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Is The Equal Protection Clause Still a Viable Tool for Effecting Educational Reform?*

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The theoretical concept of equal educational opportunities' in firmly rooted in democratic philosophy and shares an exalted position with monogamy, brotherhood, and peace. Yet this applauded ideal has been somewhat distorted when translated into concrete school policies and programs. Thus, philosophical beliefs alone have not guaranteed educational equity, so many citizens have turned to legal means, particularly the guarantees of the Federal Constitution, in their efforts to bring about educational reform.[1]

One constitutional mandate, the fourteenth amendment equal protection clause, has played an extremely crucial role in educational litigation during the past two decades. However, the continued potency of this clause is currently being questioned. It is the purpose of this article, therefore, to analyze the vitality of equal protection guarantees in shaping future public educational policies. Specifically, the following areas will be examined: the constitutional framework, desegregation litigation, school finance litigation, within-school classification practices, and the emerging equal protection standard of review. Even though the egalitarian ethics of the 60's have been somewhat tempered, it is an underlying premise throughout this article that the full potential of the equal protection clause has not yet been exhausted in the school domain.

The Constitutional Framework

The fourteenth amendment guarantees that no state shall "deny to any person within its jurisdiction the equal protection of the laws."[2] This constitu-

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[1] Sugarman has noted that the lawsuit is the "major weapon in the arsenal of those who wish to change American public schools." S. Sugarman, *Accountability Through the Courts*, SCHOOL REVIEW, February, 1974, at 235.

[2] U.S. Const. Amend. XIV, Section 1. Since its enactment the equal protection clause has aroused much debate, and the educational arena has not been exempted from this controversy. The concept of equality is difficult to grasp, especially when comparing human attributes. Thus, application of the equal protection clause to evaluate state action is plagued with inherent problems. Additional handicaps are evident when analyzing equal protection claims in the educational realm due to the continuing controversy over criteria to measure adequacy

tional provision has been interpreted to mean that governmental action cannot discriminate among persons similarly situated, unless it can be demonstrated that differential treatment is justified to achieve a valid governmental goal.[3] In the school context, the Tenth Circuit Court of Appeals has noted that the Constitution does not guarantee the right to an education, but it does secure the right "to equal treatment where the state has undertaken to provide public education to the persons within its borders."[4] Benson has interpreted this mandate to mean that "any two children of the same abilities shall receive equivalent forms of assistance in developing those abilities, wherever they live in a given state and whatever their parental circumstances are."[5]

In applying the equal protection clause to public school policies and practices, courts have used two tests which have been developed for evaluating state legislation. The traditional or rational basis equal protection test has been evoked in a majority of cases concerning economic regulation. Under this doctrine the state must demonstrate simply that the challenged classification bears some rational relationship to a legitimate governmental goal.[6] When the traditional test is employed, the presumption of constitutionality rests with the state action.

A second equal protection test, popularized during the activist Warren Court era, is commonly referred to as strict scrutiny analysis. Legislation is vulnerable to this stringent test when the state impairs a fundamental interest or creates a suspect classification.[7] To withstand such analysis, the state must prove that its action is necessary to achieve a compelling governmental interest. When the strict scrutiny test is employed, the burden of proof shifts dramatically in favor of the party attacking the state legislation. In fact, rarely has a state been able to exhibit a governmental goal sufficiently compelling to withstand strict scrutiny analysis.[8] Consequently, the

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and equality in public schools. For example, does 'equal protection' mean that all persons must have equal access to public schools, or does it require equal treatment of all students, or does it mandate differential treatment of pupils in an attempt to achieve equality in outcomes? For a discussion of the conflicting standards of equality required in public education, *see* D. Moynihan, *Solving the Equal Educational Opportunity Dilemma: Equal Dollars is not Equal Opportunity,* 1972 U. Ill. L. F. 259, 262.

[3] T. Shannon, *Chief Justice Wright, the California Supreme Court and School Finance: Has the Fourteenth Done it Again?* 3 Nolpe School L. J. 1 (1973). *See* Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920).

[4] Flemming v. Adams, 377 F.2d 975 (10th Cir. 1967).

[5] C. Benson, The Cheerful Prospect: A Statement on the Future of Education, 62 (1965).

[6] *See* McDonald v. Bd. of Election Comm'rs 394 U.S. 802 (1969); McGowan v. Maryland, 366 U.S. 420, 425 (1961).

[7] *See* Douglas v. California, 372 U.S. 353 (1963); Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966); Williams v. Rhodes, 393 U.S. 23, 30 (1968).

[8] Not since 1944 has the Supreme Court declared a state purpose to be compelling enough to justify impairment of a fundamental interest or creation of a suspect classification. Korematsu v. United States, 323 U.S. 214 (1944). *See* D. B. Hornby and G. Holmes, *Equality of Education,* 58 Va. L. Rev. 161, 168 (1972).

heart of this test is the identification of a fundamental interest or a suspect classification.

In employing the strict scrutiny test, the Supreme Court has developed a sliding scale to determine the breadth of equal protection guarantees.[9] Some inherently suspect classifications will evoke strict judicial scrutiny of the governmental action regardless of whether the interest affected is considered to be fundamental.[10] Likewise, certain interests have been judicially declared to be so fundamental that they deserve special treatment under the equal protection clause even in conjunction with classifications which might be considered neutral under other circumstances.[11] Since this test involves consideration of the type of classification and/or the nature of the interest affected, the result is that the same interest (e.g., education) may evoke strict judicial scrutiny in some cases and not in others depending on the form of the classification.[12]

Strict scrutiny analysis has been criticized due to its potential for usurping legislative power. Also, the rational basis standard has been chastized because of its leniency and characteristic judicial 'hands off' posture. Thus, dissatisfaction with the two-tiered equal protection test has caused the Burger Court to seek a middle ground in reviewing equal protection claims.[13] In contrast to the activist posture of the Warren Court era, the current Supreme Court appears reluctant to expand the scope of equal protection analysis. However, the Court has not abandoned the equal protection clause and is still using it to nullify state action, but is doing so without strict scrutiny vernacular. In order to place this emerging standard in proper perspective, the following sections will review application of equal protection

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[9] D. B. Hornby and G. Holmes, *id.*

[10] *See* Graham v. Richardson, 403 U.S. 365 (1971); Oyama v. California, 332 U.S. 633 (1948).

[11] *See* Reynolds v. Sims, 377 U.S. 533 (1964); United States v. Guest, 383 U.S. 745 (1966); NAACP v. Alabama, 357 U.S. 449, 460 (1958); Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[12] It appears that the Supreme Court has developed a hierarchy of rights which are afforded varying degrees of constitutional protection under both the equal protection and due process clauses of the fourteenth amendment. Rights which are stated in the text of the Constitution have been deemed 'fundamental interests' and are guaranteed by both due process and equal protection mandates. In addition, certain implied rights have been elevated to the status of 'fundamental interests'. *See* Roe v. Wade, 410 U.S. 113 (1973) (right to procreation); Reynolds v. Sims, 337 U.S. 533, 561 (1964) (right to vote in state elections); United States v. Guest, 383 U.S. 745, 757–58 (1966) (right to interstate travel). Other rights, which have been designated 'property rights,' are those created by state laws and regulations. These property rights, such as the right to education and to the receipt of welfare benefits, are shielded by due process guarantees but do not evoke strict judicial scrutiny under the equal protection clause. *Compare* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973) and Goss v. Lopez, 419 U.S. 565 (1975); Goldberg v. Kelly, 397 U.S. 254 (1970) and Dandridge v. Williams, 397 U.S. 471 (1970). The Court's ambiguity in categorizing which preferred personal interests comprise each category of rights has provided a fertile ground for debate. Compare, for example, the Court's posture toward the individual's right to education in Meyer v. Nebraska, 362 U.S. 300 (1923); Brown v. Bd. of Educ. of Topeka, 347 U.S. 483 (1954); Rodriguez, *supra.*; and Goss, *supra.* For a discussion of this topic, *see* M. McCarthy, "The Right to Education: From Rodriguez to Goss," *Educational Leadership,* April, 1976, at 519.

[13] *See* text with notes 110–128, *infra.*

mandates in educational litigation. Then the emerging equal protection standard will be examined and evaluated as to its strength in effecting future school reform.

