Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy After Kadrmas v. Dickinson Public Schools

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"Success" in America has been exemplified by “The Horatio Alger Dream,” an optimistic vision of a land where limitless opportunities and great personal happiness await those who diligently embrace the traditional work ethic.1 Despite the ongoing skepticism of leading commentators,2 and the often-bitter satirical writings of major literary figures,3 Americans in the late twentieth century refuse to abandon this vision. Many still seek to identify policies that would enable all citizens to “pursue happiness” by developing their talents and fulfilling their hopes for a brighter future.4

The fourteenth amendment has become the single most important vehicle for the protection of individual rights in this area.5 Disadvantaged plaintiffs attempting to pursue happiness under

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1 Horatio Alger's highly popular nineteenth-century novels all embody a similar story line. See generally J. Tebbe, From Rags to Riches: Horatio Alger, Jr. and the American Dream (1963) (describing the impact of such works as Risen from the Ranks, Strive and Succeed, and Struggling Upward).


3 See, e.g., T. Dreiser, An American Tragedy (1925); W.D. Howells, The Rise of Silas Lapham (1885); F. Kafka, Amerika (1946); N. West, A Cool Million (1934) (four novels which go to great lengths to characterize this alleged dream as "The Horatio Alger Myth").

4 See, e.g., D. Elwood, Poor Support: Poverty in the American Family (1988) (outlining a program for combatting poverty that extends far beyond current federal legislation); C. Murray, In Pursuit: Of Happiness and Good Government (1988) (analyzing the potentials for success if people are left unimpeded to "make small, incremental changes in their lives").

conditions of enduring social inequity have often looked to the Equal Protection Clause, occasionally relying on the “fundamental rights” doctrine and its unique combination of due process and equal protection guarantees.

In Brown v. Board of Education, the United States Supreme Court began to clarify the central role that the fourteenth amendment would play in enabling all citizens to derive maximum benefit from the public educational system. Building on the recognition in Brown that public schooling was “perhaps the most important function of state and local governments,” several commentators soon began to argue that education would be a logical addition to the growing list of fourteenth amendment “fundamental rights.” State action impinging on a student’s education would thus be subject to the strictest possible standard of review. Yet a 5-4 majority

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7 See Aleinikoff, Constitutional Law in the Age of Balancing, 96 Yale L.J. 943, 970 (1987) (placing the “fundamental interest” line of cases “at the intersection of equal protection and substantive due process”).

“Fundamental rights,” though not expressly granted by the Constitution, have been held to be implicitly guaranteed to individuals under a variety of controversial legal theories. See Brest, The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship, 90 Yale L.J. 1063, 1067-89 (1981) (outlining the major positions in the ongoing debate regarding the sources and limits of fundamental rights analysis).

The modern “fundamental rights” doctrine can be traced back to the 1942 case of Skinner v. Oklahoma, 316 U.S. 535 (1942), in which the Supreme Court invalidated Oklahoma’s Habitual Criminal Sterilization Act. “We are dealing here,” Justice Douglas wrote, “with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race.” Id. at 541. Since that time, the list of rights recognized as “fundamental” under the fourteenth amendment grew to include at least (1) the right to privacy (Griswold v. Connecticut, 381 U.S. 479, 484-86 (1965)); (2) the right to vote (Harper v. Virginia State Bd. of Elections, 383 U.S. 663 (1966)); (3) the right to interstate travel (Shapiro v. Thompson, 394 U.S. 618 (1969)); and (4) the right of access to the judicial process (see, e.g., Bounds v. Smith, 430 U.S. 817 (1977)).


9 See infra notes 27-30 and accompanying text.

10 Brown, 347 U.S. at 493.


12 During the school finance revolution of the 1970s, several state courts adopted the position that education was a fundamental right. Strict scrutiny was therefore applied, and statewide systems of school finance were found to violate federal and/or state equal protection clauses. In many of these cases, victorious plaintiffs bolstered their positions by also arguing that wealth should be considered a suspect classification. See, e.g., Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); cert. denied, 432 U.S. 907 (1977); see also Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

For an excellent overview of the school finance reform movement in general, see D.
in the 1973 case of San Antonio Independent School District v. Rodriguez explicitly determined that education was not a fundamental right under the United States Constitution and did not merit the strict scrutiny that accompanied such a designation. Analyzing the impact of the Rodriguez decision, many concluded that fundamental rights analysis was simply not viable in a school setting.

Legal doctrines, however, often develop several parallel strands. One strand may "run its course," while others retain a continuing vitality. During the past two decades, several key education rights cases suggest the possibility of a "fundamental rights" approach under an intermediate level of judicial review.

In the most recent Supreme Court case to address the topic of public education, Kadrmas v. Dickinson Public Schools, the plaintiff sought to have the Court apply such a heightened scrutiny framework on behalf of Sarita Kadrmas, an economically disadvantaged North Dakota child living sixteen miles from the nearest elementary school. The majority ultimately held for the defendant, rejecting the family's contention that the imposition of a fee for the school district's optional door-to-door bus service violated the Equal Protection Clause.

Yet despite Justice O'Connor's suggestion that this case involved no more than a relatively straightforward application of Rodriguez, Kadrmas proved to be a closely contested 5-4 decision accompanied by two strong dissents. Given the highly volatile na-
ture of the case's subject matter, this difference of opinion is not surprising. Few areas of constitutional law have proven more controversial than the three that the Kadrmas Court attempted to address: the right to equal educational opportunity, the emergence of a new heightened scrutiny, and the role of the judiciary in shaping public policy.23

This Article examines the applicability of fundamental rights analysis in light of the Kadrmas decision. Part I analyzes the parameters of the right to equal educational opportunity and the trend toward a minimal standard of adequate educational services.24 Part II documents the emergence of intermediate judicial review, focusing on the precedential value of key education cases.25 Part III explores prospective litigation under the heightened scrutiny framework, and suggests the potential for shaping educational policy in the related areas of testing and curriculum.26 The Article concludes that this new fundamental rights framework remains a particularly promising approach for maximizing equality of educational opportunity under the fourteenth amendment.

I
THE CONTINUING VITALITY OF THE RIGHT TO EQUAL EDUCATIONAL OPPORTUNITY

In Brown v. Board of Education,27 the Court held that under the Equal Protection Clause "the opportunity of an education . . . is a right which must be made available to all on equal terms."28 Most commentators and jurists have determined that this language validates a "right" to some form of "equal educational opportunity,"29 with the subsequent debates centering on the definition of the term and on the extent to which a legal system can require or enforce equality of opportunity.30

Brennan joined; Justice Stevens filed a dissenting opinion in which Justice Blackmun joined.

23 See Biegel, Major Issues Left Unresolved: After Kadrmas, U.S. Supreme Court Is in "a Holding Pattern," L.A. Daily Journal, July 22, 1988, § 1, at 4, col. 2 (where a variety of perspectives underlying this Article were initially explored).
24 See infra notes 27-76 and accompanying text.
25 See infra notes 78-156 and accompanying text.
26 See infra notes 157-257 and accompanying text.
28 Id. at 493.
29 See, e.g., Hobson v. Hansen, 269 F. Supp. 401, 511 (D.D.C. 1967) (the "sum result . . . when tested by the principles of equal protection and due process, is to deprive the poor and a majority of the Negro students . . . of their constitutional right to equal educational opportunities."), cert. dismissed, 393 U.S. 801 (1968).
More than three decades later, Justice Marshall relied heavily on the language of Brown in his Kadrmas dissent, reproducing the most famous paragraph from Chief Justice Warren's opinion\(^3\) and concluding that the North Dakota statute authorizing the imposition of fees for transporting students infringes upon the right to equal opportunity.\(^3\) "In allowing a State to burden the access of poor persons to an education," he declared, "the Court denies equal opportunity and discourages hope. I do not believe the Equal Protection Clause countenances such a result."\(^3\)

A. The Parameters of the Right

Marshall's focus on the right to equal educational opportunity as the key interest at stake in the North Dakota case reflects the continuing vitality of this right in the American legal system today. Indeed, the controversy regarding the parameters of the right has been at the center of many school-related disputes. Although not always mentioned explicitly, "denial of equal opportunity" is typically a central, underlying concern in fourteenth amendment litigation that involves such volatile areas as school desegregation,\(^3\) school finance,\(^3\) handicapped rights\(^3\) (including the rights of AIDS-infected students),\(^3\) standardized testing,\(^3\) and bilingual education.\(^3\)

The right to equal educational opportunity has appeared in


\(^3\) See 108 S. Ct. at 2493 (Marshall, J., dissenting) (quoting Brown, 347 U.S. at 493): [E]ducation is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society. It is required in the performance of our most basic public responsibilities, even service in the armed forces. It is the very foundation of good citizenship. Today it is a principal instrument in awakening the child to cultural values, in preparing him for later professional training, and in helping him to adjust normally to his environment. In these days, it is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education.

\(^3\) Id. at 2493-94.

\(^3\) Id. at 2494.

\(^3\) See, e.g., Crawford v. Los Angeles Bd. of Educ., 458 U.S. 527 (1982).

\(^3\) See generally supra notes 11-14 and accompanying text.


\(^3\) See, e.g., Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984); Debra P. v. Turlington, 730 F.2d 1405 (11th Cir. 1984).

many different guises, typically in the form of judicially recognized rights or state statutory entitlements. Major cases have pinpointed a right to acquire knowledge, 40 a right to a free and suitable "publicly supported education," 41 a right of "advancement on the basis of individual merit," 42 and a right to "direct the education of children by selecting reputable teachers and places." 43 State and federal entitlements provide public school students and their parents with additional, specific protection against the denial of opportunity, 44 such as the right to procedural safeguards when a student is suspended or expelled, 45 the right to a free and appropriate public education for the handicapped, 46 and the right to a safe school environment. 47 Typical statutory guidelines also give citizens the right to an education that "meets the needs" of all pupils, 48 within the framework of specific subject matter that the state deems essential. 49 Many provisions spell out clear educational goals, specifying particular skills that parents have a right to expect their children to attain in a public

44 Education is not explicitly mentioned in the United States Constitution, and thus it became, from the earliest days of the republic, a "power" reserved to the states under the tenth amendment. See E. Reutter, The Law of Public Education 2 (3d ed. 1985). It should be noted, however, that during recent decades the number of federal statutes dealing with education has increased significantly. See generally Levin, The Courts, Congress, and Educational Adequacy: The Equal Protection Predicament, 39 Md. L. Rev. 187, 226-45 (1979).
The right to equal educational opportunity has become a strong and multi-faceted interest, evolving from the fourteenth amendment and buttressed by an extensive statutory scheme and well-settled judicial precedent. When federal legislation establishing a separate Department of Education included a declaration that the new cabinet post had been set up "to strengthen the federal commitment to ensuring access to equal opportunity for every individual," Congress was simply affirming that this recognized right now occupied a position of central importance in educational policy making.

