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The principle of equality, which to this day this nation is struggling to achieve, did not receive explicit constitutional recognition until 1868 when the fourteenth amendment became law. Using a double-negative form of expression, the fourteenth amendment prohibits the state and, by interpretation, the federal government[1] from denying any person "the equal protection of the laws."[2]

This short provision has been the source of the most significant constitutional developments of our time. Though significant developments have occurred, we cannot allow ourselves to be lulled into a false sense of security that such a provision might create. We must not for one moment forget the "struggle," for it continues to this day. But we can be thankful for a man like Justice Douglas,[3] who has been characterized as "an egalitarian activist"; that is, a Justice willing to use "whatever judicial tools [are] at hand—or may be created—to promote the ends of equality of opportunity."[4] This description is appropriate because for thirty-six years Justice Douglas struck many libertarian blows for the freedom of "underdogs": political, racial, or religious minorities who have needed the Court's help to awaken the majority to their messages.

Although some of us may compliment Justice Douglas, others have

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1. *Cf.* Bolling v. Sharpe, 347 U.S. 497 (1954) (racial segregation of public schools in the District of Columbia violates due process of law guaranteed by the fifth amendment).

2. U.S. CONST. amend. XIV provides in part:

> No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. Justice Douglas was appointed to the Court by President Franklin Roosevelt in 1939. He retired November 12, 1975, after serving more than 36 years, the longest term in the history of the Court. Justice Douglas died in 1980. *See* C. BARNES, MEN OF THE SUPREME COURT: PROFILES OF THE JUSTICES (1978).

4. Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716, 717 (1969).

regarded his attempts to promote equality as being unsupported by constitutional law and a manifestation of what Justice Robert Jackson once described (and he intended no compliment) as the work of "a cult of libertarian judicial activists" who fail to pay proper respect to decisions of the elected branches of government.[5]

At present, when the courts are being led by public opinion to face up to the absence of equality in American society, it is easy to forget that until very recently the Supreme Court was remarkably inhospitable to such claims.[6] In spite of this, Justice Douglas' philosophy demonstrates a concern for the welfare of all. He believed that governmental action directed against powerless minorities is invalid unless justified, as it rarely can be, by an overriding interest of the state.[7] Similarly, governmental action that impairs the fundamental interests of a particular group is also invalid unless justified by a compelling state interest.[8]

Practically speaking, the phrase "invidious discrimination" belongs to Justice Douglas. In its modern usage, it comes from his opinion in *Skinner v. Oklahoma*.[9] In *Skinner*, the Court struck down a law that required the sterilization of a person who had been convicted three times of a felony "involving moral turpitude," but exempted embezzlement and other white collar offenses from the sterilization sanction. Justice Douglas stated that interference with the fundamental right to bear children required "strict scrutiny" by the Court;[10] that larceny, one of the crimes for which the defendant was convicted, was "intrinsi-

5. R. JACKSON, THE SUPREME COURT IN THE AMERICAN SYSTEM OF GOVERNMENT 57 (1955).

6. *See e.g.*, Plessy v. Ferguson, 163 U.S. 537 (1896); Civil Rights Cases, 109 U.S. 3 (1883).

7. *See, e.g.*, Carter v. Jury Comm'n, 396 U.S. 320, 341 (1970) (Douglas, J., dissenting in part) (he sought the remedy of proportioned representation of the races where challenged jury commission had long record of racial discrimination in jury selection); Reitman v. Mulkey, 387 U.S. 369, 381 (1967) (Douglas, J., concurring opinion) (invalidating the state constitutional amendment which had overturned a law forbidding racial discrimination in residential housing); Bell v. Maryland, 378 U.S. 226, 242 (1964) (Douglas, J., concurring opinion) (using equal protection clause to reverse convictions of blacks arrested for sit-ins at lunch counters of privately owned restaurants). *See also* Karst, *supra* note 4, at 736.

8. *See, e.g.* Bodie v. Connecticut, 401 U.S. 371, 383 (1971) (Douglas, J., concurring in result) (using equal protection clause to allow indigent welfare mothers to bring divorce actions without payment of filing fee and costs); Levy v. Louisiana, 391 U.S. 68 (1968) (Douglas, J., majority opinion) (invalidating state law that denied illegitimate children certain rights afforded legitimate children); Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966) (Douglas, J., majority opinion) (invalidating poll tax as applied to state elections on ground of denial of equal protection); Douglas v. California, 373 U.S. 353 (1963) (Douglas, J., majority opinion) (upholding right to appointed counsel for indigent criminal defendants on direct appeal); Skinner v. Oklahoma, 316 U.S. 535 (1942) (Douglas, J., majority opinion) (holding that forced sterilization of persons convicted three times of robbery or larceny, but not those convicted of embezzlement, was a violation of equal protection).

