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Articles

William F. Foster* and
Gayle Pinheiro**

Constitutional Protection of the Right to an Education

I. *Introduction*

The education of its citizenry is often recognized as one of the most important public services provided by the state. The history of the rise and development of public education in the provinces of Canada reveals, above all, the influence of the Protestant and Roman Catholic churches.[1] The educational philosophy, aims and broader objectives of the public education system reflected the moral and religious doctrines of the faith which had sponsored the founding of the institution.[2] Yet there also existed a pervasive belief among the general populace in the power of education to support and nourish basic democratic values. Moreover, any judicial or legislative involvement with educational issues tended to centre on the constitutional protection for separate schools and the rights of linguistic minorities to educational services in their mother tongue.[3]

A new issue now threatens to compete for attention with these traditional values. Downward trends in educational achievement by students in at least the public sector of the educational system[4] have raised widespread and serious concerns over the quality of the education provided. Furthermore, government restraint (if not parsimony) in the funding of education has created serious doubts as to the ability of the system to accommodate the wide range of demands made of it while improving the literacy levels of those who pass through it. These factors, coupled with popular movements for greater accountability in education, raise, it is suggested, a fundamental question for the legal system — what

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1. *See generally* Sissons, *Church and State in Canadian Education* (1959).
2. *See generally* Wallace, *A History of the University of Toronto* (1927); Sissons, *A History of the University of Victoria* (1952).
3. *See, eg., Quebec Association of Protestant School Boards* v. *A.G. Quebec*, [1984] 2 S.C.R. 66. *See also* Bale, "Law, Politics and the Manitoba School Question: Supreme Court and Privy Council" (1985), 63 Can. B. Rev. 461.
4. Nikifourk, "Why Our Teachers Can't Teach", Quest Magazine, September 1984, at 35.

role, if any, should legal mechanisms play in the struggle to ensure that each child receives a high quality education?

The importance of education to society as a whole, over and above the personal and financial advantages that accrue to the educated individual, has produced a broad spectrum of scholarship on the function of the educational system within society.[5] By comparison, legal scholarship in education has been restricted largely to questions of equal access and equal opportunity — both concepts interpreted as establishing a prohibition against discrimination based on race and, more recently, on mental and physical disability in the provision of educational services. But legal mechanisms protecting equal access to educational services are meaningless without further controls over the quality of educational services provided. The value of educational services to the individual can only be measured by the quality of instruction received.[6] Yet the decision of the U.S. Supreme Court in *Brown* v. *Board of Education*[7] stands as the lone judicial pronouncement that equality of educational opportunity must include an evaluation of the quality of educational services provided.

However, a consensus seems to be emerging that a crisis now exists in the public school system, because of its failure to impart basic knowledge to individuals. Present illiteracy trends demonstrate that traditional political mechanisms, local control and legislative reform, have failed to ensure every individual a standard of educational achievement appropriate to becoming a fully functioning member of society. If it is accepted that an individual's interest in educational services is a "fundamental" right that extends beyond questions of access to include the quality of services received, legal mechanisms designed to protect educational interests must address policies having an adverse effect on the quality of services provided; and the general reluctance to employ legal mechanisms to devise a standard to regulate the quality of instruction provided in the public school system must be re-evaluated.

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5. Throughout the modern era, education has been hailed as a cornerstone of democracy and economic advancement. It is seen as the primary cultural vehicle through which a society rejuvenates its values and aspirations: Butts & Cremin, *A History of Education in American Culture* (1955); Katz & Mattingly, ed's, *Education and Social Change: Themes from Ontario's Past* (1975); and Dewey, *Democracy and Education* (1957).

6. ". . . [T]he poor man, whom the law does not allow to take an ear of corn when starving, nor a pair of shoes for his freezing feet, is allowed to put his hand in the pocket of the rich and say, you shall educate me, not as you will, but as I will: not alone in the elements, but, by further provision, in the languages, in sciences, in the useful and in elegant arts". Ralph Waldo Emerson, "Education", in Rippa, ed., *Educational Ideas in America: A Documentary History* 176 (1969).

7. *Brown* v. *Board of Education*, 347 U.S. 483 (1954).

It is, of course, arguable that legal structures of "rights" and "duties" may be inappropriate mechanisms for most dispute resolution and adjudication within the educational system.

> From a legalistic standpoint, amassing evidence, finding witnesses, and being mentally prepared to do legal battle may be a legitimate way to conduct one's affairs. However, the workings of the education system are not and should not be analogous to those of the courtroom. A co-operative attitude is of little importance in judicial cases, but it is crucial in education... [otherwise] education will be radically transformed into a *(sic)* disputatious arena in which enormous energy is wasted in attempting to demonstrate the primacy of one set of "facts" over another.[8]

Nevertheless, a closer inquiry into the administrative structure and objectives of the educational system is required before the dispute resolution structure of legally enforceable "rights" can be dismissed.

Even if it is accepted that the primary purpose of the educational system is to confer benefits on students and that the interests of students and educators are generally compatible, the vital importance of education requires that students must possess some legally recognizable interest in the process, allowing them to challenge educational procedures, decisions or policies adopted by school boards or administrators.[9] And when the interests of students and educators do conflict, the resolution of such conflicts should not be left to the traditional model of a benevolent dictatorship of professional educators.

Yet courts, often upholding the powers and expertise of local educational authorities, have proven reluctant to intervene in student-teacher or student-school board disputes, thereby leaving a student with no independent adjudicative body in which to protect his interest in receiving an effective education. School authorities, for example, have a legitimate interest in promulgating rules and regulations designed to ensure order and discipline within public schools. However, the interest of central educational authorities in maintaining order and discipline should not be held to override the student's interest in an effective education, fair procedures in evaluation, promotion and dismissal, equal educational opportunity, and the opportunity to argue that such interests have been severely curtailed or even denied by the actions of educational

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8. Hodder, "The Education Act (Ontario) 1980" (1984), 15:3 Interchange 44 at 46.
9. The educational process is often regarded as asymetrical — the teacher instructs and the student is expected to execute the required task. Furthermore, the discretion granted educators in regulating a student's academic and extra-curricular activities is broad. *See* Hollander, *Legal Handbook for Educators* 85-116 (1978), for a discussion of the professional discretion of educators in an American setting, and Mackay, *Education Law in Canada* (1982) for a similar discussion in the Canadian setting.

authorities. A greater balance is required in the dispute resolution process available within the educational setting.

> That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes.[10]

Both the structure of the educational system, which localizes power in the hands of educational authorities, and the spirit of its objective to inculcate rational thought, require a system of dispute resolution ensuring the student independent and impartial adjudication. For this reason, the concept of "right to an education" is at least plausible as a way of conceiving the question here in issue.

II. *Framework of the Inquiry*

Education is a vast and complex field. It is also a lifelong activity carried out by a number of social groups — the family, civic, religious and volunteer organizations, governmental agencies, business, the media and the like — in addition to the formal school system. However, the following discussion of the proper classification of an individual's interest in educational services deals primarily with the public education sector — that sector to which the Canadian *Charter of Rights and Freedoms* might apply since it is a matter "within the authority of the legislature of each province".[11]

A thorough examination of the question of whether there exists a right to an education and, if so, the proper scope of such a right, is fundamental in establishing the role of the courts in reviewing educational policies in general. This right may be based on constitutional principles of fundamental justice and equal protection, or upon statutory enactments or the duties of parents under the common law. However, this paper only addresses the question whether the right may be constitutionally based.[12]

The structure of analysis to be followed may be stated briefly. First, regard will be had to a variety of arguments maintaining that education deserves constitutional protection by virtue of its central role in the development of the individual and the betterment of society at large. Next, the judgment of the Supreme Court of the United States in *San*

10. *West Virginia* v. *Barnette*, 319 U.S. 624 (1943) at 637.
11. Section 32(1), *Charter of Rights and Freedoms*, Part 1 of the *Constitution Act, 1982* being Schedule B of the *Canada Act 1983* (U.K.), c. 11 (hereinafter cited as the *Charter*).
12. For a discussion of the right to an education and the need for its constitutional protection in a Canadian context, see MacKay, "Public Education in Nova Scotia: Legal Rights, Fleeting Privileges or Political Rhetoric?" (1984), 8 Dalhousie L.J. 137.

Antonio Independent School District v. *Rodriguez*,[13] which held that education was not constitutionally protected, will be examined. This decision, rather than being considered as definitively denying a constitutional right to an education, can be used, it is suggested, to construct a constitutional right to an education under the due process and equal protection provisions of the American constitution and the fundamental justice and equal protection and equal benefit provisions of the Canadian constitution.

It is to the applicability of the foregoing principles to the educational arena that the balance of this paper is addressed. While the terminology used in the Canadian constitution differs from that found in the American constitution, arguably similar concepts exist therein. Indeed, fundamental justice in the Canadian *Charter* recently has been interpreted as ensuring substantive as well as procedural protection; that is, along the broad models of due process theory elaborated in the United States. Again, in speaking of equal protection and equal benefit of the law, and given the character, purpose, and larger objectives of the *Charter*, parallels seem to exist with American principles of equal protection and opportunity. Consequently, the analysis of the fundamental justice and equal protection and benefit arguments will be comparative, beginning with an examination of relevant American jurisprudence (which is considerably more extensive in these areas). Regard will then be had to Canadian materials to determine where parallel principles or constructions may be attempted.

The critical task in evaluating the aforementioned principles as legal mechanisms to protect an individual's interest in an education is to explore their impact on judicial approaches to the review of political and administrative decision-making. An optimal protective framework constructed on the basis of these principles will help to legitimate increased judicial intervention in areas of educational policy most likely to give rise to litigation and will permit greater protection of the individual's interest in an education without embroiling the courts in educational policy issues.

Two opposing models of the substantive limits of a right to an education are utilized in this paper. The first model focuses on the individual student and argues that persons have a right to be educated "to the limits of their capacities". This model was adopted by the state of Illinois in 1970.[14] The second model focuses on educational output and

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13. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).
14. Art. X, s. 1 of the *Illinois Constitution*.

argues that the right to an education encompasses the right to achieve a minimum level of proficiency in basic literacy skills.[15]

The harm, or legally recognizable injury, to be redressed through the recognition of a constitutionally protected "right to an education" must also be elaborated. Basically, inequality of educational opportunity — defined broadly in terms of both access to educational facilities and of the quality of educational services offered — represents discrimination in the provision of government services. Given general societal prohibitions against discrimination, and the recognized importance of the individual's interest in receiving high quality educational services,[16] the issue becomes how judicial review of educational decisions may best be structured rather than whether judicial review of educational decisions is warranted.

Recognition of a right to an education would extend legal principles to areas heretofore unregulated through formal adjudicative mechanisms. The process undertaken in this paper is an attempt to construct a model of constitutional interpretation that permits the judiciary to distinguish legitimate from illegitimate policy considerations in areas where the individual interest affected is fundamental.

III. *Education: A Fundamental Right?*

It must be noted that a right to an education is not among the rights explicitly guaranteed either by the Canadian *Charter of Rights and Freedoms* or the American Constitution. Moreover, the nature of a right to an education differs substantially from the more traditional civil and political rights, such as freedom of speech or assembly, which do not require that government confer a benefit.

Fundamental rights are often perceived as limitations on government action. Under the *Charter of Rights and Freedoms,* legislation that impinges upon an individual's protected rights is invalid unless passed under the override clause in section 33, or demonstrably a reasonable limit prescribed by law and justified in a free and democratic society.[17] In the United States, a standard of strict judicial scrutiny, which denies the legislative scheme the benefit of the usual presumption of validity, is applied to such legislation. This standard, which compels the state to demonstrate "compelling state interests" before the legislative scheme

15. "The constitutional value of education, like that of voting, depends upon rigorous equality. Inequalities in education produce "unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural and political activity of our society". Ratner, "A New Legal Duty for Urban Schools: Effective Education in Basic Skills" (1985), 63 Texas L. Rev. 776.

16. *Serrano* v. *Priest,* 487 P. 2d 1241 (1971) at 1257, citing *San Francisco Unified School Dist.* v. *Johnson,* 479 P. 2d 669 (1971) at 676.

17. S. 1, *Charter.*

will be upheld, is reserved, however, for cases involving "laws that operate to the disadvantage of suspect classes or interfere with the exercise of fundamental rights and liberties explicitly or implicitly protected by the constitution".[18] If it could be established successfully that an individual's interest in an education was a fundamental right, the courts might become less secure in habitually deferring, in their review of the formation and implementation of educational policies, to the expertise of pedagogical authorities, or the vagaries of the political process.

Furthermore, the existence of a fundamental right to an education may have a significant effect on the standard of care imposed both on educators in the performance of their duties and on legislators in allocating resources to the educational system. Generally speaking, United States courts have refused to uphold legislative schemes allotting insufficient funds and thus failing to ensure that the rights of all recipients are respected. The courts have utilized the prohibitions against discrimination and arbitrary classification to require governmental authorities to ensure the provision of adequate services. Consequently, in such areas as the provision of special services for physically or mentally handicapped youngsters, the existence of a fundamental right could counter government arguments that it is providing the maximum amount of services possible within its budget.

Thus, even if it is accepted that students have a right to an education, it still is necessary to inquire whether this right should be accorded constitutional protection by virtue of its fundamental role in society.[19] There are several arguments which can be made in favour of affording the right to an education such protection.

1. *Education: An Egalitarian Liberty*

Egalitarian liberties, claims to equality of opportunity in access to educational or employment situations, have been the liberties most neglected by the judiciary in constitutional interpretation in Canada.[20] Because equality is fundamental to the proper exercise of political

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18. For a general, introductory discussion of standards of judicial review in fundamental rights litigation, see Tribe, *American Constitutional Law* (1978).
19. There may also be an argument that the right to an education is explicitly protected by s. 93 of the *BNA Act* 1867, 30-31 Vict., c. 3 (U.K.) (now called the *Constitution Act, 1867*) which protects denominational schools. Section 93 of the *BNA Act* has been narrowly interpreted as protecting primarily those rights and privileges which relate to denominational schools: *Ottawa Separate School Trustees* v. *Mackell*, [1917] A.C. 62 (P.C.) at 71-74. An in-depth analysis of the scope of protection afforded under s. 93 is beyond the scope of this paper. However, on this subject, see Bale, *supra*, note 3.
20. Laskin, "Civil Liberties" (1959), 37 Can. Bar Rev. 77 at 80-82.

liberties, such as free speech, and serves to protect the dignity of the individual, egalitarian liberties should be provided with constitutional protections: "And — at least where education is concerned — the protection afforded by the equal protection guarantee does not stop at the poverty line. It also addresses inequalities within the category of 'non-needy' families."[21]

However, it is possible to argue that an individual has a vital interest in a number of services — the provisions of adequate housing and sufficient food, for example — and that it would be unwise to extend constitutional protection to such a wide variety of interests. Thus, many argue that a distinction must be drawn between rights dependent on the restriction of government activity — traditional fundamental liberties or rights — and those dependent on social consensus and the formulation of government policies. Government programs like welfare or public education, by their very nature, require entitlement criteria, resource distribution hierarchies and political control mechanisms, such as locally-elected school boards. The constitutionalization of government benefit schemes could supposedly hinder government efforts to administer such schemes by allowing ineligible recipients to contest the deprivation of their benefits by legal means.[22]

Be that as it may, the theoretical distinction between rights that depend on restricting government action and rights that require positive action on the part of government can be characterized as a false dichotomy where the issue to be determined is the degree of deference afforded by the judiciary in reviewing government policy decisions. Many of the benefits available under modern welfare legislation incorporate passive elements (which merely restrict government action) and active elements (which call on the government to confer positive benefits) within the same legislative scheme. It would be illogical to restrict access to judicial review to those elements of such a scheme characterized as passive. Once a substantive individual right has been threatened, the judiciary must consider the legislative scheme in its entirety to avoid violating the purpose of the enactment. It is difficult then to maintain a rights/privilege distinction when applying the kinds of standard used by the modern law.[23]

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21. *Hartzell* v. *Connell*, 201 Cal. Rpt. 601 (1984) at 618.

22. "The operation of a welfare state is a new experiment for our Nation. For this reason . . . I feel that new experiments in carrying out a welfare program should not be frozen into our constitutional structure. They shall be left, as are other legislative determinations, to the . . . legislatures that people elect to make our laws." *Goldberg* v. *Kelly*, 397 U.S. 254 (1969) at 277-78 (Justice Black dissenting).

23. "Especially today, a person may have discretionary rights, that is to say, his right to do something depends on establishing that this falls under some general and often vague standard

Where the right is dependent on positive government action, it is no less deserving of judicial protection. Furthermore, the protection of welfare rights need not entail the extension of judicial discretion beyond traditional legal conceptions of an impartial, non-politicized judiciary. The framework required would allow the judiciary to determine the validity of policy considerations employed in providing welfare benefits without requiring that they create, implement and administer the schemes in question. The classification of interests not expressly provided constitutional protection is perhaps a political process as well as an exercise in legal reasoning.[24]

2. *Education: A Utilitarian Perspective*

Further, a fundamental right to an education may also be based on arguments of social utility. The pivotal role played by educational services in contemporary society has been acknowledged.[25] A proper education is a prerequisite to reasoned exercise of political and economic liberties. Justification for the existence of a right to an education can be found in international human rights documents, classic political pronouncements, and philosophical theories of justice.

Thus, for example, the existence of a fundamental right to an education is recognized in three separate international human rights instruments to which Canada is a signatory: the *Universal Declaration of Human Rights,*[26] the *Declaration of the Rights of the Child,*[27] and the *International Covenant on Economic, Social and Culltural Rights.*[28] The spirit of the international enactments concerning the right to an education is that a well-educated global population will help to achieve world peace. Both Article 26 of the *Universal Declaration* and Article 13 of the *International Covenant* denote the goals of education to be the full

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such as what is 'reasonable', 'fair', or 'in the public interest' . . . . The relationship between judicial decisions based on such 'open-ended' criteria and the decisions of other branches of government is best seen by considering standards which, *prima facie,* are very similar to the kinds of consideration which the latter commonly invoke". Bell, *Policy Arguments in Judicial Decisions* 38 (1983).

24. See, in this regard, the dissenting judgement of Marshall J. in *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 110-16.

25. *See, eg., Brown* v. *Board of Education,* 347 U.S. 483 (1954) at 493, where the court observed, "Today, education is perhaps the most important function of state and local government". *See also* Dewey, *supra,* note 5.

26. U.N. Doc. A/811, 1948, Art. 26.

27. U.N. G/A Res. 1386 (XIV), Nov. 20, 1959, Principle 7.

28. UN G/A Res. 2200A (XXI), 16 Dec. 1966 (entered into force on January 3, 1976), Art. 13. The right to an education is also protected under the Human Rights Codes of a number of provinces. *See, eg., Saskatchewan Human Rights Code,* R.S.S. 1978, c. S-9, s. 13(1); *Quebec Charter of Human Rights and Freedoms,* 2R.S.Q. 1977, c. C-12, art. 40.

development of the human personality and the promotion of "understanding, tolerance and friendship among all nations, racial or religious groups [to] further the activities of the United Nations for the maintenance of peace". Principle 7 of the *Declaration of the Rights of the Child* requires that a child be given an education "to develop his abilities, his individual judgement, . . . and to become a useful member of society".

