Volume 11
Number 3 *Spring 1977*

*pp.*435-472

Spring 1977

Equal Protection of the Laws and San Antonio Independent School District v. Rodriguez

Timothy E. Gammon

EQUAL PROTECTION OF THE LAW AND SAN ANTONIO INDEPENDENT SCHOOL DISTRICT V. RODRIGUEZ

TIMOTHY E. GAMMON

INTRODUCTION

In *San Antonio Independent School District v. Rodriguez*[1] a class action was brought on behalf of certain Texas public school students who lived in school districts which had a low property tax base. The plaintiffs challenged the Texas school finance system as a violation of equal protection requirements of the fourteenth amendment because the differences in assessable property among districts caused substantial interdistrict disparities in tax burdens and per pupil expenditures, favoring richer districts.[2] The plaintiffs asserted a right to equal educational opportunity, claiming that the amount spent per pupil should be the same throughout the state and alleged that the Texas school financing plan resulted in inequality since more was being spent on students in richer districts even though their parents were taxed at lower rates.

The Supreme Court, in an opinion by Justice Powell, applied the rational relationship standard and upheld the Texas method of public school finance, concluding that there was a reasonable relationship between the state educational obligations, the desire to allow local school district autonomy, and the Texas finance system.[3] The Court selected the rational basis standard because it used the two-tier approach to the equal protection question and found that neither fundamental interest nor suspect classifications were involved.[4]

Under the two-tier approach state laws are evaluated in one of two ways. Using the less critical rational basis standard a state need only show some reasonable connection between the law and a legitimate state interest. Under the more demanding strict scrutiny standard a state must justify the law and demonstrate that state objectives can not be met by less restrictive measures. The key to choosing which of the two standards under the two-tier approach is to be employed is determined by whether a fundamental, constitutionally protected interest is involved, or whether the statute

1. 411 U.S. 1 (1973).
2. 411 U.S. at 5, 11-16.
3. 411 U.S. at 43, 50-54.
4. 411 U.S. at 25, 28, 33, 35.

creates a discriminatory classification which is constitutionally improper or suspect. The Supreme Court has employed the strict scrutiny standard only if it first found either a fundamental interest or suspect classification was involved.[5]

The critical issue in *Rodriguez* was whether a fundamental interest was affected (education of the children) or whether a suspect classification was created by the Texas statute (the discrimination against both children and parents in poorer school districts). The majority stated that fundamental rights must be implied or expressed by specific constitutional guarantees, and although education is important it is not explicitly protected by the Constitution.[6] After reviewing considerable data on the wealth, tax bases, and per pupil expenditures in Texas school districts, the majority further concluded that evidence was lacking that the poor were concentrated in districts with low tax bases and that no general correlation existed between individual wealth and the per pupil tax expenditures.[7] The Court held that the residents in districts with a small tax base did not need special protection against the normal workings of the political process, thus departing from earlier cases which had applied strict scrutiny to wealth discrimination. These cases, however, had involved complete deprivation of the petitioners' interests.

Rodriguez and the "contemporary compromise" mode of adjudication could be defended as representative of a consistent and logical judicial approach which requires that a constitutionally protected interest be expressed or easily implied from the text of the Constitution itself before they will be given special treatment.[8] But

5. *See* notes 17, 31, and 32 *infra* and accompanying text.

6. 411 U.S. at 33, 35.

7. 411 U.S. at 26, 28.

8. Constitutional law and the way rights, liberties, or objectives are determined to be a part of the Constitution has involved three related dilemmas: first, the dilemma of constitutional content or basis for constitutional rights and pronouncements; second, the dilemma of constitutional law or form of constitutional rights and pronouncements; and third, the dilemma of the judicial role, which is a product of the first two. According to Professor Richard Parker of Harvard, the history of constitutional law can be seen as a series of efforts by jurists to work out these dilemmas.

The efforts to rebuild constitutional doctrines following the impact of legal realism included attempts in the 1950's and 1960's to totally eliminate judicial discretion, which was done by abandoning perfect objectivity while simultaneously limiting subjectivism by restricting the identification of constitutionally protected rights to those listed in the Constitution, those inferable from the text of the Constitution, and those which the framers of the Constitution could be said to have undoubtedly intended to include by implication because they are inextricably connected to certain enumerated rights. This mode of adjudication—called the contemporary compromise—has been characterized as being external to the Constitution but not transcendant;

like earlier attempts to deal with the dilemmas of constitutional law and the need for judicial objectivism, this mode of adjudication appears ludicrous when *Rodriguez* is contrasted with a decision like *Roe v. Wade*.[9]

The Supreme Court's opinion in *Rodriguez* constitutes a failure of judicial responsibility in adopting the rational basis standard as a fair and impartially selected, unbiased tool for reaching a decision when the actual purpose of the court was to buttress a predetermined judgment.[10] Selection of an equal protection standard of

---

changing or mutable; not limited to that which is discoverable from the text of the Constitution alone but rather inferable from the intentions of those who wrote the Constitution; and distinguishable from legal realism by the way constitutional values are sought.

For discussion and debate over these aspects of the contemporary compromise, particularly the issue of what sources can be considered in drawing inferences that constitutional rights not enumerated are nevertheless protected by implication, see, *e.g.*, J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); P. Heyman & D. Bradley, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973); E. Michleman, *In Pursuit of Constitutional Welfare Rights: One View of Rawl's Theory of Justice*, 121 U. PA. L. REV. 962 (1973); L. Tribe, *Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1972).

9. 410 U.S. 113 (1973). In *Roe* the Court held state laws prohibiting abortion, at least during the earlier stages of pregnancy were unconstitutional. The Court identified this right to an abortion as fundamental and protected by the Constitution. If the inference of constitutional rights had been limited in *Roe* as they were in *Rodriguez* to a specific constitutional provision, the state statute in *Roe* should have been upheld. *See* J. Ely, *The Wages of Crying Wolf: A Comment on Roe v. Wade*, 82 YALE L.J. 920 (1973); *contra*, P. Heyman & D. Bradley, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U.L. REV. 765 (1973).

10. The judgment is determined not by application of either the strict scrutiny or rational basis test under the two-tier approach, but by selection of the test to be used. The problem is that it cannot be predicted from established legal precedents and the particular circumstances which test the court will use. Rather the selection of the test actually depends on the characterization of the circumstances by the court, whether interests are labeled fundamental or classifications identified as suspect, instead of their actual nature. Because a particular judgment is assured by the test chosen, e.g. using the rational basis test in *Rodriguez* rather than strict scrutiny, or using due process in *Roe v. Wade* rather than equal protection, which meant the interest of petitioner in *Roe* could be inferred from more general constitutional provisions which would not be possible under the two-tier approach in which fundamental interests must be clearly implied by more specific constitutional provisions, the trier of fact can manipulate the factors that determine which test will be chosen. *Compare* San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973), *with* Roe v. Wade, 410 U.S. 113 (1973).

The most obvious historical analogy to this process of adjudication would be the ancient English trial by ordeal, in which various tests were given to an individual accused of a crime to determine the individual's guilt or innocence. For example, burning coals would be placed in his hand and the hand would be bound; if when the hand was unwrapped the wound was festered or infected the individual would be deemed to

review in *Rodriguez* and other recent decisions has become a judgment in itself or more often a means of justifying a preconceived judgment, rather than a process used to evaluate all the evidence and reach a decision on the merits. A judgment is rendered usually on the basis of the personal prejudices, fears, or political beliefs of the Court and then the corresponding standard of review is identified and its use in the particular case is rationalized.[11] Specifically, in *Rodriguez* the Court marshalled and contorted precedents[12] to prove that education was not a fundamental interest and that wealth discrimination did not create a suspect classification. This permitted application of the less demanding rational basis standard. Analysis of the two-tier approach in equal protection cases and the specific alternatives to the pernicious treatment of the equal protection issue in *Rodriguez*[13] supports the thesis that under equal protection

---

have been judged guilty and he would be punished. Selection of the specific ordeal and its administration was normally left to the clergy, who could assure a particular outcome either by selection of a particular test or the manner in which the test was given. The clergy could and often did insure the right result by choosing the ordeal or application of the ordeal in a particular manner. *See* T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 114-15 (5th ed., 1956).

11. The personal beliefs and philosophies of jurists have influenced their judicial temperament, and the course of American constitutional history. The initial assertion of supreme judicial power and autonomy in Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803), can more easily be explained by the political philosophy of Chief Justice John Marshall than by examination of the bare text of the Constitution. Those members of the Supreme Court appointed by President Franklin Roosevelt were picked, in part, because of their political philosophy and since that time many appointments would appear to have been made primarily on that basis.

The instant case serves as an excellent example. Despite the elusiveness and generalization of labels, few would deny that the more liberal members of the Supreme Court during the 1972 term were Justices Brennan, Douglas, and Marshall, or that the more conservative members of the court were Justices Blackman, Powell, Rehnquist, and Chief Justice Berger. In *Rodriguez* every member of the former, more liberal group dissented while every member of the more conservative faction were numbered among the majority. *Rodriguez* was not the only decision during the 1972 term in which the majority and minority were aligned along the same liberal-conservative lines. *See* Schneckloth v. Bustamonte, 412 U.S. 218 (1973); Chaffin v. Stynchcombe, 412 U.S. 17 (1973); Preiser v. Rodriguez, 411 U.S. 475 (1973); United States v. Russell, 411 U.S. 423 (1973); Tollett v. Henderson, 411 U.S. 258 (1973); Davis v. United States, 411 U.S. 233 (1973); Lemon v. Henderson, 411 U.S. 192 (1973); Ortwein v. Schwab, 410 U.S. 656, *petition for rehearing denied*, 411 U.S. 922 (1973); United States v. Kras, 409 U.S. 922 (1973).

12. *See* Wisconsin v. Yoder, 406 U.S. 205 (1972); Eisenstadt v. Baird, 405 U.S. 438 (1972); Graham v. Richardson, 403 U.S. 365 (1971); Reynolds v. Sims, 377 U.S. 533 (1964); Abington School Dist. v. Schempp, 374 U.S. 203 (1963); Douglas v. California, 372 U.S. 353 (1963); Griffen v. Illinois, 351 U.S. 12 (1956); Brown v. Board of Education, 347 U.S. 483 (1954); Skinner v. Oklahoma, 316 U.S. 535 (1942).

13. The history, development, and proposed changes in equal protection standards of review have been analyzed extensively. *See, e.g.*, Brest, *The Conscientious*

the Court could have upheld the plaintiffs' claims that denying equal educational opportunity based on interdistrict wealth discrepancies involved a suspect classification touching upon a fundamental interest, either education or equal educational opportunity.

THE RODRIGUEZ DECISION

The Supreme Court, in upholding the Texas school finance structure, reversed the ruling of a three judge federal district court which had recommended application of the principle of "fiscal neutrality."[14] The lower court had held first, that the state had not explained why acts of other governmental units should excuse the state from its obligations or the consequences of state law and second, that supplementary federal funds were not intended to compensate for the inequalities produced by state districting.[15] Thus the

---

Legislator's Guide to Constitutional Interpretation, 27 STAN. L. REV. 585 (1975); Dorsen, *Equal Protection of the Laws*, 74 COLUM. L. REV. 357 (1974) (discussing justice, equal protection, and Justice Marshall's spectrum analysis); Goodpaster, *The Constitution and Fundamental Rights*, 15 ARIZ. L. REV. 479 (1973) (advocating implementation of an intermediate standard); Gunther, *The Supreme Court, 1971 Term—Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1 (1972); Karst, *Invidious Discrimination: Justice Douglas and the Return of the "Natural-Law-Due-Process Formula,"* 16 U.C.L.A. L. REV. 716 (1969); Kurland, *Egalitarianism and the Warren Court*, 68 MICH. L. REV. 629 (1970); Nowak, *Realigning the Standards of Review Under the Equal Protection Guarantee—Prohibited, Neutral, and Permissive Classifications*, 62 GEO. L.J. 1071 (1974) (discussing new standards); Tague, *An Indigent's Right to the Attorney of His Choice*, 27 STAN. L. REV. 73 (1974); Tushnet, *". . . And Only Wealth Will Buy You Justice"—Some Notes on the Supreme Court. 1972 Term*, 1974 WIS. L. REV. 177; Tussman & ten Broek, *The Equal Protection of the Laws*, 37 CALIF. L. REV. 341 (1949); Wilkinson, *The Supreme Court, the Equal Protection Clause, and the Three Faces of Constitutional Equality*, 61 VA. L. REV. 945 (1975); Yackel, *Thoughts on Rodriguez: Mr. Justice Powell and the Demise of Equal Protection Analysis in the Supreme Court*, 9 U. RICH. L. REV. 181 (1975); Symposium, *Equal Protection*, 29 OHIO ST. L.J. 941 (1968); Note, *Borass v. Village of Belle Terre: The New, New Equal Protection*, 72 MICH. L. REV. 508 (1974); Comment, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to Lafleur*, 62 GEO. L.J. 1173 (1974); Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. C.R.-C.L. L. REV. 105 (1972). *See also Developments in the Law-Equal Protection*, 82 HARV. L. REV. 1065 (1969) (hereinafter cited as *Developments*). *See generally* D. BELL, RACE, RACISM, AND AMERICAN LAW 242-57 (1973); T. EMERSON, D. HABER, & N. DORSEN, POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES (3d ed. 1967); 2 P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 1071-1141 (3d ed. 1967); P. KAUPER, CONSTITUTIONAL LAW: CASES AND MATERIALS 694-799 (4th ed. 1972); J. TEN BROEK, EQUAL UNDER LAW (1965).

14. Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280, 282 (W.D. Tex. 1971).

15. *Id.*

state was free to adopt any financial system it wanted provided the variations in wealth of governmentally created units did not affect the amount spent on educating any child. The court indicated it would itself enforce this principle of "fiscal neutrality."[16]

In a five-to-four decision consisting of the Nixon appointees and Justice Stewart in the majority, the Supreme Court acknowledged that the system favored more affluent school districts but held that the Constitution does not require "absolute equality or precisely equal advantages," concluding "some inequality in the manner in which the State's rationale is achieved is not alone a sufficient basis for striking down the entire system."[17]

The majority approach to the case was first to decide what standard of equal protection review was to be used in analyzing the Texas school financing scheme and then to evaluate the financing scheme under the selected judicial standard.[18] Following the established two-tier bifurcation, the Court had to select a judicial standard of review from between two diametrically opposed alternatives.[19] The more demanding "strict scrutiny" standard would only have been utilized if it had been determined that either a suspect classification or fundamental interest was involved.

The tone of the Court was set by its pronouncement that the wealth discrimination struck down by lower courts in school finance

16. 337 F. Supp. at 284. On the power of courts to enforce equalization of expenditures, see Hobson v. Hansen, 327 F. Supp. 844 (D.D.C. 1971); Hobson v. Hansen, 269 F. Supp. 401 (D.D.C. 1967), *aff'd sub nom.* Smuck v. Hobson, 408 F.2d 175 (D.C. Cir. 1969), *further relief granted*, 320 F. Supp. 409 (D.D.C. 1970) (desegregation order).

The 1971 *Hobson* case involved the problem of intradistrict disparities in expenditures. Judge Wright ordered the school board to bring its per pupil expenditures for teachers' salaries and benefits at each school to within five percent of the system-wide average. Despite the close relation of the issues in *Hobson* to those in this article further discussion is beyond the scope of this article. For a history and analysis of the litigation, see Hornby & Holmes, *Equalization of Resources Within School Districts*, in CONSTITUTIONAL REFORM OF SCHOOL FINANCE 93 (K. Alexander & K. Jordan eds. 1973); Kirp, *The Poor, the Schools and Equal Protection*, in EQUAL EDUCATIONAL OPPORTUNITY 134, 140 (1969).

17. *Id.* at 51.

18. *Id.* at 17. While the majority limited the issue before it to the constitutionality of the Texas school financing structure under the appropriate fourteenth amendment equal protection standard, the majority's subsequent analysis and development of that issue included references to the input/output debate, the effect that affirming the lower court decision would have on property taxes and the provision of other governmental services, and problems in implementing an affirmance of the lower court decision and a court administered financing scheme if the legislature refused to act.

19. The equal protection standards of review are discussed in the following section.

cases was "quite unlike any of the forms of wealth discrimination heretofore reviewed by this Court."[20] The Court maintained there was "no definitive description of the classifying facts or delineation of the disfavored class."[21] Nevertheless, it identified one possible basis for describing the class disadvantaged by the Texas school financing system that could arguably have met the criteria established by case precedent—discrimination against those with income below a poverty level.[22] This, however, was apparently only a straw man. The Court hastened to conclude there was an absence of evidence that the system classified or discriminated against an identifiable category of poor people or resulted in absolute deprivation of education.[23] By analyzing and distinguishing prior wealth classification cases the Court was able to concede some correlation between wealth, property tax base, and student expenditures in certain districts while holding "the Texas system does not operate to the disadvantage of any suspect class."[24]

---

20. *Id.* at 18-19.

21. *Id.* at 19-20. The Court pointed out this led to uncertainty. The financing system might be regarded as discriminating against persons whose incomes fall below some identifiable poverty level, those who are relatively poorer than others or those who, irrespective of their individual income, live in relatively poorer school districts. The Court proceeded to consider whether there was discrimination on the basis of any one of the three and whether the resulting classification would be suspect. *Id.* at 20.

22. *Id.* at 22. The Court stated that the individuals who constituted suspect classes in prior cases had shared two distinguishing characteristics. First, they were totally unable to pay for some desired benefit because of their impecunity. Second, they consequently sustained an absolute deprivation of a meaningful opportunity to enjoy that benefit. *Id.* at 20-22. *See* Bullock v. Carter, 405 U.S. 134 (1972); Tate v. Short, 401 U.S. 395 (1971); Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); Griffen v. Illinois, 351 U.S. 12 (1956).

23. 411 U.S. at 22-25. The Court citing a Connecticut study held, "there is reason to believe that the poorest families are not necessarily clustered in the poorest property districts." *Id.* at 23-24. *See* Davis, *Taxpaying Ability: A Study of the Relationship Between Wealth and Income in California Counties*, in NATIONAL EDUCATION ASSOCIATION COMMITTEE ON EDUCATIONAL FINANCE, THE CHALLENGE OF CHANGE IN SCHOOL FINANCE, 10TH N.E.A. CONFERENCE ON SCHOOL FINANCE 199 (1967); Note, *A Statistical Analysis of the School Finance Decisions: On Winning Battles and Loosing Wars*, 81 YALE L.J. 1303, 1328-29 (1972).

The Court further implied it would not act absent a total deprivation of education because there were so many variables effecting the educational process and the controvesy over whether expenditures were related to educational quality was unresolved. 411 U.S. at 24.

24. *Id.* at 29. The Court denied any universal correlation between wealth and property tax base per pupil. The weakness of the Court's analysis seems evident in its following summary:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treat-

The majority, which declined to intrude into state educational policies, concluded the disparities produced by the local property tax system were not clear-cut enough to require judicial second guessing of the way tax revenues are raised and distributed within the states. This conclusion was reached despite statistics showing variations from $5,960 to $49,000 in local assessed valuation per student and variations from $26 to $333 in locally retained contributions to per student expenditures among school districts in Texas.[25]

Similarly, the Court acknowledged the societal importance of education,[26] but distinguished the circumstances in the case before it from those in previous cases in which the Court had recognized that education was a fundamental interest.[27] In the instant case education was not considered a fundamental interest because "social importance is not the critical determinant for subjecting state legislation to strict scrutiny."[28] A specific interest was fundamental only if

---

ment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.

Id. at 28. *See* Note, *San Antonio Independent School District v. Rodriguez: A Study of Alternatives Open to State Courts*, 8 U.S.F. L. REV. 90, 111, where it is noted the Court did not say poverty could not be a suspect class, but merely that the classes petitioners presented for consideration were not acceptable.

25. *Id.* at 12-13. These figures were supported by the affidavit of Professor Berke and his study of 110 Texas school districts demonstrating a direct correlation between the amount of a district's taxable property and its level of per pupil expenditures. *Id.* at 15 n.38. *See also Id.* at 134, 135, 137 (appendices).

Justice Powell stated that insofar as the correlations of Professor Berke were relevant to the constitutional thesis presented in the instant case the Court might accept its basic thrust, but he did identify an article questioning the affiant's methodology and he noted the study established only a partial correlation between a district's median family income and per pupil expenditures. *Id.* at 15 n.38.

26. The Court cited this well-known passage in *Brown*:

. . . 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.

411 U.S. at 29-30 (quoting Brown v. Board of Education, 347 U.S. 483, 493 (1954)). *See* Wisconsin v. Yoder, 406 U.S. 205, 213, 237-39 (1972); Abington School District v. Schemmpp, 374 U.S. 203, 230 (1963); Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 212 (1948); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923); International Consolidated Street Ry. v. Massachusetts, 207 U.S. 79 (1907).

27. 411 U.S. at 32. *Compare* Shapiro v. Thompson, 394 U.S. 618 (1969), *with* Lindsey v. Normet, 405 U.S. 56 (1972), *and* Dandridge v. Williams, 397 U.S. 471 (1970). The Court invoked strict scrutiny in *Shapiro* because a constitutionally recognized fundamental interest was shown but the Court rejected strict scrutiny in the latter two cases because such interests were not shown.

28. 411 U.S. at 32.

there existed an explicitly or implicitly guaranteed right under the Constitution pertaining to that interest.[29] Since education clearly is not an expressly guaranteed Constitutional right, the question was thus narrowed to whether education was guaranteed by implication.

The majority presented the question as should the Court adopt the "nexus" theory of appellees? Education, according to the "nexus" theory, would be a fundamental right because education is so closely tied to other rights and liberties, particularly the effective exercise of the first amendment freedoms and the right to vote.[30] Justice Powell, writing for the majority, recalled that the Supreme Court in *Brown* had described education as perhaps the most important function of state and local governments, but also stated, "It is not the province of this Court to create substantive constitutional rights in the name of guaranteed equal protection under law."[31] The majority thus paid homage to *Brown* and the fundamental importance of education while refusing to apply or extend the philosophy presented in *Brown.* This inconsistency between *Brown* and *Rodriguez* is shown by the statement of Justice Powell in *Rodriguez* that the Supreme Court does not consider the right to education to be among the constitutionally guaranteed fundamental rights and thus the Court need not apply the strict judicial scrutiny to this area that it has to others—as where it ruled that citizens have a constitutionally protected right to vote on an equal basis.[32]

The Court suggested that the case before it was not one involving total deprivation similar to that previously presented to the Court in the speech and voting rights cases.[33] It concluded that the

29. *Id. See* Eisenstadt v. Baird, 405 U.S. 438 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

30. 411 U.S. at 35.

31. *Id.* at 33. *See* Brown v. Board of Education, 347 U.S. 483, 493 (1954).

32. 411 U.S. at 33.

33. *Id.* at 36. The Court indicated that rather than being asked to follow the speech and voting cases it thought it was being asked to break new and dangerous ground by guaranteeing the quality of the right, in this instance education, when there were innumerable variables affecting quality:

> The Court has long afforded zealous protection against unjustifiable governmental interference with the individual's right to speak and to vote. Yet we have never presumed to possess either the ability or the authority to guarantee to the citizenry the most effective speech or the most informed electoral choice.

Id. Similar to its approach to the problem of identifying wealth as a suspect classification, the Court recited the difficulty in singling out education from the myriad of personal interests and the possible effect on the provision of other governmental services that affirming the decision of the lower federal court decision would have. *Id.* at 37.

current Texas scheme had been implemented in an effort to extend public education and improve its quality.[34] The Court added that even if an identifiable quantum of education were required the appellees had presented no facts from which the Court could conclude that the present system failed to provide that quantum.[35]

Having found neither a suspect classification nor a fundamental interest, the Court declared that the Texas educational financing system must be evaluated by the less demanding "rational relationship" standard, where the state has only to show some rational basis for the challenged legislation.[36] Describing the contours of the Texas school financing system in considerable detail the Court identified local control of education as the rational basis for maintaining the present system.[37] The Court reasoned first, that loss of local control would follow if a different financing system were used, especially one that increased state financing responsibility, and second, that the local property tax was a valid means of providing for local

---

34. *Id.* at 38-39. The Court relied on a 1966 decision in which it had concluded that reform legislation need not cover all ills and reform legislation would not be viewed as legislation denying fundamental rights simply because it did not provide universal relief. Katzenbach v. Morgan, 384 U.S. 641 (1966). In *Katzenbach* the Court noted:

> Every step leading to the establishment of the system Texas utilizes today—including the decisions permitting localities to tax and spend locally, and creating and continuously expanding state aid—was implemented in an effort to extend public education and to improve its quality. Of course every reform that benefits some more than others may be criticized for what it fails to accomplish. But we think it plain that, in substance, the thrust of the Texas system is affirmative and reformatory and, therefore, should be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution.