B. A "Basic Floor of Opportunity": Clarifying the Legal Impact of the Right

The Burger Court, particularly in the school finance case of San Antonio Independent School District v. Rodriguez and the handicapped student case of Board of Education v. Rowley, attempted to clarify the legal impact of the right to equal educational opportunity by moving toward a minimal standard of educational adequacy.

In Rodriguez, Justice Powell, writing for the Court, suggested almost as an aside that some minimal level of adequate educational services might be required under the fourteenth amendment. Nine years later, this dicta apparently became the foundation of Justice Rehnquist's analysis in Board of Education v. Rowley. The Rowley

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[I]t is the policy of the people of the State of California to provide an educational opportunity to the end that every student leaving school shall have the opportunity to be prepared to enter the world of work: that every student who graduates from any state-supported educational institution should have sufficient marketable skills for legitimate remunerative employment. . . .

See also N.J. Const. art. IV, § 7 (guaranteeing a "thorough and efficient" system of education); see generally Robinson v. Cahill, 70 N.J. 464, 360 A.2d 400 (1976) (Robinson VII), the most recent of numerous decisions attempting to construe the scope of this guarantee in a protracted school finance dispute. For additional explorations of a legal right to education in this context, see Hubsch, Education and Self-Government: The Right to Education under State Constitutional Law, 18 J.L. & Educ. 93 (1989) (assessing the potential impact of relying on the "education articles" in state constitutions); Levin, Education as a Constitutional Entitlement: A Proposed Judicial Standard for Determining How Much Is Enough, 1979 Wash. U.L.Q. 703 (arguing that "the state must ensure a basic level of education for all").

54 Rodriguez, 411 U.S. at 36-37.
55 See id. ("Even if it were conceded that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of [these rights], we have no indication that the present levels of educational expenditures . . . provide an education that falls short."). See generally Levin, supra note 44.
Court considered whether the refusal to provide an in-class sign-language interpreter for a deaf student "constituted a denial of the 'free appropriate public education' guaranteed by the [Education of the Handicapped] Act."\(^{56}\) Acknowledging that the act was promulgated "to provide equal protection of the laws,"\(^ {57}\) and that a "right to equal educational opportunity" had been recognized by previous fourteenth amendment decisions, the Court explored the possibility of establishing a workable standard for this interest.\(^ {58}\)

Given the differences in "educational opportunities provided by our public school[s]," and the "myriad of factors that might affect a particular student's ability to [succeed]," the Court declared that "[t]he requirement that States provide 'equal' educational opportunities would . . . seem to present an entirely unworkable standard requiring impossible measurements and comparisons."\(^ {59}\) The Court concluded, therefore, that a "basic floor of opportunity" would be enough to satisfy the mandate of the fourteenth amendment. Under this minimal standard, the Court would focus only on whether allegedly injured students were being provided with "[equal] access . . . sufficient to confer some educational benefit . . . ."\(^ {60}\)

Justice O'Connor appeared to follow this line of reasoning in **Kadrmas,**\(^ {61}\) choosing to focus on the plaintiff's contention that the "user fee for bus service unconstitutionally deprives those who cannot afford . . . it of 'minimum access to education.'"\(^ {62}\) Although she did not explicitly refer to a "right to equal educational opportunity," her analysis of what might constitute "minimum access"\(^ {63}\) suggests that for the majority, denial of minimum access (or "basic floor of opportunity") might constitute an infringement of the right. She concluded, however, that in light of **Rodriguez,** Sarita Kadrmas's

\(^{56}\) **Rowley,** 458 U.S. at 185.

\(^{57}\) Id. at 198; \(see\) also 20 U.S.C. §§ 1400-1461 (1982) (generally known as the Education of the Handicapped Act). Section 1400(b)(9) provides, in pertinent part: "It is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."

\(^{58}\) **Rowley,** 458 U.S. at 198-201.

\(^{59}\) Id. at 198.

\(^{60}\) Id. at 200-01.


\(^{62}\) Id. at 2487.

\(^{63}\) Justice O'Connor, writing for the majority, stated: "Appellants contend that . . . [the] user fee . . . unconstitutionally deprives those who cannot afford to pay it of 'minimum access to education.' . . . Appellants must therefore mean to argue that the busing fee unconstitutionally places a greater obstacle to education in the path of the poor than it does in the path of wealthier families. Alternatively, appellants may mean to suggest that the Equal Protection Clause affirmatively requires government to provide free transportation to school, at least for some class of students that would include Sarita Kadrmas." Id.
interest was not sufficient to trigger heightened judicial review. Justice O'Connor thus applied the deferential rational basis test and found that "charging a user fee for bus service is constitutionally permissible."\textsuperscript{64}

In declining to apply a more exacting level of scrutiny, the Court overlooked a viable, principled approach that could have given effect to the plaintiff's right of equal opportunity under current judicial precedent.

C. The Plyler Framework: Fundamental Rights Analysis and the Denial of Equal Educational Opportunity

In \textit{Plyler v. Doe,}\textsuperscript{65} the right to equal educational opportunity triggered a heightened level of judicial review. Plaintiffs had mounted an Equal Protection Clause challenge to a Texas statute that prevented undocumented alien children from enrolling in public schools. Justice Brennan, writing for the majority, conceded at the outset that education was not a fundamental right granted by the United States Constitution.\textsuperscript{66} Nonetheless, his reasoning followed the usual pattern of fundamental rights analysis:\textsuperscript{67} a key interest was identified, which in turn required the Court to apply a higher level of scrutiny.

After alluding to the occasionally suspect nature of an alienage classification and identifying a parallel between the students in \textit{Plyler} and the illegitimate children of previous cases,\textsuperscript{68} the Court focused on the importance of the interest in education and the related right to equal opportunity. Justice Brennan first cited a wide variety of school-related cases in support of his assertion that education was not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation," but an important interest that plays a "fundamental role in maintaining the fabric of our society."\textsuperscript{69} He then turned to the consequences of denying students an education and simultaneously introduced the "right to equal educational opportunity" into the analysis,\textsuperscript{70} ultimately reproducing the same passage from \textit{Brown} that Justice Marshall comes back to in his

\textsuperscript{64} Id. at 2489-91.
\textsuperscript{65} 457 U.S. 202 (1982).
\textsuperscript{66} Id. at 221.
\textsuperscript{68} See Plyler, 457 U.S. at 218-20.
\textsuperscript{69} Id. at 221.
\textsuperscript{70} Id. at 221-23.
Kadrmas dissent six years later.\footnote{See supra note 31 and accompanying text.} “These well-settled principles,” Brennan concluded, “allow [the Court] to determine the proper level of deference to be afforded [the Texas statute].”\footnote{Plyler, 457 U.S. at 223.}

The Plyler framework thus begins by identifying a key interest in education along with an implicated class, continues by recognizing a specific right to equal educational opportunity, and concludes by determining that such dire consequences would result from a denial of the right that this deprivation should trigger heightened scrutiny.\footnote{Id. at 218-24.} Unlike typical “fundamental rights” cases, where the interest is found to be fundamental and the level of scrutiny is therefore deemed to be “strict,” the interest in Plyler is described as “important” and tied to a process that plays a “fundamental” role.\footnote{Id. at 221.} This important interest, bolstered by a recognized right to equal opportunity and the identification of a disabling status, thus triggers a corresponding level of scrutiny that falls somewhere between the rational relationship standard and the strict judicial review afforded to state action that impinges upon fundamental rights.\footnote{The rational relationship standard requires only that the state action “be shown to bear some rational relationship to legitimate state purposes.” San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973). The strict scrutiny standard requires that the state action “further a compelling state interest.” Id. at 16. The standard in Plyler, requiring that the state action further some substantial goal, appears to fall somewhere in between the two. See Plyler, 457 U.S. at 224 (stating that the disputed legislation “can hardly be considered rational unless it furthers some substantial goal of the State”).}

Yet Plyler was not the first case to apply heightened scrutiny under the fourteenth amendment. The development of an intermediate level of review over the past two decades has been thoroughly documented.\footnote{Plyler, 457 U.S. at 243.}

II
THE EVOLUTION OF AN INTERMEDIATE STANDARD OF REVIEW

It is generally agreed that, within the context of the fourteenth amendment, the Court will now apply more than a minimal rationality standard but less than strict scrutiny in a number of clearly iden-
The evolution of this "heightened" scrutiny has been one of the most controversial developments in modern constitutional law. Since a majority of justices have failed to provide "a coherent explanation of the characteristics which . . . trigger intermediate review," several members of the Court, as well as many commentators, have attempted to establish a unifying framework for the seemingly disparate fourteenth amendment decisions in this area. Some have identified a so-called "sliding scale" theory of judicial scrutiny, while others have argued that a case-by-case in-


79 The intermediate level of review emerged most clearly and emphatically in an Equal Protection Clause context, because equality has become "the argument of first choice" when fourteenth amendment violations are alleged. See Westen, The Empty Idea of Equality, 95 HARV. L. REV. 537, 558 (1982). See generally Brest, supra note 7 (discussing fundamental rights adjudication).

80 See, e.g., Spece, The Most Effective or Least Restrictive Alternative as the Only Intermediate and Only Means-Focused Review in Due Process and Equal Protection, 33 VILL. L. REV. 111 (1988); see also G. GUNTHER, INDIVIDUAL RIGHTS IN CONSTITUTIONAL LAW 257 (4th ed. 1986) ("[B]y the 1980's, there remained ample basis for the widespread and justified charge that the modern court's exercise of equal protection review has been erratic. . . . [The decisions] reveal a doctrinal landscape strewn with not always reconcilable fragments."). See generally Simson, A Method for Analyzing Discriminatory Effects Under the Equal Protection Clause, 29 STAN. L. REV. 663, 665-66 (1977) (identifying some major attempts at establishing a "unifying framework" to explain the Court's application of intermediate review).

81 Justice Marshall has been a major force in this area of law, arguing since the early 1970s that the Court's equal protection decisions defy the "easy categorization" of two "neat" tiers:

A principled reading of what this Court has done reveals that it has applied a spectrum of standards in reviewing discrimination allegedly violative of the Equal Protection Clause. This spectrum clearly comprehends variations in the degree of care with which the Court will scrutinize particular classifications, depending, I believe, on the constitutional and societal importance of the interest adversely affected and the recognized invidiousness of the basis upon which the particular classification is drawn.


Indeed, Justice Marshall's 67-page dissent in Rodriguez, containing the most elaborate articulation of this position, arguably is proving more influential than the majority opinion itself. Several commentators believe that the Court, in Plyler and Cleburne, actually adopted the 'sliding scale' approach. See Aleinikoff, supra note 7, at 968-69; Note, A Changing Equal Protection Standard? The Supreme Court's Application of a Heightened Scrutiny
quiry into the relevance of the classification would be the most principled approach.\textsuperscript{82} Very few, however, would claim that the Court in the late 1980s only applies a rigid two-tiered analysis, automatically upholding state action subject to rational basis review while striking down state action subject to strict scrutiny.\textsuperscript{83}

A. The Emerging Heightened Scrutiny in a School Setting

Education cases in particular reflect this gradual shift toward a middle level of judicial review. Although a majority of Supreme Court justices have steadfastly refused to extend fundamental rights recognition to education,\textsuperscript{84} the Court has been less than deferential to school districts and states in reviewing disputed actions and policies under a fourteenth amendment framework.

