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THE COURTS, CONGRESS, AND EDUCATIONAL ADEQUACY: THE EQUAL PROTECTION PREDICAMENT

BETSY LEVIN*

INTRODUCTION

In Brown v. Board of Education\(^1\) the Supreme Court said that because of "the importance of education to our democratic society . . . the opportunity of an education . . . where the State has undertaken to provide it, is a right which must be made available to all on equal terms."\(^2\) The unanimous Brown opinion thus indicated that "equal educational opportunity" was a constitutional right.\(^3\) From the perspective of today's complexity, the legal issue raised in Brown seems relatively simple: whether state-imposed segregated schooling denies black children equal protection of the laws, even though the segregated public schools are equal in terms of physical facilities, resources, and

* Professor of Law, Duke University. A.B. 1956, Bryn Mawr, LL.B. 1966, Yale University. This Article was originally presented as the Simon E. Sobeloff Memorial Lecture at the University of Maryland School of Law on April 18, 1979. To be invited to give a lecture at the University of Maryland would have been honor enough, but to have been asked to give the first lecture to memorialize Judge Simon E. Sobeloff was more than an ordinary honor. It was a task upon which I embarked with great trepidation, not just because he was such a distinguished jurist, but because Judge Sobeloff, whom I served as law clerk in 1966-67, was my mentor and very dear friend. Although I could not begin to aspire to the wit, the graceful prose, the incisive analysis, and the sprightly sense of humor with which Judge Sobeloff would attack a subject, I hope that I bring to my topic that concern for human liberty and dignity and that reverence for the Constitution and the American democratic traditions that he tried to impart to his law clerks and to all of us.

The comments of several colleagues were very helpful in preparing the lecture. I particularly wish to thank Professors Walter E. Dellinger and Thomas D. Rowe of the Duke University School of Law. I also wish to acknowledge the very able research assistance of Douglas Carter, Stephen Kern, and Gail Rising, law students at Duke University School of Law. The final responsibility for the finished product is, of course, mine.

2. Id. at 493.
3. Equal educational opportunity was also an issue in several earlier cases such as Sweatt v. Painter, 339 U.S. 629 (1950), and McLaurin v. Oklahoma State Regents for Higher Educ., 339 U.S. 637 (1950). These pre-Brown cases were mainly concerned with the equal aspect of "separate but equal," while Brown focused on the separation itself as affecting the educational opportunities of minority students.
other tangible factors. In the context of that case, equal educational opportunity meant at least an education provided on a non-segregated basis.

What else the concept of "equal educational opportunity" might mean, we — society, the legal community, the political institutions — have never resolved. Both the courts and Congress have struggled to define the concept, and the result has been varying definitions at different times. The question is a troubling one, whether we are concerned only with that equality of educational opportunity that is constitutionally protected or, beyond the constitutional minimum, with that amount of education that as a just society we should provide for all children. And at times we have confused the legal imperative with the moral imperative.

Focusing first on that educational opportunity that the fourteenth amendment protects, we find that there are several possible definitions. Equal educational opportunity could mean simply making available to all children the same books, teachers, and facilities. Education could be thought of as a dinner placed on a platter and then offered to the child, leaving it up to the child to help himself. The opportunity is made available by the state, but the responsibility to do something with it is the child's. This is a minimal definition of equal educational opportunity.5

Is the system constitutionally obligated to go farther, to provide extra help to those who cannot help themselves to what is on the platter? Is it the responsibility of the school system to give the child a spoon if he does not have one of his own? For instance, must the system provide free textbooks or waive laboratory fees for indigent students?6 If

4. It is unclear whether Brown stands for the proposition that segregated schools deny whites as well as blacks equal protection. Cf. Trafficante v. Metropolitan Life Ins. Co., 409 U.S. 205 (1972) (white tenants alleging owner's racially discriminatory renting practices denied them the benefits of living in an integrated community granted standing to sue); Equal Educational Opportunity; Hearings Before the Senate Select Comm. on Equal Educational Opportunity, 91st Cong., 2d Sess. 71 (1970) (statement of Dr. Kenneth Clark): If we are realistically to move toward planning and implementing serious programs for the desegregation of American public schools and related institutions in our society, we must now begin to examine very carefully and to present honestly and clearly the evidence which suggests the deep, insidious damage which segregated schools and segregated institutions inflict upon privileged white children.

There is strong evidence to suggest that racial segregation, which is in fact the institutionalization of racism in America, is flagrantly and insidiously detrimental to privileged middle class and working class white children.

Id. at 73.


the child comes to school with his hands wrapped in bandages through no fault of the school system, should it be required to spoon-feed him? The analogy here, of course, is to physical or mental handicaps or the handicapping conditions of poverty, or isolation — isolation because of ethnicity, as with some Indian students, or because of circumstances, as with migrant workers' children.

Is the government constitutionally obligated to ensure that each school or each school district has the same offering on the platter, or only that each district has sufficient funds to provide a full offering, allowing each district to decide for itself whether it wants to include dessert or spend the dessert money on health care for the aged?

Finally, in perhaps a shift from the legal to the moral imperative or to an intermingling of the two, we may ask whether the societal concern for the problems of autistic children or migrant workers' children demands that those problems be redressed through the public schools. Why do we focus on that institution? Who should bear the economic and social costs of redressing these problems? And who decides that society must redress these problems, in a world of finite resources, rather than some other problem?

This Article examines some of the constitutional and political considerations that affect the answers to these questions and the implications of some of the answers. In addition, it analyzes the effect of the Supreme Court's decision in San Antonio Independent School District v. Rodriguez, in which the Court refused to find a basic constitutional entitlement to an education. The refusal of the Court to find an affirmative governmental duty to equalize differences in wealth or differences in educational services resulting from differences in wealth, or even a duty to provide education at all, disappointed those groups seeking educational equity and led to a search for alternative ways of achieving their objectives. This Article reviews the post-Rodriguez litigation concerning the right to an education and Congress' legislative attempts to expand the entitlement to a certain amount and

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kind of education, and suggests some of the political and institutional problems raised by these approaches to equal educational opportunity.

As a result of Rodriguez, then, we are left with the question whether equal educational opportunity, however defined, is a constitutional mandate. If Brown is reduced to a case about state-imposed discrimination on the basis of race rather than a case about education,11 as the majority's decision in Rodriguez seems to imply, there is no consistent approach to the education for which various disadvantaged groups are competing, no consistent theory as to who is disadvantaged in this context, and no consistent theory of that equality — and concomitant governmental duty — that is their entitlement.

If the Supreme Court had decided that education was a constitutional right, and a majority might well have done so if the Court had not been blinded by a concern that it would have to legislate what is education, then the focus might have been on that education that is essential for all children. This focus would have provided a context in which to treat those kinds of children who need special help, yet perhaps with less divisiveness and more emphasis on quality education for all children than now exists.

Thus, this Article explores an alternative model on which to base a finding that the federal equal protection clause guarantees an educational opportunity. The Supreme Court's reluctance to find that education is a fundamental right entitled to special protection was at least in part due to the Court's fear that there are no judicially manageable standards for determining what amount of education is constitutionally guaranteed. The recent school finance cases decided on state constitutional grounds may provide the model for a judicially articulated standard for determining when the federal equal protection clause has been violated without involving courts in issues of educational policy. A more politically promising approach for Congress is also drawn from these state cases.

I. THE RODRIGUEZ DECISION

San Antonio Independent School District v. Rodriguez12 involved a challenge to the Texas school finance system, under which local school

11. The numerous decisions that followed Brown, striking down racial separation in noneducation areas, suggest that race may have been the critical factor in that decision. See, e.g., Watson v. City of Memphis, 373 U.S. 526 (1963) (parks); New Orleans City Park Improvement Ass'n v. Detiege, 358 U.S. 54 (1958) (parks); Gayle v. Browder, 352 U.S. 903 (1956) (buses); Holmes v. City of Atlanta, 350 U.S. 879 (1955) (golf courses); Mayor of Baltimore v. Davison, 350 U.S. 877 (1955) (beaches).

districts are delegated authority by the state legislature to raise funds for education by levying a tax on property located within the district. Because of significant differences in property wealth among school districts, the system results in large disparities in per pupil expenditures, despite some subventions from the state. The plaintiffs, relying on the equal protection clause, sought to have education revenues redistributed on a wealth-neutral basis, so that the quality of education would not be related to the per pupil property wealth of school districts. The Supreme Court held, however, that a state system of financing education that produced relative differences in the quality of education among school districts within a state did not violate the equal protection clause of the fourteenth amendment.

Before turning to a discussion of the Court's holding and its implications, it may be useful to explore two legal theories of equal protection, both of which may be traced to Brown v. Board of Education, under which an equal educational opportunity was thought to be constitutionally protected.

A. The Theories Underlying a Fourteenth Amendment Right to an Equal Educational Opportunity

1. Protected Classes

A substantial gloss has been built up around the fourteenth amendment's seemingly simple equal protection clause. The clause has been interpreted as a broad regulation of the way in which the government discriminates among classes in allocating its burdens and benefits. Equal protection doctrine, then, understandably concerns itself with two things: the nature of the discrimination, that is, the division of people into classes for the purpose of differential application of the law, and the nature of the burdens or benefits involved.

The first theory advanced in Rodriguez centers on the class being denied an equal educational opportunity. Certain classifications trigger a more exacting judicial scrutiny than others, imposing on the state a heavy burden of justifying them. Other classifications are presumed

constitutional unless the party challenging the legislation can show that the state had no rational basis for the classification in question.

Obviously, then, the characterization of the class determines the outcome of the constitutional challenge. If the class can be characterized as one entitled to special protection, the legislation that has established the classification is subjected to close judicial scrutiny. If there is no compelling governmental objective, or if that objective can be achieved by less restrictive alternatives, the statute is unconstitutional.

The argument that there are classes that deserve some special judicial protection, "suspect classes," was foreshadowed in United States v. Carolene Products Co. The Supreme Court said that the rational basis test for legislation, that is, the presumption that legislation is constitutional, might not be appropriate in every case: "[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry." The Supreme Court has held that classifications based on race, national origin, and — in some circumstances — alienage will trigger more careful review, almost regardless of the significance of the interest affected, whether access to public schools or to public golf courses.

Other classifications, such as those based on gender and illegitimacy, have been treated as entitled to a standard of review

17. 304 U.S. 144 (1938).
18. Id. at 153 n.4 (dictum).
25. See Trimble v. Gordon, 430 U.S. 762 (1977); Mathews v. Lucas, 427 U.S. 495, 510 (1976) (Illegitimacy classifications fall into a "realm of less than strictest scrutiny," but this scrutiny "is not a toothless one.").
somewhere between strict scrutiny and "rational basis." This standard requires the governmental interest at stake to be substantially related (rather than absolutely necessary) to achieving an important (but not compelling) governmental interest. Intermediate scrutiny also requires the government to show that its important interest could not be accomplished by less discriminatory alternatives.26 Again, the individual's interest affected by the classification need not itself be significant: it may be equal access to academically elite schools27 or equal access to 3.2 beer.28

Some classifications, age, for example, have been unambiguously held not entitled to any special protection.29 In these cases the discriminatory legislation is presumed constitutional. To counter this presumption, plaintiffs must show that the classification is wholly arbitrary and irrational, a burden they are unlikely to meet.

The classifications the Supreme Court has treated least clearly are those based on wealth. No Supreme Court decision has applied the strict scrutiny test to a wealth classification that did not also involve a significant individual interest, which of course shifts the equal protection focus away from the classification and onto the interest


27. In Berkelman v. San Francisco Unified School Dist., 501 F.2d 1264 (9th Cir. 1974), the Ninth Circuit, addressing this issue, did not clearly state which standard of scrutiny it was using, but the court's discussion of the issue and its citation of Reed v. Reed, 404 U.S. 71 (1971), suggest that "the task is to examine the school district's assertion that the standard of past academic achievement substantially furthers the purpose of providing the best education possible . . . . The Court [in Reed] indicated that sex classifications are to be tested on the basis of strict rationality . . . ." 501 F.2d at 1267, 1269.

28. See Craig v. Boren, 429 U.S. 190 (1976). With those classifications entitled to intermediate level review, however, there are indications that only absolute denial of some benefit will be closely examined. Mere imposition of a greater burden on the class may be subject simply to a rational basis test. See, e.g., Mathews v. Lucas, 427 U.S. 495 (1976) (upholding Social Security Act provision requiring certain illegitimate children to show that deceased wage earner was both child's parent and was supporting child at time of death in order to be eligible for survivors' benefits, whereas legitimate children are entitled to presumption of dependency). Courts may not even closely scrutinize separate, segregated access to a benefit as long as the benefit is provided equally. See, e.g., Vorcheimer v. School Dist., 532 F.2d 880 (3rd Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977) (gender classifications for admissions to separate but equal academic public high schools upheld because equal opportunity was extended to each sex and restriction applied to both).

affected. In some cases, that interest has been an independent constitutional right, such as interstate travel. In others, it has been a right so closely related to specific constitutional rights that it appears to be a right implicit in the Constitution itself, such as the right to vote or the right to marry. In still other cases, the interest involved may have overtones of fundamental fairness, such as the interest in an effective criminal appeal. Equal protection analysis of wealth classifications has been further obscured by the fact that wealth and racial classifications often coincide. Whether wealth classifications alone could ever be suspect or even of a character entitling them to intermediate-level scrutiny is unresolved.

2. Protected Interests

The second method that has been used to flesh out the equal protection clause is to treat certain interests as being of sufficient importance that they are constitutionally protected. If an interest is characterized as "fundamental," it must be provided to all equally unless the state can justify discriminatory legislation by showing that it


32. See Zablocki v. Redhail, 434 U.S. 374 (1978) (invalidating statute requiring persons obligated to support out-of-custody children to obtain court approval before marrying, as right to marry held to be of "fundamental importance"); cf. Boddie v. Connecticut, 401 U.S. 371 (1971) (due process clause prohibits state from denying indigents seeking a divorce access to courts because they cannot pay court fees, as "marriage involves interests of basic importance in our society").

33. See, e.g., Douglas v. California, 372 U.S. 353 (1963) (state must provide indigents with counsel on direct appeal of criminal conviction); Griffin v. Illinois, 351 U.S. 12, 17 (1956) (state must furnish trial transcript to indigent without cost, as "the central aim of our entire judicial system [is that] all people charged with crime must, so far as the law is concerned, 'stand on an equality before the bar of justice in every American court'").


35. When the issue is governmental infringement of a "fundamental" interest, the relevance of the equal protection clause becomes problematical. In some cases, the question of a governmental classification is irrelevant: for example, the right of marital privacy or the right to decide whether to bear a child may not be interfered with by the government without a compelling justification, whether the interference is applicable to all or only to some. In such cases the issue is often framed in terms of the due process clause. See, e.g., Roe v. Wade, 410 U.S. 113 (1973); Griswold v. Connecticut, 381 U.S. 479 (1965). At other times, however, the issue is still framed in terms of the equal protection clause, and it is the unequal treatment that invalidates the infringement of the fundamental interest. See, e.g., Kramer v. Union Free School Dist., 395 U.S. 621 (1969); Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942).
is necessary to the attainment of a compelling governmental objective that cannot be achieved by less restrictive alternatives. The denial of other interests, whether to all or only to certain groups, is presumed constitutional unless the party challenging the legislation can show that the state's objective is not a legitimate one. When the challenge to the constitutionality of legislation impinging on certain interests is based on the equal protection clause, the characterization of the classification affected may also be relevant, so that at times the two theories appear to merge into a hybrid theory.

As with the characterization of classes, it is clear that the characterization of the interest determines the outcome of the constitutional challenge. If the interest is not characterized as fundamental, then the challenger is unlikely to meet with success even if he can show that the government's objective is insubstantial and could be accomplished by less restrictive alternatives.

The rights of interstate travel, procreation, and equal treatment with regard to voting and criminal appeals have been declared to be fundamental interests, but the Supreme Court has declined to extend similar treatment to basic subsistence needs such as welfare, housing, employment, and with its decision in the Rodriguez case, education. These latter interests have been characterized as matters of social and economic policy, not fundamental interests firmly rooted in the Constitution and thereby entitled to special judicial protection.

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44. 411 U.S. at 37.
45. Nevertheless, as Professor Michelman has ably illustrated, there are hints in some of the Supreme Court opinions that suggest that basic subsistence needs are to be given greater weight on the scale of interests than most others. Michelman, Welfare Rights in a Constitutional Democracy, 1979 WASH. U.L.Q. 659, 663–64.
explores the problems of the fundamental interest analysis as it is applied to education. One of the questions explored is whether, even if "education" can be characterized as a fundamental interest, there are judicially manageable standards for determining whether the Constitution guarantees a particular amount or quality of education for all children, a minimum or basic amount of education, or an education that is absolutely equal to the education that anyone else receives.

3. Equal Protection Theory in the Context of Equal Educational Opportunity

Two other aspects of the question whether there is a constitutional right to an equal educational opportunity seem to depart from the traditional view of the fourteenth amendment's equal protection clause: whether the constitutional violation arises from government-permitted relative differences in education or only from governmental failure to provide any education at all, and whether the Constitution imposes on the state an affirmative duty to provide extra educational services to particular groups rather than merely requiring that the state cease discriminating against these groups in the provision of education. The traditional view of the equal protection clause is that it provides a right not to be treated differently by government — because of certain traits or characteristics — than others are treated. The standard is a negative one. The government has an obligation not to install barriers that prevent certain classes of children from obtaining the same education that all other children are receiving. For example, otherwise qualified children of Chinese background cannot be excluded from the classroom and the school solely because of their national origin. Children who live in certain areas of the state cannot be denied an education when the state provides an education to all other children within the state. This traditional negative standard seems to apply most appropriately to cases


47. See, e.g., Griffin v. County School Bd., 377 U.S. 218 (1964).
in which access to a benefit has been denied outright. However, plaintiffs in cases in which the question is one of degree, where government provided lower quality services or imposed somewhat greater burdens, have also been able to have the negative standard applied. These cases concern relative differences in services rather than the absolute denial of such services, but the view of the equal protection clause is really the same. Equal protection merely passively prohibits state-sanctioned discrimination and requires identical treatment.

An approach that goes beyond the plain language of the equal protection clause — that no state shall "deny to any person within its jurisdiction the equal protection of the laws" — is one that imposes an affirmative duty on the government to remove a barrier not necessarily of the government's making, such as poverty or limited English language ability. Under this interpretation, the government has a duty to treat people differently. For example, children who speak only Chinese may be constitutionally entitled to special educational programs, since they cannot understand what goes on in the regular classroom where only English is spoken. If they do not receive special treatment, the argument goes, they do not have an opportunity equal to that of others to take advantage of the education the government offers to all. The denial of equal protection of the laws then arises because the government fails to classify them and treat them differently than all other schoolchildren.