411 U.S. at 39 (quoting Katzenbach v. Moore at 656-57).

35. 411 U.S. at 36-37.

36. *Id.* at 40. In his concurring opinion, Justice Stewart approved of the Standard of review chosen by the Court:

> I join the opinion and judgment of the Court because I am convinced that any other course would mark an extraordinary departure from principled adjudication under the Equal Protection Clause of the Fourteenth Amendment.

Id. at 59 (Stewart, J., concurring).

37. *Id.* at 49-55. The Court traced the power to tax local property for education which has existed in Texas at least since 1883, the implementation of the "foundation program" theory in the 1920's which assured a guaranteed level of education, and the different sources of basic and equalizing educational revenue. Holding that the Texas plan "abundantly satisfied" the traditional rational basis standard, the Court praised the state and extolled the virtues it saw in the Texas financing system:

> While assuring a basic education for every child in the State, it [the Texas school financing system] permits and encourages a large measure

autonomy over education.[38] An additional justification given by the Court for approving the property tax scheme was the importance of local property tax in the provision of other governmental services and the implications invalidating local property taxation for education would have on financing those services.[39]

---

of participation in and control of each district's schools at the local level. In an era that has witnessed a consistent trend toward centralization of the functions of government, local sharing of responsibility for public education has survived. The merit of local control was recognized last Term in both the majority and dissenting opinions in Wright v. Council of the City of Emporia, 407 U.S. 451 (1972).

Id. at 49.

48. *Id.* at 50-51. On the first point, the language of Justice Powell was more equivocal than the holding:

> The people of Texas may be justified in believing that other systems of school financing, which place more of the financial responsibility in the hands of the State, will result in a comparable lessening of desired local autonomy. That is, they may believe that along with increased control of the purse strings at the state level will go increased control over local policies.

Id. at 51-53.

On the second issue, the validity of local property tax, Justice Marshall charged in dissent that the issue was raised unnecessarily by the Court not the litigants:

> [W]e are told that the case requires us "to condemn the State's judgment in conferring on political subdivisions the power to tax local property to supply revenues for local interests." Yet no one in the course of this entire litigation has ever questioned the constitutionality of the local property tax as a devise for raising educational funds. The District Court's decision, at most restricts the power of the State to make educational funding dependent exclusively upon local property taxation so long as there exists interdistrict disparities in taxable property wealth. But it hardly eliminates the local property tax as a source of educational funding or as a means of providing local fiscal control.

Id. at 132 (Marshall, J., dissenting).

39. The majority stated:

> [T]he Court does well not to impose too rigorous a standard of scrutiny lest all local fiscal schemes become subjects of criticism under the Equal Protection Clause.

Id. at 41. The Court subsequently elaborated upon the consequences of failing to heed that admonition:

> [I]f local taxation for local expenditures were an unconstitutional method of providing for education then it might be an equally impermissable means of providing other necessary services customarily financed largely from local property taxes, including local police and fire protection, public health and hospitals, and public utility facilities of various kinds. We perceive no justification for such a severe denigration of local property taxation and control as would follow from appellees' contentions.

Id. at 54. Justice Powell concluded the Court had never had the power to invalidate state financing plans simply because the burdens or benefits of the plans fell unevenly on individuals due to the relative wealth of the political subdivisions in which they lived. *Id.*

Those cases invalidating school finance systems were criticized by the Court for their constitutional views and their assumptions regarding gains likely to be recognized by minority students, poor students, and large cities if the present systems were invalidated.[40] Admitting taxable wealth disparities exist and even acknowledging that tax systems too heavily dependent on local property tax need reforming, the Court nevertheless proclaimed: "The ultimate solutions must come from the lawmakers and from the democratic pressures of those who elect them."[41]

Justice Marshall, in a lengthy dissent, presented data and cogent arguments in support of the lower court's disposition of the case.[42] He felt the question of legal protection was adequately raised by the disparities shown: total deprivation of education should not be required. He thereby highlighted the inappropriateness of the rigid, traditional rational basis standard.[43] In its analysis the Court

40. *Id.* at 55. *See* Rodriguez v. San Antonio Independent School District, 337 F. Supp. 280 (W.D. Tex. 1971); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

One commentator has questioned whether *Rodriguez* was really a limitation on *Serrano*, noting, "What is constitutionally forbidden in California, *Rodriguez* notwithstanding, is the substantial wealth-based inequality in school spending that persists under the 1972 Act." Karst, *California—Serrano v. Priest's Inputs and Outputs*, 38 LAW & CONTEMP. PROB. 333, 349 (1974). *See also* Grubb, *The First Round of Legislative Reforms in the Post-Serrano World*, 38 LAW & CONTEMP. PROB. 457 (1974).

41. 411 U.S. at 49-50, 53-55, 58-59. The determination that solutions to inequalities in school financing should be left to the state legislature was echoed in the tone of Justice Powell's opinion. He repeatedly expressed a reluctance to act based on lack of expertise. *Id.* at 41-43.

42. *Id.* at 70 (Marshall, J., dissenting). Justice Brennan supported the recognition of education as a fundamental interest based on the nexus theory: "[E]ducation is inextricably linked to the right to participate in the electoral process and to the rights of free speech and association." *Id.* at 62-63 (Brennan, J., dissenting).

Justice White stated the disparities were not inconsequential when two separate districts in the same county would have to tax at the rates of $.68 per hundred dollars of assessed valuation and $5.76 per hundred dollars of assessed valuation respectively in order for both to equal the highest per pupil yield of any district in the same county. *Id.* at 63-70 (White, J., dissenting).

Justice Douglas concurred in the dissenting opinions of Justices Marshall and White.

43. Justice Marshall noted:

> The Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequalities of state action. It mandates nothing less than that "all persons similarly circumstanced shall be treated alike."
>
> . . . In my view, then, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws.

Id. at 89, 90. Justice Marshall also maintained that education was a fundamental in-

had not previously restricted its choice to the two standards under the two-tier approach but had instead applied a spectrum of standards varying according to the basis of the classifications involved, the relative constitutional and societal significance of the interest adversely affected, and the available legislative alternatives in limiting or structuring the particular actions or processes.[44] By combining his criticism of the majority's resort to the rational basis standard with identification of the spectrum or sliding scale approach, Justice Marshall presented a meaningful alternative approach to the equal protection cases.[45] But Justice Marshall made it

---

terest, based both on the nexus theory and the language of previous Supreme Court cases showing the Court had considered education a favored interest in the past. *Id.* *See* cases cited note 26 *supra.*

44. 411 U.S. at 98-110. *See, e.g.*, James v. Strange, 407 U.S. 128 (1972); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971); Richardson v. Belcher, 404 U.S. 78, 90 (1971) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 519-21 (1970) (Marshall, J., dissenting); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942).

45. Marshall stated:

> [I]t seems to me inescapably clear that this Court has consistently adjusted the care with which it will review state discrimintion in light of the constitutional significance of the interests affected and the invidiousness of the particular classification. In the context of economic interests, we find that discriminatory state action is almost always sustained, for such interests are generally far removed from constitutional guarantees. . . . But the situation differs markedly when discrimination against particularly disadvantaged or powerless classes is involved. . . .
>
> Nevertheless, the majority today attempts to force this case into the same category for purposes of equal protection analysis as decisions involving discrimination affecting commercial interests. By so doing, the majority singles this case out for analytic treatment at odds with what seems to me to be the clear trend of recent decisions in this Court, and thereby ignores the constitutional importance of the interest at stake and the invidiousness of the particular classification, factors that call for far more than the lenient scrutiny of the Texas financing scheme which the majority pursues.

411 U.S. at 109-10.

As an example of how the scale slides in evaluating wealth classifications to increase the state's burden to show a compelling interest as more important rights or interests are involved, Justice Marshall cited Harper v. Virginia Board of Elections, 383 U.S. 663 (1966), noting:

> While the "poor" have frequently been a legally disadvantaged group, it cannot be ignored that social legislation must frequently take cognizance of the economic status of our citizens. Thus, we have generally gauged the invidiousness of wealth classifications with an awareness of the importance of the interests being affected and the relevance of personal wealth to those interests.

411 U.S. at 121-22.

clear that if the only choice were between strict scrutiny and the rational basis standard he would choose the former in the instant case because in his opinion education is a fundamental interest and the Texas financing system unreasonably classified and discriminated on the basis of wealth.[46]

Justice Marshall assailed the reasoning of the majority on several other crucial points. First, he challenged the Court's dismissal of admitted disparities by attributing to Texas an effective and ongoing plan to remove the disparities.[47] Second, he agreed with

---

In further defense of his spectrum approach Justice Marshall noted there were greater problems with determining the minimum education the majority indicated it would require. *Id.*

46. Justice Marshall argued:

> [T]he fundamental importance of education is amply indicated by the prior decisions of this Court, by the unique status accorded public education by our society, and by the close relationship between education and some of our most basic constitutional values.

Id. at 111. *See* cases cited note 26 *supra*. *See also* Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938).

Justice Marshall, unlike the majority, had no trouble identifying the discriminated class:

> In light of the data introduced before the District Court, the conclusion that the school children of property poor districts constitute a sufficient class for our purposes seems indisputable to me. . . .
>
> . . . [H]aving established public education for its citizens, the State, as a direct consequence of the variations in local property wealth endemic to Texas' financing scheme, has provided some Texas school children with substantially less resources for their education than others. Thus, while on its face the Texas scheme may merely discriminate between local districts, the impact of that discrimination falls directly upon the children whose educational opportunity is dependent upon where they happen to live. Consequently, the District Court correctly concluded that the Texas financing scheme discriminates, from a constitutional perspective, between school age children on the basis of the amount of taxable property located within their local districts. . . .
>
> . . . I do not believe that a clearer definition of either the disadvantaged class of Texas school children or the allegedly unconstitutional discrimination suffered by the members of that class under the present Texas financing scheme could be asked for, much less needed.

411 U.S. at 91, 92, 97.

47. In his dissent, Marshall stated:

> [I]nstead of closely examining the seriousness of these disparities and the invidiousness of the Texas financing scheme, the Court undertakes an elaborate exploration of the efforts Texas has purportedly made to close the gaps between its districts in terms of levels of district wealth and resulting educational funding. Yet, however praiseworthy Texas' equalizing efforts, the issue in this case is not whether Texas is doing its best to ameliorate the worst features of a discriminatory scheme, but rather

the majority that courts should not resolve disputes over educational theory and the input/output debate, but he disagreed such disputes were relevant, stating the standard of measurement should be the opportunity provided not the use made of that opportunity.[48] Third, he contended use of the sliding scale standard would produce a fairer and more predictable decision, with less chance of the decision supporting an accusation that the Court was legislating, than would the Court's reversal of the district court on the ground that Texas had provided some undefined minimum quantum of education.[49] Finally, he questioned the Court's assertions that the present system provided local control and that invalidating the present system would reduce, if not destroy local control.[50]

---

whether the scheme itself is in fact unconstitutionally discriminatory in the face of the Fourteenth Amendment's guarantee of equal protection of the laws.

Id. at 72.

48. Marshall noted:

> [T]he question of discrimination in educational quality must be deemed to be an objective one that looks to what the State provides its children, not to what the children are able to do with what they receive. That a child forced to attend an underfunded school with a narrower range of courses than a school with substantially more funds—and thus with greater choice in educational planning—may nevertheless excel is to the credit of the child, not the State. . . . Indeed, who can ever measure for such a child the opportunities lost and the talents wasted for want of a broader, more enriched education?

Id. at 84.

49. In propounding the utilization of the sliding scale standard Marshall contended:

> A principled reading of what this Court has done reveals that it has applied a spectrum of standard in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scritinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn. I find in fact that many of the Court's recent decisions embody the very sort of reasoned approach to equal protection analysis for which I previously argued—that is an approach in which "concentration (is) placed upon the character of the classification in question, the relative importance to the individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted state interests in support of the classification."

Id. at 98-99; *accord,* Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (dissenting opinion).

50. While Justice Marshall admitted local control of public education constituted a substantial state interest, he stated that the record in the instant case established "the State's purported concern with local control is offered primarily as an excuse rather than a justification for interdistrict inequality." 411 U.S. at 126. He explained the failure of the present system to provide local control.

