. L.J. 568, 575 (1986). Lawyers for the Committee discovered an industry-wide pattern wherein "white men and white women were hired for desirable jobs, black men were hired for low-paying, undesirable jobs, and black women were simply not hired at all."

⁴⁵ As the district court noted in *Judge v. Marsh*, recognition of black women as a distinct group under Title VII does not alter the proof framework. 649 F. Supp. at 780. Also, despite the concerns of the district court in *DeGraffenreid*, the group "black women" is neither seeking, nor entitled to "greater standing than . . . a black male" under Title VII. 413 F. Supp. at 145.

⁴⁶ See *infra* text accompanying notes 21-23.

class. Under an equal protection analysis, black women might proceed as a separate group not only to focus the evidence with particularity on the harm done to black women, but also in order to get the court to assess the evidence within a framework which offers more protection to black women than it might to white women or to black men.⁴⁷ It is because of this difference between Title VII and the Constitution that a new analysis is required to situate the group "black women" within the Equal Protection Clause, and to consider how this group should be treated by the courts.

II. The Equal Protection Clause

The way in which a group is defined for purposes of the Equal Protection Clause⁴⁸ both *describes* how that group is viewed by the larger society, and *defines* how that group *should be* viewed. The Court must see how the group has been treated historically by the larger society before it decides what level of protection it will provide the group. For example, in *City of Cleburne v. Cleburne Living Center*,⁴⁹ the Court had to decide whether a zoning ordinance which excluded group homes for the mentally retarded violated the Equal Protection Clause. In order to do this, the Court had to determine whether a classification based on mental retardation reflected "prejudice and antipathy" by society, "an outmoded notion" of the capabilities of the mentally retarded, or whether the mentally retarded have "distinguishing characteristics relevant to interests the State has the authority to implement."⁵⁰ The Court determined that the classification made by legislators based on mental retardation reflected not prejudice, but a concern for the real differences in ability to function; and therefore it refused to presume that even those legislative actions which disadvantaged the retarded were constitutionally invalid.⁵¹ Thus, the perception of the Court and society of the mentally retarded determined the level of constitutional protection the group was to be afforded.

⁴⁷ See *infra* text accompanying notes 31-47.

⁴⁸ See *supra* note 10, at 5.

⁴⁹ 473 U.S. 432 (1985).

⁵⁰ *Id.* at 441.

⁵¹ *Id.* at 448.

A. *The Framework for Group Protection Under the Equal Protection Clause*

The groups possessing the clearest definition, and therefore the highest level of protection under the Constitution, are racial and ethnic minorities. As the Court noted in *Korematsu v. U.S.*, "legal restrictions which curtail the civil rights of a single racial group are immediately suspect."⁵² Such laws are subject to strict scrutiny and will be sustained only if they serve a compelling state interest.⁵³ Thus, black Americans, both male and female, are entitled to the highest level of protection under the Constitution when confronted with state action which restricts them due to their race.

Women, along with several other groups,⁵⁴ come after racial and ethnic minorities in this hierarchy of protection. The Court has determined that a classification which has a negative effect on women is not "immediately suspect," although it is subject to a heightened standard of review. The government need only show that the classification is substantially related to an important government objective for it to be held constitutionally permissible under the Equal Protection Clause.

The third category of groups are those which have been defined by the Court as not needing and therefore not entitled to any heightened level of scrutiny. The Court will defer to the legislative body in cases of classifications based on age,⁵⁵ out of state persons,⁵⁶ new residents in the state⁵⁷ or the mentally retarded,⁵⁸ as long as the classification is "rationally related" to a legitimate state interest.

⁵² 323 U.S. 214, 216 (1944).

⁵³ *Graham v. Richardson*, 403 U.S. 365 (1971); *McLaughlin v. Florida*, 379 U.S. 184, 192 (1964).

⁵⁴ *See, e.g.*, *Craig v. Boren*, 429 U.S. 190, 197 (1976). *See also Plyler v. Doe*, 457 U.S. 202 (1982) (classification based on alienage); *Lalli v. Lalli*, 439 U.S. 259 (1978) (classifications based on illegitimacy).

⁵⁵ *Massachusetts Board of Retirement v. Murgia*, 427 U.S. 307 (1976).

⁵⁶ *Metropolitan Life Ins. Co. v. Ward*, 470 U.S. 869 (1985).

⁵⁷ *Williams v. Vermont*, 472 U.S. 14 (1985).

⁵⁸ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432. Several Justices have discussed the need to modify this tripartite system of equal protection analysis. *See, e.g.*, *City of Cleburne* at 449, (Stevens and Burger, concurring); 473 U.S. at 451 (Marshall, Brennan and Blackmun, concurring). This article's analysis is based on the tripartite system, however, because it is still the basis for the Court's analysis, and

Given this schema, black women can find specific protection under the Equal Protection Clause as either blacks or as women and, in fact, have already done so. Surely black women were protected as *blacks* in, for example, *Gomillion v. Lightfoot*,⁵⁹ which involved racial gerrymandering for voting purposes. Black women were granted protection as *women*, along with white women, in *Califano v. Westcott*,⁶⁰ which involved the use of a gender-based classification to allocate benefits to families with dependent children. If, however, a group of black women makes the claim that it is being denied the equal protection of the laws because its members are both black and women, it is not clear what kind of constitutional protection this group will be provided. Should the scrutiny level be "strict" because the women are black or should it be the lesser, heightened level of scrutiny because these blacks are women, or is the answer to acknowledge that black women constitute a discrete group in American culture whose position in society should be analyzed separately to determine what level of scrutiny should attach to state action which adversely affects them?

It is unlikely that a statutory classification which explicitly limits the opportunities of black women can be found today, although such classifications did exist in the past.⁶¹ It is not unlikely, however, that there are statutory classifications which place an overwhelming burden on black women.

The Court has held that facially neutral laws, which impose heavier burdens on a suspect class, do not alone violate the Equal Protection Clause.⁶² That type of discriminatory impact is insufficient; plaintiffs must be able to show discriminatory intent. Although such discriminatory intent may be inferred from the totality of the relevant facts, a statistical showing of adverse impact on the protected group, standing alone, is not equivalent to proof of a constitutional violation. The question then becomes whether black women can prove an intent to

because it is still true that the Court's choice of category is the decision which ultimately determines whether or not the state classification will be upheld. *See City of Cleburne*, 473 U.S. 432 (Justice White writing for the plurality).

⁵⁹ 364 U.S. 339 (1960).

⁶⁰ 443 U.S. 76 (1979).

⁶¹ *See infra* text accompanying notes 31-32.