Indeed, public education is the primary modern means through which a society transmits its culture to the young. The power of the educational system in this regard cannot be seriously questioned.[29] Judicial pronouncements creating or establishing rights for students within the education system have cited the role of the educational system in training future citizens as the justification for legal intervention.[30] Schools seek to impart respect for democratic principles and institutions through a variety of techniques and procedures. Perhaps the best indication of the effect of schooling on the exercise of political rights is the direct correlation between the level of schooling obtained and the exercise of the franchise. In fact, many critics of the educational system argue that the system has become a microcosm of adult concerns rather than an environment which fosters learning for pleasure.[31]

However, arguments that an education helps to ensure the quality of constitutional rights possessed by individuals may be somewhat more problematic to construct. Even assuming that equal educational opportunity can be achieved in the substantive sense of equal access, equal resources and the like, disadvantaged children nevertheless may continue to attain lower levels of academic achievement and remain impervious to the quality of their basic rights.[32] Social factors other than education undoubtedly also affect how involved an individual will become in the democratic process.[33] Providing the individual with an

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29. *See generally,* Wishy, *The Child and the Republic* (1968) for a discussion of the historical evolution of public education as a socializing agent.
30. For example, the U.S. Supreme Court has observed, "It can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the Schoolhouse gate". *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969) at 506.
31. Holt, *How Children Fail* (1965). *But see , contra,* Frankena, "The Concept of Education Today", in Doyle, ed., *Educational Judgements* 19 (1973).
32. Illich, *Deschooling Society* 6 (1971), has stated that: "It should be obvious that even with schools of equal quality a poor child can seldom catch up with a rich one . . . poor children lack most of the educational opportunities which are casually available to the middle class child . . . So the poorer student will generally fall behind so long as he depends on school for advancement or learning."
33. The relationship between educational achievement and exercise of the franchise, nonetheless, is established. *See* United States Department of Commerce, Bureau of the Census, Voting and Registration in the Election of November 1968, Current Population Reports, Series

education, it could be argued, only attacks a symptom of a more pervasive social inequality.

Although there is no guarantee that an individual who receives an education will be more diligent in the exercise of his basic rights, sociological data demonstrate that educated individuals are more likely to become active on the community level.[34] Thus, while education alone cannot overcome the effects of a disadvantaged economic position, it may afford the individual increased choice. Once possessed of the skills required to exercise basic rights of speech, assembly, or the franchise, the individual may choose the circumstances under which he will become involved rather than being permanently excluded because of a lack of such skills. The importance of ensuring that the individual is able to choose to become involved in the exercise of basic rights — and will possess the skills to participate effectively — then becomes readily apparent.[35] Thus, it is argued that a lack of education is an objective shackle to effective participation.[36]

Constitutional protection of political liberties does not, of course, guarantee the individual "the most effective" speech or "the most informed electoral choice".[37] Nevertheless, enshrining a right within the constitution gives it a special and peculiar status.[38] As a minimum, it should be accepted that this status requires that the individual will have the opportunity to acquire "effective speech" or "informed electoral choice". If constitutional rights cannot be overtly infringed or withdrawn by government action, they should not be rendered void and superfluous by denying individuals the opportunity to acquire an effective education.[39]

P-20, No. 192, p.17, Table 4. In Canada, *see generally*, Mischler, *Political Participation in Canada* (1979) and Butler & Stokes, *Political Change in Canada* (1979).

34. Mischler, *id.;* J. Coleman et al., *Equality of Educational Opportunity* (1966).

35. As Rand J. has noted: "... Canadian Government is in substance the will of the majority expressed directly or indirectly through popular assemblies .... Parliamentary government postulates a capacity in men, acting freely and under self-restraints, to govern themselves; and that advance is best served in the degree achieved of individual liberation from subjective as well as objective shackles". *Switzman* v. *Ebling*, [1957] S.C.R. 285 at 358.

36. *See* authorities cited *supra*, notes 33 and 34.

37. *See: San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

38. Subject, of course, in Canada, to the reasonable limits clause in s. 1 of the *Charter*, which states that the rights and freedoms therein guaranteed are subject: "... only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society"; and the statutory override provision in s. 33 of the *Charter*.

39. As has been stated, "education also supports each and every other value of a democratic society — participation, communication and social mobility, to name but a few". *Serrano* v. *Priest*, 487 P. 2d 1241 (Cal. Sup. Ct., 1971) at 1258, citing Coons, Clune, & Sugarman, "Educational Opportunity: A Workable Constitutional Test for State Financial Structures" (1969), 57 Cal. L. Rev. 300 at 362-63.

However, the instrumentality of an education goes well beyond basic considerations such as speech and electoral choice.[40] Education, in fact, touches the exercise of all four categories of individual liberties: political liberties, economic liberties, legal liberties, and egalitarian liberties. Therefore, the close relationship between education and lifestyle and between education and political activity may justify arguments that education should be raised to the status of a constitutional right on the basis of utilitarian considerations — in short, the proper exercise of the majority of constitutional rights requires that the individual possess an education.

3. *Other Considerations*

In addition, it must be acknowledged that, with the evolution of a state-supported system of public education, the government has acquired a virtual monopoly on the dissemination of information to children of compulsory schooling age. Across Canada, provincial governments have assumed the responsibility of regulating the educational curriculum, methods of instruction, and teacher certification. The public educational system is currently the only formal structure established to impart basic skills and knowledge to a broad cross-section of citizens. In short, there is no present viable alternative to government-sponsored formal educational structures. Furthermore, the traditional aim of modern educational institutions, to provide fair equality of opportunity to all,[41] becomes increasingly significant to the maintenance of democratic

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40. In *Serrano* v. *Priest*, 487 P. 2d 1241 (1971) at 1258-59 the California Supreme Court held that education should be classified as a "fundamental interest" because of its "distinctive and priceless function" in society. The Court isolated five aspects of the educational system which distinguished it from other government services:

> First, education is essential in maintaining . . . "free enterprise deomocracy" — that is, preserving an individual's opportunity to compete successfully in the economic marketplace, despite a disadvantaged background. . . .
>
> Second, education is universally relevant. . . . Every person benefits from an education. . . .
>
> Third, public education continues over a lengthy period of life — between 10 and 13 years. Few other government services have such sustained . . . contact with the recipient. . . .
>
> Fourth, education is unmatched in the extent to which it molds the personality of the youth of society . . . public education attempts to shape a child's personal development in a manner chosen . . . by the state. . . .
> Finally, education is so important that the state has made it compulsory. . . .

41. Education has traditionally been viewed in Canada as an equalizing force in society. *See* Sissons, *supra*, note 1, at 19. The view of education as an equalizing force developed somewhat later in the United States. *See* Butts & Cremin, *supra*, note 5, and Erikson, *Childhood and Society* (1964).

structures as a society matures.[42] "Only against the background of a just basic structure, including a just political constitution and a just arrangement of economic and social institutions, can one say that the requisite just procedure exists."[43] The nature of the educational undertaking, the dependence of the participants on the services received and the importance of educational achievement in the broader social context creates substantial justification for allowing legal redress even though such redress is directed to the remediation of a non-traditional harm — inequality of educational opportunity and achievement — which is ongoing and may be the result of a number of causal factors.

The role of the educational system has been justified in a number of different ways. Perhaps the most popular argument is that an education is essential for an individual to become a fully functioning member of society.[44] As Epictetus observed: "Only the educated are free".[45] Others have urged that a well-educated population is a prerequisite to maintaining democratic structures and ideals.[46] It can also be argued that an effective education — one that imparts knowledge of basic skills and trains the individual to logical thought and analysis — forms the basis of individual dignity and self-respect:

> To be reduced to life-long dependance on the support of others, however — even supposing this to be forthcoming — might itself be regarded as an unacceptable humiliation and therefore as a harm from which the individual is entitled to be protected.[47]

The role played by the educational system in the personal development of the individual may serve as a more functional justification for arguments that the right to an education is deserving of constitutional protection. Each individual should be entitled to achieve a normative standard of literacy as a basic minimum. While individuals enter the educational system possessed of widely variant academic talents and levels of motivation (inequalities which the system, in effect, is powerless to alter) it is crucial that a distinction be drawn between the product of

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42. Litigation that has arisen over perceived inequality of educational opportunity has become increasingly sophisticated in its demands for judicial involvement in the allocation of educational resources. From the essentially non-interventionist stance in *Plessy* v. *Ferguson,* 163 U.S. 537 (1896) — the so-called "separate but equal doctrine" — courts are now prepared to strike down regional desegregation plans if they fail to provide special arrangements for students engaged in extra-curricular activities. *See: Kelly* v. *Metropolitan City Bd. of Ed.,* 492 F. Supp. 167 (M.D. Tenn. 1980).

43. Rawls, *A Theory of Justice* 87 (1973).

44. *See: Brown* v. *Board of Education,* 347, U.S. 483 (1954).

45. *Discourses,* Book II, Chap. 1.

46. The most convincing treatment of the role of educational institutions in democracy is fictional. *See* Clavell, *The Children's Story* (1963).

47. Wringe, *Children's Rights* 146 (1981).

an education — the substantive knowledge imparted — and its processes. Many children fail to develop the basic thought processes that would allow them to face daily problems with confidence.[48] And poorly developed thought processes then become a type of cognitive albatross that may inhibit both further effective learning and personal development.[49] In a society that prizes learning and achievement, there can be no dignity for the individual deprived of an opportunity to develop basic structures of effective thought. Yet the individual's right to dignity is a clearly accepted tenet of both constitutional law and international human rights agreements.

Consequently, education should be accorded a preferred status because it is intimately tied to the development of individual dignity and administered by a monopolistic structure which, in many ways, denies the individual any opportunity or choice of alternative educational opportunities.[50] If constitutional guarantees restraining government and majoritarian discrimination are to remain fundamental constructs of social ordering, the scope of their protection must expand to non-traditional interests, such as an education, which have come to assume a dominant influence on individual development.

IV. *Constitutional Protection of the Right to Education: An American View*

It is arguable that the Canadian courts, as their American counterparts, will be reluctant to accept interests not expressly listed in the Constitution as deserving of constitutional protection. Nevertheless, the foregoing arguments that the right to an education should be so accepted on the basis that it is inherent to the dignity of the individual, or that it is a prerequisite to the meaningful exercise of a broad variety of constitutional rights should be sufficient to overcome judicial reluctance to expand the interests subject to constitutional protection.[51] However, that has not been the case yet in America.

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48. Holt, *supra*, note 31, at 56-57.
49. Holt, *How Children Learn* 7-3 (1970).
50. *See, eg.,* Coons & Sugarman, *Education By Choice* (1978) for a discussion of educational voucher plans which would give students and their parents greater choice in the type of educational experience they received.
51. The majority of the U.S. Supreme court, after considering the arguments raised in *Serrano* (that education should be recognized as a fundamental interest) stated that it found such arguments "unpersuasive": *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 37. Lower courts faced with school finance litigation after *Rodriguez* have not all followed the Supreme Court's reasoning. *See, eg., Hartzell* v. *Connell,* 201 Cal. Rptr. 601 (1984); *Frederick L.* v. *Thomas,* 419 F. Supp. 960 (E.D. Pa 1976), *aff'd,* 557 F. 2d 373 (3d Circ. 1977).

The most comprehensive judicial pronouncement rendered to date by the United States Supreme Court on the question of whether there exists a right to an education is found in *San Antonio Independent School District* v. *Rodriguez.*[52] In a five-to-four judgement, the Court upheld a Texas school financing scheme which resulted in radically disproportionate per pupil expenditures on an interdistrict comparison. The financing scheme required the greatest proportion of each school district's funds to be raised through property taxes levied on property within the district. In attacking the validity of the scheme, the appellees had argued that education was a "fundamental" interest; substantial interdistrict disparity in per pupil expenditure reflected the quality of educational opportunity provided to the children in each district; the effect of the scheme denied poorer children the chance to receive an education of similar quality to that offered in wealthier districts and thus violated equal protection principles.

The majority of the Supreme Court rejected the findings of the U.S. District Court that education was a fundamental interest. After citing its opinion in *Brown* v. *Board of Education,* characterizing education as "a principal instrument in awakening the child to cultural values, ... preparing him for later professional training, and ... helping him to adjust normally to his environment",[53] Mr. Justice Powell, for the majority, stated simply: "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."[54]

In other words, the Court was of the view that it could not assume jurisdiction to characterize interests as fundamental, and therefore subject to constitutional protection, but rather, that the proper role for the Court in constitutional litigation simply was to recognize established constitutional rights and afford them the level of protection the Constitution demanded.

Despite the formalistic overtones of the reasoning employed by the majority, the *Rodriguez* judgement should not be considered determinative of the proper classification of a right to an education. The majority accepted both the proposition that a right not explicitly guaranteed by the Constitution may be implicitly guaranteed, and the fact that some "identifiable quantum of education" may be a constitutionally protected prerequisite to the meaningful exercise of other basic rights.[55]

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52. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973).
53. *Brown* v. *Board of Education,* 347 U.S. 483 (1954) at 493.
54. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 30.
55. *Id.,* at 36-37.

The appellee's unsuccessful argument in *Rodriguez* was that disparate funding led to relative differences in the quality of education available to children in poorer districts. Therefore, in view of the majority judgment, a litigant seeking to establish education as a fundamental interest would have two options: he could accept the *Rodriguez* reasoning and attempt to demonstrate that the authorities involved failed to provide him with an "identifiable minimum quantum of education"; or he could challenge the validity of the arguments in the majority opinion.

The concept of a constitutionally-protected minimum quantum of education corresponds to the educational output model. From a judicial standpoint, the issue would then become how to determine what type of education could be designated as "minimum." Justice Powell hints at two standards: total denial of educational opportunity, or the provision of "each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process."[56] To employ the standard requiring total denial of educational opportunity is excessive. The majority accepted earlier court pronouncements on the weight of an individual's interest in an education, and pointed out that the plaintiff introduced no evidence to refute the State's assertion that a minimum education was provided to every child. To require complete denial of educational opportunity would be anomalous because of the accepted weight of the interest involved and, by analogy, the standard of review employed in other types of welfare rights litigation.[57]

On the other hand, to adopt a constitutional standard which required that every child be given an opportunity to acquire basic skills necessary to exercise rights of speech and political rights would quickly plunge the courts into the position of having to review educational policy. By explicitly recognizing the close linkage between education and the exercise of other constitutional rights, the majority accepted utilitarian justifications for extending constitutional protection to education. Relative disparities in funding did not violate the right to an education. Such disparities did not bar the individual from receiving an education which would allow him "full participation" in the political process: "As long as the state did not define its educational objective the Court in

56. *Id.*, at 38-39.

57. *See, eg., Goldberg* v. *Kelly*, 397 U.S. 254 (1969) (AFDC payments are a proprietary interest deserving of due process protection and, therefore, cannot be terminated without prior notice and hearing); and *Lau* v. *Nichols*, 414 U.S. 563 (1974) (failure to provide English lessons to students of Chinese ancestry violated equal protection under #601 of the Civil Rights Act 1964, 42 U.S.C. #2000 d.).

Rodriguez allowed the state wide latitude in providing the means, no matter how disproportional to that vague end..."[58]

If the objective of the educational system is defined in utilitarian terms — effective use of rights of speech and political rights — and it can be demonstrated by accepted methods of evaluation that such objectives are not being attained, the amount of latitude afforded to the state would have to be reduced. Educational authorities could be asked to demonstrate that their methods of student classification were a valid means to attain the constitutional objective, that such students had been given appropriate instruction, and that their structure of program and instructional material had a basis in fact.[59]

There remains, therefore, sufficient room to maneuvre within the majority decision in *Rodriguez* to construct a substantive right to an education. The conception of a minimum-protected quantum of education must be continually re-evaluated. Even if only a substantive minimum education is constitutionally protected, nevertheless the minimum standard provided must remain relevant to the constitutional objective of full participation.

Thus, it is necessary to examine the proper roles of the constitutional principles of due process and fundamental justice on the one hand, and equal protection and opportunity or benefit on the other, in the review of educational policy and decision-making. In each instance regard is first had to the American experience in applying these principles to the field of education before an analysis is made of the Canadian situation and the likely impact of the *Charter* on the right to an education.

V. *Due Process and Fundamental Justice in the Educational Setting*

1. *Due Process: The American Experience*

Before undertaking an analysis of the majority opinion in *Rodriguez,* it may be helpful to summarize briefly basic precepts of American constitutional law on due process. Conventionally, the Fifth and Fourteenth amendments of the United States Constitution dealing with due process have been used in cases involving criminal procedure and legislation which created unequal classifications for its application.[60] The interpretation of the due process clause in the Fourteenth Amendment

58. Haggerty & Sacks, "Education of the Handicapped: Towards a Definition of an Appropriate Education" (1977), 50 Temple L.Q. 961 at 982.

59. The standard proposed has been utilized by many courts in litigation under *The Education For All Handicapped Children Act,* Pub. L. No. 94-142, 89 Stat. 775 (codified as amended at 20 U.S.C. No's. 1401-1461 (1976 & Supp. III 1979). *See: Frederick L.* v. *Thomas,* 419 F. Supp. 960 (E.D. Pa., 1976), *aff'd* 557 F. 2d 373 (3d Circ. 1977).

60. *See generally,* Tribe, *supra,* note 18.

has fluctuated between the specific guarantees of the Fifth Amendment, notions of substantive due process and a "natural law" orientation.[61] However, the flexible instrumental approach to due process principles which has emerged from recent Supreme Court decisions makes due process considerations applicable to the field of education as a means of ensuring students equal protection of the law and also as a means to protect their substantive interests of personality.

Primarily, due process principles would be applicable in the context of disciplinary actions such as suspension or dismissal. However, an attempt could be made to apply due process requirements to the more substantive aspects of the educational process such as the grading of examinations or clinical performance. Also, by applying due process requirements to such aspects of educational policy as tracking, or the distribution of college-bound as opposed to vocational programs available in certain school districts, arbitrary patterns of resource allocation could be challenged.

The procedural and substantive areas of educational policy for which a litigant may seek judicial review under the due process clause fall within the dichotomy developed in the cases between procedural and substantive due process.

> Having identified a specific state policy, one can ask, substantively, whether the content of that policy comports with various constitutional limits on the ends government may pursue and the means it may employ. Given an attempted invocation of the policy to someone's disadvantage, one can ask, procedurally, whether the application of the policy has been sufficiently accurate as a means of implementing its purposes.[62]

After developing the traditional structure of due process analysis, regard is had to a novel tripartite basis of analysis in due process litigation proposed by Lawrence H. Tribe.

(a) *Due Process: The Traditional View*

In due process litigation, the preliminary question to be determined by the courts is whether the state action complained of threatens a protected liberty or property interest. Then the nature of the process required to ensure constitutional protection of the interest in question must be

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61. *Hurtado* v. *California,* 110 U.S. 516 (1883). In this case the Supreme Court allowed the state of California to abolish indictment by grand jury in criminal trials and adopt prosecution by information despite the existence of Fifth Amendment guarantees of trial by jury. "Since the substitution of prosecution by information . . . did not impair the right to a judicial trial on the merits, it did not offend the due process concept. Thus was laid the foundation for a concept of procedural due process, divorced from the specifically enumerated procedural limitations of the Bill of Rights and oriented toward the broadly conceived 'fair trial' standard". Kauper, *Frontiers of Constitutional Liberty* 152 (The Thomas M. Cooley Lectures, 7th Series, 1956).
62. Tribe, "Structural Due Process" (1975), 10 Harv. C.R.-C.L. L. Rev. 268-321, at 290.

identified. In recent years the United States Supreme Court has developed a utilitarian interest-balancing approach to the nature of the process it will require. By tailoring the structure of the review required to the specific circumstances of the litigation of which it is seized, the Court has expanded the scope of procedural due process principles while simultaneously attempting to avoid unduly burdening the administrative structure established by the legislature.

Both American federal and state courts have accepted the basic premise that an individual's interest in receiving an education is properly classified as a protected interest deserving of some form of constitutional protection.[63] The due process clause, thus, may be invoked if the individual's interest in an education is classified as a property interest and the administrative action complained of does not constitute merely *de minimis* deprivation.[64] It is necessary to note that an appeal under the due process clause need not be based on arguments which assert a constitutional right to an education. Protected interests in property generally are not founded in the Constitution. "Rather, they are created and their dimensions are defined by an independent source such as state statutes or rules entitling the citizen to certain benefits."[65]

In two student disciplinary cases, *Goss* v. *Lopez,*[66] and *Ingraham* v. *Wright,*[67] the Supreme Court recognized that students possessed substantial interests which deserved due process protection. In *Goss,* the 10-day suspension of students charged with disruptive and disobedient conduct in connection with a series of student demonstrations was held to be in violation of constitutional protection afforded by the due process clause.[68] In *Ingraham,* while the court did not impose due process principles on educational authorities, because the risk of punishment being excessive or unnecessary was met by adequate redress from tort remedies and criminal sanctions, it was recognized that the practice of imposing corporal punishment without either notice to the student or allowing him a chance to be heard did impinge on a student's interest in "freedom from bodily restraint and punishment."[69]

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63. *See: Goss* v. *Lopez,* 419 U.S. 565 (1975); *Ingraham* v. *Wright,* 430 U.S. 651 (1977); *Serrano* v. *Priest,* 487 P. 2d 1241 (1971); *Mills* v. *Bd. of Education,* 348 F. Supp. 866 (1972).

64. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) at 481 (a court must look to the nature of the interest rather than its weight). *See also* Note, "Due Process, Due Politics and Due Respect: Three Models of Legitimate School Governance" (1981), 94 Harv. L. R. 1104.

65. *Morrissey* v. *Brewer,* 408 U.S. 471 (1972) at 577.

66. *Goss* v. *Lopez,* 419 U.S. 465 (1975).

67. *Ingraham* v. *Wright,* 430 U.S. 651 (1977).

68. "The student's interest is to avoid unfair or mistaken conclusion from the educational process, with all of its unfortunate consequences". *Goss* v. *Lopez,* 419 U.S. 565 (1975) at 579.

69. *Ingraham* v. *Wright,* 430 U.S. 651 (1977) at 672-74. The Court also implied that under an instrumental analysis the costs of providing procedural safeguards could be considered

Traditionally, in imposing due process requirements the courts have required that common law procedural guarantees be followed[70] although the type of procedure imposed varies widely with the circumstances presented. While it has been suggested that due process procedural requirements are generally imposed to minimize risks of error, such a limitation of the due process concept cannot be supported by jurisprudence.[71] Due process has continually been interpreted as extending beyond a review of the minimum conceptual standard essential to a fair trial to encompass an examination of evidence bearing on the standards adopted.

In *Goss,* the Supreme Court established a skeletal procedural framework for the review of suspensions and dismissals.[72] A more elaborate review procedure, the Court held, would be impractical considering the number of brief disciplinary suspensions and the administrative costs of allowing students to secure counsel and cross-examine witnesses.[73] The interest-balancing engaged in by the Court is clearly evident. The student's interest in not being deprived of the benefits of an education are weighed against both the administrative costs of implementing due process proceedings, and the effect of instituting such proceedings on the practice of using suspensions as a disciplinary measure[74] — a procedure which the Court recognized as a valid.

Much has been written since the *Goss* decision, criticizing the instrumental analysis utilized by the Court to determine the nature of the process due. Nevertheless, it does appear that because the Court did impose only a skeletal procedural requirement on educational authorities, the decision attempts to accommodate non-legal values, such as a progressive and participatory conception of the proper mode of

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excessive when compared with the perceived educational gain. While there seems to be little divergence of opinion on the manner in which the courts determine the existence of a liberty or property interest deserving of due process protection, the Supreme Court's use of instrumental analysis to determine the type of process due has raised a storm of criticism and controversy.

70. *See generally,* Tribe, *supra,* note 18, as to these requirements.

71. Due process has been invoked to protect the right to work (*Truax* v. *Raich,* 239 U.S. 33 (1915)) and the right to teach a foreign language (*Meyer* v. *Nebraska,* 262 U.S. 390 (1923)).

72. A student who faced suspension would have to be given "some kind of notice and afforded some kind of hearing . . . the timing and content of the notice and the nature of the hearing will depend on appropriate accommodation of the competing interests involved". *Goss* v. *Lopez,* 419 U.S. 565 (1975) at 579.

73. "To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities . . . and, by diverting resources, cost more than it would save in educational effectiveness. . . . [F]urther formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly . . . but also destroy its effectiveness as part of the teaching process". *Id.,* at 583.

74. *See* Note, *supra,* note 64, at 1111.

governance in public education institutions. However, when compared with the application of the instrumental analysis in *Ingraham*, where the Court declined to impose any due process limitations before school authorities could administer corporal punishment, the strength of the instrumental analysis model as predicative of the actions of the Court may be called into question: "The utility calculations are so crude and provide a standard so elastic as to justify virtually any conclusion."[75]

Any model of analysis in due process cases adopted by the courts must be tailored to accommodate the historical concerns which led to the development of a residuary procedural guarantee, and the circumstances surrounding the deprivation of the interest in question. Therefore, a strict model of interpretation of the due process clause is incompatible with its function as a residuary procedural guarantee of fairness.[76]

Freezing the meaning of due process, which in the final analysis is more a moral command that a strictly jural precept, destroys the chief virtue of its generality: its elasticity.[77] The flexibility of the formulation of due process requirements in *Goss* may not only be considered the strength of the judgment, but also a proper basic principle on which to base future judicial forays into educational policy under due process requirements.

The concept of constitutional limitations of due process arise from the perception that governmental power is potentially destructive of the conditions of individual freedom.[78] In addition to offering protection to interests which constitute conditions of individual freedom, due process principles ensure the individual of an appropriate remedy for the vindication of private rights.[79] An interest which is recognized as deserving of due process protection, then, should not be deprived of such protection by an overtly formalistic analytical model which may deny the individual an appropriate remedy. While this approach is open to the criticism that it is vague and raises the question whether there was constitutional warrant for process so little like adjudication,[80] a second interpretation of the Court's holding seems to have been overlooked.

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75. Tribe, *supra*, note 18, at 540.
76. "Thus the guarantees of due process, though having their roots in Magna Carta's *'per legem terrae'* and considered as procedural safeguards 'against executive usurpation and tyranny', have in this country become bulwarks also against arbitrary legislation". *Hurtado* v. *California*, 110 U.S. 516 (1883) at 532.
77. Kadish, "Methodology & Criteria in Due Process Adjudication — A Survey and Criticism" (1957), 66 Yale L.J. 319 at 341.
78. "In framing a government which is to be administered by men over men, the great difficulty lies in this: you must first enable the government to control the governed; and in the next place oblige it to control itself". *The Federalist* No. 51, at p. 337 (Modern Lib. ed).
79. Mott, *Due Process of Law* 292 (1973).
80. Friendly, "Some Kind of Hearing" (1975), 123 U. Pa. L. Rev. 1267.

An earlier line of Supreme Court decisions — *West Virginia* v. *Barrette,*[81] to *Tinker* v. *Des Moines*[82] — simply had extended general constitutional principles to the student/teacher relationship.[83] Clearly, however, such principles must be modified within the educational setting to allow for the effective management of schools and students. Nevertheless, with the ruling in *Goss,* the Court gave notice to educational authorities that they would intervene to ensure some minimal protection for the exercise of student's constitutional rights against arbitrary decisions.

Cases which followed *Goss* — *Ingraham* v. *Wright*[84] and *Horowitz* v. *Board of Curators of the University of Missouri*[85] — need not be viewed as a retreat by the Court in upholding its earlier decisions to extend constitutional principles to the educational setting.

In *Ingraham,* as already noted, the Court found that while a student's interest in freedom from bodily restraint and punishment was deserving of Fourteenth Amendment protection, it did not require procedural guarantees given that adequate alternative avenues of redress existed. Writing for the majority, Justice Powell characterized the issue as the determination of the educational value of corporal punishment, a policy decision of such magnitude that was best left to "normal processes of community debate and legislative action".[86] Mandating procedural requirements for some instances of punishment would require the formulation of broad principles applicable to punishment generally. The Court was also of the view that, even under the instrumental analysis, such procedures should not be imposed — notwithstanding that the need for procedural safeguards was clear — because they would saddle the school authorities with excessive costs. The *Ingraham* decision is reconcilable with *Goss* in so much as it recognizes the case law which extends constitutional principles to the school setting and supports the instrumental analysis model as a method of determining what process is due. *Ingraham,* however, should not be considered strong precedent on the issue of the application of due process principles in the educational setting, because the Court then goes on to characterize the issue as one of policy, and justifies its holding on policy grounds.

In *Horowitz,* the plaintiff student alleged that she had been dismissed from medical school for poor academic performance without due process

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81. *West Virginia* v. *Barrete,* 319 U.S. 624 (1943).
82. *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969).
83. Wright, "The Constitution on Campus" (1969), 22 Vanderbilt L. Rev. 1027 at 1059.
84. *Ingraham* v. *Wright,* 430 U.S. 651 (1977).
85. *Horowitz* v. *Board of Curators of the University of Missouri,* 435 U.S. 78 (1978).
86. *Ingraham* v. *Wright,* 430 U.S. 651 (1977) at 681.

of law. The court avoided deciding whether due process requirements should extend to academic dismissals, holding that on the facts presented it was unnecessary to determine whether an academic dismissal from professional school infringed a constitutionally-protected interest.[87] Nonetheless, the Court was unanimous in holding that, if a constitutionally-protected interest had been found to exist, the elaborate review procedures provided by the University satisfied Fourteenth Amendment requirements. The judgment unexplainably then goes on to analyze the competing interests involved and cites the risk of "deterioration of many beneficial aspects of the student-faculty relationship," and the perception that a due process hearing would be "useless or harmful in finding out the truth as to scholarship" as grounds for concluding that even the minimal hearing outlined in *Goss* is not required in academic dismissals.[88]

In *Horowitz,* the majority view was that due process principles should be confined in their application to disciplinary procedures: academic judgments were of necessity "more subjective and evaluative than the typical factual questions presented in the average disciplinary decision."[89] But a distinction between objective determinable facts and subjective valuation is unsuited to the educational setting. All disciplinary actions encompass a subjective valuation as to the individual's culpability; conversely, academic evaluations incorporate a significant portion of objectively determinable facts — leaving such considerations as the form and grammar used by the student aside — the main question to be determined being whether the responses given were correct.[90]

One commentator has characterized *Ingraham* and *Horowitz* as a radical break with traditional modes of due process analysis in that the concern of the Court shifts from the accuracy of the process to the legitimacy of the process.[91] Another has observed:

> On the one hand, the procedural approximation (of consent) would seem to be the fullest possible participation in the decisional process. On the other hand, notions of expertise and majoritarian consensus represent classic bases of authority. Decisions are legitimated either by the professionalism of the schoolmaster *(Horowitz)* or by local democratic control of schools *(Ingraham)*.[92]

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87. *Horowitz* v. *Board of Curators of the University of Missouri,* 435 U.S. 78 (1978) at 86, n. 3.
88. *Id.,* at 87.
89. *Id.,* at 90.
90. Justice Powell acknowledged the strain inherent in building a distinction on the bases of objective as opposed to subjective facts in his concurring judgement. *Id.,* at 95.
91. Tribe, *supra,* note 18, at 560.
92. Note, *supra,* note 64, at 1121.

Furthermore,

> [W]hen the claim being advanced is that the processes are not legitimate — that they do not conform with due process of law — then more is required than the observation that the processes are ... "professional" or "democratic."[93]

Classifying due process requirements as alternatively seeking to ensure the accuracy of a decision, or seeking to legitimate a decision, may be an erroneous truncation of the due process clause. It is submitted that, from a historical standpoint as well as in modern judgments, the Fourteenth Amendment is recognized as performing both a legitimating function and a jural function, in the sense of ensuring the accuracy of information presented. Therefore, the main issue in evaluating the analytical model adopted by the judiciary is not whether it favours the legitimation over the jural function; rather, once again, the issue is how well the model protects individual rights.

Of the three decisions examined, *Goss* emerges as the model of due process analysis best suited to application within the educational setting. Unlike the decisions in *Ingraham* and *Horowitz, Goss* clearly specifies the individual interest deserving of protection and establishes a flexible framework of review which adapts with the severity of the deprivation to be imposed. Furthermore, the extension by *Goss* of constitutional principles to the educational setting follows a number of earlier decisions assuring free exercise of the constitutional rights by students within the school setting.[94] Both *Ingraham* and *Horowitz,* by comparison, simply decline to involve the courts in educational issues on the basis of policy considerations.

Constitutional due process guarantees represent a residual procedural safeguard to ensure the individual an appropriate remedy for the vindication of his rights.[95] If the courts are to defer their power of review on such bases, relying on local debate and the democratic process to ensure the vindication of private rights, constitutional due process guarantees will be meaningless in any area of public policy which the court characterizes as overly technical or complex.[96] With the growing

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93. *Id.,* at 1123.

94. *See, eg., West Virginia* v. *Barnette,* 319 U.S. 624 (1943); *Tinker* v. *Des Moines Independent Community School District,* 393 U.S. 503 (1969).

95. Mott, *supra,* note 79, at 292.

96. One can compare the attitude of the Courts in enforcing desegregation, which has required a virtual flood of litigation and court decrees (Emerson, Haber & Dorsen, *Political and Civil Rights in the United States,* c. 17-18 (3rd ed. 1967); and Bickel, "The Decade of School Desegregation: Progress and Prospects" (1964), 64 Colum. L. Rev. 193, to the early negative reactions of the Courts to educational malpractice claims (*Peter W.* v. *San Francisco United School District,* 131 Cal. Rpt. 854 (1976); *Donohue* v. *Copiague Union Free School District,*

number and importance of government entitlements to services and privileges,[97] the need for judicial review in areas of public policy will increase proportionately.[98] Further, denial of responsibility for review of the decisions of education authorities by the judiciary would be unwise: "... institutions [such as educational institutions] capable of perpetuating their habitual norms even after these norms have ceased to reflect anything like a consensus make a weak case for judicial deference."[99] Due process requirements represent a flexible and effective judicial vehicle to review the decisions of school authorities.

(b) *Substantive Due Process*

The *Goss* formulation of procedural due process can also serve as the basis of a substantive due process analytical framework. To protect the individual's basic entitlement to an education, judicial review must extend beyond the procedural aspects of disciplinary and academic dismissals. Specifically, problems of resource discrimination which are perpetuated without substantial justification could be made subject to judicial review under a model of substantive due process which focused on "the structures through which policies are both formed and applied, and formed in the very process of being applied."[100]

The birth of the substantive due process doctrine is credited to the judgment of Justice Miller in the *Slaughterhouse* case,[101] in which the Court reaffirmed the distinction between federal and state spheres of activity.

> The Court thus came to perceive a perfect complementarity between the citizen's right to "life, liberty and property" and the state's authority to preserve [such rights] ... through the exercise of its implied powers within settled common law standards. This complementarity permitted the turn of the century Court to believe that the federal judiciary could protect citizen autonomy without intruding upon the state's sphere — because any state action that *invaded* the liberty or property of its citizens was, by definition, beyond the state's sphere.[102]

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47 N.Y.S. 2d 440 (1978), aff'd 418 N.Y.S. 2d 375 (1979)). The degree of judicial involvement in the latter category of situations probably would be no greater than that undertaken by the courts in enforcing desegration, yet the courts assert in malpractice litigation that supervision of the educational system is too technical and beyond their expertise.

97. Reich, "The New Property" (1964), 73 Yale L.J. 733.
98. Reich, "Individual Rights and Social Welfare: The Emerging Legal Issues" (1965), 74 Yale L.J. 1245.
99. Tribe, *supra*, note 62, at 317.
100. *Id.*, at 269.
101. 83 U.S. (16 Wall) 36 (1873).
102. Tribe, *supra*, note 18, at 422.

From a modern perspective, decisions rendered by the Court under the substantive due process doctrine were decidedly anti-egalitarian in their focus. During the so-called "*Lochner* era" the Court invalidated a series of minimum wage and labour standard statutes by holding that such legislation infringed the worker's right to freedom of contract.[103] To approach substantive due process litigation from a modern perspective may dwarf the significance of the theory in a shadow of presentism.

Substantive due process doctrine arose as a result of the perceived need for the federal judiciary to protect the rights of citizens against state governments. The perceived function of governments under the public/private distinction prevalent during the *Lochner* era was to promote the total public good:

> . . . any statute which was imposed upon individual or corporations in order to redistribute resources and thus benefit some persons at the expense of others (for that is how redistribution was then conceived) would extend beyond the implicit boundaries of legislative authority. Such a law would thus violate natural rights of property and contract, rights lying at the very core of the private domain.[104]

Yet where the legislation sought to protect groups considered incapable of protecting themselves (such as women or minors), state intervention limiting contractual freedom was upheld.[105] Logically, as other groups came to be regarded as incapable of protecting their interests, government could introduce protective mechanisms to ensure group interests. Inconsistency in the application of substantive due process theory persisted throughout the *Lochner* era and may have contributed to its demise in 1937 in *West Coast Hotel* v. *Parrish*.[106]

For present purposes, the substantive due process model is significant because it invokes judicial review where implied limitations on government action have been breached. Immediately the issue arises as to how such implied limitations are to be developed and applied. Certainly it can no longer be argued that a "natural" social or economic order exists which the courts may validly prevent the legislature from upsetting. The Courts, then, must either imply limitations from normative standards or defer to the institutional competence and authority of government or

103. It should also be noted that the Court upheld more legislation than it invalidated during the "Lochner era". *Compare: Lochner* v. *New York*, 198 U.S. (1905) (invalidating state 10 hr. daily/60 hr. weekly maximum employment hours legislation), with *Muller* v. *Oregon*, 208 U.S. 412 (1908) (upholding a maximum hours statute for minors). For a comprehensive treatment of the "Lochner era" see Small, ed., *The Constitution of the United States* 1392-99, 1427-87 (1964 ed.).

104. Tribe, *supra*, note 18, at 439.

105. *See, eg., Muller* v. *Oregon*, 208 U.S. 412 (1908).

106. *West Coast Hotel* v. *Parrish*, 300 U.S. 379 (1937).

administrative bodies. Whatever the choice, there is an assumption of power by the judiciary — they retain the discretion to decide whether or not to intervene in any given situation.[107]

> As long as judges do not fully and irrevocably repudiate the mission of *occasionally* rejecting majoritarian political choices, there is no honest way for them to escape the burdens of substantive judgement *in every case*. Now of course the *right* substantive judgement cannot be wholly insensitive to matters of institutional competence and democratic legitimacy.[108]

Tribe's structural due process model attempts to incorporate the flexibility of substantive due process doctrine and place the concept of individual participation in the democratic process — one of the oldest and most basic democratic values — as the normative standard on which implied limitations on government can be constructed so as to legitimize judicial review in the area of egalitarian liberties.

(c) *Structural Due Process Theory*

A major stumbling block to active judicial review of educational policies, in both Canada and the United States, is a constitutional division of powers which awards primary jurisdiction over education to local (provincial or state) government. In the United States, the power of the state to regulate affairs within its jurisdiction has been subject to limitation by fundamental law,[109] tests of minimum rationality,[110] and tests based on "suspect classifications", or dealing with "constitutionally fundamental" interests.[111]

Any attempt to challenge resource discrimination between school districts on a substantive basis as constituting an infringement of a constitutional right would be hard-pressed to escape the holding in *Rodriguez*[112] — indeed, it would seem that the majority of educational policy decisions would pass substantive due process requirements as a valid exercise of state power. But under traditional procedural due process theory, litigants could attempt to establish an entitlement to an

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107. Tribe, *supra*, note 18, at 454.
108. *Id.*
109. *Ferguson* v. *Skrupa*, 372 U.S. 726 (1963).
110. *O'Brien* v. *Skinner*, 414 U.S. 524 (1974).
111. *See, eg., Brown* v. *Board of Education*, 347 U.S. 483 (1954) (race); *Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) (wealth); *Takahashi* v. *Fish and Game Commission*, 334 U.S. 410 (1948) (national origin).
112. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973). The Court denied everything above a minimum quantum of education the status of a constitutionally fundamental interest and dismissed district wealth as suspect classification in state financing schemes.

education arising from compulsory attendance laws, and argue that resource discrimination constituted a substantive deprivation of that entitlement.[113]

The issue to be determined at the hearing would be twofold: (1) Was there in fact resource discrimination as complained of by the litigants which resulted in substantial deprivation? and (2) Was the policy on which such discrimination was based — for example, school funding primarily through local property tax revenues — violative of due process requirements? Given that the establishment of resource allocation schemes has been characterized by the Court in *Rodriguez* as a matter of policy and thus outside the scope of procedural due process review,[114] on what basis can the court play a more active role in protecting individual rights adversely affected by such decisions while escaping the arbitrary substantive limitations on legislative power?