THE DOCTRINE: THE TWO-TIER APPROACH TO EQUAL PROTECTION

The Supreme Court has utilized two separate tests in assessing the constitutionality of challenged state legislative classifications under the equal protection clause.[51] Legislative classifications discriminate by grouping particular individuals for specific reasons whether by design or consequence. Legislative classifications may discriminate against age groups by limiting drivers' licenses to those over sixteen or requiring every child under fourteen to be in school; against groups lacking certain educational degrees by not allowing individuals who lack law or medical degrees from certain accredited colleges to take the bar or medical examination or to practice law or medicine; against groups based on their income by denying welfare benefits to those with income above a specified limit or requiring a percentage of income to be payed as income tax only from those making above a certain level; or against other groups by denying convicted felons the right to hold office or vote.

> If Texas had a system truly dedicated to local fiscal control one would expect the quality of the educational opportunity provided in each district to vary with the decision of the voters in that district as to the level of sacrifice they wish to make for public education. . . . [But] local school school districts cannot choose to have the best education in the State by imposing the highest tax rate. Instead, the quality of the educational opportunity offered by any particular district is largely determined by the amount of taxable property located in the district—a factor over which local voters can exercise no control.

Id. at 127-28. He added local control could better be provided by other financing plans.

> [A]ppellees have pointed out a variety of alternative financing schemes which may well serve the State's purported interest in local control as well, if not better, than the present scheme without the current impairment of the educational opportunity of vast numbers of Texas school children.

Id. at 129.

Justice Marshall maintained the district court decision only affected local control as it was related to raising school funds and the continued interdistrict wealth discrimination inherent in the present property tax. He contended the district court decision did not require centralized decision making, federal intervention in the operation of public schools, or implementation of a particular centralized or decentralized plan from among the proposed plans that would eliminate interdistrict discrimination:

> [A]ffirmance of the District Court's decision would hardly sound the death knell for local control of education. . . .
>
> Nor does the District Court's decision even necessarily eliminate local control of educational funding.

Id. at 130. *See also* Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32, 64-67 (1973).

51. *See Developments, supra* note 13, at 1076. *Contra*, Dandridge v. Williams, 397 U.S. 471, 489 (1970) (Harlan, J., dissenting) (no solid basis for the doctrine of two equal protection standards to assess legislative classifications).

The traditional test to determine whether a statutory classification conflicted with the equal protection clause, developed over the six decades following the Civil War, presumed the constitutionality of the statute. Although in theory the state had to show the statute was rationally related to a legitimate governmental objective,[52] in practice this presumption of constitutionality usually meant only a minimal requirement that the legislative classification not be patently irrational and the burden of proof was on the individual challenging the statute.[53]

---

52. *See* Rinaldi v. Yeager, 384 U.S. 305, 309 (1966); McGowan v. Maryland, 366 U.S. 420, 425 (1961); Rapid Transit Corp. v. City of New York, 303 U.S. 573, 578 (1938); F. S. Royster Guano Co. v. Virginia, 253 U.S. 412, 415 (1920). In a 1911 decision the Court stated:

> The contention is made that . . . [the statute which the petitioner-company seeks to attack] is arbitrary in its classification, and consequently denies the equal protection of the laws to those whom it affects. The rules by which this contention must be tested, as is shown by repeated decisions of this court, are these: 1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against the clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.

Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78-80 (1911). *See also* Dykstra, *Legislative Favoritism Before the Courts*, 5 IND. L.J. 38 (1951); Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893); Warsoff, *The Weight of the Presumption of Constitutionality Under the Fourteenth Amendment*, 18 B.U.L. REV. 319 (1938); Willis, *Due Process of Law Under the United States Constitution*, 74 U. PA. L. REV. 331 (1926); Yackel, *supra* note 13.

53. The general practice, when the traditional rational-basis test has been used, has been one of "investigating legislation with a presumption of constitutionality and requiring merely that distinctions drawn by a challenged statute bear some rational relationship to a conceivable legitimate state purpose." Westbrook v. Mihaly, 2 Cal. 3d 765, 784, 471 P.2d 487, 500, 87 Cal. Rptr. 839, 852 (1970), *vacated on other grounds*, 403 U.S. 915 (1971); Comment, *Equality and the Schools: Education as a Fundamental Interest*, 21 AM. U.L. REV. 716, 718 (1972).

The equal protection clause was first construed in the Slaughter-House Cases, 83 U.S. (Wall.) 36, 81 (1873), but it was not until Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942), that a state was required to show a compelling governmental interest. Ruvoldt, *Educational Financing in New Jersey, Robinson v. Cahill and Beyond*, 5 SETON HALL L. REV. 1, 12 (1973).

The Supreme Court subsequently found the traditional test failed to protect adequately the individual rights and liberties conferred by or inferred from the Constitution because it was too difficult for those challenging state legislation to overcome the presumption that the legislation was constitutional. Thus a second standard of review was formulated.[54] The state under this second tier of review had to show first, that a compelling governmental interest justified the legislation, although no precise formula was given for distinguishing compelling state interests from other state interests, and second, that the distinctions drawn by the classification were requisite to accomplishing the legislative intentions.[55] Specifically, the state had to prove that less discriminating alternatives would not achieve the expressed legislative purpose and that the classification was neither "overbroad nor underinclusive."[56] The Court has employed this compelling interest test only after having determined there was either a suspect classification[57] or a fundamental interest[58] that justified

54. Shapiro v. Thompson, 394 U.S. 618, 658 (1968); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184 (1964); *The Supreme Court, 1968 Term*, 83 HARV. L. REV. 118 (1969); Note, *Residency Requirements*, 53 MARQ. L. REV. 439 (1970); Comment, *Residency Requirements Constitute an Invidious Discrimination Denying Applicants Equal Protection of the Laws, Violate the Due Process Clause of the Fifth Amendment, and Place a "Chilling Effect" on the Right of Interstate Travel*, 1 ST. MARY'S L.J. 268 (1969). *See also* Areen & Ross, *The Rodriguez Case: Judicial Oversight*, 1973 SUP. CT. REV. 33 (Baker v. Carr, 369 U.S. 186 (1962), was the first equal protection case under the new approach requiring that the government show a compelling interest.)

55. Hall v. Beals, 369 U.S. 45, 52 (1969) (Marshall, J., dissenting) (recognizing establishment of the dual aspect of the strict scrutiny standard); Comment, *supra* note 54, at 718 n.18.

56. Kramer v. Union Free School District, 395 U.S. 621 (1969); Carrington v. Rash, 380 U.S. 89 (1965). One commentator has noted:

> Strict scrutiny therefore requires familiar judicial balancing: the court must weigh benefits accuring to society if the classification is sustained against [the] importance of the individual or group rights infringed and long term adverse affects on those interests.

Comment, *The Evolution of Equal Protection—Education, Municipal Services and Wealth*, 7 HARV. C.R.-C.L. L. REV. 105, 113 (1972).

57. The terminology "suspect classification" was first employed in United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938). *See* Lusky, *Minority Rights and the Public Interest*, 52 YALE L.J. 1 (1942); Wilkinson, *supra* note 13, at 979.

For cases on discriminatory classifications based on race and alienage, see McLaughlin v. Florida, 379 U.S. 184 (1964); Hernandez v. Texas, 347 U.S. 475 (1954); Takahashi v. Fish & Game Commission, 334 U.S. 410 (1948); Oyama v. California, 332 U.S. 663 (1948); Korematsu v. United States, 323 U.S. 214 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Leger v. Sailer, 321 F. Supp. 250 (E.D. Pa. 1970), *aff'd sub nom.* Graham v. Richardson, 403 U.S. 365 (1971).

Concerning the suspect classification of the Japanese and their relocation, during World War II, see Alexandre, *The Nisei—A Casuality of World War II*, 28 COR-

subjecting the statute to strict scrutiny.[59] When laws restrict constitutional freedoms or classify and discriminate against groups on

---

NELL L.Q. 385 (1943); Freeman, *Genesis, Exodus and Leviticus—Genealogy, Evacuation and Law*, 28 CORNELL L.Q. 414 (1943); Rostow, *Japanese-American Cases—A Disaster*, 54 YALE L. J. 489 (1945); Wolfson, *Legal Doctrine, War Power, and Japanese Evacuation*, 32 KY. L.J. 328 (1944); Comment, *Constitutional Aspects of War Relocation Authority and Japanese Americans*, 11 GEO. WASH. L. REV. 482 (1943); Comment, *Civil Rights and Anti-Japanese Discrimination*, 18 U. CHI. L. REV. 81 (1949).

For a discussion of classification according the race and the unconstitutionality of anti-miscegenation statutes, see Loving v. Virginia, 388 U.S. 1 (1967); Avins, *Anti-Miscegenation Laws and the Fourteenth Amendment: The Original Intent*, 52 VA. L. REV. 1224 (1966); Riley, *Miscegenation Statutes—A Reevaluation of Their Constitutionality in Light of Changing Social and Political Conditions*, 32 S. CAL. L. REV. 28 (1958); Weinberger, *A Reappraisal of the Constitutionality of Miscegenation Statutes*, 42 CORNELL L.Q. 208 (1957).

58. Harper v. Virginia Board of Elections, 383 U.S. 663, 668 (1966) (recognizing a fundamental right to vote without paying poll tax); Griffin v. Illinois, 351 U.S. 12 (1956) (requiring the state provide indigent criminals a right of appeal).

For discussion of *Harper*, see *The Supreme Court, 1965 Term*, 80 HARV. L. REV. 124 (1966); Note, *Fourteenth Amendment Equal Protection—State Poll Tax Prerequisite to Voting—Denial of Equal Protection*, 16 AM. U.L. REV. 128 (1966); Note, *Poll Tax-Violative of Equal Protection*, 28 OHIO ST. L. REV. 189 (1967); Note, *The Poll Tax*, 8 WM. & MARY L. REV. 161 (1966). *See also* U.S. Const. amend. XXIV (eliminating the poll tax in federal elections).

For additional cases and articles dealing with the issues presented in *Griffin*, see Gardnes v. California, 393 U.S. 367 (1969); Long v. District Court, 385 U.S. 192 (1966); Allen, *Griffin v. Illinois: Antecedents and Aftermath*, 25 U. CHI. L. REV. 151 (1957); Note, *Failure to Provide Transcript Without Cost to Indigent Defendants Violates Equal Protection Clause*, 34 TEX. L. REV. 1083 (1956); Comment, *Due Process and Equal Protection: Right of an Indigent Defendant to a Transcript of the Trial*, 4 U.C.L.A. L. REV. 274 (1957).

The fundamental rights or interest interpretation of the due process clause is discussed in: 2 L. BOUDIN, GOVERNMENT BY JUDICIARY 372-442 (1932); E. CORWIN, LIBERTY AGAINST GOVERNMENT 116-83 (1948); 2 W. CROSSKEY, POLITICS AND THE CONSTITUTION 1119-58 (1953); H. WECHSLER, THE NATIONALIZATION OF CIVIL LIBERTIES AND CIVIL RIGHTS (1970); Barnett, *Vested Rights in the Common Law*, 27 ORE. L. REV. 25 (1947); Brockelbank, *The Role of Due Process in American Constitutional Law*, 39 CORNELL L.Q. 561 (1954); Corwin, *The "Higher Law" Background of American Constitutional Law*, 42 HARV. L. REV. 149, 365 (1928-29); Hyman & New house, *Standards for Preferred Freedoms*, 60 NW. U.L. REV. 1 (1965); Kadish, *Methodology and Criteria in Due Process Adjudication—A Survey and a Criticism*, 66 YALE L.J. 319 (1957); Warren, *The New "Liberty" Under the Fourteenth Amendment*, 39 HARV. L. REV. 431 (1926).

59. Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942); Comment, *Validity of Sex Offenders Acts*, 37 MICH. L. REV. 613 (1939); Comment, *Sane Laws for Sexual Psychopaths*, 1 STAN. L. REV. 486 (1949). *See generally* Karst, *supra* note 13; Kurland, *supra* note 13; Symposium, *supra* note 13.

As to which factor, fundamental interest or suspect classification, is more significant, see Note, *Serrano v. Priest: "Equal" Protection and Public School Finance*, 8 CALIF. W.L. REV. 547, 561 (1972) ("The purpose of the equal protection clause should be more to protect 'fundamental interests' than to ferret out and extinguish 'suspect classifications.' ").

grounds other than those related to legitimate governmental purposes the presumption of constitutionality has been abandoned in certain cases and the risk of non-persuasion shifted from those who challenged the law to those who defended it.