The decision in \textit{Vlandis v. Kline}\textsuperscript{85} represents one of the earliest examples of intermediate review in an education context. Relying on both the Due Process and the Equal Protection Clauses, a group of Connecticut students challenged a statute which enabled the state university to charge them a higher nonresident tuition.\textsuperscript{86} Under the statute, once they had enrolled as out-of-state students, they were forever precluded from qualifying for the lower in-state rate even if they later moved into Connecticut as residents. Although the right to equal educational opportunity was not specifically mentioned, the

\textsuperscript{82} Justice Stevens began to define this position in \textit{Craig v. Boren}, 429 U.S. 190 (1976), arguing that "there is only one Equal Protection Clause. . . . It does not direct the courts to apply one standard of review in some cases and a different standard in other cases." \textit{Id.} at 211-12 (Stevens, J., concurring). A decade later, joined by Chief Justice Burger in \textit{Cleburne}, he reiterated that he has "never been persuaded that these so-called 'standards' adequately explain the decisional process." \textit{Cleburne}, 473 U.S. at 451 (Stevens, J., concurring). Justice Stevens described in some detail a method of analyzing equal protection cases under one standard, and expressly rejected the idea that the Court applies any form of intermediate review. \textit{See id.} at 452-54.

\textsuperscript{83} See also Note, Justice Stevens’ Equal Protection Jurisprudence, 100 Harv. L. Rev. 1146, 1154 (1987): “Rather than focusing on the abstract categorization of classifications, Justice Stevens conducts a case-by-case inquiry into the 'relevance' of the classification to a valid public purpose.”

\textsuperscript{84} See, e.g., G. \textsc{Gunther}, supra note 80, at 255. Several states, however, have extended fundamental rights recognition to education under the equal protection clauses of state constitutions. \textit{See supra} note 12. \textit{See generally} Mosk, \textit{Beyond the Constitution}, 7 Cal. L. Rev., Aug. 1987, at 100 (noting distinctions between state and federal constitutional jurisprudence).

\textsuperscript{85} 412 U.S. 441 (1973).

\textsuperscript{86} \textit{Id.} at 442-45.
denial of equal opportunity to these students was clearly a major underlying concern, since the continuing imposition of a significantly higher tuition infringed upon their ability as state residents (vis-a-vis other similarly situated state residents) to complete their education at a public university.87

Relying on cases that had overturned statutes creating conclusive presumptions,88 the Court held for the plaintiffs, declaring that "it is forbidden by the Due Process Clause to deny an individual the resident rates on the basis of a permanent and irrebuttable presumption of nonresidence . . . ."89

In a pivotal concurring opinion, Justice White argued that the Vlandis case is more correctly viewed as an example of heightened judicial review triggered by an important interest. "[I]t is clear," he wrote, "that we employ not just one, or two, but, as my Brother Marshall has so ably demonstrated, a 'spectrum of standards in reviewing discrimination allegedly violative of the . . . [fourteenth amendment]'"90 "[I]t must now be obvious," he continued, "or has been all along, that, as the Court's assessment of the weight and value of the individual interest escalates, the less likely it is that mere administrative convenience . . . will be sufficient to justify what otherwise would appear to be irrational discriminations."91

Under a traditional rational basis standard, the Court would have presumed the Connecticut law to be valid, and "any conceivable basis" would have been sufficient to uphold it.92 Yet not only did the Vlandis Court analyze the facts from the plaintiff's perspective,93 but Justice Stewart suggested that the students must be provided a chance "to demonstrate that they had become bona fide . . . residents."94 Although the majority opinion did not explicitly discuss the level of judicial review it had employed, Justice White addressed the issue in his concurrence. "Here," he asserted, "it is enough for me that the interest involved is that of obtaining a higher education, and that the State, without sufficient justification

87 Id.
89 Vlandis, 412 U.S. at 452.
91 Id. at 459.
92 See, e.g., Note, supra note 81, at 956 (describing judicial review under the traditional rational basis test).
93 See Vlandis, 412 U.S. at 448-52. Professor Tribe argues that an "altering of perspective" alone can be viewed as a form of intermediate review. See L. Tribe, supra note 79, at 1604.
94 Vlandis, 412 U.S. at 453.
... [maintains] ... this ... pattern of discrimination.”

In Regents of the University of Michigan v. Ewing,96 the Court considered the interests of a public university student under a substantive due process approach.97 The medical school had dismissed Scott Ewing after he failed a qualifying examination, and Ewing argued that the University had violated his fourteenth amendment rights because he was the first student who had not been allowed a second opportunity to take the test.98 The university defended its actions by claiming that the plaintiff’s decidedly “unenviable” academic record, combined with the failing score on the NBME test, provided sufficient justification for dismissal.99

The only federal interest specifically mentioned in this case was a “constitutionally protectible property right in continued enrollment ... free from arbitrary state action.”100 Underlying the plaintiff’s position, however, was the same interest in public education that Justice White identified in Vlandis,101 bolstered by a similarly unstated denial of equal educational opportunity: the denial of “the opportunity” to retake the NBME.102

95 Id. at 459. Justice Stewart’s majority opinion cited the irrebuttable presumption doctrine, which is that an irrebuttable presumption violates the Due Process Clause of the fourteenth amendment unless the presumed fact “necessarily or universally” follows from the proved fact. See id. at 452. (For example, in Vlandis, the fact that the students were not currently in-state residents does not follow necessarily or universally from the proved fact that they were not in-state residents the previous year.) Initially, most of the commentary concerning Vlandis focused on this doctrine and on the extent to which it remained in effect. Many concluded that the doctrine as originally formulated had become discredited. See, e.g., Weinberger v. Salfi, 422 U.S. 749, 772 (1975). See generally Note, Irrebuttable Presumptions: An Illusory Analysis, 27 STAN. L. REV. 449 (1975) (authored by John M. Phillips). Today, however, it appears that the precedential value of these so-called “irrebuttable presumption” cases may very well center on their method of giving effect to “substantial, cognizable” interests. See, e.g., Stanley v. Illinois, 405 U.S. 645 (1972) (where the Court analyzed the nature and extent of plaintiff’s interests).

Professor Gunther declares that “the [irrebuttable presumption] approach may survive for use where there are independent reasons for heightened scrutiny, as when ‘fundamental interests’ are affected.” G. GUNther, supra note 80, at 520 n.4.


97 Id. at 222. The Court stated: “We [previously] assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard ... We ... accept the University’s invitation to ‘assume the existence of a constitutionally protectible [sic] property right in [Ewing’s] continued enrollment ... ’”

For an excellent overview of the fluctuations in the Court’s willingness to find for a plaintiff under substantive due process, as well as an analysis of the approach’s alleged return to favor in recent years, see Lupu, Untangling the Strands of the Fourteenth Amendment, 77 MICH. L. REV. 981 (1979).


99 Id. at 227.

100 Id. at 223.

101 412 U.S. at 459 (White, J., concurring).

102 Ewing, 474 U.S. at 219.
Writing for a unanimous Court, Justice Stevens explained that "[c]onsiderations of profound importance counsel restrained judicial review . . . ."103 "This narrow avenue for judicial review," he continued, "precludes any conclusion that the decision . . . was such a substantial departure from accepted academic norms as to demonstrate that the faculty did not exercise professional judgment."104

Some would argue that by employing this language Stevens was using a rational basis standard.105 Yet an analysis of the Ewing Court's approach reveals that Stevens's inquiry might be closer to heightened scrutiny. The test articulated by the Court focused on whether or not the state action was a substantial departure from "accepted academic norms." This suggests that if the educators' acts were indeed a substantial departure, the Court would hold for the plaintiff. Under the rational basis approach, however, even such a substantial departure would likely result in a decision against the plaintiff. The rational relationship test has traditionally been so deferential that "the state" (or "academic institution") would prevail if it could demonstrate "any conceivable basis" for its actions, even if these actions were significant departures from "the norm."106

In addition, the traditional rational basis standard presumes a valid purpose, and the state is not required to convince the Court of the wisdom of its actions.107 Yet in Ewing, even though the Court emphasized the necessity of deferring to "genuine[ ] academic decisions"108 and eventually upheld the student's dismissal, the deference was by no means automatic. The Court fully explored the wisdom of the university's action, expressly analyzed the facts "from Ewing's perspective," and examined the policy reasons behind the university's decision at length.109 Given the extent of this policy review, it is reasonable to conclude that the Ewing Court did more than simply apply a minimal rationality standard.110

103 Id. at 225.
104 Id. at 227.
105 See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 5, at 359-60 n.60; cf. Ewing, 474 U.S. at 227 n.13 ("Even viewing the case from Ewing's perspective, we cannot say that the explanations and extenuating circumstances he offered were so compelling that their rejection can fairly be described as irrational.").
106 See, e.g., supra note 92 and accompanying text.
107 See Note, supra note 81, at 956.
108 Ewing, 474 U.S. at 225 ("When judges . . . review . . . a genuinely academic decision, . . . they should show great respect for the faculty's professional judgment. Plainly, they may not override it unless it is such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.").
109 Id. at 227-28 n.13.
110 For a discussion of this "covertly heightened scrutiny" approach, see Note, supra note 81, at 956-57. See also Cleburne, 473 U.S. at 478 (Marshall, J., concurring and dissenting); L. TRIBE, supra note 79, at 1448-46.
In his concurring opinion, Justice Powell acknowledged that by recognizing the existence of a constitutionally protected interest under a substantive due process framework, the Court was required to employ "particularly careful scrutiny." Agreeing with the decision against the plaintiff, but not willing to support the Court's "fundamental rights" approach, he attempted to limit the precedential value of the Ewing majority opinion. Powell argued that the plaintiff had nothing more than a "state-law contract right." He asserted that "the fact that Michigan may have labeled this interest 'property' [does not entitle] it to join those other, far more important interests that have heretofore been accorded the protection of substantive due process." The language in Powell's concurrence provides further support for the position that the Court will give effect to certain important interests under an emerging heightened scrutiny framework.

The handicapped rights cases of the 1980s provide yet another example of "fundamental rights" analysis, giving effect to plaintiffs' interests under an indirect application of the fourteenth amendment. These cases typically focus on the construction of statutory entitlements granted to students within the context of equal protection. Since the newly acquired rights of the handicapped have been codified with the express purpose of "assur[ing] equal protection of the law," the statutes tend to be construed by applying fourteenth amendment principles and methodology.

Key cases in this area follow the familiar pattern. They recognize an important interest in education bolstered by a right to equal opportunity, and then proceed to review state action under a heightened level of scrutiny. In Board of Education v. Rowley, for example, the Court examined the parameters of a handicapped student's "interest." Justice Rehnquist, writing for the majority, concluded that the equal protection specified in the Act required a "basic floor of opportunity," consisting of "access" to specialized instruction and related services.

