NEW MEXICO LAW REVIEW

Volume 20
Issue 1 *Winter 1990*

Winter 1990

Constitutional Law - No Free Ride to the Schoolhouse Gate: Equal Protection Analysis in Kadrmas v. Dickinson Public Schools

Jeffrey Jenkins

Recommended Citation
Jeffrey Jenkins, *Constitutional Law - No Free Ride to the Schoolhouse Gate: Equal Protection Analysis in Kadrmas v. Dickinson Public Schools*, 20 N.M. L. Rev. 161 (1990).
Available at: https://digitalrepository.unm.edu/nmlr/vol20/iss1/8

This Notes and Comments is brought to you for free and open access by The University of New Mexico School of Law. For more information, please visit the *New Mexico Law Review* website: www.lawschool.unm.edu/nmlr

CONSTITUTIONAL LAW—No Free Ride to the Schoolhouse Gate: Equal Protection Analysis in *Kadrmas v. Dickinson Public Schools*

I. INTRODUCTION

In *Kadrmas v. Dickinson Public Schools*[1] the United States Supreme Court held that a North Dakota statute allowing public school districts to charge parents a fee for bus service does not violate the equal protection clause.[2] The Court refused to apply either a strict or a "heightened" level of scrutiny to the statute[3] and, applying the rational relation test,[4] found that the state had a legitimate purpose in enacting such legislation.[5] Rather than applying a more flexible standard for equal protection analysis in education cases,[6] the Supreme Court in *Kadrmas* resumed a close adherence to a tier-selection analysis of equal protection in education.[7] By rejecting more flexible approaches which may depend "less on choosing the 'formal label' under which the claim should be reviewed,"[8] the Court has returned to a rigid tiers-of-scrutiny methodology for equal protection claims, and issued a dark reminder of its holding in *San Antonio Independent School District v. Rodriguez*[9] that education is not a fundamental right.[10] As the first decision involving equal protection in education from a Court much changed since *Rodriguez*,[11] *Kadrmas* presents a current view of the Court's thinking about both equal protection and education.

---

1. 108 S. Ct. 2481 (1988).
2. *Id.* at 2491.
3. *Id.* at 2489. Levels of scrutiny in equal protection analysis are discussed *infra* at notes 29-33 and accompanying text.
4. *Id.*
5. *Id.*
6. The analysis of "tiers," or levels of scrutiny, stems from the Warren Court's expansion of equal protection analysis in areas beyond race. *See* Gunther, *The Supreme Court, 1971 Term—Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972).
7. It had been suggested that the Court, following its employment of a "heightened" level of scrutiny in Plyler v. Doe, 457 U.S. 202 (1982), would no longer rely on tiers of scrutiny to analyze equal protection claims but, rather, would balance the competing interests at stake. Hutchinson, *More Substantive Equal Protection? A Note on Plyler v. Doe*, 1982 SUP. CT. REV. 167, 193. *Kadrmas* demonstrates that the tiers-of-scrutiny approach is alive and well.
8. *Kadrmas*, 108 S. Ct. at 2492 (Marshall, J., dissenting) (quoting City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 478 (1985) (Marshall, J., dissenting)).
9. 411 U.S. 1 (1973).
10. *Id.* at 34-35.
11. Justice Douglas was replaced by Justice Stevens; Justice Stewart was replaced by Justice O'Connor; Chief Justice Burger was replaced by Justice Scalia; and Justice Powell, who wrote the Court's opinion in *Rodriguez*, was replaced by Justice Kennedy.

II. STATEMENT OF THE CASE

The State of North Dakota has traditionally encouraged its sparsely populated school districts to consolidate with other districts, or "reorganize," in order to more efficiently provide educational services.[12] In 1979, North Dakota enacted a statute allowing nonreorganized school districts to charge parents a fee for busing their children to school.[13] Under the statute, the Dickinson public school district, as a nonreorganized district,[14] required parents whose children rode the district's buses to pay approximately eleven percent of the bus service cost.[15]

The Kadrmas family was a poor North Dakota family with two preschool children and a third child, Sarita, who attended a public elementary school in the Dickinson school district.[16] The family lived 16 miles from Sarita's school, and, until 1985, agreed to pay Dickinson a required fee of $97 to bus Sarita to the school.[17] In 1985 the Kadrmases refused to pay the fee[18] and incurred private transportation costs of over $1000.[19] In 1987 they resumed their contract with Dickinson to bus Sarita.[20]

Sarita and her mother filed suit against the Dickinson Public Schools in state court in September 1985, seeking to enjoin Dickinson

---

12. *Kadrmas*, 108 S. Ct. at 2484.

13. N.D. CENT. CODE 15-34.2-06.1 (Supp. 1989). The statute provides:

> Charge for bus transportation optional. The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. For schoolbus service which was started prior to July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the state average cost for transportation or the local school district's cost, whichever is the lesser amount. For schoolbus service started on or after July 1, 1981, the total fees collected may not exceed an amount equal to the difference between the state transportation payment and the local school district's cost for transportation during the preceeding school year. Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided.

14. *Kadrmas*, 108 S. Ct. at 2485.

15. *Id.*

16. *Id.*

17. *Id.*

18. The Kadrmases refused to pay for two reasons. First, they fell behind in arranged payments on the busing fee and, at the time of refusal, were heavily in debt for this and other expenses. Joint Appendix, Transcript of Proceedings at 30; Brief for the Appellants at 5. Second, the North Dakota Supreme Court held in Bismarck Public Schools v. Walker, 370 N.W.2d 565 (N.D. 1985) that signing the busing fee contract constituted a waiver of any objection to the fee. Thus, signing the contract would have foreclosed the Kadrmases' challenge. Brief for the Appellants at 9.

19. *Kadrmas*, 108 S. Ct. at 2485. These costs resulted from driving Sarita to school in the family truck and carpooling with a neighbor. Expenses from gasoline were approximately $114 per month, and replacement of the truck's engine cost $800 during the school year. Brief for the Appellants at 7.