Desegregation Litigation: State Intent

The significance of the cases involving racial discrimination should not be underestimated in analyzing an individual's constitutional rights under the equal protection clause. After all, the *Brown* decision did initiate the egalitarian revolution and opened the schoolhouse door to the critical eye of the federal judiciary, Justice Warren, speaking for the unanimous Supreme Court, declared that once a state provides public education, "it is a right which must be made available to all on equal terms."[14] Some dedicated egalitarians would go so far as to say that the holding in *Brown* should be viewed as a mandate for states to eliminate all discrimination in public schools, not simply racial discrimination.[15]

The desegregation litigation during the past two decades has nurtured a change in the Court's attitude toward its responsibility in protecting constitutional rights in the educational arena. The former judicial laissez faire posture toward the schools has been replaced in many situations by strict protection of individual rights and close supervision of remedial decrees.[16] At first the judiciary was hesitant to order specific remedial measures and emphasized the exposure of constitutional violations, while leaving the details for effecting a solution to local authorities. However, many federal courts have increasingly broadened their basis for finding discriminatory action, and have become more assertive in ordering remedial plans which must be implemented under the supervision of the courts.[17] This trend has not been limited to cases involving racial discrimination, and in other situations the burden of proof has been shifted from the party attacking the legality of school policies to the school authorities for justification of their actions. Thus, discriminatory practices against pregnant students, handicapped students, female students, and indigent students as well as gross inequalities among the schools within a state have been revealed and often subjected to strict review by the courts.[18]

Although the *Brown* decision has provided the impetus for much educational reform, the scope of school equality required by the 1954 decision has been the source of controversy. If the *Brown* mandate had been uniformly interpreted over the past two decades, the impact on the entire field of public education would have been significant, since the ever-lurking claim of racial

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[14] Brown v. Bd. of Educ. of Topeka, 347 U.S. 483, 493 (1954).

[15] *See* J. COONS, W. CLUNE, S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION, 404 (1970).

[16] *See generally* J. HOGAN, THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST, Chapter 2 (1974); A. Cox, *Supreme Court 1965 Term, Foreword: Constitutional Adjudication and the Promotion of Human Rights*, HARV. L. REV. 91, 94–96 (1966).

[17] *See* Morgan v. Hennigan, 401 F. Supp. 216 (D. Mass. 1975); T. Flygare, *Can Federal Courts Control an Educational Program?* PHI DELTA KAPPAN, April, 1976, at 550–51.

[18] *See* text accompanying notes 56–98, *infra*.

prejudice has been allied with other types of unequal treatment in public schooling. Allegations of discrimination on the basis of ability, handicaps, and poverty often have been accompanied by racial overtones.[19] Unfortunately, the *Brown* ruling left unanswered questions concerning implementation of the constitutional requirements, and as the composition of the Supreme Court has changed, the constitutional protections enunciated in *Brown* have taken on different meanings.

The troublesome *de jure/de facto* controversy surfaced by desegregation litigation is destined to play a prominent role in the future of constitutionally required educational reform. The Supreme Court has a powerful tool to use in hastening equalization in education by finding *de jure* discrimination based on race or wealth or other classifying factors. However, the court has not defined with precision the nature of state intent required to constitute unlawful state action. Closure has not been reached as to whether the state must *actively attempt* to disadvantage certain classes of people in order to be held responsible for *de jure* discrimination or whether acts of *omission* or acts of the state's political subdivisions can be grounds for judicial enforcement of the state's obligations to eradicate inequalities in public education.

For example, in the Denver desegregation case Justice Powell claimed that school boards, by acts of commission or omission, are sufficiently responsible for discriminatory results.[20] He further emphasized that racial discrimination which is "state-created or state-assisted or merely state-perpetuated" all constitutes state action.[21] In the same decision Justice Douglas addressed the meaning of state action in connection with racial segregation:

> When a State forces, aids, or abets, or helps create a racial "neighborhood," it is a travesty of justice to treat that neighborhood as sacrosanct in the sense that its creation is free from the taint of state action.[22]

In contrast, the 1974 Supreme Court ruling concerning desegregation in the Detroit area was couched in a different attitude toward state action.[23] The Court majority avoided the implications of unlawful state action by noting that the state did not design the political subdivisions with segregation in mind. Furthermore, the Court focused on the lack of guilt evidenced by the local suburban districts involved in the case. Thus, the Supreme Court totally sidestepped the fact that the state could be held constitutionally responsible for remedying the existing segregation, since the state initially created the school districts and retained ultimate responsibility for public education within its boundaries.

The Supreme Court has appeared particularly hesitant to uncover *de jure*

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[19] *See* Hobson v. Hansen, 269 F. Supp. 401 (1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969); Mills v. Bd. of Educ., 348 F. Supp. 866 (D.D.C. 1972); Milliken v. Bradley, 418 U.S. 717, 761 (1974) (Douglas, J., dissenting).

[20] Keyes v. School Dist. No. 1, 413 U.S. 189, 224 (1973) (Powell, J., concurring in part, dissenting in part).

[21] *Id.* at 227.

[22] *Id.* at 216 (Douglas, J., separate opinion).

[23] Milliken v. Bradley, 418 U.S. 717 (1974).

segregation in situations where the remedy would require redesigning school districts or crossing district lines. Since the protection of minority rights has become so entwined with the remedial measures employed, the mounting public pressure and congressional legislation concerning 'busing' are bound to influence the Court's future posture. Moreover, the issue of disregarding school district lines for desegregation purposes cannot be divorced from the state's responsibility to reorganize school systems in order to eradicate other inequities in public education. If all states were required to shoulder the responsibility for eliminating racial discrimination in the schools, regardless of its cause and even if the process entailed consolidating school dsitricts, would the Constitution place similar obligations on the states to take necessary steps to equalize financial resources among districts or to ensure adequate program offerings or to promote efficiency in the organization and administration of the schools?

Obviously, the evolution of the Supreme Court's interpretation of the rights secured by the equal protection clause cannot easily be separated from the duty imposed on the states to guarantee these rights. The Supreme Court's final interpretation of the extent of state involvement necessary to produce *de jure* discrimination and its determination of the minimum remedial measures required to satisfy equal protection of the laws could well pose one of the greatest challenges to the Court since Chief Justice Marshall assumed the power of judicial review.[24]

School Finance Litigation: Adequacy or Equality

Although litigation involving racial discrimination in schools has a rather lengthy procedural history, the federal judiciary only recently has been called upon to evaluate claims of wealth discrimination in education as violating the equal protection clause.[25] These legal controversies over the validity of state financing schemes for public schools have forced the courts to evaluate whether provision of an adequate, although unequal, education for all students satisfies constitutional mandates.

The equal protection attack on school financing schemes has focused on the inequities resulting when a student's educational expenditures are dependent on his place of residence or on the wealth of his parents.[26] Since education is a

[24] Marbury v. Madison, 1 Cranch 137 (1803).

[25] Early school finance cases usually were initiated in state courts by taxpayers who contested the state's method of redistributing tax revenues to school districts. Most of the early litigation actually challenged the state's efforts to equalize educational expenditures among districts through its method of allocating public funds. The courts generally held that matters of taxation were within the powers of the state legislature and that the state only had to demonstrate a rational relationship between the classifications employed and the governmental purposes. *See* Sawyer v. Gilmore, 109 Me. 169, 83 A. 673 (1912); Miller v. Korns, 107 Ohio St. 287, 240 N.E. 773 (1923); Miller v. Childers, 107 Okla. 57, 238 P. 204 (1924).

[26] *See* A. Wise, Rich Schools Poor Schools (1968). Also, it has been alleged that state financing plans do not provide educational programs appropriate to the needs of the students. *See* McInnis v. Shapiro, 293 F. Supp. 327 (N.D. Ill. 1968), *aff'd sub nom.* McInnis v. Ogilvie, 394 U.S. 322 (1969); Burruss v. Wilkerson, 310 F. Supp. 572 (W.D. Va. 1969), *aff'd mem.* 397 U.S. 44 (1970).

state responsibility, it is argued that some students are denied equal protection of the laws because of the unequal fiscal resources created by the heavy reliance on local property taxes to finance public education.