At one point, the Court invoked the traditional deference of the rational basis test, acknowledging that "the courts must be careful

111 Ewing, 474 U.S. at 229 (Powell, J., concurring).
112 Id.
113 Id.
114 See Education of the Handicapped Act, 20 U.S.C. § 1400-1461 (1982) [hereinafter the Education of the Handicapped Act, or Public Law 94-142]. Section 1400(b)(9) provides, "It is in the national interest that the Federal Government assist State and local efforts to provide programs to meet the educational needs of handicapped children in order to assure equal protection of the law."
116 Id. at 201-03. See also supra notes 34-60 and accompanying text.
to avoid imposing their view of preferable educational methods upon the States." Yet, in ruling for the board of education, the Court did not automatically defer to the school district’s judgment. As the majority had done in both Vlandis and Plyler and would soon do in Ewing, the Court in Rowley explored the policy reasons underlying the district’s decision in great detail.

Although the Rowley Court did not specifically refer to Craig v. Boren, it can be argued that it applied the same standard of heightened scrutiny. In Craig, the Court had recognized an intermediate level of scrutiny in the context of gender discrimination. The test under this heightened standard of review was whether the state classification served “important governmental objectives” and was “substantially related to achievement of those objectives.” In Rowley, the Court examined the objectives underlying the handicapped student’s statutory interest at great length, and then provided a detailed analysis of the school district’s justification for its actions in light of these objectives. Finally, it concluded that the state action in the present case did in fact “fit” the objectives.

Similarly, in the recent case of Honig v. Doe, the Court considered whether “local school authorities may... unilaterally exclude disabled children from the classroom for dangerous or disruptive conduct growing out of their disabilities.” Justice Brennan reviewed the legislative history of Public Law 94-142, and concluded that Congress was “aware that the schools all too often had denied” emotionally disturbed children access to the classroom. The Court recognized that the twenty and thirty-day suspensions imposed by San Francisco school officials constituted just the sort of actions the statute was designed to prevent.

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117 Id. at 207.
118 See supra notes 89, 109, and infra notes 132-41 and accompanying text.
119 See Rowley, 458 U.S. at 207-10.
120 429 U.S. 190 (1976).
121 Id. at 197.
122 Id.
124 Id. at 209-10 (“[T]he ‘evidence firmly establishes that Amy is receiving an ‘adequate’ education, since she performs better than the average child in her class and is advancing easily from grade to grade.... In light of this finding, and of the fact that Amy was receiving personalized instruction and related services calculated by the... school administrators to meet her educational needs,.... the decision of the Court of Appeals is reversed.”) (quoting Rowley v. Board of Educ., 483 F. Supp. 580, 583 (1980)).
126 Id. at 308.
127 Id. at 309-11.
128 Id. at 323, 326. Arguably, the Honig Court employed two different techniques of intermediate review: the form of “demanding close fit” described above, and the method of “assessing importance” by weighing the respective interests of the parties.
The handicapped rights cases thus provide another variation of fundamental rights analysis at the intersection of due process and equal protection. Since the Education of the Handicapped Act has emerged from a due process and equal protection framework, judges construing the extent of this statutory protection often apply the assumptions and rationales of previous fourteenth amendment decisions. In both Rowley and Honig, the Court appears to recognize implicitly that handicapped students' rights are important enough to trigger heightened scrutiny in the same manner that the rights of the female plaintiff in Craig v. Boren triggered heightened scrutiny for gender discrimination.

B. Kadrmas v. Dickinson Public Schools and the Applicability of the Plyler Framework

Read together with the above cases, Plyler v. Doe can be

See L. Tribe, supra note 79, at 1602-03. "In the present case," Justice Brennan wrote in Honig, "we are satisfied that the District Court . . . properly balanced respondent's interest in receiving a free appropriate public education . . . against the interests of the state and local school officials in maintaining a safe learning environment . . .." 108 S. Ct. at 606; see also Irving Indep. School Dist. v. Tatro, 468 U.S. 883 (1984), where the Court applied the Rowley analysis and held that the school district was indeed required under Public Law 94-142 "to provide a handicapped child with clean intermittent catheterization during school hours." Id. at 885.

129 See supra note 7 and accompanying text. Professor Lupu provides additional clarification of the Court's fundamental rights analysis in this regard. See Lupu, supra note 97, at 984:

Which new rights properly derive from the liberty strand, and which from the equality strand? Sometimes the Court tells us; other times it does not. Often, members of the Court agree upon the preferred status of an interest but disagree about its textual source. On occasion, members of the Court concede that an interest has no textual source, yet battle still over which strand of the fourteenth amendment protects it from state interference.

Many times, the Court appears to be applying the two clauses simultaneously. See Note, Equal Protection: A Closer Look at Closer Scrutiny, 76 Mich. L. Rev. 771, 791 (1978) ("equal protection is often substantive due process in disguise").

In Vlandis v. Kline, the plaintiffs argued their case under both due process and equal protection theories. While the majority then gave effect to plaintiff's interests under due process alone, Justice White would have applied fundamental rights analysis under an equal protection theory. 412 U.S. 441, 456-59 (1973) (White, J., concurring). In Plyler v. Doe, the majority gave effect to plaintiffs' interests solely under the Equal Protection Clause (see 457 U.S. 202, 230 (1982)), and in Ewing solely under Due Process. See 474 U.S. 214, 225-26 (1985).


131 See supra notes 120-24 and accompanying text.

viewed as much more than simply an isolated, result-oriented decision. The heightened scrutiny employed by the Plyler Court, balancing a recognized student interest against the interests of the school district and the state, cannot simply be dismissed as a unique confluence of theories when other decisions have employed techniques of heightened review triggered at least in part by an express or implied denial of equal educational opportunity.

Under this emerging framework, intermediate judicial review is applied to protect burdened classes that have been denied these important interests. A favorable decision in a school setting typically requires the identification of at least (1) the important interest in education, (2) the right to equal opportunity, and (3) an arguably burdened class of injured plaintiffs. In Vlandis, for example, the interest in education plus an unstated right to interstate travel combined with the identification of an implicated class of out-of-state students to generate intermediate judicial review. In Plyler, the impact of the general interest in education and the specific right to equal opportunity was bolstered by the fact that the injured plaintiffs all belonged to a disadvantaged class of undocumented alien children.

133 Chief Justice Burger called Plyler an "unabashedly result-oriented" case, "spin[n]g out a theory custom-tailored to the facts . . . ." Id. at 244 (Burger, C.J., dissenting).
134 See id. at 221-31. The "weighing of interests" in the Plyler case has been examined at length by several excellent commentaries. See, e.g., Aleinikoff, supra note 7, at 970-71. See generally Hutchinson, More Substantive Equal Protection? A Note on Plyler v. Doe, 1982 Sup. Ct. Rev. 167.
135 See, e.g., Hutchinson, supra note 134, at 169. See also Karst, The Supreme Court, 1976 Term—Foreword: Equal Citizenship under the Fourteenth Amendment, 91 Harv. L. Rev. 1, 2, 26-33 (1977) (identifying components of this framework at an earlier stage of its development).
136 Although the framework typically requires a combination of important interests plus disabling classifications, some have argued that the identification of an important interest alone can trigger intermediate judicial review. See, e.g., L. Tribe, supra note 79, at 1610-13.
137 The identification of a burdened class alone, without the presence of an important interest, has been sufficient to trigger heightened scrutiny if the classification has been deemed "quasi-suspect." In recent times, the Supreme Court has extended quasi-suspect status to gender and illegitimacy. See generally Note, Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model, 90 Yale L.J. 912, 914-19 (1981) (describing the ambiguity in the Supreme Court's criteria for determining quasi-suspect status).
139 Professor Tribe identifies this unstated interest in his analysis of the Vlandis case. See L. Tribe, supra note 79, at 1623 n.35.
140 See Vlandis, 412 U.S. at 442-45. In addition, students who were not married were placed at an additional disadvantage, arguably resulting in an additional implicated class of unmarried out-of-state students. See id. at 442.
141 See Plyler v. Doe, 457 U.S. 202, 218-20 (1982); see also Hutchinson, supra note 134, at 175.

A growing body of research has documented the courts' willingness to consider a
Although the Court has ostensibly put a halt to the creation of new "fundamental interests" which trigger strict scrutiny, the door apparently remains open for the identification of "important" interests which could trigger heightened judicial review. Justice White's language in *Vlandis* continues to be an appropriate description of this framework. The greater the weight and value of the interest, the more difficult it is to justify state action that may infringe upon this interest. Professor Peter Westen, emphasizing the central role of rights analysis in all fourteenth amendment decisions, has argued that the degree of judicial scrutiny in a given case is determined by the acknowledged importance of the underlying right. Commentators have also pinpointed various methods of review employed by the Court once heightened scrutiny has been triggered. Professor Laurence Tribe has cataloged six major techniques of intermediate review.

*Kadrmas v. Dickinson Public Schools* presented the Court with an ideal set of circumstances for an application of this new height-

combination of several classes and interests before determining the appropriate level of review. See, e.g., Levin, supra note 44, at 206.

City of Cleburne v. Cleburne Living Center, 473 U.S. 432 (1985), conceivably reflects such a combination. In *Cleburne*, the Court overturned the city’s denial of a use permit to a group of mentally retarded people who had wished to live in a group home. Two disabling classifications (economic disadvantage and mental disability) combine with at least one important interest (the right to shelter) to generate a level of review that has been labeled "covertly heightened scrutiny." See supra note 110 and accompanying text.


Professor Kirp identified the viability of a "quasi-fundamental interests" approach the same year that the *Rodriguez* Court expressly refused to grant education "fundamental interest" status. See Kirp, *Schools as Sorters: The Constitutional and Policy Implications of Student Classification*, 121 U. PA. L. REV. 705, 722 (1973) ("Even if the 'fundamental interest' analysis is abandoned by the Court, a weighing of state and individual concerns more precise and careful than that adopted in *Rodriguez*, and more typical of other recent Supreme Court decisions, may ultimately prevail.").

141 *Vlandis*, 412 U.S. at 459.

142 See Westen, supra note 78, at 542 ("[S]tatesments of equality logically entail (and necessarily collapse into) simpler statements of rights; and . . . the additional step of transforming simple statements of rights into statements of equality not only involves unnecessary work but also engenders profound conceptual confusion.").

143 See id. at 584-85.

144 See, e.g., Simson, supra note 80, at 663-66; Spece, supra note 80, at 118-20.


ened scrutiny. The important interest in education was at stake, and the plaintiffs were part of a disadvantaged class of people: those at or near the poverty line. Justice Marshall noted that "the Plyler Court's reasoning is fully applicable here. As in Plyler, the State . . . has acted to burden the educational opportunities of a disadvantaged group of children, who need an education to become full participants in society." Justice O'Connor, however, attempted to distinguish Plyler, ignoring Justice Brennan's majority opinion and looking instead to the concurring and dissenting opinions in support of her assertion that the 1982 case dealt with "unique circumstances." "The case before us does not resemble Plyler," she concluded, "and we decline to extend the rationale of that decision to cover this case."