These latter two approaches to equal educational opportunity — the focus on relative differences in, rather than exclusion from or absolute deprivation of, education and the focus on an affirmative duty to provide special, additional services for certain groups — are among the main

48. E.g., Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967) (equal protection denied by educational "tracking" system that placed disproportionate number of blacks into slower learning tracks where they received a "watered down" curriculum), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); cf. Beal v. Lindsay, 468 F.2d 287 (2d Cir. 1972) (action brought by black and Puerto Rican residents alleging that New York City unconstitutionally discriminated against them by failing to maintain neighborhood park to standard equivalent to other community parks in the Bronx).

49. U.S. CONST. amend XIV, § 1.


The majority opinion concedes that the children who speak no English receive no education and those who are given some help in English cannot receive the same education as their English speaking classmates. In short, discrimination is admitted. Discriminatory treatment is not constitutionally impermissible, they say, because all children are offered the same educational fare, i.e., equal treatment of unequals satisfies the demands of equal protection. The Equal Protection Clause is not so feeble. Invidious discrimination is not washed away because the able bodied and the paraplegic are given the same state command to walk.
weapons of those seeking judicial approval of a broad definition for what equal educational opportunity is constitutionally required. This Article explores the judicial and legislative reactions to these arguments.

B. The Rodriguez Decision

1. The Suspect Class Argument

In order to trigger the "strict scrutiny" equal protection standard of judicial review, the plaintiffs in San Antonio Independent School District v. Rodriguez sought to persuade the Supreme Court that the state's school financing legislation discriminated on the basis of wealth, a "suspect" classification. The plaintiffs had before them the legacy of the Carolene Products footnote. In addition, there were the criminal appeals and voting rights cases decided by the Warren Court holding that classifications based on wealth were to be strictly scrutinized. Thus it is not surprising that the plaintiffs attempted to characterize the class being discriminated against in Rodriguez — those students who lived in low-property wealth school districts — as a suspect classification based on wealth, and hence entitled to the strict scrutiny standard of equal protection review.

The Court, however, held that Texas' system of financing schools did not discriminate against any class of persons considered suspect. In its view, the subject of the classification was property-poor districts, not poor persons. The injured class was said to be comprised of all students who lived in low-property wealth school districts, rather than indigent students who might live in either low- or high-property wealth districts or indigent students who lived in property-poor school districts. Justice Powell, who wrote the majority opinion, noted that the precedents involving wealth discrimination had been confined to discrimination on the basis of personal wealth. Moreover, the class in Rodriguez was not

52. See notes 17 & 18 and accompanying text supra.
53. E.g., Harper v. Virginia Bd. of Elections, 383 U.S. 663 (1966); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956). In Harper the Court, in striking down the poll tax, said that "[l]ines drawn on the basis of wealth or property, like those of race . . ., are traditionally disfavored." 383 U.S. at 668 (emphasis added) (citation omitted). This, plus such encouraging dicta as that used by the Warren Court in McDonald v. Board of Election Comm'rs, 394 U.S. 802 (1969), to the effect that wealth and race are "factors which would independently render a classification highly suspect," id. at 807 (emphasis added), obviously led to expectations that wealth classifications generally would be treated as suspect and thus demanding of strict judicial scrutiny, despite the fact that the Warren Court cases dealt solely with access to the political and judicial processes.
55. Id. at 20.
the kind to which special judicial protection is generally provided; it was not a politically powerless discrete and insular minority. As the Court put it, a class is suspect if it is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process."57

The Court's holding that the Texas school finance system did not disadvantage any class that could be identified as "suspect" has been criticized on several grounds.58 First, the Court noted that individual income did not always correlate with district property wealth, but most studies show that although the correlation is not perfect, there is generally a strong correlation between low income and low property wealth.59 Even if a strong correlation between personal wealth and district wealth had been shown, however, the majority noted, the cases relied upon by plaintiffs in which the strict scrutiny standard had been applied to wealth discrimination had all involved absolute deprivations of rights rather than relative differences.60 Thus, the Court articulated a

57. 411 U.S. at 28.
59. 411 U.S. at 23. The Court cited a recent Connecticut school district study, reported in Note, A Statistical Analysis of the School Finance Decisions: On Winning Battles and Losing Wars, 81 YALE L.J. 1303 (1972). The study demonstrated, according to the Court, "that the poor were clustered around commercial and industrial areas — those same areas that provide the most attractive sources of property tax income for school districts." 411 U.S. at 23. Two social scientists, however, have attacked the statistical methodology upon which the study relies, noting, inter alia, misinterpretation of correlation coefficients, lack of coefficients, lack of weighted variables resulting in a failure to account for the size of each district, and analysis based on local, not total, expenditures. Grubb & Michelson, Public School Finance in a Post-Serrano World, 8 HARV. C.R.-C.L. L. REV. 550 (1973). In his dissenting opinion, Justice Marshall criticized the Court for drawing conclusions about Texas on the basis of a study of Connecticut, as well as for allowing the state to relitigate data in the Supreme Court that went unchallenged in the district court. 411 U.S. at 95 n.56.
60. E.g., B. Levin, T. Muller, W. Scanlon & M. Cohen, Public School Finance; Present Disparities and Fiscal Alternatives (1972) (report prepared for the President's Commission on School Finance) [hereinafter cited as B. Levin]. This study indicates that in most states, there is a strong correlation between low per capita income and low per pupil property values, particularly in rural areas.
new limit on finding discrimination on the basis of wealth. Not only must the discrimination be against a precisely defined class of indigents, but the deprivation must be absolute. No student was absolutely deprived of an education under the Texas system.\textsuperscript{62} The differences in educational quality among school districts were relative, and the Court would not treat relative educational deprivation as a basis for finding a suspect wealth classification.\textsuperscript{63}

The cases cited by Justice Powell, however, need not necessarily be characterized as involving absolute deprivation of a right or a benefit. In \textit{Griffin v. Illinois}\textsuperscript{64} and in \textit{Douglas v. California},\textsuperscript{65} for example, criminal defendants were not absolutely barred from appealing a criminal conviction. They were merely prevented from bringing a more effective appeal — one in which the bill of particulars was accompanied by a transcript of the trial proceedings or one presented by an attorney rather than by the defendant.

Another argument against the \textit{Rodriguez} majority's refusal to treat district wealth as a suspect class focuses on the nature of the service provided by the government. In indicating that previous "wealth" cases limit the doctrine to situations in which an individual, because of his indigency, is denied a benefit or deprived of a right, the Court sought to distinguish personal and group wealth. It would therefore apply the suspect class doctrine only to a case in which a poor person is denied access to education by, for example, the imposition of a tuition fee requirement. In opposition to this view, it is argued that in the case of education the Court has drawn a line between group and individual wealth that does not exist. Public education is purchased not with personal wealth but with district wealth, the boundaries of that wealth having been determined by the state.\textsuperscript{66} Since education is a publicly provided service, both rich and poor residents of a low property wealth district are poor in the only wealth with which public education can be purchased — district property wealth.\textsuperscript{67}

\textsuperscript{62} 411 U.S. at 24.
\textsuperscript{63} Id. at 23–24. One explanation for this position lies in the Court's view of the disagreement among educators and social scientists as to whether there was any relationship between per pupil expenditures and the quality of education. Id. at 42–43. If the evidence of such a relationship were in doubt, merely showing disparities in per pupil expenditures, as the plaintiffs had, would not be enough to trigger strict scrutiny. Id. at 54–55.
\textsuperscript{64} 351 U.S. 12 (1956).
\textsuperscript{65} 372 U.S. 353 (1963).
\textsuperscript{66} Michelman, \textit{supra} note 46, at 50.
\textsuperscript{67} Coons, \textit{supra} note 58, at 303.
Related to this argument is one that had been made explicitly by some members of the Court in earlier wealth discrimination cases, is at least implied in the opinions of others, and has been expressed by several commentators. It is whether governmental interference with basic economic processes, through the use of the equal protection clause to find an affirmative governmental duty to eliminate handicaps, such as the lack of adequate food or shelter, that arise from differences in individual economic circumstances, is wise. However, this is not a concern relevant to education. Since education is a publicly provided service, purchased with state-circumscribed group wealth, there is no question of the appropriate scope of governmental intervention into the market economy, as there might be in the case of housing, food, and health care, which are purchased with private income. Education is simply not a commodity the supply of which is to be determined by market forces.

Furthermore, since public elementary and secondary education are compulsory, the student who resides in a property-poor area and receives lower quality educational services is closer to the indigents in Griffin and Douglas, who were caught up in the states' criminal process, than to the indigent who cannot afford adequate food or shelter. The state puts the student in his situation by drawing district boundaries and then financing education through a scheme that relies principally on the wealth within those boundaries. In other words, the government makes education compulsory and then provides a process for providing education that ensures that the privileged retain their status.

A final criticism of the Rodriguez majority's treatment of the suspect class issue is that it failed to consider whether the intermediate
level of equal protection review might be applied. The difficulty with the two-tiered analysis, as pointed out by Justice Marshall in his dissent, is its rigidity. There is no suspect classification unless the education is absolutely inadequate, and there is an overwhelming correlation between personal wealth and district wealth. With the rational basis standard the only alternative, the Court is precluded from considering whether there are other approaches that would achieve the state’s asserted interest — the promotion of local control of education — with less inequality.

2. The Fundamental Right Argument

The Rodriguez plaintiffs also argued that education was a fundamental right. Recognizing the novelty of the argument, they attempted to tie education to rights already declared fundamental, such as free speech and voting, by contending that education was inextricably related to those rights. This argument met with no success, however. The Court saw the connection as no more compelling than the connection between housing, food, or other subsistence needs and the right to vote. It refused “to create substantive constitutional rights in the name of guaranteeing equal protection of the laws,” stating that for a right to be fundamental, it must be “explicitly or implicitly guaranteed by the Constitution.” Although the right of interstate travel, like education, is not expressly mentioned in the Constitution, it nevertheless, according to the Court, is implicitly guaranteed by the Constitution. Hence, a law burdening or penalizing interstate travel would trigger strict scrutiny, whereas one that affected welfare,

73. See text accompanying notes 24 to 28 supra.
74. 411 U.S. at 98.
75. A version of the intermediate scrutiny standard, the "sliding scale" test, has been applied in one equal educational opportunity case. Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).
77. 411 U.S. at 37.
78. Id. at 33.
79. Id. at 33–34.
80. See, e.g., United States v. Guest, 383 U.S. 745 (1966). In that case the Court said, "[t]he constitutional right to travel from one State to another ... occupies a position fundamental to the concept of our Federal Union." Id. at 757. It cited Edwards v. California, 314 U.S. 160, 177 (1941) (Douglas, J., concurring); Twining v. New Jersey, 211 U.S. 78, 97 (1908); Williams v. Fears, 179 U.S. 270, 274 (1900); and Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1867). "Although there have been recurring differences in emphasis within the Court as to the source ... [a]ll have agreed that the right exists." 383 U.S. at 759. See also Shapiro v. Thompson, 394 U.S. 618, 630 (1969).
housing,\textsuperscript{82} or education would not.\textsuperscript{83} Thus, differences in educational offerings — unless wholly arbitrary — would be permitted.\textsuperscript{84}

The Court also noted that the cases in which it had held the strict scrutiny standard applicable involved legislation that infringed or interfered with the free exercise of a fundamental right.\textsuperscript{85} In Rodriguez, by contrast, the state of Texas was not interfering with or restricting the ability of school districts to provide education. Instead, by allocating some state funds to school districts, rather than relying solely on local revenues to finance education, the state was attempting to expand, not restrict, the available educational offerings.\textsuperscript{86}

As with its approach to the argument that wealth is a suspect class,\textsuperscript{87} the Court's failure to distinguish the interest in education from that in subsistence needs or other public services has been criticized.\textsuperscript{88} Education is widely believed to be the key to other basic needs. It is education that will break the poverty cycle\textsuperscript{89} and open up access to adequate food, shelter, and other subsistence needs. An education facilitates participation in both the political\textsuperscript{90} and the economic proces-

\textsuperscript{82} Lindsey v. Normet, 405 U.S. 56, 74 (1972) ("[T]he Constitution does not provide judicial remedies for every social and economic ill. We are unable to perceive in that document any constitutional guarantee of access to dwellings of a particular quality . . . .").


\textsuperscript{84} Id. at 24.

\textsuperscript{85} Id. at 37–38 (citing Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Skinner v. Oklahoma, 316 U.S. 535 (1942)).

\textsuperscript{86} 411 U.S. at 39.

\textsuperscript{87} See text accompanying notes 51 to 75 supra.


\textsuperscript{89} For example, President Lyndon B. Johnson, when what was to become the Elementary and Secondary Education Act of 1965, including compensatory education for the economically disadvantaged, was reported out of the Senate Education Subcommittee, said:

With education, instead of being condemned to poverty and idleness, young Americans can learn the skills to find a job and provide for a family. . . .

How many young lives have been wasted . . . because America has failed to give all our children a chance to learn . . . .

. . . .

[Building an adequate education system] represents a national determination that this shall no longer be true. Poverty will no longer be a bar to learning, and learning shall offer an escape from poverty.


\textsuperscript{90} Education is, to use Professor Ely's language, representation-reinforcing. Ely, Toward a Representation-Reinforcing Mode of Judicial Review, 37 Md. L. Rev. 451 (1978).
ses. Thus, the pervasive belief is that education not only enhances an individual's social and economic well-being but strengthens the democratic system as well. It is for these reasons that education is publicly provided and made compulsory by the state. Education can be distinguished from other interests and can, therefore, be recognized as fundamental without opening the door to every substantive interest.

Furthermore, with respect to the Court's view that the state was not interfering with or burdening the exercise of a right, it has been argued that the state had in fact sharply limited the freedom of school districts with low property tax bases to choose to spend more for their children's education. The state had restricted the means for increasing the amount of revenue allocated to education to increasing the local property tax. As Justice White pointed out in his dissent, state law imposed a ceiling on the tax rate that a district could levy. Districts with very low per pupil tax bases would therefore find it impossible to raise school revenues comparable in amount to those raised by districts with higher real property bases through the only mechanism permitted by the state.

Finally, as with its approach to wealth classifications, the Court can be faulted for its rigid view toward fundamental rights. Even the right to minimal access to a benefit, let alone equal access, is not constitutionally protected unless the right is fundamental. Since education is not categorized as fundamental, any inequality in educational offerings would withstand challenge unless wholly arbitrary and irrational. The Court did not slam the door totally shut, however. It suggested that some minimal level of education might be a fundamental right. Strict scrutiny might be triggered by the failure to provide children "with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." But the Court made it clear that without a showing that plaintiffs were absolutely deprived of sufficient education to attain the minimal basic skills, there could not be a violation of the fourteenth amendment, since only a rational relationship between the classification and the state's objective need exist.

92. 411 U.S. at 67.
93. Id. at 37.
94. Id. at 38–40.
II. EQUAL EDUCATIONAL OPPORTUNITY IN A POST-RODRIGUEZ WORLD: THE COURTS

A. Increasing the Number of Protected Classes or Finding Absolute Deprivation of Education

In its five-to-four decision in Rodriguez, the Supreme Court not only ensured that the quality of a child's education would continue to be related to the wealth of the school district in which he resides, but also signaled that it did not intend to treat education as a constitutional right in itself. Rather than deterring attempts to find a basis for a governmental obligation to provide a certain level of educational services, this has led to a proliferation of special interest groups, seeking to obtain judicial or legislative protection for the classes they represent.

The Rodriguez decision left open two possible approaches under the equal protection clause. One is to define more carefully the class involved. Unlike property-poor districts, the class must clearly be identifiable as a "discrete and insular minority" entitled to special judicial protection. This approach has been taken by state and lower federal courts and by Congress in enacting education legislation. Although this route was a well traveled one before the Rodriguez decision, the Supreme Court's refusal in Rodriguez to label education as a fundamental interest undoubtedly made it more attractive. If education is not a fundamental right that must be provided to all equally, then creating new classes entitled to special protection may have to be relied upon to trigger the duty of the government to provide a certain level of education for each category.

This proliferation of classes causes several problems — some political, some legal, some institutional — which are outlined below. Beyond that, however, the expectations that are raised by lower court cases that have extended special protection to newly created classes are likely to be frustrated when the question comes before the Supreme Court. The Court has held only race, national origin, and alienage (and the latter only under certain circumstances) to be suspect and has treated gender and illegitimacy as intermediate categories. It is unlikely to add to the number of classes entitled to special judicial protection.

95. See note 154 and accompanying text infra.
96. See text accompanying note 203 infra.
97. See text accompanying notes 19 to 21 supra.
98. See text accompanying notes 24 & 25 supra.
The issue is further complicated by plaintiff groups who contend that "equal" treatment means more than equal services and other resources, that "equal" means whatever is necessary to put them on a par with the average child. Both Congress and some lower courts, responding to these groups, have adopted the position that in certain circumstances there is an affirmative governmental duty to remove barriers not of the government's making. When federal courts treat the removal of language or other handicapping barriers to learning as an affirmative constitutional duty — or the failure to do so as a constitutional violation — significant questions about the appropriateness of the role of federal courts are raised, since often the remedy involves a major reallocation of resources and educational priorities within a state or school district. And when Congress directs states to undertake these affirmative remedies, questions of federalism are raised.

The other approach to finding a state's constitutional obligation to ensure equal educational opportunity, largely confined to the courts, is to focus on the suggestion in *Rodriguez* that some minimal level of education might be a fundamental right. In this case, the classifications need not be suspect in themselves; it is their relationship to the fundamental or important right that triggers the equal protection claim. This in a sense is a return to the language in *Brown v. Board of Education* that education is so important that if the state provides it, it must be provided equally.

In some cases, it has been argued that with certain classes, the failure of the government affirmatively to provide them with extra resources or special treatment amounts to the functional equivalent of an absolute deprivation of education. In such cases, the argument goes, even though education is offered on an equal basis, the class in question,

99. See text accompanying notes 49 & 50 supra.

100. In *Brown* the Court stated:

Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.

because of barriers not of the government's creation, is unable to take advantage of the education offered.