20. 108 S. Ct. at 2485.

from charging them a fee for busing.[21] The plaintiffs claimed that the statute violated the North Dakota Constitution's establishment of a system of free public schools[22] and that the statute also violated the equal protection clause of the fourteenth amendment to the United States Constitution.[23]

The trial court dismissed the action on the merits,[24] and the Kadrmases appealed to the North Dakota Supreme Court. The supreme court affirmed the trial court ruling and held that the North Dakota Constitution did not require school districts to provide free transportation.[25] The court also rejected the claim that the statute violated the equal protection clause of the fourteenth amendment.[26] The United States Supreme Court noted probable jurisdiction to consider the equal protection claim[27] and subsequently affirmed the North Dakota Supreme Court.[28]

III. DISCUSSION AND ANALYSIS

A. Equal Protection Analysis in Education

The Supreme Court's three-tiered approach to equal protection claims is well-known if not well-understood in its application. The tests of "rational basis,"[29] "strict scrutiny,"[30] and "middle tier"[31] have entered the lexicons of law students and legal scholars while, at the same time, the Supreme Court itself has sought to define

---

21. *Id.*

22. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897, 899 (N.D. 1987), *aff'd*, 108 S. Ct. 2481 (1988).

23. *Id.* at 902.

24. *Id.* at 898.

25. *Id.* at 902.

26. *Id.* at 903.

27. 108 S. Ct. 63 (1987).

28. *Kadrmas*, 108 S. Ct. at 2491. Justice O'Connor wrote the majority opinion in which Justices White, Scalia, Kennedy, and Chief Justice Rehnquist joined. Justice Marshall and Justice Stevens filed separate dissents.

29. Justice O'Connor explained that, under this test, "the Equal Protection Clause is offended only if the statute's classification 'rests on grounds wholly irrelevant to the achievement of the State's objective,'" *Kadrmas*, 108 S. Ct. at 2489 (quoting McGowan v. Maryland, 366 U.S. 420, 425 (1961)), and "'we will not overturn such a statute unless the varying treatment of different groups is so unrelated to the achievement of any combination of legitimate purposes that we can only conclude that the legislature's actions were irrational.'" *Id.* (quoting Vance v. Bradley, 440 U.S. 93, 97 (1979)).

30. A statute "provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,'" *Kadrmas*, 108 S. Ct. at 2487 (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973)).

31. "This standard of review, which is less demanding than 'strict scrutiny' but more demanding than the standard rational relation test, has generally applied only in cases that involved discriminatory classifications based on sex or illegitimacy." *Kadrmas*, 108 S. Ct. at 2487. Justice O'Connor noted that although Plyler v. Doe, 457 U.S. 202 (1982) "did not fit this pattern," the Court in *Plyler* "concluded that the State had failed to show that its classification advanced a substantial state interest" and the case was limited to its "'unique confluence of theories and rationales.'" *Id.* at 2487-88 (quoting *Plyler*, 457 U.S. at 243).

and redefine these terms.[32] It is not surprising, therefore, that modern equal protection jurisprudence has engendered significant amounts of legal commentary. Numerous commentators have noted both the rigidity of the approach and inconsistencies in application[33] as the Court has struggled with a variety of new and complex equal protection claims over the past two decades.

The Court's decisions involving education have proved to be fertile ground for articulating the framework for equal protection analysis. As the principal example of this, *Brown v. Board of Education*,[34] holding unconstitutional widespread school segregation, stands as the Court's most sweeping pronouncement of equal protection rights.[35] Prior to *Brown* and the few education cases leading up to that opinion,[36] the "separate but equal" principle from *Plessy v. Ferguson*[37] served as the Court's equal protection doctrine in education whenever race was at issue.[38] Although *Brown* held that "in the field of public education the doctrine of 'separate but equal' has no place,"[39] the decision can be seen as the watershed of the Court's march from recognizing the potential unconstitutionality of racial classifications[40] to actually applying an equal protection standard that was "'strict' in theory and fatal in fact."[41] Indeed, considering the Court's repeated rejection of "separate but equal" in areas unrelated to education,[42] *Brown* demonstrates the unique place of education in the Court's jurisprudence as a platform for shaping constitutional principles.[43]

---

32. *See, e.g., Rodriguez*, 411 U.S. at 98 (Marshall, J., dissenting); Craig v. Boren, 429 U.S. 190, 212 (1976) (Stevens, J., concurring).

33. *See, e.g.*, Gunther, *supra* note 6, at 8; Hutchinson, *supra* note 7, at 193; Note, *Justice Stevens' Equal Protection Jurisprudence*, 100 HARV. L. REV. 1146 (1987).

34. 347 U.S. 483 (1954).

35. *Id.* at 495 ("[W]e hold that the plaintiffs and others similarly situated for whom the actions have been brought are, by reason of the segregation complained of, deprived of the equal protection of the laws guaranteed by the Fourteenth Amendment.").

36. *See* Missouri ex rel. Gaines v. Canada, 305 U.S. 337 (1938); Sweatt v. Painter, 339 U.S. 629 (1950); McLaurin v. Oklahoma State Regents, 339 U.S. 637 (1950).

37. 163 U.S. 537 (1896).

38. *See* Cumming v. Bd. of Educ., 175 U.S. 528 (1899) (rejecting black taxpayers' challenge to a tax assessment for support of a white-only high school after a black high school was closed).

Between *Plessy* and *Brown*, fewer than 300 education cases were brought before all federal courts and, of these, a very small percentage were heard by the Supreme Court. J. HOGAN, THE SCHOOLS, THE COURTS, AND THE PUBLIC INTEREST 11 (1985).

39. *Brown*, 347 U.S. at 495.

40. *See* United States v. Carolene Prods. Co., 304 U.S. 144, 152 n.4 (1938); Korematsu v. United States, 323 U.S. 214 (1944).

41. Gunther, *supra* note 6, at 8.

42. *See, e.g.*, Muir v. Louisville Park Theatrical Ass'n, 347 U.S. 971 (1954), *vacating and remanding*, 202 F.2d 275 (6th Cir. 1953) (parks); Mayor of Baltimore v. Dawson, 350 U.S. 877 (1955), *aff'g*, 220 F.2d 386 (4th Cir. 1955) (beaches); Gayle v. Browder, 352 U.S. 903 (1956), *aff'g*, 142 F. Supp. 707 (M.D.Ala. 1956) (buses).