Ironically, had the Kadrmas Court chosen instead to "extend" Plyler, the disposition might very well have been the same. An examination of the facts reveals that the plaintiff's case may not have been that strong. The Kadrmas family apparently failed to request that the school board waive the $97-per-year fee, a procedure expressly made available under a North Dakota statute. Instead, the plaintiffs arranged to transport their daughter privately, incurring costs of more than $1,000 per year in 1985 and 1986. Sarita Kadrmas was not, therefore, denied any education; she continued to attend school throughout the course of litigation.

Applying heightened scrutiny, the Court could have balanced these facts against those that supported the plaintiff's cause. Such an analysis would have included the recognition that most students in North Dakota are provided with free bus transportation, and that the money collected by the Dickinson Public School District for transporting indigent families represents "a minuscule proportion of the costs of the bus service." All this could have been considered in light of the unusual emphasis on school transportation throughout the North Dakota statutes, an emphasis designed to ensure that all students in this rural, sparsely populated state can indeed get to school.

An intermediate level of review in Kadrmas would have been a more equitable approach for the complicated and wide-ranging

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147 Id. at 2484-88.
148 Id. at 2494 (Marshall, J., dissenting).
149 Id. at 2488.
151 Kadrmas, 108 S. Ct. at 2485.
152 Id.
153 Id. at 2494.
154 Id.
155 See id. at 2484-85.
problems that arise in a school setting. Although the Court rejected such an approach on the facts of Kadrmas, it did not expressly foreclose future applications of Plyler. In a closely reasoned opinion that avoided broad pronouncements, Justice O'Connor simply concluded that it would not be appropriate to apply the heightened scrutiny framework in the present case.¹⁵⁶

The majority apparently hesitated to rule in Sarita Kadrmas's favor because she was not injured in any perceivable way. With a stronger case, however, a Supreme Court majority may be comfortable applying Plyler and openly recognizing the existence of intermediate judicial review in an education context. Plaintiffs initiating future litigation under the emerging heightened scrutiny must be certain to delineate an actual injury resulting from a denial of equal opportunity and a deprivation of education. The related areas of testing and curriculum are particularly ripe for such litigation.

III

PROSPECTIVE LITIGATION IN A SCHOOL SETTING: TOWARD AN EXPRESS RECOGNITION OF THE NEW HEIGHTENED SCRUTINY

Despite a stated unwillingness to impose their own views of education on the public school community,¹⁵⁷ the judiciary has continued to shape educational policy simply by reviewing the practices of school districts and states.¹⁵⁸ School-related cases have increased significantly in both volume and scope, raising new types of issues and creating new constitutional theories.¹⁵⁹ Every decision in these cases affects the policies of educators in some fashion.

Even in an era when judicial activism has allegedly become disfavored,¹⁶⁰ litigation in an education context remains a key vehicle for change. The courts cannot and will not ignore plaintiffs who come before them with grievous school-related injuries.

Many students have been injured by public school practices in

¹⁵⁶ See generally id. at 2487-89.
¹⁵⁷ See, e.g., San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 42-43 (1972): Education . . . presents a myriad of 'intractable economic, social, and even philosophical problems . . . .' In such circumstances, the judiciary is well advised to refrain from imposing on the States inflexible constitutional restraints that could circumscribe or handicap the continued research and experimentation so vital to finding even partial solutions to educational problems and to keeping abreast of ever-changing conditions.
¹⁵⁹ See D. TYACK, J. JAMES & A. BENAVOT, supra note 6, at 196-97.
the related areas of testing and curriculum. Under the *Plyler* framework, prospective litigation in these areas could point toward an express recognition of the new heightened scrutiny, and could seek to effect significant changes in both standardized testing programs and curricular policy. The remedies of declaratory and injunctive relief would relieve the aggrieved plaintiff, while the very process of scrutinizing these policies may prompt significant changes in this area.161

The "fundamental rights" approach set forth in *Plyler* begins with the identification of important interests, notes the existence of a disabling classification, and assesses the consequences of the deprivation.162 Whether an intermediate level of review is triggered by this combination in a school setting appears to depend on three factors: (1) denial of equal opportunity, 163 (2) a disabling classification,164 and (3) a case-by-case examination of the consequences of deprivation.165

A. Students Injured by Current Testing Practices

It is impossible to ignore the central role that the machine-scored, multiple-choice test has played in our educational system since the end of World War II.166 By the early 1960s, the "far-reaching effects of the . . . emphasis on such standardized tests" had already been documented.167 "[F]ew people realize," Professor Banesh Hoffmann wrote, "[that] these tests have become the dominant factor in educational research; they furnish the yardstick—indeed the very definition—of 'progress.' "168

During the past twenty-five years, educators have developed an

161 See Margolick, *At the Bar*, N.Y. Times, Nov. 18, 1988, at B13, col. 2 (alluding to "Heisenberg's uncertainty principle," that "the very process of scrutinizing something changes it"). Thus, even if a plaintiff should lose on the merits but succeed in convincing the Court to apply heightened scrutiny to education, policy changes in the areas of testing and curriculum are likely to emerge.

162 See *Plyler*, 457 U.S. at 221-24. See generally supra notes 65-77 and accompanying text (an overview of the *Plyler* framework).

163 See id.; see also supra notes 27-51 and accompanying text (an analysis of the right to equal educational opportunity).

164 See *Plyler*, 457 U.S. at 223.

165 See id. at 221-24.

166 The continued growth and extensive influence of multiple-choice testing is reflected in the history of the Educational Testing Service (ETS). The first multiple-choice Scholastic Aptitude Test (SAT) was added by ETS to the U.S. "college boards" in 1926, and the essay portion was dropped altogether in 1942 (ostensibly because the outbreak of World War II had made it difficult to recruit graders). After various "unsatisfying" experiments with essay sections and "writing samples" in the 1950s and 1960s, only an optional twenty-minute essay was retained. See D. Owen, *None of the Above* 18-26 (1985).

even greater reliance on multiple-choice testing.\textsuperscript{169} State-mandated competency and proficiency tests are administered regularly in the public schools, with dire results for those who do not perform well.\textsuperscript{170} The highly publicized education reform movement of the 1980s has triggered still more testing,\textsuperscript{171} and test data has become "the primary indicator in monitoring the success or failure . . . of the


\textsuperscript{170} See Fiske, America's Test Mania, N.Y. Times, Apr. 10, 1988, § 12 (Education Supplement), at 16-17:

[Test] scores . . . are increasingly being used to promote and hold back students, hire and fire teachers, award diplomas, evaluate curriculums, and dole out money to schools and colleges. . . . The actual number of states requiring students to pass a standardized test for high school graduation has jumped from 15 in 1985 to 24 in 1987, while the number using them to help determine whether students should be promoted has gone from eight to 12 during the same period.

Professor Airasian adds that

[by the mid-1980s,] 29 states required that pupils take competency or proficiency tests at selected points on the educational ladder. . . . Thirty-two states [required] teachers to pass a standardized competency examination in order to obtain or maintain their certification to teach. Other states [used] pupil standardized test results to allocate remedial funding to local school districts and to award 'bonuses' to schools based on year-to-year pupil test score improvement.

See Airasian, supra note 169, at 393-94.

\textsuperscript{171} See, e.g., Fiske, supra note 170, at 16, col. 1 (describing the "reform movement's biggest side effect—the burgeoning use of standardized tests").

Most agree that the education reform movement "officially" began in 1983 with "A Nation at Risk, the report of the National Commission on Excellence in Education," which "shattered complacency about the state of American education" with its detailed documentation of "mediocrity" in the public schools. See Olson, Inside 'A Nation at Risk,' Educ. Week, Apr. 27, 1988, at 1, col. 2.

During this era, the status quo in our educational system became unacceptable. Educators and elected officials on both ends of the political spectrum sought to forge a consensus, united in a new "commitment to excellence," even as they continued to disagree on the relative importance and inherent workability of the various reform proposals. See generally E. STEVENS & G. Wood, supra note 30, chs. 12-14 (placing the current wave of reform in historical perspective by examining past movements). See also Pipho, States Move Reform Closer to Reality: A Special Report, 68 PHI DELTA KAPPAN K1, K5 (Dec. 1986) (highlights of state legislative action reflecting the unifying themes of the reform movement: "more rigorous standards for students and more recognition and higher standards for teachers").


American educational system." Multiple-choice tests today are often "the primary or sole piece of information used in [educational] decision making.”

Relying almost exclusively on multiple-choice tests that have been prepared by an unregulated industry, school districts and states acquire statistical profiles of students that are often incorrect or incomplete. Not only does the current multiple-choice format embody inherent limitations, but the predictive value of a given test score varies due to the idiosyncratic nature of standardized formats. Key "hidden variables," such as an examinee's personal background and her possible exposure to certain teaching styles, must be taken into account when attempting to make appropriate inferences from test scores. Yet, all too often, one score alone determines admission to a special school, eligibility for a particular school program, placement in an advanced track, or even admission to college and other institutions—all hang upon this instrument peculiar to our century.”

See generally Gold, Extensive Tests in Indiana Make Teachers Uneasy, Educ. Week, Apr. 13, 1988, at 1, col. 1 (describing what "may be the most sweeping [standardized testing program] in the nation, both in terms of the number of grades it includes and the extent to which results are used to require . . . placement and retention").