⁶² *Washington v. Davis*, 426 U.S. 229 (1976).

discriminate against them, specifically, as a class. As the Court noted in *Hunter v. Underwood*, statistical proof of harm plus historical testimony tending to show an intent to discriminate would be sufficient to make out a constitutional violation.⁶³

Such a *prima facie* showing could be made as follows. In 1952, when seventy percent of all of the mothers with one or more illegitimate children in Georgia were black,⁶⁴ a Georgia legislator proposed a bill making it a misdemeanor for women to give birth to an illegitimate child.⁶⁵ If one were to transport this situation to the present, black women could show that the law imposes a substantially heavier burden upon them than upon any other group. Also, given statements by the state welfare director that he wanted to limit aid to the children of unwed black mothers,⁶⁶ the plaintiffs could make a credible equal protection argument.

B. The Protection of Black Women as a Class Within the Framework of the Equal Protection Clause

There are three possible ways to protect black women within the equal protection framework. The first is to treat black women as a subset of blacks or of women, and to grant their claims the level of protection accorded that group under the current tripartite analysis of the Court. The second is to treat black women as a discrete group seeking protection under the Constitution, and to assess that group on its own merits to determine the level of protection it should be afforded. One might analyze the situation of black women in this society as that of a "discrete and insular" minority which is unable to enjoy the benefits of full citizenship, and thus entitled to strict scrutiny protection under the Equal Protection Clause. Third, one might argue that since black women carry the burden of membership in the black group, which is already entitled to strict scrutiny protection, and in the disfavored female group, they should be entitled to *more* than strict scrutiny protection by the courts.

⁶³ 471 U.S. 222 (1985).

⁶⁴ *W. Bell, Aid to Dependent Children* 81 (1965).

⁶⁵ *Id.* at 67.

⁶⁶ *Id.* at 67.

1. *The Subset Theory*

How are black women to be sub-classified: in the black group, or in the female group? This question is important because the level of protection granted black women will differ depending upon whether they are placed in the black group or the female group. Yet the notion that the level of protection would change depending upon which way they are classified is bizarre since black women are always both black and women. To the extent that they are always burdened by both classifications, the level of protection should be constant. Moreover, since black women are always stigmatized by the race classification, they should always be provided the highest level of protection available under the Constitution. If we accept the Court's formulation that race classifications are inherently more suspect than sex classifications, we must therefore conclude that the Court considers the status of racial minorities to be "lower" than the status of women. Thus if black women are provided only intermediate scrutiny, as women, a portion of the burden they carry will have gone completely unaddressed by the legal system. As long as race is part of the group identity, any classification which limits their opportunities should be reviewed under the highest level of scrutiny.

2. *The "Discrete and Insular Minority" Theory*

The second possibility is to treat black women as a discrete group seeking protection under the Constitution, and to assess the group on its own merits to determine the level of protection it should be afforded. Black women are entitled to the greatest constitutional protection under the Equal Protection Clause because they can be viewed just as the Court has viewed other groups which have sought the same level of protection. In making this determination, the Court has traditionally looked at several criteria to determine if a group is a "discrete and insular" minority,⁶⁷ and thus unable to enjoy the benefits of full citizenship. The basic criteria are: whether or not the group is defined

⁶⁷ U.S. v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1937).

by immutable characteristics,⁶⁸ whether or not there has been historical prejudice against the group,⁶⁹ and the extent to which the group is politically powerless.⁷⁰ A classification which reflects deep-seated prejudice against a particular group would be equally suspect.⁷¹

a. Immutable Characteristics

Race, gender, national origin, mental retardation and (il)legitimacy are all immutable characteristics which often adversely affect the way certain people are treated in our society. Hence, the Court is more likely to see a group as one needing protection if one of these characteristics is part of its social group identity. This category has not been applied consistently or rigorously, however. Some groups classified on the basis of their immutable characteristics, such as mentally retarded citizens, have not been given the highest level of protection,⁷² whereas other groups defined by mutable characteristics, such as alienage, have been granted such protection.⁷³ Despite this confusion, clearly race and sex are immutable characteristics, and black women thus satisfy this prong of the test.

b. Historical Prejudice

The role of history is critical in the determination of what level of protection a group receives. As Justice Holmes has noted, in determining which groups are "discrete and insular," "a page of history is worth a volume of logic."⁷⁴ Justice Marshall has further stated on this point that:

The lessons of history and experience are surely the best guide as to when, and with respect to what inter-

⁶⁸ See, e.g., *Frontiero v. Richardson*, 411 U.S. 677 (1973).

⁶⁹ See, e.g., *San Antonio v. Rodriguez*, 411 U.S. 1, 28 (1973).

⁷⁰ See, e.g., *Mass. Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); *Graham v. Richardson*, 403 U.S. 365, 372 (1971).

⁷¹ See, e.g., *Mississippi Univ. v. Hogan*, 458 U.S. 718 (1982); *Plyler v. Doe*, 457 U.S. 202, 216 (1982).

⁷² See *supra* text accompanying notes 20-21.

⁷³ See *Plyler v. Doe*, 457 U.S. 202 (1982).

⁷⁴ *New York Trust Co. v. Eisner*, 256 U.S. 345, 349 (1921).

ests, society is likely to stigmatize individuals as members of an inferior caste or view them as not belonging to the community. Because prejudice spawns prejudice, and stereotypes produce limitations that confirm the stereotype on which they are based, a history of unequal treatment requires sensitivity to the prospect that its vestiges endure.⁷⁵

History proves that black women suffered a dual degradation, both as black slaves and as women. Although black women did not suffer any more than black men as a result of slavery, it is fair to say that they suffered differently, because they were women. As blacks they were exploited for their physical strength in the production of crops; as women, they performed a reproductive function which was crucial to the economic interests of the slaveholders.⁷⁶ As one historian notes, "Blacks constituted a permanent labor force and metaphor that were perpetuated through the Black woman's womb."⁷⁷ The reproductive function became especially important after 1801, when it became illegal to import slaves from Africa into the United States.⁷⁸

Black slave women were sexually exploited for other than reproductive reasons. Their objectification as sexual beings also served the function of demonstrating power, and of terrorizing the entire slave community. Rape and the constant threat of rape was not only a means of crushing attempts at resistance by black women, but was also a means of humiliating and symbolically attacking black men.⁷⁹

Statutes enacted during the pre-Civil War period legitimated this power relationship.⁸⁰ For example, statutes in Virginia simultaneously provided that: it was not unlawful for a white man to have sex with a black female slave; it was a crime for whites

⁷⁵ *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, (1985) (Marshall, J., concurring).