43. Other of the Court's education cases that do not involve equal protection also support this point. *See, e.g.*, Epperson v. Arkansas, 393 U.S. 97 (1968) (religion); Hazelwood School Dist. v. Kuhlmeier, 108 S. Ct. 562 (1988) (freedom of speech).

The Court has frequently used education cases to consider heightened scrutiny for equal protection claims in areas beyond race. Classifications based on gender,[44] alienage,[45] and wealth[46] have all been explored within the context of education.[47] This convergence of education with equal protection claims suggests more than mere coincidence. Rather, prior to *Kadrmas*, education cases appeared to be particularly troublesome for the modes of equal protection analysis that developed following *Brown*. This difficulty stemmed from the Justices' views of the interest at stake in such cases[48] and became most apparent in the Court's opinions in *San Antonio Independent School District v. Rodriguez*[49] and *Plyler v. Doe*.[50]

In *Rodriguez* the Court examined whether the school financing plan of the State of Texas, by allowing wealthy school districts to provide greater per-child resources than poor districts, violated the equal protection clause.[51] In determining whether it should apply strict scrutiny, the Court first noted the difficulty in defining the class of "poor" persons affected.[52] Regardless of whether the "poor" are a suspect class, reasoned the Court, a discriminatory classification based on poverty has two distinguishing characteristics: the class must be completely unable to pay for some desired benefit, and must be absolutely deprived of a meaningful opportunity to enjoy that benefit.[53] Finding that in no case were poorer districts completely deprived of the educational benefit, the Court concluded that no suspect class was disadvantaged.[54]

---

44. Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982).

45. Nyquist v. Mauclet, 432 U.S. 1 (1977); Ambach v. Norwick, 441 U.S. 68 (1979); Plyler v. Doe, 457 U.S. 202 (1982).

46. San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1 (1973).

47. Classifications based on illegitimacy have also been subjected to greater scrutiny, although not in educational settings. *See* Levy v. Louisiana, 391 U.S. 68 (1968) (striking down statute that denied illegitimate children the right to sue for wrongful death of parent); Mills v. Habluetzel, 456 U.S. 91 (1982) (one year statute of limitations for establishing paternity for child support held unconstitutional).

48. Justice Powell noted this concern in his opinion in *Rodriguez*: "It is this question—whether education is a fundamental right, in the sense that it is among the rights and liberties protected by the Constitution—which has so consumed the attention of courts and commentators in recent years." 411 U.S. at 29.

49. 411 U.S. 1.

50. 457 U.S. 202.

51. 411 U.S. 1. Mexican-American parents of children in the Edgewood School District in San Antonio brought the suit, arguing that the state educational financing scheme provided Edgewood schools with only $356 per pupil, whereas the financing scheme provided Alamo Heights, another San Antonio school district, $594 per pupil. The differences could be accounted for, in part, by the relative wealth of the two communities and their differences in tax base.

52. *Id.* at 19. The Court noted that the record offered no definition of the disfavored class but identified three potential classifications for "poor": (1) persons whose incomes fall below a given level; (2) persons who are relatively poorer than others; and (3) all persons, regardless of income, who live in relatively poorer school districts. *Id.* at 19-20.

53. *Id.* at 20.

54. *Id.* at 28. The Court also noted that the "large, diverse, and amorphous class" had

The *Rodriguez* Court also, for the first time, squarely considered the issue of whether education is a fundamental right, triggering strict scrutiny under the fourteenth amendment. Writing for the Court, Justice Powell explained that a fundamental right is one that is explicitly or implicitly guaranteed by the Constitution.[55] Addressing the argument that education bears a close relationship to other constitutional freedoms like free speech and the right to vote, Justice Powell noted that the Constitution does not guarantee "the most *effective* speech or the most *informed* electoral choice."[56] Finding that there was no basis for affording education the status of either an explicit or implicit constitutional right,[57] the Court refused to apply strict scrutiny to the Texas financing scheme.[58] Under the rational basis standard, the Court held that Texas' unequal per-pupil expenditures did not violate the equal protection clause because the state financing system rationally furthered a legitimate state purpose in balancing local control of educational resources against the state's interest in providing adequate minimum levels of education.[59]

Thus, the Court in *Rodriguez* continued to rely on a two-tier analysis of equal protection claims by refusing to consider wealth classifications as suspect and applying a rational basis standard. Moreover, the holding that education is not a fundamental right, in spite of the often-quoted language from *Brown* that "'education is perhaps the most important function of state and local governments,'"[60] reflected the Court's unwillingness to apply strict scrutiny to state statutes affecting education. The Court chose to rely on its tier-selection approach to equal protection,[61] rather than adopt a

---

"none of the traditional indicia of suspectness: the class is not saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*

55. *Id.* at 33-34. Justice Powell prefaced this conclusion by stating: "Nothing this Court holds today in any way detracts from our historic dedication to public education. . . . But the importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause." *Id.* at 30.

56. *Id.* at 36 (emphasis in original). The opinion also elaborated: "Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either right, we have no indication that the present levels of educational expenditures in Texas provide an education that falls short." *Id.* at 36-37.

57. *Id.* at 35.

58. *Id.* at 39. The Court also pointed out that more deference should be given to the state because the Texas financing system was implemented to extend rather than curtail educational benefits; thus, the "affirmative and reformatory" nature of the system was an additional reason for lowering the level of scrutiny. *Id.* at 37-39.

59. *Id.* at 48, 54-55.

60. *Id.* at 29 (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

61. Of course, this is not to suggest that all of the Justices were satisfied with this analytic approach. The most vocal of the dissenters in *Rodriguez*, Justice Marshall, clearly stated: "I must once more voice my disagreement with the Court's rigidified approach to equal

standard that would balance "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn."[62]

While this approach changed dramatically with the introduction of a "middle tier" in *Craig v. Boren*,[63] the addition of a third tier did little to clarify equal protection analysis.[64] Not until *Plyler v. Doe*[65] came before the Court for its hearing on the educational deprivation of alien children did the Court seem to relax its adherence to a rigid tiers-of-analysis approach.