When the claim to a certain level of education is grounded solely in the Constitution, rather than in a statute, the courts have been relatively cautious about creating new classifications that are to be treated as suspect or finding that the state has deprived a class of even a minimal level of education. In some areas, however, courts have been more willing to find that the equal protection clause has been violated. A few illustrations are given of the various approaches courts have taken.

B. Equal Educational Opportunity: Different Strokes for Different Folks

1. Racial Minorities

The initial concern in the area of racial discrimination in education, the area of law most fully developed by the Supreme Court in the absence of a statute, was to end the massive racial insult blacks had received at the hands of the state. The state, through compelled segregation, had stigmatized racial and ethnic groups. State-imposed isolation was a constitutional violation and the affirmative obligation of ending that isolation fell upon the government. After Green v. County School Board\(^\text{101}\) was decided in 1968, the affirmative obligation took the form of a duty to "take whatever steps might be necessary to convert to a unitary system in which racial discrimination would be eliminated root and branch."\(^\text{102}\)

Recently, in the second phase of the Detroit desegregation case, Milliken v. Bradley (Milliken II)\(^\text{103}\), the Supreme Court held that the duty requires not merely pupil reassignment, but also compensatory or remedial reading programs, guidance and counseling programs, and teacher and administrator retraining, to the extent that these additional and compensatory educational services are necessary to restore the victim of discrimination to the educational position in which he would have been but for the unconstitutional conduct of school officials.\(^\text{104}\) This suggests that equal educational opportunity means more than equal education provided in a nonsegregated setting. Extra educational services are to be provided to minority children who have been

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102. Id. at 437–38.
104. See id. at 274–75, 280, 287.
attending racially isolated schools. The difficult problem is how a court can determine where the victim would have been but for government-imposed or -encouraged racial or ethnic isolation and what kinds of educational services and what quantity will restore him to that position. In view of our limited knowledge of the conditions associated with racial and cultural isolation and of what programs would correct those conditions, one wonders why the Supreme Court believes lower courts can readily discern and order the appropriate programs. The Court in Rodriguez certainly seemed skeptical, noting that the case:

involve[d] the most persistent and difficult questions of educational policy, another area in which this Court's lack of specialized knowledge and experience counsels against premature interference . . . . Education . . . presents a myriad of "intractable economic, social and even philosophical problems. . . ." On even the most basic questions in this area the scholars and educational experts are divided.

It is hard to believe that the remedial horrors conjured up by the Supreme Court in Rodriguez are any greater than would be encountered in determining the effects of segregation and the kinds of programs that would best ameliorate its effects.

This difference between Rodriguez and Milliken II certainly cannot be explained by changes in the quality of social science evidence. Social science research is no better here than it was on the issues in Rodriguez. And the difference between Rodriguez and Milliken II certainly does not lie in a changing faith in the ability of federal courts to decide issues of educational policy. Why then in Milliken II does the Court find that the Constitution affirmatively requires the state to provide more than equal treatment where minority children are involved? One possible explanation is that Milliken II involved a suspect class whereas Rodriguez did not, but a closer analysis of the case suggests that the difference between the scope of the remedy in the two cases lies in the source of the wrong. Milliken II is really not a very great leap from the traditional equal protection approach, even though courts are likely to be involved in ordering the reallocation of significant resources and educational

105. Although the Supreme Court had not previously addressed the question whether federal courts could order compensatory education programs as part of a school desegregation remedy, many lower courts had long required the inclusion of such programs in desegregation plans. See cases cited id. at 283–86.
106. 411 U.S. at 42 (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)).
priorities. Before federal courts can devise and order new educational programming, they must find that racial isolation was the result of deliberate acts of discrimination by school authorities. The net result is that, in the area of race, the principal governmental duty is still to remove a state-imposed barrier. Therein lies the justification for the Milliken II Court's foray into the field of educational policy. Racial minorities, it seems, have an affirmative constitutional right to compensatory education, but not in the absence of some initial unconstitutional conduct by the government.107

2. Gender Discrimination

Similarly, in the area of gender classification in education, there has been no major involvement of the courts in anything more than removing government-imposed barriers. Even then courts have certainly not yet intervened to the extent of requiring significant reallocation of resources or restructuring of institutions, as in Milliken II.

The Supreme Court held in Craig v. Boren108 that a gender classification is not suspect, but is sufficiently tainted to require that it be substantially related to an important governmental interest.109 It remains to be seen how this intermediate standard of review will work when confronted with something less than total deprivation of a benefit. The only constitutional violations found by lower courts to date have involved total exclusion from schools or educational programs and activities on the basis of gender. The remedy for such a violation is admission — not unlike the pre-Brown cases such as Sweatt v. Painter.110 For example, lower courts have found unconstitutional the denial of access to academically elite schools111 and the use of differential admission standards that give preference to less qualified males.112 Several state and lower federal courts have also indicated that the complete exclusion of female students from certain sports — generally

107. But cf. Hobson v. Hansen, 269 F. Supp. 401, 515 (D.D.C. 1967), aff'd sub nom. Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969) (where, because of density of residential segregation or for other reasons, black children were denied integrated education, school system must provide compensatory education "sufficient at least to overcome the detriment of segregation and thus provide, as nearly as possible, equal educational opportunity to all schoolchildren.").
non-contact sports — is a denial of equal protection and have ordered their inclusion.

It is unlikely that in the area of sex, in contrast to race, even separate schools and programs will be found unconstitutional as long as they are equal. When this issue was presented to the Supreme Court in *Vorchheimer v. School District of Philadelphia*, the result was an equally divided Court, leaving standing a Third Circuit decision upholding separate girls' and boys' academically elite public high schools. The defendant school board had argued that sex-segregated high schools are a "time honored educational alternative," and had presented some social science evidence supporting the view that a single-sex school — especially for adolescents — is more conducive to learning than a coeducational school. Moreover, women were not deprived of educational opportunities since there was a comparable academic facility for women. Whether after *Craig v. Boren*, this would be a sufficient justification for the intermediate test, which requires a substantial relation to an important governmental interest, is

113. E.g., Brenden v. Independent School Dist. 742, 477 F.2d 1292 (8th Cir. 1973) (tennis, skiing, running); Gilpin v. Kansas State High School Activities Ass'n, Inc., 377 F. Supp. 1233 (D. Kan. 1974) (cross-country). While most cases grounded in the equal protection clause have indicated that contact sports might be treated differently, some state courts, applying their state constitution's equal rights amendment, have held that qualified girls cannot be excluded even from contact sports. E.g., Darrin v. Gould, 85 Wash. 2d 859, 540 P.2d 882 (1975) (football). Other courts have utilized the rational basis standard of equal protection review and upheld the exclusion even in the case of non-contact sports. E.g., Ritacco v. Norwin School Dist., 361 F. Supp. 930 (W.D. Pa. 1973).

114. 430 U.S. 703 (1977), affg by an equally divided Court, 532 F.2d 880 (3d Cir. 1976).

115. In 1970 a similar case arose at the university level, where the issue was raised by male plaintiffs. The three-judge district court held that a state statute that limited admission to one of its eight colleges to females on the theory that the curricula were especially helpful to female vis-a-vis male students was not without a rational justification, and therefore did not deny equal protection. Williams v. McNair, 316 F. Supp. 134 (D.S.C. 1970). The Supreme Court summarily affirmed the decision. 401 U.S. 951 (1971).


117. The "social science evidence" was rather weak. The study introduced to support the schoolboard's position was based on a questionnaire administered to juniors and seniors in New Zealand attending both sex-segregated and coeducational high schools. Male and female students were asked how much time they devoted to homework, how they would use an extra hour at school, and whether they would prefer to be remembered at school as a leader, a brilliant student, or a popular person. Males and females in coeducational institutions studied less, would use the extra hour for study less frequently, and were concerned with popularity more frequently than students who attended sex-segregated facilities. Vorchheimer v. School Dist., 400 F. Supp. 326, 330–31 (E.D. Pa. 1975).

118. 532 F.2d at 882–83.

not certain. The decisions to date, however, indicate that it remains constitutional to have government-imposed separation based on gender.

Even when courts have found that the exclusion of women from certain educational programs is attributable to intentional acts of discrimination by school officials, no court has required special remedial education in, for example, math and science, industrial arts, or physical fitness. Thus, there is no gender counterpart of *Milliken II*. This undoubtedly reflects the view that the constitutional harm is the unequal treatment of an individual — e.g., denying access to a particular educational program on the basis of the individual's gender. Equal treatment, in the form of access to the program, eliminates the harm. An alternative view consistent with the treatment of race is that women, as a group, have been restricted in their access to the political process — by government, by society, or what have you — and therefore are in need of special judicial protection. Under this perception of the constitutional harm, women as a group might be constitutionally entitled to special affirmative assistance. The courts, however, by and large have not taken this view.

3. **Language Minorities**

The question whether ethnic minorities are constitutionally protected from discriminatory treatment — defined as the invidious separation from the majority or denial by the government of a benefit that is provided all other children — is no longer in doubt. In question now is whether the Constitution obligates governmental authorities to treat members of ethnic minority groups with limited English language abilities differently than other students are treated. In other words, is there an affirmative duty to provide them with special programs to offset their language handicap when it is a barrier to their educational progress, even though the barrier is not one invidiously created by the government?

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120. See id. at 197–99.
121. There are several decisions that suggest that it may not be unconstitutional to provide special compensatory programs for women. See, e.g., Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190, 198 n.6 (1976); Kahn v. Shevin, 416 U.S. 451 (1974). *But cf.* Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978) (opinion of Powell, J.) (medical school admissions policy including a minority quota violated majority applicant's right to equal protection).
The Ninth Circuit, in *Lau v. Nichols*, was presented with the argument that even though a student is given the same course of instruction as all other schoolchildren, "he is denied education on 'equal terms' with them if he cannot understand the language of instruction. . . ." The plaintiffs' position was that *Brown v. Board of Education* require[d] schools to provide 'equal' opportunities to all, and equality is to be measured not only by what the school offers the child, but by the potential which the child brings to the school. If the student is disadvantaged with respect to his classmates, the school has an affirmative duty to provide him special assistance to overcome his disabilities, whatever the origin of those disabilities may be.

The Ninth Circuit rejected this argument. The use of English as the sole language of instruction did not evidence the requisite affirmative governmental discrimination against persons because of their race or ethnic origin, nor was there any evidence that the plaintiffs' language deficiencies were related to any past discriminatory action by the state.

The Supreme Court reversed, although it avoided the constitutional issue. The majority relied solely on section 601 of Title VI of the Civil Rights Act of 1964 and guidelines promulgated under it requiring school districts that receive federal funds to provide assistance to students with English language deficiencies. Although the case thus became one of statutory construction rather than constitutional interpretation, the Court did recognize that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers and curriculum; for students who do not understand English

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124. *Id.* at 794.
125. *Id.*
128. 42 U.S.C. § 2000d (1976): "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."
are effectively foreclosed from any meaningful education."\(^{130}\) This certainly sounds like an argument based on constructive exclusion from education. When coupled with the suggestion of the Rodriguez Court that some minimal quantum of education may be a fundamental right, the way has been opened to the argument that the failure to provide children of limited English language ability with special assistance to overcome their "linguistic handicaps" absolutely deprives them of that quantum of education that may be a "constitutionally protected prerequisite" to the "meaningful exercise" of the right to speak and to vote.\(^{131}\)

Even if this argument were successful, other questions remain unresolved. Is the constitutional entitlement to an equal educational opportunity that of an individual child of limited English language ability or that of a defined ethnic or language-minority group?\(^{132}\) Is every language minority group constitutionally entitled to affirmative assistance or only groups that historically have been stigmatized and invidiously discriminated against?\(^{133}\)

The Supreme Court did not reach the constitutional question in *Lau v. Nichols*. Whether students with English-language deficiencies who cannot communicate in the classroom are constructively excluded from an education to the point that a constitutionally protected interest is violated has thus not been clarified. In several lower court cases plaintiffs raising constitutional issues similar to those in *Lau* have been unsuccessful in the absence of proof of past governmental discrimination.\(^{134}\)

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130. 414 U.S. at 566 (emphasis added).
131. 411 U.S. at 36.
132. Although the majority opinion in *Lau v. Nichols* did not comment on whether § 601 would apply to a smaller number of students than the 1,800 non-English-speaking Chinese students involved in that case, Justice Blackmun emphasized that he concurred solely because of the size of the affected group.
   I merely wish to make plain that when, in another case, we are concerned with a very few youngsters, or with just a single child who speaks only German or Polish or Spanish or any language other than English, I would not regard today's decision, or the separate concurrence, as conclusive upon the issue whether the statute and the guidelines require the funded school district to provide special instruction. For me, numbers are at the heart of this case and my concurrence is to be understood accordingly.
414 U.S. at 572 (Blackmun, J., concurring in result).
133. For example, are Hungarian or Italian children of limited English-speaking ability entitled to special assistance, or are only such groups as the Mexican-Americans in the Southwest or the Chinese and Japanese in California, historically subjected to government as well as private discrimination, entitled to special language assistance?
134. E.g., Otero v. Mesa County Valley School Dist. No. 51, 408 F. Supp. 162 (D. Colo. 1975), vacated on other grounds, 568 F.2d 1312 (10th Cir. 1977). In Guadalupe Org'n, Inc.
It is only in the context of desegregation litigation that a remedy to provide extra education to correct English language deficiencies has been constitutionally imposed on school authorities, but such circumstances parallel those in *Milliken II*, in that there had been a prior finding of deliberate discrimination by the state. Thus, the existing case law suggests that while ethnic and national origin minorities are clearly suspect classifications triggering strict judicial scrutiny, before the equal protection clause requires an affirmative remedy there must be a showing that the government has deliberately singled out the class for differential discriminatory treatment.

4. **Handicapped Students**

   a. **Total Exclusion**

Handicapped students clearly should be able to draw upon the Supreme Court's definition of a suspect class in *Rodriguez*. They are saddled with "disabilities" that are largely immutable and determined solely by accident of birth or disease. There is a long history of discriminatory treatment of handicapped persons at the hands of state legislatures, ranging from involuntary sterilization to prohibitions on

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v. *Tempe Elem. School Dist. No. 3*, 587 F.2d 1022 (9th Cir. 1978), the court held that the school district was not constitutionally required to provide bilingual-bicultural programs to Mexican American and Yaqui Indian children. In the absence of intentional discrimination, the decision to provide only remedial language assistance and not bilingual-bicultural education met the rational basis test of *Rodriguez*. *Id.* at 1026–27. According to the court, the legitimate state interest to which this program bore a rational relationship was, in effect, the preservation of cultural homogeneity. *Id.* at 1027. The decision implies, however, that there may be a constitutional duty to provide some assistance (even if only remedial English) to limited English-speaking children.


137. 411 U.S. at 28. It should be noted, however, that Justice Brennan, in his plurality opinion in *Frontiero v. Richardson*, 411 U.S. 677 (1973), distinguished sex, like race and national origin, "from such nonsuspect statuses as intelligence or physical disability," noting that the sex characteristic, like other suspect criteria, "frequently bears no relation to ability to perform or contribute to society." *Id.* at 686. Presumably, then, mental retardation does bear some relation to ability to perform.

138. In *Buck v. Bell*, 274 U.S. 200 (1927), the Supreme Court upheld the constitutionality of a Virginia statute that permitted the sterilization of institutionalized patients "afflicted with hereditary forms of insanity, imbecility, etc." *Id.* at 206. By the late 1950's, 28 states had some form of sterilization statute; 17 of these laws included epileptics as well as the mentally ill and mentally retarded. Burgdorf & Burgdorf, *A History of Unequal..."
marriage\textsuperscript{139} and on more mundane rights such as the right of contract\textsuperscript{140} and to obtain licenses of various kinds.\textsuperscript{141} Most importantly, many handicapped children have long been excluded from any public schooling.\textsuperscript{142} Finally, since in many cases handicapped persons have been denied the right to vote,\textsuperscript{143} they are clearly "relegated to . . . a position of political powerlessness."\textsuperscript{144} Thus, it could be — and has been — argued that the handicapped are a suspect class entitled to "extraordinary protection from the majoritarian process."\textsuperscript{145}

The first major legal breakthrough for education for handicapped students came in a pre-Rodriguez case, Pennsylvania Association for Retarded Children (PARC) \textit{v.} Pennsylvania.\textsuperscript{146} Under state law, retarded

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142. See, e.g., Department of Pub. Welfare \textit{v.} Haas, 15 Ill. 2d 204, 154 N.E.2d 265 (1958). There the court stated:

While this constitutional guarantee [that "the general assembly shall provide a thorough and efficient system of free schools," Ill. Const. art. VIII, § 1] applies to all children in the State, it cannot assure that all children are educable. The term "common school education" implies the capacity, as well as the right, to receive the common training, otherwise the educational process cannot function. . . . Existing legislation does not require the State to provide a free educational program, as a part of the common school system, for the feeble minded or mentally deficient children who, because of limited intelligence, are unable to receive a good common school education. Under the circumstances, this constitutional mandate has no application. \textit{Id.} at 213, 154 N.E.2d at 270.


143. See, e.g., Ky. Const. § 145(3); Neb. Const. art. VI, § 2; P.R. Laws Ann. tit. 16, § 10 (1972).


145. \textit{Id.} See generally Burgdorf & Burgdorf, supra note 138.

children could be excluded from the public schools if they had been certified as "uneducable and untrainable" or had not attained the mental age of a normal five-year-old child. The plaintiffs introduced evidence that all mentally retarded persons are capable of benefitting from a program of education and training. Without deciding whether mentally handicapped children were a suspect class or education was a fundamental right, the court concluded that the policy of providing education to normal children while denying it entirely to a substantial number of children with mental handicaps "established a colorable constitutional claim even under the less stringent rational basis test." The parties entered into a consent agreement whereby the state recognized its "obligation to place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . . ." In Mills v. Board of Education, another pre-Rodriguez case dealing with the mentally retarded and emotionally disturbed, the district court held that the District of Columbia school board, in denying such students an education, violated statutory policy embodied in the District of Columbia Code as well as the due process clause of the Constitution. In neither of these cases was the question whether the handicapped were a suspect class clearly dealt with.

Since the Supreme Court's decision in Rodriguez, only one court, the North Dakota Supreme Court, has unequivocally found the handicapped to be a suspect class. However, even if the courts are unlikely to consider handicapped students a suspect class, most courts, presented with the kind of evidence of the ability of even severely mentally

147. Id. at 282.
148. Id. at 296.
149. Id. at 283 n.8.
150. Id. at 307.
152. Id. at 873–74. The court quoted § 31–203, which provided:
    The Board of Education . . . may issue a certificate excusing from attendance at school a child who, upon examination ordered by such board, is found to be unable mentally or physically to profit from attendance at school: Provided, however, that if such examination shows that such child may benefit from specialized instruction adapted to his needs, he shall attend upon such instruction.