⁷⁶ J. Jones, *supra* note 17, at 11-12; Hine and Wittenstein, *Female Slave Resistance: The Economics of Sex*, in *The Black Woman Cross-Culturally* 296 (F. Steady ed. 1981).

⁷⁷ Giddings, *supra* note 17, at 39.

⁷⁸ Hine, *supra* note 76, at 296.

⁷⁹ Davis, *Reflections on the Black Woman's Role in the Community of Slaves*, 12 *Black Scholar* 3, 12-14 (1981); Lerner, *supra* note 23, at 69-73.

⁸⁰ Giddings, *supra* note 17, at 43-45.

to marry blacks; and the status of a child was based on the mother's status. These laws encouraged the exploitation of black women by white men, and discouraged the legitimation of their sexual relationships by marriage.⁸¹

During this period, black women unlike white women were often grouped along with white and black men as persons who were to till the soil.⁸² A 1643 Virginia statute, for example, stated that "tithable persons"—those who worked the ground, whether slave or free—included all adult men and black women. Maryland enacted a similar statute in 1664.⁸³

After the Civil War, both the states and the federal government acted in ways inimical to the interests of black women, treating them, again, differently from white women and black men. Guidelines created by the Freedman's Bureau required that black women receive lesser wages than black men, based on their sex.⁸⁴ Agents of the Bureau also gave less monetary support to former slave families with female heads of households than to those with male heads of households.⁸⁵

The subsequent history of black women as workers followed slave history by reinforcing the view of black women as either domestic servants or manual laborers.⁸⁶

⁸¹ A.L. Higginbotham, *In the Matter of Color: Race and the American Legal Process: The Colonial Period* 43 (1978). For a similar discussion of the laws of Georgia and Pennsylvania, see *id.* at 58 and 251.

⁸² Anna Julia Cooper, born a slave, spoke poignantly of the struggle of black women to protect themselves and their daughters from sexual exploitation:

Yet all through the darkest period of the colored women's oppression in this country her yet unwritten history is full of heroic struggle, a struggle against fearful and overwhelming odds, that often ended in a horrible death, to maintain and protect that which woman holds dearer than life. The painful, patient, and silent toil of mothers to gain a fee simple title to the bodies of their daughters, the despairing fight, as of an entrapped tigress, to keep hallowed their own persons, would furnish material for epics.

Black Women in Nineteenth Century American Life, *supra* note 17, at 329 (statement made by Cooper in 1893 to the Congress of Representative Women, on the status of black women).

⁸³ Giddings, *supra* note 17, at 36-37; W. Jordan, *White Over Black: American Attitudes Toward the Negro, 1550-1812*, at 77 (1968).

⁸⁴ Giddings, *supra* note 17, at 36-37.

⁸⁵ Jones, *supra* note 17, at 62.

⁸⁶ *Id.* at 62.

The subsequent history also followed slave history by reinforcing the view of black women as sexually available and unprotected from sexual exploitation or attack. Black Women in White America, *supra* note 17, at 149-63; Ellis, *Sexual Harassment*

After the Civil War, black women worked largely in rural areas in the South as sharecroppers or in urban areas as domestics in white households. Since the image of black women was limited to that of a domestic, and not, for example, worker in the cotton mills,⁸⁷ domestic jobs were "reserved" for black women.⁸⁸ Therefore, black women, unlike the women of any other group, replaced the men in their families as primary breadwinners⁸⁹ while still bearing responsibility for the traditional "wifely" duties. The exploitation of black women as domestics was not a regional phenomenon, however. Despite the fact that the black women who migrated to the North tended to be younger and better educated than those left behind in the South,⁹⁰ by 1905 ninety percent of all the black women working in New York City were domestics.⁹¹ Black women were completely excluded from sales and clerical work.⁹²

During the Depression, southern black women returned to farm work and migratory labor camps; in the North, domestic servants were forced to look for jobs through "slave markets." Wages dropped drastically. A survey of wages of domestics in Mississippi showed that the average weekly pay was less than two dollars per week. In Philadelphia in 1932, domestics earned between five and twelve dollars per week.⁹³ Despite the overall benefits of the public works projects of the thirties that were initiated by the Roosevelt Administration, many job training and job referral opportunities were closed to black women.⁹⁴ This

and Race: A Legal Analysis of Discrimination, 8 Notre Dame J. of Leg. 30, 39-41 (1981). See also Gruber and Bjorn, *Blue-Collar Blues: The Sexual Harassment of Women Autoworkers*, 9 Work and Occupation 271, 284-85 (1982) (black women harassed more frequently and more severely than white women). The dynamic which encourages the sexual exploitation of black women workers also exists outside the work environment, and influences the likelihood of sexual attack. Black women are between two to three times more likely to be raped than white women. The profile of the most frequent rape victim in this country is a young woman, divorced or separated, poor, and black. A. Karmen, Introduction to Part II Women Victims of Crime, in *The Criminal Justice System and Women* 188 (Price & Sokoloff eds. 1982).

⁸⁷ Giddings, *supra* note 17, at 135-36.

⁸⁸ *Id.* at 112.

⁸⁹ *Id.* at 112.

⁹⁰ *Id.* at 155.

⁹¹ *Id.* at 156.

⁹² *Id.* at 178.

⁹³ *Id.* at 206-07.

⁹⁴ Jones, *supra* note 17, at 216-18.

was directly attributable to southern whites' concern that helping black women find better jobs would eliminate an important source of cheap labor for white households and for the fields. Thus, public works officials in the South manipulated wages and job assignments to preserve racial and sexual inequities.⁹⁵

These inequities were maintained throughout World War II, as black women moved into jobs in industry. There they were assigned to the most dangerous, backbreaking tasks in segregated job categories.⁹⁶ Black women were routinely assigned to jobs that required them to stand in rooms filled with toxic fumes. White women, on the other hand, were given the jobs which allowed them to sit in well-ventilated rooms.⁹⁷ Black women were also routinely assigned to work the night shift.⁹⁸ The Armed Forces discriminated against black women by forcing them to maintain the role of domestic. Army records disclose that in at least one instance, black women were court-martialed for refusing to accept kitchen assignments, a job to which white women in the Army were not assigned.⁹⁹

Within the past 20 years, the relative economic status of those black women with jobs has improved, in large part due to the increased convergence of their job structures with those of white women.¹⁰⁰ This convergence only underscores the fact that black women are moving into essentially low-status, dead-end jobs. Despite this convergence, black women are still the lowest-paid group when compared to white women, black men, or white men.¹⁰¹ Even with the improvements, black women still face significantly higher unemployment rates than any other group. For example, black female unemployment rates have been twice those of white women throughout the past decade.¹⁰²

⁹⁵ *Id.* at 216–21.