Plyler presented the issue of whether the equal protection clause was violated by a Texas statute that allowed school districts to deny the children of illegal aliens the benefit of a free public education.[66] In a five-to-four opinion written by Justice Brennan,[67] the Court refused to find that illegal aliens constituted a suspect class,[68] but noted that the statute "imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[69] Citing *Rodriguez*, the Court reaffirmed its holding that education is not a fundamental right,[70] but explained that "neither is it merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation"[71] since it "has a fundamental role in maintaining the fabric of our society."[72] The Court employed a level of review that was "properly heightened"[73] and, failing to find a "substantial state interest,"[74] held the statute to be invalid.[75]

Although in *Plyler* the Court acknowledged and employed "middle tier" scrutiny in its equal protection analysis,[76] the Court chose

---

protection analysis." 411 U.S. at 98. Justice Powell himself noted that "with respect to state taxation and education . . . this Court's action today is not to be viewed as placing its judicial imprimatur on the status quo. . . . But the ultimate solutions must come from the lawmakers and the democratic pressures of those who elect them." *Id.* at 58-59.

62. *Id.* at 99 (Marshall, J., dissenting).

63. 429 U.S. 190 (1976).

64. *See* Seeburger, *The Muddle of the Middle Tier: The Coming Crisis in Equal Protection*, 48 Mo. L. Rev. 587 (1983).

65. 457 U.S. 202 (1982).

66. The statute, Tex. Educ. Code Ann. Sec. 21.031 (Vernon Supp. 1981), provided that only children "who are citizens of the United States or legally admitted aliens" were entitled to the benefit of state funding and were required to be admitted to free public schools in their districts of residence.

67. Justices White, Rehnquist and O'Connor joined Chief Justice Burger's dissent.

68. *Plyler*, 457 U.S. at 219 n.19.

69. *Id.* at 223.

70. *Id.*

71. *Id.* at 221.

72. *Id.*

73. *Id.* at 238 (Powell, J., concurring).

74. *Id.* at 230.

75. *Id.*

76. *Id.* at 217-218. As Justice Brennan explained, "This technique of 'intermediate' scrutiny permits us to evaluate the rationality of the legislative judgment with reference to well-settled

middle tier not only on the basis of the classification, as in gender cases,[77] but also because of the nature of the interest at stake.[78] Where previously neither alienage nor education had required heightened scrutiny, in *Plyler* the particular combination of education and the alien status of children convinced the majority that something more than a rational basis analysis was appropriate.[79] Thus, *Plyler* seemed to represent a further repudiation of the inflexible two-tiered analysis evident in *Rodriguez*, while at the same time appearing to embrace the *Rodriguez* dogma that education is not a fundamental right. By employing a heightened form of scrutiny to strike down a statute depriving illegal alien children of a free education, *Plyler* suggested the possibility that education, in consort with a second factor, might serve to elevate the Court's scrutiny. The *Plyler* holding thus produced a hope that the Court would broaden its use of the middle-tier and perhaps abandon its tier-selection equal protection analysis altogether.[80]

A second possible explanation of the *Plyler* holding, however, was that it was *sui generis* and not a case whose rationale was analytically defensible or easily generalizable.[81] Specifically, Justice Brennan's opinion may have reflected nothing more than his successful attempt to build a coalition for overturning the Texas statute, rather than

---

constitutional principles. . . . Only when concerns sufficiently absolute and enduring can be clearly ascertained from the Constitution and our cases do we employ this standard to aid us in determining the rationality of the legislative choice." *Id.* at 218 n.16.

77. *See, e.g.*, Craig v. Boren, 429 U.S. 190 (1976).

78. As Justice Brennan stated: "[M]ore is involved in these cases than . . . whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. . . . [W]e may appropriately take into account its costs to the Nation and to the innocent children who are its victims." 457 U.S. at 223-24. It has been suggested that this approach may have reflected a movement in the Court toward Justice Marshall's "sliding scale" analysis. *See* Hutchinson, *supra* note 7, at 170. In his concurring opinion in *Plyler*, Justice Marshall himself pointed out that "the facts of these cases demonstrate the wisdom of rejecting a rigidified approach to equal protection analysis, and of employing an approach that allows for varying levels of scrutiny depending upon 'the constitutional and societal importance of the interest adversely affected. . . .'" 457 U.S. at 231 (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 99 (1973)).

79. One commentator described the test used in *Plyler* as "zero plus zero equals one; that is, a nonsuspect classification plus a nonfundamental right requires almost strict scrutiny." Hutchinson, *supra* note 7, at 193. The thrust of this argument is that the Court employed a peculiar calculus whereby neither a nonsuspect classification nor a nonfundamental right would allow heightened scrutiny, yet in combination they add up to a stricter standard of review. In Hutchinson's view, the Texas statute in *Plyler* required heightened scrutiny because of the specific combination of alienage (a nonsuspect classification) and education (a nonfundamental right). From his 1982 perspective, Hutchinson concluded that after *Plyler*, equal protection analysis had lost its predictability since it was impossible to know, even aided by prior case law, which particular combination of factors would trigger heightened scrutiny. *Id.* at 192-93.

80. *See Plyler*, 457 U.S. at 231 (Marshall, J., concurring); Hutchinson, *supra* note 7, at 169, 193; Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 970-71 (1987).

81. Tushnet, *The Optimist's Tale*, 132 U. PA. L. REV. 1257, 1263 (1984).

a serious effort to advance equal protection doctrine.[82] The Court's opinion in *Kadrmas* supports this latter view and demonstrates the continuing vitality of the *Rodriguez* tiers-of-analysis approach.