The California Rule

Judicial action has generated reform in several state schemes for financing public schools.[27] *Serrano v. Priest,* a California Supreme Court decision, is particularly germane because it presented legal arguments used in subsequent federal litigation concerning state funding of education.[28] Justice Sullivan, writing for the court, unequivocally announced that the inequities in California's plan for financing schools violated the equal protection clause:

> We have determined that this funding scheme invidiously discriminates against the poor because it makes the quality of a child's education a function of the wealth of his parents and neighbors. Recognizing as we must that the right to an education in our public schools is a fundamental interest which cannot be conditioned on wealth, we can discern no compelling state purpose necessitating the present method of financing.[29]

If an identical posture had been adopted by the United States Supreme Court, then all school policies and practices, challenged under the fourteenth amendment, would have become the target for strict judicial scrutiny.

The California court relied on Supreme Court precedents in concluding that discrimination based on wealth or place of residence should be strictly reviewed under the equal protection clause.[30] The court cited *Harper v. Virginia State Board of Elections,* where the Supreme Court held that "[l]ines drawn on the basis of wealth or property, like those of race, are traditionally disfavored."[31] The court also referred to cases dealing with apportionment, where the Supreme Court established that arbitrary boundary lines of local political subdivisions of the state could not be grounds to justify discrimination among the state's citizens.[32] Thus, the California Supreme Court reasoned: "If a voter's address may not determine the weight to which his ballot

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[27] *See* Van Dusartz v. Hatfield, 334 F. Supp. 870 (D.C. Minn. 1971); Robinson v. Cahill, 62 N.J. 473, 303 A.2d 273 (1973); Milliken v. Green, 390 Mich. 389, 212 N.W.2d 711 (1973); Shofstall v. Hollins, 110 Ariz. 88, 515 P.2d 590 (1973).

[28] 5 Cal. 3d 584, 96 Cal. Rptr. 601, 487 P.2d 1241 (1971).

[29] *Id.* 96 Cal. Rptr. 604. In declaring education to be a fundamental interest, the court relied on *Brown v. Bd. of Educ. of Topeka,* 347 U.S. 483, 493 (1954), where the Supreme Court declared: "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." Furthermore, the California court reasoned that the right to education is as vital to the individual as other constitutionally protected rights such as the right to vote and the right to criminal justice procedures. 96 Cal. Rptr., 616-619.

[30] *See* Douglas v. California, 372 U.S. 353 (1963); Griffin v. County School Bd. of Prince Edward County, 377 U.S. 218 (1964); Griffin v. Illinois, 351 U.S. 12 (1964); Kramer v. Union School Dist., 395 U.S. 621 (1969).

[31] 383 U.S. 663, 668 (1966).

[32] *See* Baker v. Carr, 369 U.S. 186 (1962).

is entitled, surely it should not determine the quality of his child's education."[33]

The California Supreme Court did not rule on the merits of the *Serrano* case, but merely substantiated why the lower court's dismissal was in error. Thus, the case was remanded to be tried on its merits, and the trial court was instructed to invalidate the state's system of financing education if the asserted discrimination based on wealth could be confirmed.[34] In light of the intervening *Rodriguez* Supreme Court decision,[35] the trial court's ruling had to be grounded in state law. Since the court was able to verify that California's system of funding schools violated state mandates, it reiterated the higher court's conclusions.[36]

San Antonio Independent School District v. Rodriguez

The mounting tension over the school finance issue finally reached its peak in the *Rodriguez* case.[37] In this litigation the federal district court invalidated the method of financing public schools in Texas as violating the equal protection clause of the Federal Constitution. In holding that more than mere rationality was required to maintain a state classification affecting a fundamental interest, the court applied strict judicial scrutiny since the interest at stake was the individual's opportunity for public education. As in *Serrano,* the court found wealth to be a suspect classification and relied heavily upon prior Supreme Court decisions which had invalidated discriminatory wealth classifications affecting voting and criminal justice procedures. Accordingly, the court concluded that the local property tax system unconstitutionally classified the school districts of Texas on the basis of wealth.[38]

The district court, therefore, ordered Texas to adopt a standard of fiscal neutrality which required that the quality of public education could not be a function of wealth, other than the wealth of the state as a whole.[39] The court was explicit in declaring that fiscal neutrality did not require the state to make expenditures in a certain prescribed manner. Thus, the state was left free to choose any desirable financing scheme so long as "the variations in wealth among the governmentally chosen units do not affect spending for the education of any child."[40] The court contended that it was not trying to become a "super legislature," but was encouraging legislative discretion, as long as the plan adopted did not tie the quality of public education to wealth other than the wealth of the entire state.[41]

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[33] 96 Cal. Rptr. 601, 622 (1971).

[34] *Id.* at 626.

[35] 411 U.S. 1 (1973). *See* text with note 42, *infra.*

[36] Civil Action No. C938254 (Cal. Super. Ct., Los Angeles County, April 10, 1974). Since California's constitution contained no explicit language concerning 'education as a right of the people,' Assemblyman Alex Garcia introduced a constitutional amendment to the California Legislature which included 'obtaining an education' as an inalienable right. *See* J. Hogan, *supra* note 16, at 60, for a discussion of the amendment.

[37] 337 F. Supp. 280 (W.D. Tex. 1971).

[38] *Id.* at 283-84.

[39] *Id.* at 284.

[40] *Id.*

[41] *Id.* at 285.

However, the United States Supreme Court did not agree with the lower court's decision. In holding that neither a suspect classification nor a fundamental interest was involved in the case, the Court reasoned that it should not evoke the standard of strict judicial scrutiny and thus reverted to the rational basis test in reviewing the legislative action.[42] Although education was noted as one of the most important services performed by the state, it was not recognized as a constitutionally protected right.

Also, the Supreme Court held that the Texas system did not disadvantage an identifiable class of poor persons. Since the Court concluded that a suspect class had not been defined, it declined to apply the strict scrutiny test to a "large, diverse, and amorphous class, unified only by the common factor of residence in districts that happen to have less taxable wealth than other districts."[43]

Furthermore, the Supreme Court was hesitant to interfere with Texas' method of taxation and distribution because it considered this an area "in which [the Court] has traditionally deferred to state legislatures."[44] The *Rodriguez* majority recognized that all claims arising under the equal protection clause have implications for the balance of power between national and state governments, but it stressed that "it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state."[45] Thus, the Court feared that it if applied the strict scrutiny test to the Texas financing plan, it would, in effect, be invalidating the system for financing public schools in most other states.

The Supreme Court also countered the district court's assumption of a correlation between educational expenditures and the quality of education with the argument that there is considerable disagreement in this area among scholars and educational experts.[46] The Court further contended that even if the correlation could be substantiated, the equal protection clause does not require "absolute equality or precisely equal advantages."[47] Since the Court reasoned that no system could be expected to assure equality in education "except in the most relative sense," it concluded that the Minimum Foundation Program in Texas provided at least an "adequate" education for all children in the state.[48] Hence, the Court declared that constitutional mandates were satisfied since the plaintiffs failed to show that the lack of personal resources occasioned an "absolute deprivation of the desired benefit."[49]

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[42] Rodriguez, 411 U.S. 1 (1973). It is interesting to note that Justices Brennan and White saw no need for the lengthy discussion of fundamental interests' and 'suspect classes', as they found in Texas scheme for financing public schools to be invalid under the traditional rational basis test, *id.* at 62 (Brennan, J., dissenting), *id.* at 66–68 (White, J., dissenting).

[43] *Id.* at 28.

[44] *Id.* at 40.

[45] *Id.* at 44.

[46] *Id.* at 43.

[47] *Id.* at 24.

[48] *Id.*

[49] *Id.* at 23.