This shift in burden of proof to the government, which increases the probability the legislation will be struck down, is the crucial difference between the compelling interest standard and the rational basis standard. Together they constitute the two-tier approach.[60] The compelling interest standard has been restricted primarily to cases involving voting rights,[61] school segregation,[62] and criminal defendants.[63] The Court's reluctance to act as a super legislature in selecting or identifying other interests to be characterized as fundamental may be because the rights of accused criminals and

60. Significantly, one commentator has observed: "Since 1944 the Court has not held any classification or action infringing an interest that triggers the strict scrutiny test to be justified by a compelling state interest." Richards, *Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication*, 41 U. CHI. L. REV. 32 (1973). *See* Korematsu v. United States, 323 U.S. 214 (1944).

61. *See, e.g.*, Bullock v. Carter, 405 U.S. 134 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Swann v. Adams, 385 U.S. 440 (1967); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Lucas v. Colorado, 377 U.S. 713 (1964); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962); Kauper, *Some Comments on the Reapportionment Cases*, 63 MICH. L. REV. 729 (1969); Lucas, *Legislative Apportionment and Representative Government: The Meaning of Baker v. Carr*, 61 MICH. L. REV. 711 (1963); Macleod & Wilberding, *State Voting Requirements and Civil Rights*, 38 GEO. WASH. L. REV. 93 (1969).

62. Brown v. Board of Education, 347 U.S. 483 (1954). *See* Bikel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1 (1955); Black, *The Lawfulness of the Segregation Decisions*, 69 YALE L.J. 421-30 (1960); Kelly, *The Fourteenth Amendment Reconsidered: The Segregation Question*, 54 MICH. L. REV. 1049 (1956); Kohn, *Social Psychological Data, Legislative Fact, and Constitutional Law*, 29 GEO. WASH. L. REV. 136 (1960); Roche, *Plessy v. Ferguson: Requiescat in Pace?* 103 U. PA. L. REV. 44 (1954); Sanders, *The School Segregation Cases*, 7 VAND. L. REV. 985 (1954); Waite, *Race Segregation in the Public Schools: Jim Crow at the Judgment Seat*, 38 MINN. L. REV. 612 (1954); Comment, *Separate But Equal Doctrine and the Segregation Cases*, 19 ALB. L. REV. 233 (1955). *See also* Bolling v. Sharpe, 347 U.S. 497, 499 (1954); Kills Crow v. United States, 451 F.2d 323 (8th Cir. 1971). *See generally* Detroit Bank v. United States, 317 U.S. 329 (1943); Currin v. Wallace, 306 U.S. 1, 13 (1939); Steward Machine Co. v. Davis, 301 U.S. 548, 585 (1937).

63. Tate v. Short, 401 U.S. 371 (1972); Williams v. Illinois, 399 U.S. 235 (1970); Douglas v. California, 372 U.S. 353 (1963); Griffin v. Illinois, 351 U.S. 12 (1956); Note, *Imprisonment for Nonpayment of Fines and Costs: A New Look at the Law and the Constitution*, 22 VAND. L. REV. 611 (1969) (criminal fines); Comment, *Fines, Imprisonment and the Poor: "Thirty Dollars or Thirty Days,"* 57 CALIF. L. REV. 778 (criminal fines); Comment, *Imprisonment for Debt and the Constitution*, 1970 LAW & SOC. ORD. 659 (1971) (imprisonment for civil debt).

voters, and the equal protection of law for all races are guaranteed by specific constitutional provisions.[64]

The Supreme Court in recent decisions has delimited the equal protection clause and the court's role in judging legislative classifications by its treatment of interests which could have been labeled fundamental and classifications that could have been characterized as suspect.[65] In one case the Court held that the traditional test was better than the compelling interest test because the former did not allow federal courts to impose their views of what constituted wise economic or social policy upon government.[66] A second decision considered the possible racial implications of an article in the California constitution which required community approval before initiating low-rent housing projects.[67] The Court, satisfied the article did not

64. Shapiro v. Thompson, 394 U.S. 618, 659 (1969) (Harlan, J., dissenting).

Not long after the adoption of the fourteenth amendment the Court indicates the amendment extended to considerations and situations outside those concerned with race. *See* Strauder v. West Virginia, 100 U.S. 303 (1880) (rights of criminals and jury composition); Slaughter-House Cases, 83 U.S. (16 Wall.) 36 (1873) (economic discrimination against certain businesses).

65. Estelle v. Dorrough, 420 U.S. 534 (1975); Johnson v. Robinson, 415 U.S. 361 (1974); Ross v. Moffitt, 417 U.S. 600 (1974); Lemon v. Kurtzman, 411 U.S. 192 (1973); James v. Valtierra 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970).

66. Dandridge v. Williams, 397 U.S. 471 (1970). *See also* Note, *Maryland's Maximum Grant Regulation on AFDC Payments Does Not Violate the Equal Protection Clause nor Is It Inconsistent with the Social Security Act*, 35 ALB. L. REV. 416 (1971); Note, *The Maximum Welfare Grant*, 9 DUQ. L. REV. 271 (1970); Note, *A Judicial Cease Fire in the War on Poverty?* 36 MO. L. REV. 117 (1971); Note, *Dandridge v. Williams: Equal Protection and Welfare Law*, 1 N.Y.U. REV. L. & SOC. CHANGE 119 (1971); Comment, *Legal Rights of AFDC Recipients After Rosado v. Wyman and Dandridge v. Williams*, 21 AM. U.L. REV. 207 (1971); Comment, *The Equal Protection Clause and Exclusionary Zoning After Valtierra and Dandridge*, 81 YALE L.J. 61 (1971).

For comments favorable to the position of welfare petitioners that discrimination against the poor creates a suspect classification, and the dissent of Justices Brennan, Douglas, and Marshall in *Dandridge*, see R. O'NEIL, THE PRICE OF DEPENDENCE: CIVIL LIBERTIES IN THE WELFARE STATE (1970); Dienes, *To Feed the Hungry: Judicial Retrenchment in Welfare Adjudication*, 58 CALIF. L. REV. 555 (1970); Graham, *Civil Liberties Problems in Welfare Administration*, 43 N.Y.U.L. REV. 839 (1968); Reinstein, *The Welfare Cases: Fundamental Rights, the Poor and the Burden of Proof in Constitutional Litigation*, 44 TEMP. L.Q. 1 (1970).

On the effect of *Dandridge* in foreclosing recognition of education as a fundamental interest, see Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324 (1972).

67. James v. Valtierra, 402 U.S. 137 (1971). *See, e.g.*, Lefcoe, *The Public Housing Referendum Case, Zoning, and the Supreme Court*, 59 CALIF. L. REV. 1384 (1971); Note, *Mandatory Referendum Approval of Low-Rent Housing Projects*, 46 TUL. L. REV. 806 (1972); Note, *James v. Valtierra: Housing Discrimination by Referendum?* 39

classify on the basis of race, declared the article was not unconstitutional just because it kept persons from obtaining public housing. The Court refused to consider whether the article classified citizens by wealth.[68] In *Boddie v. Connecticut*,[69] the Court could have declared it was a denial of equal protection to bar indigents from divorce proceedings because they were unable to pay court costs. Instead the Court held the petitioners did have a right to proceed without payment of fees. But because the Court rested its decision on due process not equal protection *Boddie* could be interpreted as a philosophical stand-off. If it was an expansion of due process then it was also a limitation of equal protection.[70] The holding of *Boddie* was subsequently restricted in 1973, when the Supreme Court held there

---

U. CHI. L. REV. 115 (1971); Note, *Mandatory Referendum and Approval for Low-Rent Housing Projects: A Denial of Equal Protection?* 25 U. MIAMI L. REV. 790 (1971); Note, *Public Housing for Low Income Families—Mandatory Referendum Requirement*, 1972 WIS. L. REV. 268. Comment, *Mandatory Referendum on Low-Income Housing*, 13 B.C. IND. & COM. L. REV. 603 (1972); Comment, *The Poor, Equal Protection, and Public Housing: James v. Valtierra—Where to from Here?*, 20 KAN. L. REV. 253 (1972). *See also* Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324 (1972) (*Valtierra* suggests wealth is not a suspect classification.).

68. 402 U.S. at 140-42.

69. 401 U.S. 371 (1971). For comments on *Boddie*, see Note, *Prepayment of Filing Fees as a Condition Precedent to the Grant of a Discharge in Bankruptcy of an Indigent Petitioner Denies Equal Protection*, 72 COLUM. L. REV. 781 (1972); Note, *Boddie v. Connecticut: Free Access to Civil Courts for Indigents*, 76 DICK. L. REV. 749 (1972); Note, *Access to Courts—Indigents Seeking Divorce Decree*, 10 DUQ. L. REV. 123 (1971); Note, *A State's Denial to Indigents of Access to Its Courts in a Divorce Proceeding Due to Financial Barriers Is a Violation of Due Process*, 20 KAN. L. REV. 554 (1972); Note, *State's Refusal To Permit Indigents To Institute Divorce Actions Without Prepayment of Court Fees and Service Costs Is a Denial of Due Process*, 47 NOTRE DAME LAW. 366 (1972); Note, *Boddie v. Connecticut and the Constitutional Rights of Indigents*, 46 TUL. L. REV. 799 (1972); Note, *Indigent Access to Civil Courts: The Tiger Is at the Gates*, 26 VAND. L. REV. 25 (1973); Comment, *Boddie v. Connecticut: Wither the Indigent Civil Litigant?*, 22 CATH. U.L. REV. 427 (1973).

70. The holding of *Boddie* was subsequently restricted in 1973, when the Supreme Court held there was neither a statutory right under the Bankruptcy Act and 28 U.S.C. § 1915(a), nor a constitutional right within the meaning of due process and equal protection to proceed in bankruptcy without payment of fees. United States v. Kras, 409 U.S. 434 (1973). *See* McGuire, *The Indigent Debtor's Dred Scott*, 47 AM. BANKR. L.J. 157 (1973); Tribe, *The Supreme Court, 1972 Term—Forward: Toward a Model of Roles in the Due Process of Life and Law*, 87 HARV. L. REV. 1 (1973); Comment, *The Right of Access to Civil Courts by Indigents: A Prognosis*, 24 AM. U.L. REV. 129 (1974); Comment, *United States v. Kras: Justice as a Price*, 40 BROOKLYN L. REV. 147 (1973); Comment, *Access to Courts in Civil Cases: An Extension of Boddie Refused*, 3 CAP. U.L. REV. 115 (1974); Comment, *The Heirs of Boddie: Court Access for Indigent Litigants: Searching for the Remains of Boddie After a Kras-Landing*, 48 IND. L.J. 452 (1973); Comment, *Conditioning Indigent's Discharge in Bankruptcy Upon Pay-*

was neither a statutory right under the Bankruptcy Act and 28 U.S.C. § 1915(a), nor a constitutional right within the meaning of due process and equal protection to proceed in bankruptcy without payment of fees. In a fifth case, in which an indigent criminal was denied a second appeal because the court would not appoint an attorney, wealth discrimination was not viewed as creating a suspect classification; the Court held that the fourteenth amendment does not require the state to equalize economic conditions.[71]

Claims to objectivism and consistency fail when these decisions are contrasted with earlier opinions of the Court. Comparing the Court's treatment of the equal protection issues in the preceding five cases with earlier cases in which the compelling interests were used indicates the selection of a standard of review was determined by the Court's characterization of the classification and the interest that was affected. For example, a right to divorce or abort a fetus would not universally be accepted as more basic than the right to housing or an education, nor can either the former or latter be said to be expressly provided for in the Constitution. To those who would defend the Court's recent equal protection analysis as an honest effort to deal with the dilemmas of constitutional adjudication by seeking a contemporary compromise based on inferences from the text of the Constitution, it could be replied that superficially the recent analysis can be better explained with less sophistication as manipulation of a test or tool to effect a retrenchment from the egalitarian meanderings of the Warren Court.

EDUCATION AS A FUNDAMENTAL INTEREST AND WEALTH AS A SUSPECT CLASSIFICATION

The Court in *Rodriguez*, even using the contemporary com-

---

ment of Filing Fees Held Constitutional, 25 MERCER L. REV. 343 (1974); Comment, *The Indigent and Access to the Civil Courts*, 52 N.C. L. REV. 172 (1973); Comment, *Constitutional Law—Right to Bankruptcy—Equal Protection—Due Process*, 19 N.Y.L.F. 894 (1974); Comment, *Bankruptcy and the Poor, the Constitutionality of Filing Fees*, 1973 UTAH L. REV. 302 (1973); Note, *Constitutional Law: Supreme Court Denies Indigents Access to the Courts*, 8 VAL. U.L. REV. 455 (1974). *See also* Sosna v. Iowa, 419 U.S. 393 (1975) (upholding the Iowa divorce residency requirement and refusing any extension of *Boddie*); Ortwein v. Schwab, 410 U.S. 656, *petition for rehearing denied*, 411 U.S. 922 (1973).