Madaus has pointed out that a student's lack of ability or low achievement are only two of many possible explanations for a low test score. Other possible reasons include the lack of opportunity to learn the material, the quality and methodology of classroom instruction, and one or more additional variables in the following areas: cognitive, attitudinal, affective, health, nutritional, social, and ecological. See id. at 32, 47.
the ability groupings within a specific classroom.\textsuperscript{181}

1. Denial of Equal Opportunity: Testing as an Unreasonable Obstacle

Under the Plyler framework, a denial of equal educational opportunity has occurred when "barriers present\[ ] unreasonable obstacles to advancement on the basis of individual merit."\textsuperscript{182} Plaintiff students could argue that both the inferior testing instruments and the practice of admitting and placing young people on the basis of incorrect or incomplete assessments amount to unreasonable obstacles.\textsuperscript{183}

Whether these "obstacles" are deemed unreasonable may depend on the existence of viable alternatives.\textsuperscript{184} In response to criticism of multiple-choice testing, school districts typically point to the alleged efficiency of the multiple-choice format and the supposed absence of alternative approaches.\textsuperscript{185} Yet during the past decade, significant advances in microcomputer technology have triggered the development of many reasonable testing alternatives, including more precise measurement techniques using traditional formats as
well as new evaluation instruments using innovative formats.\textsuperscript{186} The new technology may enable school districts to combine a variety of instruments and procedures, rather than relying exclusively on any one type of test.\textsuperscript{187}

Teacher licensing, a major focus of current reform efforts, may soon reflect these policy changes. In a surprising and unprecedented decision, the Educational Testing Service\textsuperscript{188} recently announced that by 1992 it would replace its controversial and widely criticized National Teachers Examination (NTE) with a new three-part instrument that may employ interactive video, computer simulations, and portfolios documenting teachers' accomplishments.\textsuperscript{189}

2. The Disabling Status: Identifying an Implicated Class

Although certain fundamental rights will trigger strict or heightened scrutiny without the identification of a disadvantaged

\textsuperscript{186} See, e.g., Birenbaum, "How"—Beyond the "What," Towards the "Why": A Rule-Assessment Approach to Achievement Testing, 12 STUD. IN EDUC. EVALUATION 159-68 (1986) (rule assessment tests which go beyond an analysis of whether a student has mastered a skill to inquire into the rules that a student may be learning incorrectly and thus using to generate an incorrect answer); Bruno, Assessing the Knowledge Base of Students: An Information Theoretic Approach to Testing, 19 MEASUREMENT & EVALUATION IN COUNSELING AND DEVELOPMENT (1986) ("MCW-APM," an innovative scoring system designed to give students partial credit for partial knowledge, and identify with greater precision both the parameters of a student's understanding and the effectiveness of an instructional program). Yen, Green & Burket, Valid Normative Information from Customized Achievement Tests, 6 EDUC. MEASUREMENT: ISSUES & PRACT. 7-13 (1987) ("Latent-Trait Item Generation," which customizes test items so that performance can be analyzed as if all of the students were identical in ability).

\textsuperscript{187} See also Seven Ways of Knowing Not One, Educ. Week, Jan. 27, 1988, at 19 (discussing Professor Howard Gardner's recent book, FRAMES OF MIND: THE THEORY OF MULTIPLE INTELLIGENCES (1983), and describing his research-based findings that at least seven relatively autonomous avenues of intelligence exist which educators can assess and monitor in new and creative ways).

The State Bar of California may also be providing a service to educators in this regard with the development of a new "performance test." This section of the California bar exam, developed in the early 1980's and modified in 1985, is designed to measure practical legal skills by assessing an examinee's ability to analyze legal problems from a client file and generate memorandums similar to those required of practicing attorneys. See California Bar Examination (1985-1989).

\textsuperscript{188} ETS, the largest testing company in the world, creates and administers such tests as the SAT, GRE, GMAT, MCAT, LSAT, and the Multistate Bar Examination. See generally NAIRN, THE REIGN OF ETS: THE CORPORATION THAT MAKES UP MINDS (1980) (The Ralph Nader Report) (revealing flaws in standardized testing by examining the impact of Educational Testing Service). See also B. HOFFMAN, supra note 167 (providing a critical analysis of the standardized testing industry and exposing the defects in that method of examination).

\textsuperscript{189} See Fiske, Teachers' Exam, Often Criticized to be Replaced, N.Y. Times, Oct. 28, 1988, at A1.
class, the Plyler framework clearly requires such an identification. Under Plyler the implicated group of students need not be "suspect," but simply "a discrete class of children not accountable for their disabling status." This language provides great latitude in identifying a "category" of injured students. Students who are "not accountable for their disabling status" may include not only such typical classifications as minority and gender, but also such disputed classifications as wealth. Indeed, there may even be room for the identification of new burdened classes of students who may not be accountable for their inability to perform well on standardized tests.

Social science research has already provided support for the identification of implicated classes in this context. Extensive studies documenting cultural bias in standardized tests have served as the basis for a successful challenge to a testing program at the state level. Recent findings have noted a consistent pattern of disparity in the standardized test scores of men and women, and commentators have begun to question whether tests based on the SAT model discriminate on the basis of gender. A growing body of

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190 There are those who argue that, particularly under a substantive due process theory, a plaintiff need only show that the defendant has infringed upon an important interest. See, e.g., J. NOWAK, R. ROTUNDA & J. YOUNG, supra note 5, at 323, 529-31. See also Lupu, supra note 97, at 998-99 (arguing that Roe v. Wade is most appropriately viewed as a substantive due process case, and demonstrating that the important interest itself was sufficient to trigger a form of fundamental rights analysis).

191 See Plyler, 457 U.S. at 221-24.

192 Id. at 223.


195 See Kadrmas, 108 S. Ct. at 2491-94. See also supra notes 18-22 and accompanying text.


196 See Larry P. v. Riles, 793 F.2d 969 (9th Cir. 1984) (the case that ultimately prohibited the administration of IQ tests to black students in California).

197 See, e.g., Begley, Closing the Gender Gap, Newsweek, Apr. 11, 1988, at 73 (noting the continued disparity in scores between men and women on mathematics tests). See also N. MEDINA & D. NEILL, supra note 179, at 8 ("Gender bias affects both males and females. Among very young children, some tests appear to be biased against boys. On the other hand, among older children and adolescents, most bias affects girls.").


In a ruling that could have a significant effect on public policy in the area of testing, a New York federal district court recently determined that the SAT did indeed discriminate on the basis of gender. In light of this determination, the court held that the practice of relying solely on SAT scores to determine the winners of Regents and Empire Scholarships violated both Title IX (20 U.S.C. § 1681(a)) and the Equal Protection
research suggests that socioeconomic status impacts directly on a student’s ability to succeed, lending support to the argument that testing may discriminate on the basis of wealth. Finally, a significant body of research has identified previously unexplored aspects of culture and personality. Studies concerning human nature and the impact of the environment on the learning process may lead, for example, to the identification of a discrete class of students who simply do not perform well on multiple-choice tests and who are “not accountable for this disabling status.”

3. The Consequences of Deprivation: Effects on Individuals and Society

The Plyler framework requires consideration of both the effects


"After a careful review of the evidence," Judge Walker declared, "this Court concludes that SAT scores capture a student's academic achievement no more than a student’s yearbook photograph captures the full range of her experiences in high school. . . . The evidence is clear that females score significantly below males on the SAT while they perform equally or slightly better than males in high school. Therefore, the (State Education Department’s) use of the SAT as the sole criterion for awarding . . . scholarships discriminates against females. . . ." Id. at 362, 364.

199 See, e.g., Gaps in Admission-Test Scores Linked to Income, Coursework, Educ. Week, Mar. 9, 1988, at 3, col. 3 ("If we could move [Hispanics] into higher income levels, and get them to take more academic courses, they would achieve equally well," according to University of Iowa Professor George A. Chambers, author of a new study on this subject).

See generally W.J. Wilson, The Declining Significance of Race (1978) (noting the increasing importance of class and family background for blacks as a factor in determining who goes to college and overall academic achievement).

200 For a notable example of this argument, see Nairn, supra note 188, at 197-220 (Chapter 5—"Class in the Guise of Merit"—providing evidence that ETS discriminates between the rich and the poor).


202 See, e.g., Sternberg, Misunderstanding Meaning, Users Overrely on Scores, Educ. Week, Sept. 23, 1987, at 22 ("The selection and placement system in education is heavily weighted in favor of applicants who test well. We often pass up students who may possess other strong qualifications. . . . [Typical standardized multiple-choice tests] do not measure synthetic or insightful-thinking skills, nor do they measure practical intellectual skills."). For a detailed overview of Professor Sternberg's findings, see R. Sternberg, Beyond IQ: A Triarchic Theory of Human Intelligence (1985).

See generally Cronbach, Heredity, Environment and Educational Policy, 39 Harv. Educ. Rev. 399 (1969) ("What the person does with an experience, and what it does to him, depends on physical structures that were laid down during the previous years, or days, of his existence."). See also supra note 177.
on an individual and the costs to society.\footnote{See Plyler, 457 U.S. at 221-24.} The ultimate consequences of deprivation may range from the short-term effects of an inappropriate educational setting to the lasting, long-term impact of an inferior self-image and a mediocre education.

Inappropriate classroom assignments based on faulty assessments place significant obstacles in the path of students for whom “education is often the only route by which to become full participants in our society.”\footnote{See Kadnmas, 108 S. Ct. at 2494.} Instead of gaining the skills and knowledge that will enable them to become “self-reliant,”\footnote{See Plyler, 457 U.S. at 222.} students begin to lose interest in school. Faced with material that is too easy, too difficult, or simply irrelevant, young people look elsewhere for excitement and fulfillment. Even if they stay in school, their energies too often are directed toward such destructive pursuits as drug abuse and gang-related activities.\footnote{Innumerable sources document the often-related problems of drug abuse and gang activity among young people today. See, e.g., Crack: The Junkies, The Jailers, The Pimps, and the Tiniest Addicts, NEWSWEEK, Nov. 28, 1988, at 64.}

The stigma of failure resulting from such inappropriate placements, or from categorizing and labeling students on the basis of test scores, does not cease at the time the child leaves school.\footnote{See Kirp, supra note 140, at 731-37, for an excellent overview of the stigma issue and the ways that schools stigmatize students.} The Plyler Court described the consequences of this stigma-related deprivation: “[W]e foreclose,” the Court explained, “the means by which [disfavored students] might raise [their] level of esteem.”\footnote{Plyler, 457 U.S. at 222.} Evidence of a negative impact on students’ self-concepts proved particularly damaging to the state’s position in Brown v. Board of Education,\footnote{See 347 U.S. 483, 494 (1954). The Brown Court relied heavily on psychological and sociological data to analyze “the effect of segregation . . . on public education” and concluded that the stigma imposed on black children was unacceptable.} and litigators today can rely on even more sophisticated social science research.\footnote{See, e.g., Raffini, Student Apathy: A Motivational Dilemma, 44 EDUC. LEADERSHIP Sept. 1986, at 53 (“[n]orm-referenced, competitive evaluation procedures force 50 percent of the student population into the bottom half of the graduating class. . . . [M]ost students conclude early . . . that once below average, always below average.”).}

“Enduring disabilities”\footnote{See, e.g., Plyler, 457 U.S. at 222, referring to illiteracy as an example of an “enduring disability.”} such as illiteracy, which can have a permanent and irreversible effect on future employment opportunities, are a particularly frightening consequence of deprivation in a school setting. One highly respected commentator recently noted that “the sanctions attached to test results have become the most
striking aspect of the new surge in testing. The term coined to describe this is ‘high-stakes testing’: the financial, educational and other psychological consequences of passing or failing the test have become greater than in the past."  

Language from Plyler alluding to "the inestimable toll of that deprivation on the social, economic, intellectual, and psychological well-being of the individual" is especially applicable in this context.

These adverse effects on the individual also represent significant social costs. Courts should consider these costs in applying the Plyler framework. All Americans are adversely affected when young people leave public schools less skilled and less confident due to failures of the educational system.