⁹⁶ *Id.* at 240.

⁹⁷ *Id.* at 240.

⁹⁸ *Id.* at 240.

⁹⁹ *Id.* at 253.

¹⁰⁰ P.A. Wallace, *Black Women in the Labor Force 23–25* (1980).

¹⁰¹ U.S. Dep't of Labor, *Times of Change: 1983 Handbook on Women Workers 29* (1983) [hereinafter *Times of Change*]. See also National Committee on Pay Equity *supra* note 18, at 15–16.

¹⁰² Jones, *Black Women and Labor Force Participation: An Analysis of Sluggish Growth Rates*, in *Slipping Through the Cracks*, *supra* note 17, at 17. In 1981, the unemployment rate for black women was 15.6%, compared to 8.2% for white women. *Times of Change*, *supra* note 101, at 29. This unemployment ratio has remained constant

The history of dual oppression which has operated and continues to operate in the marketplace thus continues to limit the life opportunities of black women. The effects on the black community are devastating. In 1970, fifty-six percent of all poor black families were maintained by women; by 1981, that figure had jumped to seventy percent.¹⁰³ In 1981, there were 22.1 maternal deaths per 100,000 live births to black women, compared to 6.5 maternal deaths per 100,000 births for white women.¹⁰⁴

c. Political Powerlessness

The political powerlessness of black women is best illustrated by their struggle for the right to vote. As members of two disenfranchised groups, they were forced to struggle twice, both as blacks and as women, to gain a meaningful franchise. Moreover, as the least powerful members within both the black and the female groups, black women have had to fight to make their voices heard at all. Thus the heaviest burden in terms of improving their social condition has fallen on, and continues to fall on, the group occupying the weakest political position.¹⁰⁵

During the debates on whether the franchise should be extended to black men through the fifteenth amendment,¹⁰⁶ some black women hesitated to support the measure because they were not sure they could count on black men for protection. Sojourner Truth, for example, opposed the amendment, fearing the even greater oppression of black women.¹⁰⁷ In the formal

during a period when young black women have increased their median years of schooling faster than have young white women, suggesting that education yields lower returns to black women than to whites. *Id.* at 17-19.

¹⁰³ Times of Change, *supra* note 101, at 29. The comparable increase for white families is from thirty percent to thirty-nine percent. *Id.* at 29.

¹⁰⁴ Headen and Headen, *General Health Conditions and Medical Insurance Issues Concerning Black Women* in Slipping Through the Cracks, *supra* note 17, at 187.

¹⁰⁵ See M. Marable, *How Capitalism Underdeveloped Black America: Problems in Race, Political Economy and Society* 103 (1983) ("Historically, Black women have carried the greatest burden in the battle for democracy in this country.")

¹⁰⁶ Section 1 of the fifteenth amendment states: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

¹⁰⁷ Giddings, *supra* note 17, at 64-65.

political conventions held by blacks during this period, there were no reported women delegates.¹⁰⁸

Many white women worked hard for the passage of the fifteenth amendment, hoping that they could link the issues of black suffrage and women's suffrage.¹⁰⁹ This, however, did not prove possible.¹¹⁰

After passage of the fifteenth amendment, social reformers turned to considering whether or not the franchise should be extended to women through the nineteenth amendment to the Constitution.¹¹¹ At this time, black women suffragists struggled for their enfranchisement in black women's organizations, or in segregated chapters of white women's organizations; they marched for their enfranchisement in segregated suffrage parades.¹¹² However, many powerful forces in the country were convinced that extending the franchise to black women posed considerable risks. White women in the women's movement were concerned that requesting extension of the franchise to

¹⁰⁸ Jones, *supra* note 17, at 66.

¹⁰⁹ E. DuBois, Elizabeth Cady Stanton, Susan B. Anthony: Correspondence, Writings and Speeches 89-90 (1981). However, other white feminists, including Elizabeth Cady Stanton and Susan B. Anthony, refused to support the fifteenth amendment once it became clear that the franchise would be extended to black men only. *Id.* at 91.

At least one legislator, Senator Cowan of Pennsylvania, linked the issues of black suffrage and women's suffrage when he stated: "If I have no reason to offer why a Negro man shall not vote, I have no reason why a white woman shall not vote." G. Myrdal, *An American Dilemma* 1076 (1944). Extension of the franchise to black women was, in his view at least, not even under consideration.

¹¹⁰ The anger of white women suffragists at losing this issue often took on racist tones, showing once again the political division between black and white women. Elizabeth Cady Stanton, a co-founder of the American Equal Rights Association, "made derogatory references to 'Sambo' and to the enfranchisement of Africans, Chinese, and all the ignorant foreigners the moment they touch our shores." E. Flexner, *Century of Struggle* 147 (1975). Almost one hundred years later, during the legislative debates on Title VII, Rep. Martha Griffiths drew on this history and this anger when she stated, in discussing the possibility that Congress would prohibit employment discrimination based on race, but not on sex:

It would be incredible to me that white men would be willing to place white women at such a disadvantage except that white men have done this before . . . your great grandfathers were willing as prisoners of their own prejudice to permit ex-slaves to vote, but not their own white wives.

E.E.O.C., *supra* note 7, at 3219.

¹¹¹ The nineteenth amendment states, in part: "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

¹¹² Lerner, *supra* note 23, at 104.

black women would damage their chances of gaining the vote for themselves.¹¹³ Southern states were concerned about what the extension of the vote to black women would mean for their way of life. In 1914, for example, in South Carolina there were 100,000 more blacks than whites and the largest group of potential voters was black women.¹¹⁴ Senator Smith of South Carolina voiced concern about this fact when he stated: "If it was a crime to enfranchise the male half of this race, why is it not a crime to enfranchise the other half? . . . [I]t was perfectly competent for the legislatures . . . to so frame their laws as to preserve our civilization without entangling legislation involving women of the black race."¹¹⁵ This concern about extending the vote to black women was not limited to the South. For example, in 1914, after enfranchising women, the Illinois state legislature attempted to eliminate black women from the rolls.¹¹⁶ On the federal level, while the suffrage bill was in the southern-dominated Senate, several congressmen proposed amendments which would have limited the scope of the amendment to white women.¹¹⁷

When black women finally obtained the vote under the nineteenth amendment, whites harassed them with the intention of rendering that vote useless. In various states black women were subject to tax and property requirements imposed on them exclusively, were given special "educational tests," or were forced to wait to register to vote until after white women had registered.¹¹⁸

The history of political powerlessness of black women becomes even more apparent when examining the number of group members who are elected officials on the local, state and federal

¹¹³ Terborg-Penn, *Discontented Black Feminists: Prelude and Postscript to the Passage of the Nineteenth Amendment*, in *Decades of Discontent: The Women's Movement, 1920-1940*, at 263 (Scharf & Jensen eds. 1983). See also Giddings, *supra* note 17, at 162, for a statement by the president of the National American Women's Association that black women should sacrifice themselves and apply for the vote later.