On the probability that *Boddie* would be limited and restricted, as it subsequently was in *Kras* and *Ortwein*, see Note, *Indigent's Access to Civil Court*, 4 COLUM. HUMAN RIGHTS L. REV. 267, 294 (1972). *Contra, e.g.*, LaFrance, *Constitutional Law Reform for the Poor: Boddie v. Connecticut*, 1971 DUKE L.J. 487, 537; Comment, *Solicitation by the Second Oldest Profession: Attorneys and Advertising*, 8 HARV. C.R.-C. L. REV. 77, 98 (1973). *See also* Wilkinson, *supra* note 13, at 1013-16.

71. Ross v. Moffitt, 417 U.S. 600, 612 (1974).

promise approach of inferring the importance of education from the text of the Constitution under a "nexus" theory (declaring education is so closely related to certain expressed constitutional rights and liberties such as the right to vote that it too is fundamental), could have as easily justified strict scrutiny of the Texas public school finance law as to rationalize use of the less demanding rational basis standard. Precedents existed on both sides; holding either that education was a fundamental interest or that it was not a fundamental interest could have been supported by selecting the proper precedents. This shows the weakness of the current equal protection approach which requires a fundamental right of petitioner, a suspect classification effectively inhibiting exercise of that right, and the lack of a compelling governmental policy, but which allows no gradations or balancing of the first and second elements.

Identifying or declaring a right or interest to be fundamental which is not explicitly so enumerated in the Constitution is difficult because such a declaration can hardly be limited to the case before the Court. No single criterion for identifying fundamental interests could guarantee either fairness in every case or that additional rights would not meet that criterion in the future. Identification of fundamental rights often depends on the beliefs of the individual or court that decides the case. Any such declaration has ramifications for other interests that can be compared to the interest judged to be fundamental. For example, should the right to procreate be judged fundamental and a state is barred from sterilizing citizens, can that not be used to argue that neither should the state prevent sexual activity or the use of birth control devices under a right to engage in sex apart from procreation?[72] A better approach would be to ask which interests should be given judicial protection and to what degree these interests should be protected.[73] Using this analysis, recognition of education as a fundamental interest would be based on sound judicial precedent and logic.[74]

---

72. *See* Griswold v. Connecticut, 381 U.S. 479 (1965); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535, 541 (1942).

73. Goodpaster, *The Integration of Equal Protection, Due Process Standards, and the Indigent's Right of Access to the Courts*, 56 IOWA L. REV. 223 (1970); Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435, 437-39 (1967).

74. The Court has often acknowledged both the importance of education and the public support of education. School District of Abington Township v. Schempp, 374 U.S. 203, 230 (1963) (Brennan, J., concurring) ("Americans regard the public schools as a most vital civil institution for the preservation of a democratic system of government."); Brown v. Board of Education, 347 U.S. 438, 493 (1954) ("It is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of

Determining whether a particular classification created by statute is suspect can be as difficult as identifying fundamental interests. Instead of declaring particular classifications or groupings such as those based on wealth, as always suspect, identifying elements of invidious classification would be more useful.[75] The elements of invidious classification have been delineated by several

---

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."); Meyer v. Nebraska, 262 U.S. 390, 400 (1923) ("The American people have always regarded education and acquisition of knowledge as matters of supreme importance which should be diligently promoted."); International Consolidated Street Ry. v. Massachusetts, 207 U.S. 79, 87 (1907) ("Education is one of the first objects of public care."); Hosier v. Evans, 314 F. Supp. 316 (D. V.I. 1970) ("Education is a basic personal right."). *See* Wisconsin v. Yoder, 406 U.S. 205, 213, 237-39 (1972); Keyishian v. Board of Regents, 385 U.S. 589, 603 (1967) (The classroom is the market place of ideas.); Illinois *ex rel.* McCollum v. Board of Education, 333 U.S. 203, 231 (1948) (Frankfurter, J., concurring) (Education is the most powerful agency for poromoting cohesion among a heterogenous people and the symbol of our common destiny.); Missouri *ex rel.* Gaines v. Canada, 305 U.S. 337 (1938); Pierce v. Society of Sisters, 268 U.S. 510 (1925).

Many legal scholars have argued education should be recognized as a fundamental interest. Richards proclaimed:

> In terms of the fundamental quality of the interest, the opportunity involved in *Rodriguez* is even more fundamental than the liberties that those early cases justly called inestimable.

Richards, *supra* note 60, at 52. Wilkinson explained the function of education:

> A judicial role should exist in behalf of equality of opportunity. . . . The rights that lie closest to our opportunity to take best advantage of our personal potential are education, whose function it is to develop our natural gifts and interests, and the right to seek a career comensurate with our abilities and desires.

Wilkinson, *supra* note 10, at 976, 986. A third writer defended education as a fundamental theory under a nexus theory:

> The "nexus theory" [that education is fundamental because it is so closely related to first amendment rights] is logical, workable, and desirable but the majority opinion in the instant case [*Rodriguez*] shows the Court's undeniable dedication to the incumbent two-tiered equal protection test for fundamental rights.

Note, *Equal Protection of the Laws: Education Is Not a Fundamental Right*, 23 U. FLA. L. REV. 155, 159 (1973). *See also* Note, *Validity of Texas Public School Financing System*, 12 DUQ. L. REV. 348, 364 (1973); Comment, *Serrano v. Priest and the Financing of Public Education in Kansas: Beyond the Rhetoric*, 20 KAN. L. REV. 433 (1972) (classification affecting education should be subject to strict scrutiny). *But see* Roos, *The Potential Impact of Rodriguez on Other School Reform Legislation*, 38 LAW & CONTEMP. PROB. 566, 577 (1974) (The hopes that the Court would hold education was a fundamental interest in *Rodriguez* were only inchoate because the judgments in previous cases were made without the Court first finding education to be a fundamental interest.).

75. Noting the lack of a common denominator in those circumstances where the Supreme Court has found a suspect classification and the inconsistency of analysis

writers including Professor Michelman of Harvard who formulated the following succinct definition:

> An "invidious" classification or trait is one which combines, in greater or lesser degree and in various proportions, three qualities: (1) a general ill-suitedness to the achievement of any proper governmental objective; (2) a high degree of adaption to uses which are oppressive in the sense of systematic and unfair devaluation, through majority rule, of the claims of certain persons to nondiscriminatory sharing in the benefits and burdens of social existence; and (3) a potency to injure through an effect of stigmatizing certain persons by implying popular or official belief in their inherent inferiority or undeservingness.[76]

The first element is the least valuable, for it only begs the question of what is the relationship between the classification and the governmental purpose. Some wealth classifications, for example the income tax laws, are not generally ill-suited to a proper governmental objective. Yet it can be argued this first element of Professor Michelman's trinal definition is present in cases like *Rodriguez* because the present public school finance structures are singularly ill-suited to achieving the avowed state purpose. States have identified the compelling governmental interest under existing school finance systems to be protection of local control. Few would deny that preserving local autonomy over education policy and spend-

---

by the Court, one writer suggested the special need to protect discrete and insular minorities was an appropriate reason for arguing that the existence of suspect traits ought to be present before invoking the "heightened judicial solicitude" of the strict scrutiny doctrine. Additionally, he contended the strict scrutiny doctrine should be used whenever the classification "discriminates against an individual on the basis of factors over which he has no control." Comment, *supra* note 53, at 720. *See* Graham v. Richardson, 403 U.S. 365 (1971) (identifying alienage as a suspect classification); Labine v. Vincent, 401 U.S. 532, 551 n.19 (1971) (Brennan, J., dissenting) (emphasizing the significance of situations where an individual has no control); United States v. Carolene Products Co., 304 U.S. 144, 152 n.4 (1938).

76. Michelman, *The Supreme Court, 1968 Term, Forward: On Protecting the Poor Through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 20 (1969).

Professor Michelman's first element is merely the converse of the equal protection requirement that under the first tier standard there be a rational relationship between the act and some governmental objective or that under the second tier standard of review there be a compelling governmental objective. *See* Frontiero v. Richardson, 411 U.S. 677 (1973); *Developments*, *supra* note 13, at 1124-27, 1173-76; Note, *Discrimination Against the Poor and the Fourteenth Amendment*, 81 HARV. L. REV. 435 (1967).

ing, local experimentation and innovation, or community involvement and commitment to education are worthwhile goals. Yet critics of the present financing programs correctly point out that because of fiscal restraints poor districts have virtually no choice and little control over education since all their funds must go for state prescribed requisites. Requiring equal educational opportunity, measured by equal dollar inputs, would actually increase local control throughout the state.[77]

The second element is present in classifications based on wealth, since the end results of virtually all discrimination are poverty and oppression. The Supreme Court has long considered classifications directed against members of a disadvantaged minority "suspect."[78] And the Court has implied that wealth discrimination would afford an independent basis for strict judicial scrutiny, which suggests the poor might be a disadvantaged minority: "A careful examination on our part is especially warranted where the lines are drawn on the basis of wealth or race . . . two factors which would independently render a classification highly suspect and thereby demand a more exacting judicial scrutiny."[79] While Professor Michel-

77. *See* note 50 *supra*. *See also* Note, *Equal Protection of the Laws: Education Is Not a Fundamental Right*, 23 U. FLA. L. REV. 155, 160 (1973) (local control not a sufficient state interest even under the rational-basis test); Comment, *The Aftermath of Serrano: The Strict Scrutiny Approach and the Viability of Property Tax Financing for Public Educational Systems*, 17 VILL. L. REV. 928 (1972).

78. McDonald v. Board of Election Commissioners, 394 U.S. 802 (1969); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); McLaughlin v. Florida, 379 U.S. 184, 192 (1964); Korematsu v. United States, 323 U.S. 214 (1944).

79. McDonald v. Board of Election Commissioners, 394 U.S. 802, 807 (1969). *See* Bullock v. Carter, 405 U.S. 134 (1972). *Contra*, Ross v. Moffitt, 417 U.S. 600 (1974); San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973); Ortwein v. Schwab, 410 U.S. 656, *petition for rehearing denied*, 411 U.S. 922 (1973); United States v. Kras, 409 U.S. 434 (1973); Michelman, *supra* note 76, at 21 (wealth not yet a suspect classification); Nicholson, *Campaign Financing and Equal Protection*, 26 STAN. L. REV. 85 (1975) (Bullock v. Carter 405 U.S. 134 (1972) still valid but *Rodriguez* shows it will not be expanded).

The Supreme Court initially has required only that a state show a compelling governmental interest and the necessity of a wealth classification when the Court finds the statutory classification affected a fundamental interest of those classified. Some writers have cautioned against concluding wealth classifications as suspect:

> While some broad language has been employed by the Supreme Court to the effect that classifications based on wealth are not favored, "wealth has not incurred the same degree of infamy as an inherently suspect basis of classification as has race."

Fessler & Forrester, *The Case for the Immediate Environment*, 4 CLEARINGHOUSE REV. 1, 9-10 (1970); Schwartz, *Municipal Services Litigation After Rodriguez*, 40 BROOKLYN L. REV. 93 (1973).

man questioned whether strict scrutiny would be invoked based only upon a wealth classification, he argued classifications based on wealth should be regarded as suspect.[80] Participation in removing invidious classifications should not be restricted to the class or minority who are the object of the discrimination, for it is in the best interest of all members of a democratic republic to extend equal protection of law and due process of law to every individual within the society.

The stigmatizing effect of invidious classifications—Professor Michelman's third element—is also an invariable result of wealth classifications. In our society nothing is more stigmatizing than poverty. The advantages of going to good public schools, usually classified as good because they are in richer areas that have the financial ability to support education, begin with application to colleges which favor graduates of these schools and continue throughout life.

In summary, evaluation of public school financing systems, even under the two-tier approach, could have resulted in those systems being held unconstitutional. The majority in *Rodriguez* could have concluded that a fundamental interest did exist, either education or equal educational opportunity, and that the inter-district wealth discrepancies or per pupil spending discrepancies did

---

80. Professor Michelman has explained:

> The convincing reasons which can be offered for extremely skeptical judicial inspection of official acts which explicitly classify by race seem applicable to statutes which explicitly or designedly classify by wealth or income, in the sense of deliberately subdividing the population according to wealth or income criterion for the purpose of extending different treatment to the groups so distinguished.

Michelman, *supra* note 34, at 20-21. *Cf.* Tushnet, *supra* note 13, at 179.

