1998

Education as a Fundamental Right: Challenging the Supreme Court's Jurisprudence

Timothy D. Lynch
# NOTE

**EDUCATION AS A FUNDAMENTAL RIGHT:**
**CHALLENGING THE SUPREME COURT’S JURISPRUDENCE**

## CONTENTS

<table>
<thead>
<tr>
<th>Section</th>
<th>Title</th>
<th>Page</th>
</tr>
</thead>
<tbody>
<tr>
<td>I.</td>
<td>INTRODUCTION</td>
<td>954</td>
</tr>
<tr>
<td>II.</td>
<td>DENYING EQUAL EDUCATIONAL OPPORTUNITY DECREASES CHANCES TO SUCCEED IN LIFE</td>
<td>957</td>
</tr>
<tr>
<td>A.</td>
<td><em>Economically Disadvantaged Children as a Class</em></td>
<td>959</td>
</tr>
<tr>
<td>B.</td>
<td><em>The Majority of Economically Disadvantaged Children Attend Substandard Public School Systems</em></td>
<td>960</td>
</tr>
<tr>
<td></td>
<td>1. The Effects of Unequal and Inferior Education</td>
<td>960</td>
</tr>
<tr>
<td></td>
<td>2. The Impact of Inadequate Educational Resources</td>
<td>963</td>
</tr>
<tr>
<td>C.</td>
<td><em>The Effect of Local Property Taxes on the Quality of Education</em></td>
<td>966</td>
</tr>
<tr>
<td>III.</td>
<td>THE FIGHT FOR EQUAL EDUCATIONAL OPPORTUNITY IN STATE COURTS</td>
<td>968</td>
</tr>
<tr>
<td>A.</td>
<td><em>The Beginning of Modern Education Rights Litigation: Serrano and Robinson</em></td>
<td>970</td>
</tr>
<tr>
<td>B.</td>
<td><em>State Court Litigation Has Been Ineffective in Remediing Inferior Education</em></td>
<td>973</td>
</tr>
<tr>
<td></td>
<td>1. The 1996 Litigation</td>
<td>976</td>
</tr>
<tr>
<td></td>
<td>2. The 1997 Litigation</td>
<td>979</td>
</tr>
<tr>
<td></td>
<td>3. Epilogue to <em>Abbott v. Burke</em></td>
<td>983</td>
</tr>
</tbody>
</table>
IV. STATE REFORM EFFORTS TO IMPROVE PUBLIC EDUCATION HAVE BEEN INADEQUATE .................................... 984

A. State Takeovers of School Systems ................................... 984
B. School Vouchers ............................................................... 987
C. For-Profit Schools ............................................................... 987

V. CHILDREN HAVE A FUNDAMENTAL RIGHT TO AN ADEQUATE EDUCATION ........................................ 990

A. Historical Overview of the Equal Protection Clause .......................................................... 990
B. Standards of Review Under the Equal Protection Clause ................................................. 991
C. Is There a Fundamental Right to Education? .......................................................... 992
D. San Antonio Independent School District v. Rodriguez: No to Education as a Fundamental Right .......................................................... 993

VI. CONCLUSION .................................................................. 1000

I. INTRODUCTION

In Brown v. Board of Education, the United States Supreme Court declared education to be one of the “most important function[s] of state and local governments.”1 Ironically, less than twenty years later, the Court held that poor urban students did not have a “fundamental right” to receive the same equal educational opportunities as their wealthier counterparts under the Equal Protection Clause of the Fourteenth Amendment in San Antonio Independent School District v. Rodriguez.2 Courts have held that the statement quoted above from Brown should not be interpreted as support for the proposition that one has a fundamental right to equal education because the Brown Court was dealing with the larger issue of the detrimental effects of racial segregation on children.3

2. Id. at 493.
4. See Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1018 n.13 (Colo. 1982) (concluding that the “strict scrutiny test was applied in Brown not because education is a fundamental interest, but because classification by race is clearly suspect”). However, what courts have often failed to recognize is that in Brown, the Court concluded that the black and white school systems, although separate, were equal “with respect to buildings, curricula, qualifications and salaries of teachers, and other ‘tangible’ factors.” Brown, 347 U.S. at 492. Today, many of this
Despite such distinction, the Court’s holding in Rodriguez was a sharp retreat from its “historic commitment to equality of educational opportunity”\(^5\) for all individuals and has contributed to the notion that there is nothing wrong with continuing to allow the vast majority of this country’s poorest children to suffer under state school funding systems that result in grossly unfair advantages for children of a different socioeconomic status.\(^6\) Although some states, most notably Kentucky, have enacted measures to remedy such disparities,\(^7\) the vast majority of poor children today continue to receive a substandard education as compared to children fortunate enough to live in wealthier households.\(^8\)

This Note contends that economically disadvantaged children, who generally receive an inferior education, have a fundamental right to receive the same educational opportunities as other children under the Equal Protection Clause of the Fourteenth Amendment. Although this subject has been of considerable interest to various legal scholars,\(^9\) this nation’s poorest children are not receiving an equal education as compared to other, more affluent, children. See John Waldron, Unequal Funding: Teaching Cadillac Kids with Chevy Dollars, HUM. RTS., Spring 1997, at 6.


6. See Wendy Anton Fitzgerald, Maturity, Difference, and Mystery: Children’s Perspectives and the Law, 36 ARiz. L. REV. 11, 15-16 (1994) (explaining how as a nation, we have failed to redress the fact that there is a serious problem in the way education is funded for our children); see also Ronald F. Ferguson, Paying for Public Education: New Evidence on How and Why Money Matters, 28 HARV. J. ON LEGIS. 465, 465 (1991) (asserting that distributing resources equally, as well as more efficiently, to public elementary and secondary schools has been a goal that continues to elude this nation).

7. See, e.g., Waldron, supra note 4, at 7 (explaining how the state of Kentucky increased its spending on education and has helped begin to change the state’s education system for the better).

8. See id. at 6 (showing how the school library for children living in rural southern Ohio cannot even afford encyclopedias written within the last twenty-five years while the school library for children from a Cleveland suburb is “well-stocked”); see also Erik Larson, Where Does the Money Go?, TWEB, Oct. 27, 1997, at 88, 90 (showing how in the Baltimore, Maryland school system, which is largely attended by poor schoolchildren, less than half of its ninth graders passed a basic skills test in mathematics, while in suburban Baltimore County, more than 85% of its students passed the same test).

9. See Connie de la Vega, The Right to Equal Education: Merely a Guiding Principle or Customary International Legal Right?, 11 HARV. BLACKLETTER J. 37 (1994) (arguing that customary international law, which supports providing all children with equal educational opportunity, should be applied to education rights cases in the United States); Joshua Seth Lichtenstein, Note, Abbott v. Burke: Reaffirming New Jersey’s Constitutional Commitment to Equal Educational Opportunity, 20 HOFSTRA L. REV. 429 (1991) (analyzing New Jersey’s approach to improving the disparity in educational opportunities between affluent suburban school districts and poor urban ones); Craig A. Ollenschleger, Comment, Another Failing Grade: New Jersey Repeats School Funding Reform, 25 SETON HALL L. REV. 1074 (1995) (offering a critical analysis of the New Jersey Supreme Court’s efforts to provide equal educational opportunities for its poorest urban school districts by analyzing its decision in Abbott v. Burke); Amy I. Schmitz, Note, Providing an Escape for Inner-City Children: Creating a Federal Remedy for Educational Ills of Poor Ur-
Note takes an analysis of the inequities that still exist in public education systems a step further by contending that the Court’s decision in *Rodriguez* was not only inherently wrong, but that the Court engaged in a form of contradictory jurisprudence in determining whether education is a “fundamental right.” Thus, this Note is highly critical of the Supreme Court’s analysis in determining that a fundamental right to education does not exist, specifically in the context of this nation’s poorest children.

Part II of this Note provides an extensive overview of the distinct obstacles faced by the vast majority of poor children as well as the inadequate education a large number still receive today. This section is necessary for the purpose of understanding precisely what is happening educationally to many economically disadvantaged children. In addition to examining how states have dealt with the inadequate education many poor students receive, Part III of this Note provides a brief analysis of the 1996 and 1997 state court decisions involving inequities in school funding. Furthermore, Part III of this Note shows how state efforts to improve public education for poor children have had a limited effect. Finally, Part IV of this Note argues that poor children have a fundamental right to equal education under the Equal Protection Clause of the Fourteenth Amendment and ultimately proposes that the Court re-examine its holding in *Rodriguez*, particularly in light of the inadequate education that many poor students continue to receive today.

However, in defining “equality” of education as it relates to school funding, the underlying issues are really “quality” as well as the goal of insuring that children, no matter what their economic circumstance, receive an adequate education that can genuinely prepare them to become meaningful participants in our political system. I am not arguing, nor is it likely, that every school district in America will spend the same amount of money on public education. Unfortunately, the majority of

---

*Ban Schools*, 78 MINN. L. REV. 1639 (1994) (arguing that the issue of unequal educational opportunities for poor urban children should return to the federal courts on the author’s belief that the equal protection approach of the Supreme Court in *Plyler v. Doe* was a novel one); cf. F. Clinton Broden, Note, *Litigating State Constitutional Rights to an Adequate Education and the Remedy of State Operated School Districts*, 42 RUTGERS L. REV. 779 (1990) (arguing that because education is one of the most important social concerns, school children in New Jersey who feel they are being denied their state constitutional right to a thorough and efficient education should have the right to seek a judicial decree authorizing a state takeover of their school district); A. Thomas Stubbs, Note, *After Rodriguez: Recent Developments in School Finance Reform*, 44 TAX LAW. 313 (1990) (analyzing the unequal educational opportunities that this country’s poorest children receive by reviewing the most widely used methods for financing public schools and the role that education finance plays in state budgets).
EDUCATION AS A FUNDAMENTAL RIGHT

Courts that have dealt with the issue of inadequacies in educational opportunities for poor students fail to focus on the “quality” of education these students receive as compared to others.  

II. DENYING EQUAL EDUCATIONAL OPPORTUNITY DECREASES CHANCES TO SUCCEED IN LIFE

This Note focuses on economically disadvantaged children and the unequal, as well as inadequate, education that many receive as compared to the education of children who reside in wealthier school districts. Contrary to popular belief, however, the worst public educational conditions do not just exist in poor urban communities. For example, many children living in poor rural districts suffer in public educational institutions that fail to provide them with an adequate education.

There are, however, notable differences in the educational deprivation that plague many inner-city schools which are not present among many poor rural school districts. One of the most remarkable distinctions is in the racial composition of many urban communities. Specifically, the fact that one-third of all black Americans reside in inner-cities disproportionately exposes this group to inferior public school systems. A recent study found that once removed from urban public

10. See, e.g., Leandro v. State, 488 S.E.2d 249, 262-63 (N.C. 1997) (Orr, J., dissenting) (arguing that the majority’s rationale that equal educational programs and resources simply are not practical for poor students is based on the incorrect assumption that the word “equal” means “identical” rather than providing “access to new textbooks, adequate facilities, other educational resources, and quality teachers with competitive salaries”); see also BLACK’S LAW DICTIONARY 536 (6th ed. 1990) (defining “equality” as “[t]he condition of possessing substantially the same rights, privileges, and immunities”).

11. See Schmitz, supra note 9, at 1641-42 (noting that education is failing in both urban and rural areas in the United States).

12. See Waldron, supra note 4, at 6 (explaining how poor rural students in southern Ohio face inferior educational conditions).

13. See Leandro, 488 S.E.2d at 252 (explaining how children from Cumberland, Halifax, Hoke, Robeson, and Vance counties of North Carolina complain that “college admission test scores and yearly aptitude test scores reflect both the inadequacy and the disparity in education received by children in their poor districts”); see also Mark S. Grossman, Oklahoma School Finance Litigation: Shifting From Equity to Adequacy, 28 U. MICH. J.L. REFORM 521, 527-57 (1995) (showing how poor rural school districts in Oklahoma have long dealt with very old and unsafe facilities and despite years of unsuccessful litigation, the public school finance system remains inadequate).


15. See, e.g., Abbott v. Burke, 575 A.2d 359, 411-12 (N.J. 1990) (declaring that unless the educational deficiency prevalent in New Jersey’s poor urban districts is not addressed, blacks and Hispanics who make up the majority of its residents are likely to remain under-educated, as well as
high schools and placed in suburban ones, black students "achieved higher grades, lower dropout rates, better academic preparation, and higher rates of college attendance compared with those who remained behind in ghetto institutions."16

In addition to the race factor, there are other variables that separate urban school districts from rural ones. "With concentrated poverty in the inner-city comes drug abuse, crime, hunger, poor health, illness, and unstable family situations. Violence also creates a significant barrier to quality education in city schools where often just getting children safely to school is considered an accomplishment."17 In short, urban school districts, while just as poor as their rural counterparts, suffer from qualitatively different problems.18 Nevertheless, economically disadvantaged children, whether residing in urban or rural communities, have a fundamental right to equal education which many are denied under the present school financing systems operating in most states.19

16. MASSEY & DENTON, supra note 14, at 169.
17. Abbott v. Burke, 693 A.2d 417, 433 (N.J. 1997); see also Pam Belluck, Gang Gunfire May Chase Chicago Children from Their School, N.Y. TIMES, Nov. 17, 1997, at A1 (reporting on how the violence surrounding one elementary school located in the middle of one of Chicago's worst housing projects is so bad that many of its students "'can't sleep at night because there's shooting and they come to school and they're sleepy and not prepared'"). The violence which plagues many inner-city school systems adds peculiar obstacles to providing students with an adequate education. For example, the chief executive officer of Chicago's public school system proposed busing 570 elementary school children to another school if the violence did not decrease in the neighborhood where their school is located. See id. at A21.
18. See MASSEY & DENTON, supra note 14, at 13 (discussing how anthropologists found that youth living in inner-cities must contend with powerful peer pressure not to do well in school); cf. JONATHAN KOZOL, SAVAGE INEQUALITIES: CHILDREN IN AMERICA'S SCHOOLS 74 (1991) (acknowledging that while children in poor, isolated rural districts such as Kentucky, northern Maine, and Arkansas face some of the same educational problems that the famed education researcher has seen in Chicago as well as East St. Louis, the nature of the poverty is truly "somewhat different"); Dwight L. Greene, Naughty by Nurture: Black Male Joyriding—Is Everything Gonna Be Alright?, 4 COLUM. J. GENDER & L. 73 (1994) (arguing that because young urban black males suffer from such factors as unequal public education, they feel locked into a situation of permanent deprivation, and therefore rebel against American society in self-destructive ways).
19. This does not mean, however, that the distinct obstacles many urban school systems face should be ignored in reversing the pattern of unequal educational opportunities its students receive. Rather, in contending that one has a fundamental right to equal education under the federal Equal Protection Clause, I do not believe that whether a child lives in an urban or rural area, or is black or white, should change this.
A. Economically Disadvantaged Children as a Class

To be a poor child in an impoverished neighborhood, no matter where you are, is a tremendous burden to bear. In fact, quantitative evidence indicates that individuals who are raised in environments of "poverty and social isolation are more likely to . . . drop out of school, achieve only low levels of education, and earn lower adult incomes." Moreover, being poor in and of itself makes one a social pariah. As a group, economically disadvantaged children comprise one-fifth of the total juvenile population in America and are, in fact, the poorest group in this country, surpassing adults. As one writer noted after visiting one poor school district in Baltimore, Maryland, "[t]here is something absurd, and deeply unfair, about a nationwide system of funding that provides the least amount of money to the most impoverished students."