B. The Analysis of Equal Protection in Kadrmas

The *Kadrmas* Court held that the equal protection clause is not violated when a school district charges parents a fee for busing their children to school.[83] Writing for the majority, Justice O'Connor began the Court's equal protection analysis[84] by considering whether strict judicial scrutiny should be applied to the North Dakota statute. The Court recited the requirements for strict scrutiny: whether the statute "interferes with a 'fundamental right' or discriminates against a 'suspect class.'"[85] The Court quickly dismissed the argument that the appellants were denied a fundamental right,[86] pointing to both *Rodriguez* and *Plyler* to support the Court's continuing view that education is not a fundamental right triggering strict scrutiny.[87]

The appellants also argued that the statute created a suspect classification because of its unequal effects on the wealthy and poor.[88] Rejecting this argument, the Court stated that a statute's differing effects on the wealthy and poor will not "on that account alone" call for strict scrutiny.[89]

The Court next considered the argument that "heightened" scrutiny should be applied to the statute, pointing out that this standard has generally had limited application to cases of discriminatory classifications of sex or illegitimacy.[90] Relying on *Plyler*, the Kadrmases

---

82. *Id.*

83. 108 S. Ct. at 2489.

84. Before reaching the merits, Justice O'Connor rejected the school district's argument that the Kadrmases were estopped from asserting their claim because they had "enjoyed the benefits" of the district's bus service. *See id.* at 2486. Dickinson moved to dismiss the appeal by relying on the principle stated in Fahey v. Mallonee, 332 U.S. 245 (1947), and more recently articulated in Strickland v. Flue-Cured Tobacco Co-op Stabilization Corp., 643 F.Supp. 310, 319 (D.S.C. 1986): "It is an elementary rule of constitutional law that one may not 'retain the benefits of the Act while attacking the constitutionality of one of its important conditions.'" Appellee's Motion to Dismiss Appeal at 3. The Court found that Sarita's benefit of bus service derived from a different statute than that under attack, and, regardless, the litigation resulted from a burdensome fee imposed by statute, not from a beneficial provision. *Kadrmas*, 108 S. Ct. at 2486.

The Court also rejected Dickinson's argument that the case was moot since the Kadrmases had subsequently signed two contracts for bus service. Justice O'Connor made it clear that a "case or controversy" existed and that "the ongoing and concrete nature of the controversy . . . is readily apparent." *Kadrmas*, 108 S. Ct. at 2486-87.

85. *Id.* at 2487. *See also* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973); *Plyler*, 457 U.S. at 216-217.

86. *Kadrmas*, 108 S. Ct. at 2487.

87. *See Rodriguez*, 411 U.S. at 16, 33-36; *Plyler*, 457 U.S. at 223.

88. *See* Brief for the Appellants at 25; *Kadrmas*, 108 S. Ct. at 2487.

89. *Kadrmas*, 108 S. Ct. at 2487.

90. *Id.* (citing Clark v. Jeter, 108 S. Ct. 1910 (1988); Mississippi Univ. for Women v. Hogan, 458 U.S. 718 (1982); Mills v. Habluetzel, 456 U.S. 91 (1982); Craig v. Boren, 429 U.S. 190 (1976)).

argued that the Court's teaching was that education is a right whose possible infringement requires a "heightened level of attention."[91] Justice O'Connor distinguished *Plyler* by noting that Sarita's parents had engaged in no illegal activity that denied her access to education.[92] Moreover, the majority found no reason "to suppose that this user fee will 'promot[e] the creation and perpetuation of a sub-class of illiterates within our boundaries, surely adding to the problems and costs of unemployment, welfare, and crime.'"[93]

To bolster their argument for a heightened level of scrutiny, the Kadrmases cited prior cases which held that the government cannot withhold from the poor certain important services, such as a trial transcript in a criminal case.[94] The Court found these cases irrelevant since they involved access to judicial process as an exclusive remedy, whereas the Kadrmases had alternative remedies to North Dakota's imposition of a bus fee, such as their choice to transport Sarita themselves.[95]

Applying the rational relation test as the "appropriate"[96] level of analysis, the Court began its inquiry with the observation that since there is no constitutional requirement that states provide any bus service, "it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free."[97] The Kadrmases argued that the equal protection clause also was violated because the statute allowed only non-reorganized districts to levy a bus fee, whereas reorganized districts were not permitted to do so, and that no rational justification could be found for this distinction.[98] The Court, quoting *Vance v. Bradley*,[99] reaffirmed the principle that legislation will be struck down only if "'the legislative facts on which the classification is apparently based could not reasonably be conceived to be true by the governmental decisionmaker,'"[100] and concluded that the Kadrmases had failed to meet their "'heavy burden'" of showing that the statute was both "arbitrary and irrational."[101]

The Court found that the statute, by distinguishing between reorganized and non-reorganized districts, justifiably sought to encourage voters to approve reorganization plans by relieving them of

---

91. Brief for the Appellants at 16.
92. *Kadrmas*, 108 S. Ct. at 2488.
93. *Id.* (quoting *Plyler*, 457 U.S. at 230).
94. Griffin v. Illinois, 351 U.S. 12 (1956). Appellants also cited Smith v. Bennett, 365 U.S. 708 (1961), Boddie v. Connecticut, 401 U.S. 371 (1971), Lindsey v. Normet, 405 U.S. 56 (1972), and Little v. Streater, 452 U.S. 1 (1981).
95. *Kadrmas*, 108 S. Ct. at 2488.
96. *Id.* at 2489.
97. *Id.*
98. *See* Brief for the Appellants at 18-22.
99. 440 U.S. 93 (1979).
100. *Kadrmas*, 108 S. Ct. at 2490 (quoting Vance v. Bradley, 440 U.S. 93, 111 (1979)).
101. *Kadrmas*, 108 S. Ct. at 2490 (quoting Hodel v. Indiana, 452 U.S. 314, 332 (1981)).

concerns about transportation costs.[102] Further, as Dickinson argued, the purpose of the statute was to spread the cost of the service to those who would most benefit from it.[103] The statute dealt only with non-reorganized districts because voters in reorganized districts, in approving their statutorily-required reorganization plan, had already approved some type of transportation system that did not include the charging of fees; addressing the statute to reorganized districts would have created an "obvious impairment of existing legal relationships."[104] On this basis, the Court found that the only difference between reorganized and non-reorganized districts is that in reorganized districts only the voters could approve a bus service fee, whereas in non-reorganized districts the local school board may, on its own authority, require a bus fee.[105] This difference, the Court concluded, stemmed from voluntary agreements made by the voters rather than any irrational basis in the statute, and therefore the Court would find no equal protection violation.[106]