A possible solution has been suggested by Tribe. He argues that in certain situations, areas in which policy determinations need to reflect rapidly changing norms and affect important individual interests in liberty and property, due process principles may require a shift from the examination of the structure or application of determinate rules to a system of individualized hearings.[115] In areas where no concrete social consensus exists, review processes must somehow be made more responsive than simply administering a determinate rule: "... from an instrumental viewpoint, such rule boundedness hinders the eventual coalescence of a new social consensus about the area of current flux".[116] Indeed the courts have intervened in issues "at least partly frozen by

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113. Once the entitlement was established (and, after all, in *Goss* v. *Lopez,* 419 U.S. 565 (1975) entitlement to a public education was classified as a property interest) and, assuming the evidentiary burden of demonstrating the link between resource discrimination and the quality of educational services could be discharged, the deprivation would be subject to the normal constitution standards of due process (regardless of any statutory procedures afforded to contest such policies) if the procedures fell short of traditional constitutional standards. The litigants would thus be entitled to a hearing. The requisite procedure to be followed at the hearing would be determined by the severity of the deprivation precipitated by the resource discrimination unless (as was the case in *Goss*) it could be argued that a hearing with full procedural protections, including the right to lead evidence and cross-examine witnesses, was intrinsically worthwhile where the litigants claimed infringement of "substantive values" (equal educational opportunity) which affected their "personal dignity and self-respect". *Id.,* at 584.

114. "We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues. We are asked to condemn the State's judgement... In so doing, appellees would have the Court intrude in an area in which it has traditionally deferred to state legislatures. This Court has often admonished against such interferences with the State's fiscal policies. ..." *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 40.

115. *See generally,* Tribe, *supra,* note 62.

116. *Id.,* at 307.

institutional constraints" on which there "was good reason for supposing that the normal processes of legislative accommodation to changing values would not function adequately".[117]

Education is generally accepted as a significant property interest.[118] The practice of resource discrimination in education has already been pronounced by a number of state courts to be contrary to constitutional principles.[119] Furthermore, there is no fixed social consensus as to how the public educational system may be equitably funded. In forming and administering educational fiscal policy, due process principles should be construed as a legitimation process which assures the individual of a chance for effective participation in the policy making process.[120] Policy formulation in sensitive areas in education should be legitimated through a structure which facilitates dialogue between the participants and the state rather than being dictated by jurisdiction or legitimated by the professionalization of the bureaucrats responsible. Regulation of the structure of dialogue — as opposed to the substantive content of state policy — arguably, is within traditional conceptions of judicial due process review.

In issues involving disadvantaged students, to rely on the legislative process for change or reform in the educational setting is to misconstrue the nature of educational consumers as a legislative constituency. The objectives of the numerous interest groups involved in the educational setting, and the objectives of individuals not involved in any formal educational lobby, are so widely divergent that sustained political pressure around a single issue would be highly problematic.[121] Furthermore, if the attainment of literacy is the basic right to be achieved through the public educational structure, that right cannot meaningfully be protected merely by the exercise of judicial control over the right of

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117. *Id.*, at 317.

118. *Goss* v. *Lopez*, 419 U.S. 565 (1975).

119. *Serrano* v. *Priest*, 487 P. 2d 1241 (1971); *Robinson* v. *Cahill*, 303 A. 2d 273 (1973); *Van Dusartz* v. *Hatfield*, 334 F. Supp. 870 (Minn. 1971), *Milliken* v. *Green*, 203 N.W. 2d 457 (1972), rehearing granted 1973.

120. "The continuing structure of the dialogue between the state and those whose liberties its laws constrain (structural due process) seems no less appropriate a concern of the judiciary than either the substance of laws (substantive due process) or procedures by which agreed-upon rules are applied to varying factual circumstances (procedural due process)". Tribe, *supra*, note 62, at 310.

121. The conflicting forces evident in the debates over the proper course to be followed by the public educational system in the 1800s (discussed in Wishy, *supra*, note 29) remain dominant in current educational policy debates, albeit couched in more sophisticated terms. *See generally*, Coons, Clune & Sugarman, *Private Wealth and Public Education* (1970).

access to education and minimal control over the dispersion of resources.[122]

In the area of educational finance it is possible to construct a structure which reflects individual and community concerns as to what constitutes appropriate levels of education. The educational output model would place the burden on the school district to demonstrate that sufficient funds are being expended to assure that each child capable of learning has the opportunity to achieve the level of functional literacy. Where the state authorities have enacted the Illinois model that entitles each child to be educated to the extent of his capabilities, the structural due process model considered may require individualized assessment by government authorities of the expressed needs of educational districts. The actual plan of distribution and collection of funds would remain a legislative decision which must be exercised in accordance with recognized constitutional principles such as equal protection. Requiring state authorities to consider the reality of individual districts demonstrates judicial concern for the quality of dialogue between the state and citizen.[123]

The call for judicial regulation of structures of dialogue is based on the assumption that confrontation is the best method of protecting individual rights.

> Fairness can rarely be obtained by secret, one-sided determination of facts decisive of rights ... Secrecy is not congenial to truth-seeking and self-righteousness gives too slender an assurance of rightness. No better instrument has been devised ... than to give a person in jeopardy of a serious loss notice of the case against him and opportunity to meet it.[124]

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122. The Supreme Court has not hesitated to intervene in other areas "at least partly frozen by institutional constraints". (Tribe, *supra*, note 62, at 317). For example, the complexity of the abortion issue in *Roe* v. *Wade*, 410 U.S. 113 (1973) (the tax enforcement of prohibitive sanctions against wealthy private clinics, the involvement of religious principles and the nascent state of female liberation advocacy) "was good reason for supposing that the normal processes of legislative accommodation to changing values would not function adequately" (Tribe, *supra*, note 62, at 317). Similarly, when the State of Illinois passed a law barring death-scrupled jurors from juries, it was struck down by the Court, in *Witherspoon* v. *Illinois*, 319 U.S. 510 (1968), as violative of Eighth amendment due process requirements: "... one of the most important functions any jury can perform in (selecting a punishment) is to maintain a link between contemporary community values and the penal system — a link without which the determination of punishment could hardly reflect the evolving standards of decency that mark the progress of a maturing society" (at 519). The *Witherspoon* decision creates a structure through which the Eighth Amendment prohibition against cruel and unusual punishment may be linked to evolving community sentiments.

123. Indeed, a proper interchange of ideas between citizen and state should be recognized as an instrumental force in the evolution and adaptation of the legal system to the society it serves.

124. *Joint Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123 (1951) at 170 & 171-172 *per* Frankfurter J., concurring.

Within the educational setting, individualized hearings would afford the individual greater opportunity to protect substantive interests, even if only by eliminating determinate policies and opening individualized decisions to judicial review on independent constitutional principles such as the equal protection clause. The task of identifying areas of moral flux and normative transition can be left to the courts in the same manner that the task of identifying fundamental constitutional interests or combines is left to them. Principles of identification will also evolve as a society matures.[125] The interests involved are simply too fundamental to be lost in legal concerns of the structure of federalism, philosophies of judicial review, and arguments of legitimation through professionalization.[126]

Due process principles, therefore, represent a potent source of legitimacy for increased judicial review within the educational setting, given it has been widely recognized as a substantial interest deserving of such protection. In *Goss,* the Supreme Court established a flexible formula by which due process principles may be applied to school disciplinary proceedings. Once the court has determined the nature of the entitlement to be protected, it can then apply an instrumental analysis in which the severity of the deprivation is considered in conjunction with the interests of administrative efficiency to determine the nature of the process due. The *Goss* formulation of flexible due process based on a balancing of interests can serve as a theoretical basis to extend due process protection to areas such as academic dismissals, or even policy decisions such as those mandating resource discrimination.

The model of "structural" due process outlined by Tribe would allow for increased judicial review of the formation of educational policies and structures through which policies resulting in substantive deprivation are formulated and implemented. By requiring individualized hearings in areas of educational policy in normative transition, the individual would be afforded greater opportunity to participate in policy formulation. Recognition of the need for dialogue between the citizen and the state would allow nascent or emerging social consensus on sensitive policy issues to penetrate the self-perpetuating cycle of determinate bureaucratic designs; and provision of a minimal structure which the dialogue should

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125. "What emerges, therefore, is probably not a 'doctrine' of structural due process at all but rather . . . a way, obviously not free of risk, for courts to facilitate, and take part in the evolution of moral and thus legal consciousness" (Tribe, *supra,* note 62, at 321).

126. In *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 44, the majority noted the possible deleterious effects of deciding in favor of the Appellees under the Fourteenth Amendment. In *Board of Curators of the University of Missouri* v. *Horowitz,* 435 U.S. 78 (1978) at 90, the Court emphasized the professionalism of the decision-makers as a grounds for denying procedural review.

follow would enable the courts to review arbitrary policies without imposing substantive limitations on the exercise of state power.

2. *Principles of Fundamental Justice: A Canadian Perspective*

Guarantees of procedural review under section 7 of the *Charter of Rights and Freedoms* may be an equally flexible mechanism for encouraging active judicial review within the educational setting. Section 7 of the *Charter,* in its reference to principles of fundamental justice, adopts as a minimum the common law formulation of procedural fairness embodied in the principles of natural justice. Government interference with private rights is prohibited "except in accordance with principles of fundamental justice".[127]

The history and tradition of procedural review at common law — the "rules of natural justice" — differ substantially from the American due process model. However, in the recent Supreme Court of Canada judgment in the *Reference Re Section 94(2) of the B.C. Motor Vehicles Act,*[128] the Court has interpreted the phrase "fundamental justice" to encompass more than mere natural justice principles; that is, it affords more than procedural protections to the aggrieved individual. Thus the Supreme Court has moved general administrative law principles closer to the more expansive interpretation found under the American due process model. A brief review of the history of judicial review under the rules of natural justice is useful before positing a synopsis of modern administrative law principles.

(a) *Natural Justice: The Traditional View*

Principles of natural justice are often defined by reference to basic common law principles: the rule of law, *audi alteram partem,* and *nemo judex in causa sua.*[129] The rule of law is traditionally defined as equality in the application of the law:

> The idea of legal order and the rule of law can only be meaningful as a solution to the tensions in a liberal consciousness. The image of law as blind, disregarding all differences between persons except those authorized by law, only makes sense to those who see substantial differences in rank and power between persons and yet believe that these differences are not fully legitimate.[130]

127. Section 7 of the *Charter* states: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with principles of fundamental justice."
128. *Reference Re Section 94(2) of the Motor Vehicles Act,* [1986]1 W.W.R. 481 (S.C.C.).
129. *Collin* v. *Lussier,* [1983] 1 F.C. 218 at 240 (T.D.).
130. Trubeck, "Complexity and Contradiction in the Legal Order: Balbus and the Challenge of Critical Social Thought About Law" (1971), 11 Law & Soc. Rev. 529 at 546.

And the maxims *audi alteram partem* and *nemo judex in causa sua* embody standard common law notions of the type of procedural safeguards required to ensure the fair and impartial nature of the adjudicative process. In other words, the common law notions of natural justice were concerned primarily with upholding the legitimacy of the adjudication process.[131]

The law developed along two basic lines: limiting the availability of procedural review to adjudicative or quasi-judicial settings, and restricting the scope of review to procedural rather than substantive issues. Thus, traditionally, a court could review a decision under principles of natural justice, only if the decision-maker was performing a judicial or quasi-judicial function. A departure from this narrow formalistic approach occured in *Nicholson* v. *Haldimand-Norfolk Police Commissioners Board*,[132] in which the Supreme Court extended the availability of review to bodies exercising solely administrative functions where such bodies acted arbitrarily or unfairly. However, the decision neither enlarged the scope of procedural protections available nor introduced an element of substantive review. Judicial review was simply more widely available.[133]

The formalism, inherent in the initial categorization of a function as judicial, quasi-judicial, or administrative is also apparent in the structure of remedies available under the rules of natural justice and fairness.[134]

Traditional natural justice theory, then, may be viewed as a series of categorizations: once the function in question is categorized as judicial or

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131. Standard protections such as prior notice, a right to a hearing, opportunity to adequately present your case, and a right to an impartial decision based on the evidence presented, are considered generally as sufficient for a tribunal to discharge its procedural obligations under natural justice theory. *See* D. Gibson, "Enforcement of the *Canadian Charter of Rights & Freedoms*", in Tarnopolsky & Beaudoin, ed's., *The Canadian Charter of Rights & Freedoms* 489 (1982).

132. [1979] 1 S.C.R. 311.

133. Even with the broader standard of fairness set out in *Nicholson*, commentators seemed reluctant to argue that the new standard could incorporate substantive review elements. *See* Mullan, "Fairness: The New Natural Justice" (1975), 25 U.T.L.J. 281; Macdonald, "Judicial Review and Procedural Fairness in Administrative Law" (1980), 25 McGill L.J. 520; Grey, "The Duty to Act Fairly After Nicholson" (1980), 25 McGill L.J. 598; Loughlin, "Procedural Fairness: A Study of the Crisis in Administration Law Theory" (1978), 28 U.T.L.J. 215.

134. Writs of *certiorari* and *mandamus* are most commonly invoked in natural justice litigation. *Certiorari* is generally described as a supervisory device over lower courts for mistake or error of fact. As the functions of a writ of *certiorari* expanded, the writ of *mandamus* evolved into a catch-all remedy available "whenever no other remedy lay". "The grounds for invoking these remedies became relatively stable during the early 19th century, when jurisdictional control by *certiorari* became preeminent; by the time of the Judicature Acts, a coherent law of judicial review could be said to have emerged" (Macdonald, *supra*, note 133, at 528). A writ of *certiorari* is only available where the function of the public authority may be classified as judicial or quasijudicial.

quasi-judicial, the requisite procedure can be constructed from the basic principles of a right to be heard by an impartial body. The remedy available must then be determined by the initial categorization as judicial or quasi-judicial and the circumstances of the case.[135] Indeed, innovations in administrative law principles seem to founder on the long history of categorization and the conception that implied procedural or substantive review of administrative decisions is inimical to traditional common law notions of parliamentary sovereignty. However, the unprecedented multiplication of administrative agencies possessing boardly framed powers which may affect life and liberty interests has spurred administrative law to a less formalistic approach: the fairness doctrine.

Under the fairness doctrine, Mullan suggests that the primary issue before the court should be characterized as follows: "What procedural protections, if any, are necessary for this particular decision-making process?"[136] Rather than viewing procedural protections as legitimate only in an adjudicative context, Mullan proposes that the extent of procedural protection required be directly related to the seriousness of the consequences to be suffered by the individual (or the weight of the individual's interest threatened by the actions of the public authority) and the circumstances of the case.[137] By asking "What procedural protections . . . are necessary?", the fairness doctrine enables a direct functional assessment of both the weight of the individual's interest and the administrative or efficiency requirements of the public authority. Thus, the role of the court in natural justice litigation under the fairness model could be characterized as a two-step process: initially, the court would weigh the interests of the parties to determine whether the threat to individual interests was sufficient to attract procedural protection; then, the structure of procedural protection required would be tailored to the characteristics of the individual public authority to allow for administrative efficiency while protecting individual rights.

Proponents of the fairness doctrine cite two major advantages to its adoption: it would eliminate the need for an initial categorization of the function of the public authority as judicial or administrative, and it would

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135. *Id.* Macdonald maintains that the structure of procedural supervision at common law is best explained by reference to its historical beginnings: "The motivation for procedural supervision flowed less from natural law theory than from the desires of the court of King's Bench to impose its own procedures upon bodies subject to its control. . . . If supervisory control of procedures is divorced from the theory of jurisdiction *rationes materiae* and linked instead to the process of adversarial adjudication . . . an alternative intellectual justification for the concept of implied procedural review must be developed." *Id.*, at 529.

136. Mullan, *supra*, note 133, at 315.

137. *Id.*, at 300.

introduce increased flexibility in the remedies available to vindicate the interest threatened as provided in section 24(1) of the *Charter.* Opponents of the fairness doctrine consider the doctrine to be an *ad hoc* structure incapable of providing any basic principles to guide judicial review. The lack of basic principles inherent in the case-by-case approach adopted may entail an over judicalization of administrative procedure, which would paralyze administrative bodies validly endowed with powers to regulate by legislation.[138]

It is necessary, therefore, to examine the basic premises of the fairness doctrine to determine the effect of *Re Section 94(2) of the B.C. Motor Vehicle Act*[139] on the current law of procedural review, and project the relevance of procedural review arguments to the educational setting.

(b) *Principles of Fundamental Justice in the Administrative Setting*

In the Canadian setting, administrative and constitutional law mingle where the interest claimed by the applicant can be characterized as constitutionally protected; that is, a matter of life, liberty, or security of the person. To bring the individual's interest in an education under the protection of section 7 of the *Charter,* it is necessary to establish the nature of the right and the infringement or denial complained of.[140]

The scope of *Charter* rights must be determined through a purposive analysis:

> The meaning of a right or freedom guaranteed by the *Charter* was to be ascertained by an analysis of the purpose of such a guarantee; . . . [this must be done] by reference to the character and larger objects of the *Charter* . . . , to the language chosen to articulate the specific right, to the historical origins of the concept enshrined, . . . [and] to the meaning and purpose of the other specific rights and freedoms with which it is associated . . . The interpretation should be a generous rather than a legalistic one.[141]

A right to an education, it is suggested, should be implicitly recognized in the specific constitutional guarantees of either a right to liberty or a right to security of the person.

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138. Mullan vigorously denies that the case-by-case approach dictated by the fairness doctrine is *ad hoc.* Such an approach "does not mean that the law must necessarily lack principle. . . . [I]t should be possible to develop principles which will assist the court in performing its function properly — that function being the placing of the particular decision-making power in the right place on the spectrum which represents the varying content of the rules of natural justice." *Id.,* at 301.

139. *Re Section 94(2) of the B.C. Motor Vehicles Act,* [1986] 1 W.W.R. 481 (S.C.C.).

140. *Operation Dismantle* v. *The Queen,* [1985] 1 S.C.R. 440 at 481.

141. *R.* v. *Big M Drug Mart,* [1985] 1 S.C.R. 295 at 344.

The right to liberty under the *Charter* has yet to be considered fully by the Supreme Court of Canada. If a broad, purposive analysis of the right to liberty is adopted, then a right to an education should be embraced within it for education has been considered historically as an element inherent to the dignity and liberty of the individual. State intervention in the provision of educational services and the development of a public educational system, from a more fragmented structure of schools administered by local authorities, was premised upon the belief that an individual required a minimal level of instruction to escape a life of dependent ignorance.[142] The level of educational achievement required for an individual to become a functioning member of society has increased. The correlation between knowledge and individual liberty remains constant and demands constitutional recognition.

In the alternative, an individual's interest in education may be characterized as an implicit element of the right to security of the person. The phrase "security of the person" is capable of a broad range of meaning.[143] Education, though perhaps more easily characterized as a property right, merits inclusion under the rubric of security of the person, by virtue of its close nexus with the mental and physical integrity of the individual.[144]

In America a variety of welfare interests have been classified as proprietary and therefore deserving of due process protection under the Fourteenth Amendment.[145] Government benefits such as welfare payments and education clearly serve the same function as property in the hands of the individual. Education provides the individual with the tools with which he may attempt to procure the necessities of life: an income, an evocation and the ability to exercise basic civil and political freedoms.[146] But section 7 of the *Charter* contains no explicit reference to property as a protected right;[147] moreover, the majority of judicial opinion has held that no implicit protection of property interest was intended.[148]

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142. Mills, "Inaugural Address Delivered to the University of St. Andrews", in Robson, ed., *Essays on Equality, Law, and Education* 215 at 233 (1984).
143. *Singh* v. *Minister of Employment & Immigration*, [1985] 1 S.C.R. 178 at 207.
144. *See: San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) at 103 per Marshall J., dissenting.
145. *Eg., Goss* v. *Lopez*, 419 U.S. 565 (1975) (public education); *Goldberg* v. *Kelly*, 397 U.S. 254 (1969) (welfare benefits).
146. *Serrano* v. *Priest*, 487 P. 2d 1241 (1971).
147. It should be noted that the provinces resisted the inclusion of the right to property in the *Charter* because it was felt that it might hinder their attempts at regional development planning.
148. *See, eg., R.* v. *Estabrooks Pontiac* (1982), 144 D.L.R. (3d) 21 (N.B.Q.B.).