D.C. CODE ANN. § 31–203 (1971) (current version identical). Thus, the Mills decision has somewhat limited precedential value in establishing a constitutional right.

153. 348 F. Supp. at 875. The court found that the District's denial of a right that it provided to other children was without a rational basis. Id.

retarded children to learn introduced by the plaintiffs in the \textit{PARC} case,\textsuperscript{155} will probably find that the exclusion of handicapped children from any education whatsoever is arbitrary and irrational and hence unconstitutional even under the less stringent equal protection standard.

The "fundamental right" strand of the \textit{Rodriguez} opinion suggests another approach for handicapped students. The \textit{Rodriguez} majority distinguished the interdistrict financing inequities in Texas, which produced relative differences in the quality of education, from a state "financing system [that] occasioned an absolute denial of educational opportunities to any of its children."\textsuperscript{156} It could be argued that completely excluding a class of children such as the mentally retarded from the public schools would violate the equal protection clause.\textsuperscript{157} A handicapped child, who is entirely deprived of an educational opportunity, is arguably distinguishable from the student in \textit{Rodriguez} who is receiving an "adequate" but relatively inferior education.

In one post-\textit{Rodriguez} case, \textit{Cuyahoga County Association for Retarded Children and Adults v. Essex},\textsuperscript{158} a statute nearly identical to that deemed unconstitutional in \textit{PARC} was upheld under the more lenient rational basis standard of equal protection, the district court expressly relying on the \textit{Rodriguez} holding that education is not a constitutionally guaranteed right.\textsuperscript{159} Other cases have found the exclusion of handicapped children unconstitutional, often without clearly articulating the standard of equal protection review applied.\textsuperscript{160}

\begin{itemize}
\item \textsuperscript{155} 343 F. Supp. at 296. \textit{See text accompanying note} 148 \textit{supra}.
\item \textsuperscript{156} 411 U.S. at 37.
\item \textsuperscript{157} The North Dakota Supreme Court recently stated with regard to the handicapped that "[f]ederal constitutional questions would arise if there were a total deprivation of educational opportunities . . . ." In re G.H., 218 N.W.2d 441, 446 (N.D. 1974).
\item \textsuperscript{158} 411 F. Supp. 46 (N.D. Ohio 1976).
\item \textsuperscript{159} \textit{Id.} at 50.
b. Special Treatment and Appropriate Education

Although most courts might have little difficulty finding the total exclusion of handicapped children from public schooling to be a violation of the equal protection clause, a more difficult question is whether the equal protection clause is violated by a state's failure to provide the handicapped with an "appropriate" education. Even if handicapped children are not excluded from public schools, is the state under a constitutional obligation to provide a certain amount and kind of education to such children? A few of the pre-Rodriguez cases, in particular PARC and Mills, required school officials to place each child in a program "appropriate to the child's capacity." Such requirements, as the Mills case makes clear, involve the reallocation of substantial resources. Because PARC was a consent decree and Mills grounded the school board's obligation in existing statutes and regulations, the question remains whether, under the equal protection clause, courts can order school systems to undertake this burden.

recognize student's entitlement to education as property right protected by fourteenth amendment's due process clause); In re K., 74 Misc. 2d 872, 347 N.Y.S.2d 271 (Kings County Fam. Ct. 1973); In re Kirschner, 74 Misc. 2d 20, 344 N.Y.S.2d 164 (Monroe County Fam. Ct. 1973); In re G.H., 218 N.W.2d 441, 446 (N.D. 1974) ("Federal constitutional questions would arise if there were a total deprivation of educational opportunities . . .").

It should be noted that the Cuyahoga County case was decided on the pleadings. The court reviewed only the facial constitutionality of the state statutes excluding children who have been "determined to be incapable of profiting substantially by further instruction . . ." 411 F. Supp. at 51. The court was not presented with the kind of evidence introduced in PARC, 343 F. Supp. at 296.

161. The consent agreement in PARC provided that the state would undertake to "place each mentally retarded child in a free, public program of education and training appropriate to the child's capacity . . . ." 343 F. Supp. at 307. In Mills, the court ordered the District of Columbia Board of Education to "provide to each child of school age a free and suitable publicly-supported education regardless of the degree of the child's mental, physical or emotional disability or impairment." 348 F. Supp. at 878. The court appeared to base this obligation to provide a "suitable" education on requirements in the statutes and regulations of the District of Columbia rather than on the due process clause of the fifth amendment. See id. at 874.

162. In Mills, the defendants had argued that it was impossible to afford plaintiffs the requested relief unless they diverted funds already appropriated for other services, thereby violating a congressional act. 348 F. Supp. at 875. The court rejected the argument, stating that the District's "interest in educating the excluded children clearly must outweigh its interest in preserving its financial resources." Id. at 876. The inadequacies of the school system could not "be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child." Id.

163. See note 161 supra.

The Supreme Court decision in *Lau v. Nichols*\(^\text{165}\) provides some support for a right to an appropriate education. That case involved non-English-speaking Chinese students who were compelled to sit in classrooms in which the only language spoken was English. Although the Court did not decide the constitutional issue, it did recognize, as noted earlier, that "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed from any meaningful education."\(^\text{166}\) An argument could be made that handicapped children who do not receive an education appropriate to their needs may similarly be foreclosed from "any meaningful education" and thus deprived of that minimum quantum of education that may be a fundamental right.\(^\text{167}\)

Several lower federal and state courts have held that handicapped students are constitutionally entitled to an appropriate education. For example, in *Fialkowski v. Shapp*\(^\text{168}\) two multiply-handicapped brothers, with mental ages of less than two — although their chronological ages were twelve and twenty-one — alleged that their equal protection and due process rights were violated because school officials failed to offer them training appropriate to their learning capacities. They sought to have the school they attended teach them how to dress, eat, and walk rather than to read or write,\(^\text{169}\) arguing that because of the nature of their handicaps, they did not benefit from the education they received. The district court noted that *Rodriguez* did not foreclose their claim:\(^\text{170}\) unlike the plaintiffs in *Rodriguez*, the plaintiffs in *Fialkowski* were seeking equal access to some minimally adequate level of education.\(^\text{171}\)

An educational program, the court said, must be evaluated in terms of its capacity to equip a child with the tools needed in life.\(^\text{172}\) Placing children with the mental abilities of two-year-olds in a program emphasizing reading and writing skills was inadequate to equip them with such tools.\(^\text{173}\)

\(^{166}\) *Id.* at 566. *See* text accompanying notes 123 to 136 supra.
\(^{169}\) *Id.* at 948 n.1.
\(^{170}\) *Id.* at 957. Since the court was ruling on defendants’ motion to dismiss, the court's discussion of this and succeeding points is largely dictum.
\(^{171}\) *Id.* at 958.
\(^{172}\) *Id.* at 959.
\(^{173}\) *Id.* Cf. Robinson v. Cahill, 62 N.J. 473, 515, 303 A.2d 273, 295, *cert. denied*, 414 U.S. 976 (1973) (state constitution’s guarantee of a “thorough and efficient system of education” interpreted as embracing “that educational opportunity which is needed in the
Several other cases have also held that the education to which handicapped children are constitutionally entitled is a "meaningful education" or an "education commensurate with their needs." And a number of cases have held that if the public school system does not have suitable facilities, an appropriate education must be provided in private facilities at public expense.

The post-Rodriguez "appropriate education" cases have, however, not yielded completely consistent views. In one case, residents of a New York institution for the mentally retarded alleged they had not been provided an adequate public education, one suited to their needs and capabilities. The district court, citing Rodriguez, declared that "if there is no constitutional infirmity in a system in which the state permits children of normal mental ability to receive a varying quality of education, a state is not constitutionally required to provide the mentally retarded with a certain level of special education." The court, viewing the rational basis test as the appropriate standard of equal protection review, found that the state had allocated scarce resources among conflicting needs in a rational manner, so that there was no constitutional violation in denying an appropriate education to the mentally retarded.

A similar case involved children with "specific learning disabilities," who claimed that they were "deprived of an education appropriate to their specialized needs," although they were afforded access to the same curriculum as normal children. Frederick L. v. Thomas, 408 F. Supp. 832, 833–34 (E.D. Pa. 1976). They contended that they could not derive any educational benefit from the normal curriculum without special instruction aimed at their learning handicap. Thus, they were "constructively excluded from public educational services, because — for them — the instruction offered is virtually useless, if not positively harmful." Id. at 835. The court said that since Rodriguez "left open the possibility that the denial of a minimally adequate educational opportunity may trench upon a fundamental interest," the plaintiffs might be entitled to the strict scrutiny standard of review "because a classification has functionally excluded them from a minimally adequate education." Id. It did not reach the constitutional question when it came to the merits because state statutory grounds proved dispositive of the claim. Frederick L. v. Thomas, 419 F. Supp. 960 (E.D. Pa. 1976), aff'd, 557 F.2d 373 (3d Cir. 1977).

Similarly, in Sherer v. Waier, public school officials had refused to enroll a child who had spina bifida, which required catheterization at least once a day during school hours, offering instead to provide homebound instruction. The district court held that this was not a denial of equal protection. Citing Rodriguez as the basis for determining that education is not a fundamental right, the court held that the defendants had not denied the child an education but had merely refused to provide special services not provided to other students. The Constitution does not place "an affirmative duty on the defendants to provide special services for a special class."

Although most cases seem to have drawn on the Rodriguez Court's speculation that the denial of some minimal level of education might be a constitutional violation, the right to an "appropriate" education for handicapped students might also be drawn from the "right to treatment" cases. The cases have held that the restraint of liberty resulting from civil commitment in order to receive treatment is a violation of the fourteenth amendment's due process or equal protection clause where no treatment is provided. This concept has been extended to training schools for juveniles adjudged "in need of supervision." Recently, a district court in New York expanded this concept in applying it to a special day school on the ground that, although students are not confined or deprived of their liberty to the extent of plaintiffs in mental institutions or training schools, the schools are a "restrictive" environment and placement is not entirely voluntary. Thus, the failure to provide "appropriate educational and therapeutic treatment" was a violation of their constitutional rights. The concept could be carried one step further to apply to all handicapped students. Schooling is compulsory, there is little choice on the part of handicapped students in their assignment to particular classes, and all schools provide to some extent a "restrictive" environment.

An analysis of the decisions holding that school districts are constitutionally required to provide handicapped students with an

180. Id. at 1047–48.
181. Id. at 1047.
182. Id. at 1048.
183. Id.
187. Id. at 1274.
“appropriate” education indicates that in general courts rarely articulate a specific definition of “appropriate.” Often the courts have turned to existing state legislation or regulations to determine what is an appropriate education. The ability to “equip a child with the tools needed in life” seems to be as specific as the courts have gotten. It is unclear whether the constitutionally protected right of a handicapped child to an equal educational opportunity means that there is a constitutional obligation to educate each individual handicapped child to his maximum potential or merely to provide such children with minimal “survival” skills. The courts that have found no constitutional right to an “appropriate” education have of course considered that equal educational opportunity means merely to make some education available to such children. There is no affirmative duty to provide special assistance to overcome the barriers created by their physical and mental disabilities.

In sum, whether there is a constitutional, as opposed to the statutory, right of handicapped students to an “appropriate” education commensurate with their “needs” is questionable. The Supreme Court has yet to hear a case involving either the exclusion of handicapped children from all education or the failure to provide an “appropriate” education to such children. Some lower courts have indicated that there is no right to an appropriate education, and other courts, having found such a right, have failed to provide any judicially manageable standards for determining when that right has been met.

5. **Wealth Discrimination**

Courts would probably apply the strict scrutiny standard of equal protection review to legislation that acted to deny low-income persons any education at all. For example, tuition fees for admission to public schools that totally barred indigent students would meet the “absolute deprivation” test of *Rodriguez.* The more difficult question arises

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189. Fialkowski v. Shapp, 405 F. Supp. 946, 959 (E.D. Pa. 1975) (“An educational program must be assessed in terms of its capacity to equip a child with the tools needed in life.”).

190. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of “poor” people — definable in terms of their ability to pay the prescribed sum — who would be absolutely precluded from receiving an education. That case would present a
where there are relative differences in the amount of money expended for education and the differences are systematically related to the wealth of individual children and their families.

The existence of a systematic pattern of disparities in per pupil expenditures on a school-by-school basis within a single school district, where low expenditures are found in schools serving low-income neighborhoods, arguably could be distinguished from the situation in Rodriguez. That case involved disparities in expenditures between school districts; here the wealth classification postulated is not district wealth but personal wealth. Thus the system discriminates against a definable group of poor people and may therefore create a "suspect classification," triggering the stricter equal protection standard.\(^\text{191}\)

Even if the weaker standard is utilized, however, it could be argued that there is no rational basis for a system that maintains disparities in educational expenditures among schools within a single district. In Rodriguez the Court found that encouraging local autonomy by permitting districts to decide how much to tax themselves for education was a legitimate state purpose, even if the result were substantial disparities among districts in per pupil expenditures. Discrimination among schools within a single district could not serve such a purpose, since it is the central school board, not the individual school, that decides how much is to be spent in each school.

In Hobson v. Hansen,\(^\text{192}\) decided before the Rodriguez decision was handed down, substantial differences in the per-pupil expenditures for teachers' salaries and benefits were found to exist between schools attended by the wealthier, predominantly white students in Washington, D.C. and schools in the low-income, minority sections of the city. Since the school board was unable to advance a compelling state interest justifying this unequal treatment, the court found it violated the equal protection clause, and ordered per-pupil expenditures for teachers from

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411 U.S. at 25 n. 60. Accord, Shapiro v. Thompson, 394 U.S. 618, 633 (1964) (state could not constitutionally "reduce expenditures for education by barring indigent children from its schools").

191. But see San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. at 22–25. The Rodriguez Court suggested that in order to fit within traditional equal protection notions a class of poor persons would have to be "fairly" defined as indigent or composed of persons whose incomes are beneath some designated poverty level. Many students who attend schools in ghetto areas would be likely to meet either of these criteria. Nevertheless, it is not clear whether the Court would also require a showing that there has been an absolute deprivation of education and not just provision of a poorer quality education.

the regular budget to be equalized within five percent in all the District's elementary schools. Although the case predated Rodriguez, it is likely that the Hobson plaintiffs would have prevailed even after that decision, because Hobson's holding rests on discrimination on the basis of race — an indisputably suspect classification — as well as on wealth.

The only significant post-Rodriguez case involving intradistrict disparities in school expenditures is Brown v. Board of Education of Chicago. The plaintiffs contended that the Chicago school board allocated school funds in a manner that discriminated against non-white and poor children. Declining to distinguish Rodriguez, the court applied the weaker, rational relationship test and held that the funding disparities were not irrational. They were due to the concentration of higher salaried teachers in certain schools. The city's voluntary teacher transfer policy, which enabled more experienced teachers to transfer to more "desirable" schools, was endorsed by the court even though it was the primary cause of the funding disparity, since it "presumably helps keep these teachers in the Chicago school system, which upgrades the skill level of the system as a whole." Because the plaintiffs made no showing that they constituted a definable category of poor persons, and because they were not absolutely deprived of education, the court held that the school-by-school disparities in expenditures did not produce any unconstitutional economic discrimination. Thus, even when the element of district wealth has been removed, and the classification is closer to personal wealth, it is unlikely that courts will deem it appropriate to apply the stricter standard of equal protection review.

193. Id. at 863-64.
195. Id. at 118-19. In many school districts, higher paid senior teachers are assigned to middle class schools, while probationary teachers, at the bottom of the salary scale, are assigned to inner city schools. See id. at 119; Hobson v. Hansen, 327 F. Supp. 844, 854-56 (D.D.C. 1971); In re Skipwith, 14 Misc. 2d 325, 338-44, 180 N.Y.S.2d 852, 866-71 (N.Y. County Dom. Rel. Ct. 1958); B. LEVIN, supra note 60, at 296.
196. 386 F. Supp. at 123.
197. See note 191 supra. The Brown court saw no distinction between the class in Rodriguez (those who live in low property wealth districts) and that in Brown (those who live in low income neighborhoods). See 386 F. Supp. at 122.
198. 386 F. Supp. at 123. As in Hobson v. Hansen, however, the court also had before it a prima facie case of discrimination on the basis of race, the paradigm suspect class, requiring the board to show that there were compelling — not just rational — interests in maintaining the system of teacher transfers. The disparities in expenditures caused primarily by the board's voluntary teacher transfer policy, since they discriminated on the basis of race, were held to be "constitutionally unacceptable" because neither "administrative convenience" nor "employee desires" are compelling state interests. Id. at 125.
C. Summary: What the Courts Have Said about Equal Educational Opportunity

Is equal educational opportunity a constitutionally protected right? If it is, does the definition of equal educational opportunity vary for different categories of children? At the least, the Supreme Court has said that equal educational opportunity means that the state may not establish and maintain separate schools for minority children even if the education provided in those schools is equal to that provided white children. When, however, the state has been found to have violated the equal protection clause by its deliberate maintenance of racially isolated schools, an appropriate remedy for the state’s victims may include special and additional educational services over and above those provided other children. These decisions, however, may have nothing to do with the right to equal educational opportunity but rather concern the right of racial minorities not to be discriminated against in the provision of any public service. The Supreme Court has suggested, though, that any child (not necessarily a member of a racial minority) who is absolutely deprived of an education, when the state has made education available to others, might have a constitutional claim. Beyond that, we can only speculate and extrapolate from non-education and non-constitutional opinions of the Supreme Court to arrive at a possible definition of that equal educational opportunity that is a constitutionally guaranteed right.

For example, the Court’s treatment of suspect classifications in non-education cases suggests that disparities in educational expenditures or services, where minority children are intentionally provided lower quality services, would be unconstitutional in the absence of a compelling justification by the state. Similarly, the intentional provision of unequal education services to one gender would be unconstitutional unless the classification were at least substantially related to an important governmental interest.

Pushing the language used by the majority in *Lau v. Nichols*, which was decided on statutory rather than constitutional grounds, to its logical extension, may yield another plausible definition of equal educational opportunity. It is possible to argue that a child who is compelled to attend a classroom in which he cannot understand the language of instruction is constructively deprived of any meaningful education unless he or she is provided with special assistance. And this might extend not only to a language-minority child but also to a deaf child or a child with other severe handicapping conditions.