¹¹⁴ Giddings, *supra* note 17, at 123.

¹¹⁵ Flexner, *supra* note 110, at 314.

¹¹⁶ Giddings, *supra* note 17, at 159. Senator Borah of Idaho also stated publicly that "[n]obody intends that the two and a half million Negro women of the South shall vote . . ." Flexner, *supra* note 110, at 314-15. See also B.H. Andolsen, *Daughters of Jefferson, Daughters of Bootblacks: Racism and American Feminism* 67-68 (1986).

¹¹⁷ Giddings, *supra* note 17, at 159.

¹¹⁸ *Id.* at 165.

government levels. If one's power be determined by the ability to elect representatives who are members of one's group and who are therefore more likely to represent that group's interests, the statistics for black women tell a tale of little power. In 1985, there were 392 black elected officials in the legislative bodies of forty-two states and the Virgin Islands. Of that number, only seventy-four were black women.¹¹⁹ Of the twenty black congressmen at the federal level, only one was a black woman.¹²⁰ Of the twenty-six black mayors of cities with a population over 50,000, only one was a black woman.¹²¹

If political power be determined by wealth, all indicators again point to black women as a group without power. Black women are over-represented among the poor. For example, although the incidence of poverty among all women with children under age eighteen is high, the poverty rate for black mothers is approximately three times that of white mothers.¹²² Even controlling for age and education, the poverty rates for black women are generally two to four times higher than the rates for white women.¹²³ Their poverty rate is also higher than that of black men. For example, twenty-eight percent of all black women who have finished high school are poor, compared to sixteen percent of black male graduates.¹²⁴

Analyses of social indicators for political alienation also demonstrate that black women feel politically powerless. A 1972 study by the Center for Political Studies showed that black women are "polarized in a set of attitudes different from those of black men and whites": a set of attitudes exemplified by a sense of powerlessness and lack of control over their lives; a sense of being forced to live "unsatisfying and insecure lives." Black women, compared to white women and black and white

¹¹⁹ Joint Center for Political Studies, *Black Elected Officials: A National Roster 2, 19-20* (1985).

¹²⁰ *Id.* at 16.

¹²¹ *Id.* at 18. In 1986 there were 843 elected and appointed black judges in the United States. Of that number, only 151 were women. See Joint Center for Political Studies, *Elected and Appointed Black Judges in the United States* (1986).

¹²² *Times of Change*, *supra* note 101, at 100. The poverty definition used here is that established by the federal government to determine eligibility for certain federally funded assistance programs. *Id.* at 99.

¹²³ *Id.* at 103.

¹²⁴ *Id.* at 105. The comparable figure for white women is 8.8%.

men, were shown to have the lowest levels of trust in the political process and the lowest feelings of political efficacy.¹²⁵ A 1976 study of the quality of American life reinforced this finding. The analysts discovered that black women were more negative in their overall sense of well-being and satisfaction than black men or whites and concluded that “[t]he quality of life of the black female appears less positive than that of any of the other segments of the population”¹²⁶ Thus, both history and social science demonstrate that black women, a group defined by two immutable characteristics, have suffered over the centuries from prejudice based on their group characteristics. As a result, black women have suffered, and continue to suffer from political powerlessness within our society. Therefore, black women clearly belong to a group which is entitled to be classified as “discrete and insular” for purposes of determining the level of scrutiny applicable to equal protection claims.

3. *The “More than Strict Scrutiny” Theory*

The final possibility is that black women—who are burdened by the double stigma of race and sex—are entitled to more than even the “strict scrutiny” level of review accorded when there is a state action which harms based on race. If the race stigma alone is sufficient to trigger strict scrutiny review, the race stigma plus an additional stigma (sex) should entitle the group to an even higher level of scrutiny and protection by the Court. As noted above, these double burdens are at least additive. In some instances, the dual burdens create a level of harm even greater than the sum of the parts.¹²⁷

How could a court provide more than a “strict scrutiny” level of review? It could ease the burden of proof in equal protection cases brought by black women by lessening the requirement for a showing of intent, for example. By so doing, a court would, in effect, be taking judicial notice of the double

¹²⁵ Baxter and Lansing, *supra* note 23, at 91, 97–99.

¹²⁶ A. Campbell, P.E. Converse and W.L. Rodgers, *The Quality of American Life: Perceptions, Evaluations, and Satisfaction* 464–65 (1976). Cf. A. Lorde, *Sister Outsider: Essays and Speeches* 145 (1984). (“Every black woman in America lives her life somewhere along a wide curve of ancient and unexpressed angers.”)

¹²⁷ See *supra* text accompanying notes 7–9.

burdens carried by black women, and the likelihood that the group identity continues to operate to their detriment.¹²⁸ Similarly, in an employment discrimination case it could require a lesser showing of harm before requiring a state employer to engage in affirmative action for black women. There are many ways a court could recognize that "race plus another burden" should be protected at the level of "strict scrutiny plus more."¹²⁹ In analytical terms, such a step is a logical extension of the equal protection framework created by the Court. Realistically, however, it seems unlikely that the Court will break ground for a group that it barely acknowledges as a separate class. Nonetheless, it is a logical next step for a court brave enough to take it.

III. Further Questions

This Article argues that black women can be viewed as a subset of blacks, and are therefore entitled to the highest level of constitutional protection by virtue of their membership in the black class.¹³⁰ It further argues that based on their history and position in society, black women can be seen as a discrete group which can be assessed on its own for purposes of determining the level of protection it should receive under the Equal Protection Clause.¹³¹ These conclusions raise new questions about the further direction of developments under the Equal Protection Clause, questions which are addressed in this section.

The first question concerns the theory that black women are a subset of the black group, and therefore qualify for the

¹²⁸ Cf. *Bundy v. Jackson*, 641 F.2d 934, 953 (D.C. Cir. 1981) (burden of proof eased in Title VII retaliation claim where plaintiff already proved underlying claims of sexual harassment).