Although poverty has long been associated with lower educational performance, it has often been used as an excuse for the failure of many impoverished school districts to adequately educate their students. However, even if this excuse proves valid, allowing many of this nation's poorest children to learn in unequal and deficient public school systems does nothing more than help to ensure that many of these same children will be reduced to a lifetime of poverty.

20. See Massey & Denton, supra note 14, at 2 (contending that the greater the degree of poverty, the worse an individual's environment will be, ultimately manifesting itself in geographical, social, and economic isolation from the rest of the world).
21. Id. at 179.
22. See id. at 9 (explaining that middle-class households in general typically seek to escape the poor).
23. See Fitzgerald, supra note 6, at 15.
25. Larson, supra note 8, at 88.
26. See Massey & Denton, supra note 14, at 141.
27. See Neil MacFarquhar, Judge Orders a State Takeover of the Newark School District: Failure Rate of Children on Statewide Tests Is Prime Reason, N.Y. TIMES, Apr. 14, 1995, at A1 (explaining how in order to avoid a state takeover of the Newark school system for failing to improve test scores for its students, Newark officials blamed the poverty of their district).
28. See, e.g., Abbott v. Burke, 575 A.2d 359, 411 (N.J. 1990) (explaining how if an inadequate education continues to be given to poor children, it is likely to result in them remaining in an impoverished environment).
B. The Majority of Economically Disadvantaged Children Attend Substandard Public School Systems

In reaching the conclusion that poor children do not have a fundamental right to equal educational opportunity, the Rodriguez Court was persuaded by studies indicating that "the poorest families are not invariably clustered in the most impecunious school districts." Moreover, the Court found that "no charge fairly could be made that the [state system of financing public education] fails to provide 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." However, in examining the effectiveness of today's public education for the vast majority of poor children, it is evident that many children are concentrated in some of the most poverty-stricken school districts and are the beneficiaries of an educational system that has failed to equip them with even the most basic skills.

1. The Effects of Unequal and Inferior Education

In Washington, D.C., poor children attend a school system where it is estimated that forty percent of its students drop out before reaching their high school graduation. Not far away, in Baltimore, Maryland,

---

30. Id. at 37.
31. It is important, however, to note that there are poor school districts with concentrated students in poverty that have achieved some degree of educational success despite unequal funding for educational expenditures. See Hempstead Schools' Revival Aids Whole Community, NEWSDAY (Long Island), Dec. 19, 1997, at A50 [hereinafter Hempstead Schools'] (reporting on how Hempstead High School, despite its poverty, was able to remove itself from New York State's list of Schools Under Registration Review which is reserved for the state's worst school districts); Larson, supra note 8, at 92-93 (showing how one middle school principal broke all the rules of the bureaucratic system in public education and used his leadership skills and the support of the local business community in order to increase the educational performance of his students); see also Nick Chiles, Eyes and Hopes of Educators Are upon Texas: Houston Classes Offer Lessons for Jersey, SUNDAY STAR-LEDGER (Newark, N.J.), Nov. 23, 1997, at 1 (reporting on how Calvert Elementary School, which is almost 80% poor and 90% black and Latino, has dramatically improved its reading, math, and writing test scores due to its adoption of an education reform plan known as Success For All). However, such instances are not the norm, and those who argue that impoverished school districts do not have a fundamental right to the same equal educational opportunities as their wealthier, suburban counterparts use such examples as proof that money does not matter. On the contrary, nothing could be further from the truth. For example, the Success For All reform plan mentioned above requires a great deal of financial commitment and schools which have implemented it without the requisite funds have suffered. See Chiles, supra, at 16.
32. See Richard Lacayo, They'll Vouch for That, TIME, Oct. 27, 1997, at 72, 74. See generally KOZOL, supra note 18, at 175-86 (explaining how wealthy parents in Washington, D.C. send their children to private school, but a person who is not wealthy has no choice but to send their children to some of the poorest schools filled with a large number of the poorest children).
where more than seventy percent of the students qualify for free lunch due to their poverty-stricken households, less than one-half of the ninth graders were able to pass a basic skills exam in mathematics. In fact, the Baltimore school system "produced a student body that failed to meet the most rudimentary state standards, as measured in a battery of tests that gauge functional skills in reading, math, writing and citizenship." Equally disturbing is the fact that almost thirty-five percent of its student body is missing from school more than twenty days out of the school year.

To contend that the majority of poor children are receiving a decent education is akin to a denial of the harsh realities of the public educational systems that they endure. Last year, children attending impoverished school systems in North Carolina sought to invalidate the state’s present educational funding system, in which more than eighty percent of the students were alleged to be failing basic subjects, like math, history, and English. The students argued that the state’s funding system failed to provide them with an adequate level of educational opportunity.

Similarly, in Philadelphia, Pennsylvania, the poor children that populate Vare Middle School are not known for their educational accomplishments, but rather for the fact that they perform poorly on tests. Economically disadvantaged children in Philadelphia face a school system in which almost forty percent of the high school student body scored below the fifteenth percentile on standardized achievement tests in recent years. On the other hand, children fortunate enough to reside in wealthier Philadelphia neighborhoods attend a public school system where only six percent of high school students scored below the fifteenth percentile on achievement tests.

Likewise, in the East New York section of Brooklyn, a poor urban community, children attend a public school system that has the dubious honor of consistently ranking among New York City’s worst. Not far away, in the impoverished community of Roosevelt, only eighteen per-

33. See Larson, supra note 8, at 90.
34. Id. at 88.
35. See id. at 90.
37. See Lacayo, supra note 32, at 72.
38. See MASSEY & DENTON, supra note 14, at 151.
39. See id. at 152.
cent of the high school students were able to pass a state test in United States history.41

In New Jersey, children living in impoverished communities who attend their local public school are almost certain to receive a substandard education. For example, in 1995, the school board in Newark, a city whose residents are largely poor,42 was forced to capitulate control to the state because of its inability to improve a system in which only one in four high school students could pass a high school proficiency test.43 In 1997, the state predicted that the most that could be expected in terms of a change was a “modest improvement in reading and math scores.”44

The critical state of the New Jersey inner-city school system has not gone unnoticed by its courts. In May 1997, the Supreme Court of New Jersey found that despite more than twelve years of education litigation,45 the majority of its poor children, who largely reside in urban communities,46 were not receiving the benefits of a quality education.47 However, recent court efforts indicate that substantial educational reform will occur in New Jersey’s poorest urban school districts within the next few years.48 Nonetheless, current data available reveals a public

42. See MacFarquhar, supra note 27, at B6 (explaining how Newark officials blame the poverty of their school district as the source of its students’ low achievement).
43. See id. at A1.
46. See generally Abbott, 693 A.2d at 420 (showing that children who are receiving an inadequate education under the state’s constitution typically reside in poor urban areas classified as “special needs districts”).
47. See id. at 432; see also id. at 433 n.22 (pointing out that for the 1995-1996 school term, the dropout rates in New Jersey’s inner-city schools were as high as 31.2%).
48. See Abbott v. Burke, A-155 Sept. Term 1997, 1998 WL 268382 (N.J. May 21, 1998) (directing that the state commissioner of education implement widespread reform among the state’s most impoverished school districts); see also Abby Goodnough, Judge Offers Specific Plans for Schools: State Court Could Force New Jersey to Comply, N.Y. TIMES, Jan. 23, 1998, at B1 (explaining how a superior court judge appointed by the New Jersey Supreme Court to address the wide disparities in educational opportunity between the state’s affluent and poor urban school districts recommended that the state allocate $312 million more a year for urban schools, and that the state spend no more than $2.8 billion to repair or replace dilapidated inner-city school buildings). The hearings that took place in order to comply with the New Jersey Supreme Court’s 1997 decision in Abbott v. Burke were bitterly contested as attorneys for the twenty-eight poorest school districts clashed with officials from the New Jersey Department of Education over how to fund and reform education. Specifically, both sides disagreed over the amount of money needed to reverse
education that is remarkably different for many of the state’s poorest children than children fortunate enough to live in wealthier communities. For example, in October 1995, approximately 75.6% of students in New Jersey were able to pass the state’s high school proficiency exam that measures basic skills.49 While at first glance the statistic seems impressive, further examination of the test results presents a different picture. In Camden, which remains one of the most impoverished communities in America,50 only 44.4% of the students were able to pass the high school proficiency exam.51 Not far away, in East Orange, another largely poor community, 30.2% of the students successfully completed the exam.52 The results were even more disturbing in Irvington, another low-income community, where the passing rate for students was only 19.9%.53 In fact, only 41.8% of students living in New Jersey’s poorest school districts were able to pass the state’s high school proficiency test as compared to 91.7% of students who reside in its affluent suburban school districts.54 Such quantitative evidence demonstrates how many poor children in New Jersey still are not being adequately educated in the most basic skills.

2. The Impact of Inadequate Educational Resources

In trying to comprehend the full impact of educational deprivation, it is important to look beyond low levels of achievement. As New Jersey Supreme Court Justice Handler commented: “[W]e cannot expect disadvantaged children to achieve when they are relegated to buildings

the downward trend of public education in the state’s poorest communities. See Abbott, 693 A.2d at 438, 443 (ordering as a temporary measure of relief that the state provide up to $250 million for the 1997-1998 school year to the poorest school districts until a more comprehensive legislative plan could be developed and mandating that the commissioner of education develop an individualized plan for educational improvement at the classroom level for such districts); Kathy Barrett Carter, Districts and State to Duke It Out on School Funding: Case Centers on Price of Reforming Education, SUNDAY STAR-LEDGER (Newark, N.J.), Nov. 16, 1997, at 23; MaryJo Patterson & Ted Sherman, Class of Abbott vs. Burke Takes Stock: 20 Pupils from 1981: Where Are They Now?, SUNDAY STAR-LEDGER (Newark, N.J.), June 8, 1997, at 16 (reporting on how the Supreme Court of New Jersey ordered the state to increase spending for impoverished school districts in order to “ensure that rich and poor children are educated equally”).

49. See Abbott, 693 A.2d at 432 n.21.
50. See KOZOL, supra note 18, at 137 (discussing the high rate of poverty which plagues the city).
51. See Abbott, 693 A.2d at 433 n.21.
52. See id.
53. See KOZOL, supra note 18, at 159; see also Abbott, 693 A.2d at 433 n.21 (discussing the percentage of students in Irvington, New Jersey who passed the state high school proficiency test in 1995).
54. See Goodnough, supra note 48, at B6.
that are unsafe and often incapable of housing the very programs needed to educate them.\textsuperscript{55}

Unfortunately, this expectation to achieve not only exists, but extends into a delusion that children attending poor school districts can receive a decent education without the adequate resources other children are accustomed to.\textsuperscript{56} For example, the Supreme Court of New Jersey found that the majority of public schools in the state’s poorest communities lacked library centers, were unable to provide space for reducing class size, and lacked adequate facilities for science as well as physical education classes.\textsuperscript{57} Similarly, in southern Ohio, it is not uncommon for elementary school children to attend educational institutions with broken toilets, ceilings that leak, and teachers who purchase basic items, such as crayons and paper, out of their own pockets.\textsuperscript{58}

In New York, many poor children attend schools that are horribly overcrowded.\textsuperscript{59} Despite studies that have repeatedly shown how smaller classes can increase a child’s learning potential particularly in basic subjects such as reading and math,\textsuperscript{60} overcrowding for many poor children in the New York City public school system has become the norm.