Justice Marshall dissented, disagreeing with the majority's analysis and holding.[107] His dissent focused on whether the state's action discriminated against the poor by not providing a basic education,[108] in contrast to the majority's focus on the provision of transportation services.[109] Reminding the Court of his dissent in *Rodriguez*,[110] Justice Marshall stated that he viewed the majority's opinion as a "retreat from the promise of equal educational opportunity."[111]

Rather than choosing labels by which the Court should analyze equal protection claims, Justice Marshall preferred to focus on identifying and analyzing the real interests at stake.[112] Specifically, Justice Marshall suggested that the Court should look to "'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.'"[113]

While acknowledging that classifications of wealth do not automatically require strict scrutiny, Justice Marshall pointed out that wealth classifications do "have a measure of special constitutional significance."[114] Moreover, Justice Marshall continued, the "extraor-

---

102. *Kadrmas*, 108 S. Ct. at 2490.
103. *Id.*
104. *Id.* (quoting Brief for Appellees at 16).
105. *Kadrmas*, 108 S. Ct. at 2490-91.
106. *Id.* at 2491.
107. *Id.* Justice Brennan joined Justice Marshall's dissent.
108. *Id.*
109. *Id.*
110. 411 U.S. at 71.
111. *Kadrmas*, 108 S. Ct. at 2491.
112. *Id.* at 2492.
113. *Id.* (quoting Dandridge v. Williams, 397 U.S. 471, 521 (1970) (Marshall, J., dissenting)).
114. *Kadrmas*, 108 S. Ct. at 2492.

dinary nature" of a person's interest in education "cannot be denied."[115] Finally, because the statute's justification rested solely on fiscal considerations, the state's interest "is therefore insubstantial; it does not begin to justify the discrimination challenged here."[116] Thus, for Justice Marshall, the statute created an unreasonable obstacle to the advancement of the poor and frustrated the intent of the fourteenth amendment, which was "to abolish caste legislation."[117]

Justice Stevens' brief dissent applied his notion of the rational basis test to the statute.[118] He first identified the actual purpose behind the statute's discriminatory classification as encouraging reorganization to improve the schools while relieving parents of concerns about transportation costs.[119] Given this purpose, it was "perfectly clear" to Justice Stevens that bus service was an important component of education in North Dakota and that, once districts had voted to approve or disapprove of reorganization, no justification remained for "allowing the nonreorganized districts to place an obstacle in the paths of poor children seeking an education in some parts of the State that has been removed in other parts of the State."[120] Thus, following his own criteria for rationality,[121] Justice Stevens saw no rational basis to support the state's purpose.[122]

C. Equal Protection and Education After Kadrmas

Kadrmas stands as a recent example of the Court's method of applying the equal protection clause. The Court continues to analyze equal protection claims by selecting one of three tiers of review. However, unlike in the past when the tiers-of-analysis approach was interpreted as sufficiently flexible to encompass "'unique circumstances'"[123] that might allow for a "'unique confluence of theories and rationales,'"[124] the Court has returned to a rigid choice

---

115. *Id.* at 2493. Justice Marshall also stated, "'it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education'" (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)), and noted that "education is not 'merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation'" (quoting Plyler v. Doe, 457 U.S. 202, 221 (1982)).

116. *Kadrmas*, 108 S. Ct. at 2494 (Marshall, J., dissenting).

117. *Id.* at 2493.

118. *Id.* at 2494-95. Justice Blackmun joined Justice Stevens' dissent.

119. *Id.* (citing the North Dakota Supreme Court's decision in *Kadrmas*, 402 N.W.2d 897, 903 (N.D. 1987)).

120. *Kadrmas*, 108 S. Ct. at 2495.

121. City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring) ("elements of legitimacy and neutrality that must always characterize the performance of the sovereign's duty to govern impartially").

122. *Kadrmas*, 108 S. Ct. at 2495.

123. *Id.* at 2488 (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

124. *Id.* (quoting *Plyler*, 457 U.S. at 243 (Burger, C.J., dissenting)).

of tiers for examining equal protection claims.[125] Moreover, a majority of the Court now appears to have a clear understanding of the limits of the equal protection clause and of the analytic method for selecting a tier of review.[126]

Briefly, equal protection analysis, in the Court's present view, requires a presumption of rational basis review.[127] This presumption can only be refuted and rational basis displaced by a higher tier of review when one of the previously-recognized prerequisites exists. Specifically, when the Court finds a fundamental right infringed or a suspect class involved, it will apply strict scrutiny.[128] The Court will employ "heightened," or middle-tier, scrutiny only when it perceives classifications based on sex or illegitimacy.[129] As suggested by Justice Marshall, the Court's analysis is now a "facile"[130] approach that adheres to a rule-based analysis rather than a consideration of the competing state and individual interests.[131]

In *Kadrmas*, the Court eschewed the more flexible approach to equal protection evident in *Plyler*[132] and more recent cases,[133] an

---

125. Justice O'Connor noted at the outset that in upholding the statute the Court was "[a]pplying well-established equal protection principles." *Kadrmas*, 108 S. Ct. at 2484.

126. "[W]e are evidently being urged to apply a form of strict or 'heightened' scrutiny to the North Dakota statute. Doing so would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases, a step we decline to take." *Id.* at 2487.

127. "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundmental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Id.* (quoting San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973)).

128. *Kadrmas*, 108 S. Ct. at 2487.

129. *Id.*

130. *Id.* at 2491 (Marshall, J., dissenting).

131. This latter method of analysis has been termed a "sliding scale" approach or a "balancing" methodology. *See* Hutchinson, *supra* note 7, at 193; Aleinikoff, *supra* note 80, at 971. Both of these commentators noted that *Plyler* represented a movement by the Court toward the balancing of competing interests in equal protection review.

132. *See* Plyler v. Doe, 457 U.S. 202, 231 (1982) (Marshall, J., concurring).