¹²⁹ Although I am convinced by the argument that the double burden carried by black women entitles them to more than strict scrutiny review, it is personally difficult to argue that black women should get more protection than black men under the Equal Protection Clause. Black men are family and it seems an unhappy splitting of the family to say that the women of that family are entitled to more than the men. The reality is, however, that black women are not creating factions within the black community but are responding to them. A legal analysis which recognizes the factions created by the larger society is only recognizing the historical and social realities which make certain remedies necessary.

¹³⁰ See *supra* text accompanying notes 26-27.

¹³¹ See *supra* text accompanying notes 26-46.

highest level of protection based on that status.¹³² If this theory applies, does it follow that other subsets of black groups, with secondary characteristics which do not warrant the highest level of protection (i.e., aged, retarded), merit the same consideration as black women? That is, should the black aged and the black retarded also be treated as the black female group?

The answer is yes. Subsets, such as the black aged and the black retarded, are in the same analytical position as black women for purposes of the Equal Protection Clause, and should be treated the same way. Since the stigma of race always exists in these instances, the level of protection accorded the race group must also be granted to subsets of that group.

In its decision on "dual discrimination" claims brought under Title VII of the Civil Rights Act of 1964, the Fifth Circuit maintained, in dicta, that such claims should be limited to those groups sharing two immutable traits, such as race and sex.¹³³ That analysis applied here would distinguish between, on the one hand, black women or the black retarded (all immutable traits), and on the other, the black aged (age, though irreversible, is not immutable). Such distinctions could be made, but would make no analytical sense.

One way of thinking about this question is to ask why, in any given case, the Court declined to extend heightened review to a particular group. What did the group lack that made the Court feel comfortable about giving it a lesser level of protection? In the case of the aged, the Court reasoned that the aged "have not experienced a 'history of purposeful unequal treatment' or been subjected to unique disabilities on the basis of stereotyped characteristics not truly indicative of their abilities."¹³⁴ This void, however, is filled by adding membership in the black group, a group which has experienced such a history and has been subjected to such disabilities.¹³⁵ Thus, the combined category "black aged" possesses the indicia of other groups which qualify for "strict scrutiny" protection. Due to the

¹³² See *supra* text accompanying notes 26-27.

¹³³ *Jefferies v. Harris City Community Action Association*, 615 F.2d 1025, 1033-34 (5th Cir. 1980).

¹³⁴ *Mass. Board of Retirement v. Murgia*, 427 U.S. 307, 313 (1976).

¹³⁵ *Id.* at 313.

force of the race stigma in this society, any group which is part of the black group must be granted the highest level of protection available under the Constitution.

A second issue is raised by the argument that black women can be considered a discrete group for purposes of the Equal Protection Clause. If this is true, what about Asian women and Hispanic women? Where do these double categories stop?

In *Judge v. Marsh* the district court allowed a group of black women to bring a Title VII claim based on their status as black women, but expressed concern that creating such subgroups turned the statute into a "many-headed Hydra."¹³⁶ The court was concerned that subgroups for every possible combination of race, color, sex, national origin, and religion could be created, and wondered "whether any employer could make an employment decision under such a regime without incurring a volley of discrimination charges."¹³⁷ The concern, then, is with the "slippery slope": What are we letting ourselves in for if we start down this path? In a recent case which raised similar "slippery slope" concerns, the Court stated that the petitioner lost the case because there was "no limiting principle" to the type of challenge he brought to the Court.¹³⁸ The task here, then, is to see if there is a "limiting principle" to the notion that groups may define themselves in different ways for purposes of constitutional protection.

In reality, because of the way the Equal Protection Clause has developed, it is already self-limiting. A group demanding recognition and protection from the Court must show that it is discrete, insular and powerless. It must show as well that this group definition is causing it to be denied the equal protection of the laws. To the extent that other "dual" groups—Asian women, for example—could show a group identity and harm to the group based on that identity, it is hard to see why they should not be equally protected. There is no way to read the language of the Equal Protection Clause to limit the scope of its protection to a small number of groups.¹³⁹

¹³⁶ 649 F. Supp. 770, 780 (D.D.C. 1986).

¹³⁷ *Id.* at 780.

¹³⁸ *McClesky v. Kemp*, 481 U.S. 279, 283 (1987).

¹³⁹ Courts have accepted the argument that the scope of Title VII is limited to

Another approach to the "many-headed Hydra" problem would be to imagine the worst possible scenario if this type of group redefinition were permitted. Again, it is instructive to look at the concerns raised by courts under Title VII as a starting point. In *Judge v. Marsh*, the court was concerned that an employer would not be able to make any employment decision at all without fear of facing a discrimination claim if the claims of subgroups were allowed. Despite the court's concern about the future, this statement reflects today's reality. The Supreme Court has already decided that Title VII's prohibition of race discrimination protects white workers as well as black, and that its prohibition against sex discrimination protects male workers as well as female.¹⁴⁰ If an employer is covered by Title VII, it is true at present that she cannot make any employment decision at all without considering the possibility of a Title VII charge. Similarly, every citizen is protected by the Equal Protection Clause. Ultimately, any "dual discrimination" claim raises issues of proof.¹⁴¹ The question then becomes whether the group alleging harm will be allowed to focus the proof on the harm caused them by their dual status and thus be able to receive a remedy.¹⁴²

certain finite groups, due to the specific statutory language in Section 703(a) prohibiting employment discrimination based on an individual's "race, color, religion, sex, or national origin." See, e.g., *De Santis v. Pacific Telephone & Telegraph Co.*, 608 F.2d 327 (9th Cir. 1979) (homosexuals not protected under Title VII ban against sex discrimination). However, even where the statute speaks of certain defined groups, the courts have been unwilling to read the statute so narrowly as to exclude claims brought by a class of black women, where the statute already protects blacks and women against discrimination under the prohibition against discrimination based on race or sex, and where such a reading would allow discrimination to go unremedied. See *supra* text accompanying notes 14-18.

¹⁴⁰ See *Newport News v. EEOC*, 462 U.S. 669 (1983) (men protected against sex discrimination); *McDonald v. Sante Fe Trail Transportation Co.*, 427 U.S. 273 (1976) (whites protected against race discrimination). It should also be noted that when white men have alleged sex/race bias in "reverse discrimination" suits, courts have assumed without discussion that the dual category "white males" is protected by Title VII. *Shoben, supra* note 39, at 798.

¹⁴¹ Cf. *Judge v. Marsh*, 649 F. Supp. 770, 780 (D.D.C. 1986) (recognizing new group does not change employer's burden of proof under Title VII).