For example, Bushwick High School in Brooklyn was originally built for 1031 students but has operated at two hundred percent over its original capacity.\textsuperscript{61} Similarly, students at Public School 150 ("P.S. 150")

\textsuperscript{55} Abbott, 693 A.2d at 438.
\textsuperscript{56} See, e.g., Leandro v. State, 488 S.E.2d 249, 256 (N.C. 1997) (declaring that, in so far as poor children in impoverished school districts are concerned, the equal opportunity clause of the North Carolina Constitution "does not require substantially equal funding or educational advantages in all school districts").
\textsuperscript{57} See Abbott, 693 A.2d at 438.
\textsuperscript{58} See Waldron, supra note 4, at 6; see also Grossman, supra note 13, at 530 (explaining, how in 1989, teachers in some school districts in Oklahoma reported spending an average of $359 out of their own pockets in order to purchase textbooks and supplies that their school districts were unable to afford for all their students).
\textsuperscript{59} See KOZOL, supra note 18, at 113 (commenting on how overcrowding in the New York City school system is so bad that one grade-school principal asserted that "we have children ... who just disappear from the face of the earth"); Donald Bertrand, Crusaders for Schools Rolling Along, DAILY NEWS (New York), Oct. 28, 1997, at 1 QLI (reporting on how a bond act would permit the state to borrow $2.4 billion to help reduce the number of overcrowded schools); see also Elizabeth Kolbert, Fine on Paper, Truant Policy Fails a Child, N.Y. TIMES, Nov. 17, 1997, at B1 (pointing out the abysmal state of New York City’s system for enforcing school attendance after a child missed school for more than two months without the public school ever noticing).
\textsuperscript{60} See, e.g., Steve Wulf, How to Teach Our Children Well (It Can Be Done), TIME, Oct. 27, 1997, at 62, 68 (explaining various ways to increase a school’s effectiveness in educating a child); see also Ferguson, supra note 6, at 466 (finding that decreasing the number of students per teacher in each school district to 18 is important for achievement in the primary grades).
\textsuperscript{61} See Michael Finnegan & Joel Siegel, Ruth Flunks Mayor on Bushwick HS, DAILY NEWS (New York), Oct. 28, 1997, at 18.
in Manhattan have been taught in classrooms that their principal contended were nothing more than oversized closets and "where second-graders shiver from drafts that whistle through rotting window frames." Even more disturbing is the fact that as late as 1997, P.S. 150 was unable to use computers to assist in teaching students because it did not have the wiring necessary to use them.

Nearby, in Roosevelt, a largely poor suburban community, the state took control of a school district in 1996 in which it was common for students to learn by reading outdated text books and to attend classes in decaying buildings with broken water fountains and leaky roofs. In fact, one teacher reported prior to the state's takeover that she was forced to teach her classroom of 123 students with forty-six textbooks. Not surprisingly, the Roosevelt school district's test scores and graduation rates are considerably lower when compared to public schools located in affluent communities which surround it.

In Illinois, the inequities in educational resources and opportunity among the state's various school districts rank among the worst in this country. To illustrate, children in one part of north central Illinois attended a public school despite the fact that it was financially unable to "remedy a[n] ... asbestos problem, repair leaky roofs, and replace flammable stage curtains." On the other hand, children living in a

62. Bertrand, supra note 59, at 1 QLI.
63. See id.
64. See Carvajal, supra note 41, at 29 (reporting on how students attending the Roosevelt public school system are so impoverished that more than half of them qualify for free lunches).
66. See State Takeover of School Unit Is Authorized, N.Y. TIMES, July 20, 1995, at B7 (hereinafter State Takeover). In the Uniondale section of Long Island, New York, inadequate classroom facilities have hindered the district's ability to effectively educate its students. The district reports that it suffers from overcrowding which has absorbed its ability to provide adequate classroom space to its students. See Special Bond Referendum, UNIONDALE PUBLIC SCHOOLS (Uniondale Bd. of Educ., Hempstead, N.Y.), Nov. 1997, at 1. Specifically, the district acknowledged that it is forced to hold classes in "cramped spaces underneath stairwells and in converted basement closets and bathrooms." Id.
67. See Carvajal, supra note 41, at 29.
68. See Carvajal, supra note 65, at B5 (reporting how the Roosevelt school district "lags far behind other Nassau County school systems in test scores and graduation rates").
69. See Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1197-98 (Ill. 1996) (Freeman, J., concurring in part and dissenting in part); see also Belluck, supra note 17, at A21 (reporting how one elementary school in one of Chicago's worst urban communities cannot even afford to repair parts of its facilities punctured by bullet holes).
70. Edgar, 672 N.E.2d at 1197-98 (Freeman, J., concurring in part and dissenting in part). Equally disturbing is the fact that one poor school district in Illinois reported that it generally "replaces its worn-out desks by retrieving from a dumpster perfectly functional desks thrown away by a neighboring school district." Id. at 1197. Although some judges, legislators, and other
nearby, but much more affluent, neighborhood attend facilities that are “new and in good condition.”

C. The Effect of Local Property Taxes on the Quality of Education

For the most part, school funding across the nation remains highly dependent upon local property taxes. This creates substantial disparities in the equality of education students receive because taxable property wealth varies from community to community. As one can imagine, school districts located in neighborhoods that have higher property values can generate higher revenues to finance educational resources by taxing at lower rates, while poorer communities, which typically have lower property values, are forced to tax at a higher rate in order to generate enough income to provide minimum educational resources. Although states in large part supplement the funds derived from local

individuals see nothing troubling about occurrences such as this, there is a direct correlation between the environment a child learns in and their academic achievement, at least in so far as establishing that one has a fundamental right to equal educational resources. See Wulf, supra note 60, at 62-69. What message are we sending to many of this country’s poorest children when we allow public schools to fall apart and students to learn on desks thrown away by other communities and picked from garbage dumpsters?

71. Edgar, 672 N.E.2d at 1197.

72. See id. at 1181 (explaining how under the Illinois School Code, school districts have the authority to levy property taxes for different school purposes); see also Abbott v. Burke, 693 A.2d 417, 420-21 (N.J. 1997) (holding that the Comprehensive Educational Improvement and Financing Act of 1996 (“CEIFA”), which depended in part on local property taxes to fund education in each of the state’s school districts, violated the state’s constitution); Waldron, supra note 4, at 6 (explaining how many blame the inequalities in public education in America on the property tax-based school funding system that is in place). However, some states have moved away from heavy reliance upon this form of school funding. See, e.g., Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 216 (Ky. 1989) (declaring that the state system of financing public schools, which created inadequate educational opportunities for student in districts with lower property values, violated the state’s constitution); see also Waldron, supra note 4, at 6-7 (discussing how after the decision in Rose, the state’s highest court worked with the legislature in increasing state spending on education by over 46%).

73. See Edgar, 672 N.E.2d at 1181; see also Hempstead Schools’, supra note 31, at A50 (contending that New York State’s present tax-assessment practices, combined with flawed school-aid formulas, have helped to create an unequal system of financing public education, thus making it even more difficult for poor school districts to achieve a degree of success).

74. See Edgewood Indep. Sch. Dist. v. Kirby, 777 S.W.2d 391, 392 (Tex. 1989); Richard Briffault, The Role of Local Control in School Finance Reform, 24 CONN. L. REV. 773, 790 (1992) (“Many affluent communities spend more per capita on their schools but tax their residents at relatively low rates, while low-wealth jurisdictions typically tax themselves at much higher rates but still can manage only relatively low levels of school spending.”). For a specific example of how wide the spending disparity can be between districts with high property values and poorer communities with lower property values, see Edgar, 672 N.E.2d at 1182 (showing how during the 1989-1990 school year in Illinois, the average tax base in the richest 10% of elementary schools was more than thirteen times the average tax base in the poorest 10%).
property taxes for education, particularly in poorer districts, this aid generally does little to remedy the large disparity in educational opportunities and resources between those communities and the more affluent ones.

Critics of providing equal educational opportunity for economically disadvantaged students often contend that there is nothing wrong with the present way schools are funded because it gives parents the freedom to spend more money towards the education of their children if they so choose. The logical inference seems to be that children who reside in more affluent school districts receive a higher quality education because their parents simply want "to do more" for them educationally. These parents argue that any measures designed to redistribute that portion of their tax proceeds in excess of the amount generated in poorer areas violates their right to local autonomy.

However, such an analysis is flawed for several reasons. First, it ignores the reality that a poor district cannot tax itself to a level of educational quality because its tax base cannot support it. Quite simply, residents of such communities, despite state assistance, cannot compensate for resources they simply do not have.

For example, the predominately poor community of Roosevelt has "struggled to maintain its schools with a tax base of mostly modest one-family homes, little industry and a strip of small businesses." Not sur-

---

75. See, e.g., Edgar, 672 N.E.2d at 1180-82 (explaining how the state supplements local property tax revenues to various school districts).

76. See id. at 1182 (showing how educational inequities still exist between impoverished communities and affluent ones despite the presence of state aid); see also Abbott v. Burke, 693 A.2d 417, 429-32 (N.J. 1997) (demonstrating that a legislature's newly enacted funding formula to help rectify the inadequate education poor students receive would actually allow the wealthier districts to raise more funds locally and spend even more on their children than the neediest districts).


78. See id. at 49 ("[L]ocal control means ... the freedom to devote more money to the education of one’s children."). But see Briffault, supra note 74, at 791 (asserting that without greater equalization from states in the area of school finance, "‘local control as local choice’" is really only "local control" for people fortunate enough to have "resources to choose").


80. See, e.g., Edgar, 672 N.E.2d at 1181 (explaining how the state "provides assistance to school districts in the form of categorical grants for a variety of specific purposes"). But cf. Abbott v. Burke, 693 A.2d 417 (N.J. 1997) (declaring that the legislative remedy for poor urban school districts violated the state constitution because it did not provide them with adequate funds to remedy the distinct problems they face).

81. See, e.g., Leandro, 488 S.E.2d at 262 (Orr, J., dissenting) (arguing that impoverished districts do not have the means to tax themselves to achieve a level of educational quality because its tax base cannot supply it).

82. Carvajal, supra note 41, at 29; cf. Kozol, supra note 18, at 120 (using Long Island, New
prprisingly, the state of New York assumed control of the town’s schools in 1996 because the community could not provide its children with an adequate education.83

In addition, poorer neighborhoods, particularly those in urban areas, must contend with what has become known as “municipal overburden.”84 This generally occurs when districts with lower property values are reluctant or unwilling to raise taxes for any purpose, even education, due to the already high costs associated with maintaining their police forces, firefighters, road maintenance, garbage collection, and other municipal employees.85 It is troubling that in many urban areas, which have greater demands placed upon their local resources than the more affluent suburban communities,86 the public schools are not able to receive a sufficient level of funding.

III. THE FIGHT FOR EQUAL EDUCATIONAL OPPORTUNITY IN STATE COURTS

Since the Supreme Court’s landmark decision in Rodriguez, plaintiffs have been left with no other choice but to challenge inequities in public school financing on either of two grounds: state equal protection87 or the education provisions of state constitutions.88 However, this has

York as an example of the disparity in school spending even in 1991, where the wealthiest towns, like Manhasset spent $11,370 per pupil, while in the poorest town, Roosevelt, the figure dropped to $6340).

83. See State Takeover, supra note 66, at B7.
85. See id.; see also Schmitz, supra note 9, at 1645 (describing the situations where “municipal overburden” arises).
86. See Briffault, supra note 74, at 790 (“Older, more crowded cities, with poorer, more dependent populations, have qualitatively different and greater demands on their local resources than do smaller, newer communities with relatively more affluent inhabitants”). For example, concentrated poverty in the inner-city brings with it drug abuse, crime, hunger, poor health, illness, and unstable family situations that local resources must address. See Abbott v. Burke, 693 A.2d 417, 433 (N.J. 1997). Moreover, the different and greater demands on the local resources of urban communities can be seen in places such as Chicago, where violence caused by gang warfare is an additional problem the city must deal with. See Belluck, supra note 17, at A21.
87. See DuFrees v. Alma Sch. Dist. No. 30, 651 S.W.2d 90 (Ark. 1983) (declaring the Arkansas statutory method of financing public schools which created large disparities in the education opportunities between property-poor and property-rich school districts violative of the state equal protection clause).
88. See Abbott, 575 A.2d at 359 (concluding that the state system of financing education violated the state constitution’s requirement that the state maintain a “thorough and efficient” education throughout the entire state). See generally Alexandra Natapoff, 1993: The Year of Living Dangerously: State Courts Expand the Right to Education, 92 EDUC. L. REP. 755, 755 (1994) (explaining how “1993 was a watershed year for education litigation” as four state courts held their school finance systems as violative of their respective constitutions).
resulted in the creation of sharp divisions among state courts with some finding that children in poorer communities do have a right to the same equal educational opportunities as their counterparts in wealthier communities, and others finding that they do not.

89. See Alabama Coalition for Equity, Inc. v. Hunt, No. CV-90-883-R, 1993 WL 204083 (Ala. Cir. Ct. Apr. 1, 1993) (holding that the Alabama system of financing public education violated the constitutional right of plaintiffs to equal educational opportunity that is guaranteed under the Alabama constitution); DuPree, 651 S.W.2d at 90 (holding that the state system of financing public education, which resulted in large inequities in school expenditures between wealthy and poor districts, violates the equal protection clause of the Arkansas constitution by failing to provide equal educational opportunity to every student); Serrano v. Priest, 487 P.2d 1241, 1265 (Cal. 1971) ("[P]laintiff children have alleged facts showing that the public school financing system denies them equal protection of the laws because it produces substantial disparities among school districts in the amount of revenue available for education."); Sheff v. O'Neill, 678 A.2d 1267, 1289 (Conn. 1996) (holding that the students of the Hartford public school system, who are for the most part poor and minority, were being denied by the state their right to a substantially equal educational opportunity under the Connecticut Constitution); Horton v. Meskill, 376 A.2d 359, 374 (Conn. 1977) (concluding that elementary and secondary education in Connecticut is a fundamental right, students attending its public schools are entitled to equal enjoyment of that right, and the state system of financing public education did not pass the test of strict judicial scrutiny as applied to its constitution); Rose v. Council for Better Educ., Inc., 790 S.W.2d 186, 213 (Ky. 1989) (concluding that every child has a fundamental right to receive an adequate education under the Kentucky Constitution and that the present system of school finance resulting in disparities in educational opportunity between rich and poor districts did not meet the constitutional mandate of "efficient"); cf. McDuffy v. Secretary of the Executive Office of Educ., 615 N.E.2d 516, 552 (Mass. 1993) (concluding that students in poor communities under the state's present financing system are not receiving an adequate education under the state's constitution); Helena Elementary Sch. Dist. No. 1 v. State, 769 P.2d 684, 690-91 (Mont. 1989) (concluding that the school funding system, which created spending disparities between poor and affluent districts and resulted in unequal educational opportunities, was unconstitutional under the education articles of the Montana constitution); Abbott v. Burke, A-155 Sept. Term 1997, 1998 WL 268832 (N.J. May 21, 1998) (mandating that the New Jersey commissioner of education implement an entire system of educational reform throughout the state's most economically disadvantaged school districts in order to comply with the education clause of the state's constitution); Abbott v. Burke, 693 A.2d 417 (N.J. 1997) (holding that the legislatively enacted CEIFA was unconstitutional as applied to the state's poorest districts because it did not provide them with adequate funds to remedy their deficiencies); Abbott v. Burke, 643 A.2d 575, 577-78 (N.J. 1994) (holding that the Quality Education Act violated the education clause of the state's constitution because it did not guarantee substantial equivalence between poorer districts and richer districts in expenditures per-pupil for regular education); Abbott v. Burke, 575 A.2d 359 (N.J. 1990) (declaring the Public School Education Act of 1975 unconstitutional as applied to impoverished urban school districts); Abbott v. Burke, 495 A.2d 376, 391 (N.J. 1985) (holding that the plaintiff's challenge to the state system of financing education which resulted in disparities in funding between urban and suburban districts should be considered by the appropriate administrative agency in order to determine whether it violates the "thorough and efficient" education clause of the state's constitution); Robinson v. Cahill, 303 A.2d 273, 295 (N.J. 1973) (holding that the state system of financing public education, which relied heavily upon local taxation resulting in sharp discrepancies in dollar input per-pupil, violated the state's constitutional provision mandating that the state provide a "thorough and efficient system of free public schools for the instruction of all the children in this State between the ages of five and eighteen years"); Abbott v. Burke, No. 91-C-00150, 1993 WL 379818 (N.J. Super. Ct. Ch. Div. Aug. 31, 1993) (concluding that the Quality Education Act of 1990 violated the state's
A. The Beginning of Modern Education Rights Litigation:
Serrano and Robinson