However, it is suggested that a distinction must be drawn between property broadly defined as commercial or economic interests, and proprietary interests which directly and materially affect the security of the person,[149] like education, which are deserving of procedural and substantive protection under the section 7 guarantee of principles of fundamental justice.[150] If this distinction has merit then a theory of judicial review available where the right to an education has been infringed may be found in principles of fundamental justice as is evident from the recent Supreme Court decision in *Re Section (94(2) of the B.C. Motor Vehicles Act*[151], which expanded the scope of protection afforded by section 7 of the *Charter* beyond procedural guarantees.

The issue in *Re Section 94(2) of the B.C. Motor Vehicles Act* was whether a strict liability offence which imposed penal consequences violated principles of fundamental justice. In the criminal law context, the Court stated, the scope of protection afforded under section 7 includes all fundamental tenets of the legal system. Thus, Lamer J. pointed out that the rights enumerated in sections 8-14 should form the basis of any analysis to determine what procedural or substantive protections would be required under principles of fundamental justice in a particular situation.[152]

> . . . [T]he principles of fundamental justice are to be found in the basic tenets of our legal system. They do not lie in the realm of general public policy but in the inherent domain of the judiciary as guardian of the justice system. Such an approach to the interpretation of "principles of fundamental justice" is consistent with the wording and structure of s. 7, the context of the section, *i.e.,* sections 8 to 14, and the character and larger objects of the *Charter* itself.[153]

It is suggested that the objective behind Lamer's J. formulation was to adopt a test flexible enough to protect the right infringed, yet cautious of involving the judiciary in public policy issues.

To determine the requirements of fundamental justice where the issue to be decided is entitlement to government benefits, a similarly broad focus which addresses the wording, character and larger objects of the *Charter* should also be employed. However, no enumerated listing of the type of procedures which must be afforded when dealing with

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149. *See, eg.,* the definition of liberty in *Meyer* v. *Nebraska,* 262 U.S. 390 (1922) at 399.
150. "The American courts have adopted broad definitions of property, life, and liberty interests and determine whether judicial review is appropriate by asking whether the infringement of the right is 'substantial'". Mullan also proposes a weighing of interests to determine whether judicial review is merited. Mullan, *supra,* note 133, at 315.
151. *Re Section 94(2) of the B.C. Motor Vehicles Act,* [1986] 1 W.W.R. 481 (S.C.C.).
152. *Id.,* at 493-496.
153. *Id.,* at 496.

adjudication over entitlement to government benefits exists within the *Charter*. Nevertheless, entitlement to government benefits such as education are specialized rights which require a comprehensive protection mechanism. In adopting fundamental justice as the constitutional standard, the legislature has indicated: "a will to give greater content to the words 'principles of fundamental justice', the limits of which were left for the courts to develop but within, of course, the acceptable sphere of judicial activity."[154]

Section 7 was conceived to protect the individual from arbitrary and purposive government restraints which materially affect his life, liberty or security. The interpretation of the phrase fundamental justice in the educational setting therefore should protect the integrity and objectives of the individual's right to an education — in much the same manner, one could argue, as the right to counsel or any of the other rights enumerated in sections 8 to 14 protect the accused's right to liberty.

A standard of judicial review capable of protecting the individual's interest in an education must contain elements of flexibility and restraint. The constitutionalization of the right to fair procedure has altered radically the theoretical basis on which a claim to procedural review is to be considered legitimate. The motivation for procedural supervision has become based in constitutional law concepts of individual liberty and the right not to be deprived thereof unless such deprivation can be justified within the ideological postulates of a free and democratic society. The scope of procedural review must therefore be expanded.

This expansion can best be achieved under a functional model for judicial review of educational disputes involving a three-step process. Initially, the court should determine whether the interest affected falls within those categories of rights listed in section 7. The onus should then fall on the applicant to demonstrate that the right is "substantially" threatened. Finally, where the procedures provided by the public authority to contest its actions do not conform to basic principles of fundamental justice, the court should grant an appropriate remedy to allow the individual to vindicate his rights. Thus, in the educational setting, principles of fundamental justice could be used to obtain judicial review of disciplinary actions, academic dismissals, and unequal resource allocation policies.

Generally, in situations calling for procedural review, it is sufficient to weigh the extent of the individual interest threatened against the effectiveness of the decision-making process questioned, and the administrative costs (both practical and theoretical) of mandating

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154. *Id.*

additional procedural safeguards. The weight of a student's interest in continuing his education is substantial. In the absence of a theory of substantive due process, the argument can be made that dismissals should be subject to a higher standard of procedural protection than may be concluded on an initial balancing of the interests and costs involved. To protect the full extent of an individual's interest in continuing his education from a purely procedural analysis, the courts must actively engage in mandating specific review structures — perhaps even mandating the status of the participants in such structures — and adopt a no-evidence rule for extreme cases.[155] The standard proposed goes well beyond the level of review adopted by the American courts; a more onerous standard of review is required by virtue of the nature of the interest involved and the general reluctance of the courts to review the judgment of professional educators. Otherwise, despite being widely accepted as an interest deserving of constitutional protection, a student's interest in continuing his education will lack adequate protection from arbitrary infringements.

Similarly, theories of substantive and structural fundamental justice would allow judicial review of educational policies which resulted in resource discrimination, where the application of the policy denies the claimant the opportunity to defend adequately against governmental action which is detrimental to his interests. Such an approach would permit specific inequities that often result from administrative decision-making — for example, school closings, inequalities in physical facilities, or widely disparate patterns of program allotment — to be challenged. The type of procedural protection required in any given context would depend on the weight of the educational interest infringed by the decision in question and considerations of administrative efficiency.

Where the harm resulting to an individual from a decision of the educational authorities is substantial, judicial review should be available. The burden would rest on government authorities to demonstrate that the procedural mechanisms adopted were fair and adequate in relation to the severity of the deprivation to be imposed, and that the administrative decision in question was demonstrably justified in a free and democratic society.[156]

155. *See generally*, Grey, *supra*, note 133.

156. *Re Section 94(2) of the B.C. Motor Vehicles Act*, [1986] 1 W.W.R. 481 (S.C.C.) at 513 per Wilson, J: "[If] the limit on the section 7 right has been affected through a violation of the principles of fundamental justice, the inquiry, in my view, ends there and the limit cannot be sustained under section 1. . . . I do not believe that a limit on the section 7 right which has been imposed in violation of the principles of fundamental justice can be either 'reasonable' or 'demonstrably justified in a free and democratic society'. . . . [A legislature] can only limit the section 7 right if it does so in accordance with the principles of fundamental justice and, even if it meets that test, it still has to meet the test in section 1".

The interplay of the fundamental justice requirement in section 7 and the reasonableness requirement in section 1 weaves the theories of substantive and structural due process into a single standard. An applicant could challenge a decision or policy of the educational authorities and vindicate his rights by demonstrating either that the requisite procedure was not followed or, alternatively, that principles of substantive fundamental justice were violated because the legislation did not provide him an adequate opportunity to defend his interests. Incorporated within the substantive requirement that the individual must be given the proper forum to adequately defend his interests, is the objective of providing individualized hearings to claimants in areas where policy determinations need to reflect rapidly changing norms.[157]

In the educational setting, where the parties suffer from unequal bargaining power and unequal access to information, to fully protect an individual's interest requires more than a purely procedural analysis of the structure and jurisdiction of educational authorities. Much depends, then, on how broadly the courts will be willing to interpret the rights of life, liberty, and security of the persons in deciding which decision-making authorities are compelled to provide procedural protection. Despite the fact that procedural protection has attained constitutional status, one would assume that the courts would remain somewhat tentative in becoming involved in the administrative process of public authorities. Nevertheless, an individual's interest in an education may be characterized as a liberty or security interest under section 7 — a student possesses the right to receive an education for the prescribed period and cannot be denied such rights except in accordance with basic constitutional principles.[158] The responsibility for enforcing such fundamental rights would then fall to the courts and, to fully protect the individual's interest, the courts would need to adopt an active supervisory role in the design of procedural protections. Fundamental justice theory, like the Fourteenth Amendment, can therefore be used to construct the parameters of a constitutionally based right to an education.

VI. *Equal Protection and Benefit in the Education Setting*

1. *Basic Principles*

Equal protection, like due process, emerged as a moral precept before being recognized as a legal principle.

157. See discussion of structural due process in the American setting in Tribe, *supra*, note 62.
158. It should be noted that the Supreme Court of Canada has held that the rights to life, liberty and security of the person in section 7 and "the right not to be deprived thereof . . ." must be read conjunctively and not disjunctively. *See: Re Section 94(2) of the B.C. Motor Vehicles Act*, [1986] 1 W.W.R. 481 (S.C.C.) at 494 per Lamer, J.

> Of equality I shall speak, not as a sentiment, but as a principle. ... Thus it is with all moral and political ideas. First appearing as a sentiment they awake a noble impulse, filling the soul with generous sympathy, and encouraging to congenial effort. Slowly recognized, they finally pass into a formula, to be acted upon, to be applied, to be defended in the concerns of life as principles.[159]

Interpretation of the equal protection and equal benefit principle in section 15(1) of the *Charter*, or that of equal protection in the Fourteenth Amendment of the American Constitution, must develop in a manner which allows it to defend a citizen's daily concerns. Traditionally, equal protection has been perceived as insulating citizens from the denial of benefits based on invidious classifications, such as race, gender, or wealth.[160] Because governments continue to assume a more active role in the regulation and provision of social services, the citizen's interest in equal protection extends beyond a right to non-discriminatory treatment to a right which involves an appropriate or effective level of quality treatment by government service agencies. It can be argued that equal protection, in the absence of discrimination, would invalidate all resource discrimination which lacks substantial justification.

As a constitutional concept, then, equal protection arguments may be useful in defining the parameters of an "appropriate education" which is deserving of legal protection. The extension of equal protection principles to areas of public policy absent of discrimination is not free of peril. Nonetheless, an historical analysis of the development of equal opportunity as a legal principle demonstrates that a flexible model of protection can be constructed.

Theories concerning the proper role of the judiciary in the political process have heavily influenced the development of equal opportunity doctrine. Two primary considerations emerge: that the judiciary should not act as a "super-legislature" and substitute its opinion on social policy for that of the legislature, which is accountable to its constituents; and that the judiciary should refrain from adopting an activist stand on social policy issues for fear of the adverse reaction such involvement may precipitate against its reputation as a neutral arbiter. It is necessary to address these concerns in the ensuing discussion of models of equal protection analysis and the relevance of such models to the field of education.

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159. Frank & Munro, "The Original Understanding of Equal Protection of the Laws" (1950), 50 Col. L. Rev. 131 at 137.
160. *Id.*

2. *Equal Protection: The American Experience*

Early equal protection doctrine in the United States was largely prohibitive — states were forced not to discriminate against their residents on the basis of race with respect to rights of physical security, property rights, or freedom of movement.[161] Under such a narrow formulation of equal protection doctrine the role of the court is clearly — and solely — a supervisory one. In fiscal and regulatory matters, for example, the Court has adopted a permissive standard of review which entertains a strong presumption of constitutionality and places the burden of proof on the challenging parties.[162] In such areas, some commentators have argued:

> . . . a permissive approach which does not require every classification to be drawn with mathematical nicety seems a practical necessity if the process of legislation is not to be hopelessly stymied. . . . Only when the lack of correspondence between classification [within the legislation] and [its stated] purpose is gross or when the classification is otherwise objectionable should courts intervene on equal protection grounds.[163]

In areas involving civil rights or fundamental interests, courts have constructed comprehensive analytical models of equal protection analysis to attempt to avoid the criticism that they are usurping the power of the legislature.

The decades of school litigation following the *Brown* decision, forcing the desegregation of public schools, demonstrates vividly the concerns which may arise where the courts adopt an activist stance. Critics of the Court's holding in *Brown* charged that it had acted unconstitutionally and that desegregation should have been left to the discretion of local elected officials.[164] The reality of desegregation raised deep emotions in many communities and required almost continual judicial pronouncements to carry out the Court's order across the country.[165] The difficulty of effecting mass institutional change by court order, and in the face of community opposition, has been well documented.[166] The Supreme

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161. *See* Perry, "Modern Equal Protection: A Conceptualization and Appraisal" (1979), 79 Colum. L. Rev. 1023 at 1027-28.
162. Tussman & Tenbrock, "Equal Protection of the Laws" (1948-49), 37 Calif. L. Rev. 341 at 368, n. 1.
163. Note, "Developments in the Law—Equal Protection" (1968), 82 Harv. L. Rev. 1065 at 1083.
164. *See: Cooper* v. *Aaron,* 358 U.S. 1 (1958), in which local authorities in Little Rock, Arkansas, openly challenged the constitutionality of the Court's holding in *Brown* v. *Board of Education,* 347 U.S. 483 (1954). *See also* Bickel, *supra,* note 96.
165. *See* Bickle, *id.*
166. *See generally,* Comment, "Legal Sanctions to Enforce Desegregation in the Public Schools: The Contempt Power and the Civil Rights Acts" (1956), 65 Yale L.J. 630. *See also*

Court has, seemingly, shied away from further pronouncements which would entail substantial judicial interference into state affairs. In *San Antonio Independent School District* v. *Rodriguez*,[167] the Court's disinclination to involve itself in state affairs was evident in the majority judgement:

> This case represents far more than a challenge to the manner in which Texas provides for the education of its children. We have here nothing less than a direct attack on the way in which Texas has chosen to raise and disburse state and local tax revenues.[168]

Thus, arguments invoking the equal protection clause must be sensitive to the reluctance of the courts to be seen as meddling in the jurisdiction of local governments. Clearly, however, the final responsibility for enforcing the Constitution rests with the courts. A constitutional right to equal protection cannot for the sake of consistency bow to the exigencies of federalism or finance. Constitutional litigation, therefore, "is a delicate process of adjustment inescapably involving the exercise of judgement by those whom the Constitution entrusted with the unfolding of the process".[169]

A functional model of the proper relationship between the judiciary and the legislature must be responsive to the exalted status afforded to constitutionally protected rights, and accept as given that the parameters of such rights will be modified as a society progresses. The framework of judicial analysis adopted, then, becomes of primary importance. Such a framework must address both concerns over the proper role of the judiciary in relation to elected authorities and concerns that the exercise of judicial judgement in constitutional areas will be viewed as the arbitrary imposition of personal values. The *Rodriguez* decision presents a useful contrast of frameworks of equal protection analysis.

Traditional equal protection doctrine has spawned varying standards of judicial review of state action. Where the state action threatens an economic interest, the court will simply inquire as to whether the scheme bears a rational relationship to a legitimate state purpose. On the other hand, where the state action complained of threatens a suspect class or fundamental interest, it will be subject to a strict standard of review which requires that the state demonstrate that the scheme employed is

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Note, *supra*, note 163, at 1153. where it is observed that: "Resistance to desegregation has forced judges to become strategists in the battle for equality. Such a position takes them outside traditional conceptions of the judicial role and imposes on them an essentially political task for which they have no inherent competence."

167. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973).

168. *Id.*, at 40.

169. *Joint-Anti Fascist Committee* v. *McGrath*, 341 U.S. 123 (1951) at 162.

necessary to achieve a compelling state interest. The relationship between the classifications of suspect classes and fundamental interests is complex.[170]

The design of the classification scheme — suspect class, fundamental interest, and other interests in state action such as government services — recognizes the responsibility of the judiciary to protect the constitutional rights of the citizen, a responsibility which involves both protecting the existence of such rights and ensuring the quality of their exercise. Furthermore, the classification scheme itself, arguably, becomes illogical in its design unless it is interpreted as protecting interests necessarily incidental to the exercise of fundamental interests, even in the absence of discrimination. The philosophical and practical bases of equal protection doctrine are to protect the citizen against inequality of treatment at the hands of government services.[171] It must be the existence of inequality in areas subject to review under the equal protection clause rather than the degree of inequality that should determine the standard of review to be adopted.[172]

(a) *Equal Protection and Educational Finance*

In *Rodriguez,*[173] the majority in the United States Supreme Court held that the Texas system of school finance could not be subject to a strict standard of review because an education could not be classified as a fundamental interest. Furthermore, the Court held, the individuals adversely affected by the financing scheme could not be construed as a suspect class within the accepted notions of such classification. The system, therefore, "though concededly imperfect", did not violate the equal protection clause because it assured a basic education for every child and bore a rational relationship to a legitimate state purpose — in this case, local control of district schools.

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170. "The interaction of these two factors can be visualized by imagining two gradients. Along the first of these gradients is a hierarchy of classifications, with those that are most invidious . . . at the top. Along the second, arranged in ascending order to importance, are interests such as employment, education, and voting. When the classification drawn lies at the top of the first gradient, it will be subject to strict review even when the interest it affects ranks low on the second gradient. . . . As the nature of the classification becomes less invidious . . . the measure will continue to elicit strict review only as it affects interests progressively more important . . ." (Note, *supra,* note 163 at 1120-21).

171. *See generally,* Perry, *supra,* note 161. DeTocqueville described equality as a providential fact: "It has all the chief characteristics of such a fact: it is universial, it is lasting, it constantly eludes all human interference, and all events as well as all men contribute to its progress". Bradley, ed., *Democracy in America* 6 (1956).

172. Except, obviously, where one is dealing with a claim based on *de minimis* inequality which results from the workings of an otherwise functional administrative structure.

173. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973).

Although education had come to play a fundamental role within the society, the majority stated, it could not benefit from the level of protection afforded to fundamental interests. To so qualify, a right must be implicitly or explicitly guaranteed by the Constitution.[174] While the majority was prepared to concede that "some identifiable quantum" of education could fall under constitutional protection as necessary to the exercise of other democratic rights, it declined to accept the "nexus theory" as a basis for ensuring equality of educational opportunity.

> How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might ... [demonstrate] that the ill-fed, ill-clothed, and ill-housed are among the most ineffective participants in the political process...[175]

Suspect classifications in equal protection analysis must also possess determinative characteristics which, the majority held, evaded the class of plaintiffs under consideration.

Perhaps the best explanation for the emergence of the judicial prohibition of suspect classification goes beyond the precept urged by Dworkin, that every individual is entitled to "equal concern and respect".[176] Perry formulates the basic notion of equal protection as follows: "... although not every person is the moral equal of every other person, there are some traits and factors — of which race is the paradigmatic example — by virtue of which no person ought to be deemed morally inferior to any other person."[177] Perry's formulation seems buttressed by the language in *Brown,* which indicates that segregation violated the Fourteenth Amendment because "[t]o separate them from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."[178] Generally speaking, then, suspect classifications are those which bear no reasonable relation to the stated legislative purpose.

The majority in *Rodriguez* stated that to qualify as a suspect classification, the class of disadvantaged must be identified or "defined in

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174. "[I]f the degree of judicial scrutiny of state legislation fluctuated, depending on a majority's view of the importance of the interest affected we would have gone far toward making this court a 'super-legislature'. We would, indeed, then be assuming a legislative role ... for which the Court lacks both authority and competence". *Id.,* at 31.

175. *Id.,* at 37. Arguments supportive of the lower court's finding that education was a fundamental interest, the majority held, were "unpersuasive".

176. *See* Dworkin, *Taking Rights Seriously* (1977) 266-78.