¹⁴² An alternative approach to this problem would be to balance the burden of the employer against the burden carried by black women. Note that the district court in *Judge v. Marsh* was concerned with the problems an employer might have to face if confronted with this "many-headed Hydra." Surely, if weighed in the balance, the rights of black women to be free from employment discrimination are stronger than the right of the employer to be able to make employment decisions without thinking through the consequences of those decisions on protected classes.

Conclusion

This Article presents a way to view “new” groups which have reconstituted themselves from groups formally recognized and granted particular constitutional status by the Court. A group may either define itself as a subset of one of the groups, or as a new, discrete group created by a unique history and place in society. Because all “persons” are protected by the Equal Protection Clause, and because there is no reason to limit the number of groups protected thereunder, how aggrieved persons form themselves into groups should present no problems to a court.

This Article also discusses the level of constitutional protection which should be granted to black women, a group which can claim membership in two groups—blacks and women, each of which has been viewed differently by the Court. It argues that, whether viewed as a subset of the black group, or as a distinct group in itself, black women are entitled to the “strict scrutiny” level of constitutional protection. Although the subset argument might well be the stronger one, due to the clarity of the Court’s recognition of race as a particularly unjustifiable mode of classification, this Article maintains that black women also have a strong argument that they are a “discrete and insular” minority, that they are the object of historical prejudice and stereotypes, and that this prejudice and insularity affect their ability to use the political processes to protect their interests. From the colonial period to the present, various state and private actors have singled them out for treatment different than that meted out to white women or black men. This has resulted in the creation of a group which is overrepresented among those living in poverty, and underrepresented among those who influence the political process. It is a group which carries the degraded statuses of both blacks and women, and finds its life chances thereby doubly limited. Any state action which burdens this group should be subject to at least strict scrutiny under the Equal Protection Clause. This Article suggests that because black women are stigmatized by race plus another stigma (sex), they should be entitled to a strict scrutiny level of review (race) plus additional protection in the form of, for example, an eased burden of proof.

The Constitution was never intended by its framers to provide protection to black Americans or women Americans.¹⁴³ Certainly there was no intention of protecting black women. Only since the passage of the fourteenth amendment, with its statement that all citizens are entitled to the equal protection of the laws, has the Constitution afforded such protection. Black women clearly have not been granted the "equal protection of the laws" in the past. It is only by demanding the highest level scrutiny from the courts that they will receive such protection in the future.

A Personal Postscript on Rights

This paper is situated squarely in a "rights" theory, that is, it seeks to protect a specific group from the ravages of racism and sexism by developing a new way of protecting their rights in the courts. As such, it flies in the face of the new criticism of rights consciousness and rights claims, which views such discourse as an obstacle to political development. Rights discourse is considered an impediment because of the indeterminate nature of rights claims¹⁴⁴ and because of the way in which it emphasizes individual rather than group rights.¹⁴⁵ In addition, the focus on rights can keep people passive, acquiescing in what the state determines to grant them as "rights."¹⁴⁶ While there is much of value in these analyses of rights,¹⁴⁷ we, the dispossessed, cling to the assertion of rights as our only source of

¹⁴³ See Justice Marshall, *Reflections on the Bicentennial of the United States Constitution*, 101 Harv. L. Rev. 1 (1987).

¹⁴⁴ See, e.g., Olson, *Statutory Rape: A Feminist Critique of Rights Analysis*, 63 Tex. L. Rev. 387, 393 (1984); Lynd, *Communal Rights*, 62 Tex. L. Rev. 1417, 1418 (1984).

¹⁴⁵ See, e.g., Dalton, *Book Review* (reviewing *The Politics of Law*, D. Kairys, ed. 1982), 6 Harv. Women's L.J. 229, 235 (1983).

¹⁴⁶ See, e.g., Gabel and Harris, *Building Power and Breaking Images: Critical Legal Theory and the Practice of Law*, 11 N.Y.U. Rev. L. & Soc. Change 369, 375 (1982).

¹⁴⁷ There is much in Critical Legal Studies [hereinafter CLS] arguments which resonates in me, though I think we arrive at similar truths through dissimilar paths. In my first year of teaching law school, I first heard of CLS from white students, who, after hearing my thoughts about the law, came after class to ask me if I were a "CLS'er." Their sense was that anyone with such a strong sense of how the law is used by the powerful to control the weak and the resources, had to be a CLS'er. What I always wanted to answer, but never did, was "No, I'm just black. And this is how black people have always understood the law." Black students, of course, never asked that question.

protection in an overwhelmingly racist and sexist society.¹⁴⁸ It is not that we believe that the law is good and just and will save us. Far from it. Rather, we believe that the law, and claims to rights under the law, are all that we have, all that stand between us and even greater oppression. As Pat Williams so eloquently stated: "To say that blacks never fully believed in rights is true; yet it is also true that blacks believed in them so much and so hard that we gave them life where there was none before."¹⁴⁹ Not only have we held on to rights claims as our only hope in a hostile and legalistic world, but we have won some of these claims.¹⁵⁰ These victories give us a sense of empowerment and the energy to face yet another day of onslaught, struggle, victory and defeat. Every successful step makes the thought of the next step possible.

Elizabeth Schneider explores this theme in her dialectic analysis of rights and politics in the development of social movements.¹⁵¹ In her view, rights discourse and political experience interact in a manner which shapes the development of the political process.¹⁵² Schneider further explores the positive aspects of rights discourse in political movements, including the development of a sense of group identity and pride, and the development of a means whereby the individual can become part of the group, and then link the group to the broader society.¹⁵³ As she states, linking one's own experience with the "universal claim of rights" can be a "radical and transforming notion."¹⁵⁴

¹⁴⁸ See, e.g., Delgado, *The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?*, 22 Harv. C.R.-C.L. L. Rev. 301, 306-07 (1987); Matsuda, *Looking to the Bottom: Critical Legal Studies and Reparations*, *id.* at 340-41; Williams, *Alchemical Notes: Reconstructing Ideals from Deconstructed Rights*, *id.* at 413, 416.

¹⁴⁹ Williams, *supra* note 148, at 430; see also Matsuda, *supra* note 148, at 338.

¹⁵⁰ The fact that our victories are always partial victories—half-steps, side-steps, steps often in unexpected directions—does not mean that pressing the claim did not serve our ultimate aims. I have heard some decry the *Brown* decision, for example, because of the subsequent resegregation of so many school districts, and because of the difficulties in showing what benefits are accruing to black children. They forget, I think, both the powerful, symbolic effect of that decision in and of itself; and that the *Brown* decision spawned a whole set of decisions striking down "separate-but-equal" public accommodations. Though this might seem trivial to a northern white American, no black person who has had to live by those signs in the South would fail to see their removal as a victory, and a step towards empowerment.