Before Rodriguez was decided in 1973, the California Supreme Court, in Serrano v. Priest, became one of the first state courts to strike down its state’s public school financing system on the basis that it violated both the Equal Protection Clause under the Fourteenth Amendment and the California Constitution. In short, the Serrano court had found that education was a fundamental right and therefore constitution because it did not guarantee that funding for the poorest districts for regular education would be substantially equal to the wealthiest districts within five years; Tennessee Small Sch. Sys. v. McWherter, 851 S.W.2d 139, 140-41 (Tenn. 1993) (holding that the state funding scheme resulting in substantial disparities in the public school system violates the equal protection provisions of the Tennessee constitution).

90. See Lujan v. Colorado State Bd. of Educ., 649 P.2d 1005, 1010-11 (Colo. 1982) (holding that the Colorado school finance system which permitted spending disparities between poor students in some school districts and wealthier students in other districts did not violate “the Colorado constitutional mandate that a ‘thorough and uniform’ system of public schools be provided”); McDaniel v. Thomas, 285 S.E.2d 156, 168 (Ga. 1981) (holding that the present system of financing public education in Georgia did not violate the equal protection provisions of the state constitution, despite the fact that plaintiffs proved that serious disparities in educational opportunities existed in the state); Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1196 (Ill. 1996) (concluding that education is not a fundamental right under the Illinois Constitution despite evidence of wide disparities in educational funding as well as opportunity due to differences in local property wealth); Hornbeck v. Somerset County Bd. of Educ., 458 A.2d 758, 789 (Md. 1983) (holding that the Maryland system of public school finance which resulted in inferior educational resources to poorer districts did not violate the equal protection clause of the state constitution); Gould v. Orr, 506 N.W.2d 349, 353 (Neb. 1993) (holding that summary judgment was proper where a plaintiff alleges that the state system of public school financing is unequal but fails to show that the education each student receives does not meet the state’s constitutional requirement); Board of Educ., Levittown Union Free Sch. Dist. v. Nyquist, 439 N.E.2d 359, 369-70 (N.Y. 1982) (holding that the state system of financing education which resulted in unequal educational opportunities for property poor districts did not violate the New York State Constitution); Reform Educ. Fin. Inequities Today v. Cuomo, 199 A.D.2d 488 (N.Y. App. Div. 1995) (holding that the system by which New York State finances its public schools was not unconstitutional, even though it created disparities in the financing of education between rich and poor school districts); Leandro v. State, 488 S.E.2d 249, 256 (N.C. 1997) (concluding that “provisions of the current state system for funding schools which require or allow counties to help finance their school systems and result in unequal funding among the school districts of the state do not violate constitutional principles”); Board of Educ. of the City Sch. Dist. of Cincinnati v. Walter, 390 N.E.2d 813, 825 (Ohio 1979) (holding that Ohio’s statutory system for financing elementary and secondary education which resulted in unequal expenditures between students in different school districts did not violate either the equal protection or the benefit clauses, or even the responsibility of the legislature to provide a “thorough and efficient system of common schools” under the Ohio Constitution); Danson v. Casey, 399 A.2d 360, 362-63 (Pa. 1979) (holding that the Pennsylvania system of financing education did not impinge upon the children of Philadelphia’s constitutionally mandated right to a “thorough and efficient system of public education”).

91. 487 P.2d 1241 (Cal. 1971).
92. See id.
fell within the gambit of the Equal Protection Clause of the Fourteenth Amendment.  

Like Rodriguez, the Serrano court was confronted with the issue of children located in poor school districts receiving a lower quality education than children fortunate enough to live in wealthier neighborhoods. And like Rodriguez, the Serrano court was faced with a state system of financing public education that relied heavily on each school district’s ability to tax its local property. Consequently, poor school districts with lower tax bases were unable to spend as much money per student on education as wealthier districts that possessed a much larger tax base.

However, the Serrano court reached a far different conclusion than the Rodriguez Court in deciding that impoverished children have a fundamental right to receive an equal education. The Serrano court held that because education plays a significant factor in determining one’s economic success in today’s society and presumably affects one’s ability to participate effectively in politics, it warranted being treated as a fundamental right. Specifically, the court reasoned that “[u]nequal education, then, leads to unequal job opportunities, disparate income, and handicapped ability to participate in the social, cultural, and political activity of our society.”

In declaring education to be a fundamental right, the California public school finance system fell subject to a strict scrutiny review under traditional equal protection analysis. Under such an analysis, a state has the burden of demonstrating that it has a compelling interest in adopting the law. In Serrano, the California Supreme Court found that the California financing system was not necessary to the attainment of

93. See id. at 1258.
94. See id. at 1241.
95. See id.
96. See id.
97. See id. at 1255.
98. See id. at 1258.
99. Id. at 1257 (quoting San Francisco Unified Sch. Dist. v. Johnson, 479 P.2d 669, 676 (Cal. 1971)).
100. See id. at 1249 (explaining how a court is to analyze a law affecting a fundamental right under the Equal Protection Clause of the United States Constitution).
101. See id. See generally San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 16 (1973) (explaining that a strict scrutiny analysis under the Equal Protection Clause means that the "State's system is not entitled to the usual presumption of validity, that the State rather than the complainants must carry a "heavy burden of justification"") (quoting Dunn v. Blumstein, 405 U.S. 330, 343 (1972)). Further discussion of the analysis used in examining state action under the Equal Protection Clause will occur later in this Note.
any compelling state interest due to the fact that it made the "quality of a child's education depend upon the resources of his school district and ultimately upon the pocketbook of his parents."\(^{102}\)

However, once *Rodriguez* was decided, the *Serrano* court's conclusion that one has a fundamental right to education only stood under the Equal Protection Clause of the California Constitution.\(^{103}\) Nonetheless, while *Rodriguez* was being decided, the New Jersey Supreme Court grappled with inequities in public school financing in the landmark case of *Robinson v. Cahill*.\(^{104}\)

In *Robinson*, the plaintiffs challenged various New Jersey statutes established for the purpose of financing elementary and secondary schools on the ground that they created wide disparities in the amount of money spent per child for education.\(^{105}\) Like *Serrano* and *Rodriguez*, the state system for financing public education resulted in such disparities because of its heavy reliance on the value of local property taxes available within various school districts.\(^{106}\)

However, in finding for the plaintiffs, the *Robinson* court did not analyze educational inequities under an equal protection analysis for two reasons. First, *Rodriguez* had already been decided and thereby precluded the *Robinson* court from applying the equal protection mandate under the Fourteenth Amendment.\(^{107}\) Second, the *Robinson* court was not yet willing to apply the equal protection demands of its state constitution to education because it found it extremely difficult to find an objective basis to do so due to factors such as the term "fundamental right" not being defined.\(^{108}\)

Instead, the *Robinson* court found that the education clause of the state constitution, which required the legislature to maintain a "thorough and efficient" educational system,\(^{109}\) was violated by the state's system of financing public schools because it resulted in disparities in the amount of money spent per student.\(^{110}\) Under the *Robinson* court's view,

\(^{102}\) *Serrano*, 487 P.2d at 1263.

\(^{103}\) See *Serrano v. Priest*, 557 P.2d 929 (Cal. 1976) (modifying the earlier holding in response to the *Rodriguez* decision under the California Constitution alone).


\(^{105}\) See id. at 276.

\(^{106}\) See id.

\(^{107}\) See id. at 278.

\(^{108}\) See id. at 283-84.

\(^{109}\) Id. at 295-97. The education clause of the New Jersey constitution specifically states that the "Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years." N.J. CONST. art. VIII, § 4, ¶ 1.

\(^{110}\) See *Robinson*, 303 A.2d at 295-97.
the education clause of the New Jersey constitution generated the right of all New Jersey children to receive equal educational opportunities which the state had an affirmative obligation to ensure. Thus, Robinson began a trend which has carried over into present-day education rights litigation, where plaintiffs can look to the education clauses of their state constitutions when challenging inequities in public school financing.

B. State Court Litigation Has Been Ineffective in Remediye Inferior Education

Even where courts have found that their states have created unequal educational opportunities that work to the express disadvantage of many poor children, there has not been a substantial change for the better for the poor children the courts intended to benefit. This unfortunate result is due to several factors which are generally associated with education rights litigation in state courts. First, the litigation generally protracts for so long that the very children the suit was intended to assist do not benefit from it. Secondly, particularly where courts have struck down the existing method a state uses to finance education, state legislatures have failed to enact adequate funding schemes to rectify the inequalities in public school funding. Two states provide compelling examples of how education rights litigation, even when successful, has not improved the plight of the very children it was initiated for.

In Hartford, Connecticut, several children brought suit against the state alleging that they were being denied their right to the same equal educational opportunities their wealthier counterparts enjoyed in the

111. See id.
112. See, e.g., Leandro v. State, 488 S.E.2d 249 (N.C. 1997) (explaining that the education clause of the North Carolina Constitution does not mandate that there be substantially equal funding or educational opportunities to students in various school districts).
113. See, e.g., Sheff v. O'Neill, 678 A.2d 1267 (Conn. 1996). For a report on how one poor school district has continued to struggle in educating its students, despite winning an education rights suit against the state, see Hartford Seeks State Role in Managing School District, N.Y. TIMES, March 11, 1997, at B4.
114. See Patterson & Sherman, supra note 48, at 16-17 (explaining how the New Jersey lawsuit over equal educational opportunity for the state’s poorest school districts took so long that the children the litigation was brought for never saw an improvement in their educational situation).
115. See generally Abbott v. Burke, 693 A.2d 417 (N.J. 1997) (showing how the legislature continually failed to enact a sufficient funding formula to remedy inequities in public school financing despite repeated decisions from the state’s highest court mandating that it do so). But see Waldron, supra note 4, at 6-7 (explaining that after the Kentucky Supreme Court struck down the state’s system of financing public education, the legislature worked with the court to develop a better approach to school funding).
surrounding suburban communities in *Sheff v. O'Neill*. In Hartford, economically disadvantaged children comprised the bulk of the students and were performing significantly lower on standardized tests than students in the surrounding suburban towns. In the 1991-1992 school year, 94% of Hartford’s sixth graders did not attain the state’s goal for mathematics, 80% were unable to meet the state’s goal for reading, and 97% could not achieve the state’s goal for writing. Moreover, during that same time period, 62% percent of the sixth grade class did not even meet the state’s remedial standards for reading.

The litigation began in 1989 and was not resolved until October of 1996. Milo Sheff, the lead plaintiff, was ten years old and in the fourth grade when suit was initiated. In ruling for the plaintiffs, Associate Justice Berdon of the Supreme Court of Connecticut noted in his concurring opinion that “[e]very day that goes by is one more day that the schoolchildren who reside in Hartford and other urban centers in Connecticut are deprived of an adequate education.” However, with regard to Milo and the other plaintiffs, he could only comment that “[w]e cannot recover what has been lost for him and others.”

Although *Robinson v. Cahill* was first decided in 1973, the state of New Jersey has struggled through 1998 to deal with the issue of how to address inequities in public school finance between its most impoverished communities and its more affluent ones. Since *Robinson*, plaintiffs from the state’s poorest school districts have continued to bring suit challenging the legislature’s various methods for correcting inequalities in education funding.

Nonetheless, despite four judicial decisions overturning New Jer-

---

116. 678 A.2d 1267, 1273 (Conn. 1996) (commenting on the fact that the majority of students who populate the Hartford public school system live in homes that are impoverished and come from single-parent households).

117. *See id.*

118. *See id.* at 1294.

119. *See id.*

120. *See id.* at 1272; *Sheff v. O’Neill*, No. CV8903609775, 1996 WL 611075, at *1 (Conn. Super. Ct. Oct. 15, 1996). However, on September 8, 1998, the original plaintiffs went back to court contending that the states’ legislature had failed to enact educational policies that would make a significant change for the better in the Hartford public school system. See *Still Segregated—and Suing*, Nat’l L.J., Sept. 21, 1998, at A8. Thus, it appears that the court may not have seen the last of *Sheff*.

121. *See Sheff*, 678 A.2d at 1294 (Berdon, J., concurring).

122. *Id.*

123. *Id.*


sey's system for financing public education, the state's poorest children still do not receive the same equal educational opportunities as their counterparts in affluent neighborhoods. The unfortunate problem of education rights litigation that takes place in state courts is best illustrated by briefly examining the case of Raymond Arthur Abbott ("Raymond"), the lead plaintiff in Abbott v. Burke.