133. *See, e.g.*, City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985) (zoning ordinance requiring a special use permit for housing the mentally ill in a residential area). The Court in *Cleburne* purportedly refused to apply middle-tier scrutiny to the ordinance, yet the ordinance was "invalidated only after being subjected to precisely the sort of probing inquiry associated with heightened scrutiny." *Id.* at 458 (Marshall, J., concurring in part and dissenting in part). Rather than relying on a traditional tier-selection analysis and upholding the Cleburne ordinance on deferential rational basis grounds, the Court scrutinized both the stated and actual purposes for the regulation. It has been suggested that this marked a shift in equal protection doctrine by the Court toward a more stringent rational basis review that focuses on impermissible legislative purposes. *See* Note, *Still Newer Equal Protection: Impermissible Purpose Review in the 1984 Term*, 53 U. CHI. L. REV. 1454, 1468-69 (1986). Like *Kadrmas*, however, it may be that *Cleburne* represented nothing more than the Court's dissatisfaction with the middle tier and a return to a simpler two-tier analysis. *See infra* notes 140-144 and accompanying text. Unlike *Kadrmas*, the rational basis review in *Cleburne* was sufficiently flexible to strike down on substantive grounds the justifications offered by the city. As the *Kadrmas* Court stated: "Social and economic legislation like the statute at issue in this case . . . 'carries with it a presumption of rationality that can only be overcome by a clear showing of arbitrariness and irrationality.'" 108 S. Ct. at 2489 (quoting Hodel v. Indiana, 452 U.S. 314, 331-32 (1981)).

approach that did not involve applying a tier of analysis in an outcome-determinative fashion. Rather, it appears that the Court has all but repudiated the *Plyler* analysis and reasoning. Although the *Kadrmas* Court did not expressly overrule the approach taken in *Plyler*, it clearly stated that *Plyler*'s holding has not been extended beyond its "unique circumstances,"[134] and that *Plyler*'s reasoning could not be extended to cover the facts of *Kadrmas*.[135] It seems clear that any vitality *Plyler* may have had for equal protection analysis has been severely limited by the holding in *Kadrmas*.[136]

More specifically, the Court in *Kadrmas* has signalled its unwillingness to employ middle tier scrutiny unless a governmental regulation discriminates on the basis of sex or illegitimacy.[137] Indeed, *Kadrmas* may indicate that a majority of the Court, by carefully limiting middle tier analysis to these two types of classifications and distinguishing *Plyler*, would prefer to abandon middle tier and its complexities altogether and return to the two-tiered equal protection universe of *Rodriguez*.[138]

In *City of Cleburne v. Cleburne Living Center, Inc.*,[139] the Court discussed the circumstances in which it should apply intermediate-level scrutiny. In *Cleburne*, the Court refused to designate the mentally retarded a "quasi-suspect class"[140] and refused to apply middle tier scrutiny to a zoning ordinance which required a special use permit for a group home for the mentally retarded.[141] The Court concluded that the way to remedy invidious legislative discrimination

---

134. 108 S. Ct. at 2487-88 (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).

135. 108 S. Ct. at 2488.

136. The Court in *Kadrmas* stated that it did not "think that the case before us today is governed by the holding in *Plyler*." *Id.*

137. *Id.* at 2487.

138. The majority's opinion cited *Rodriguez* in stating the general rule for an equal protection violation: "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose." *Kadrmas*, 108 S. Ct. at 2487. This general statement of the rule makes no mention of, or provision for, the application of middle tier scrutiny.

139. 473 U.S. 432 (1985).

140. *Id.* at 442. The Court reasoned that a quasi-suspect classification was not justified for four reasons. First, the varied needs of the mentally retarded is properly a matter for legislatures guided by professionals, not for ill-informed judges. Second, legislatures should be allowed flexibility in shaping remedies, free from excessive judicial oversight. Third, the mentally retarded are not politically powerless because legislatures have responded to their plight through legislation. Finally, if the mentally retarded were elevated to a quasi-suspect status, "it would be difficult to find a principled way to distinguish a variety of other groups." *Id.* at 442-45.

141. *Id.* at 446. Purporting to apply the rational basis test, the Court struck down the zoning regulation, finding that it was based on "an irrational prejudice against the mentally retarded." *Id.* at 450. However, the Court's analysis lacked the normal deference given to government regulations under rational basis scrutiny. Rather, the Court closely scrutinized the legitimacy of the city's purposes, examining both the city's stated and actual purposes. *Id.* at 448-450; *see Still Newer Equal Protection*, *supra* note 133, at 1468-69.

against such groups was not to designate new quasi-suspect classifications, but rather to examine whether the government was rationally justified in creating a particular classification.[142]

Clearly, the *Cleburne* Court sought to avoid any further expansion of the tier-selection framework developed by use of the middle-tier in *Craig* and *Plyler*. By discussing at length why middle-tier was inappropriate, the Court seemed to be unwilling to broaden the circumstances in which middle-tier might be employed.[143] Although the Court in *Cleburne* employed rational basis review in a particularly rigorous fashion,[144] the Court's approach suggests that, at least from a doctrinal standpoint, the Court preferred to redefine equal protection problems in terms of only two tiers. Read more broadly and with hindsight, the *Cleburne* Court may have been signalling the demise of the middle tier.

In *Kadrmas*, the Court was unwilling to sanction any expansion of the middle tier. Indeed, there was no indication in the majority's opinion that education might be a quasi-fundamental right triggering any form of heightened scrutiny. Rather, the Court quickly dismissed the appellants' claim that the statute was entitled to heightened scrutiny based on either the educational interest at stake or a classification of poor persons,[145] and easily selected rational basis as the appropriate test.[146]

As a case involving education, *Kadrmas* also reflects the views of a majority of the Court regarding the nature of educational rights. However, these views are suggested as much in what was left unsaid in the opinion as in the holding of the case.[147]

The Court carefully distinguished transportation from education and focused almost exclusively on the state's interest in regulating transportation;[148] the opinion fails to consider important the fact that the transportation involved bringing children to their schools.[149]

---

142. Justice White, writing for the majority in *Cleburne* stated:

> [t]he appropriate method of reaching [instances of discrimination] is not to create a new quasi-suspect classification and subject all governmental action based on that classification to more searching evaluation. Rather, we should look to the likelihood that governmental action premised on a particular classification is valid as a general matter, not merely to the specifics of the case before us.