177. Perry, *supra,* note 163, at 1031.

178. *Brown* v. *Board of Education,* 347 U.S. 483 (1954) at 494.

customary equal protection terms"[179] and the nature of the deprivation must be absolute. Rather than attempting to define those disadvantaged as: (1) a class of "poor" persons as defined by a quantifiable standard such as the poverty level, (2) those who are relatively poorer than others, or (3) those who reside in relatively poorer school districts,[180] the appellees adopted a theory of district discrimination, contending, in essence, that the financing system would be discriminatory even if relatively poor districts did not contain poor people.[181] The majority rejected this flexible classification holding that earlier case law[182] established that the class seeking protection must be determinate and definable either as indigent or as comprised of persons whose income falls below a designated level. The deprivation alleged by the appellees must be absolute, the majority reasoned, because the equal protection clause did not require "precisely equal advantages" and because the exact relation between the quality of education received and the amount of money disbursed could not be established.[183]

The constitutionality of the finance scheme, the majority concluded, fell to be determined by the lesser standard of review — did the scheme bear a rational relation to a legitimate state purpose? In this regard, the principles of federalism would have to be considered: "... it would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every state."[184] The appellant school authorities argued that the Texas financing scheme was dedicated to the concept of local control of district schools. The interplay of principles of federalism and the desire to ensure local control of schools, considered in conjunction with the finding that the State was providing a basic minimum education to every child, established a rational relation to a legitimate state purpose. Only in cases involving the infringement of constitutional rights or civil liberties did the State have to demonstrate that it had chosen the least restrictive scheme.[185] The existence of some interdistrict inequality (as high as 50

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179. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 19.
180. *Id.,* at 19-20.
181. *Id.,* at 51.
182. *See: Griffen* v. *Illinois,* 351 U.S. 12 (1956); *Mayer* v. *City of Chicago,* 404 U.S. 189 (1971); *Gardner* v. *California,* 393 U.S. 367 (1969).
183. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 23.
184. *Id.,* at 44.
185. The Court refused to apply the strict scrutiny test in both *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) at 264; and *Dandridge* v. *Williams,* 397 U.S. 471 (1970) at 485, despite acknowledging that welfare constituted a "basic economic need" for impoverished persons.

per cent) was insufficient basis for striking down the entire scheme. Powell J. stated:

> It is also well to remember that even those districts that have *reduced ability to make free decisions with respect to how much they spend* on education still retain under the present system a large measure of authority as to how available funds will be allocated. They further enjoy the power to make numerous other decisions with respect to the operation of the schools.[186]

A minimum standard of review, then, can be satisfied by even a tenuous relation between the articulated state purpose and the legislative scheme. The State had not been required to demonstrate that it had chosen a rational basis on which to maximize local control rather than a scheme which resulted in "different treatment being accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute".[187]

The method of analysis adopted by the majority is highly formalistic. Once the interest is classified as fundamental or simply protected, it must then be examined to determine whether the aggrieved class of litigants is identifiable and a relationship between the state action and the alleged harm established. The Court has rarely employed a similarly strict method of analysis when dealing with essential government services.[188] Nevertheless, many commentators heralded this more rigorous approach to equal protection analysis because it avoided charges of judicial subjectivity in according to some interests the classification of "fundamental" and thereby providing them more protection than accorded other interests.[189] Indeed, evidence of the distrust of judicial subjectivity is pervasive throughout the majority judgement.[190] However, there exists a second approach to equal protection analysis which relies less heavily on strict classification schemes. An example of this approach is found in the dissenting judgement of Marshall J. in *Rodriguez.*

While both Marshall J. and the majority agreed that education is of vital importance to the individual, the former observed that the restrained approach adopted by the majority "... can only be seen as a retreat from

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186. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 51 (emphasis added).
187. *See: Reed* v. *Reed,* 404 U.S. 71 (1971) at 75-76.
188. *See, eg., Skinner* v. *Oklahoma,* 316 U.S. 535 (1942); *Roe* v. *Wade* 410 U.S. 113 (1973); *Harper* v. *Virginia Bd. of Elections,* 383 U.S. 663 (1966).
189. "By setting up a hierarchy of interests the Supreme Court leaves itself open to the charge that it is usurping the legislative function and preventing a proper majoritarian choice of values" (Note, *supra,* note 163 at 1132).
190. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 71 *per* Marshall J., dissenting.

our historic commitment to equality of educational opportunity and as unsupportable acquiescence in a system which deprives children in their earliest years of the chance to reach their full potential as citizens."[191] Inequality of education opportunity is the issue to be decided, and this can be accomplished without the evidentiary burdens to establish a relationship between state action and the alleged harm imposed by the majority on the respondents.

> We sit . . . to enforce our Constitution. It is an inescapable fact that if one district has more funds available per pupil than another . . . the former will have greater choice in educational planning. . . . I believe the 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 . . . [W]ho can ever measure for such a child the opportunities lost . . . for want of a broader, more enriched education? Discrimination in the opportunity to learn that is afforded a child must be our standard.[192]

It is the existence of interdistrict inequality in per pupil expenditures, rather than a question of adequacy of educational instruction, that invokes the issue of a violation of equal protection.[193]

While the equal protection clause does not mandate "precisely equal advantages", Mr. Justice Marshall was of the opinion that it does mandate that "all persons simiarly circumstanced shall be treated alike".[194] The fact that the State was providing an "adequate" education to all children, therefore, was irrelevant to equal protection analysis: " . . . this Court has never suggested that because some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable."[195] Indeed, as he points out, the judiciary would be hard-pressed to determine the standard at which an individual's education would be "constitutionally sufficient".[196] "I find any other approach to the issue", Mr. Justice Marshall states, "unintelligible and without directing principle".[197]

Rather than adopting a rigid approach to the classification of an interest and accepting such classification as determinative of the standard of review to be employed, the degree of judicial review applicable should be seen as a spectrum of standards. Determinations as to the proper

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191. *Id.*
192. *Id.*, at 83-84.
193. *Id.*, at 90: "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 laws."
194. *Id.*, at 89. *See also*, *F. S. Royster Guano Co.* v. *Virginia*, 235 U.S. 412 (1920) at 415.
195. *Id.*
196. *Id.*
197. *Id.*, at 90.

standard of review to be employed should be made after consideration of "the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn".[198] A fluid classification system would allow the Court to address the major issue — to what extent is a constitutionally recognized right dependent on an interest not mentioned in the Constitution? Thus, the determination of which interests are fundamental would remain based in the text of the Constitution.[199] Once the nature of the interest has been established, and it is determined that the nature of the harm threatened is not *de minimis,* then the availability of relief under the equal protection clause should not be further restrained by requiring that the aggrieved class be definite. A definable class is not a logical prerequisite element to equal protection analysis. Rather, it is the basis of the discrimination that must be clearly identified.[200] The discrimination in *Rodriguez,* in Mr. Justice Marshall's view, was among all school-age children on the basis of taxable property values in their district. Quoting the District Court judgment, he asserted, "The quality of public education may not be a function of wealth, other than the wealth of the state as a whole".[201]

Education must be recognized as a fundamental interest because of its close relation to the political process and its role in "opening up to the individual the central experiences of our culture".[202] The issue is not whether the appellees were entitled to the "most effective speech or the most informed vote", but rather the discrimination which affects the quality of education provided to schoolchildren within the state.[203] Because the existence of taxable property within a district bears no relation to the quality of education to be provided, the state classification on the basis of taxable property values deserves stricter scrutiny than a test of rationality. The degree of discrimination effected by the legislative

198. *Id.,* at 99.

199. "As the nexus between the specific constitutional guarantee and the non-constitutional interest draws closer, the non-constitutional interest becomes more fundamental and the degree of judicial scrutiny applied when the interest is infringed on a discriminatory basis must be adjusted accordingly. . . . Only if we closely protect the related interest . . . do we ultimately ensure the integrity of the constitutional guarantee itself" (*id.,* at 102-03).

200. "So long as the basis of the discrimination is clearly identified, it is possible to test it against the State's purpose for such discrimination — whatever the standard of equal protection analysis employed" (*id.,* at 93). *See also, Bullock* v. *Carter,* 405 U.S. 134 (1972) (primary filing fees for candidates held unconstitutional even though the disadvantaged class could not be identified).

201. 337 F. Supp. 280 (1972) at 284.

202. Note, *supra,* note 163, at 1129.

203. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 116.

scheme is irrelevant.[204] On the basis of the facts presented, Mr. Justice Marshall concluded:

> ... any substantial degree of scrutiny of the operation of the Texas financing scheme reveals that the State has selected means wholly inappropriate to secure its purported interests in assuring its school districts local fiscal control.[205]

Thus, the financing scheme would be unconstitutional as a violation of the equal protection clause. Given the threatened infringement would create more than a *de minimis* harm, the applicable standard of review is determined by assessing the fundamentality of the interest and the invidious nature of the classification imposed by the state. Although such a fluid analytical model is open to attack as arbitrary and political, any application of equal protection principles to the area of the provision of government services will be their nature involve subjective value judgements. Indeed the more stringent analytical model adopted by the majority can also be criticized as political.[206] A more useful inquiry, however, is to attempt to determine which model is best suited to the educational setting.

(b) *"Equal Access" or "Equal Outcome"*

Equal protection principles are most relevant as a means of ensuring that each student receives a "good quality" or "appropriate" education. As Yudof points out, equal educational opportunity may adopt a number of different models: equal access, equal treatment of races, and equal outcomes.[207] Equal access and equal treatment deal with the distribution of educational resources and programs. The third model, equal outcomes, would examine the effectiveness of the schooling process and attempt to secure a basic minimum level of knowledge for every child.[208] Courts, Yudof argues, should limit themselves to equal access and racial discrimination issues.[209]

> While the judiciary can bring about some adjustment in the distribution of education resources and services and help redress racial discrimination, it should not adjudicate rights in terms of schooling outcomes. Because of the functional limitations of courts in considering matters of broad social policy . . . [and] the vulnerability of the relevant social science data, the

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204. *Id.*, at 118. *See also: Harper* v. *Virginia Board of Elections*, 383 U.S. 663 (1966) at 668.
205. *Id.*, at 129.
206. *See* Note, *supra*, note 163; and Yudof, "Equal Educational Opportunity" (1973), 51 Texas L. Rev. 411.
207. Yudof, *id.*, at 412.
208. Note, "Unseparate But Unequal" (1966), 13 U.C.L.A. Law Rev. 1147 at 1168.
209. Yudof, *supra*, note 206 at 413.

> concept of equal educational opportunity defined as equal educational achievement is an inappropriate basis for judicial intervention.[210]

A legal model of equal educational opportunity will serve as a basis of judicial intervention and must acknowledge that courts are "institutionally incapable" of adopting a legislative role in areas of complex social policy.[211] The courts should be reluctant to substitute their opinion for that of elected officials except where the aggrieved class is under-represented in the political process. Doctrinal and practical considerations over the fundamentality of an individual's interest in an education, Yudolf argues, must be circumscribed by the limits of judicial manageability and the dictates of public policy.[212]

It is important to note that the equal access and equal outcome models within the educational setting cannot be considered in isolation from each other. Protection of the individual's interest in receiving an appropriate education would require an equal protection structure which incorporates regulation of educational inputs — money, extra-curricular activities and physical facilities — with the opportunity for review of administrative decisions which may exacerbate existing inequalities. Consequently, it is pertinent to consider the relationship between the equal access and equal outcome models. In contrast to Yudof's position that the fundamentality of an individual's interest in an education must bow to the limits of judicial manageability, it may be argued that the limits of judicial manageability can be adequately broadened so as to protect an individual's interest in an education.

The majority in *Rodriguez* adopts a narrow construction of equal access requirements within the educational setting:

> . . . the Equal Protection Clause does not require absolute equality or precisely equal advantages . . . in view of the infinite variables affecting the educational process . . . [No system can] assure equal quality of education except in the most relative sense . . . By providing 12 years of free public school education, and by assuring teachers, books, transportation, and operating funds . . . it now assures every child in every school district an adequate education.[213]

This construct contains no comparison of the quality of schooling between districts to determine whether they are even relatively

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210. *Id.*
211. *Id.*
212. *Id.*, at 503. Other commentators who also focus on the proper nature of the judicial role in education as non-interventionist include Kirp, "The Poor, The Schools, and Equal Protection" (1968) 38 Harv. Educ. Rev. 635; Kurland, "Equal Educational Opportunity: The Limits of Constitutional Jurisprudence Undefined" (1968), 35 U. Chic. L. Rev. 583.
213. *San Antonio Independent School District* v. *Rodriguez*, 411 U.S. 1 (1973) at 24.

comparable; it focuses on a minimum adequate level of educational opportunity. The majority argued that, without a relationship being established between the level of district expenditure and the quality of education afforded, any interdistrict comparison on the basis of wealth would be inconclusive.

On the other hand, Mr. Justice Marshall, in dissent, flatly rejected the assertion that there must be an established relationship between educational expenditure and educational achievement before equal protection analysis may be invoked.[214] The purpose of the equal protection clause, in his view, is to address arbitrary and unjustifiable inequalities of state action — not to ensure minimal sufficiency in the manner suggested by the majority. It "mandates nothing less than that 'all persons similarly circumstanced shall be treated alike'".[215] The courts, then, must examine objectively the amount of resources the state provides to each district rather than attempt to determine what the children will be able to do with the resources they receive.[216] Thus, the minority judgment seems to establish that equal access principles, when applied within the educational setting, require equal, or relatively equal, per pupil expenditure interdistrict. An appraisal of educational inputs allows the courts to protect an individual's interest in receiving an appropriate education in the absence of concrete evidence establishing the proper relationship between expenditure levels and educational achievement.

A judicially mandated financing formula requiring equal or "relatively equal" per pupil expenditure interdistrict, some commentators argue, is a species of judicial activism which cannot be supported by the terms of the Constitution.[217] In many areas, the school financing system is not guilty of any systematic discrimination against the poor: "There are simply some poor people, possibly a very small number, who bear the brunt of a system which is otherwise distributing resources in a constitutionally acceptable manner. The propriety of reshaping an entire educational structure on this basis is questionable.[218] Rationalization of judicial involvement in educational policy areas must go beyond traditional discrimination analyses. Arguments that education is a fundamental

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214. Marshall J. states: "In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our country's wealthiest school districts, which have no legal obligations to argue in support of . . . the Texas legislation, have nonetheless zealously pursued its cause before this Court" (*id.*, at 85).

215. *Id.*, at 89 citing *F. S. Royster Guano Co.* v. *Virginia*, 253 U.S. 412 (1920) at 415.

216. "Discrimination in the opportunity to learn that is afforded a child must be our standard" (*id.*, at 84).

217. *See generally*, Yudof, *supra*, note 206.

218. *Id.*, at 490. This is precisely what the state courts who have invalidated financing schemes have successfully undertaken. *See, eg.*, *Serrano* v. *Priest*, 487 P. 2d 1241 (1971).

interest can be constructed but "seem hollow when interests such as housing and welfare have been held not to be constitutionally fundamental".[219] Furthermore, without additional empirical evidence on the education production function — or the effect of education on the individual's later opportunities in life — arguments that education should be treated differently than other governmental services on the basis of its instrumental effects are unpersuasive.

> The case for treating education differently from other services must finally rest on the special characteristics of the immediate beneficiaries — the children. Children, in a sense, are less blameworthy and less responsible for their circumstances, and, in turn, they are less able to alter them.[220]

However, it is not necessary to invoke emotional concepts of innocence and youth to construct a workable legal framework for the protection of the individual's interest in receiving an appropriate education.

Under an equal outcome model, wide disparities in per pupil expenditure would be allowed in disadvantaged areas for such programs as compensatory education projects (such as "Head Start"). The main objective of the educational system should be to satisfy the needs of all children in a manner that results in equality in the effects of the schooling process.[221]

> The model assumes that the capacity to learn is randomly distributed between races and socio-economic groups, and cites the non-random distribution of success and failure in public school as proof that poor and minority group children are not performing to their full capacities.[222]

A major downfall of the equal outcome model, Yudolf argues, is that it is designed to eliminate discrimination rather than to protect the individual's right to a good quality education. Furthermore, the model imposes high achievement in test scores as the single, appropriate measure of educational success.[223]

The formulation that every child has a right to develop to his or her full potential is currently embodied in some state and provincial educational statutes.[224] To ensure comprehensive legal protection of a right to an

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219. Yudof, *supra*, note 206 at 490.
220. *Id.*, at 492.
221. *Id.*, at 419.
222. *Id.*, at 421.
223. Clearly there are a number of other, equally valid educational objectives besides imparting substantive knowledge capable of measurement through formal testing procedures. A standard that evaluated the right to education on the basis of test scores may be required, however, since the level of educational achievement will affect the exercise of other constitutional rights, such as voting (*see generally* authorities cited at notes 34-35, *supra*) and the individual's interest in career and higher educational opportunities.
224. *See, eg.*, Illinois Constitution, *supra*, note 14.

education, some form of judicial review of the effects of the schooling process must be maintained. Nevertheless, it is argued that, because social science research is unable to pinpoint conclusively the factors which contribute to educational achievement, it is inappropriate for courts to attempt to intervene in the schooling process and establish performance goals for educators or students.[225]

Many of the criticisms levelled at the equal outcome model fail to envision its primary function within a legal analytical scheme to protect an individual's right to an education. Even assuming the adoption by the judiciary of an equal access model which required uniform per pupil expenditure within the jurisdiction, a student's right to an education would continue to be threatened if such funds were improperly utilized. Proponents of the equal outcome model, Yudof states, are often forced to rely on "outrageously blatant denials of educational opportunity", such as occurred in *Lau* v. *Nichols*[226] in which the court forced a California School district to offer remedial English classes to non-native students, to justify court intervention without definitive findings as to the effect of the remedial measures sought. It can be argued that the proposition that remedial courses should be offered to non-native students is no more than a specific application of the more general principle that the educational system should attempt to identify and eliminate all non-cognitive barriers to a student's potential education achievement.[227]

Opponents of the equal outcome model point to the dearth of research available on the relationship between non-school factors — socio-economic, cultural, and family influences — and educational achievement as a major justification for their views that the courts should decline any role in imposing outcome requirements.[228] The absence of concrete data, the perils of judicial intervention into social policy, and the difficulties of enforcing a broadly interventionist equal outcome model make it an inappropriate model for judicial intervention. However, in addition to extreme examples of denials of educational opportunity (such

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225. "Courts simply cannot formulate any simple standard that would ensure improvement in the schooling outcomes of the disadvantaged . . . even assuming that a standard could be formulated, the massive difficulties inherent in judicial attempts to manipulate educational resources and policies would make enforcing such a broad equal protection decision nearly impossible" (Yudof, *supra*, note 206 at 430).

226. *Lau* v. *Nichols*, 414 U.S. 563 (1973).

227. Dewey, *supra*, note 5.

228. "[I]t is far from clear that schools modify in any way the effect of socio-economic, cultural, and family influences on achievement . . . [One study found] that after controlling for six student socio-economic background factors, differences in resources and policies between schools accounted for less than one per cent of the average pupil achievement differences" (Yudof, *supra*, note 206 at 422-23).

as that which occurred in the *Lau* decision) it is possible to enumerate other fact situations which also constitute a denial of equal opportunity and require judicial review. There are a number of factors which experience has demonstrated are irrelevant to educational achievement and should not be considered either in the allocation of educational resources or in the design of educational programs: race, socio-economic status, and family background are perhaps the most obvious of such classifications. Tracking, unequal distribution of advanced or college preparatory programs, and even blatantly unequal extra-curricular programs which are based on such characteristics, could all be subject to judicial review.[229]

However, problems such as tracking and the proper distributions of college preparatory programs could only be cured by an equal access model which goes well beyond Mr. Justice Marshall's liberal interpretation of equal per pupil expenditure. School authorities would remain free, for example, to decide that more technical/vocational programs are better suited for minority students to ensure that they secure employment in a shrinking job market. Such decisions are not, strictly speaking, educational policy decisions and yet have a profound effect on the structure and quality of education an individual will receive. Even in the absence of a discriminatory motive, the decision to implement more technical/vocational programs in disadvantaged or minority areas is one which substantially affects an individual's interest in an education. The burden should rest on the educational authorities to demonstrate that such policies further a substantial state interest. Judicial examination of issues like program allotment must come from an educational-outcome analysis. An analytical model oriented strictly towards equal protection principles, however, leaves the individual without substantive protection of his right to an education where there is no substantial resource or racial discrimination apparent in the standard established by the educational authorities.[230]

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229. *See, eg., Hobson* v. *Hansen*, 269 F. Supp. 401 (D.D.C. 1967) in which tracking was found unconstitutional. Children were tested early in their school careers and the lack of compensatory education prevented children from moving from one stream to another (for example, from vocational track to college preparatory track).