Raymond was a learning disabled student who spent eight years in the impoverished school district of Camden. During that time, Camden could not afford a staff trained to deal with students possessing learning disabilities, nor could it afford educators to teach in the subjects of science, art, music, or physical education. Consequently, Raymond's learning condition continued undiagnosed, and he was simply passed from grade to grade. In a recent interview, Raymond recalled that he had "trouble reading and writing and memorizing things." Ironically, by the time Abbott was finally decided in 1990, Raymond had already dropped out of school and is presently, at the age

126. See Abbott v. Burke, 693 A.2d 417 (N.J. 1997) (holding that the legislatively enacted CEIFA was unconstitutional as applied to the state's poorest districts because it did not provide them with adequate funds to remedy their deficiencies); Abbott v. Burke, 643 A.2d 575, 576 (N.J. 1994) (holding that the Quality Education Act violated the education clause of the state's constitution because it did not guarantee substantial equivalence between poorer districts and richer districts in expenditures per pupil for regular education); Abbott v. Burke, 575 A.2d 359, 363 (N.J. 1990) (declaring the Public School Education Act of 1975 unconstitutional as applied to impoverished urban school districts); Abbott v. Burke, No. 91-C-00150, 1993 WL 379818, at *14 (N.J. Super. Ct. Ch. Div. Aug. 31, 1993) (concluding that the Quality Education Act of 1990 violated the state's constitution because it did not guarantee that funding for the poorest districts for regular education will not be substantially equal to the wealthiest districts within five years).

127. See Carter, supra note 48, at 23 (showing how attorneys for New Jersey's poorest school districts fought with the state over how to rectify inequities in school funding in order to "give children in poor districts the same chance at getting a good education as children in richer districts").


129. See Kozol, supra note 18, at 172.

130. See id.

131. See id. Some children, who have received a poor education in their public schools have attempted to recover damages against their school district on a theory of educational malpractice, though courts have not been sympathetic to such causes of action. See Peter W. v. San Francisco Unified Sch. Dist., 60 Cal. App. 3d 814 (1976) (declaring that an 18 year-old male plaintiff did not have a cause of action against defendant school district for allowing him to graduate from high school, despite the fact that he could not read above the eighth grade level); Hoffman v. Board of Educ., 400 N.E.2d 317 (N.Y. 1979) (holding that a child of normal intelligence in the New York City public school system could not recover damages against Board of Education for negligently placing him in classes for the mentally retarded for over 10 years).

of twenty-eight, an inmate at Waterford Correctional Facility in New York.


1. The 1996 Litigation

Two 1996 cases are similar in several respects. Both involved a judicial determination of whether the equal protection clause of a state constitution could be invoked to reform the public education system for economically disadvantaged children in impoverished communities. In addition, both cases had wide political ramifications as each threatened to disrupt their state legislature's framework for educating its children. However, the outcome reached by both courts was remarkably different, with one assuming a \textit{laissez faire} approach to redressing educational inequities for poor children and the other assuming a much more active role.

In \textit{Committee for Educational Rights v. Edgar,} plaintiffs sought to show that the Illinois system for financing public education violated the state constitution's equal protection clause due to the fact that it produced wide disparities in educational spending and opportunities between poor districts and affluent ones.\textsuperscript{136} For example, there was evidence showing that some schools in poor communities used textbooks that were fifteen to twenty years old, while schools located in wealthier communities used the most current editions.\textsuperscript{137}

\textsuperscript{133} See id. Raymond was convicted for burglary. See id. I do not suggest that Raymond bears no responsibility for his actions, but what I do suggest is that allowing poor students to suffer in public schools that cannot adequately teach them plays a factor in leading some to commit crime. As the late Chief Justice Wilentz of New Jersey's highest court noted, "The poor remain plunged in poverty and severe educational deprivation. . . . There is despair, and sometimes bitterness and hostility." Abbott v. Burke, 575 A.2d 359, 411-12 (N.J. 1990). However, it should be noted that while in prison, Raymond has earned his high school equivalency diploma. See Patterson & Sherman, supra note 48, at 16.

\textsuperscript{134} The term \textit{laissez faire} is generally defined as a "political-economic philosophy of the government of allowing the marketplace to operate relatively free of restrictions and intervention." BLACK'S LAW DICTIONARY 876 (6th ed. 1990). Here, I do not use the term in the manner it is traditionally used. Rather, I use the term to refer to a judicial policy of adopting a limited role in matters affecting public education. For an example of a judicial system following what I call a \textit{laissez faire} approach to policies related to public education, see Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1189 (Ill. 1996).

\textsuperscript{135} 672 N.E.2d 1178 (Ill. 1996).

\textsuperscript{136} See id. at 1182.

\textsuperscript{137} See id. at 1197 (Freeman, J., dissenting).
The Edgar court rejected the plaintiff's equal protection claim and concluded that the "State's system of funding public education is rationally related to the legitimate State goal of promoting local control."138 In analyzing the plaintiff's claim under a traditional equal protection analysis, the Edgar court adopted the holding of Rodriguez in determining that education was not a fundamental right. Therefore, the state's system for financing public education was not subject to a strict scrutiny analysis.139 Although the Illinois constitution requires the state to maintain "high quality public educational institutions,"140 the Edgar court did not take this to mean that its citizens had a right to an education.141 Specifically, in reviewing the legislative history surrounding the enactment of the state's education provision, the Edgar court found that the framers "stopped short of declaring such educational development to be a 'right,' choosing instead to identify it as a 'fundamental goal.'"142 For the Edgar court, the fact that a sound education greatly enhances other fundamental rights, such as participation in politics, did not translate it into a fundamental right.143

After declaring that education is not a fundamental right under an equal protection analysis, the Edgar court analyzed the state's system under the less stringent rational basis test.144 Since the Edgar court found that the framers were deeply concerned about preserving local control in school funding, it held that this was not so irrational as to violate the state constitution's equal protection clause.145 Thus, the court upheld the Illinois system of financing public education.

In stark contrast, the Supreme Court of Connecticut found in Sheff v. O'Neill146 that the state system of public education violated the state constitution's equal protection clause.147 However, unlike most educa-

---

138. Id. at 1196.
139. See id. at 1193-95.
140. Ill. Const. art. X, § 1.
141. See Edgar, 672 N.E.2d at 1195.
142. Id.
143. See id. at 1194-95.
144. See id. at 1195. Under the rational basis test, "[t]he challenged classification need only be rationally related to a legitimate state goal and if any state of facts can reasonably be conceived to justify the classification, it must be upheld." Id. (citations omitted). The rational basis test, as well as other tests courts use when analyzing state systems under an equal protection analysis, are discussed in further detail in later sections of this Note.
145. See Edgar, 672 N.E.2d at 1196.
146. 678 A.2d 1267 (Conn. 1996).
tion rights litigation cases, *Sheff* did not deal with inequities in public school financing between poorer school districts and affluent ones. In fact, the state’s distribution of aid provided the most aid to the most impoverished school districts. In addition, *Sheff* is also distinguishable from other cases because the Connecticut State Constitution recognized education as a fundamental right.

In *Sheff*, the plaintiffs, economically disadvantaged students from the poor school district of Hartford, alleged that their right to equal educational opportunities was violated by the state’s system of public education which resulted in segregating students of color. Specifically, the plaintiffs contended that there were “wide disparities in the racial and ethnic composition of the student populations in the public schools in Hartford and those in the twenty-one surrounding communities.” Although the state did not intentionally segregate students of color in the Hartford public school system, the *Sheff* court found that the state played a significant role in perpetuating the high concentration of racial and ethnic minorities due to a districting statute enacted in 1909.

Since education is a fundamental right under the Connecticut constitution, the *Sheff* court analyzed the state’s public education system under a strict scrutiny analysis, which it failed to pass. Specifically, the *Sheff* court concluded that “[d]espite the initiatives undertaken by the defendants to alleviate the severe racial and ethnic disparities among school districts, . . . the disparities that continue to burden the education of the plaintiffs infringe upon their fundamental state constitutional right to a substantially equal educational opportunity.”

---

148. See *Sheff*, 678 A.2d at 1286 n.41.
149. See CONN. CONST. art. VIII, § 1 (“There shall always be free public elementary and secondary schools in the state [and] [t]he general assembly shall implement this principle by appropriate legislation.”).
150. See *Sheff*, 678 A.2d at 1271.
151. Id. at 1289.
152. See id. at 1274.
153. See CONN. GEN. STAT. ANN. § 10-240 (West 1996) (“Each town shall through its board of education maintain the control of all the public schools within its limits and for this purpose shall be a school district and shall have all the powers and duties of school districts . . . .”).
154. See CONN. CONST. art. VIII, § 1.
155. See *Sheff*, 678 A.2d at 1286-87 (explaining that the strict scrutiny analysis used by the Connecticut Supreme Court in scrutinizing legislation which allegedly violates the state’s recognition of a fundamental right to education involves a three-step process).
156. See id. at 1289.
157. Id.
2. The 1997 Litigation

The year 1997 saw the addition of new faces and the return of old ones in the controversial area of education rights litigation. North Carolina, in Leandro v. State, became one of a number of states to uphold their state's system of funding public education despite the presence of unequal educational opportunities between poor school districts and affluent ones. On the other hand, New Jersey's highest court struck down its state's method for financing public education again, firmly establishing itself as one of the most judicially active courts in the nation in dealing with education rights litigation.

Although its constitution expressly authorizes the state to maintain equal educational opportunities for all students, the Supreme Court of North Carolina held that such a provision "does not require that equal educational opportunities be afforded students in all of the school districts of the state." Analyzing its constitution in its entirety, the Leandro court found that provisions allowing local governments to increase spending on school programs beyond that which the state provides eliminated the possibility that equal educational opportunities could be available throughout North Carolina. In Leandro, the addition of provisions in the state constitution, which allowed the likelihood of unequal funding among local school districts, precluded any suspicion that its framers intended to ensure that substantially equal educational opportunities would be provided to all students.

However, the Leandro court did not close the education rights door to plaintiffs entirely. Instead, it recognized that plaintiffs could be entitled to a remedy if they could prove, by substantial evidence, that the state system of public education violated the constitutional guaran-

158. 488 S.E.2d 249 (N.C. 1997).
159. See id. at 256.
161. See Ronald T. Hyman, State-Operated Local School Districts in New Jersey, 96 EDUC. L. REP. 915, 915 (1995) ("With its school funding decisions, New Jersey has been a leader since the 1970s in litigation on school funding based on state rather than federal law.").
162. See N.C. CONST. art. IX, § 2(1).
163. Leandro, 488 S.E.2d at 257.
164. See N.C. CONST. art. IX, § 2(2).
165. See Leandro, 488 S.E.2d at 256.
166. See id.
167. In addition to the plaintiffs, there were also plaintiff-intervenors who were from large wealthy school systems. See id. at 252. They alleged that their rights to equal educational opportunities were being denied under the North Carolina system of financing public education since more state aid went to poorer school systems. See id. at 253. However, this Note focuses on economically disadvantaged children who live in poor school districts and who are receiving an inferior education, not wealthy school districts dissatisfied with the level of funding they receive.
tee that each student receive a “sound basic education.”

Nonetheless, the decision in *Leandro* represents a judicial mindset that seeks to avoid the dangers of protracted litigation that follow when courts conclude that poor children have a right to the same equal educational opportunities as others. Citing other states that have grappled with the shockwaves that follow a court’s declaration that all students have a right to equal educational opportunities, the *Leandro* court concluded that equal opportunity in public education was an “unattainable goal.” Such an extreme conclusion rests on several misguided assumptions.

First, the conclusion presumes that providing “equal educational opportunities” means forcing all local school districts to spend the exact same amount of funding on public education, thus subordinating the rights of affluent parents to spend more on education for their children. However, it has never been the contention of plaintiffs in education rights litigation that the choice of wealthier parents to spend more educationally on their children should be limited. Instead, what they have sought is judicial recognition of the fact that “affluent districts can have their cake and eat it too: they can provide a high quality education for their children while paying lower taxes.” In contrast, poor districts must contend with the problems of lower taxable wealth and the problems associated with municipal overburden and “have no cake at all.” Poor communities that value education just as much as wealthier communities have no choice but to provide their children with a lower quality of education which is not only inadequate, but in many cases fails to provide them with the basic skills necessary to escape a “life of poverty and isolation that most of us cannot begin to understand or appreciate.”

Second, a conclusion that providing “equal educational opportunities” for all children is impractical overlooks the fact that the legislative and executive branches of some state governments have fiercely resisted

---

168. *Id.* at 259.
169. *Id.* at 257.
170. *See id.* at 262-63 (Orr, J., dissenting).
173. *Id.* at 1252.
174. *See Biffault, supra* note 74, at 790 (explaining that poor communities have a “strong preference for education” as evidenced by their elevated tax rates to support their school systems, despite their dearth of taxable resources).
providing adequate educational funding for poor school districts for political reasons.\textsuperscript{176} Thus, there are powerful barriers to effectively remedying the educational deprivation of many poor children that courts should consider before deciding that equalizing educational opportunities is an unworkable framework.