But Justice Stewart for the majority in *Dandridge* expressed a contrary view:

> The administration of public welfare assistance, by contrast [with business regulation cases], involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference . . . but we can find no basis for applying a different constitutional standard. . . .
>
> [T]he Fourteenth Amendment gives the federal courts no power to impose upon the states their views of what constitutes wise economic or social policy. . . .
>
> . . . [T]he intractable economic, social and even philosophical problems presented by public welfare assistance programs are not the business of this Court.

Dandridge v. Williams, 397 U.S. 471, 485-87 (1970); Comment, *Educational Financing, Equal Protection of the Laws, and the Supreme Court*, 70 MICH. L. REV. 1324, 1335 (1972).

involve a suspect classification. This conclusion would have mandated a more strict judicial review of the Texas school finance laws, which would have probably resulted in the finance system being invalidated because of its disparities in taxable wealth and resource expenditures.

CRITICISMS OF AND ALTERNATIVES TO THE TWO-TIER APPROACH

The two-tier approach to equal protection has been assailed by both jurists and scholars primarily for its rigidity and the unfairness of the all or nothing categorizations that determine the outcome. Several writers have proposed as an alternative other approaches which weigh and balance the various factors rather than polarizing the results of only two factors as is done under the two-tier approach.

The dissent of Justice Marshall in *Rodriguez* is representative of the judicial sentiment on the Court that disfavors using the two-tier approach to equal protection problems.[81] Justice Marshall earlier stated:

> In my view, equal protection analysis of this case is not appreciably advanced by the a priori definition of a "right," fundamental or otherwise. Rather, concentration must be placed upon the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[82]

For Justice Marshall the character or nature of the classification and interest of those challenging the statute is most important. The judicial tags of fundamental or constitutionally inferable are not controlling in themselves, but under the two-tier approach the label is all important. Justice Powell shied away from the two-tier approach in two 1974 cases and used a test which balanced individual rights and governmental interests, thereby approximating a due process approach which is less restricted in both the identification and pro-

81. San Antonio Independent School District v. Rodriguez, 411 U.S. 1 (1973) (Marshall, J., dissenting.) *See* notes 89-90 *infra*.

82. Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting).

tection of fundamental rights.[83] Even Chief Justice Burger has acknowledged that the two-tier approach does not really help to decide anything, at least regarding delineation of suspect classifications, thus indicating the value of the approach is to explain a decision rather than to help in deciding a case even though the latter was its intended purpose.[84]

One writer prophetically predicted the Court's use of the two-tier approach in *Rodriguez*, and simultaneously identified how it might be misused to justify a decision rather than used to reach a decision on the merits.[85] A second criticism of the limitation of equal protection in *Rodriguez* was that although the current concern of the equal protection has been racial discrimination, the purposes of the fourteenth amendment have been historically characterized more abstractly and the equal protection clause has been understood to embody broader principles of fair treatment in economic and business regulations and other areas.[86] The Court's use of the two-

---

83. Mitchell v. W. T. Grant Co., 416 U.S. 600, 623 (1974) (Powell, J., concurring); Arnett v. Kennedy, 416 U.S. 134, 164 (1974) (Powell, J., concurring in part). *See* Yackle, *supra* note 13, at 205-06.

84. Wilkinson, *supra* note 10, at 983 n.195 (The "code phrase" of "suspect classification," Chief Justice Burger has complained, tends "to stop analysis while appearing to suggest an analytical process."). *See In re* Griffiths, 413 U.S. 717, 730 (1973) (Burger, C.J. dissenting).

According to Professor Wilkinson, Justice Rehnquist might not abandon the two-tier approach but he would at least confine equal protection strict scrutiny to matters of race. *See* Sugarman v. Dougall, 413 U.S. 634, 649 (1973) (Rehnquist, J., dissenting); Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164, 172 (1972) (Rehnquist, J., dissenting); Wilkinson, *supra* note 13, at 949.

The problem which the Court has had with the two-tier approach is failing to recognize that what was supposed to be a test or tool for evaluating challenged statutes has become a constitutional doctrine, and the difference between a test which should be fair and neutral and a doctrine which can be defended and used to support a position has been blurred.

85. Professors Clune, Coons, and Sugarman warned:

> If the Court is intimidated by the high stakes involved [in the suits challenging the state school finance laws] it may wash its hands in the warm waters of the rationality test.

Clune, Coons, & Sugarman, *A First Appraisal of Serrano*, 2 YALE L. SOC. ACTION 111, 114 (1971); Note, *Public Education Financed Partially Through Local Property Taxes Is Not Proper Subject for Strict Judicial Scrutiny*, 18 HOW. L.J. 435, 444 (1974). *See also* Comment, *supra* note 80, at 1359 ("If the Court anticipated outright resistance to its decrees, it might prefer to avoid involvement in educational financing litigation altogether.").

Other writers have advocated all equal protection cases be given full treatment on the merits. *See, e.g.*, Gunther, *supra* note 13; Yackle, *supra* note 13, at 192.

86. Brest, *supra* note 13, at 598. *See* Weber v. Aetna Cas. & Sur. Co., 406 U.S. 164 (1972); Reed v. Reed, 404 U.S. 71 (1971); Morey v. Doud, 354 U.S. 457 (1957). *Con-*

tier approach was also criticized in less specific terms.[87] Justice Holmes, for example, recognized the complexity of judicial analysis and the futility of trying to develop simple, unchangable but universally applicable formulas for resolving difficult issues. He explained the personal prejudices of the Court would have as much influence on the decision as these formulas, which might conceal the true *ratio decidendi*.[88]

---

tra, Cox, *Forward: Constitutional Adjudication and the Promotion of Human Rights*, 80 HARV. L. REV. 91 (1966) ("Once loosed, the idea of equality is not easily cabined.").

87. *See, e.g.*, Note, *San Antonio Independent School District v. Rodriguez: A Retreat from Equal Protection*, 22 CLEV. ST. L. REV. 585, 600 (1973) (The *Rodriguez* approach to equal protection was wrong and the decision could be used to effectively eliminate the equal protection clause as an effective constitutional means of protecting vital individual interests from arbitrary state discrimination.); Tribe, *The Supreme Court, 1972 Term*, 87 HARV. L. REV. 1, 105 114 (1973) (The Court's use of the two-tier equal protection analysis in *Rodriguez* was unfortunate.); Note, *supra* note 77, at 159. *See also* Millikin v. Bradley, 418 U.S. 717, 760 (1974) (Marshall, J., dissenting) (It is still clear that the poor must pay their own way.); Tushnet, *supra* note 13, at 179 (The present principle of the Supreme Court appears to be "equal protection for the rich, social experimentation for the poor.").

88. O. HOLMES, THE COMMON LAW 1 (1881) ("The felt necessities of the time, the prevalent moral and political theories, institutions of public policy, avowed or unconscious, have had a good deal more to do that the syllogism in determining the rules by which men should be governed."); Harrison, *What Now After San Antonio Independent School District v. Rodriguez? Electorial Inequality and the Public School Finance Systems in California and Texas*, 5 RUT.-CAM. L.J. 191, 213 (1974).

Perhaps the most telling criticism was the analogy drawn by Professor Paul Freund, "The world does not move on a 'binary' principle." Wilkinson, *supra* note 13, at 948 n.15 (1975).

The paradox of the two-tier approach and the inherent weakness of any binary system were identified in the article by Professor Wilkinson. Selection of either the rational basis standard or the compelling interest test will normally determine how the decision will go since the consequences flowing from selecting one of the standards are polar extremes. Yet choosing a standard is based on whether a particular classification is deemed suspect or a specific interest is recognized to be fundamental, and unfortunately, there has been no consistent discernable pattern from which it could be concluded or predicted with certainty how the particular interest and classification in any given case would be characterized. The result is that very similar cases, either from the standpoint of the interests or the classifications involved, may be decided differently because the nebulous and changing requirements for strict scrutiny are said to be barely satisfied in one case but not quite satisfied in another. Professor Wilkinson explained the deficiency of the two-tier approach:

> This analysis is deferential because the lenient "rational basis" scrutiny applied to most statutes almost never results in voidance of the legislation, though the heightened "compelling state interest" scrutiny almost invariably will. It is rigid because in theory it permits only two widely variant levels of scrutiny with no gradation for rights of intermediate importance. It is deficient. . . .

Wilkinson, *supra* note 13, at 948.

Fortunately, recent criticism of the majority's two-tier approach has frequently been accompanied with suggested alternatives for evaluating claimed denials of equal protection. The best known alternative is the sliding scale or spectrum approach endorsed by Justice Marshall, who argued in his dissenting opinion in *Rodriguez* that the Court has already used a sliding scale approach though admittedly without verbally sanctioning or even expressly recognizing it.[89] This spectrum or sliding scale analysis involves measuring and contrasting the character of the classification in question, the relative importance to the individuals in the class discriminated against, the governmental benefits that they do not receive, and the asserted state interests in support of the classification.[90]

The advantage of Justice Marshall's approach is that it acknowledges the complexity of equal protection analysis and requires the petitioner's classification and interest be measured against the governmental interest in each case. Because it is more flexible it can be employed with greater fairness to individual litigants; their claims will not be foreclosed by a predetermination that their interests are important but not expressly covered by the Constitution. Justice Marshall's approach lacks the consistency of the two-tier approach because it does not automatically disregard all interests not enumerated in the Constitution, but such consistency is unworthy of perpetuation. Related benefits from Justice Marshall's approach are, first, that every case has to be treated on its merits, and second, the importance of categorization and phraseology is decreased so the case does not turn, as it does under the two-tier approach, on the language used to describe the circumstances. The spectrum approach is superior to the two-tier approach because all facts are weighed and balanced, not just the two polar characterizations of fundamental or non-fundamental interests and suspect or non-suspect classifications. Additionally, one writer has suggested the considerations called for in spectrum analysis provide a model that

89. San Antonio Independent School District v. Rodriguez, 411 U.S. 1, 98-99, 109-10 (1973) (Marshall, J., dissenting); Dandridge v. Williams, 397 U.S. 471, 520-21 (1970) (Marshall, J., dissenting); *see* notes 43, 45, 49 *(supra)*.

Justice Marshall identified no less than six instances where he claimed the Court had already used the more flexible spectrum approach. *See* Kramer v. Union Free School District No. 15, 395 U.S. 621 (1969); Rinaldi v. Yeager, 384 U.S. 305 (1966); Carrington v. Rash, 380 U.S. 89 (1965); McLaughlin v. Florida, 379 U.S. 184 (1964); Douglas v. California, 372 U.S. 353 (1963); Skinner v. Oklahoma *ex rel.* Williamson, 316 U.S. 535 (1942); Comment, *Irrebuttable Presumptions as an Alternative to Strict Scrutiny: From Rodriguez to Lafleur*, 62 GEO. L.J. 1173, 1200 (1974).

90. *See* notes 43, 45, 49 *supra*.

would be of even greater benefit to legislatures than it would be to courts.[91]

One intermediate spectrum approach can be precisely identified. The Supreme Court has said a statute is invalid if it rests on an "irrebuttable presumption" that is contrary to law and fact.[92] In cases in which such language has replaced the two-tier approach rhetoric of rational basis and compelling state interest it seems to have been an attempt to avoid the undesirable results of upholding a constitutionally suspect statute by restructuring the analysis or adjudication from equal protection to due process. This new standard, which is more stringent than a minimum rational relationship test but less fatal to those challenging the constitutionality of state laws than strict scrutiny, is triggered by a finding of an irrebuttable statutory presumption.[93] The advantage of this standard is that it "allows the legislature freedom to experiment with various answers to difficult social welfare problems without fear that statutes will be overturned on sweeping equal protection grounds," since the legislature does not automatically risk having its statutes subjected to the compelling interest standard because an interest that could

---

91. Professor Brest of California explained that Marshall's approach would benefit legislatures:

> [If Marshall's criterion seems] too amorphous to guide decision making by a nonrepresentative judiciary, it nonetheless speaks to a legislator. . . .
>
> As the interest affected by legislation becomes more important and the classifications more invidious, the parochialism, self-interest, logrolling, and the like, that pervade the political process must yield to generally shared principles of fair treatment.

Brest, *supra* note 13, at 599.

It is hard to disagree with what appears to be Professor Brest's two-fold premise. First, he implies that categorizing interests as fundamental and classifications as suspect or non-suspect are judicial-type, all or nothing, win or lose judgments that a legislator can easily dismiss as close questions that could legitimately go either way. Second, he suggests that a balancing test would require weighing the individual's interests and the classification together in each instance so the legislator would have to do more than flip a coin to make a decision. The legislator would have to actually think about the legislation's impact on the individual and whether there are less objectionable means of attaining the governmental goal, rather than dismissing the individual's claim out-of-hand just because the legislation is not totally unrelated to any governmental objective.