However, Justice Marshall took issue with the latter statement in his dissenting opinion. He contended that the "stark differences in the treatment of Texas school districts, due to the differences in taxable property wealth, constituted a direct violation of the equal protection clause."[50] He also refuted the majority's assertion that the Minimum Foundation Program provided an adequate education for all children and thus eliminated the constitutional issue:

> [I]t is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws. I find any other approach to the issue unintelligible and without directing principle.[51]

Nevertheless, the Court majority was not convinced that the relative value of education in a competitive society made *inequality* entail similar injuries as total *deprivation*.[52] Thus, the Court reasoned that provision of a minimum education for all children satisfied the constitutional requirement of equal protection of the laws.[53]

Even in view of the *Rodriguez* ruling, the cases attacking state educational financing plans remain important for several reasons. Besides revealing a form of discrimination in public schools other than discrimination based on race, they have caused courts to grapple with constitutional mandates regarding adequacy versus equality in education. In addition, these cases, coupled with desegregation litigation, have accentuated the need for clear criteria to use in evaluating the state action necessary to constitute *de jure* discrimination under the equal protection clause.[54]

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[50] *Id.* at 82 (Marshall, J., dissenting).

[51] *Id.* at 90.

[52] Michelman has voiced an opposing view and has asserted that education "is valued because of its relevance to a competitive activity." Hence, he has concluded that education is meaningful in relation to having as much or more than someone else, so deprivation exists only where inequality exists, and conversely, "inequality implies deprivation." F. Michelman, *Supreme Court 1968 Term, Foreword: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 49 (1969).

[53] It should be noted that in desegregation litigation the provision of an 'adequate' education for all students has been an insufficient rationale for maintaining unlawfully separate and unequal schools. *See* Brown v. Bd. of Educ., 347 U.S. 483 (1954); Green v. County School Bd. of New Kent County, 391 U.S. 430 (1968). It must be concluded, therefore, that the Court has required various standards of equality in public schools depending on the nature of the discriminatory classifications involved.

[54] For example, the majority's reasoning in *Rodriguez* is somewhat difficult to reconcile with the Court's stance in the Detroit desegregation case regarding the conditions necessary to establish *de jure* discrimination. Concerning Detroit, the Court concluded that the state was not required to eliminate school district segregation because it resulted from housing patterns and other factors which the state could not control. Thus, the state and suburban school districts' lack of *intent* to discriminate relieved them of unconstitutional state action, Milliken v. Bradley, 418 U.S. 717 (1974). Following this line of reasoning, it is difficult to justify the conclusion reached in *Rodriguez*. Perhaps the state cannot totally control the racial composition of neighborhoods, but it can control the financing of public schools by legislative action. In his *Rodriguez* dissenting opinion, Justice Marshall emphasized the *de jure* nature of discriminatory school financing schemes: "It is the State that has created local school districts, and tied educational funding to the local property tax and thereby to local district wealth." 411 U.S. 1, 123 (1973) (Marshall, J., dissenting).

Within-School Classification Practices

In addition to desegregation and school finance cases, which have addressed the legality of school policies on a large scale, many within-school or even within-class practices which differentiate among students recently have received judicial attention under the protective arm of the fourteenth amendment. Although the *Rodriguez* decision has been used to counter claims of discrimination in education,[55] it certainly has not nullified the guarantees of the equal protection clause. Dimond has aptly stated that to draw the conclusion that the impact of a classification in education is never a constitutional violation is to allow "the semantics and form of *Rodriguez* to govern the substance of constitutional adjudication hereafter."[56] Without relying on the fundamentality of education, courts have held that handicapped children and other vulnerable minorities contain the elements of a suspect class.[57] Furthermore, some forms of differential student treatment have been invalidated under the less stringent equal protection test.[58]

Most student classifications, unlike those based on race, are not considered to be inherently suspect. It has been asserted that without the power to classify students, the business of public education could not proceed.[59] Pupils are categorized by academic levels, social maturity, athletic ability, sex, age, and many other distinguishing traits. According to Kirp, such classifications "provide mechanisms for differentiating among students, offer rewards and sanctions for school performance, ease the tasks of teachers and administrators by restricting somewhat the range of ability among students in a given classroom, and purportedly improve student achievement."[60]

The right of educators to classify students is not being questioned in the courts, but procedures used to make such determinations and the bases for classifications are being questioned and in some cases being invalidated under the mandates of the Federal Constitution. Although grouping practices are being attacked on many fronts, the following discussion primarily will deal with the equal protection issues involved.[61]

Classifications Based on Academic Achievement or Ability

Ability grouping practices are based on the premise that the instructional program should be matched to the capabilities of students, and this well-

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[55] *See* New Rider v. Bd. of Educ. of Indep. School Dist. no. 1, Pawnee County, Oklahoma, 480 F.2d 693 (10th Cir. 1973); Associated Students v. National College Athletic Ass'n, 493 F.2d 1251 (5th Cir. 1974).

[56] P. Dimond, *The Constitutional Right to Education: The Quiet Revolution,* 24 HAST. L. J. 1087, 1103 (1973).

[57] *See* text with notes 70–76, *infra.*

[58] *See* text with notes 80–108, *infra.*

[59] J. Hogan, *An Analysis of Selected Court Decisions Which Have Applied the Fourteenth Amendment to the Organization, Administration, and Programs of the Public Schools,* 1950–1972 (doctoral dissertation, University of California, 1972), at 128.

[60] D. Kirp, *Student Classification, Public Policy, and the Courts,* 44 HARV. EDUC. REV. 7, 11 (1974).

[61] In addition to equal protection claims, the constitutional assault on student classifications has concentrated on the inadequate procedural safeguards used in making placement decisions.

intentioned goal is not being challenged. However, strategies employed to meet this goal, such as ability tracking schemes, are raising many social and educational concerns in addition to constitutional issues. Such procedures are being attacked due to the lack of flexibility in the plans, the cultural bias of testing instruments, and the stigmatization of lower track students.[62] Although it is beyond the scope of this article to explore in depth the educational efficacy of tracking plans, there are legal issues which educators can no longer ignore in making grouping decisions. Courts are not assuming that all grouping practices are evidence of invidious discrimination, but they are evaluating such practices closely to ensure that the students are receiving *actual* and not *imagined* benefits.

For example, courts are questioning the use of achievement test scores to assign students to instructional programs. In the widely publicized decision, *Hobson v. Hansen,* the use of such scores to track students in Washington, D.C. was attacked as unconstitutional.[63] Plaintiffs charged that students in lower tracks had little chance of advancing to higher tracks due to the limited curriculum and absence of remedial instruction. Furthermore, plaintiffs alleged that some students were erroneously placed, and thus, the track system attached "a dear price [to] teacher misjudgments."[64]

In this case the federal court particularly scrutinized the test scores used to assign students to the various tracks. Judge Wright analyzed the accuracy of the testing instruments and concluded that mistakes often result from assigning pupils to instructional programs on the basis of such test scores. Thus, for the first time, a court evaluated the testing issue, examined its theory, data, and methods, and found it to be discriminatory in nature. The court concluded that the tests were inaccurate guides to pupil placement and that they disadvantaged black children by erroneously placing them disproportionately in lower tracks.[65]

The use of test scores to group students is especially crucial in cases where students are assigned to special education classes. Incorrect placement can have an impact on the student's status in the school environment and can result in harmful psychological stigma.[66] In a California case it was alleged that IQ scores were used to the detriment of black and Mexican-American children in their placement, instruction, and evaluation in school. This suit

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[62] For a discussion of this topic, see D. Kirp, *supra* note 60 at 7–33; M. Lazarus, *Coming to Terms with Testing,* THE NATIONAL ELEMENTARY PRINCIPAL, vol. 54, no. 6, 1975, at 24.

[63] 269 F. Supp. 401, 511–14 (1967), *aff'd sub nom.* Smuck v. Hobson, 408 F. 2d 175 (D.C. Cir. 1969).

[64] *Id.,* 269 F. Supp. 492.

[65] *Id.* at 513. It can be argued that tracking students becomes a self-fulfilling prophecy because students who score poorly on placement tests and are assigned to lower tracks, with less challenging work and often less competent teachers, usually do progress at slower rates than fellow classmates placed in higher tracks. *See Legal Implications of the Use of Standardized Ability Tests in Employment and Education,* 68 COLUM. L. REV. 691, 735 (1968). *See also* Singleton v. Jackson Municipal Separate School Dist., 419 F. 2d 1211 (5th Cir. 1969); Moore v. Tangipahoa Parish School Bd., 304 F. Supp. 244 (E.D. La. 1969).