In contrast to \textit{Leandro}, the New Jersey Supreme Court’s 1997 decision in \textit{Abbott v. Burke} ("Abbott I")\textsuperscript{177} can be viewed as a judicial mindset of marked deference toward achieving equal educational opportunity for economically disadvantaged students at all costs.\textsuperscript{178} This type of judicial thinking has been attacked by other state courts\textsuperscript{179} as well as critics who have even gone so far as to point to \textit{Abbott I} as an example of "result oriented jurisprudence cloaked in superfluous reasoning."\textsuperscript{180}

In \textit{Abbott I}, the plaintiffs contended that the Comprehensive Educational Improvement and Financing Act of 1996 ("CEIFA") left wide disparities in educational funding between the state’s poorest school districts and its affluent ones, thus violating their right to a "thorough and efficient" education as mandated under the state constitution.\textsuperscript{181} The

\textsuperscript{176} See, e.g., Goodnough, \textit{supra} note 48, at B6 (explaining how many legislative leaders in New Jersey reacted to a judge’s recommendation that substantial increases in state aid be made to poor urban schools by expressing concern that the potential cost of doing so could siphon aid from suburban schools, something which suburban parents have opposed for years). In fact, New Jersey’s politicians have responded directly to suburban voter opposition to any state efforts to equalize spending between affluent suburban school districts and poor urban ones. See, e.g., Abbott v. Burke, 693 A.2d 417, 429 (N.J. 1997) (showing how the legislature altered a bill that would have required the state’s higher spending districts to defend any amounts they spent on education that was higher than what the state felt was necessary due to a “strong reaction from educators and others in the wealthier districts, who . . . labeled the proposal a ‘dumbing down’ approach to the school finance problem, and eventually it was abandoned”). Indeed, New Jersey politicians pay particular attention to the majority of its suburban voters, particularly after seeing how after former Governor Jim Florio raised taxes by $2.8 billion in 1991 in order to equalize the spending disparity between wealthy suburban school districts and urban poor ones; such a move ultimately cost him his job. See Goodnough, \textit{supra} note 48, at B6. In fact, I suggest that political entities, particularly politicians, do not base their decision-making solely on what can most effectively improve the educational plight of this nation’s poorest children, but rather on what is in their best political interest.

\textsuperscript{177} 693 A.2d 417 (N.J. 1997).

\textsuperscript{178} Those costs include the loss of judicial efficiency due to protracted litigation in an effort to redress inequities in public education, as well as threatening the sovereignty of each branch of government by assuming a judicially active role in matters relating to education policy. See Abbott v. Burke, 693 A.2d 417 (N.J. 1997); Abbott v. Burke, 643 A.2d 575 (N.J. 1994); Abbott v. Burke, 575 A.2d 359 (N.J. 1990).

\textsuperscript{179} See, e.g., Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178, 1188 (Ill. 1996) (characterizing the decision reached in \textit{Abbott} as a “dubious result”).


\textsuperscript{181} N.J. CONST. art. VIII, § 4, ¶ 1 ("The Legislature shall provide for the maintenance and support of a thorough and efficient system of free public schools for the instruction of all the children in the State between the ages of five and eighteen years.").
New Jersey Supreme Court agreed, concluding that CEIFA failed to provide "a substantive educational opportunity to public school children in the poorer urban districts that will enable them to achieve a thorough and efficient education." Although the Abbott I court found that CEIFA's educational standards conformed to the constitutional mandate that the state provide an education that was thorough and efficient, it nonetheless found the statute unconstitutional as applied to poor urban districts due to its insufficient funding.

CEIFA was the result of a legislative determination that a thorough and efficient education could be provided to every student through the development of specific standards outlining what a thorough and efficient education should contain. Under CEIFA, these standards would be met pursuant to a fixed per-pupil cost contained in the statute which was based on a hypothetical model. Thus, the fixed per-pupil cost under CEIFA was believed to be adequate to guarantee that all students are able to receive a thorough and efficient education. However, CEIFA permitted each school district to raise funds locally if any wanted to spend in excess of the fixed per-pupil cost. Thus, this invariably resulted in permitting the state's most successful school districts, typically located in affluent suburban communities, to spend at levels that exceeded the statute's fixed per-pupil cost.

Since CEIFA's funding provisions were taken from a model school district which did not share any of the characteristics of the state's successful school districts, the Abbott I court found it constitutionally inadequate on the basis that affluent districts "are achieving and undoubtedly will continue to achieve at high levels, and it is thus eminently reasonable . . . to focus on their recipe for success until experience under the new standards dictates otherwise." Thus, the Abbott I court rejected the state's contention that CEIFA's fixed expenditure per-pupil was sufficient to ensure that students in poorer school districts receive a thorough and efficient education. In addition, the Abbott I court found that the supplemental aid under CEIFA, which was to be allocated to the

182. Abbott, 693 A.2d at 439.
183. See id. at 428.
184. See id. at 429.
185. See id. at 425.
186. See id. at 426.
187. See id.
188. See id. at 427.
189. See id. at 429.
190. See id. at 432.
191. Id. at 432-33.
poorest school districts, failed to address the unique disadvantages students in these districts face.\textsuperscript{192}

In fashioning a remedy for the plaintiffs, the \textit{Abbott} I court did not look to the legislature for assistance. Instead, it ordered the state to increase funding to the poorest school districts for the 1997-1998 school year.\textsuperscript{193} In addition, it remanded the case to a lower court which would direct the state in developing a comprehensive reform plan for improving the poorest school districts, and ordered the lower court’s decision to be presented to it for review no later than December 31, 1997.\textsuperscript{194}

3. Epilogue to \textit{Abbott v. Burke}

On May 21, 1998 the New Jersey Supreme Court announced which recommendations it would accept for improving the state’s poorest school districts in the latest edition of \textit{Abbott v. Burke} (\textit{Abbott II}).\textsuperscript{195} The decision was prepared by a lower court pursuant to the remand ordered in the 1997 litigation.\textsuperscript{196} In its 1998 ruling, the court explained which recommendations it found must be implemented by the state in order to guarantee that children from impoverished urban communities receive a thorough and efficient education.

Specifically, the court ordered that the state undertake the following actions in relation to its poorest school districts: implement a system-wide reform of elementary schools,\textsuperscript{197} establish full-day kindergarten programs,\textsuperscript{198} develop a half-day pre-school program,\textsuperscript{199} and fund the cost of repairing dilapidated schools.\textsuperscript{200} In addition, the court ordered the state to provide schools in poor urban communities with services such as medical care and counseling, if necessary.\textsuperscript{201}

Moreover, the court established a battery of deadlines that the state must follow when implementing the remedial measures. For example, in order to reduce the overcrowding prevalent in poor urban school districts, the state must begin constructing new classroom facilities no later

---

192. See \textit{id.} at 433.
193. See \textit{id.} at 456.
194. See \textit{id.} at 456-57.
196. See \textit{Abbott}, 693 A.2d at 417.
197. See Tom Hester, \textit{Now Show Us Money, Urban Schools Say: Satisfaction over Court’s Ruling Is Restrained}, \textit{STAR-LEDGER} (New Jersey), May 23, 1998, at 1 (explaining that the state must implement a new reading-centered program, \textit{Success For All}, in its poorest school districts).
198. See \textit{id.}
199. See \textit{id.}
200. See \textit{id.}
201. See \textit{id.}
than the spring of 2000 at an estimated cost of $1.8 billion.\textsuperscript{202}

However, unlike its prior rulings, the court in \textit{Abbott II} found that both the legislative and executive branches of the state government finally enacted sufficient mechanisms that, if carried out, would ensure that children from poor urban communities receive a thorough and efficient education.\textsuperscript{203} In fact, after finding that both branches were firmly committed to reforming educational opportunities in poor urban communities, the court "announced it would step aside and let the education commissioner and Legislature take over."\textsuperscript{204}

\textbf{IV. STATE REFORM EFFORTS TO IMPROVE PUBLIC EDUCATION HAVE BEEN INADEQUATE}

Along with education rights litigation, states themselves have attempted to improve the level of education for economically disadvantaged students through several means—assuming complete control over failing school districts, utilizing a voucher system, and in some cases, hiring outside organizations to run for-profit schools. Nonetheless, such measures still fall short of improving the level of education for many of this country's poorest children.

\textbf{A. State Takeovers of School Systems}

Several states have responded to the inferior education many economically disadvantaged students receive by enacting statutes or by passing legislation that expressly authorizes the state to assume full control of public schools that are performing poorly.\textsuperscript{205} When such action is taken, it is commonly referred to as a "state takeover."\textsuperscript{206}

\begin{thebibliography}{99}
\bibitem{202} See id.
\bibitem{204} Id. at 1.
\bibitem{205} See, e.g., N.J. STAT. ANN. § 18A:7A-15.1 (West 1989) (giving the New Jersey State Board of Education the authority to remove a district board of education that is unable to correct deficiencies in its educational system and establish a state-operated school district); \textit{see also} Denise Howard, Note, \textit{Rewarding and Sanctioning School District Performance by Decreasing or Increasing the Level of State Control}, 5 KAN. J.L. & PUB. POL'Y 187, 188 (1996) (explaining how since 1988, nine states have taken complete control over local school districts that were not succeeding educationally); \textit{State Takeover, supra} note 66, at B7 (reporting on how New York Governor George E. Pataki signed legislation "authorizing the state takeover of the troubled school district in Roosevelt, Long Island, warning that takeovers could happen elsewhere if local officials don't shape up").
\bibitem{206} See Hyman, \textit{supra} note 161, at 917-19 (explaining the background, history, and use of the term "state takeover"). The use of the term "state takeover" has been harshly criticized due to the fact that it often "conjures up the negative image of a hostile corporate takeover, with bitter

http://scholarlycommons.law.hofstra.edu/hlr/vol26/iss4/5
In a typical state takeover, the local school board of education is removed by a state board of education, who then appoints a superintendent. The state's commissioner of education is expected to develop a comprehensive education reform plan for the school district within a specified length of time. Thus, the local school district is transformed into a "state-operated school district." However, state takeovers are intended to last only for a specified period of time, with the ultimate goal being the transfer of control back to the local school board once the school district improves. Since some of the worst school districts lie in impoverished communities, the few state takeovers that have transpired have occurred either in inner-cities or in low-income suburbs. Although state takeovers are a recent phenomenon, evidence indicates that takeovers have not been effective in improving the educational opportunities for economically disadvantaged students.

legal, financial, and organizational fights between two private corporations." Id. at 917. The few state takeovers that have taken place have been bitterly fought by local school districts and highlighted by lengthy court battles and fierce resistance by local officials. See Abby Goodnough, Jersey City and Paterson: Mixed Results for State, N.Y. TIMES, April 14, 1995, at B6 (reporting on how, when New Jersey proceeded to take steps to take over the Jersey City school district, it led to a lengthy legal dispute); see also Smothers, supra note 44, at B2 (explaining how after the state takeover of Newark, some parents came to view the state "as an occupying army whose promises to liberate the district from two decades of mismanagement, corruption and unresponsiveness have turned sour"). Therefore, I use the term because, although it may have negative connotations, it best reflects what in fact is happening when local school boards are removed by the state.

207. See N.J. STAT. ANN. § 18A:7A-15.1; see also Carvajal, supra note 41, at 29 (explaining how after the state board of education voted to remove the Roosevelt school district's five-member school board, the head of the state takeover panel became the temporary president of that school board).

208. See, e.g., N.J. STAT. ANN. § 18A:7A-15.1 (giving the state board of education the authority after a state takeover to appoint a state district superintendent to manage the entire school district).

209. See, e.g., N.J. STAT. ANN. § 18A:7A-31.3 (requiring that after six months of a state takeover of a school district, the state's education commissioner is required to present to a state committee his "corrective action plan developed for the district").

210. This term is expressly used in the takeover statutes of the state of New Jersey. See N.J. STAT. ANN. § 18A:7A-15.1 (authorizing the creation of a state-operated school district).

211. See, e.g., Goodnough, supra note 206, at B6 (explaining how, after the state seized control of the Jersey City school district in 1989, it planned to leave after five years).

212. See Abbott v. Burke, 693 A.2d 417, 433 (N.J. 1997) (explaining that across the country, the most horrible educational conditions can be found in poor, inner-city schools).

213. See MacFarquhar, supra note 27, at A1 (explaining how a state judge authorized the state takeover of school districts in the poor community of Newark).

214. See Carvajal, supra note 41, at 29 (explaining problems which plague the educational system of the poor suburb of Roosevelt, Long Island, in the state of New York, despite a state takeover of the school system).

215. State takeovers of local school districts began to occur in 1988. See Howard, supra note 205, at 188.
The state of New Jersey, for example, has used its takeover statutes three times, beginning with Jersey City in 1989,\textsuperscript{216} Paterson in 1991,\textsuperscript{217} and Newark in 1995.\textsuperscript{218} In 1995, after five years of managing the school districts of Jersey City, the state legislature voted to extend its control because it was unable to improve the district to the point where the district could meet state certification standards.\textsuperscript{219} In fact, state takeovers have been criticized for focusing more on bettering the management of a school district rather than the academic problems.\textsuperscript{220} In fact, except for Paterson,\textsuperscript{221} New Jersey's state-run districts have substantially failed to improve the educational deprivation its students suffer.\textsuperscript{222}

While state takeovers are a justifiable attempt by states at rectifying the inferior education poor children receive, they do not guarantee that a poor child's education will be any better than it was under the local school board. State takeovers constitute nothing more than a change in the management of a school district,\textsuperscript{223} and thus do not effectively remedy the lack of equal educational opportunity students in poor communities receive. For a child living in the impoverished neighborhood of Newark, where roaches and rodents were not uncommon in classrooms\textsuperscript{224} and only one in four students was able to pass a high school proficiency test as recent as 1993,\textsuperscript{225} it does not matter whether their school district is run by a local school board or by the state. What matters is that the children are not receiving a comparable education that their wealthier counterparts so freely enjoy.

\textsuperscript{216} See Goodnough, supra note 206, at B6.
\textsuperscript{217} See id.
\textsuperscript{218} See MacFarquhar, supra note 27, at A1.
\textsuperscript{219} See Goodnough, supra note 206, at B6.
\textsuperscript{220} See Hyman, supra note 161, at 929; see also Joseph F. Sullivan, Improvement Lags After School Takeovers, State Says, N.Y. Times, Apr. 25, 1995, at B6 (explaining how the New Jersey Commissioner of Education conceded that state-run districts have not been successful in changing academic deficiencies because they have been focused more on improving the management of the school district).
\textsuperscript{221} See Goodnough, supra note 206, at B6 (reporting how independent auditors found that the conditions in Paterson had improved to the point that local control could be returned in 1996).
\textsuperscript{222} See id. at B6 (reporting how state control of the Paterson school district had to be extended since it could not even meet state certification standards); see also Smothers, supra note 44, at B2 (explaining how after 18 months of seizing control of the Newark school district, the state expected only a "modest improvement in reading and math scores").
\textsuperscript{223} See Hyman, supra note 161, at 929 (criticizing the New Jersey takeover statutes for focusing heavily on the management of a school district rather than how to better improve the educational environment of students).
\textsuperscript{224} See MacFarquhar, supra note 27, at B6.
\textsuperscript{225} See id.
B. School Vouchers

In an effort to improve the level of education for impoverished students, some legislators have approved the use of vouchers, "cash stipends that can be used to help pay private-school tuition." Two cities, Milwaukee, Wisconsin and Cleveland, Ohio, already use tax revenues to supply vouchers to parents of school children. However, for the most part, vouchers are administered through private businesses as donations. In October 1997, Congress debated whether or not to approve a $7 million voucher plan for students in Washington, D.C. that would have provided almost $3200 per student in tuition assistance to students who attend the Washington, D.C. public schools.