230. "[I]f the denial of access is not total, if it involves no suspect classification, and if school authorities present substantial reasons for their actions, the Courts should not intervene to alter the allocation of services. . . . The standards for decision are every bit as vague and indeterminable as under the equal outcomes theory of equal educational opportunity; . . . The need to draw minute qualitative decisions would force the courts into the awkward task of determining who needs what . . . [T]hat process would lead full circle to some form of outcome determination" (Yudof, *supra*, note 206 at 476).

If viewed as an analytical model which simply allows judicial review of seemingly neutral and benign educational policies which, in fact, may prevent individuals from attaining their full potential as citizens, the equal-outcomes theory of equal educational opportunity becomes a necessary third leg in a flexible legal structure designed to protect the individual's right to an education, namely, procedural review, removal of access barriers and then enforcement of substantive parity of opportunity. "A state denies equal protection whenever it fails to give it. Denying includes inaction as well as action."[231] The right to an education necessarily involves a more active stance of judicial review because the quality of educational opportunity received is determinative of the existence of the right itself.[232]

A combined equal-access/equal-outcomes structure which mandated equal or relatively equal per pupil expenditure — which can be defined as prohibiting all resource discrimination that lacks substantial justification — would protect the individual from an inferior educational experience. The early equal-protection decisions prohibiting discrimination against blacks constitutionalized the principle of the moral irrelevance of race. The extension of equal-protection principles to other areas of social policy may also be based on the proposition that:

> . . . it is legitimate for the Court to constitutionalize the principle of the moral irrelevance of other traits indicating nothing about the moral worth or desert of a person. . . . Of course, this more general equal protection principle — that government may not attach negative significance to traits indicating nothing about a person's moral status — does not itself indicate which traits are morally relevant and which are not.[233]

To determine the constitutionality of any classification, then, it is necessary to examine whether the classification should be accepted as representing a morally relevant trait. If the classification does not represent a morally relevant criterion — indicating something about the moral worth or desert of the individual — there is no justification for an unequal distribution of government services on the basis of the classification imposed.

Resource discrimination in educational financing schemes is a clear example of a violation of the equal protection principle on a morally irrelevant classification. In *Serrano* v. *Priest* the court stated:

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231. Frank & Munro, *supra*, note 159 at 164, quoting Cong. Globe, 42nd Cong. 1st Sess. 501 (1871).

232. In *Green* v. *County School Board*, 391 U.S. 430 (1968), for example, the Court imposed a positive duty on the Board to rectify past segregationist policies. A freedom-of-choice plan, therefore, was held unacceptable when more effective remedies were available.

233. Perry, *supra*, note 161 at 1051.

> To allot more educational dollars to the children of one district than to those of another merely because of the fortuitous presence of . . . [taxable] property is to make the quality of a child's education dependent upon the location of private commercial and industrial establishments. *Surely this is to rely on the most irrelevant of factors as the basis for educational financing.*[234]

Within the context of the judgement the court's statements go beyond a mere call for rationality in policy making. It establishes that educational financing schemes based on taxable wealth within a district are founded on a classification which is morally irrelevant to the quality of educational opportunity that a state offers its children — property-based financing schemes brand children in property-poor districts as inferior.[235] They infringe upon the individual's right to an appropriate education in the same manner as racially segregated schools often represented blatant inequalities in educational opportunity. The injury suffered by children in property-poor districts is the resource discrimination itself.

Generally, it is unnecessary to prove injury once discrimination has been established in traditional discrimination analyses under the equal protection clause.[236] If an "ultimate injury" suffered by children affected by inequitable financing schemes could be established, it would provide additional impetus for judicial intervention. But it has been claimed that it "is virtually impossible to determine the long-term impact that absolute or relative denial will have on a person's life."[237] However, when dealing with questions of educational opportunity, it is misleading to argue in terms of relative denial. The quality of the education afforded, once again, is determinative of the existence of the right to an education: educational services can be distinguished from other government services on this basis. By permitting inequalities in interdistrict financing a state is, in fact, denying children in property-poor districts the right to an education — even as they are provided 12 years free tuition and books.

> That a child forced to attend an underfunded school with poor physical facilities, less experienced teachers, larger classes, and a narrower range of courses than a school with substantially more funds — and thus greater

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234. *Serrano* v. *Priest*, 487 P. 2d 1241 (1971) at 1252-53 (emphasis added).
235. Like segregation on the basis of racial origin, property-based financing schemes force poor children to begin their school careers at a disadvantage. As the U.S. Supreme Court held in *Brown* v. *Board of Education*, 347 U.S. 483 (1954) at 492, we must look to the effect of unequal expenditures on public education. To separate poor children in inferior schools "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone" (at 494).
236. *Hargrave* v. *Kirk*, 313 F. Supp 944 (M.D. Fla. 1970).
237. Yudof, *supra*, note 206 at 484.

> choice in educational planning — may nevertheless excel is to the credit of the child, not the State. . .[238]

Thus in terms of educational opportunity, relative denial can reasonably be equated with absolute denial. Unless an individual has received an appropriate education he will be barred from pursuing the higher education or career opportunities open to others.[239] Denial of educational opportunity, therefore, must be seen as an injury in a rapidly advancing and highly technological society.[240]

Equal protection principles offer a flexible analytical framework for judicial intervention to protect the individual's right to an education notwithstanding the majority judgement in *Rodriguez.* A framework of equal-protection analysis based on an equal-access/equal-outcome structure would justify judicial intervention into resource discrimination in education. It also would allow courts to address, in a fluid and cohesive manner, the central issue in educational litigation: how much constitutional protection should be afforded to the individual's interest in an education. There is little need for concern that courts would soon become involved in attempting to review day-to-day educational policy decisions. The nature of the right to an education under the equal protection doctrine may be defined as equal access to educational resources and equal opportunity in program allotment. Educational outcomes are relevant primarily as a means for the judiciary to determine whether superficially neutral policy decisions, in effect, are perpetuating low achievement patterns among children from property-poor districts.

3. *Equal Protection and Equal Benefit: The Canadian Views*

Canadian equal protection principles may be developed along similar lines of argument to protect the individual's right to an appropriate education. In all Canadian jurisdictions, education is funded primarily by the state on a basic per pupil rate.[241] There remains, nonetheless, instances where resource allocation or program allotment should be subject to judicial scrutiny to ensure that the individual's right to an appropriate

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238. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 84 *per* Marshall J., dissenting.

239. *See, eg.,* Marshall's J. comments on the difficulty of establishing minimum quantum of education which would be constitutionally protected (*id.,* at 89). *See also* Michelman, "Foreword: On Protecting the Poor Through the Fourteenth Amendment" (1969), 83 Harv. L. Rev. 7.

240. The fallacy of "relative" equal educational opportunity is perhaps best exposed by illiteracy statistics. *See infra,* note 242.

241. For a brief, general discussion on educational finance, see MacKay, *Education Law in Canada* 27-8, 44-5, 247 (1984).

education is not threatened. Low achievement rates in inner-city schools and among minority communities may be indicative of state policies which deprive such students of their right to an appropriate education.[242]

The Canadian analysis will begin with a review of the equal protection doctrine under the Canadian *Bill of Rights*,[243] followed by an examination of section 15(1) of the *Charter*.

(a) *The Pre-*Charter *Era*

The Canadian *Bill of Rights*, in section 1(b) recognizes "the right of the individual to equality before the law and the protection of the law". Judicial interpretation of equal protection doctrine under the *Bill of Rights* was based upon the common law concept of the rule of law. Dicey defined the rule of law as follows:

> ...Equality before the law, or the equal subjection of all classes to the ordinary law of the land, administered by the ordinary law courts; the "rule of law" in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals....[244]

The burden of interpreting equal-opportunity doctrine under formalistic conception of the rule of law resulted in a line of tortured and contradictory judicial decisions.

Pre-*Charter* equal opportunity decisions limited the scope of the doctrine to largely procedural questions. Individuals were equal before the law if a law validly enacted by the legislature to apply to only one class of citizens was applied equally among all members within the designated class.[245] There appeared to be one limited exception to this very restrictive view of the operation of section 1(6) of the *Bill of Rights*. In *R.* v. *Drybones*,[246] a decision of the Canadian Supreme Court invalidating a conviction under section 94(a) of the *Indian Act* which made it unlawful for an Indian to be intoxicated off an Indian reserve, Mr.Justice Ritchie stated that in regard to classifications based on race

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242. The results of Winnipeg inner-city students on the Canadian Test of Basic Skills may be cited as an example: "... all 28 of its inner city schools scored well below (the national average)... — only one in 100 schools in any given jurisdiction should do that badly... two schools landed at the bottom first percentile in all categories, which is like not taking the test at all" (Nikifourk, "Why Our Teachers Can't Teach", Quest Magazine, September, 1984, 35 at 39).

243. *Canadian Bill of Rights*, S.C. 1960, c. 44 (R.S.C. 1970, Appendix III).

244. Dicey, *Introduction to the Law of the Constitution* 202-03 (Wade, ed., 10th ed., 1961).

245. The leading equal protection cases are: *A.G. Canada* v. *Lavell*, [1974] S.C.R. 1349; *A.G. Canada* v. *Canard* (1975), 52 D.L.R. (3d) 548 (S.C.C.); *Bliss* v. *A.G. Canada* (1978), 92 D.L.R. (3d) 417 (S.C.C.).

246. *R.* v. *Drybones*, [1970] S.C.R. 282.

the equal protection provision of the *Bill of Rights* meant at the very minimum:

> ... that no individual or group of individuals is to be treated more harshly than another under the law.... An individual is denied equality before the law if it is made an offence punishable at law, on account of his race, for him to do something which his fellow Canadians are free to do without having committed any offence...[247]

However, the Supreme Court was reluctant to extend the ambit of the classifications which would be invalid under equal protection principles beyond racial classifications which affected the administration of justice.[248] The Court rejected the "egalitarian concept exemplified by the Fourteenth Amendment of the U.S. Constitution", adopting instead Dicey's definition of equal protection as "equal subjugation of all classes to the ordinary law of the land administered by the ordinary courts".[249] The formal equality principle was to be invoked in a series of decisions which focused on the question of whether the law was validly enacted rather than whether it contravened equal protection principles.[250] Perhaps the low point of this era was reached in *Bliss* v. *A. G. Canada*,[251] in which signs of severe strain in the formal equality-principle reasoning became evident. Section 46 of the *Unemployment Insurance Act*, which required pregnant women to have worked longer than other persons, including non-pregnant women, in order to qualify for benefits, was held not to contravene equal opportunity principles.

> Section 46 applies to pregnant women, it has no application to women who are not pregnant, and it has no application, of course, to men. If s. 46 treats unemployed pregnant women differently from other unemployed persons, be they male or female, it is, it seems to me, because they are pregnant and not because they are women.[252]

In *Bliss*, *Drybones* was distinguished on the basis that the latter case involved "the imposition of a penalty on a racial group to which other citizens are not subjected", while the former involved "a definition of the qualifications required for entitlement to benefits".[253] Thus, the major issue in equal opportunity litigation became whether the scheme in question was "justifiable" as promoting a "valid federal objective".

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247. *Id.*, at 297.
248. *A.G. for Canada* v. *Lavell*, [1974] S.C.R. 1349.
249. *Id.*, at 1365-66.
250. *See, eg.*, *A.G. Canada* v. *Canard* (1975), 52 D.L.R. 3d 548. The Court felt that if it invalidated ss. 42-44 of the *Indian Act* its judgement would render the entire *Act* inoperative.
251. *Bliss* v. *A.G. Canada* (1978), 77 D.L.R. (3d) 609 (F.C.A.).
252. *Id.*, at 613 *per* Pratte J.
253. *A.G. Canada* v. *Bliss* (1978), 92 D.L.R. (3d) 417 at 423 (S.C.C.).

The valid federal objective test has been applied consistently in equal opportunity litigation and most recently in *Mackay* v. *The Queen*.[254] For the majority in *Mackay,* the valid federal objective test was fulfilled if it was shown that the legislation in question "was enacted by Parliament constitutionally competent to do so and exercising it powers in accordance with the tenets of responsible government".[255] Thus conceived, the equal opportunity doctrine became:

> ... nothing more than a demand for rationality — a demand that statements made about one person be generalizable into statements about all similar persons in similar circumstances.... It becomes necessary, then, in order to apply the formal equality principle, to determine in what respects men are similar and to decide which of these are relevant to the kind of treatment they should receive.[256]

(b) *The* Charter *Era*

The equal protection provisions of the Charter of Rights and Freedoms is to be found in section 15(1):

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age, or mental or physical disability.

The wording of this provision differs substantially from that found in section 1(a) of the *Bill of Rights* and provides the courts with the opportunity to start afresh in dealing with issues of equal protection and opportunity. There is no need for the reasoning employed in pre-*Charter* era equal protection cases to be utilized in the post-*Charter* period.[257]

However, before turning to an examination of the application of the equal protection principle in section 15(1) of the *Charter* to the field of education, it is necessary to digress for a moment to consider a relevant and important issue, that of group versus individual rights under the *Charter.*

Tarnopolsky draws a distinction between group rights and individual rights:

> ... an assertion of a human right emphasizes the proposition that everyone is to be treated the same regardless of his or her membership in a particular identifiable group. The assertion of group rights, on the other hand, bases

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254. *Mackay* v. *The Queen,* [1980] 2 S.C.R. 370.
255. *Id.,* at 393.
256. Note, *supra,* note 163 at 1164.
257. Some of the factors which support a new beginning are provided in Hogg, *Constitutional Law of Canada* 650-51 (2nd ed., 1985).

> itself upon a claim of an individual or a group of individuals because of membership in an identifiable group.[258]

This "basic distinction", it is argued, leads to constraints on the availability of remedies to redress violation of group rights.

> The question that arises is whether a constitutional guarantee of rights could be at all effective if it requires positive governmental action for its realization... How does one enforce the economic, social and cultural rights which require the state to provide something? ... In considering group rights such as those of language, culture and education, it is necessary to recognize the limitations upon constitutional guarantees.[259]

Thus, the individual/group rights dichotomy is perceived to be fraught with classification difficulties and seems to negate the foundation of equal protection and equal benefit principles by insulating government action in a number of areas from judicial review.

However, the dichotomy, arguably, is antithetical to the broadly phrased remedial powers bestowed upon the judiciary by section 24 of the *Charter*. In the educational setting, for example, it may be argued that equal protection principles require government to provide equal services to minority groups. It should be noted, however, that an individual within a minority could claim the same relief for provision of equal services regardless of his membership within the minority group. A black parent from a disadvantaged area, for example, could claim that his children were being denied equal educational opportunity and that "blacks" were, by virtue of section 15, entitled to such opportunity. Everyone, regardless of his membership in a particular group, is entitled to equal protection and equal benefit.[260] To argue that the judiciary should recognize "limitations on constitutional guarantees" where the government must take positive action to protect the right in tautological. Again, using the educational setting as an example, it may be asked: Is forcing educational authorities to ensure relative equality of educational inputs requiring that such authorities take a "positive action" — or is the judiciary invalidating a legislated structure which results in unequality of opportunity?

The individual/group rights dichotomy is neither a necessary nor a logical component in a theory of the construction of remedies under

258. Tarnopolsky, "The Equality Rights", in Tarnopolsky & Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* 437 (1982).

259. *Id.*, at 438-39.

260. There is no requirement in Canadian constitutional law that the disadvantaged be a "class" or "determinable". *Cf. San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) (majority judgement).

section 24 of the *Charter.* Sections 24(1) of the *Charter* and 52(1) of the *Constitution Act* must be interpreted in conjunction. Section 24(1) states:

> Anyone whose rights or freedoms, as guaranteed by this Charter, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances.

Section 52(1) of the *Constitution Act* also is applicable to the provisions of the *Charter:*

> The constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force of effect.

The provisions of section 52(1) become relevant in determining the proper scope of the remedial powers granted to the judiciary under section 24(1).[261]

Initially, the remedial framework established by the construction of section 24(1) must be clarified. Coupled with the pre-*Charter* case law on standing,[262] the section clearly gives every individual the right to allege a violation of his constitutional rights so long as he in some way is personally affected by the government action. The requirement that the action be brought in a court of "competent jurisdiction" could be interpreted as forcing the victim to bring an action in the tribunal competent to award the type of remedy sought.[263] It is more practical and in keeping with the history of the section, however, to interpret the reference to "court of competent jurisdiction" as referring to jurisdiction over subject matter and litigants. All courts, then, would possess discretionary competence in the application of remedies to litigious issues falling within their jurisdiction subject to the "just and appropriate" standard set out in the section.[264] Furthermore, there is nothing in the language of section 24(1) which compels the courts only to have recourse to remedies currently in use in constitutional litigation. But

> [e]ven if section 24(1) were construed to restrict each court to its normal remedial powers, many opportunities for innovation would remain, because most courts have a variety of flexible remedial tools at their disposal ... [and] ... recent developments ... demonstrate the courts' continuing ability to tailor equitable remedies to suit new situations.[265]

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261. For an innovative and comprehensive treatment of remedies under the *Charter,* see Gibson, "Enforcement of the *Canadian Charter of Rights and Freedoms",* in Tarnopolsky & Beaudoin, eds., *The Canadian Charter of Rights and Freedoms* 489 (1982).
262. *Thorson* v. *A.G. Canada,* [1975] 1 S.C.R. 138; *Nova Scotia Bd. of Censors* v. *McNeil,* [1976] 2 S.C.R. 265; *Min. of Justice (Can.)* v. *Borowski,* [1982] 1 W.W.R. 97.
263. Gibson, *supra,* note 261 at 50.
264. *Id.*
265. *Id.,* at 504-05.

In judicial review of educational disputes, mandatory and prohibitory injunctions may prove to be the remedies best suited to the task of maintaining equal opportunity to an appropriate education.[266] The appeal of the injunction as a remedy in the educational setting is its flexibility. A court may order, for example, that a school district desist in a discriminatory pattern of program allotment without imposing specific allotment requirements. The reorganization process which would follow a judgment establishing a violation of equal opportunity principles would involve all interested parties: the litigants, other volunteer or educational support groups, and the educational authorities.[267] The court's function, then, would be to sanction the resulting agreement as in keeping with constitutional principles; it would not be the function of the court to become involved in educational policy decisions. Indeed, with the entrenchment of the *Charter,* courts may prove more amenable to fashioning innovative remedies to protect constitutional rights:

> . . . as an Australian authority on equitable remedies points out, it is a question of degree: as the importance of injunctive relief increases in particular situations, the reluctance of the courts to undertake supervisory responsibility decreases. Few legal matters are as important as compliance by governmental authorities with constitutionally entrenched safeguards.[268]

The right of equal opportunity to an appropriate education has a number of complex components. In addition to the traditional concept of review of the process by which educational policy decisions are taken, it is necessary to be able to review the interplay of objective variables (such as resource allotment), on the more subjective variables, such as student achievement patterns interdistrict, which act as indicies of the level of educational opportunity being offered to the individual. Low achievement patterns in districts are often indicative of a lower level of educational opportunity, either through less motivated teachers, larger

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266. Mandatory and prohibitory injunctions have been employed extensively by the judiciary in the United States in implementing school desegregation orders. However, the use of injunctions in civil rights litigation has presented a number of difficulties. Many litigants have been forced to continually reapply to the courts for injunctive relief in the face of non-compliant public authorities. *See, eg.,* the judgement of Chief Justice Burger in *Swann* v. *Charlotte-Mecklenburg Board of Education,* 402 U.S. 1 (1971). Over the years since *Brown,* many difficulties were encountered in implementation of the basic constitutional requirement that the State not discriminate between public school children on the basis of their race. Deliberate resistance of some to the Court's mandates has impeded the good-faith efforts of others to bring school systems into compliance.

267. The list of participants imposed is an attempt to be faithful to Tribe's structural due process theory (Tribe, *supra,* note 62).