[66] *See* Moses v. Washington Parish School Bd., 303 F. Supp. 1340 (E.D. La. 1971); Lemon v. Bossier Parish School Bd., 444 F. 2d 1400 (5th Cir. 1971).

was a class action in behalf of Spanish-speaking children who claimed that group administered tests unfairly evaluted their ability due to the racial, cultural, and linguistic bias in the tests.[67] The federal district court agreed that placement of students in classes for the mentally retarded on the basis of IQ scores violated equal protection guarantees.

In another California case, *Larry P. v. Riles,* plaintiffs sucessfully argued that they were unconstitutionally assigned to instructional programs based on IQ test results.[68] The federal court placed the burden on the school district to justify the disproportionate number of black children found in classes for the mentally retarded. The court rejected the school officials' claim that the racially biased IQ tests were the best available means for classifying students and thus satisfied constitutional mandates: "[T]he absence of any rational means of identifying children in need of such treatment can hardly render acceptable an otherwise concededly irrational means, such as the IQ test as it is presently administered to black students."[69]

To date, successful attacks on ability grouping practices usually have been accompanied by racial or ethnic overtones. Evidence of an unbalanced percentage of minority children located in lower tracks or special education classes has usually aroused judicial suspicion. It can be predicted, however, that the burden of proof will increasingly be shifted to school officials to justify all ability grouping practices, especially those which have a serious and lengthy impact on students.

Classifications Based on Handicaps

Since tracking schemes affect all students to varying degrees, constitutional assaults on such procedures must often specify an identifiable class which has been disadvantaged. In contrast, handicapped children who are discriminated against in public schools already contain the elements of a suspect class. Children who are totally denied a public education because of their handicaps certainly represent an abused minority group.

The *Rodriguez* decision lends support to the contention that the exclusion of selected children from a state-supported education would not withstand constitutional analysis. Although the Supreme Court concluded that fiscal inequities among Texas districts did not violate constitutional mandates, it recognized that the "absolute denial of educational opportunities to any . . . children" would impair a fundamental right or liberty.[70]

Although no firm precedent has yet been established by the Supreme Court or a federal circuit court of appeals concerning the rights of handicapped

[67] Covarrubias v. San Diego Unified School Dist., Civil Action No. 70-294-S (S.D. Cal., Aug. 21, 1972), cited in *Segregation of Poor and Minority Children into Classes for the Mentally Retarded by the Use of IQ Tests,* 71 MICH. L. REV. 1223 (1973). *See also* Rutz v. State Bd. of Educ., Civil Action No. 218294 (Sup. Ct. San Francisco County, Cal., filed Dec. 16, 1971), cited in A. Abeson, *A Continuing Summary of Pending and Completed Litigation Regarding the Education of Handicapped Children Number 7,* Eric Reports, ED 085 930, November, 1973.

[68] 343 F. Supp. 1306 (N.D. Cal. 1972).

[69] *Id.* at 1313.

[70] 411 U.S. 1, 36-37 (1973).

children to a public education, several lower courts have ruled that these children have been discriminated against by school authorities in violation of the equal protection clause. In Pennsylvania, a class action suit on behalf of all retarded persons between the ages of six and twenty-one who were excluded from public education was initiated under the Civil Rights Act of 1871.[71] In a consent agreement the three-judge panel held that the state was obligated to place each "mentally retarded child in a free, public program of education and training appropriate to the child's capacity."[72] The Court also stressed that placement of retarded children in a regular class was preferable to a special class, and placement in a special class was preferable to any remaining options.

A Washington, D.C. case, *Mills v. Board of Education,* followed the principle established in the Pennsylvania agreement, and expanded the right to an individually appropriate public education beyond the mentally retarded, to all other children alleged to be suffering from mental, behavioral, emotional, or physicial deficiencies.[73] Since the *Mills* ruling was based on a constitutional issue, it established stronger legal precedent than the consent agreement issued in Pennsylvania.[74] Judge Waddy stated for the court that these 'special' students were denied an equal state supported education while such opportunities were provided to other children. Furthermore, he declared that some students were totally excluded, suspended, or reassigned to special classes without procedural safeguards. The court definitively held:

> [N]o child eligible for a publicly supported education in the District of Columbia public schools shall be excluded from a regular public school assignment . . . unless such child is provided . . . adequate alternative educational services suited to the child's needs....[75]

Litigation regarding handicapped children's rights to attend school and to receive appropriate instruction is presently in progress in many states.[76] In addition, recent equal protection claims also have been initiated on behalf of classes of children with behavior disorders. Children with emotional or behavioral problems as well as children with physical handicaps are often categorized under the same general labels and assigned to special education classes or denied educational opportunities altogether. In Iowa, students were excluded from school or otherwise disadvantaged due to being classified as

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[71] 42 U.S.C. Sections 1981, 1983. Section 1983 of Title 42 provides: "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

[72] Pennsylvania Association for Retarded Children v. Commonwealth, 343 F. Supp. 279, 285 (E.D. Pa. 1972).

[73] 348 F. Supp. 866 (D. D. C. 1972).

[74] P. Friedman, *Mental Retardation and the Law: A Report on the Status of Current Court Cases,* Eric Reports, ED 084 756, April, 1973, at 32.

[75] 348 F. Supp. 866, 878 (1972).

[76] See A. Abeson, *supra* note 67; P. Friedman, *supra* note 74.

disruptive, immature, or abnormal.[77] Plaintiffs demonstrated that grave injury accrued to the children from the indiscriminate use of such unjustified classifications.

When teachers or other school authorities are given the freedom to exclude children from school or to place them in special classes because they exhibit deviant behavior or social maladjustment, a great weight is placed on the accuracy or inaccuracy of the judgments of educators. There is a real danger that children with minor behavior problems could be misclassified as emotionally disturbed. Conceivably, a personality conflict between the teacher and pupil or an innocent act, interpreted as deviant behavior, could be the basis for determining the type of educational opportunities the child will receive or possibly result in his expulsion from school.

Although the Supreme Court has not directly addressed school classifications based on an individual's mental or emotional characteristics, a direct analogy can be drawn between these categories and classifications based on alienage, illegitimacy, or race. Persons are stigmatized when discriminatory state action results from any of these classifications. Also, all of these classifying facts concern the individual's status at birth or inherent characteristics over which he has no control. The Supreme Court has held that neutral factors, such as race or illegitimacy, should not be the basis for penalizing a person.[78] Thus, it can be speculated that the high Court would similarly strike down discriminatory school classifications based on an individual's physical or mental capabilities.[79]

Classifications Based on Sex

During the past few years the judiciary has been called upon to review claims of discrimination in public schools based on another inherent trait-sex. Sex discrimination has been alleged concerning grooming policies, admission practices, and eligibility for athletic competition. Although the Supreme Court has not deemed 'sex' to be a suspect classification, it has become increasingly inclined to invalidate policies which discriminate on the basis of this unalterable trait.[80]

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[77] Fox v. Benton, Civil Action No. 74-5-D (S.D. Iowa 1974). *See* M. McClung, *The Problem of the Due Process Exclusion: Do Schools Have a Continuing Responsibility to Educate Children with Behavior Problems?* 3 J. L. & EDUC. 491, 511 (1974).

[78] *See* Levy v. Louisiana, 391 U.S. 68 (1968); Weber v. Aetna Casualty and Surety Company, 406 U.S. 164 (1972); text with note 118, *infra*.

[79] As often occurs, court decisions regarding the rights of handicapped children have been accompanied by federal legislation. The Education for All Handicapped Children Act of 1975 (P.L. 94-142) guarantees certain basic rights and protections to all handicapped children. Among the mandates of this sweeping piece of legislation is the requirement that individualized educational plans be developed for all handicapped children. Furthermore, extensive due process procedures must be followed to assure that each handicapped child is placed in the least restrictive alternative educational setting. For a discussion of this law, *see* F. J. Weintraub, *et al., Public Policy and the Education of Exceptional Children,* The Council for Exceptional Children, 1976; *Third Draft Consolidated Concept Paper Under Part B of the Education of the Handicapped Act as Amended by Public Law 94-142,* Department of Health, Education, and Welfare, October 15, 1976.

[80] *See* Reed v. Reed, 404 U.S. 71 (1971); Frontiero v. Richardson, 411 U.S. 677 (1973); note 116, *infra*.