While school vouchers may improve the level of education for some poor students, they cannot substitute for providing the majority of economically disadvantaged children with a sufficient education. First, it is doubtful that states already struggling to provide increased funds for education for low-income communities will be able to provide every poor child who seeks to attend a private school rather than a public school with tuition assistance. Second, proponents of vouchers overlook the fact that this form of educational improvement is not available to all poor children. To illustrate, the $7 million voucher plan Congress almost approved for Washington, D.C. would have been available to only 2000 out of the 78,000 children attending public school.

C. For-Profit Schools

Several states have allowed local school boards in poor communities to turn their public school districts over to private, for-profit companies hoping that the company will be able to better improve the level of education for its student population. There are two general ap-
proaches a school district will follow when it decides to privatize its public school system: the contract model and the ownership model.234

Under the contract model, a for-profit company is allowed to take control of a school or an entire district’s management responsibilities but not the school’s facilities.235 The facilities remain under state control. Generally, in this type of arrangement, the local school board will enter into a contractual agreement where it agrees to pay a private company the amount of money it spends on educating each child.236 For example, when the poor rural community of Wichita, Kansas selected a company to run one of its schools, it entered into a contract allowing the company to “hire its own principal and teachers, manage its own budget and teach its own curriculum.”237 The goal in contract model arrangements is to educate the child for less money than the school district allotted, thus generating a profit.238 To illustrate, when the for-profit company Education Alternatives, Inc. (“EAI”) operates a public school district, it generally earns its profit by developing cheaper methods to purchase supplies and by drastically reducing a school’s non-teaching staff.239 In contrast to the contract model, the ownership model is when a “private, for-profit firm owns the physical facilities and operates a group of K-12 schools in competition with existing public, private and parochial schools.”240

The privatization of public education is viewed as one of the most effective mechanisms for equalizing educational opportunity throughout this country, particularly for this nation’s poorest children.241 In fact, the concept of privatization is appealing to many because of its focus on applying the main principle of a market-driven economy to public educational institutions: competition.242 Proponents of private, for-profit educational providers believe that competition will force inadequate public schools to improve their efficiency, strengthen good schools, and

236. See Fedarko, supra note 233, at 82.
237. Id.
238. See id.
239. See Romer, supra note 235, at 265.
240. Solomon, supra note 234, at 892.
241. See generally Romer, supra note 235 (arguing that the privatization of public schools is the most effective way to combat educational inequality).
force the weaker ones to shape up or shut down.”

However, experiments in privatizing public education have yet to produce any definitive results and in some cases have failed to remedy the inadequate education problem. To illustrate, in Hartford, Connecticut, the school district turned control of its public school system to EAI on October 4, 1994. However, by 1996, it abandoned the experiment after failing to see significant improvements in its student’s academic performance. Less than a year later, the Hartford Public School system called for a “state takeover of their troubled school system, saying its problems are too large for them to handle on their own.”

Similarly, in July of 1992, the Baltimore School Board contracted with EAI to operate nine of its public schools. Nonetheless, after two years of running such schools, standardized test scores continued to decline rather than increase. Finally, on November 23, 1995, Baltimore officials terminated its contract with EAI amid criticism that the “company had failed to raise test scores in its schools despite receiving $1 million more a year per school than a typical school was receiving under the district budget.”

In addition, the for-profit company known as the Edison Project has operated the Sherman Independent School District in Texas since the 1995-1996 school year but still produces test results that its own assistant superintendent for instruction concedes are “disappointing.” Nonetheless, advocates of privatizing public education contend that it is still too new of a phenomenon to characterize it as a success or failure and that it remains a better alternative than equalizing spending between affluent school districts and poor ones. They argue that rare situations, like Hartford, where per-pupil spending is one of the highest in the state

243. Id. at 914.
244. See Fedarko, supra note 233, at 82 (explaining how a for-profit company’s chain of schools is “still too new to show definitive results”).
246. See Romer, supra note 235, at 246.
248. Id.
249. See Romer, supra note 235, at 258.
252. Applebome, supra note 233, at A12.
253. See Romer, supra note 235, at 260 (discussing how the privatization effort in the Baltimore school system had only been operated for three years before being eliminated, and it was therefore premature to characterize its achievement as a success or a failure).
254. See id. at 268-69.
yet the quality of education remains low, disproves the "thesis that equal spending leads to equal educational opportunity and relative levels of success." However, such an analysis overlooks the fact that states like Kentucky, whose highest court found that its poorest children were not receiving as adequate an education as wealthier ones, have improved its educational system by substantially increasing spending on education throughout the entire state. In fact, Kentucky has now moved ahead of several other states in its improvement of education for all of its students.

V. CHILDREN HAVE A FUNDAMENTAL RIGHT TO AN ADEQUATE EDUCATION

A. Historical Overview of the Equal Protection Clause

The Supreme Court has traditionally analyzed legislative judgments that affect education rights under the Equal Protection Clause of the Fourteenth Amendment, which provides that "[n]o state shall ... deny to any person within its jurisdiction the equal protection of the laws." First and foremost, the Equal Protection Clause was passed "as part of an effort to grant by constitutional decree equal rights to black persons." It was a direct response to the fact that prior to the Civil War, black Americans received no constitutional protection from state action, which deprived them of certain rights and privileges. However, it was not until the mid 1950s that the Court would enforce the notion of equal protection with its decision to invalidate separate educational institutions for black students. In short, the prime beneficiaries of the Equal Protection Clause were black Americans, as evidenced by the intent of the framers of the Fourteenth Amendment. However, Congress did not

255. Id. at 269.
257. See Waldron, supra note 4, at 7.
258. See id.
262. See id. § 18.6.
263. See id. § 18.5.
just have black Americans in mind when it added the Equal Protection Clause to the Fourteenth Amendment.

Members of the thirty-ninth Congress “often emphasized [that] the Fourteenth Amendment in its Equal Protection Clause had the purpose of protecting particularly the poor, the lowly and the humble.”265 Thus, despite the Rodriguez Court’s indifference to this,266 part of the impetus behind the Equal Protection Clause was congressional concern for ensuring that the poorest individuals would be entitled to equality in the law.267 In short, the Equal Protection Clause was intended by the framers to eradicate caste-based, as well as malicious, class-based legislation.268 Furthermore, the Equal Protection Clause serves the goal of removing governmental barriers that result in constructing obstacles to advancement on the basis of individual merit.269

B. Standards of Review Under the Equal Protection Clause

Since the Equal Protection Clause mandates that “all persons similarly circumstanced shall be treated alike,”270 federal courts have enforced this mandate by requiring states to show that they have a compelling interest before allowing the state to infringe upon a person’s fundamental rights.271 Specifically, a person’s right has been traditionally regarded as “fundamental” where the Constitution explicitly or implicitly guarantees a person’s right to enjoy a certain freedom.272

Under an equal protection analysis, legislative action must interfere with fundamental constitutional rights or disadvantage a suspect class in order to trigger strict judicial scrutiny.273 Under strict judicial scrutiny, a state’s system will not be afforded the usual presumption of validity,274 but rather, the state must carry the burden of showing that it has a compelling interest that justifies the application of the law in question and is necessary to further its legislative purpose.275

However, if the legislation at issue does not infringe upon a fundamental right or disadvantage a suspect class, then the standard of re-

265. Id. at 239.
267. See ANTmAU, supra note 264, at 239.
269. See id. at 221-22.
271. See Plyler, 457 U.S. at 217.
274. See Rodriguez, 411 U.S. at 16.
view used by federal courts is the rational basis test.\textsuperscript{276} Under the rational basis test, the challenged legislation will withstand an equal protection attack if it is rationally related to a legitimate state purpose.\textsuperscript{277} Thus, a two-level test emerged for analyzing legislation under the Equal Protection Clause—strict judicial scrutiny and the rational basis test.\textsuperscript{278}

The Supreme Court also recently developed a third standard whenever it determines that legislation does not infringe upon a fundamental constitutional right or threaten a suspect class but substantially nonetheless merits “special constitutional sensitivity.”\textsuperscript{279} This standard, sometimes referred to as “heightened” judicial scrutiny,\textsuperscript{280} is not as demanding as strict judicial scrutiny but still requires more than the rational basis test.\textsuperscript{281} Under this intermediate standard, legislation will only be considered rational if it “furthers some substantial goal of the State.”\textsuperscript{282}

C. Is There a Fundamental Right to Education?

The decision by the United States Supreme Court in \textit{Rodriguez}, concluding that education is not a fundamental right, was a significant blow to ensuring that America’s poorest children receive the same equal educational opportunities as children in more affluent communities. First, it precluded any type of federal judicial remedy. Second, it significantly influenced the outcome of state court litigation over education rights.\textsuperscript{283}

The fact that only five of the Supreme Court justices\textsuperscript{284} joined in the \textit{Rodriguez} court’s conclusion, as well as the several strong dissenting opinions, has sharply undercut the strength, as well as the force, of the majority’s analysis relating to education.\textsuperscript{285} Thus, the \textit{Rodriguez} court’s determination that education is not a fundamental right does not stand like an impregnable fortress incapable of being successfully attacked. Instead, it is more like a fragile scale that is quite capable of being tipped. In fact, while the present Supreme Court may not view education rights challenges under federal equal protection favorably, future

\textsuperscript{276} See Kadrmas, 487 U.S. at 461.
\textsuperscript{277} See id. at 457-58.
\textsuperscript{278} See \textit{Serrano}, 487 P.2d at 1249-50.
\textsuperscript{280} See Kadrmas, 487 U.S. at 459.
\textsuperscript{281} See id.
\textsuperscript{282} Plyer, 457 U.S. at 224.
\textsuperscript{285} See, \textit{e.g.}, \textit{id.} at 70 (Marshall, J., dissenting).
political shifts in the Court may change this. Hence, it is not entirely unlikely that the majority opinion in *Rodriguez* will be reversed.

**D. San Antonio Independent School District v. Rodriguez: No to Education as a Fundamental Right**

In *Rodriguez*, indigent Mexican-American parents whose children attended a poor urban school district challenged the Texas system of financing public education because it resulted in unequal educational opportunities compared to the more affluent suburban counterparts.\(^{286}\) Although the *Rodriguez* court acknowledged that education plays a significant role in society,\(^ {287}\) it nonetheless found that a right to education was not explicitly or implicitly guaranteed by the Constitution\(^ {288}\) and therefore was not a fundamental right that would subject state legislation to strict judicial scrutiny.\(^ {289}\) Moreover, the Court found that poverty did not qualify as a suspect class.\(^ {290}\) Thus, despite the fact that a state system of financing public education created unequal educational opportunities for poorer students, the Court upheld it under the more lenient rational basis test.\(^ {291}\)

For the *Rodriguez* Court, education was a legitimate state activity\(^ {292}\) that "should be scrutinized under judicial principles sensitive to the nature of the State’s efforts and to the rights reserved to the States under the Constitution."\(^ {293}\) Moreover, the *Rodriguez* Court rejected the plaintiff’s contention that education was a fundamental right, since it bears such a close relation to other fundamental rights protected by the Constitution, most notably the right of free speech and the right to fully participate in the political process.\(^ {294}\) Under *Rodriguez*, a state system of funding or providing public education would have to completely fail to provide each student with the opportunity to gain "basic minimal skills" before being deemed to infringe upon other fundamental rights, thereby triggering strict judicial scrutiny.\(^ {295}\)

Although the Constitution does not provide a judicial remedy for

---

\(^{286}\) *See id.* at 4-5.
\(^{287}\) *See id.* at 30.
\(^{288}\) *See id.* at 35.
\(^{289}\) *See id.* at 40.
\(^{290}\) *See id.* at 28.
\(^{291}\) *See id.* at 54-55.
\(^{292}\) *See id.* at 36.
\(^{293}\) *Id.* at 39.
\(^{294}\) *See id.* at 36.
\(^{295}\) *See id.* at 37.
all social or economic problems, the Court’s refusal to apply the equal protection mandate to state systems of public education that disadvantage poor children undercuts the framers’ intent to eradicate all “caste-based” legislation. Specifically, the perpetuation of inadequate and unequal educational systems for many of this country’s poorest students helps to ensure that many will remain in poverty. Thus, the Rodriguez decision can more appropriately be viewed as a judicial “callous indifference to the realities of life for the poor.” Moreover, it demonstrates an effective use of a result-oriented jurisprudence in order to avoid disrupting state public education systems. Indeed, had the Court in Brown v. Board of Education been more concerned with the difficulties that would result from its decision to strike down state public education systems that segregated students of color, the well-established “separate but equal” doctrine of Plessy v. Ferguson might well have survived an equal protection attack.

Due to the level of educational deprivation many poor children endure today, the Court should re-examine the conceptual framework it used in determining whether there is a fundamental right to education. Although the degree of unequal educational opportunities may have been remarkably different in 1973 when Rodriguez was decided, today it is clear that many of this nation’s poorest children are learning in inadequate educational systems that have failed to teach them the most basic subjects. Furthermore, as demonstrated, state action has had a limited effect, and in many cases has failed to effectively remedy the low levels of education these students receive. Consequently, in light of such facts, Justice Brennan and Justice Marshall’s dissent in

---

297. See Abbott v. Burke, 575 A.2d 359, 411 (N.J. 1990) (discussing the fact that the state’s poorest children would be unlikely to escape a bleak culture that is directly related to poverty without an effective education).
301. 163 U.S. 537 (1896).
302. See, e.g., Michael Symons, Urban Schools Get Low Grades, HOME NEWS TRIBUNE (New Jersey), Jan. 8, 1998, at A1 (reporting that “half the fourth- and eighth-graders in the nation’s urban public schools fail to reach minimum standards on national tests in reading, math and science” and that 35% of the student population in such schools are comprised of poor children).
Rodriguez now represent the sounder view in determining whether education is a fundamental right.