Cleburne, 473 U.S. at 446.

143. *Id.* at 441-46. *See supra* note 140.

144. Justice Marshall, concurring in part and dissenting in part, referred to the Court's analysis as "'second order' rational basis review." *Id.* at 458.

145. *Kadrmas*, 108 S. Ct. at 2487.

146. *Id.* at 2489.

147. After reaffirming the proposition that education is not a fundamental right, *id.* at 2487, the Court viewed the imposition of a bus fee as an example of "social and economic legislation." *Id.* at 2489. Viewed from this perspective, the Court appeared to have little need to directly address the educational aspects of the case.

148. *See id.* at 2488, 2490-2491.

149. *See id.* at 2491 (Marshall, J., dissenting).

By focusing on the state's requirement of a user fee for transportation, the Court had little difficulty in upholding the statute under rational basis review:

> [W]e think it is quite clear that a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible. The Constitution does not require that such service be provided at all, and it is difficult to imagine why choosing to offer the service should entail a constitutional obligation to offer it for free.[150]

Moreover, by defining the deprivation in terms of transportation rather than education, the Court aligned the case more closely with those cases that upheld as rational the choice of a state to provide certain services over others.[151] By narrowly construing the issue in the case, the Court seemed less concerned with the question of education than with exemplifying rationality review within the tiers-of-analysis framework.[152]

In addition, the Court was unwilling to consider the North Dakota regulation as an obstacle to educational attainment.[153] Conspicuously absent from the Court's opinion was any recognition that education, while not a fundamental right, was an important right that previously had received special solicitude. In contrast to both *Rodriguez* and *Plyler*, where the Court recognized the vital role of education and its particular importance where equal protection claims are concerned,[154] the *Kadrmas* majority made little mention of education

---

150. *Id.* at 2489.

151. *See, e.g.*, Maher v. Roe, 432 U.S. 464 (1977) (upholding state's payment of expenses for childbirth, but not for non-therapeutic abortions); Harris v. McRae, 448 U.S. 297 (1980) (upholding denial of Medicaid benefits for abortion, but allowing funding for other medical procedures for the poor).

152. It may be that *Kadrmas* presented the Court with too easy a case. Sarita Kadrmas was not actually deprived of an education since she did find transportation for which her parents paid far more than the required school district busing fee. 108 S. Ct. at 2485. However, what if the fee had been for public school tuition? Or books and other essential and required supplies? Such fees could clearly deprive poor children of an education. The Court's two-tier analysis seems insufficient to handle such situations. Strict scrutiny would not apply since the poor is not a suspect class, nor is education a fundamental right. Also, a state may rationally be justified in spending its limited resources on services other than education since there is no affirmative constitutional requirement that states provide education. Moreover, following the reasoning of *Maher*, poor children unable to pay fees for education would be no worse off for the deprivation than if a state were to choose to provide no services at all. *Cf.* 432 U.S. at 481 (Burger, C. J., concurring). Although hypothetical, these examples suggest both the analytical difficulties with a strict adherence to two tiers of equal protection analysis and the evident social problems raised when a real deprivation of education is at issue.

153. The majority noted that in spite of the fact that the Kadrmas family suffered economic hardship by transporting Sarita, she continued to go to school, and such facts "do not imply that the Equal Protection Clause has been violated." *Kadrmas*, 108 S. Ct. at 2488.

154. *See* San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 30 (1973) ("Nothing this Court holds today in any way detracts from our historic dedication to public education."); Plyler v. Doe, 457 U.S. 202, 234 (1982) ("Classifications involving the complete denial of education are in a sense unique, for they strike at the heart of equal protection values by involving the State in the creation of permanent class distinctions.").

at all.[155] While such silence may be consonant with the majority's view of the case as one involving transportation services, it does bespeak a "retreat"[156] from the proposition that education is "'perhaps the most important function of state and local governments.'"[157]

IV. CONCLUSION

Kadrmas is the most recent example of the Supreme Court's approach to equal protection in education. Much appears to have changed in the Court's equal protection analysis since *Plyler*.[158] The present Court appears to have returned to a formulaic analysis of tiers of scrutiny, eschewing a balancing approach that may more easily accommodate careful consideration of the specific interests at stake. Given the reminder from *Plyler* that "denial of education to some isolated group of children poses an affront to one of the goals of the equal protection clause: the abolition of governmental barriers presenting unreasonable obstacles to advancement on the basis of individual merit,"[159] the Court's decision to overlook the educational impact of the statute in *Kadrmas* is all the more surprising. By failing to consider the educational interest at stake and simplifying its approach to equal protection claims in education, the Court has signalled its return to rigid tier analysis of claims under the equal protection clause.

JEFFREY JENKINS

---

155. *Cf.* 108 S. Ct at 2487.

156. *Id.* at 2491 (Marshall, J. dissenting).

157. *Id.* (quoting Brown v. Bd. of Educ., 347 U.S. 483, 493 (1954)).

158. Of course, the makeup of the Court has changed since *Plyler* as well. *See supra* note 11. It is interesting to note that all three cases, *Rodriguez*, *Plyler* and *Kadrmas*, were five-to-four decisions. Since Justice Powell, who concurred in the majority opinion of *Plyler*, was replaced by Justice Kennedy, who joined the *Kadrmas* majority, it is tempting to speculate about both how Justice Powell might have ruled in *Kadrmas* and what Justice Kennedy's views are on equal protection in education.

In *Rodriguez*, Justice Powell suggested that a total deprivation of educational opportunity may present a meritorious argument for heightened scrutiny. 411 U.S. at 37. Also, Justice Powell agreed that *Plyler* called for "heightened" review because of the penalty imposed on children who were victims of their circumstances. 457 U.S. at 238. Coupling this with his finding that the state's interest was insubstantial compared to the denial of education, *id.* at 239, he arguably would have found, at a minimum, the need for closer scrutiny than rational basis in *Kadrmas*.

Justice Kennedy's silent agreement with the majority in *Kadrmas* must speak for itself until a future case allows him to write on the topic.

159. 457 U.S. at 221-222.