Compelling evidence establishing a direct connection between standardized testing practices and such enduring disabilities may serve to facilitate the express recognition of an intermediate judicial review in a school setting. Additionally, litigation in this area might advance important educational policy goals. Plaintiffs could seek to foster the use of fairer and more effective evaluation procedures in the public schools, including the adoption of advanced systems employing new technology, as well as a testing program that utilizes a variety of evaluation instruments. Litigants could also seek to prohibit the practice of exclusive reliance on test scores when making major educational decisions.

B. Adverse Effects of Curriculum Design and Implementation

Curriculum reform has become a major policy issue in the late 1980s. The highly publicized efforts of prominent national leaders, reinforced by several widely acclaimed best sellers, have generated increasing concern in this area. Plaintiffs challenging curricular practices under the fundamental rights framework could follow the model set forth in Part III-A, focusing either on deficient

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212 See Fiske, supra note 170, at 17, col. 1.
213 Plyler, 457 U.S. at 222.
214 Id. at 223-24.
215 See, e.g., report by former Secretary of Education William J. Bennett, James Madison High School: A Curriculum for American Students, reprinted in Educ. Week, Jan. 13, 1988, at 27 (proposing a core curriculum that allegedly reflects the common goals of most Americans): "I believe that there remains a common ground that virtually all our schools can reach and inhabit. And I believe that most Americans agree about where that common ground is—about what our students should learn." Id. at 27, col. 1.
217 See, e.g., Greene, In Search of a Critical Pedagogy, 56 HARV. EDUC. REV. 427 (1986) (outlining major historical, philosophical, and sociological issues that must be considered by those who would choose America's pedagogical direction).
curricular design, or on a failure to implement a strong and effective curriculum.

1. The Flawed Curriculum as an Unreasonable Obstacle to Advancement

Plaintiffs could demonstrate a denial of equal opportunity by a showing that an inappropriate and ineffective curriculum does not meet the student's needs and therefore presents an unreasonable obstacle to advancement based on individual merit. There is growing evidence of a widespread and ongoing failure on the part of the schools in this regard. Litigants focusing on curricular design could bolster their claims by citing typical state statutes requiring that a curriculum meet "the educational needs of students and the public." In *Rethinking Curriculum: A Call for Fundamental Reform*, released in late 1988 by the National Association of State Boards of Education (NASBE), a national panel of state-board members charged that weaknesses in curriculum and instruction constitute "the fatal flaw in the American education system." The panel has recommended, among other things, "a major and broad-reaching overhaul of course content."

Occasionally, a curriculum is particularly strong and appropriate on paper, but has not been implemented effectively at the local level. One reason for this deficiency is the increasingly prevalent practice of allowing a test to "drive the curriculum." Experts in this field noted ten years ago that "tests can very easily come to determine skills taught, rather than having desired skills guide the selection of appropriate assessment techniques." Educators, increasingly seeking to increase their pupils' test scores, may skew their teachings towards those areas covered by the standardized tests. Such practices deny students the opportunity to develop their writing skills and deprive young people of valuable learning in

218 See supra notes 182-83 and accompanying text.
219 See, e.g., Magnet, Special Report: How to Smarten Up the Schools, FORTUNE, Feb. 1, 1988, at 86 ("The failure of U.S. public education from kindergarten through high school is vast and ominous.").
220 Litigants may wish to focus on state frameworks, or on the curriculum as interpreted at the local district level.
223 Id.
224 The NASBE report explicitly notes that "tests drive the curriculum." Id. at 18, col. 4 (quoting NASBE report).
226 See, e.g., D. OWEN, supra note 166, at 264. After posing as a senior in a public
the areas of analysis, synthesis and evaluation.\textsuperscript{227}

2. Proposed Changes in Curricular Policy

The adoption of a core curriculum would provide one reasonable alternative in the area of curriculum design.\textsuperscript{228} Former Secretary of Education William Bennett has argued in favor of such a standardized curriculum, where all Americans would be exposed to a “core” of basic skills and knowledge.\textsuperscript{229} The recent notable efforts of educators representing a wide variety of perspectives suggest a trend toward a common ground in this regard.\textsuperscript{230} Brighter

high school, the author documented the following experience: “In English class, we spent six weeks reading a 55-page book, and devoted the rest of our time to memorizing lists of vocabulary words and solving SAT-like multiple-choice word problems. . . . We almost never had to write anything and, aside from our weekly ten-page assignments, we didn’t have to read. In large measure, our time was spent doing multiple-choice busywork.” \textit{Id.}

\textsuperscript{227} See, e.g., Barzun, \textit{supra} note 173, at cols. 2, 3 (outlining the direct connection between an emphasis on multiple-choice testing and an increasingly deficient curriculum):

Knowing something means the power to summon up facts and their significance in the right relations. Mechanical testing does not foster this power. . . . In subjects that require something other than information . . . straining toward a plausible choice is not instructional. Nobody ever learned to write better by filling in blanks with proffered verbs and adjectives. . . . Multiple-choice tests, whether of fact or skill, break up the unity of knowledge and isolate the pieces; in them, nothing follows on anything else, and a student’s mind must keep jumping.

\textit{See also} M. Kourilsky & L. Quaranta, \textit{supra} note 187, at 4-8, for a description of Bloom’s Taxonomy, which conceptualizes student learning by identifying in order of sophistication a hierarchy of six processes: (1) knowledge, (2) comprehension, (3) application, (4) analysis, (5) synthesis, (6) evaluation. An effective curriculum provides opportunities for learning in all six areas.

\textsuperscript{228} The NASBE report has proposed a core curriculum, “in which teachers would address ‘fewer subjects rigorously and in greater depth.’” Rothman, \textit{supra} note 222, at 18, col. 2 (quoting NABSE report). The curriculum would focus on six broad areas: language arts, mathematics and science, citizenship, fine arts, health, and foreign language. \textit{Id.} at 1, col. 4.

\textsuperscript{229} See \textit{supra} note 215 and accompanying text. The statement issued by the President and the nation’s Governors at the recent “Education Summit” appears to be consistent with this position. Not only did America’s political leaders agree “to establish a process for setting national education goals,” but they expressly noted the value of “a rigorous program of instruction [which would] ensure that every child can acquire the knowledge and skills required in an economy in which our citizens must be able to think for a living.” \textit{See “A Jeffersonian Compact”: The Statement by the President and Governors}, N.Y. Times, Oct. 1, 1989, § 4, at 22, cols. 2, 5. \textit{See also} Doyle, \textit{Time for America to Set National Education Norms}, L.A. Times, Sept. 9, 1989, § 5, at 3, col. 4 (providing an international context for this debate).

\textsuperscript{230} Dr. Marshall S. Smith, Dean of the School of Education at Stanford University, recently declared that in light of the current activity by national groups, “[i]n the next 10 to 15 years we’ll be much closer to a national curriculum than we have been in the past.” \textit{See} Rothman, \textit{What to Teach: Reform Turns Finally to the Essential Question}, Educ. Week, May 17, 1989, at 8, col. 1. \textit{See also} A Nation Prepared: Teachers for the Twenty-first Century, \textit{The Report of the Task Force on Teaching as a Profession} (the widely acclaimed “Carnegie Report”), at 20:
students would not be limited by such a mandate, because schools would provide them with opportunities to advance far beyond "the basics." Recognizing that absolute equality is impossible, the schools would still be able to guarantee a minimum level of equal access to basic skills and a clearly defined knowledge base. This guarantee would be consistent with the minimal standard of educational adequacy adopted by Justice Rehnquist in Board of Education v. Rowley and alluded to by Justice O'Connor in Kadrmas.

In the area of implementation, the drift toward a test-driven curriculum and the resulting failure to implement potentially beneficial programs can be halted by policy changes in the area of testing. Since standardized test scores have become for many the only basis for comparing and evaluating the success or failure of a school, administrators and teachers are under tremendous pressure to gear their learning programs toward the improvement of multiple-choice testing skills. This pressure is exacerbated by expectations on the part of many parents that the schools "prepare" their sons and daughters for success on the SAT, and by a movement in state legislatures to establish a link between public school financing and standardized test scores. In fact, Connecticut has recently become

The skills needed now are not routine. Our economy will be increasingly dependent on people who have a good intuitive grasp of the ways in which all kinds of physical and social systems work. They must possess a feeling for mathematical concepts and the ways in which they can be applied to difficult problems; an ability to see patterns of meaning where others see only confusion; a cultivated creativity that leads them to new problems, new products and new services. . .; and, in many cases, the ability to work with other people in complex organizational environments where work groups must decide for themselves how to get the job done.

See generally Greene, supra note 217, at 440-41 ("[A] plurality of American voices must be attended to. . . a plurality of life stories must be heeded, if a meaningful power is to spring up through a new 'binding and promising, combining and covenanting.'").

231 See, e.g., Board of Educ. v. Rowley, 458 U.S. 176, 198-99 (1982), in which Justice Rehnquist wrote: "The educational opportunities provided by our public school systems undoubtedly differ from student to student, depending on a myriad of factors that might affect a particular student's ability to assimilate information presented in the classroom." See also supra notes 58-60 and accompanying text.

232 458 U.S. at 198-201.


234 See supra notes 172-73 and accompanying text.


236 See D. Owen, supra note 166. In a recent controversy, New Jersey's education department invited each district to submit its students' scores on the SAT "as part of the state's three-year-old program." Schools Withhold Data From New Jersey Chief, Educ. Week, May 11, 1988, at 9, col. 2. A number of superintendents withheld this data, declaring that they feared the statistics would be used against them in district "report cards." Id. at col. 1.
the first state to use test scores as a basis for distributing aid to school districts. Such counterproductive measures can be ameliorated by the adoption of new, varied programs of evaluation, and by the implementation of policies that would forbid decisions based on one multiple-choice test score alone.

3. The Disabling Status: Unequal Treatment for Those Judged Less Able

Professor John McNeil has pointed out that "despite recent political and legal actions intended to assure equal educational opportunities, it is clear that ... the able and talented students are given one curriculum and those students who are judged less able are given a different one." Thus, the analysis regarding disabling classifications in the area of testing is equally applicable in the curriculum context. Groups of students "judged less able" and yet "not accountable for their disabling status" often fall into certain identifiable classifications. Litigants choosing to focus on a curriculum which does not meet the needs of all students could identify an implicated class that has been denied "equal access" to a basic curriculum. Such litigants could argue that the adoption of a core

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238 See, e.g., Rothman, supra note 222, at 18, col. 5 (documenting the NASBE report's recommendations that "[s]chools ... should move to performance-based assessments and tests that develop students' creativity and thinking skills, ... rather than multiple-choice tests that measure basic skills and factual information").
240 See supra notes 191-202 and accompanying text.
241 Legal disputes in the area of "equal access to the curriculum" have typically centered on the constitutionality of "tracking" and "ability grouping." See Note, Teaching Inequality: The Problem of Public School Tracking, 102 Harv. L. Rev. 1518 (1989); see generally J. Oakes, Keeping Track: How Schools Structure Inequality (1985) (examining the effects of tracking programs, which classify students based upon their learning ability or desired future occupation). However, school tracking programs are not necessarily the only possible focus for plaintiffs alleging a denial of equal access to the curriculum. Many students arguably have been deprived of "access to information and ideas," irrespective of any tracking or ability grouping. See Board of Educ. v. Pico, 457 U.S. 853, 866 (1982) (''Our precedents have focused [on] ... affording ... access to discussion, debate, and the dissemination of information and ideas. And we have recognized that 'the State may not ... contract the spectrum of available knowledge.' '') (citation omitted).