In *Bray v. Lee,* admission practices of the Boston Latin Schools were questioned on the grounds that they discriminated against female applicants.[81] Due to the different seating capacities in the two schools, a higher entrance exam score was required for female applicants than for male applicants. The federal court concluded that the entrance requirements resulted in unconstitutional discrimination on the basis of sex. In a similar California case, the Ninth Circuit Court of Appeals held that the use of higher admission standards for female students violated the equal protection clause.[82]

School athletic activities also have been the source of litigation alleging sex discrimination in education, and according to Hogan, "the last sanctum of male chauvinism—the locker room—is about to be invaded by the girls."[83] In *Haas v. South Bend Community School Corporation,* a regulation of the Indiana High School Athletic Association was challenged because it prohibited boys and girls from participating in interschool athletic games as mixed teams.[84] A female student, qualifying for a high school golf team, had been denied the opportunity to participate in team competition. The Supreme Court of Indiana found no reasonable justification for denying female students the opportunity to qualify with male students in non-contact interscholastic activities, and thus held that the regulation violated equal protection mandates.

Similarly, the Eighth Circuit Court of Appeals struck down sex discrimination in Minnesota. In *Brenden v. Independent School District 742,* the appellate court affirmed that the high school athletic league's rule, banning participation by females on males' teams, are arbitrary, unreasonable, and a violation of the equal protection clause.[85] The district court had pointed out that there were no alternative school programs in tennis or cross-country running and skiing which would provide an equal opportunity for females to compete in these events. Thus, the court concluded that female students were totally excluded from team competition due to their sex. The district court in *Brenden* further elaborated on the judiciary's duty to invalidate arbitrary school classifications based on sex:

> There is no longer any doubt that sex-based classifications are subject to scrutiny under the equal protection clause and will be struck down when they provide dissimilar treatment for men and women who are similarly situated with respect to the object of the classification.[86]

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[81] 337 F. Supp. 934 (D. Mass. 1972).

[82] Berkelman v. San Francisco Unified School Dist. 502 F. 2d 1264 (9th Cir. 1974).

[83] J. Hogan, *Sports in the Courts,* PHI DELTA KAPPAN, October, 1974, at 132.

[84] 339 N.E.2d 495 (Ind. Sup. Ct. 1972).

[85] 342 F. Supp. 1224 (D. Minn. 1972), *aff'd* 477 F. 2d 1292 (8th Cir. 1973).

[86] *Id.* 342 F. Supp. 1224, 1234. The judiciary has not been the only forum for recent action concerning sex discrimination in the schools. Title IX of the Educational Amendments of 1972 (45 CRF, Part 86) forbids sex discrimination in admissions, counseling, course offerings, athletics, and employment in school districts receiving federal funds. Discriminatory grooming policies, sex biased career counseling, and sex stereotyping in public education are subject to attack under these regulations. *See* Title IX, "Educational Briefing Paper," U.S.O.E., September, 1974.

excluded a certain class of students without showing a compelling state interest.[94]

School regulations which deny pregnant students an education or discriminate against pregnant students are also being questioned in the courts. Although some regulations have been upheld,[95] at present it appears that the courts will scrutinize differential treatment of pregnant students unless a direct relationship can be shown to protecting the girl's health or an alternative program more suitable to the student's needs is made available. In 1966 a school rule in Texas was attacked which excluded married mothers from attending regular public school classes. The only alternative available to the excluded students was to attend adult education classes which required a minimum age of twenty-one. Thus, the teenage mothers were totally denied any educational opportunities for several years. The Texas Court of Civil Appeals invalidated the school board policy and held that the students had a right to an education furnished by the state because they were of the age for which the state supplied funds for such purposes.[96]

In the leading decision asserting that pregnant students must be treated the same as other students, *Ordway v. Hargraves,* the Massachusetts district court held that school authorities could not exclude a pregnant, unmarried student from attending regular high school classes.[97] School officials had proposed that Miss Ordway be allowed to use all school facilities, attend school functions, participate in senior activities, and receive assistance from teachers in completing assignments. However, she was not to attend school during regular school hours. Since the school authorities were unable to demonstrate any educational purpose or medical reasons for this special treatment, the court held that Miss Ordway had a constitutional right, shielded by the equal protection clause, to attend classes with other children.[98]

Lack of Classification: Functional Exclusion

In addition to discriminatory classifications, courts recently have directed attention to the lack of special instruction for certain groups of children who cannot benefit from the mainstream educational program. In these cases the discriminatory results, rather than inequities in treatment, have been attacked.

For example, in 1973, Chinese students asserted that the San Francisco public school program failed to provide for the needs of the non-English-speaking students in violation of the equal protection clause of the Federal Constitution and Section 601 of the Civil Rights Act of 1964.[99] Both the district

[94] Bell v. Lone Oak Indep. School Dist., 507 S.W.2d 636 (Tex. Civ. App. 1974).

[95] *See* State *ex rel.* Idle v. Chamberlain, 174 N.E.2d 539, 541–42 (Ohio C.P. 1961).

[96] Alvin Indep. School Dist. v. Cooper, 404 S.W.2d 76 (Tex. Civ. App. 1966). *See also* Perry v. Grenada Municipal Separate School Dist., 300 F. Supp. 748, 753 (N.D. Miss. 1969).

[97] 332 F. Supp. 1155 (D. Mass. 1971).

[98] *Id.* at 1158.

[99] Lau v. Nichols, 483 F. 2d 791 (9th Cir 1973), *rev'd* 414 U.S. 563 (1974). Section 601 of the Civil Rights Act of 1964, 42 U.S.C., part 2000d bans discrimination based "on the grounds of race, color, or national origin" in "any program or activity receiving Federal financial assistance."

Classifications Based on Marriage and Pregnancy

Marriage and pregnancy are not unalterable characteristics, like race, sex, and handicaps, but courts have become increasingly inclined to challenge differential student treatment based on these conditions. Although courts traditionally sanctioned differential treatment of married students in public education,[87] today the prevailing view is that married students must be granted the same right to attend school as unmarried students. In *Board of Education of Harrodsburg v. Bentley,* the Kentucky Court of Appeals held that the school board could not make marriage, *ipso facto,* the basis for denying the student's right to obtain an education.[88] The court found the exclusion of married students to be arbitrary and unrelated to the school's asserted purpose. Similarly, the Texas Court of Civil Appeals ruled that boards of education could not deny admission to school because of a student's marital status.[89]

Since it generally has been accepted that a married student has the right to remain in school, the controversial issue at present concerns the married student's right to participate in extracurricular activities. In the past, courts upheld regulations prohibiting married students from participating in extracurricular activities on the basis that teenage marriages contributed to the school dropout problems.[90] An Ohio regulation, barring married students from taking part in extracurricular activities, was upheld by the common pleas court because school officials demonstrated that married athletes were often in a position to be idolized and copied by other students. Thus, the school's purpose of attempting to curtail underage marriages justified the regulation.[91]

However, several recent cases have challenged the traditional view that students could be denied participation in extracurricular activities due to their marital status. In *Davis v. Meek* an Ohio federal court recognized extracurricular activities as "an integral part" of the total school program and relied upon the landmark *Brown* decision in declaring that married students were entitled to equal treatment in all aspects of public education.[92] Similarly, in *Holt v. Shelton* the federal district court held that school regulations preventing married students from participating in extracurricular activities unconstitutionally infringed upon the student's right to marry and right to attend school.[93] Likewise, in a recent Texas case the court of civil appeals invalidated the exclusion of married students from extracurricular activities on the rationale that once the state established such programs, it could not

[87] *See* State v. Marion County Bd. of Educ., 302 S.W.2d 57 (Tenn. 1957).

[88] 383 S.W.2d 677, 680 (Ky. Ct. App. 1964).

[89] Anderson v. Canyon Indep. School Dist., 412 S.W.2d 387 (Tex. Civ. App. 1967).

[90] *See* Bd. of Directors of Indep. School Dist. of Waterloo v. Green, 259 Iowa 1260, 147 N.W.2d 854 (1967); Starkey v. Bd. of Educ. of Davis County School Dist., 14 Utah 2d 227, 381 P.2d 718 (1963).

[91] State *ex rel.* Baker v. Stevenson, 189 N.E.2d 181 (Ohio C. P. 1962).