Some, but clearly not all, lower courts have, at least in the case of the handicapped, implicitly accepted this argument. They tie the notion
of constructive exclusion to Rodriguez' suggestion of an "absolute deprivation" test in order to find that handicapped children not only have a constitutional right not to be totally excluded from an education but also have a right to an "appropriate" education. The courts have not gone as far, however, in the case of language minorities.

Finally, the only intradistrict wealth discrimination case to arise in the post-Rodriguez era suggests that there will be little significant attempt to distinguish that case and find a constitutionally protected right to an equal education where inequalities are based on wealth — even if personal wealth.

This review of the cases suggests that the courts have been somewhat reluctant to expand the number of classes entitled to special judicial protection or to find that some level of education is a fundamental right — particularly where an affirmative governmental duty is claimed in the absence of any prior discrimination. Except in a few instances then — primarily in the area of the handicapped199 — the courts, contrary to popular belief, have largely left to the legislature the function of re-allocating education revenues among conflicting claimants.

III. EQUAL EDUCATIONAL OPPORTUNITY: THE CONGRESS

A. Increasing the Number of Protected Classes

The refusal of the Supreme Court to find a constitutional entitlement to an education and the reluctance of lower courts to expand the number of classes entitled to special judicial protection has led to pressure on the legislative branch to expand the number of classes. This pressure has come from groups who see access to equal and adequate education as attainable only through having themselves designated as separate and in need of special treatment.

Congress has not been quite as reluctant to respond to these groups as have the courts. It has used the enforcement clause of the fourteenth amendment200 and its taxing and spending power201 to enact a variety of

199. It should be noted that most of the cases that concerned the right of the handicapped as a class to access to equal educational opportunity, and that involved substantial reallocations of education revenues, were consent decrees, e.g., LeBanks v. Spears, 60 F.R.D. 135 (E.D. La. 1973); Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279 (E.D. Pa. 1972), or were based on an interpretation of a statutory rather than constitutional obligation, e.g., Mills v. Board of Educ., 348 F. Supp. 866 (D.D.C. 1972).

200. "The Congress shall have power to enforce, by appropriate legislation, the provisions of this Article." U.S. Const. amend XIV, § 5; see Katzenbach v. Morgan, 384 U.S. 641 (1966).

201. U.S. Const. art. 1, § 8, cl. 1; see Steward Machine Co. v. Davis, 301 U.S. 548 (1937).
anti-discrimination statutes that impose special conditions on recipients of government aid. Among the groups thus determined by statute to be entitled to special protection are women, the physically, mentally and linguistically handicapped, the economically disadvantaged, Indians, and migrant workers' children.

In both the conditions attached to its spending programs and its statutory requirements of non-discrimination, Congress has also said that certain groups are entitled to more than equal treatment. School authorities are required, in some circumstances, to treat certain groups unequally by allocating to their education additional resources and special services beyond those provided the average child.

This section presents some illustrations of Congress' attempt to guarantee equal educational opportunity, and outlines some of the potential institutional and political problems inherent in that attempt.

B. Special Treatment vs. Non-Discrimination

1. Racial Minorities

In 1964 Congress enacted Title VI of the Civil Rights Act, which provided that no person could "be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" on the grounds of race, color, or national origin. The Department of Health, Education, and Welfare promulgated "guidelines" to implement Title VI and subsequently adopted regulations. The legislation and the


204. A substantial number of state legislatures have followed suit, but a detailed examination of state legislation is beyond the scope of this Article.


206. See Office of Education, U.S. Dept. of Health, Education & Welfare, General Statement of Policies Under Title VI of the Civil Rights Act of 1964 Respecting Desegregation of Elementary and Secondary Schools (1965). These guidelines included minimum standards for use in determining whether a local school board's desegregation plan would qualify the district for federal financial assistance. The school must plan to desegregate the faculty and staff and eliminate all discrimination with respect to programs, activities, facilities, and services; the plan must contain information that prepares the pupils, teachers, staff, and community for the changes involved in
regulations were significant factors in moving the South in the late sixties from token desegregation, at best, to integration, particularly when endorsed by the courts. With but a few exceptions, however, Congress has now largely abandoned the issue of equal educational opportunity for racial minorities to the courts, and, indeed, the predominant congressional response has been a negative one. Thus, in the area of race, the "backlash" phenomenon has already begun. Legislation has been specifically enacted to impede or undercut the desegregation process. Anti-busing legislation that prohibits the use of federal funds for transportation to carry out a court-ordered school desegregation plan and prohibits any federal agency from requiring or encouraging busing past neighborhood schools impedes the process. The requirement in Title I of the Elementary and Secondary Education Act that eligible students be concentrated before compensatory education funds are allocated undercuts desegregation efforts by discouraging the dispersal of low-income students who, in urban areas, are predominantly members of minority groups.

207. 29 Fed. Reg. 16,298 & 16,988 (1964), 30 Fed. Reg. 35 (1965) (codified at 45 C.F.R. Part 80 (1979)). Under these regulations, school districts that have abandoned past discriminatory practices, but in which "the consequences of such practices continue to impede the full availability of a benefit," and school districts that through no past or present discriminatory practice nevertheless fail to provide equal benefits to some racial or nationality group must affirmatively act to insure that all are adequately served. 45 C.F.R. § 805(i)–(j). In Regents of the Univ. of Cal. v. Bakke, 438 U.S. 265 (1978), however, five Justices of the Supreme Court indicated that the kind of "affirmative action" program for minorities used by the University of California Medical School at Davis was impermissible under Title VI.


209. In 1972 Congress enacted the Emergency School Aid Act, 20 U.S.C. §§ 1601–1619 (1976), designed to assist school districts undergoing desegregation. The Act provides funds for remedial programs, in-service teacher training, and the development of new curricula — many of the same programs that the Supreme Court said in Milliken II federal courts may require as part of a remedial order to restore the victim of unconstitutional conduct to the position in which he would have been had there not been discrimination. See Milliken v. Bradley, 433 U.S. 267 (1977).

210. See text accompanying notes 317 & 318 infra.


212. See id. § 1652(b). See also id. § 1656 (removing power of United States courts to issue order seeking to achieve racial balance in any school by requiring transportation of students from one school to another or one school district to another); id. § 1755 (all other remedies must be found inadequate before busing is a permissible remedial tool).

For the most part, then, Congress has not enacted any broad scale programs providing special assistance to racial minorities or requiring the states to provide preferential unequal treatment for racial minorities as such.\textsuperscript{214} Limited as it is to Title VI of the Civil Rights Act, the federal effort has been simply to bar government-imposed discrimination or to require the removal of government-imposed barriers.

2. Gender Discrimination

With the passage of Title IX of the Education Amendments of 1972, Congress expressed its concern with the differential treatment of students based solely on sex. Title IX provides that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance . . . ."\textsuperscript{215} The legislation’s implementing regulations indicate that some constitutionally acceptable government-imposed discrimination might be barred.\textsuperscript{216} But the Vorchheimer result — that female students may be excluded, solely on the basis of sex, from all-male schools where there is an all-female school of comparable quality\textsuperscript{217} — is permissible under Title IX\textsuperscript{218} as well as under the Constitution. Thus Congress has perpetuated gender-separate but equal facilities.

\begin{itemize}
  \item \textsuperscript{215} 20 U.S.C. § 1681(a) (1976).
  \item \textsuperscript{216} See, e.g., 45 C.F.R. § 86.21(b)(2) (1979) (no test that has a disproportionate adverse effect on persons on the basis of sex may be administered as a criterion for admission); id. § 86.23(b) (can not recruit primarily at institutions that admit as students only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex); id. § 86.34(d) (use of single standard of measuring skill or progress in physical education class that has adverse effect on members of one sex prohibited).
  \item \textsuperscript{217} Vorchheimer v. School Dist., 532 F.2d 880, 888 (3d Cir. 1976), aff'd by an equally divided Court, 430 U.S. 703 (1977).
  \item \textsuperscript{218} 29 U.S.C. § 1681(a)(1)(1976) limits the effect of the basic prohibitory language quoted in the text accompanying note 215 supra with the following caveat: "In regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education . . . ." 45 C.F.R. § 86.35(b) (1979), implementing Title IX, provides:

  A recipient which is a local educational agency shall not, on the basis of sex, exclude any person from admission to:

  \begin{itemize}
    \item Any . . . school or educational unit operated by such recipient, unless such recipient otherwise makes available to such person, pursuant to the same policies and criteria of admission, courses, services, and facilities comparable to each course, service, and facility offered in or through such schools.
  \end{itemize}
\end{itemize}
Title IX will not, however, permit the exclusion of women (or men) from an academically elite, a vocational, or any other school if there is no comparable institution for the opposite sex, \(^{219}\) nor will it permit the use of differential admissions criteria. \(^{220}\) Moreover, Title IX regulations prohibit sex-separated health, industrial, business, vocational-technical, home economics, and music courses, and sex-based differential course requirements for graduation, such as home economics for girls and industrial arts for boys. \(^{221}\) Separate physical education classes are prohibited, although students may be grouped by ability if the grouping is based on an assessment of individual skills and not on the sex of the student. \(^{222}\) Discrimination on the basis of sex in the counseling or guidance of students is also outlawed by Title IX. \(^{223}\) Finally, Title IX regulations prohibit the exclusion of pregnant students or students who are parents from any education program or activity unless the student chooses to participate in a separate program or activity. \(^{224}\)

Thus, by and large, the Congressional concern to provide equal educational opportunity for women — as with racial minorities — is focused on barring government-imposed discrimination on the basis of gender or requiring removal of government-imposed barriers. In some instances, this will mean significant expenditures of money by state and local authorities, primarily in the area of athletics. \(^{225}\) But Congress has

\(^{219}\) 45 C.F.R. at § 86.35.

\(^{220}\) A student may not be excluded on the basis of sex from admission to a school unless comparable courses, services, and facilities are otherwise made available "pursuant to the same policies and criteria of admissions . . . ." Id. § 86.35(b).

\(^{221}\) Id. § 86.34.

\(^{222}\) Id. § 86.34(b).

\(^{223}\) Id. § 86.36.

\(^{224}\) Id. § 86.40(b)(1).

\(^{225}\) Id. § 86.41(c) provides in part:

A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

\[\ldots\]

(2) The provision of equipment and supplies;

\[\ldots\]

(4) Travel and per diem allowance;

\[\ldots\]

(6) Assignment and compensation of coaches . . . .

[The Director may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex. See also id. § 86.34 (recipient can not "refuse participation therein by any of its students on [the basis of sex], including health, physical education, industrial, business, vocation, technical, home economics, music and adult education courses."). Thus, a school district may be required to commit additional funds to provide more classes in these areas should there be a demand from students previously excluded on the basis of gender.]
not enacted a major program of either federal aid or mandated state expenditures to remove barriers not of the government's own making. In other words, equal treatment of both genders is required, not the singling out of one gender for preferential unequal treatment.\textsuperscript{226}

3. \textit{Language Minorities}

Where students of limited English-speaking ability are involved, Congress has gone further than merely prohibiting unequal treatment. The Bilingual Education Act, passed in 1968 as an amendment to the Elementary and Secondary Education Act, makes funds available for pilot programs in bilingual education for school districts that wish to apply.\textsuperscript{227} The purpose of the act, as the preamble states, is "to encourage . . . educational programs using bilingual educational practices, techniques, and methods . . . ."\textsuperscript{228} Instruction "to the extent necessary" is to be in the native language of the student with limited English-speaking ability.\textsuperscript{229}

Congress has thus made a substantial commitment to guaranteeing the equal educational opportunity of language minorities by funding programs aimed at affirmatively removing barriers not of the government's making. It is very interesting to note, however, that in so doing Congress is stressing one particular educational technique: bilingual education. There are other techniques and there is significant controversy as to which approach is of greater educational value to language-minority children. Some social science research indicates that language-minority children make greater gains when assigned to standard classrooms.\textsuperscript{230} Other research suggests that bilingual programs facilitate

\textsuperscript{226} Several Supreme Court cases suggest, however, that if Congress so desired, preferential treatment for females could be mandated. \textit{See} Califano v. Webster, 430 U.S. 313 (1977); Craig v. Boren, 429 U.S. 190, 198 n.6 (1976); Kahn v. Shevin, 416 U.S. 351 (1974). This is in contrast to the more cautious position Justice Powell took in Regents of Univ. of Cal. v. Bakke, 438 U.S. 265, (1978) (opinion of Powell, J.), with regard to race.


\textsuperscript{228} Id. § 3222(a)(7)(A).

\textsuperscript{229} Id. § 3223(a)(4)(A)(i).

\textsuperscript{230} The simplest approach is to provide English as a Second Language (ESL) instruction. An ESL program does not provide instruction in the child's native language, but the child receives his regular subject matter instruction in classes with English-speaking classmates and is removed from the regular classroom for an intensive program of instruction in English.

One of the strongest arguments against a need to teach students first in their native language is made by a second-language learning study conducted at Montreal's St. Lambert School. Beginning in kindergarten, English-speaking children were taught subject matter entirely in French. English was introduced later as a separate subject. The
learning more than do English as a Second Language programs.\textsuperscript{231} Drawing any definitive conclusions from research on bilingual education is not possible at this time, however, because much of the research suffers from serious methodological defects.\textsuperscript{232}

The Bilingual Education Act represents the carrot approach to removing language barriers. The alternative to the carrot is the stick — cutting off federal funds under Title VI of the Civil Rights Act. Title VI provides: "No person . . . shall, on the ground of . . . national origin, . . . be denied the benefits of . . . any program or activity receiving Federal financial assistance."\textsuperscript{233} The Supreme Court in \textit{Lau v. Nichols} held that this statutory provision and the corresponding policy guideline promulgated by HEW\textsuperscript{234} required a school district receiving federal funds

students learned as well in French as their English-speaking peers did in English. They also became near-native speakers of French while learning English. Similar programs in the Montreal area have shown the same results. This study is reported in N. Epstein, \textit{Language, Ethnicity, and The Schools: Policy Alternatives for Bilingual-Bicultural Education} 53 (1977). \textit{See also A Storm Brews Over Bilingual Teaching}, U.S. News \& World Report, March 6, 1978, at 59 (quoting Professor Gary Orfield's criticism of current bilingual programs: that they are often "expensive, highly segregated programs of no proven educational value to children.")


Other research indicates that bilingual programs facilitate learning, especially in mathematics. \textit{See}, e.g., Balinsky and Peng, \textit{An Evaluation of Bilingual Education for Spanish Speaking Children}, 9 \textit{Urban Educ.} 271, 277 (1974). ESL might be open to attack on other fronts. \textit{See}, e.g., \textit{A Storm Brews Over Bilingual Teaching}, \textit{supra note} 230, at 59 (quoting Professor González's criticism of stress on mastering English first for "help[ing to] maintain the outdated melting-pot syndrome which discourages cultural pluralism in American society.").

\textsuperscript{232} See, e.g., N. Epstein, \textit{supra} note 230, at 51–53; Cardenas, \textit{Response I}, in N. Epstein, \textit{supra} note 230, at 74–76. Cardenas refers to an Intercultural Development Research Association (IDRA) analysis of a study of bilingual education conducted by the American Institute for Research (AIR). Included among the flaws IDRA found in the AIR study were:

1. Language classifications were done subjectively by teachers in spite of a body of research which points to the unreliability of teacher judgment as an indicator of the language characteristics of students.

2. Half of the teachers classifying students in the various language categories did not speak any language other than English.

... .

7. Program characteristics varied considerably as to . . . instructional methodologies. Impact findings did not control for such differences.

\textit{Id. See also A Storm Brews Over Bilingual Teaching}, \textit{supra note} 230, at 59.


to provide assistance to students with English language deficiencies. The Court did not specify whether remedial English, English as a Second Language, or bilingual educational programs were required. Nor was it clear whether only those who are totally deprived of an education because they cannot understand the language in which it is offered are to be helped or whether school districts must also assist low achievers who are capable of receiving some benefit from the education offered, but whose performance would be improved if they received special treatment.

Following the Supreme Court's decision in *Lau v. Nichols*, HEW's Office for Civil Rights promulgated the so-called "Lau Remedies," guidelines for determining school district compliance with Title VI. Under the guidelines, school districts are expected to provide bilingual, rather than English as a Second Language, instruction. Although the guidelines are not binding, in order to be in compliance with Title VI, a school district not providing bilingual education has the burden of showing that its approach is at least as effective as that recommended by HEW.

In 1974 Congress incorporated into statutory language the regulations promulgated by HEW to implement Title VI and relied upon by the Court in *Lau*: "No State shall deny equal educational opportunity to an individual on account of his or her . . . national origin, by . . . the failure by an educational agency to take appropriate action to overcome language barriers that impede equal participation by its students in its instructional programs." This provision of the Equal Educational Opportunity Act clearly establishes the principle that the state must affirmatively overcome the language deficiencies of limited English-

235. 414 U.S. at 568. Mr. Justice Blackmun concurred in the result, stressing the large number (about 1,800) of children involved in the case. For him, "numbers are at the heart of this case . . . ." *Id.* at 572.

236. No specific remedy is urged upon us. Teaching English to the students of Chinese ancestry who do not speak the language is one choice. Giving instruction to this group in Chinese is another. There may be others. Petitioners ask only that the Board of Education be directed to apply its expertise to the problem and rectify the situation. *Id.* at 564–65.


238. *Id.* at 7–10.

It also suggests that Congress has answered the question raised above: that assistance must be provided low-achieving language-minority students above and beyond that which would merely enable them to participate in the educational program being offered, but which rather would enable them to participate equally.

In the area of bilingual education, then, Congress has clearly responded to the demands of certain disadvantaged groups for affirmative governmental action to overcome deficiencies that were not of the government's making. Congress has singled out children whose native language is not English as a category entitled to special educational assistance even though few courts have found this to be a constitutionally required obligation. Moreover, significant expenditures are undoubtedly required by states to comply with the congressional command, especially since Congress and HEW have indicated a strong, almost mandatory, preference for bilingual education — a controversial approach that is more expensive than other approaches that might be used.