This first amendment interest in receiving information and ideas should qualify as "an important interest" for purposes of fundamental rights analysis, therefore helping to trigger heightened scrutiny under a fourteenth amendment equal protection theory when equal access has been deprived. The interplay between the first and fourteenth amendments has already been noted in several education-related decisions. See, e.g., Plyler, 457 U.S. 202, 221 (citing first amendment cases in support of a framework that would trigger an intermediate level of review under the fourteenth amendment). See also San Antonio Indep. School Dist. v. Rodriguez, 411 U.S. 1, 113-14 (Marshall, J., dissenting) (documenting first amendment deprivaions in his argument that at least a height-
curriculum of basic knowledge and skills would help ensure that all students, no matter how they may be tracked or grouped, would be provided with a minimal level of educational adequacy.

Plaintiffs challenging the test-driven curriculum could compile evidence that the most typical victims of test-driven curriculum practices fall into identifiable groups of students who consistently perform poorly on standardized tests and who may not be responsible for this disabling status. These students tend to be placed in classes where attempted remediation is geared directly toward the improvement of "multiple-choice" skills, while others who score well on such tests are often assigned to classes where they can focus on the development of more sophisticated skills. So-called remedial students having greater difficulty improving their test scores may thus find themselves under the greatest amount of pressure to do so. Ultimately, they may become locked in a pattern of test-driven instruction that perpetuates failure, when exposure to a more relevant and wide-ranging curriculum might have enabled them to develop their talents and leave school with skills that multiple-choice tests never measure.

4. The Consequences of Deprivation: Significant Social Costs

The Plyler Court warned that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests." Although America's schools are not solely to blame for this denial, certain curricular practices play a key role in the flawed process. Echoing the feelings of many educators and policy makers, Xerox Corporation Chairman David T. Kearns declared recently

\(^{242}\) See generally Drowatzky, supra note 181, at 44: "Ability grouping or tracking practices were developed to place children into groups having similar educational needs.... [T]he practices used can vary considerably from school to school." Id. Drowatzky states that placing students into tracks is one option among many when creating student groupings. Id. at 47.

Although tracking and ability grouping are not necessarily synonymous, the word "tracking" has been used to denote a variety of school "ability grouping" practices. See id. at 50-56.

\(^{243}\) See generally J. McNeil, supra note 239, at 217-18, 225-26 (describing the technical hazards of standardized testing and the possibility of erroneous conclusions drawn from them).

\(^{244}\) See Ramsey, Unforeseen Consequences: How Reform Perpetuates Social Tracking, 2 UCLA J. Educ. 115 (1987). See also Cal. Educ. Code § 51004 (West 1989) (policies regarding skills that every student who graduates from a public high school should attain). See generally supra notes 228, 231 (describing the adverse effects of multiple-choice testing on cohesive thought and the need for development of intuitive reasoning skills in the 21st century).

\(^{245}\) Plyler, 457 U.S. 202, 221.
that "if we do not restructure our schools, this nation will be out of business by the year 2000."246

Kearns argues that "we cannot have a world-class economy with dropout rates that average 25 percent [and] approach, 50 percent in our cities."247 Jonathan Kozol, focusing on the "enduring disability" of illiteracy, recently noted that "over one third of the adult population is unable to read editorial opinions [and] millions cannot understand the warning on a pack of cigarettes or comprehend the documents they sign to rent a home, . . . buy a car, [or] purchase health insurance."248 Rand Corporation’s Linda Darling-Hammond, Director of Education and Human Resources, warns that "[w]e don’t have any choice now but to make education effective for all kids. . . . We can’t afford the inequities [and] the inefficiencies we have tolerated in the system."249

Instead of allowing teachers and school-based administrators to use their intimate knowledge of the learning process and the students to help develop the most appropriate solutions for these inequities and disabilities,250 school districts and states pressure educators to improve standardized test scores.251 With job promotions and staffing decisions linked increasingly to higher student scores, “teachers [become] more concerned with helping students pass [these tests] than with seeing them learn.”252

An additional consequence of test-driven curricular practices is that “control over curriculums has been shifted . . . to testing companies.”253 The Boston Globe recently warned that “hundreds of companies have sprung up during the past five years . . . sens[ing] the opportunity for profit in designing and marketing tests for individual states and school systems that suddenly have been mandated by law to test their students.”254 Policy goals underlying litigation in the area of curriculum should thus include the establishment of state or federal control over the completely unregulated testing

247 Id.
249 See Olson, supra note 246, at 7, col. 2.
250 The advantages of “teacher empowerment” have become increasingly more apparent in recent years. See, e.g., Duckworth, Teaching as Research, 56 HARV. EDUC. REV. 481 (1986); McDonald, Raising the Teacher’s Voice and the Ironic Role of Theory, 56 HARV. EDUC. REV. 355 (1986).
251 See supra notes 234-38 and accompanying text.
253 The Testing Explosion, supra note 174, at 94, col. 2.
254 Id.
The models outlined in this part set forth a framework for awarding declaratory and injunctive relief to current public school students. Other plaintiffs who might arguably succeed under this approach include students who have graduated with deficient skills, and "third-party" plaintiffs such as teachers, administrators, and school districts who can demonstrate a nexus between their own interests and those of the injured students. Any of these potential lawsuits could provide the Court with a vehicle for the express recognition of heightened judicial review in an education context.

Even if a particular fact situation triggers heightened scrutiny, the plaintiff will not automatically emerge victorious. It may be that the interests of a state in a given case outweigh those of a particular plaintiff seeking relief for the deprivation of education caused by a denial of equal opportunity. Too often, even after experts have identified urgent policy imperatives, school districts have hesitated, equivocated, and ultimately accomplished only marginal reforms. Yet the alternatives sought by a plaintiff in the area of testing or curriculum may still be in the earliest stages of development, and

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255 American Federation of Teachers President Albert Shanker has outlined some suggestions in this regard. See Shanker, Testing Needs Regulation, N.Y. Times, Oct. 23, 1988, § 2, at 7, col. 5.

256 Parents and students thus far have been unsuccessful in their attempts to win monetary awards from the schools under a tort theory of "educational malpractice." See generally Loscalzo, Liability for Malpractice in Education, 14 J.L. & Educ. 595 (1985). Judges prefer to avoid assessing "the validity of broad educational policies," and are unwilling "to sit in review of the day-to-day implementation of these policies." Donohue v. Copiague Union Free School Dist., 47 N.Y.2d 440, 444-45, 391 N.E.2d 1352, 1354, 418 N.Y.S.2d 375, 378 (1979). Furthermore, the courts have been unable to agree upon "a workable [standard] of care against which [a school district's] conduct may be measured." See Hunter v. Board of Educ., 292 Md. 481, 484, 439 A.2d 582, 584 (1982). See also Peter W. v. San Francisco Unified School Dist., 60 Cal. App. 3d 814, 826, 131 Cal. Rptr. 854, 862 (1976) ("the failure of educational achievement may not be characterized as an 'injury' within the meaning of tort law").

Under state or federal constitutional law theories, however, plaintiffs seeking declaratory and injunctive relief have had much greater success. Many courts have reviewed curricular policy decisions and have invalidated certain mandates, prerequisites, and practices. See, e.g., Board of Educ. v. Pico, 457 U.S. 853 (1982) (first amendment limits school board's discretion over removing books from school libraries); Lau v. Nichols, 414 U.S. 563 (1974) (school system must provide English instruction for students of Chinese ancestry); Meyer v. Nebraska, 262 U.S. 390 (1923) (law forbidding teaching of foreign languages in the younger grades held unconstitutional).

257 See generally Monaghan, Third Party Standing, 84 COLUM. L. REV. 277, 297-304 (1984) (asserting that much constitutional third party standing law ought to be understood in first party terms, in that the litigant simply asserts his own right to be regulated in accordance with a constitutionally valid rule); Sedler, The Assertion of Constitutional Jus Tertii: A Substantive Approach, 70 CALIF. L. REV. 1308 (1982) (arguing that an individual should be able to prevail in constitutional litigation only if he can show some violation of his own rights, and that the Supreme Court in fact has acted consistently with this rule).
the schools may not be able to move directly into the implementation process. On a case-by-case basis, intermediate review under a fundamental rights framework can be employed to provide a precise and equitable adjudication of current disputes.

CONCLUSION

With its decision in *Kadrmas*, the Court has remained in a proverbial holding pattern, breaking no new ground in the ongoing controversy over the parameters of the right to equal educational opportunity, but not foreclosing future applications of *Plyler v. Doe*. The rights of families living in poverty remained in limbo, as the Court sent the same message it had set forth fifteen years earlier in *Rodriguez*.

Although most commentators agree that the schools are not the only parties responsible for the widespread failures of the current system, school districts and states have simply not earned the sort of deference some justices would invoke in the area of educational policy. The legal system has in fact proven to be an effective vehicle for change in a school setting, and a growing number of decisions express at least a tacit recognition of this reality.

As this Article has demonstrated, the Court is not as constrained in its ability to fashion remedies for disadvantaged students as Justice O'Connor suggests in *Kadrmas*. Read together with a growing number of covertly heightened scrutiny decisions, the *Plyler* "fundamental rights" framework emerges as a viable, principled approach. Whether an intermediate level of review is triggered in this context depends on an analysis of three factors: (1) the denial of equal opportunity, (2) the disabling nature of the classification, and (3) the consequences of deprivation.

Prospective litigation would enable the Court to clarify the applicability of this framework and expressly recognize heightened judicial review for education. Unlike *Kadrmas*, where the student was not deprived of any education, plaintiffs must demonstrate an actual deprivation caused by denial of equal opportunity. The related areas of testing and curriculum are particularly appropriate in this regard, since so many public school students are harmed by substandard testing programs and flawed curricular practices.

Policy goals should be a key component of any principled litigation employing fundamental rights analysis. Plaintiffs could point toward the use of fairer and more effective evaluation procedures in the public schools, including an end to the practice of relying exclusively on multiple-choice test scores when making major educational decisions. Litigants might also argue for the development and im-
plementation of a new curriculum that would seek to provide all students with a core of basic knowledge and skills.

Given the complexity and unpredictability of life chances, schools cannot and should not be expected to be guarantors of success. Neither, however, should they be entitled to continue untenable programs that result in unprecedented failure for such a large percentage of students. A Supreme Court opinion sets a tone, creates a mood, and defines the parameters of an issue in the same fashion as a president's major policy decision. One such ruling, expressly acknowledging the existence of heightened scrutiny in an education context, may very well serve to foster the kind of professional accountability that Americans are demanding from their public schools.