[92] 344 F. Supp. 298, 301 (N.D. Ohio 1972). *See also* Moran v. School Dist. No. 7, Yellowstone County, 350 F. Supp. 1180, 1186–87 (D. Mont. 1972).

[93] 341 F. Supp. 821, 823 (M.D. Tenn. 1972).

court and the Ninth Circuit Court of Appeals rejected the plaintiffs' contention that the school system was obligated to provide for the special needs of these students. The appellate court noted that it would be "socially desirable" for special remedial programs to be provided for disadvantaged students, but it found no statutory or constitutional basis for mandating such services.[100]

The United States Supreme Court, however, reversed the appellate court's ruling and held that the lack of sufficient remedial English instruction violated Section 601 of the Civil Rights Act of 1964. Justice Douglas, speaking for the majority, clearly stated: "Under these state-imposed standards, there is not equality of treatment merely by providing students with the same facilities, text books, teachers, and curriculum...."[101] The Court also stressed that "basic English skills are at the very core of what these public schools teach," and therefore, "students who do not understand English are effectively foreclosed from any meaningful education."[102] The Court concluded that requiring children to acquire English skills on their own before they can hope to make any progress in school "is to make a mockery of public education."[103]

Although the Supreme Court declined to address the equal protection issue in *Lau v. Nichols,* lower federal courts have relied upon equal protection mandates in ordering bilingual programs. In *United States v. Texas,* the Fifth Circuit Court of Appeals ruled that an identifiable ethnic group was denied equal protection of the laws due to the lack of bilingual instruction.[104] The federal court in *Arvizu v. Waco* further elaborated on the state's *affirmative duty* to provide for the special needs of non-English-speaking students:

> Although we find that the isolation of Mexican-Americans in Waco is not the result of past state action, our finding that Mexican-Americans in Waco are an identifiable ethnic class with special educational needs does impose upon the [school district] an affirmative obligation to assure that Mexican-American students are assured the equal protection of the laws in the future. . . .[105]

These cases regarding the rights of ethnic minorities have raised several crucial issues concerning the rights of *all* children to equal educational opportunities. They have gone beyond the mere right of the child to be in school and have addressed the suitability of the program to the needs of the pupil. Some implications of the decisions are readily apparent such as the requirement to provide remedial instruction for students who are learning English as a second language.[106] Other, more subtle, ramifications of these cases may greatly influence school reform efforts of the future. For example, the Supreme Court inferred in *Lau v. Nichols* that because education is state-

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[100] *Id.,* 483 F. 2d 791, 798 (9th Cir. 1973).

[101] *Id.,* 414 U.S. 563, 566 (1974).

[102] *Id.*

[103] *Id.*

[104] 342 F. Supp. 24 (E.D. Tex. 1971), *aff'd* 466 F. 2d 518 (5th Cir. 1972).

[105] 373 F. Supp. 1264, 1269 (W.D. Tex. 1973). *See also* Serna v. Portales Municipal Schools, 351 F. Supp. 1279 (D. N.M. 1972), *aff'd* 499 F. 2d 1147 (10th Cir. 1974).

[106] Fifteen states already have passed bilingual education legislation, and four states have bills currently pending. See *NEA Reporter,* National Education Association, vol. 15, no. 4, 1976, at 15.

imposed, the program provided must be appropriate to the needs of the students in order to be acceptable.[107] Following this logic, provision of little more than custodial care for certain pupils would be declared repugnant by the Supreme Court. It can be extrapolated from this bilingual mandate that other classes of children who cannot benefit from the mainstream program, such as culturally disadvantaged students, could have a valid claim to a public school program designed to meet their unique needs.[108]

In light of the Supreme Court's reasoning in *Lau v. Nichols,* it may be that egalitarians will find greater relief under the Civil Rights Act of 1964 than has been possible when relying on constitutional grounds alone. But, regardless of whether litigation is couched in equal protection terms, or brought under civil rights legislation, or even based on federal guidelines to implement the laws, within-school practices which disadvantage classes of students are destined to be evaluated by the courts.[109]

The Emerging Equal Protection Standard

As mentioned previously, equal protection analysis is taking a new direction under the Burger Supreme Court, and this emerging standard of review will have an impact on the future breadth of court-required school reform. The Court's quest for a new doctrine to use in evaluating state legislation seems due to dissatisfaction over the rigid classification of equal protection cases into "two neat categories which dictate the appropriate standard of review—strict scrutiny or mere rationality."[110] In fact, the Court's attempt to adhere to the two-tiered test has created an ironical situation. The existence of the strict scrutiny standard, which was originally designed to offer greater protection to individual interests, has had an opposite effect under the Burger Court. The rigor of this test has caused the Court to severely limit the number of rights identified as 'fundamental' and the classes deemed 'suspect' so as not to render legislatures powerless. But this has placed the Court in the awkward position of reverting to the lenient rational basis test as the only available option. Hence, the Supreme Court has cautiously searched for a

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[107] 414 U.S. 563, 566 (1974). It may be that the progeny of *Lau v. Nichols* will shed new light on the 'educational needs' issue which was rejected in school finance litigation. See note 26, *infra.*

[108] *See* T. Van Geel, *Right to be Taught Standard English: Exploring the Implications of Lau v. Nichols for Black Americans,* 25 SYRACUSE L. REV. 836-910 (1974).

[109] The judiciary has seemed more assertive in striking down school classifications based on race, sex, marriage, ability, and other characteristics when there has been unmistakable injury to students and the proposed remedies have not disturbed the delicate balance of power between state and federal governments. On the other hand, the Court has seemed reluctant to uncover constitutional violations in desegregation and school finance cases if the remedies would interfere with the state's power to levy taxes and distribute funds or design its political subdivisions. *See* Rodriguez, 411 U.S.1 (1973); Milliken v. Bradley, 418 U.S. 717 (1974).

[110] *Rodriguez,* 411 U.S. 1, 98 (1973) (Marshall, J., dissenting). Actually, neither standard is specified in the constitutional mandate of 'equal protection of the laws,' but rather has been an attempt to interpret what was meant by the original framers of the amendment. The judiciary has been accused of becoming so entwined in reinterpreting these court-created standards that it has lost sight of the actual constitutional mandate and has sporadically guaranteed equal protection to citizens.

middle standard to use in evaluating legislation under the equal protection clause.

The emerging equal protection test can be categorized as a more stringent rational basis doctrine. Although this standard is often referred to as the traditional rational basis review, it seems to fall somewhere between the two-tiered test formerly evoked by the Court. This 'inbetween standard' does not foreclose the possibility that the legislation will be upheld, as has usually been the case with strict scrutiny analysis, but it does call for a closer examination of state action than has been required by the traditional test. Nowak has referred to the emerging standard as the "demonstrable basis standard," and has asserted that this approach, "selectively employed" by the Court, examines closely the means and ends of legislation.[111] Thus, according to Nowak, the state must be able to demonstrate the relationship between discriminatory classifications and necessary governmental goals, even though neither a fundamental right nor a suspect class is involved.

In recent terms the Supreme Court has sparingly used strict scrutiny analysis, and has evoked this stringent test mainly in cases involving discrimination based on race or alienage.[112] To avoid using strict scrutiny, the Court has limited the category of fundamental interests to those rights "firmly rooted in the text of the Constitution."[113] However, this judicial posture does not necessarily indicate that the equal protection clause has been stripped of its strength. The fourteenth amendment implies that persons similarly situated must receive similar governmental treatment, but it does not infer that a constitutional right must be abridged in order to enforce equal protection mandates. As Justice Marshall has observed, equal protection analysis does not have to be affected by the *a priori* definition of "a right, fundamental, or otherwise."[114]

Hence, the Court has continued to scrutinize discriminatory classifications even though its mention of a fundamental interest has been noticeably lacking in recent decisions. Gunther has commented that the Burger Court has "found bite in the equal protection clause after explicitly voicing the traditionally toothless minimal scrutiny standard."[115] The Court has been especially protective of individuals affected by classifications based on unalterable human characteristics, such as sex and illegitimacy, in contrast to classifications relating to human actions.

For example, in several cases the Supreme Court has invalidated legislation resulting in sex discrimination without deeming 'sex' to be a suspect classification. In *Reed v. Reed* the unanimous Court nullified an Idaho

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[111] J. Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L. J. 1071, 1071–73 (1974).