One interesting development that could result in special programs for blacks even where there has been no prior history of discrimination

240. In remanding a case dealing with the charge that the failure of the school district to meet the "special needs of its Mexican-American students" is unconstitutional discrimination, the Fifth Circuit noted that although the matter of bilingual-bicultural education should probably be left to educators and not courts, the district court must nevertheless consider the matter, since "[i]t is now an unlawful educational practice to fail to take appropriate action to overcome language barriers." Morales v. Shannon, 516 F.2d 411, 415 (5th Cir.), cert. denied, 423 U.S. 1034 (1975). The court cited both the Equal Educational Opportunity Act and Lau v. Nichols. Id. Accord, Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57 (E.D.N.Y. 1978). In holding a school board's plan to "immerge" language-minority children in the English language and culture unacceptable, the court noted that the underlying theory of the plan overlooks the declaration of policy and the findings of the Congress as embodied in Section 105(a)(1) of the Bilingual Education Act, 20 U.S.C. § 880(b), the statutory right of the non-English speaking child recognized under Section 204 of the Equal Educational Opportunity Act of 1974, 20 U.S.C. § 1703, Section 601 of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, the teaching of Lau, and the suggestions of the Lau guidelines promulgated for the purpose of demonstrating methods of compliance with statutory and decisional requirements.

241. See text accompanying notes 122 to 136 supra.

242. See notes 231 to 233 supra.

243. Only a few courts have gone so far as to hold that Title VI and the Equal Educational Opportunities Act require not only bilingual but also bicultural instruction with bilingual teachers, not just aides, and have declared a school district's program of English as a Second Language in violation of federal law. See Cintron v. Brentwood Union Free School Dist., 455 F. Supp. 57 (E.D.N.Y. 1978); Serna v. Portales Mun. Schools, 351 F. Supp. 1279 (D.N.M. 1972), aff'd on other grounds, 499 F.2d 1147 (10th Cir. 1974).
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lurks in the opinion of the federal district court in Martin Luther King, Jr. Elementary School Children v. Michigan Board of Education. In that case plaintiffs, black elementary school children, claimed that the school system's failure to provide "special education services to children whose unsatisfactory academic performance is based on their cultural, social, or economic backgrounds" violated their civil rights. Denying the defendants' motion to dismiss, the court agreed that the plaintiffs had stated a claim that the local educational agency had failed to take appropriate action to overcome language barriers in violation of the Equal Educational Opportunities Act. The court held that a de jure segregated school system was not a prerequisite to finding a denial of equal educational opportunity under the statute and that "language barrier" as used in the statute could be interpreted to include a child's inability to use standard English effectively because that child's native language is "Black English."

4. Handicapped Students

With the passage of the Rehabilitation Act of 1973 and the Education for All Handicapped Children Act of 1975, the federal role in the education of the handicapped took a quantum leap. Under these acts, school officials may not exclude children or treat them differently because of a handicap without risking loss of federal funds. Not only must such children not be excluded from a free public education, but they also must be provided an "appropriate" public education. Section 504 of the Rehabilitation Act provides that "[n]o otherwise qualified handicapped individual . . . shall, solely by reason of his handicap, be excluded from the participation in, be denied the benefits

245. Id. at 1327.
246. Id. at 1332. The court dismissed the plaintiffs' constitutional claims as not well founded. Id. at 1328–29.
247. Id. at 1331–32. The remedy the court finally imposed was to require special training of teachers so that they could recognize Black English and know enough about it to be able to teach its speakers to use standard English. Martin Luther King, Jr. Elem. School Children v. Ann Arbor School Dist. Bd., 473 F. Supp. 1371 (1979).
of, or be subjected to discrimination under any program or activity receiving Federal financial assistance. . ." 252 The Education for All Handicapped Children Act (Public Law 94–142) provides funds to assist states in meeting the educational needs of handicapped children and in protecting their parents' rights. 253 Thus, while the requirements of section 504 are mandatory for all states and school districts that receive any federal funding, 254 the requirements of Public Law 94–142 are binding only on those states and districts receiving funds allocated under the Act. 255 No funds are provided by Congress under section 504, and the funds provided under Public Law 94–142, while a significant total, fall far short of the amount a state needs to be able to comply with the act's requirements.

Both statutes require that states provide handicapped children with a free, appropriate public education, educate handicapped and non-handicapped children together to the extent appropriate, identify and locate all unserved handicapped children, assure the provision of proper classification and educational services, and establish procedural safeguards. 256 The statutes differ in various ways, however. 257 For example, section 504's definition of a "handicapped individual" as "any person who (i) has a physical or mental impairment which substantially limits one or more of such person's major life activities, (ii) has a record of such impairment, or (iii) is regarded as having such an impairment" 258 includes drug addicts (and those with a history of drug abuse) and alcoholics. 259 The definition of the term "handicapped children" used in

256. 45 C.F.R. Part 121a, app. A at 500 (1977). This Appendix is a comprehensive analysis of the final regulations promulgated under P.L. 94–142. It has not been included in the current edition of C.F.R. A similar analysis of the regulations implementing § 504 is found at 45 C.F.R. Part 84 app. A at 377 (1979).
257. Section 504 is more comprehensive than P.L. 94–142. For example, it applies to postsecondary education as well as to elementary and secondary education, 45 C.F.R. §§ 84.41–.47 (1979), to program accessibility, id. §§ 84.21–.23, and to employment by educational institutions, id. §§ 84.11–.14. P.L. 94–142 applies only to preschool, elementary, and secondary education. 20 U.S.C. § 1412(2)(B) (1976); 45 C.F.R. § 121a.122 (1979).
Public Law 94–142 is not as broad in scope, since it only includes "mentally retarded, hard of hearing, deaf, speech impaired, visually handicapped, seriously emotionally disturbed, orthopedically impaired, or other health-impaired children with specific learning disabilities, who by reason thereof require special education and related services."\(^{250}\)

The definition of "free appropriate public education" also differs slightly under the two statutes. The regulations promulgated under section 504 define an "appropriate" education as:

the provision of a regular or special education and related aids or services that (i) are designed to meet individual educational needs of handicapped persons as adequately as the needs of non-handicapped persons are met and (ii) are based upon adherence to procedures that satisfy the requirements [specified elsewhere in the laws and regulations].\(^{261}\)

Under Public Law 94–142, an appropriate education is defined as special education and related services designed to "meet the unique needs of a handicapped child ...."\(^{262}\) Thus, Public Law 94–142 requires special education and related services to be provided in accordance with an individualized education program,\(^{263}\) whereas section 504 requires regular or special education and related aids, which are designed to meet the individual needs of handicapped persons as adequately as the needs of non-handicapped persons are met.\(^{264}\) One commentator has interpreted the section 504 definition as going further than Public Law 94–142, noting that section 504 suggests that the

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An appropriate education could consist of education in regular classes, education in regular classes with the use of supplementary services, or special education and related services. Special education may include specially designed instruction in classrooms, at home, or in private or public institutions and may be accompanied by such related services as developmental, corrective, and other supportive services (including psychological, counseling, and medical diagnostic services). ....

... The quality of the educational services provided to handicapped students must equal that of the services provided to non-handicapped students; thus, handicapped student’s teachers must be trained in the instruction of persons with the handicap in question and appropriate materials and equipment must be available.

Id. Part 84 app. A at 388.
quality of the programs for handicapped and non-handicapped children should be equal regardless of cost.\textsuperscript{265}

An "appropriate" education is one that takes place in the least restrictive educational setting.\textsuperscript{266} And under both acts, even if the regular educational setting is inappropriate for academic subjects, handicapped students are to participate with non-handicapped students in non-academic and extracurricular services.\textsuperscript{267}

Congress has thus mandated "mainstreaming" the handicapped. The burden is put on the educational system to show that the child could not be educated satisfactorily in a regular classroom. This is the case despite the fact that not all educators and psychologists agree that "mainstreaming" is the best approach for at least one large handicapped group, the mentally retarded, particularly if the school system fails to provide the necessary supporting services for the child and fails to provide training for the regular classroom teacher.\textsuperscript{268}

\textsuperscript{265} Haggerty & Sacks, supra note 253, at 986.

\textsuperscript{266} "A recipient shall place a handicapped person in the regular educational environment . . . unless it is demonstrated by the recipient that the education of the person in the regular environment with the use of supplementary aids and services cannot be achieved satisfactorily." 45 C.F.R. § 84.34(a) (1979).

Post-secondary educational institutions must "take such steps as are necessary to ensure that no handicapped student is denied the benefits of . . . the education program or activity . . . because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills." Id. § 84.44(d)(1). These auxiliary aids include "taped texts, interpreters [for] students with hearing impairments, readers in libraries for students with visual impairments, classroom equipment adapted for use by students with manual impairments, and other similar services and activities." Id. § 84.44(d)(2). However, recipients are not required to provide "attendants, individually prescribed devices, readers for personal use or study, or other devices or services of a personal nature." Id. § 84.44(d)(2).

Under Public Law 94–142, handicapped children may be removed "from the regular educational environment . . . only when the nature or severity of the handicap is such that education in regular classes with the use of supplementary aids and services cannot be achieved satisfactorily." 20 U.S.C. § 1412(5)(B); 45 C.F.R. § 121a.550(b)(2). See generally Comment, The Least Restrictive Environment Section of the Education for All Handicapped Children Act of 1975: A Legislative History and Analysis, 13 Gonz. L. Rev. 717 (1978).

\textsuperscript{267} 45 C.F.R. §§ 84.34(b), 121a.553 (1979). See also 45 C.F.R. §§ 84.37(a)(1), (2), 121a.306.

The "free" education in both statutes means that if the handicapped child must be educated in a private institution, the school district must pay the costs. These costs, of course, can be quite high. In addition, the "related services" to which Public Law 94–142 refers includes a costly array:

transportation, and such developmental, corrective and other supportive services (including speech pathology and audiology, psychological services, physical and occupational therapy, recreation, and medical and counseling services, except that such medical services shall be for diagnostic and evaluation purposes only) as may be required to assist a handicapped child to benefit from special education, and [related services] includes the early identification and assessment of handicapping conditions in children.

Congress and the executive branch have thus been much more specific about the scope of an appropriate education than have the courts. The consent agreements in PARC and LeBanks, approved by the courts, provide the most detailed, non-statutory example of what was believed to be required in an appropriate education. The agreement in PARC required the state to provide mentally retarded children with free public programs of education and training appropriate to a child's capacity, with the presumption that placement in a regular public school class is the preferred mode of education. The LeBanks agreement provided that placement in a regular public school class with


269. Under § 504 a "free" education is the provision of educational and related services without cost to the handicapped person . . . except for those fees that are imposed on non-handicapped persons. . . . It may consist either of the provision of free services or, if a recipient places a handicapped person in . . . a program not operated by the recipient . . ., of payment for the costs of the program.


271. See pp. 226 to 238 supra.

appropriate support services is preferred over isolation of handicapped children and required evaluation and development of a special education plan for each child along with a free public education appropriate to the child's age and mental status. In these consent agreements and in the court order handed down in Mills, "mainstreaming" handicapped children, that is, placing them in regular public school classes rather than special education classes, is preferred. The two federal statutes go further than these cases, however, in requiring educational agencies to offer handicapped children non-academic and extracurricular services and activities together with non-handicapped children or at least that such services be equivalent.

Only a few cases have been decided under these statues, with somewhat conflicting results. Several cases have involved the requirement that handicapped students be placed in regular classes with the use of supplementary services unless the education of such students cannot be accomplished satisfactorily in such an environment. In Hairston v. Drosick, parents of a child with spina bifida, a condition that left the child with minor physical impairments, alleged that the school district's refusal to admit their child to regular classes violated section 504 of the Rehabilitation Act. The court held that to exclude a handicapped child from the regular public school classroom without a compelling educational justification constituted discrimination in violation of section 504. School officials were ordered to "make every effort to include such children within the regular public classroom situation, even at great expense to the school system." The court cited testimony that showed that placement in as normal an environment as possible would achieve maximum benefits for a child and that placement in an abnormal environment with little peer interaction imposes great burdens on a handicapped child. Homebound instruction or assignment to a special education class for physically handicapped children rather than placement in a regular classroom with special services was not an "appropriate" education.

275. See note 267 supra.
277. Id. at 184.
278. Id.
279. Id. at 183.
Other cases have involved questions of what is an appropriate education under the statutes. In a case arising in Texas, parents of a learning disabled and emotionally disturbed child sought injunctive relief to ensure that he receive appropriate education. The child had received special services while attending junior high school, but when he entered high school and developed emotional and behavioral difficulties, he was disciplined rather than being referred to the special education department. He was finally expelled from the school. The court, in granting a preliminary injunction, found that the high school had failed to provide him with a free, appropriate public education and failed to provide an individualized education program meeting his unique needs, in violation of section 504. The court ordered the defendants to evaluate the child's educational needs, develop an individual education plan to meet them, and provide a free, appropriate education in a normal setting with non-handicapped children, to the maximum extent possible. Thus, the court determined that section 504 creates an affirmative duty to diagnose a handicapped student's difficulties and provide an education suitable to overcome those difficulties.

A suit challenging a school district's refusal to provide a full-time tutor for an autistic child was recently brought under both section 504 and Public Law 94-142. A motion to dismiss for failure to state a claim was denied by the district court on the ground that "if the right to an appropriate education is to be meaningful, it must encompass — even at considerable expense — the provision of a full-time tutor in the home of an autistic child who cannot fit into another educational setting." Such a claim was therefore actionable under section 504 and Public Law 94-142.

Finally, several challenges to the length of the school year have been brought under the federal requirement of "appropriate" public education for the handicapped. Plaintiffs in a suit in Pennsylvania alleged that for severely handicapped children "appropriate" education means year-round programs either in public schools or in private schools.

282. Id. at 639.
283. Id.
284. Id. at 641.
285. Id. at 642.
287. Id. at 1109.
at public expense. The district court held that the failure to operate a year-round program deprived such severely handicapped children of an appropriate education in violation of Public Law 94–142.

In Southeastern Community College v. Davis, the Supreme Court seems to have limited the application of section 504. In a unanimous opinion, the Court held the statute not to require a community college to admit to its nursing program an applicant who had a hearing disability. The Fourth Circuit had directed the district court to consider whether the college could be required to modify the nursing program's requirements to accommodate the plaintiff.

The Supreme Court reversed, holding that an "otherwise qualified" handicapped individual is one "who is able to meet all of a program's requirements in spite of his handicap." It found that the physical qualification Southeastern Community College required the plaintiff to meet — the ability to understand speech without relying on lipreading — was essential for participation in its nursing program. Southeastern's stated goal of training students who would be able to perform all the normal roles of a registered nurse was a legitimate academic policy. Even if the plaintiff could meet some less demanding state licensing requirement, the Court held, section 504 does not require an educational institution to lower its standards.

The plaintiff had argued that under the Act and its regulations the college must take some affirmative action to modify the standards of the program so that oral communication is not essential, citing provisions in the regulations that require recipients of federal funds to modify their programs and provide auxiliary aids. The Court held that the


290. Davis v. Southeastern Community College, 574 F.2d 1158 (4th Cir. 1978). The court cited 45 C.F.R. §§ 84.44(a) and 84.44(d)(1) in support. Id. at 1162. Those regulations provide that "[a] recipient . . . shall make such modifications to its academic requirements as are necessary to ensure that such requirements do not discriminate . . . on the basis of handicap, against a qualified handicapped applicant or student," 45 C.F.R. § 84.44(a)(1979), and that "[a] recipient . . . shall take such steps as are necessary to ensure that no handicapped student is . . . excluded from participation . . . because of the absence of educational auxiliary aids for students with impaired sensory, manual, or speaking skills," id. § 84.44(d)(1).

291. 442 U.S. at 406.

292. Id.

293. Id. at 412–13.

294. Id.

295. Id. at 407–09. See 45 C.F.R. § 84.44.
regulations in question do not require the college to alter fundamentally the nature of its program, construing section 504 as reflecting a congressional intent that qualified handicapped persons be treated evenhandedly, not that affirmative efforts be made to overcome handicaps.\footnote{296}

The decision thus suggests that to the extent the handicapped student's participation would require fundamental changes in the nature and goals of the program, or lowering the program's standards, an educational institution, at least at the post-secondary level,\footnote{297} is justified in refusing to admit such a student. The Court did not, however, indicate that affirmative efforts on the part of school officials are never required. It recognized that "situations may arise where a refusal to modify an existing program might become unreasonable and discriminatory."\footnote{298} Such a situation would occur, according to the Court, when handicapped persons could participate "without imposing undue financial and administrative burdens upon a State."\footnote{299}

Although restricting the scope of the Act by finding that an "otherwise qualified" handicapped person is one who, if treated as any other person and without special assistance, could meet the requirements of the program, the decision tells us little about the extent to which there is an affirmative duty to provide special services to enable a child to participate in an existing program without having to modify that program. Nor does the case say anything about the right of a child, compelled to attend a school by state law, to an "appropriate" education in the public schools.

The case of the handicapped presents the clearest example of an affirmative duty imposed by Congress on state and local authorities. There is an obligation to treat handicapped children differently by providing special aids, services, and other resources to enable such children to overcome barriers not of the government's own making. To do this, the school districts are required to make substantial expenditures and significantly reallocate their resources. However, in the \textit{Davis} case the Supreme Court has limited the extent to which at least

\begin{footnotes}
\footnote{296}{442 U.S. at 410–11.}
\footnote{297}{Several lower court cases have indicated that handicapped students might be denied the benefits of some programs even at the elementary and secondary school level where there is a compelling educational or other justification. \textit{See, e.g.}, Kampmeier \textit{v. Nyquist}, 553 F.2d 296, 299 (2d Cir. 1977); New York State Ass'n for Retarded Children \textit{v. Carey}, 466 F. Supp. 479, 486 (E.D.N.Y. 1978); Hairston \textit{v. Drosick}, 423 F. Supp. 180, 184 (S.D. W. Va. 1976).
}
\footnote{298}{442 U.S. at 412–13.}
\footnote{299}{\textit{Id.}}
\end{footnotes}
post-secondary institutions will be required to modify their existing programs and lower standards in order to include the handicapped.

5. Wealth Discrimination

Although Congress has not singled out low wealth districts or their residents as groups requiring special protection or assistance, it has provided a major program of assistance for children from low-income groups, particularly in districts that have significant concentrations of such children. Title I of the Elementary and Secondary Education Act of 1965, which provides funds for compensatory and remedial programs for the economically deprived, was part of the first major federal aid to education legislation enacted. It requires that expenditures for these programs must supplement, not supplant, state and local expenditures. School districts cannot use Title I money to “free up” state and local revenues for use in non-Title I schools. Per pupil expenditures from state and local funds are supposed to be equal in every school, before the federal funds are added to supplement the offerings in those schools with predominantly low-income children. With this “supplement, not supplant” provision, Congress has sought to remove barriers states might have imposed on economically disadvantaged students — since there is evidence that districts often spent less per pupil in poor schools than in schools serving middle class populations.