268. Gibson, *supra,* note 261 at 506.

class sizes, less educational leadership by the principal, or any of the other factors identified as having an impact on student achievement patterns.[269]

Injunctive relief is particularly suited to the educational setting. It can be used to invalidate both procedural inequities that may put racial or cultural minorities at a disadvantage in the formulation of educational policy, and substantive inequities, facially neutral policies which perpetuate low student achievement. It is necessary, however, to approach the analysis of equal educational opportunity issues from a bistructured input/outcome model. Clearly, even without concrete evidence linking expenditure levels to educational achievement, equal educational opportunity must incorporate a standard which permits resource discrimination only where there exists substantial justification. Educational policies must also be evaluated with reference to their outcomes.

(c) *Equal Protection: A Constitutional Guarantee*

Pre-*Charter* equal opportunity doctrine had expanded from the concept of purely formal equality only to an acceptance of race as an invidious classification which could invalidate a validly enacted legislative scheme[270] where the scheme imposed a penalty but not where it conferred a benefit.[271] This distinction is difficult to support on the basis of rational argument. Surely once the discriminatory effect of a classification is demonstrated, the issue must become whether the discrimination perpetrated is "justifiable" rather than whether the form of discrimination is acceptable. As a constitutional construct, therefore, the equal opportunity provisions of the *Charter* must expand to encompass a growing range of government services and benefits.

The function of equal opportunity principles, in general, is to ensure fair and open competition within the society. As Rawls suggests, "each person is to have an equal right to the most extensive basic liberty compatible with a similar liberty for others".[272] Frank Scott defined equality before the law as "two basic rules underlying our constitutional structure. . . .":

> The first is that the individual may do anything he pleases . . . unless there is some provision of law prohibiting him. Freedom is thus presumed and is the general rule. *All restrictions are exceptions* . . . [The second is that

269. For a discussion of effective school research, see Ratner, "A New Legal Duty for Urban Public Schools: Effective Education in Basic Skills" (1985), 63 Texas L. Rev. 776.
270. *R.* v. *Drybones,* [1970] S.C.R. 282.
271. *See* Tarnopolsky, *supra,* note 258.
272. Rawls, *supra,* note 43 at 60.

a] public officer can do nothing in his public capacity unless the law permits it. His incapacity is presumed and authority to act is an exception.[273]

As a constitutional principle, equality before the law is designed to protect the citizen from arbitrary action by government which is against his interest, not to protect government actions from judicial review. To draw a distinction between legislation inflicting a penalty and legislation conferring a benefit in equal opportunity analysis is misleading; it diverts attention away from the central issue: Has the government overstepped its authority by conferring a benefit or imposing a penalty on a class of individuals on the basis of a classification which is not constitutionally acceptable? Furthermore, where legislation sets out a comprehensive scheme of entitlement to benefits or penalties for non-compliance with statutory or administrative directives, it is both illogical and impractical to classify the statute in monolith form as either conferring a benefit or inflicting a penalty. Where the interest governed by the legislation is substantial, and the government action proposed would inflict more than *de minimis* harm, the judiciary cannot continue counselling plaintiffs to rely on the political process to vindicate their interests. Certain matters cannot be left to the vagaries of the political process for resolution. While some would suggest that it is of the essence of the democratic process that the will of the majority control, it controls not because it necessarily is always right but "because it is the will of the majority".[274] This, as Fuller notes, "is an impoverished conception of democracy"[275] and it suggests a reason for judicial intervention in the outcome of the political process that defies rational defense such as inequality of educational opportunity.

But how do we devise a formula that provides a basis for more active judicial involvement in ensuring equal educational opportunity? Considerable assistance in this task may be derived from the dissenting judgment of McIntyre, J. in *Mackay* v. *The Queen*,[276] and in particular his observation that:

The question which must be resolved in each case is whether such inequality as may be created by legislation affecting a special class . . . is arbitrary, capricious or unnecessary, or whether it is rationally based and acceptable as a necessary variation from the general principle of universal

273. Scott, Excerpt from a Dinner Address at the Official Opening of The University of Windsor Law Building, 1970, reproduced in Djwa & Macdonald, ed's, *On F.R. Scott* 144 (1983).
274. Fuller, "The Forms and Limits of Adjudication" (1978). 92 Harv. L. Rev. 353 at 367.
275. *Id.*
276. *Mackay* v. *The Queen* [1980] 2 S.C.R. 370.

> application of law to meet special conditions and to attain a necessary and desirable social objective.[277]

In his view, digressions from the principle of universal application of laws should only be countenanced by the judiciary to the extent necessary in the circumstances to attain the desired social objective. From this may be constructed a flexible equal opportunity analytical model well suited to the post-*Charter* era in general and the educational setting in particular.

Under the McIntyre formula, the issue to be determined in equal protection litigation, it is suggested, is whether the inequality imposed by legislation can be struck down as arbitrary, or upheld as rationally based to meet special conditions or attain a desirable social objective.[278] The burden of proof rests with the state to demonstrate that it has adopted the classification scheme that is the least restrictive of individual liberties.

The advantages of a well-educated citizenry in a democracy are well recognized.[279] As a fundamental service that bestows advantages on both the individual and society, it is difficult to fathom any other basic formulation for the distribution of educational resources other than the principle of equal opportunity.[280] Therefore, there must be a heavy burden of proof placed on parties defending inequalities in educational opportunity. In other words, the importance of the interest to the individual will determine the standard of judicial review.

The individual's interest in education can be divided into three components: the right of access, a right to a good quality or appropriate education, and a right not to be deprived of his educational interests without due process of law. By using an equal-access/equal-outcomes model, the court's analysis of educational classifications can extend beyond empirical issues of resource distribution. In such areas as tracking and program allotment, the court could demand that educational authorities demonstrate that their classification schemes are both rational and the least restrictive.

Judicial review of educational policies need not be restrained by the absence of empirical data on the effect of variables such as resource

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277. *Id.*, at 406.
278. *Id.*, at 407-8.
279. *See* Story, *Miscellaneous Writings* 124 (1835).
280. The District Courts in *Rodriguez* v. *San Antonio Independent School District*, 337 F. Supp. 280 (W.D. Tex. 1971) and *Mills* v. *Board of Education*, 348 F. Supp. 866 (1972), stated that the quality of educational opportunity offered to the individual child must be a function of the wealth of the state as a whole rather than the wealth of the individual district. "The inadequacies of the District of Columbia Public School System whether occasioned by insufficient funding or administrative inefficiency, certainly cannot be permitted to bear more heavily on the 'exceptional' or handicapped child than on the normal child" (*Mills* v. *Board of Education*, 348 F. Supp. 866 (1972) at 876).

discrimination on student achievement. Proof of inequality in substantive pedagogical practices can be seen either as the existence of the inequality of service itself — because equal opportunity is recognized as the basic guiding principle in the distribution of educational resources — or in terms of lower opportunity for individuals adversely affected by the practice under scrutiny. It should be noted that the nature of the harm to be remedied will help to define the limits of judicial review.

An equality standard which requires relatively equal resource (both monetary and human) distribution absent substantial justification would establish a fairly broad scope of judicial review. Resource discrimination is an objective issue easily demonstrated by a plaintiff. Furthermore, once discrimination is established, there is generally no need to prove additional injury and the degree of discrimination is irrelevant.[281] Many of the evidentiary difficulties cited by the majority in *Rodriguez,* and by commentators like Yudof, are bypassed and the court must decide whether the defense of inequalities offered by the state constitutes "substantial justification".

> The assertion that, absent some substantial justification, the state is obligated to distribute its education dollars equally must . . . find support in legal or ethical theories about how a just government should behave in a democratic society. Considerations of judicial manageability demand it.[282]

The basis of equal protection principles is to protect the individual from deprivation as a result of arbitrary government action. Principles of judicial manageability in the review of broad areas such as public education must be based on a number of different sources and considerations, and the first, and most basic, principle for judicial review of educational policies is the constitutional standard of equal opportunity. However, it has been stated that judicial activity to promote equal access to school resources cannot be a based on equality of educational outcomes: "Otherwise, courts will be saddled with the two-fold task of determining when resource inequality hinders or promotes achievement equality and of devising distribution systems that will achieve the goal."[283] Educational outcomes, however, must be considered in appraising the level of educational opportunity afforded. For example, the general objectives of college preparatory programs are all very similar: a certain level of substantive knowledge is to be imparted and the

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281. *See: R.* v. *Drybones,* [1970] S.C.R. 282; *Harper* v. *Virginia Board of Elections,* 383 U.S. 663 (1966).
282. *Yudof, supra,* note 206 at 485.
283. *Id.,* at 481.

student must master basic literacy skills and the discipline to complete the work on schedule. A radically disproportionate failure rate among college-bound students in interdistrict comparisons, even assuming relative equality in educational expenditures, should raise a justiceable issue under the equal protection/equal benefit principle as indicative of inequality of opportunity. Judicial review must be triggered by the existence of inequality and not the nature of the policy area or the degree of discrimination.[284]

Finally, it is necessary to consider the effect of judicial pronouncements on other educational objectives, such as community control of schools. Community control of schools should only be accepted as a limiting consideration on the scope of judicial review of educational opportunity where the legislative scheme makes true local control a reality for all school districts.[285] Otherwise, "local control" becomes an escape hatch for legislative schemes guilty of resource discrimination. The "local control" argument is often shrouded in "basic democratic principles" arguments and injects an unnecessary tension between the role of the judiciary and the role of community government structures.

Local control would remain possible under an equal opportunity principle that eliminated unjustifiable resource discrimination.[286] If harm in equal educational opportunity litigation is construed as the existence of resource discrimination, judicial review would be triggered by inequality in resource distribution or inequality in educational outcome. Extraneous educational objectives, like community control of schools, would only constitute a limiting factor on the scope of judicial review where they were in keeping with the basic principle of equal educational opportunity and did not result in undue advantages to certain school districts. Evidentiary issues, the need to determine the relationship between equal opportunity and educational achievement, only arise when the harm occasioned is defined as lost opportunity.

Judicial intervention into the educational process to regulate educational outcomes also has been described as a "socialist" model for educational reform.[287]

> The boldest assumptions of the socialist model, the ones most directly affecting judicial intervention, are as follows: first, that our technology can

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284. "That swimming pools may not be educationally essential does not justify a discriminatory decision to make them available to some students and not to others" (*id.,* at 485).

285. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 130 *per* Marshall J., dissenting.

286. Coons & Sugarman, *supra,* note 50.

287. Silberman, *Crisis in the Classroom* 62 (1970).

> identify precisely what factors affect schooling outcomes; second, that there are experts who can and will perform this function; and third, that society is obliged to heed the advice of these experts in formulating the scope of constitutional rights.[288]

Educational outcomes have been incorporated into the present analytical model to act solely as an indicium of inequality of opportunity. The assertion that it is necessary to demonstrate a positive correlation between factors which affect schooling outcome and underachievement (or non-achievement) among disadvantaged students before the judiciary should attempt to intervene is somewhat tautological.

Critics of the socialist model of reform argue that harm within an educational malpractice or equal opportunity claim must be established along traditional legal structures of reasoning.[289] In an equal opportunity claim, it is said it must be demonstrated that factors such as physical facilities, better qualified teachers, and increased monetary resources affect a child's ability to learn; and because such a positive correlation cannot be demonstrated, there can be no denial of equal opportunity. The consequence, of course, of this line of reasoning is that the inequality, in effect, is legalized. Such arguments seem to bypass common sense and insulate inequality in the provision of services behind a thin shroud of logic. As Marshall J. pointed out in *Rodriguez:*

> In fact, if financing variations are so insignificant to educational quality, it is difficult to understand why a number of our county's wealthiest school districts, which have no legal obligation to argue in support of the constitutionality of the Texas legislation, have nevertheless zealously pursued its cause before this Court.[290]

In arguing that there is no correlation between expenditure and educational quality, the state is conceding the irrelevance of its own legislative scheme of resource allocation. The weight of the individual's interest in an education, at the very least, should shift the burden of proving that such disparities do not affect the quality of education afforded to the state.[291]

However, if the harm suffered by individuals who allege inequality of educational opportunity is defined as "lost opportunity", the standard of judicial review available would be reduced significantly. Opportunity would be defined as the level of expenditure, thus leaving educational authorities to decide the type of programs or activities best suited to the district in question. Focusing on the issue of the equality of expenditure,

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288. Yudof, *supra,* note 206 at 422.
289. *Id.*
290. *San Antonio Independent School District* v. *Rodriguez,* 411 U.S. 1 (1973) at 85.
291. *Id.,* at 86.

however, may divert attention from the need to monitor the equality of the service provided.[292] For the right to an appropriate education to be properly protected through legal mechanisms, there must be some basis on which the judiciary also can review the outcomes of the educational programs to measure their effectiveness.

The McIntyre formula may be employed to redress inequality in the level of services provided interdistrict. The state would be forced to demonstrate that interdistrict inequalities in the level of service provided was neither capricious nor arbitrary, but was rationally based to obtain a desired social objective. Inequality in educational opportunity cannot be considered a desirable social objective. Other valid social objectives, such as increased local control of schools, must be achieved within the basic constitutional principle of equal opportunity. Furthermore, the McIntyre formula does not represent an increase of the political role of the judiciary in constitutional litigation. Because judicial review is available only upon demonstration of unequal access or unequal outcome, there is little basis on which to fear judicial involvement in the daily decisions of the public authorities. The role of the judiciary is to pronounce constitutional standards, not fashion minute and detailed policies.[293]

VII. *Conclusion*

In attempting to balance the interests of students and institutions in a drive towards a more effective public educational system, a structure of "rights", then, can be useful. The individual possesses a clear and identifiable interest in receiving a good quality education. As a government benefit, the provision of educational services should be governed by basic principles of fundamental justice[294] and equal protection.[295]

Principles of fundamental justice may be fashioned so as to protect the individual's interest in an education in disciplinary or dismissal proceedings. These principles should ensure that individuals will always possess an appropriate remedy for the vindication of private rights. Once

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292. "When faced with the imminent threat of integration southerners showed willingness to take some steps toward equality. . . . In South Carolina, for instance, the Governor and the legislature had authorized a new $75 million bond issue. Even under the gun, however, the equalization moves were limited. The new buildings were often overcrowded from the beginning and offered a limited range of courses taught by poorly trained teachers" (Orfield, "Will Separate Be More Equal?" Integrated Education, Jan.-Feb. 1976, at 3).
293. It should be noted that in over a decade of desegregation litigation, the Courts have never attempted to define "integrated" or establish a minimum numerical quotient for a district school board.
294. Gibson, *supra*, note 261.
295. Coons and Sugarman, *supra*, note 50.

an interest is recognized as deserving of protection, the structure of analysis employed should be modified to accommodate the exigencies of the factual circumstances giving rise to the alleged deprivation.

A leading decision of the United States Supreme Court on the issue of due process, *Goss* v. *Lopez,* established a flexible test to determine the protection required in educational disciplinary proceedings. Essentially, the Court required that the rudiments of due process protection — a right to a hearing, notice of a hearing and the right to be heard — would be required in most disciplinary procedures but that the actual timing and content of the hearing and the right to be heard — would be required in most disciplinary procedures but that the actual timing and content of the hearing was to be determined by an appropriate accommodation of the competing interests involved. Despite the practical utility of such a flexible approach to fashioning the constitutional protections to be accorded individuals in the educational setting, courts have shied away from mandating the review of academic dismissals on the ground of lack of expertise. The decision to confine judicial review to disciplinary procedures excludes the possibility of redress in an area of educational policy where arbitrary decision, perhaps, are the most numerous and the value to the individual of the interest affected (promotion, the right to continue in a programme or institution, *etc.*) is greatest.

The adoption of a theory of structural due process within the ambit of principles of fundamental justice would eliminate in Canada the perceived need both to distinguish disciplinary dismissals from academic dismissals, and to isolate academic dismissals from judicial review for fear of challenging the integrity of the judgement of educators. Such a theory would call for individualized decision-making in controversial policy areas that can be characterized as "at least partly frozen [in place] by institutional constraints". The educational system represents a model grounds for the implementation of a structural due process theory because of the recognized weight of the individual's interest in an education and the heavily bureaucratized structure of educational policy decision-making. The standard of judicial review employed in due process litigation would remain directly correlated to the weight of the individual's interest threatened. Again, it must be noted that the issue before the court in such litigation is the degree of natural justice required in a particular decision-making process: the choice and structure of such processes remain the responsibility of educational authorities.

Similarly, notwithstanding that equal protection doctrine traditionally has been applied primarily against racial classification,[296] it also has a role

296. Yudof, *supra,* note 206.

to play in the educational setting. The basis of the doctrine, which prohibits the distribution of government resources and services unequally on the basis of an invidious classification, can clearly be extended to encompass invidious classifications, other than race, which result in harm or prejudice to classes of citizens. Within the educational context, equal opportunity doctrine could serve as a legal mechanism to protect the individual's interest in receiving educational services. An individual's right to an education must be expanded beyond a mere right of access to a seat in a classroom for a mandatory schooling period:

> . . . it is not enough to see to it that education is not actively used as an instrument to make easier the exploitation of one class by another. School facilities must be secured of such amplitude and efficiency as will in fact, and not simply in name, discount the effects of economic inequality, and secure to all the wards of the nation equality of equipment for their future careers.[297]

However, traditional equal protection doctrine focused on questions of formal equality. Thus, to function as a protective mechanism within the educational setting, equal opportunity analysis must be developed in a bistructured manner so as to allow consideration of both issues of access to educational services and the quality of services provided.

The formula for equal protection litigation suggested by McIntyre J. in *Mackay* v. *The Queen* establishes a basic two-step process of judicial analysis: Is there demonstrated inequality in the provision of services? If so, is the inequality rationally based to further or attain a desirable social objective? A definition of equality of educational opportunity that encompasses both access and quality considerations would expand legal protection of an individual's right to an education. The question of whether the demonstrated inequality is rationally based and designed to attain a desirable social objective must be approached from the basis that the party defending the inequality must prove its rationality.

Increased judicial involvement to protect the individual's right to an education on either of the above bases need not be viewed as the end of decision-making autonomy for public school authorities. The only issues before the court in educational litigation are the constitutional standards applicable to various educational policies. The design and structure of educational policies to achieve pedagogical objectives and their day-to-day implementation would remain the responsibility of education professionals.

The constitutionalization of an individual's right to an education has emerged as both a moral and legal imperative. In the words of Justice

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297. J. Dewey, *supra*, note 5 at 114.

Story: "It is one of the wise dispensations of Providence that knowledge should not only confer power, but should also confer happiness."[298] As educators struggle to adapt to increased work loads and drastic cutbacks in government funding, the profession ceases to generate the impetus to ensure that every child's birthright to an appropriate education is protected. Many educational harms — claims arising from alleged inequality of educational opportunity — can only be classified as non-traditional harms. Legal mechanisms designed to protect the individual's interest in an education will, of necessity, be of non-traditional design.

Essentially, the basic issue to be resolved is the value of an appropriate education to both the individual and the society at large.

> Our destruction, should it come at all, will be . . . [f]rom the inattention of the people to the concerns of their government . . . Make them intelligent, and they will be vigilant; give them the means of detecting the wrong, and they will apply the remedy.[299]

As society becomes more complex, an appropriate education becomes increasingly fundamental — not in terms of assuring personal success, but as a means of promoting personal survival with dignity. The role to be played by the judiciary in ensuring educational opportunity will be influenced by a number of factors: judicial precedent, demands for consistency in constitutional theories, political conceptions as to the proper role of the judiciary in sensitive policy issues. The scope of judicial involvement must be determined by the fact that the educational rights of generations of students are being infringed by a series of educational policies from which these students have no effective avenue of redress. The constitutional arguments presented attempt to address broader concerns as to the proper justification for increased judicial intervention into the educational process. Perhaps the best justification for increased intervention is, simply, that "a mind is a terrible thing to waste".[300]

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298. Story, *supra*, note 279 at 124.
299. John Swett, quoted in Cloud, *The Story of California's Schools* 20 (1946).
300. Advertising slogan of the United Negro College Fund Appeal Campaign.