9. 316 U.S. 535 (1942).

10. *Id.* at 541.

cally" the same as embezzlement;[11] and that sterilization of a thief but not a white collar embezzler violated the equal protection clause.[12] Justice Douglas stated: "When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment."[13]

This decision may seem obvious in 1980, but in 1942 it was a notable achievement to place the burden on a state to justify the line it drew between larceny and embezzlement. In 1942 it was also a notable achievement to invalidate a statute because the state could not meet that burden. According to Justice Douglas, the fundamental right to bear children includes the defendant's right to be free from sterilization without a compelling justification. The statute could not be sustained merely because the classification had a rational basis.[14] The Oklahoma law was class legislation in the worst sense, discriminating invidiously against criminals who were not sophisticated enough to do their stealing in a genteel manner.

A principal theme in Justice Douglas' equal protection opinions is his desire to protect the despised, the defenseless, and especially the penniless in American society. In *Harper v. Virginia State Board of Elections*,[15] the Supreme Court held that payment of Virginia's annual poll tax of $1.50 could not constitutionally be made a condition for voting in state elections. Justice Douglas, writing for the majority of six Justices, held that such a condition violated the equal protection clause and invalidated the poll tax:

> Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race . . . are traditionally disfavored . . . . To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.[16]

Words like "irrational" or "capricious" came to be used, particularly by Justice Douglas, as shorthand descriptions of the Court's conclusion that the state's classification is unconstitutional. Irrationality or arbitrariness in the literal sense of an utter lack of justification is not required in order for a classification to be struck down. Rather, the label of irrationality is affixed whenever the state fails to justify its discrimi-

11. *Id.* at 539.
12. *Id.* at 541.
13. *Id.*
14. *Id.* at 540.
15. 383 U.S. 663 (1966).
16. *Id.* at 668.

nation to the satisfaction of a majority of the Court. In short, discrimination against a disadvantaged group (such as blacks) in relation to an interest of great importance (such as voting) is, in the absence of compelling justification, "invidious discrimination" which violates the equal protection clause.[17]

Always following this theory, Justice Douglas was particularly sensitive to financial barriers that prevent poor people from gaining access to the courts. In *Griffin v. Illinois*,[18] the Court held that a state must provide an indigent defendant with a free trial transcript if it is necessary to appeal a criminal conviction. The Court held that a denial of a transcript would be "invidious discrimination" in violation of the equal protection clause.[19] Moreover, the Court stated that "[t]here can be no equal justice where the kind of trial a man gets depends on the amount of money he has."[20] Justice Douglas joined in this opinion, and several years later had an opportunity to extend its reach. In *Douglas v. California*,[21] the state was also required to provide counsel for an indigent appellant in his first appeal from a criminal conviction.[22] Writing for the Court, Justice Douglas stated that the state's failure to provide counsel drew "an unconstitutional line . . . between rich and poor,"[23] a line that amounted to "invidious discrimination."

The conclusion that a classification produces an "invidious discrimination" emerges from a three-part inquiry. The Court must decide (a) whether the classification results in discrimination against a disadvantaged group; (b) whether that discrimination relates to an interest that is "basic," "fundamental," or "critical"; and, assuming an affirmative answer to these two questions, (c) whether the state's asserted justification for the classification is sufficiently "compelling" to overcome the presumptive invalidity implicit in the phrase "strict scrutiny."[24]

Answers to these questions should be clear in cases involving racial discrimination that is written into law.[25] Most legislation has different effects on various groups, and discrimination can be found in almost anything the government does or fails to do. Therefore, the important question is what groups are to be called "disadvantaged."

The best explanation of judicial solicitude for the disadvantaged has

17. *See* text accompanying note 24 *infra*.
18. 351 U.S. 12, 19 (1956).
19. *Id.* at 19.
20. *Id.*
21. 372 U.S. 353 (1963).
22. *Id.* at 355-56.
23. *Id.* at 357.
24. G. GUNTHER, CASES AND MATERIALS ON CONSTITUTIONAL LAW 671-72, 705 (10th ed. 1980).
25. Similarly, alienage is a suspect category. *See* Takahasi v. Fish & Game Comm'n, 334 U.S. 410 (1948).

come not from the Supreme Court, but from Judge J. Skelley Wright in his often-cited opinion in *Hobson v. Hansen.*[26] Judge Wright stated that the courts look with "close scrutiny" at legislation that adversely affects the basic interests of disadvantaged groups:

> [This is because of] the judicial attitude toward legislative and administrative judgments. Judicial deference to these judgments is predicated in the confidence courts have that they are just resolutions of conflicting interests. This confidence is often misplaced when the vital interests of the poor and of racial minorities are involved. These groups are not always assured of a full and fair hearing through the ordinary political processes, not so much because of the chance of outright bias, but because of the abiding danger that the power structure—a term which need carry no disparaging or abusive overtones—may incline to play little heed to even the deserving interests of a politically voiceless and invisible minority.[27]

Furthermore, a good measure of outright bias is built into every situation of inequality. The "haves" will seldom be inclined to make the "have nots" more equal by sharing with them.