¹⁵¹ *The Dialectic of Rights and Politics: Perspectives from the Women's Movement*, 61 N.Y.U. L. Rev. 589 (1986).

¹⁵² *Id.* at 590.

¹⁵³ *Id.* at 627.

¹⁵⁴ *Id.* at 629.

Williams also articulates a positive aspect of rights discourse by pointing out how empowering it can be to claim one's rights, to claim, that is, the place one is entitled to in the society. "Rights' feels so new in the mouths of most black people. It is still so deliciously empowering to say. It is a sign for and a gift of selfhood It is the magic wand of visibility and invisibility, of inclusion and exclusion, of power and no-power."¹⁵⁵

It is within this framework of rights discourse—one of self-definition and empowerment—that I wish to situate this work. And I want to discuss how the assertion of my rights claims—as a black woman with a keen interest in her rights under the Constitution—has been personally “radical and transforming.”

I, like many other black women, have often felt torn between two distinct and often warring social movements: the black movement and the women's movement. In each of them, I could reflect and act upon one aspect of my self, and in each of them, I was one of a member of the (relatively) powerless outsider group.¹⁵⁶ I had the sense of being fragmented, of being split into two entities with often competing goals.¹⁵⁷ Certainly during the civil rights movement of the 1960s and 1970s, black women who expressed a concern about women's rights were considered traitors to the race.¹⁵⁸

Thinking about and writing about the constitutional rights of black women has allowed me to pull those fragments of self

¹⁵⁵ Williams, *supra* note 148, at 431.

¹⁵⁶ See, e.g., J. Jordan, *Civil Wars* 118 (1981). (“And why does it continue to be the case that, when our ostensible leadership talks about the ‘liberation of the Black man’ that is precisely, and only, what they mean?”); and L. Clifton, *Good Woman: Poems and a Memoir 1969–1980*, at 122 (1987), in a poem entitled “To Ms. Ann”:

*I will have to forget
your face
when you watched me breaking
in the fields,
missing my children.
. . .
and you never called me sister
then, you never called me sister
and it has only been forever and
I will have to forget your face.*

¹⁵⁷ Cf. N. Shange, *For Colored Girls Who Have Considered Suicide/When the Rainbow Is Enuf* 45 (1975). (“but bein’ alive & bein’ a woman & bein’ colored is a metaphysical dilemma/I haven’t conquered yet”).

¹⁵⁸ See Marable, *supra* note 105, at 83–99.

back into a whole, focused and centered. And one works more strongly and clearly from a centered self.¹⁵⁹ Another empowering act has been to take charge of defining my group, of naming myself. Naming oneself, defining oneself and thereby taking the power to define out of the hands of those who wield that power over you, is an important act of empowerment.¹⁶⁰ The “first power of the weak” is the “refusal to accept the definition of oneself that is put forth by the powerful.”¹⁶¹ Defining a group of black women who see themselves with group rights under the Constitution is staking a claim to whatever those with privilege are entitled. The act of self-definition thus makes clear our worth and entitlement, and sets forth our view of ourselves as one which will have to be reckoned with.

Self-definition is intimately linked with empowerment. Empowerment, or claims to power, I must admit, are not easy to make. They are, in fact, frightening to make, for I live, like every other black woman law professor, in a world where the silences about black women in the legal literature and in the classrooms are so loud as to be deafening, and in a world where

¹⁵⁹ See Lorde, *supra* note 126, at 120–21:

My fullest concentration of energy is available to me only when I integrate all the parts of who I am, openly, allowing power from particular sources of my living to flow back and forth freely through all my different selves, without the restrictions of externally imposed definition. Only then can I bring myself and my energies as a whole to the service of those struggles which I embrace as part of my living.

¹⁶⁰ Cf. M. Cliff, *Claiming an Identity They Taught Me to Despise* 8 (1980). (“I am untangling the filaments of my history The question of my identity is partly a question of color: of my right to name myself.”). Lewis Carroll captured this connection between the power to define and the power to control in *Through the Looking Glass*:

“When I use a word,” Humpty Dumpty said, in rather a scornful tone, “it means just what I choose it to mean—neither more nor less.”

“The question is,” said Alice, “whether you *can* make words mean so many different things.”

“The question is,” said Humpty Dumpty, “which is to be master—that’s all.”

L. Carroll, *Alice’s Adventures in Wonderland and Through the Looking Glass* 247 (1962).

¹⁶¹ E. Janeway, *The Powers of the Weak* 167 (1980). Of course, once one has refused to believe in and accept the way the powerful categorize black women, it is an easy next step to refuse to believe the content the powerful pour into the name “black women.”

those in power will determine my career based upon their assessment of what I write. How can it be “worthwhile scholarship” to write about black women? If it were “important,” surely a white man would have written about it long ago! And would not a black female law professor—herself of clearly low status—be seen as more “professional” if she wrote about “important” issues, such as tax or corporations,¹⁶² or the burden of proof in age discrimination cases. But again, by connecting rights discourse back to empowerment and community, I was able to find a community which empowered me to write and to assert my rights . . . a community of historians, poets, essayists, scholars. Audre Lorde, for one, yielded no ground. She said: “I am myself—a Black woman warrior poet doing my work—come to ask you, are you doing yours?”¹⁶³ She sympathized: “Of course I am afraid, because the transformation of silence into language and action is an act of self-revelation, and that always seems fraught with danger. [But] . . . the machine will try to grind you into dust anyway, whether or not we speak.”¹⁶⁴ And finally, she urged:

We can learn to work and speak when we are afraid in the same way we have learned to work and speak when we are tired. For we have been socialized to respect fear more than our own needs for language and definition, and while we wait in silence for that final luxury of earlessness, the weight of that silence will choke us.¹⁶⁵

Writing about rights for black women has put me in touch again with issues of self-definition, empowerment, staking my claim in the larger community, and creating and working within a community of support. Like Alice Walker, I too “write all the things I should have been able to read.”¹⁶⁶

¹⁶² It is always clear to me that by writing, teaching, or thinking about the bottom, one is always writing, teaching, or thinking about the top. I am not sure it is always clear to others.

¹⁶³ Lorde, *supra* note 126, at 41–42.

¹⁶⁴ *Id.* at 41–42.

¹⁶⁵ *Id.* at 44.

¹⁶⁶ A. Walker, *In Search of Our Mothers' Garden* 13 (1983).