Title I obviously seeks to do more than remove state-imposed barriers to equal educational opportunity, however. Even where school districts have not discriminated against schools serving poor children, Title I provides funds for special additional programs to help remove barriers to learning not imposed by the government but resulting from the students’ socioeconomic backgrounds. Thus, in some sense, the economically disadvantaged are singled out as a separate category for special assistance as the mentally and physically or the linguistically handicapped students have been.

303. 20 U.S.C.A. § 2736(c), (d); 45 C.F.R. § 116b.32 (1979).
C. Summary: What Congress Has Said About Equal Educational Opportunity

Congress, authorized by section 5 of the fourteenth amendment and the taxing and spending clause, has tried its hand at defining equal educational opportunity. In some cases — primarily where racial minorities or women are involved — it has merely reinforced the approach taken by the courts under the traditional view of the equal protection clause: state-imposed barriers to an education must be removed. Once those barriers are removed, all students of whatever race or gender are treated equally.

In other cases, Congress has said that certain categories of children must be provided with special assistance, that is, treated unequally, in order to ensure equal educational opportunity. The theory behind this approach, of course, is that such students — because of barriers created by national origin, disease, genetic defect, or economic circumstance, rather than government- or even societally-imposed barriers — are unable to take advantage of the education offered them. Thus, the government should provide them with the assistance needed to bring them to the same starting line as other children. The difficulty lies in determining what kinds of services in what amounts and at what cost to the regular programming will be needed to bring various categories of children to this "starting line."

IV. Expanding The Protected Classes: Some Problems And Prospects

In its five-to-four decision in Rodriguez, the Supreme Court refused to expand the classifications entitled to special judicial protection and refused to treat education as a constitutionally protected right. Moreover, despite what one might wish to read into the entrails of Lau v. Nichols, no Supreme Court decision has clearly indicated that the

305. The economically deprived were provided for by Congress in Title I, discussed in text accompanying notes 300 to 303 supra. Among the other groups singled out by Congress are Indian students, 20 U.S.C.A. §§ 241aa-ff (Supp. 1979), and migrant workers' children, 20 U.S.C.A. §§ 2761–2763 (Supp. 1979). Indian children do not clearly belong in this category. The barriers that stand in the way of their educational opportunity are likely to have been imposed by the government and/or society. Migrant workers' children, however, are closer to the class of economically deprived children. Theoretically, at least, the isolation creating barriers to their learning has resulted more from their family circumstances than from government action. Of course, in actuality, many school districts have deliberately discriminated against migrant workers' children as they have discriminated against the economically disadvantaged and the physically and mentally handicapped.
Constitution requires more than equal educational services even for suspect classes, other than as a limited remedy for prior unconstitutional conduct on the part of the state.

As the previous sections have indicated, the approach taken by the Supreme Court toward classifications on the basis of race, national origin, and alienage, and to a lesser extent gender and illegitimacy, has not, to any great degree, been extended by lower courts to include new classifications. A few lower courts have treated handicapped and, in one case, economically deprived students as constitutionally entitled to special protection. In some instances, this special protection has meant preferential treatment. And a few courts have indicated that failure to provide special services to correct deficiencies not of the government's making is unconstitutional because it amounts to an absolute deprivation of that quantum of education that the *Rodriguez* Court indicated might be a fundamental right.

Congress, however, has been more freewheeling about expanding the categories of students to be given special protection by legislation. While racial and ethnic minorities have long been thought to be entitled to special *judicial* protection from the majoritarian process because as "discrete and insular minorities" they were politically powerless, Congress is now requiring or encouraging the protection of many other categories. And Congress has gone beyond merely prohibiting discriminatory action by officials against certain groups — that is, merely requiring that government-imposed barriers be removed, the group in question being entitled to *equal* treatment — to requiring a "suitable," "adequate," or "appropriate" education for certain categories of children. This of necessity means *more* than "equal" education, at least in terms of resources expended if not results obtained.

This movement to expand the concept of equality to embrace many of the previously forgotten and maltreated groups in our society seems clearly appropriate as an objective of our society and as a contemporary interpretation of the fourteenth amendment's equal protection clause. If the present way in which it is done persists, though, it may bear with it some seeds of its own destruction. Some of the problems raised by the creation of new categories and the requirement that they be given more than equal treatment are outlined in this section of the Article.

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306. Views on what constitutes unequal and discriminatory treatment under law do change over time. As Justice Douglas has said: "[T]he Equal Protection Clause is not shackled to the political theory of a particular era. In determining what lines are unconstitutionally discriminatory, we have never been confined to historic notions of equality . . . ." *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 669 (1966).
First, there are no clear, readily ascertainable criteria for determining which groups should be entitled to be treated as "discrete and insular minorities." This leads to an ad hoc approach and an increasing proliferation of special categories, in proportion to the degree of political pressure certain groups can bring. This ad hoc approach of creating new classes around the fringes of the basic suspect classification doctrine, rather than attacking the problem of education frontally, raises several institutional considerations. First, the lesson conveyed is that those interests that cannot command a majority in the state legislature, rather than regrouping and attempting to develop a majority coalition of interests, can make an end run to enlist Congress' aid in getting the state to provide them what they could not obtain through the state's political process. Special interest groups join across state boundaries to form powerful lobbies in Congress to achieve what they are politically impotent to achieve at the state level. This raises questions that go to the core of our federal system. Increasingly, decisions about what has been traditionally a state and local function are being made at the federal level.

Secondly, Congressional legislation increasingly is concerned with restrictions and constraints on the ways in which states and localities deliver educational services and administer their educational institutions, focusing on sanctions for non-compliance rather than on incentives. On the one hand, there is the important societal objective of ensuring that certain groups of children are not denied an equal educational opportunity by states whose majoritarian institutions are hostile toward or at least insensitive to their plight. But it is unclear whether this objective outweighs in every case the intrusion into state legislative decisions regarding education, and the resulting significant reallocation of resources and shifting of state educational priorities. Perhaps the balance would be more clearly weighted toward the need for federal intervention if we knew with more certainty what equal educational opportunity is and if we were clearer about how to attain it.

Thirdly, regulating education through requirements, rather than through fiscal and programmatic assistance, requires large expenditures of state and local rather than federal funds, and encourages a politically irresponsible attitude on the part of Congress. Where the federal government imposes stringent and costly requirements on the states, without significantly funding their implementation, states may find that their educational priorities have to be reordered without a clear consensus on the need for certain programs at the expense of others.

The piecemeal approach toward creating new categories presents two additional and related problems. As the categories are divided more
finely, more and more children are found to fit not one classification, but several. A child could be economically disadvantaged, and thus entitled to remedial programs of various kinds. If he also has limited English-speaking ability, he is entitled to other programs. If he is in a district undergoing desegregation, he is entitled to certain programs. And if he has a mental or physical disability, he is entitled to still other programs. Rarely is a coordinated educational approach taken toward a child who falls into a number of categories. He can be subjected to inconsistent, scattershot programs and end up with minimal education, since in many cases such children are pulled out of the regular classroom for each special federal program. Related to this is the impact on the educational institution itself. In many inner city schools most students are members of "protected minorities," and most fall into more than one category. The result is that so many competing and conflicting requirements are imposed on school systems that the institution is in danger of becoming overwhelmed by them, and may respond by acting in ways that tend to frustrate program objectives or by not acting at all.

The obligation imposed on state and local governments to provide special services to enable certain categories of children to overcome barriers not of the government's making, the obligation to provide an "appropriate" or "suitable" education to compensate for "deficiencies" of language, poverty, or birth and disease, will undoubtedly lead to considerable conflict between school officials concerned about budgetary constraints and parents of children in the special categories. These conflicts will have to be resolved by the courts with little congressional guidance on standards for what is "appropriate" or "suitable." Can courts enforce standards for an "appropriate" education where educators, clinicians, and other experts cannot agree?

The question of an "appropriate" education suitable to the needs of handicapped children — including the emotionally disturbed and the learning disabled — has led to some strange litigation pairings:

demands for placement in regular classrooms with special services and aids\textsuperscript{311} compete with demands for removal from regular classrooms and placement in special classes.\textsuperscript{312} These cases ask whether it is better for handicapped children to be placed together in small classes, where they will have a specially trained teacher and more individual attention or more important to lessen their isolation from regular school experiences and thus perhaps reduce the psychological and social stigma often experienced by those clearly labeled handicapped. Courts will have to weigh the potential academic benefit of placement in a special class against the potential social or psychological detriment.\textsuperscript{313} And even if, in theory, such children are likely to have a better educational experience if they are "mainstreamed," what is the effect, in practice, of placing them in regular classrooms where teachers are not adequately trained to deal with them and school systems have insufficient funds to provide the necessary supporting services? The lack of agreement among social scientists complicates the resolution of this dilemma. How much education and of what kind is enough to meet the duty? Must sufficient resources be provided to achieve approximately equal achievement levels among children of vastly differing abilities?

As with the handicapped, difficult questions arise as to what is an "appropriate" education for children of limited English-speaking ability. Courts, in the course of applying the federal statutes, will have to determine whether "appropriate" means bilingual-bicultural education rather than remedial English. They will have to decide whether only those children whose English is so limited as to make them incapable of benefiting from the proffered education are entitled to special assistance or whether children who are low achievers in both English and their native language must be included. Moreover, courts, in interpreting statutes involving language-minority children, and administrative agencies, in implementing the legislation, at times appear to be creating even more new categories.\textsuperscript{314}


\textsuperscript{313} The thrust of the legislation at issue in such cases, however, seems to be to place the burden on school officials to justify the placement on the basis of the best interests of the child. See text accompanying notes 266 & 267 supra.

\textsuperscript{314} See, e.g., Martin Luther King, Jr., Elem. School Children v. Michigan Bd. of Educ., 451 F. Supp. 1324 (E.D. Mich. 1978) (students who speak "Black English" may have a "language barrier" to equal participation in instructional programs within the meaning of the Equal Educational Opportunities Act).
Can there be a fixed meaning of "appropriate" in light of the Rodriguez decision and the disparities in expenditures between districts? What is "appropriate" for a handicapped or language-minority child in a high wealth-high expenditure district may not be "appropriate" for a similar child in a low expenditure district if the level of resources for those classes entitled to special treatment is measured against the resources available for regular programming within the same school district.

Where there are scarce resources and competing demands for them, is the preferred distribution to the targeted group and away from the average child? As one federal district court noted in a case involving the issue of an appropriate education for severely emotionally handicapped children, the federal requirement to spend substantially more state and local resources on the handicapped students "may well necessitate a sacrifice in services now afforded children in the rest of the school system." 315 At what point do non-handicapped children have a claim to a certain amount of educational services? Congress has established no such claim, and under Rodriguez only the deprivation of some minimal level of education might be constitutionally protected.

There has been little discussion, in the course of recent litigation and in the enactment of legislation concerning the handicapped, of whether the public schools should be singled out to fulfill what may be very valid societal objectives of caring for the very severely handicapped. Are schools the appropriate institution to provide such children with toilet training or to teach them how to dress and eat? 316 If the obligation — constitutional and statutory — to provide a minimally satisfactory life for the severely handicapped is imposed on the public schools in a time of declining enrollments and other fiscal pressures, what effect will the shift of substantial resources to these areas tenuously related to the traditional educational function of the public schools have on the standard educational programming for the "normal" child?

Creating new classes entitled to special treatment, rather than dealing with education frontally, and requiring the expenditure of significant amounts of state and local funds when there is a lack of a clear consensus on what is an "appropriate" education for certain classes

315. Lora v. Board of Educ., 456 F. Supp. 1211, 1293 (E.D.N.Y. 1978). In Lora, Judge Weinstein noted that the average cost of educating a child in a special day school was $6,300 per pupil plus the substantial costs of the required evaluation, procedural safeguards, and so forth, compared to $2,300 for a regular child's education. New York City receives only $55 per handicapped child from the federal government, so the rest of the costs must be covered from state and local resources. Id.
of children, and which institutions in society should be responsible for that "education" beyond that traditionally within the capacity of the public schools, may have contributed to the "backlash" the country is currently experiencing. That is, guaranteeing a certain level of educational services for a growing number of protected classes at the expense of the white middle class has led to increased opposition against these special groups.

Those who are not members of a "disadvantaged minority," even if they are harmed by a school system's failure to respond to their educational needs, have little hope of recourse from the courts, since the most permissive standard of equal protection review will apply, and little hope from Congress, which is providing educational services only for classes it considers entitled to special protection. As the demography of the school population relative to the population of society as a whole changes — with increasing proportions of minorities in the schools, and an aging population that is largely white — political support for an appropriate education as an entitlement for specially disadvantaged classes such as the handicapped, the economically disadvantaged, or racial and linguistic minorities may diminish still further. We have already seen an increase in "middle class flight" to private schools. As public school enrollment declines, pressure for private school tuition tax credit plans\footnote{317} and other forms of aid to non-public schools increases, and such brakes on spending for education and other public services as the Proposition 13 legislation are promoted.\footnote{318} Thus, minorities are set against non-minorities in the competition for shrinking resources. Since there is no firm support in the Constitution for expanding the number of classes to be protected, under fiscal and political pressures Congress could cut back the "protections" and the classes being protected.

Increasingly, the phenomenon of minorities competing with other minorities for resources has surfaced, as exemplified by the Adams v. Califano litigation.\footnote{319} The initial complaint in that suit was brought on behalf of blacks to compel HEW to require segregated school districts to comply with Title VI. The Women's Equity Action League intervened to insure that HEW did not give Title VI enforcement priority over Title IX enforcement.\footnote{320} Subsequently, a group representing Hispanics inter-
vened, seeking to have resources reallocated to the enforcement of the "national origin" desegregation requirements of Title VI, and a group representing the handicapped, the National Federation of the Blind, also intervened to insure that their concerns were not overlooked. As the number of groups singled out for special assistance expands within a world of finite resources, priority among the groups may become the object of a political as well as legal struggle. And as Justice Powell said in another context about tying the protection to which a particular minority group is entitled to "the ebb and flow of political forces[:] Disparate constitutional tolerance of such classifications well may serve to exacerbate racial and ethnic antagonisms rather than alleviate them."

Finally, the proliferation of "specially protected" classes and the sense of competition for resources may increase, rather than decrease, our distance from a classless and colorblind society in which people are treated as individuals. Should education become yet another arena for competing special interests out to grab a share before the others get it? And does the need to label students in order to get these special programs not only further divide children but also stigmatize some of the target pupil populations? These many questions demand a search for an alternative to the present solution of the problem of equal educational opportunity.

321. Id. at 418.
323. In a case brought in Pennsylvania on behalf of children with "specific learning disabilities," plaintiffs raised an equal protection claim that foreshadows the likely clashes between various special interest groups over finite resources. They complained that school officials, as a result of the PARC consent decree in that state, "are providing mentally retarded children with a free public education especially suited to their individual needs, but are denying learning disabled children an equal educational opportunity, namely, a curriculum adapted to overcome their handicaps." Frederick L. v. Thomas, 408 F. Supp. 832, 835 (E.D. Pa. 1976).
325. Both the courts and Congress have, in certain circumstances, taken yet another approach to ensuring educational equity. That approach — which seems to stem from a mistrust of state and local education officials — is based on a procedural due process model. A full discussion of this development is beyond the scope of this Article, but a few examples will serve as an illustration. It should be obvious, however, that expanding this approach — increasing the requirements for procedural safeguards, enacting accountability measures, including competency testing requirements, and providing for educational malpractice litigation — will not resolve many of the dilemmas raised by this section of the Article.

The "due process" approach has been most comprehensively developed in the area of handicapped students. Because of the stigma of the handicapped label, both courts and Congress have required placement in the least restrictive environment, and have
V. AN ALTERNATIVE ROUTE — A GOVERNMENTAL DUTY TO PROVIDE AN ADEQUATE EDUCATION TO ALL CHILDREN

There is no doubt that there are a number of groups in this nation who have been and still are being mistreated or neglected by our society. Nor is there any doubt that the goal of enabling all children to attain an adequate education — the ticket to their future life chances — ought to be of paramount concern to our society. And where state and local governments impede the attainment of that goal, the responsibility for removing the impediments of necessity devolves upon the national government. Yet, as I have argued, there are serious constitutional, political, and institutional problems with the present way in which some of these concerns are being attacked. In the post-Rodriguez era, the federal courts have been reluctant to expand the categories of protected classes or to find a deprivation of a fundamental right when education is not provided equally. On the other hand, the approach that Congress has taken — to increase the number of classes entitled to special assistance — has raised both political concerns and concerns centered on the nature of our federal system. And increasingly we see various "child advocacy" groups representing different kinds of children competing with each other for a share of a rapidly shrinking pie. This section explores the feasibility of an alternate route, that of educational adequacy rather than equality. Had the courts taken this route, some of the pressures for continually expanding the number of specially protected categories of children might have diminished.

surrounded any change in a child's placement with stringent procedural safeguards. PARC required procedural safeguards as a constitutional obligation in any situation in which the result could be stigmatizing. Pennsylvania Ass'n for Retarded Children v. Pennsylvania, 343 F. Supp. 279, 285 (E.D. Pa. 1972) (consent decree). Mills required "a hearing prior to exclusion, termination or classification into a special program." Mills v. Board of Educ., 348 F. Supp. 866, 878 (D.D.C. 1972). And the Education for All Handicapped Children Act of 1975 provides substantial due process guarantees whenever a change in educational placement is proposed, requested, or refused. See 20 U.S.C. § 1415 (1976). The opportunity to challenge placement decisions minimizes the misuse of classification and the provision of inappropriate educational services. Administrative decisions can be appealed to the courts for a de novo hearing. Id. § 1415(e)(2). Moreover, Congress has provided that each child in a special education setting must have an Individualized Education Program (IEP) with goals for ultimate placement in a regular classroom and a provision for periodic re-evaluation. Id. §§ 1401(19), 1413(a)(11); 45 C.F.R. § 121a.340-.349 (1979). See also the Rehabilitation Act of 1973, 29 U.S.C. §§ 701–794 (1976), and its implementing regulations, 45 C.F.R. §§ 84.33–.36 (1979). Thus, due process safeguards are required of anyone receiving federal funds. This approach has been taken in the case of disciplinary suspensions and expulsions. The requirement of procedural safeguards may serve to impede the disproportionate use of such sanctions against the minority and the poor. See, e.g., Goss v. Lopez, 419 U.S. 565 (1975).
The Supreme Court in *Rodriguez* refused to find an affirmative duty to provide equal education or equal access to an education. There were no standards by which the Court could tell whether such a hypothetical duty were satisfied or violated unless the standard were one of absolute equality. Under such a standard if students in a high expenditure district begin the study of foreign languages in the first grade, then all students in the state should be able to begin foreign languages in the first grade. If one school district can afford to offer its students individual violin lessons, advanced organic chemistry, or a course in movie making, then all school districts should be able to — or none. Such a standard would mean, for example, that the students in school districts in the state of California that spend less per pupil than Beverly Hills are being denied an equal educational opportunity. The Court must have feared that if state systems were constitutionally required to equalize, either they would bankrupt themselves trying to level up to the highest spending district, or they would level down to an equal mediocrity.