[112] *See* Sugarman v. Dougall, 413 U.S. 634, 642 (1973); *In re* Griffiths, 413 U.S. 717, 727 (1973).

[113] Rodriguez, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting). *See* Dandridge v. Williams, 397 U.S. 471 (1970); Jefferson v. Hackney, 406 U.S. 535 (1972); Lindsey v. Normet, 405 U.S. 56, 73 (1972).

[114] Dandridge v. Williams, 397 U.S. 471, 520 (1970) (Marshall, J., dissenting).

[115] G. Gunther, *The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 18–19 (1972).

probate provision which gave men preference over women of the same entitlement for appointment to administrator of a decedent's estate.[116] Similarly, in *Frontiero v. Richardson* the Court struck down discrimination against women in the uniformed services concerning receipt of dependent benefits.[117]

Likewise, the Supreme Court has found discriminatory practices against the class of illegitimate citizens to be constitutionally repugnant. In *Weber v. Aetna Casualty and Surety Company* the Court invalidated discrimination against illegitimate children as "contrary to the basic concept of our system that the legal burdens should bear some relationship to individual responsibility or wrongdoing."[118] The Court explicitly declared that "the equal protection clause does enable us to strike down discriminatory laws relating to status of birth."[119]

The Supreme Court's recent sensitivity toward classifications which disadvantage individuals on the basis of unalterable characteristics has implications for future educational litigation. If the Court continues in this fashion, then it *should* strike down discriminatory student classifications based on ability, handicaps, wealth, or other traits relating to one's status at birth.[120] Consequently, attacks on arbitrary school classifications may be destined to greater success than attempts to verify the constitutionally preferred status of one's right to an education. However, it must be cautioned that the Supreme Court is still in the process of developing criteria to use in equal protection analysis, so a predictable course cannot be charted with accuracy at this time.

Another factor which complicates an assessment of the potency of the emerging equal protection standard is the Court's recent revival of substantive due process as a tool to evaluate the constitutionality of state legislation. The Supreme Court has used due process guarantees to invalidate 'irrebuttable presumptions' about classes of persons in some cases which formerly would have been reviewed on equal protection grounds.[121] For example, in *Cleveland Board of Education v. LaFleur* the Court nullified school board regulations which required pregnant teachers to take maternity leave without pay at a designated point during pregnancy.[122] Although the lower courts had decided the case on equal protection grounds,[123] the Supreme Court held that decisions concerning marriage and family life are included in the due

[116] 404 U.S. 71 (1971). Although this decision has been used in subsequent litigation to contend that sex is an inherently suspect classification, the Supreme Court in *Reed* invalidated the state legislation without specifically elevating 'sex' to the category of suspect classes, *id.*, 76-77. *See* Frontiero v. Richardson, 411 U.S. 677 (1973).

[117] 411 U.S. 677 (1973).

[118] 406 U.S. 164, 175 (1972).

[119] *Id.* at 176. *See* Levy v. Louisiana, 391 U.S. 68 (1968), where the Supreme Court held that a state could not deny illegitimate children the opportunity to prosecute a wrongful death action on behalf of their mother.

[120] It should be noted that the *Rodriguez* decision runs counter to this conclusion, 411 U.S. 1 (1973). *See* note 42, *supra*.

[121] *See* Stanley v. Illinois, 405 U.S. 645 (1972).

[122] 414 U.S. 632 (1974).

[123] LaFleur v. Bd. of Educ., 325 F. Supp. 1208, 1213-14 (N.D. Ohio 1971) (regulation meets rational basis test), *rev'd* 465 F. 2d 1183 (6th Cir. 1972) (regulation discriminates on the basis of sex.).

process guarantee of 'liberty.' Thus, the Court struck down the 'irrebuttable presumption' that all pregnant teachers were unable to work after a designated date as a violation of due process rights. The Court's tendency to jockey between due process and equal protection review is further evidenced by two cases which involved similar discriminatory governmental practices in the distribution of food stamps. The Supreme Court handed down the decisions on the same day, but invalidated the state action under the equal protection clause in one case and under due process guarantees in the other.[124]

The Court does not seem totally comfortable with either the emerging equal protection test or the 'irrebuttable presumption' due process doctrine in its search for an appropriate standard to shield individuals from arbitrary governmental interference. The revival of substantive due process has evoked criticism similar to that leveled against the strict scrutiny equal protection test. Justice Powell has voiced concern that 'irrebuttable presumption' review has the potential to negate legislatures' power to operate by classifications. He has further asserted that the "concept at root" often is the equal protection clause "masquerading as a due process doctrine."[125] Chief Justice Burger also has asserted that the Supreme Court is "engrafting" the close judicial scrutiny test onto due process review and has cautioned fellow justices to heed the "doctrinal difficulties" involved in applying either standard.[126]

The Court's vacillation between due process and equal protection tests in reviewing alleged discriminatory classifications and its ambiguity in delineating which preferred personal interests are protected under each doctrine have made it difficult for individuals to ascertain the perimeters of their constitutional rights.[127] The judicial inconsistencies have been further aggravated by the Court's increasing tendency toward five-to-four splits in reaching decisions. In a recent dissenting opinion Justice Powell voiced his frustration over the Court's inability to clearly articulate constitutional protections:

> One need only look to the decisions of this Court—to our reversals, our recognition of evolving concepts, and our five-to-four splits—to recognize the hazard of even informed prophecy as to what are "unquestioned constitutional rights."[128]

Future Directions

It must be concluded that the Supreme Court has not yet defined with precision the nature of equality required in public schools, so the scope of an individual's rights to equal educational opportunities remains uncertain.

[124] United States Dep't of Agriculture v. Moreno, 413 U.S. 528 (1973) (equal protection grounds); United States Dep't of Agriculture v. Murry, 413 U.S. 508 (1973) (due process grounds). *See also* Stanley v. Illinois, 405 U.S. 645 (1972), Eisenstadt v. Baird, 405 U.S. 438 (1972).

[125] Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632, 652 (1974) (Powell, J., concurring).

[126] Vlandis v. Kline, 412 U.S. 441, 462 (1973) (Burger, C. J., dissenting).

[127] For example, when the Supreme Court announced that students have a protected property right to an education which cannot be denied without due process, *Goss v. Lopez,* 419 U.S. 565 (1975), Justice Powell proclaimed that the majority justified "this unprecedented intrusion" into the domain of public education "by identifying a new constitutional right." *Id.* at 585 (Powell, J., dissenting).

[128] Wood v. Strickland, 420 U.S. 308, 329 (1975) (Powell, J., concurring in part, dissenting in part).

Although the constitutional mandate of equal protection of the laws' appears to be a relatively simple phrase, judicially-created standards for implementing this mandate have become complex indeed. The individual's rights under this clause have expanded and contracted with the shifting composition of the Supreme Court. The ever changing judicial vernacular combined with the temporal nature of tests for reviewing equal protection claims makes it difficult to plot the future vitality of the equal protection clause. The Supreme Court seems stalled in the midst of alternative directions, each with notably different repercussions for both the rights of the individual and the powers of the state.

The various standards selectively used by the Court to enforce equal protection of the laws indicate that the Court is still searching for an interpretation of the constitutional mandate which will create a proper balance between judicial intervention and abstention in the affairs of state legislatures. Possibly the Supreme Court's recent tendency to deemphasize fundamental interests and concentrate on the necessity of governmental classifications to achieve valid state purposes is its attempt to become emancipated from the limitations of both former standards used to evaluate claims under the equal protection clause. Hopefully, the Supreme Court's emerging equal protection standard coupled with the revival of due process analysis will eventually provide a set of criteria which can be uniformly applied in evaluating state action and guaranteeing personal rights.

The obscure code surrounding an individual's constitutional entitlement to equal educational opportunities finally will be broken if the judiciary takes a firm stand concerning how far the protective umbrella of the fourteenth amendment reaches in safeguarding students from discriminatory state action. Since the Supreme Court does not seem willing to abandon the social welfare area totally to the discretion of the legislative branch of government, the equal protection clause remains a viable tool for judicial initiation of educational reform. Hence, avid eglitarians should retain hope, as the final act in the unfolding equal protection drama' is yet to come.