Under Justice Brennan and Justice Marshall's view, the fundamentality of a right is measured by the "extent to which constitutionally guaranteed rights are dependent on interests not mentioned in the Constitution." Therefore, a right not explicitly protected under the Constitution can nonetheless qualify as a fundamental right the closer it is connected to a specific constitutional guarantee. Under such an analysis, courts should adjust the scrutiny with which it will review state action in response to the constitutional significance of the interests that are affected. Thus, this results in a variable standard of review when determining whether a right is fundamental for the purpose of applying the appropriate level of judicial scrutiny to state action. If one applies this framework to issues involving the unequal educational opportunities many poor children face, its substantial connection to their future ability to use other constitutionally protected rights becomes much more evident.

To illustrate, in Dunn v. Blumstein, the Court reiterated that all citizens have a "constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction." In addition, in Wisconsin v. Yoder, the Court accepted the proposition that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system if we are to preserve freedom and independence." Although the Court did not define what degree of education would be sufficient, one can reasonably infer, as Justice Marshall did in Rodriguez, that education plays a preeminent role in allowing an individual to fully participate in the political process. However, the disparaging effects of unequal education have been regarded as one of the many reasons why the level of participation in an electoral democracy is lower among poor urban populations than

---

303. San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 102 (1973) (Marshall, J., dissenting). In addition, Justice Brennan shared this same view of how a right should be analyzed in determining whether it is fundamental. See id. at 62. Throughout the rest of this Note, citations will refer to Justice Marshall's dissent in particular.
304. See id. at 102-03.
305. See id. at 109.
307. Id. at 336 (citations omitted).
309. Id. at 221.
If one accepts the proposition that the constitutional guarantee of the right to vote means more than simply fulfilling the mechanical process of being able to pull a lever at the ballot box, it is difficult to conceive that poor urban children can participate meaningfully in our electoral process if they are failing basic educational courses. Moreover, applying the analysis used by Justice Marshall and Justice Brennan for determining whether a right is fundamental generates more consistency among post-Rodriguez decisions involving the use of the Equal Protection Clause to invalidate legislative actions that allegedly affect basic rights.

In Plyler v. Doe, the Court held that a Texas statute that denied children of illegal immigrants the right to a free public education violated the Equal Protection Clause. Under Plyler, the denial of educational opportunities to illegal aliens would bear significant social costs to the country, and therefore the Texas statute should be analyzed under heightened judicial scrutiny. Unable to show that denying education to the children of illegal aliens served a substantial state interest, the Texas statute was deemed irrational and was subsequently invalidated. The Plyler court used strong language to exemplify its classification of education as an important interest. Specifically, the Plyler court viewed education as playing a "fundamental role in maintaining the fabric of our society" and vital to maintaining this nation's political as well as cultural heritage. Thus, the Court found that so long as illegal immigrants were present in the United States, they should have the right to have access to a basic education, particularly since it was unclear whether or not some of the children would eventually become citizens. However, the Plyler court also affirmed the Rodriguez view that

311. Cf. Greene, supra note 18, at 74, 105-06 (generally showing how external forces such as unequal public education, poverty, and high unemployment rates are some of the myriad of factors which contribute to the lack of participation by many young, poor, and urban black males in an electoral democracy).

312. See, e.g., Symons, supra note 302, at A1 (explaining that more than one-half of the fourth and eighth graders in urban schools nationwide, 35% of which were reported as being impoverished, failed to reach minimum standards on national tests in reading).


314. See id. at 230.

315. See id. at 223-24. However, the standard of review was not officially termed "heightened" judicial scrutiny until much later. See Kadrmas v. Dickinson Pub. Schs., 487 U.S. 450, 459 (1988).

316. See Plyler, 457 U.S. at 230.

317. See id. at 221.

318. Id.

319. See id.

320. See id. at 226.
education was not a fundamental right. Since there was no suspect class involved, the Court’s decision to apply a standard of review stricter than the rational basis test fashioned a new theory of equal protection analysis.

In analyzing the Texas legislature’s system of denying public education to the children of illegal immigrants under heightened judicial scrutiny, the Plyler court seemed to view education as a quasi-fundamental right. Specifically, it avoided declaring education to be a fundamental interest but at the same time conceded that education plays a “fundamental role in maintaining the fabric of our society,” as well as “sustaining our political and cultural heritage.” Thus, the Plyler court was aware that education was an interest as paramount as other fundamental rights but apparently sought not to conflict with the Court’s previous decision in Rodriguez.

Although Plyler involved a complete denial of education to children, its judicial analysis nevertheless conflicts sharply with the Rodriguez court’s conclusion that a fundamental right to education does not exist. Specifically, the Plyler court spoke of ensuring that all children have the right to receive a “basic education.” However, since illegal aliens are not a suspect class and since the Plyler court asserted that education is not a fundamental interest, the conclusion that children of illegal aliens have a right to an education does not logically follow. Specifically, the Court failed to articulate how it was able to conclude that all children have a right to a “basic education” for the purpose of preserving our society if education does not qualify as a fundamental interest.

If Plyler is analyzed under the Brennan and Marshall view that a right becomes more “fundamental” the closer it is connected to a specific constitutional guarantee, then it fits much more appropriately
within the context of an equal protection analysis. For example, the Court’s concern that a denial of education would undermine a person’s ability to become involved in our political system would be determined according to whether there is a nexus between education and a person’s ability to use their constitutionally implied right to become involved in the political process.\textsuperscript{31} Since empirical evidence indicates that there is such a connection,\textsuperscript{32} education could be deemed fundamental for the purpose of analyzing a state’s system under strict judicial scrutiny.

By recognizing that all citizens have a right to a basic education, the \textit{Plyler} court conflicts with the \textit{Rodriguez} court’s determination that education should not be deemed a fundamental right because difficult matters of educational policy are better left to the judgments made at the state and local level.\textsuperscript{33} However, if a basic education is something every American is entitled to under a state public education system, then permitting grossly unequal educational opportunities between this country’s poorest school districts and its affluent ones distorts this concept.

For example, a basic education is typically regarded as an education that gives a person the basic tools such that they might be able to lead an economically productive life.\textsuperscript{34} Hence, today, a basic education in an affluent district means exposing students to the use of computers because exposure to computers is necessary to acquire skills to compete in today’s work environment.\textsuperscript{35} On the other hand, for children in poor communities, a basic education means teaching students without any type of computer education because most impoverished school districts do not have access to computers.\textsuperscript{36} The effects of such a disparity undermine an important goal of the Equal Protection Clause—the elimination of legislation that provides an obstacle to “advancement on the basis of individual merit”\textsuperscript{37} because children from wealthier school districts will have an unfair advantage in employment opportunities.

Nonetheless, Justices Brennan and Marshall’s conceptual framework of for determining the “fundamentality” of education has been harshly criticized. Specifically, opponents argue that it adopts a

\begin{itemize}
\item \textsuperscript{31} See \textit{id.} at 35 n.78.
\item \textsuperscript{32} See \textit{id.} at 114.
\item \textsuperscript{33} See \textit{id.} at 42-43.
\item \textsuperscript{34} See \textit{Plyler}, 457 U.S. at 221.
\item \textsuperscript{35} See, e.g., \textit{Abbott v. Burke}, 575 A.2d 359, 395-96 (N.J. 1990).
\item \textsuperscript{36} See \textit{id.} at 395; \textit{see also Bertrand, supra} note 59, at 1 QLI (reporting how P.S. 150 cannot use computers to assist in teaching because it does not have the necessary wiring to install them).
\item \textsuperscript{37} \textit{Plyler}, 457 U.S. at 222.
\end{itemize}
"variable standard of review"\textsuperscript{338} in an equal protection analysis and contend that this results in transforming the judiciary's role into a legislative one.\textsuperscript{339} This is exemplified by many courts being unwilling to tackle issues relating to educational policies under the rationale that the legislative branch is a more appropriate forum.\textsuperscript{340} However, the use of a variable standard of review in an equal protection analysis, particularly when dealing with unequal educational opportunities, better ensures that the judicial branch applies the appropriate level of scrutiny to state education systems that threaten to undermine the "framework of equality embodied in the Equal Protection Clause."\textsuperscript{341}

In fact, the Supreme Court itself used a variable standard of review in \textit{Plyler}, although it hid such an analysis under the guise of concern for the social costs involved in denying any education to illegal immigrants.\textsuperscript{342} With no fundamental interest or suspect class involved, the \textit{Plyler} court should have applied the rational basis test, but chose instead to apply heightened judicial scrutiny due to what it decided were the apparent social costs involved.\textsuperscript{343} This resulted from the \textit{Plyler} court's ability to look at the effect education has on a person's ability to exercise their rights in our democratic system,\textsuperscript{344} as well as the significant social costs that are involved in promoting a "subclass of illiterates."\textsuperscript{345} In doing so, the \textit{Plyler} court created a flexible level of scrutiny in analyzing state action under an equal protection analysis by focusing on the relationship between constitutionally protected rights and rights not explicitly mentioned.\textsuperscript{346}

Judicial deference to the legislative branch's ability to remedy unequal educational opportunities, such as that in \textit{Rodriguez}, operates under the presumption that elected officials can better address the problem. However, the very fact that this nation's poorest children are unable to vote has the effect of relegating their societal status to

\textsuperscript{338} Where a court adopts a "variable standard of review" in an equal protection analysis, it means that it is willing to analyze state regulation under strict judicial scrutiny "when discrimination against important individual interests with constitutional implications and against particularly disadvantaged or powerless classes is involved." San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1, 109 (1973) (Marshall, J., dissenting).

\textsuperscript{339} See id. at 31.


\textsuperscript{341} \textit{Plyler}, 457 U.S. at 222.

\textsuperscript{342} See id. at 223-24.

\textsuperscript{343} See id. at 248 (Burger, C.J., dissenting).

\textsuperscript{344} See id. at 221-23.

\textsuperscript{345} Id. at 230.

\textsuperscript{346} See id. at 221-24.
“discrete, powerless minorities.” In short, there is no assurance that they will be represented. If one accepts the proposition that politicians tend to “speak out for only those that vote and otherwise participate in the mainstream political process,” then one should be willing to accept that this country’s poorest children are at a considerable disadvantage if they depend solely on the legislative branch to remedy educational deprivation. For example, the New Jersey legislature consistently failed to fulfill a mandate given by the state’s highest court in 1990 to devise an appropriate remedy for poor urban schools until 1998. Therefore, the judicial system provides the best forum for addressing the unequal educational opportunities many poor students face, and since state courts lack uniformity in providing a remedy, the issue should return to federal courts under the Equal Protection Clause of the Fourteenth Amendment. In order for this to occur, the Supreme Court must be willing to re-analyze, as well as reverse, the Rodriguez court’s conclusion that education is not a fundamental right.

VI. CONCLUSION

The Court’s jurisprudence in the area of education under the federal Equal Protection Clause since Brown v. Board of Education has become mired in inconsistency. This point is best illustrated by the conflict between the Rodriguez court’s refusal to recognize education as a fundamental right, and how the Plyler dissent pointed out that its majority decision presumed education to be a “quasi-fundamental” right.

The Court’s refusal to recognize education as a fundamental right has left many of the nation’s poorest children in the hands of states that

348. Greene, supra note 18, at 105. Although Professor Greene was speaking in the context of black politicians, such a view is applicable to more than just politicians who are “black.”
349. See generally Abbott v. Burke, 693 A.2d 417 (N.J. 1997) (demonstrating how the legislature has repeatedly failed to enact a sufficient remedy for the educational deprivation of the state’s poorest children, despite numerous court orders to do so).
350. See id. at 422-39.
351. See Schwaneberg, supra note 203, at 1.
352. Compare Horton v. Meskill, 376 A.2d 359 (Conn. 1977) (concluding that schools are entitled to equal enjoyment of that right, and the state system of financing public education did not pass strict judicial scrutiny as applied to its constitution), with Committee for Educ. Rights v. Edgar, 672 N.E.2d 1178 (Ill. 1996) (concluding that education is not a fundamental right under the Illinois Constitution despite evidence of wide disparities in educational funding, as well as opportunities, due to differences in local property wealth).
for the most part have failed to effectively remedy the low levels of education these students are receiving. In addition, the Court’s failure to recognize education as a fundamental right infringes upon other basic rights of these students. For example, in 1972, the Court recognized that “education prepares individuals to be self-reliant and self-sufficient participants in society.”\textsuperscript{355} However, the level of educational deprivation in many impoverished communities has a direct impact on their employment opportunities.\textsuperscript{356} Thus, without an adequate education, the majority of poor children are likely to remain entrenched in poverty\textsuperscript{357} and will continue to add to the “problems and costs of unemployment, welfare, and crime.”\textsuperscript{358}

\textit{Timothy D. Lynch}\textsuperscript{*}

\textsuperscript{355} Wisconsin v. Yoder, 406 U.S. 205, 221 (1972).
\textsuperscript{356} See MASSEY & DENTON, supra note 14, at 164-65; see also Abbott v. Burke, 575 A.2d 359, 411-12 (N.J. 1990) (explaining that without an adequate protection, poor children in New Jersey will be unable to compete in the state’s economic marketplace).
\textsuperscript{357} See Abbott, 575 A.2d at 411.
\textsuperscript{358} Plyler, 457 U.S. at 230.

* I am especially thankful to the following individuals for without whom, completion of this Note would have been even more difficult: Professor Cheryl L. Wade whose time, criticism, and expertise were greatly appreciated; Professors John DeWitt Gregory and Pamela Edwards for their encouragement; and the entire staff of the Hofstra Law Review for their tireless work. This Note is dedicated to my mother, Gail Lynch, and aunt, Linda Beasley, who have never stopped believing in me.