Since "equality" was the essence of the constitutional provision invoked to support a right to a certain level of education, whether a student was getting his share could only be determined in comparison to what others were getting. No baseline standard existed for that education to which every child is entitled.

An alternative approach has been utilized where certain "disadvantaged" categories are concerned. Handicapped children, language-minority children, and children of racial minorities that have been victims of affirmative governmental discrimination are said to have a right to an "appropriate" education suitable to their needs. This standard requires that each child should be educated to his potential, but it is a standard that is not and realistically could not be applied to other children.

Professor Frank Michelman of Harvard, in a thought-provoking article written over a decade ago, suggested an alternative approach to that which measures educational opportunity by comparison.\(^326\) His focus was not on equality of educational offerings, but on a basic level of education that would be constitutionally protected.\(^327\) Professor Michelman wanted to read the equal protection clause as a "minimum protection" clause, and argued that the government is constitutionally required to provide an adequate level of basic needs and services, or of

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327. Id. at 18.
what he terms "welfare rights." Indeed, the Supreme Court's opinion in *Rodriguez* does suggest that some basic level of education might be a constitutionally guaranteed right. But Professor Michelman failed to provide any standards for determining what is that basic or minimally adequate education to which every child is entitled. All Professor Michelman told us is that disparity in educational offerings is the *signal* that some children might be deprived of a basic level of education.

Professor Michelman's approach raises the concern that the courts will get into educational policy issues when there is no underlying consensus as to what society wants — and will pay for — and what is educationally sound. In terms of institutional competence, it appears to be no easier for the courts to determine how much education each child should be given to satisfy the constitutional duty than to determine when relative inequalities in educational offerings constitute a constitutional violation.

Some state courts have, in the area of school finance litigation, tried to come to grips with some of these problems, and their solutions may provide a guide to workable standards for applying the Federal Constitution's equal protection clause. These courts, rejecting the comparison approach taken by the plaintiffs in *Rodriguez*, have focused rather on the provision of an adequate education to all children. The

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leading case is *Robinson v. Cahill* in which the New Jersey Supreme Court overturned that state's school finance scheme on the ground that it violated the state's constitutional command to the legislature to provide a "thorough and efficient system of free public schools . . . " In construing this state constitutional provision, the court said that "[t]he Constitution's guarantee must be understood to embrace that educational opportunity which is needed in the contemporary setting to equip a child for his role as a citizen and as a competitor in the labor market."

The New Jersey court then held that there was no relationship between the educational needs of school districts and their tax bases. It concluded that because New Jersey's system of financing education relied heavily on local revenues, resulting in substantial disparities in it is violated," *id.* at 335. The plaintiffs had demanded that "expenditures be made only on the basis of pupils' educational needs without regard to the financial strength of local school districts." *Id.* The alternative — "equal dollar expenditures for each student" — was also dismissed by the court as inappropriate. *Id.* at 336. In the *Burruss* case, the plaintiffs had urged that educational resources should be related to varying levels of "educational needs." 310 F. Supp. at 573. The court, relying on *Mclnnis*, rejected the plaintiffs' claim and suggested that they seek legislative relief. The court noted that it had "neither the knowledge, nor the means, nor the power to tailor the public moneys to fit the varying needs of these students throughout the State." *Id.* at 574.

The fiscal neutrality theory, in attempting to avoid the *Mclnnis* trap, focused on the equalization of fiscal capacity — equalizing the property tax base. Thus, despite the arguments based on fundamental rights and suspect classes, *Rodriguez* was framed as a taxpayer equity suit rather than an equal educational opportunity suit.


332. N.J. Const. art. VIII, § 4, para. 1.

333. 62 N.J. at 515, 303 A.2d at 295. Subsequently, the legislature enacted the Public School Education Act of 1975, N.J. Stat. Ann. § 18A:7A-1 to -7A-33 (West Supp. 1979), which defined a "thorough and efficient system of free public schools" as one which "provide[s] to all children in New Jersey, regardless of socioeconomic status or geographic location, the educational opportunity which will prepare them to function politically, economically and socially in a democratic society." *Id.* § 18A:7A-4. The legislative definition is substantially similar to the standard suggested by the New Jersey Supreme Court in *Robinson I*, and was affirmed by that court on the assumption that the legislature would provide sufficient funding to support such an education. Robinson v. Cahill, 69 N.J. 449, 464, 355 A.2d 129, 136 (1976) (*Robinson V*). When the New Jersey legislature failed to fund the 1975 Act, the court enjoined the expenditure of *any* funds for the support of public schools until the act was fully funded for the school year 1976-77. Robinson v. Cahill, 70 N.J. 155, 160, 358 A.2d 457, 459 (1976) (*Robinson VI*).

334. 62 N.J. at 515, 303 A.2d at 295.
per pupil expenditures, the system failed to fulfill the mandate of the constitution, "unless we were to suppose the unlikely proposition that the lowest level of dollar performance happens to coincide with the constitutional mandate and that all efforts beyond the lowest level are attributable to local decisions to do more than the State was obliged to do."

The New Jersey court thus rejected a view of equal educational opportunity as equal tax capacity, as access to equal inputs, or as a guarantee of equal results. Instead, it adopted the view that the educational opportunity to which each child was entitled was a guaranteed educational floor or basic level of adequacy, allowing local leeway beyond that level: "Nor do we say that if the State assumes the cost of providing the constitutionally mandated education, it may not authorize local government to go further . . . ."

The standard articulated by the New Jersey court seems to require of the government more than the minimum level the Supreme Court suggested in Rodriguez might be a constitutional obligation: the "basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." But the Robinson standard does not require the government to equalize all educational expenditures.

More recently, the Seattle School District brought suit challenging Washington State's school financing system. The decision in that case also suggested a basic level of education standard. The trial court held that the state's "paramount duty" was to guarantee sufficient funds to support a "basic education" without relying on voted local property tax levies. The Washington Supreme Court affirmed, noting that the duty under the state constitution went beyond the basic minimal skills of "mere reading, writing, and arithmetic." Echoing the language of the New Jersey court in Robinson, it held that the constitutional duty "also embraces broad educational opportunities needed in the contemporary setting to equip our children for their role as citizens and as potential competitors in today's market as well as in the marketplace of ideas."

The court noted that these are "broad guidelines and that the effective

335. Id.
336. Id. at 520, 303 A.2d at 298.
339. Slip op. at 34.
340. 90 Wash. 2d at 517, 585 P.2d at 94.
341. Id.
teaching and opportunities for learning these essential skills make up the minimum of the education that is constitutionally required." Once the state fulfills its duty of supplying every district with a basic education, however, expenditure disparities resulting from local choice constitutionally may exist, even if they are a direct consequence of district wealth. As the trial court had said:

[Locally voted levies] may only be required or utilized to fund programs, activities and support services of the district which the state is not required to fund. In other words, if the taxpayers in a district desire to offer an "enriched" program, that is, one which goes beyond that required by the Constitution, then they may be required to fund the same.

The Washington trial court had used several approaches, approved by the state supreme court, to determine whether the state had, in the absence of a legislative definition of a basic program, met its constitutional duty to make "ample provision" for the education of all children residing within its borders. One approach was to "cost out" the current requirements imposed on school districts by state statutes and the regulations of the State Board of Education, and measure that amount against the amount of state funds received by the Seattle school district." Another approach determined the costs associated with operating those programs necessary for the Seattle school district to maintain state accreditation. Applying these standards, the resources available for education under existing law were insufficient in the Seattle school district. Thus, for the Washington courts, that educational opportunity that is constitutionally protected is whatever the state determines is basic. Above and beyond a basic or minimum program, the level of a child's education may be determined by district wealth and effort.

342. Id. at 518, 585 P.2d at 95.
344. Id. at 54–56.
345. Id. at 68–69. A third approach, less defensible than the other two, designated the "collective wisdom" approach, involved determining the costs for Seattle of employing "the statewide average per pupil deployment of certified staff and nonsalary related costs for the maintenance and operation of the common school program for a normal range student." Id. at 53. The Washington Supreme Court's discussion of the trial court's methods is found in 90 Wash. 2d at 533–35, 528 P.2d at 102–03.
346. The Serrano court's approach was quite different than that of the Washington courts. Under Serrano, if tax capacity is not equalized, then spending differences among districts are not constitutionally permissible even if the state were to fund fully a program of "basic education." On the other hand, the California court's approach seems not to
This brief look at two recent state school finance cases suggests that courts can articulate a principle of a right to an adequate education, without getting into issues of educational policy and "legislating" the kind of education to which a child is entitled. Nor is the state required to provide the same education to all children. The approach these courts have taken is to return to the legislature the task of defining what is an adequate education for all children.

It could be argued that these courts have articulated an empty principle. If the states can define what is basic, they can exclude kindergarten, foreign languages, or even reading and arithmetic.

require the state to provide any particular amount of education — as long as what is provided is not wealth-related.

The Washington legislature has recently adopted a definition of "basic education" in an attempt to comply with the court's order. The act, known as the Basic Education Act of 1977, requires the state to provide "fully sufficient" funding for specified programs and services. Ch. 359, 1977 Wash. Laws 1606. Foreign language instruction is excluded from the definition of basic education, but (along with instruction in traffic safety) may be provided at the discretion of the district, if paid for with locally raised funds. The Washington act, in contrast to the New Jersey act, see note 333 supra, clearly defines basic education in terms of inputs rather than outputs.

The West Virginia Supreme Court has provided the most expansive definition of that education constitutionally required under a "thorough and efficient" clause, although it remanded the case to the trial court to obtain the testimony of expert witnesses and also encouraged the legislature to establish standards. Pauley v. Kelly, ___ W. Va. ___, 255 S.E.2d 859 (1979). The court said that a thorough and efficient system of schools "develops . . . the minds, bodies and social morality of its charges to prepare them for useful and happy occupations, recreation and citizenship, and does so economically." Id. at ___, 755 S.E.2d at 877.

The court went on to include the elements in this definition:

development in every child to his or her capacity of (1) literacy; (2) ability to add, subtract, multiply and divide numbers; (3) knowledge of government to the extent that the child will be equipped as a citizen to make informed choices among persons and issues that affect his own governance; (4) self-knowledge and knowledge of his or her total environment to allow the child to intelligently choose life work — to know his or her options; (5) work-training and advanced academic training as the child may intelligently choose; (6) recreational pursuits; (7) interests in all creative arts, such as music, theatre, literature, and the visual arts; (8) social ethics, both behavioral and abstract, to facilitate compatibility with others in this society.

Implicit are supportive services: (1) good physical facilities, instructional materials and personnel; (2) careful state and local supervision to prevent waste and to monitor pupil, teacher and administrative competency.

Id.

A suit has been filed in Maryland, challenging that state's school finance scheme on state as well as federal constitutional grounds. Somerset County Bd. of Educ. v. Hornbeck, Case No. A-58438 (Cir. Ct. Balto. City, filed Feb. 15, 1979). Thus we may eventually have a Maryland Court of Appeals definition of what is a "thorough and efficient" educational system as required by Article VIII, Section 1 of the Maryland Constitution. An earlier challenge to Maryland's school finance scheme, on federal equal protection grounds was dismissed on plaintiff's motion after a ruling that education was not a fundamental interest. Parker v. Mandel, 344 F. Supp. 1068 (D. Md. 1972).
However, there are two limiting principles. One is the absolute minimal education that the Rodriguez Court hinted might be a constitutional right, "the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process." This limiting principle was applied in Board of Education, Levittown Union Free School District v. Nyquist, in which a New York state trial court found that large concentrations of functionally illiterate high school graduates in the urban districts of New York State were absolutely deprived of an education by the state school funding statute. The court thus held that the statute violated the federal equal protection clause under Rodriguez as well as the state constitution. The other limiting principle is the requirement articulated in several state cases that the necessary skills to compete in today's labor market be provided. Minimal basic skills of reading, writing, and arithmetic are clearly not enough in today's technological society.

What the courts seem to be suggesting in these school finance cases is that a state must be concerned with the educational needs of its children. Indeed, by providing publicly supported, compulsory schooling, all states have already expressed this concern. A state cannot meet its concerns by a system that relies heavily on the haphazard location of property wealth and the whims of local voters.

The standard articulated by many of the recent school finance cases for determining whether a duty under the state constitution to provide education equitably has been met is partly a negative one. Basic educational opportunities may not be a function of local district fiscal capacity (reflecting municipal and education overburdens as well as property wealth), and the willingness of local voters to approve local tax levies. The standard is also partly affirmative. It is an "education need" standard under which the state guarantees an educational floor and permits localities to choose the level of program they desire to provide beyond the basic state-provided program.

Is this a model that courts could follow within the framework of the equal protection clause of the Federal Constitution? Can that clause encompass a right to an "adequate" or "basic" education for all children? Of course, there are differences — at least superficially — between the constitutional claim made in Rodriguez and that made under state

348. 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).
349. Id. at 534–35, 408 N.Y.S.2d at 643–44.
constitutions. Education is not mentioned in the Federal Constitution and is explicitly mandated by state constitutions. In addition, the constitutional claim in the state school finance cases is raised under the duty imposed on the state legislature to provide a "thorough and efficient" education. But every state constitution treats education as an important public service, essential to the well-being of the government itself, and not as a statutory benefit that can be repealed at will. Thus, the equal protection clause should mean that some level of education — if the government provides education at all — is constitutionally guaranteed. An analogous argument is made in the voting and criminal appeals cases. There is no federal constitutional obligation to provide the right to vote for certain offices or access to an appeal from a criminal conviction, but once provided, the equal protection clause obligates the government to provide equal access for all. To carry the analogy further, the requirement to provide effective access to an appeal need not mean absolute equality. An indigent is guaranteed a lawyer, not the most competent lawyer he could hire with unlimited private funds. Similarly, then, where a state provides education, the equal protection clause should obligate the state to provide a basic or adequate education for all.

If the Federal Constitution's equal protection clause were read as creating an affirmative obligation to provide an adequate education to all children, the courts need not, as feared, become super school boards, specifying the minimum educational services that must be provided. The court's role could be merely to command the state to devise a system that provides for all children — regardless of where they live or who they are — that education the state has already indicated it considers

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351. The exact wording varies. Some states use "thorough" or "efficient"; some use the phrase "general and uniform" or require that the state make "ample provision for the education of all children." For a listing of the various state constitutional standards, see Levin, supra note 13, at 1103 n.18.

352. See, e.g., Kramer v. Union Free School Dist., 395 U.S. 621, 629 (1969) ("States do have latitude in determining whether certain public officials shall be selected by election or chosen by appointment . . . .").

353. As the Supreme Court noted in Griffin v. Illinois, 351 U.S. 12, 18 (1956), "It is true that a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all."

354. See, e.g., id.: "But that is not to say that a State that does grant appellate review can do so in a way that discriminates . . . ." See also Reynolds v. Sims, 377 U.S. 533 (1964); Douglas v. California, 372 U.S. 353 (1963).

Moreover, this approach has the advantage that a finding of intentional governmental discrimination against a particular class need not be a prerequisite.\footnote{357}

This approach requires states to provide varying levels of resources according to the varying prices of education in different areas,\footnote{358} the varying educational starting points of different children,\footnote{359} and the varying capacities of school districts to raise the revenues to fund an adequate education.\footnote{360} There is some accommodation to the white middle class, which cannot have itself designated as a specially protected group entitled to special treatment, while at the same time the special needs of various disadvantaged groups are not ignored. If children such as the language disabled, the handicapped, and the economically disadvantaged receive an education that will provide them with sufficient skills to compete in today's labor market in the context of ensuring all children such skills, then the legal and moral imperatives may coincide. Requiring the state to provide an adequate level of education for all children, but allowing some choice for programs beyond that level, meets the demands of equal treatment while still preserving some libertarian principles. The clash between egalitarian and libertarian notions need not be total, and the tensions between minorities and non-minorities may be diminished.

\footnote{356. Courts making these commands would not be picking and choosing among public services, deciding, for example, that education "is a fundamental interest and recreation is not." Winter, \textit{Poverty, Economic Equality, and the Equal Protection Clause}, supra note 46, at 93. The courts would merely be deciding that since the state has declared the fundamental importance of education, making it compulsory and public, it must ensure a basic level of education for all. Whatever the merit of a general concern over judicial definition of what is a fundamental interest, or of how much of that fundamental interest is enough that concern is not appropriate to education. \textit{See} text accompanying notes 76 to 94 supra.}

\footnote{357. \textit{Cf.} \textit{Massachusetts v. Feeney}, 434 U.S. 884 (1977) (vacating and remanding for reconsideration in light of decision requiring showing of discriminatory intent a district court determination that state's veterans' preference statute violated equal protection rights of females); Village of Arlington Heights v. Metropolitan Hous. Dev. Corp., 429 U.S. 252, 265 (1977) (proof of discriminatory intent required to sustain finding that Village's decision not to vary zoning laws to permit low-income housing project violates fourteenth amendment).}


\footnote{359. \textit{See}, \textit{e.g.}, Board of Educ., Levittown Union Free School Dist. v. Nyquist, 94 Misc. 2d 466, 408 N.Y.S.2d 606 (Sup. Ct. 1978).}

\footnote{360. \textit{Id. \textit{See also}} B. \textit{Levin}, T. \textit{Muller}, & C. \textit{Sandoval}, \textit{supra} note 358, at 53-68.}
Finally, establishing a basic level of education for all children — either as a right guaranteed by the equal protection clause or as a national legislative concern — may bring into sharper focus the question whether public schools are to be required to provide the most appropriate education for those at the extremes, such as the very severely handicapped. The extent to which imposing the societal obligation to provide a minimally satisfactory life for the severely handicapped on the public schools, in a time of declining enrollments and other fiscal pressures, may detract from the traditional educational function of the public schools should be more closely examined.

Despite the fact that there are still more questions than answers, it seems that if we shift our focus from special and competing categories of children, to concentrate on articulating a standard of basic education for all children, the answers we get may be more sensible — and more enduring.