How then should a disadvantaged class of illegitimates be characterized? In *Levy v. Louisiana*,[28] Levy, on behalf of five illegitimate children, brought an action for the wrongful death of their mother. The lower court held that the phrase "surviving child" as used in the statute did not include an illegitimate child. The denial of a right of recovery was "based on morals and general welfare [which] discourage[d] bringing children into the world out of wedlock."[29]

In an opinion written by Justice Douglas, the Supreme Court held that the statute's denial of a right of recovery by illegitimate children creates an "invidious discrimination" contravening the equal protection clause of the fourteenth amendment.[30] This is because legitimacy or illegitimacy has no relation to the nature of the wrong allegedly inflicted on the mother.[31] This reasoning suggests that illegitimate children, or even their natural parents, can be called disadvantaged in the political sense suggested by Judge Wright.[32] While they may be nu-

26. 269 F. Supp. 401 (D.D.C. 1967), *aff'd and modified sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969).

27. *Id.* at 507-08. Chief Justice Warren made a similar point in a voting rights case, Kramer v. Union Free School Dist. No. 15, 395 U.S. 621, 628 (1969):

> The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge to this basic assumption, the assumption can no longer serve as the basis of presuming constitutionality.

28. 391 U.S. 68 (1968).

29. *Id.* at 70.

30. *Id.* at 72.

31. *Id.*

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

merous, their political strength is near zero. More persuasive, however, is an explanation of this case that takes into account the possibility that the legislative classification was a covert form of racial discrimination.

In *United States v. Carolene Products Co.*,[33] it was suggested that "prejudice against discrete and insular minorities" who do not have adequate access to the political process should call for "exacting judicial scrutiny."[34] Justice Douglas, however, did not rest exclusively on judicial precedent; he made good use—perhaps more than any other Justice during that time—of empirical data and social science findings to demonstrate how disdavantaged the poor in fact are.[35]

The philosophical underpinnings of Justice Douglas' egalitarian view are important and should be made explicit. It is not that "equality" is synonymous with "justice" or is capable of providing answers to the ultimate question of what rights individuals should have in society. The point is that once society grants or accords certain rights or material benefits to some, the concept of equality informs us that these are, at least presumptively, valid criteria of what rights or material benefits society should grant to others. Like most general principles, this one does not allow for every variation in the facts. However, the premise is sound: if government treats one group one way, another group has a prima facie claim to equal treatment.[36]

The battle is not over in the development of doctrine under the equal protection clause, but we can thank Justice Douglas for refining its analysis so that the Court could realistically take into account the varied forms of discrimination.

> There is irony in recognizing Justice Douglas' doctrinal leadership. He was a Justice who was supposed to be so "result-oriented" as to care nothing for the articulation of principle. But his legacy to us in the equal protection area is precisely a legacy of doctrinal principle. True, he often painted with a broad brush. When one wishes to stake out a broad principle, that is quite appropriate, and may even be necessary. As well as any other Justice of his time, Justice Douglas told us what the factors were that caused him to decide as he did. That is surely the most important test of a good opinion; if the opinion also can integrate and consolidate doctrine, so much the better. But it is not easy both to consolidate and to innovate in the same breath. Justice Douglas was doctrinally innovative, and he usually explained the bases of his innovations so that neither a lower court nor a legislator would have difficulty understanding them. Constitutional growth demands such Justices . . . .[37]

33. 304 U.S. 144 (1938).
34. *Id.* at 152 n.4.
35. *See, e.g.*, Bell v. Maryland, 378 U.S. 226, 242 (1964).
36. *See* Karst, *supra* note 4, at 717.
37. Karst, *Justice Douglas and the Equal Protection Clause*, 51 IND. L.J. 14, 16 (1975).

For his egalitarian vision of America, and for the doctrinal underpinnings he supplied to our egalitarian movements, we are grateful. Justice Douglas was a judicial activist, a great civil libertarian, and one of the foremost defenders of human rights. Without question, he deserves a place on the list of great jurists.