92. Turner v. Department of Employment Security, 423 U.S. 44 (1975), *rev'g* 531 P.2d 870 (Utah 1975); United States Department of Agriculture v. Murry, 413 U.S. 508 (1973); Vlandis v. Kline, 412 U.S. 441 (1973); Stanley v. Illinois, 405 U.S. 645 (1972); P. FREUND, A. SUTHERLAND, M. HOWE, & E. BROWN, CONSTITUTIONAL LAW: CASES AND OTHER PROBLEMS 138-41 (Supp. 1975); Note, *The Irrebuttable Presumption Doctrine in the Supreme Court*, 87 HARV. L. REV. 1534 (1974); Note, *The Conclusive Presumption Doctrine: Equal Process or Due Protection?*, 72 MICH. L. REV. 800 (1974).

93. 423 U.S. 44.

be labeled fundamental is affected. It thus strikes an appropriate balance between judicial deference to the legislature and judicial intervention of behalf of the individual.[94]

A second proposal, similar to the spectrum approach of Justice Marshall, was presented by Professor Gunther of Stanford, who suggested a model of "means" scrutiny by which the Court would require that the means chosen by the legislature substantially advance a particular articulated governmental purpose rather than any conceivable governmental objective which the reviewing court, with the benefit of hindsight, could dream up when it considers the case.[95] The problem with Professor Gunther's approach would be identifying the circumstances when legislative intent would be implied and the limits of such implications.

A third alternative to the two-tier approach and its concomitant identification of fundamental interests either limited to those explicitly enumerated in the Constitution or those inferable because of their importance. merits discussion. But because of its complexity only those aspects applicable to the claims of petitioners in the school financing cases are discussed here. Professor Wilkinson of Virginia acknowledged varying gradations of classifications and interests but he first identified the three visages of constitutional equality: political equality, equality of opportunity, and economic equality.[96] Suits challenging school finance systems, by his definitions, would fall into the second category, equality of opportunity. Wilkinson suggests equality of opportunity simply indicates there is a governmental background that favors none but instead allows all an equal chance to survive, pursue, and succeed.[97] His proposed stand-

94. Comment, *supra* note 89, at 1200-01; *see also* Yackle, *supra* note 13, at 205-06.

95. Gunther, *supra* note 13, at 20-48.

96. Wilkinson, *supra* note 13, at 970-1016.

Political equality is protected by the specific constitutional guarantees of the right of assembly and to vote. Equality of opportunity means the government does not have to provide everyone with success or income, but it does have an obligation to see that the opportunities to succeed are equal. Economic quality, however, would provide the same economic benefits for all regardless of who needed or deserved them. Economic equality should not be guaranteed. The willingness of the judiciary to intervene should vary, according to Professor Wilkinson, along the lines of this tertiary division. *Id.* at 976 ("A judicial role should exist in behalf of equality of opportunity, stronger than that for economic equality but not so affirmative as in the area of political equality.").

97. One writer defined equal opportunity:

> [W]e might say that those with similar abilities and skills should have similar life chances. . . . In all sectors of society there should be roughly

ard for evaluating alleged equal protection denials of equal opportunity involve balancing the opportunity being denied with the state interest served in denying it, in light of the particular group affected.[98]

Several writers have analyzed the proposed alternatives to the two-tier approach.[99] Comparing the alternatives with the two-tier ap-

---

equal prospects of culture and achievement for everyone similarly motivated and endowed.

J. RAWLS, A THEORY OF JUSTICE 73 (1971); Wilkinson, *supra* note 13, at 987. *See also* E. VAN DEN HAAG, EDUCATION AS AN INDUSTRY 39 (1956).

Admitting this places a premium on ability since differences in talent and industry will result in disparity of achievement and equality of opportunity favors those with natural ability, Professor Wilkinson defended this system as being most consistent with the history, Constitution, and values of America. Wilkinson, *supra* note 13.

Because the key is equal opportunity, which in education means equal dollar expenditures per pupil, rather than economic equality or guaranteed achievement, Professor Wilkinson's concept of equality is consistent with the social imperative of providing equal educational opportunity. *Id.* at 987.

98. Explaining how denials of opportunity should be evaluated Wilkinson said:

> The Constitutional inquiry to test governmental denials of equal opportunity ought to weigh and to balance carefully the following elements: 1) the importance of the opportunity being unequally burdened or denied; 2) the strength of the state interest served in denying it; and 3) the character of the groups whose opportunities are denied.

Wilkinson, *supra* note 13, at 991.

This standard is a considerable improvement over the two-tier approach. First, it does not force all or nothing characterizations of interests and classifications but rather it allows a balancing of the elements involved. Second, it is more flexible and could be applied to achieve more consistently fair judgments. Finally, by considering the character of the group granted or denied a particular opportunity, it would permit legislation to stand which under the two-tier approach would probably be struck down as involving a "suspect classification," such as legislation favoring racial minorities or disadvantaged individuals. Affirmative action legislation favoring minorities historically discriminated against would usually be upheld under this test.

99. *See, e.g.*, Brest, *supra* note 13, at 598 (Justice Marshall's proposal neither compelled nor foreclosed by the equal protection clause); Carrington, *Financing the American Dream: Equality and School Taxes*, 73 COLUM. L. REV. 1227, 1229, 1259 (1973); Dorsen, *Equal Protection of the Laws*, 74 COLUM. L. REV. 357 (1974); Goodpaster, *supra* note 13, at 503 (suggesting an intermediate standard between the present extremes of the two-tier approach); Nowak, *supra* note 13 (comparing various standards and advocating the use of an intermediate standard); Richards, *supra* note 60, at 34-35; Taylor, *Avoiding the "Thicket,"* 2 J.L. & EDUC. 482-83 (1973) (Court's test for assessing interest in *Rodriguez* "hardly more serviceable or less arbitrary than the test it rejected"); Yackle, *supra* note 13, at 190-93; Note, *supra* note 77, at 159; Note, *San Antonio Independent School district v. Rodriguez: A Study of Alternatives Open to State Courts*, 8 U.S.F.L. REV. 90, 112 (1973); Comment, *supra* note 56, at 112-13; Comment, *supra* note 77, at 948.

Professor Kurland identified another consideration, the problem of legislatures and courts being able to predict the acceptance and consequences of egalitarian rul-

proach should have led them to the conviction that a single formula or test, such as the two-tier approach, whether it involves two or three elements may not be a sufficiently sophisticated basis for resolving complex equal protection problems when those elements are all or nothing characterizations determined by questions that have to be answered either yes or no. Labeling interests as fundamental or classifications as suspect should be less important than balancing the particular interest and nature of the classification against the state's interest. The state's purpose, alternatives for achieving that purpose, the incidental effects of the legislation, and even the potential ramifications of judicial invalidation could be balanced in deciding whether to uphold the legislation, rather than automatically thrusting a practically insurmountable burden upon the state of showing a compelling state interest simply because an interest is labeled fundamental or a classification is labeled suspect.

CONCLUSION

Careful examination of *Rodriguez* and other wealth discrimination cases reveals an inconsistency of analysis by the Supreme Court.[100] It shows that recent equal protection analysis has been deceptive and a tool the Court has used to justify its decisions. The Court's inconsistent if not catalectic reasoning is demonstrated by reviewing circumstances evaluated by the Court in other decisions in which application of those concepts or principles expressed in *Rodriguez* would have resulted in a contrary verdict. Decisions upholding election filing fees and poll taxes, while simply requiring that such expenses be waived for those few individuals who could prove absolute indigency, would have been consistent with the Supreme Court's reasoning in *Rodriguez*. In reapportionment, criminal appeal, or court access cases the Court could have required, in harmony with *Rodriguez*, proof of actual injury so that the petitioner or appellant would have to prove his lost political influence

---

ings. He stated that to be effective broad social policy decisions must first involve a simple constitutional standard that is easily understood. Second, he explained these decisions had to present a rule and remedy that courts are capable of enforcing. Third, he observed these decisions must formulate a rule which the public will generally acquiesce in as it is announced and applied. Kurland, *Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined*, 35 U. CHI. L. REV. 583, 596-99 (1968).

100. *See, e.g.*, Arlington Heights v. Metro Housing Corp., 97 S. Ct. 555 (1977); Estelle v. Dorrough, 420 U.S. 534 (1975); United States v. Kras, 409 U.S. 434 (1973); Lindsey v. Normet, 405 U.S. 56 (1972); James v. Valtierra, 402 U.S. 137 (1971); Dandridge v. Williams, 397 U.S. 471 (1970). *Contra, e.g.*, Weinberger v. Wisenfeld, 420 U.S. 636 (1975); Boddie v. Connecticut, 401 U.S. 371 (1971); Harper v. Virginia Board of Elections, 383 U.S. 663 (1966); Griffin v. Illinois, 351 U.S. 12 (1956).

would make a difference in a specific election, his criminal appeal would be successful, or the judicial proceeding would culminate in a meaningful judgment for the petitioner.[101] Contrastingly, the logic of those cases which held that an indigent could proceed in court and obtain a divorce even if she lacked court fees, that poll taxes were unconstitutional, and that an indigent criminal could not be denied counsel or his right to appeal would have supported the conclusion in *Rodriguez* that the correlation between wealth and spending per child was significant and that children in poorer districts did represent an identifiable class which was discriminated against because they were deprived of equal educational opportunities.

Unfortunately, the Supreme Court failed to recognize the legitimate claims of petitioners to a more equitable apportionment of educational opportunity. It is in cases like *Rodriguez* where discrimination is against those lacking the political or economic power necessary to obtain satisfactory redress of their grievances from the other two branches of government that judicial intervention is warranted, if not requisite, if the constitutional promises of justice, due process, and equal protection of the laws are to be provided and preserved for all Americans.[102] But the quarrel with the Supreme Court majority's perception of judicial responsibility can be at-

---

101. Goldtein, *Interdistrict Inequalities in School Financing: A Critical Analysis of Serrano v. Priest and Its Progeny*, 120 U. PA. L. REV. 504 (1972); Note, *San Antonio Independent School District v. Rodriguez: Inequitable but Not Unequal Protection Under the Fourteenth Amendment*, 27 SW. L.J. 712, 719 (1973). *See also* Yudof, *The Politics of Futility*, 2 J.L. & EDUC. 463, 468 (1973) (Past decisions did not stand on proof of injury and criminals did not have to show provision of a transcript would result in acquittal.); Note, *Validity of Texas Public School Financing System*, 12 DUQ. L. REV. 348, 364 (1973) (Access to equal representation and not access to the ballot box itself is the interest upheld in *Reynolds*.).

Decisions that might have been different if the reasoning in *Rodriguez* had predominated in the consideration of those cases include the following. Roe v. Wade, 410 U.S. 113 (1973); Bullock v. Carter, 405 U.S. 134 (1972); Boddie v. Connecticut, 401 U.S. 371 (1971); Reynolds v. Sims, 377 U.S. 533 (1964); Baker v. Carr, 369 U.S. 186 (1962); Griffin v. Illinois, 351 U.S. 12 (1956).

102. Promoting the role of the courts in protecting civil liberties Richards noted:

> Assuming the existence of a trained judiciary independent of the other branches and possessing a special technique by which to interpret and enforce the fundamental civil rights, a certain amount of judicial supremacy in interpreting and enforcing the fundamental civil rights is also justifiable.

Richards, *supra* note 60, at 49. *See* Yudof, *Equal Educational Opportunity and the Courts*, 51 TEX. L. REV. 411, 419 (1972) ("Courts are appropriate forums for redressing inequality in access to resources and racial discrimination grievances."). *See also* Note, *supra* note 77, at 159-60; Comment, *supra* note 80, at 1359.

tributed to a difference of political persuasion—a philosophical divarication. The majority's presentation of the decision as the only possible verdict and logical consequence of a consciously developed, internally consistent, historically accurate, and objective analysis based on long standing constitutional doctrines was as lamentable as the actual holding. Rather than admit the novelty of the claims and issues and the political philosophies influencing its decision, the Court tried to insulate itself from criticism by rationalizing why the circumstances mandated the Court come down on one side instead of the other. This manipulation of the equal protection analysis amounted to a shell game, which obtenebrated and enshrouded the issues and *ratio decidendi.*

Valparaiso University Law Review

Volume 11 Spring 1977 Number 3