Kadrmas v. Dickinson Public Schools: A Search for a Consistent Equal Protection Standard in Education

> Today, education 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. . . . [I]t is doubtful that any child may reasonably be expected to succeed in life if he is denied the opportunity of an education. Such an opportunity, where the state has undertaken to provide it, is a right which must be made available to all on equal terms.[1]

Introduction

The Supreme Court's unanimity in *Brown v. Board of Education* has not extended to later cases dealing with equal protection challenges to educational inequality. Nor has the Court maintained a consistent standard.[2] By rejecting the heightened scrutiny standard adopted in *Plyler v. Doe*,[3] and readopting the rational relation standard of *San Antonio School District v. Rodriguez*,[4] the Court's decision in *Kadrmas v. Dickin-*

1. Brown v. Board of Educ., 347 U.S. 483, 493 (1954). In *Brown*, the Court, in an unanimous opinion, held that separate-but-equal schools for black and white children violated the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution. If the schools were racially segregated, they were inherently unequal and violated the constitutional requirement that people in similar circumstances must be treated equally. *Id.*.

2. *See infra* notes 35-40 and accompanying text.

3. 457 U.S. 202 (1982). In *Plyler*, the Court applied the heightened scrutiny standard to a Texas statute that prohibited illegal immigrant children from attending public school tuition-free. It held that Texas could not deny illegal immigrant children the same free public education that other Texas schoolchildren received. *Id.* at 230. While deferring to the holding in San Antonio School Dist. v. Rodriguez, 411 U.S. 1 (1973), that education was not a fundamental right, the Court relied on the importance that *Brown v. Board of Education* gave to education to justify the heightened scrutiny standard of review. *Plyler*, 457 U.S. at 221-25. Justice Brennan wrote the *Plyler* majority opinion. Justices Marshall, Blackmun, Powell, and Stevens joined him. Chief Justice Burger wrote the dissenting opinion, joined by Justices White, Rehnquist, and O'Connor.

4. 411 U.S. 1 (1973). In *Rodriguez*, the Court held that education was not a fundamental right. *Id.* at 35. The Court applied the rational relation test to uphold the constitutionality of a Texas educational finance system that discriminated against poor school districts. *Id.* at 40. Justice Powell wrote the majority opinion in *Rodriguez*, joined by Chief Justice Burger, and Justices Stewart, Blackmun, and Rehnquist. Justice Brennan dissented. Justice White wrote a separate dissenting opinion, joined by Justices Douglas and Brennan. Justice Marshall wrote another separate dissenting opinion, joined by Justice Douglas.

son Public Schools[5] represents the latest shift in the standard for equal protection review of education.

The right to an education, like the right to vote, is not one of those rights specifically enumerated for protection by the Constitution. Neither is education a fundamental right, nor poverty a suspect class.[6] Absent these criteria, the Court applies the rational relation test.[7]

In *Rodriguez*, the Court applied the rational relation test to an equal protection challenge to a Texas educational system.[8] In *Plyler*, the major educational case following *Rodriguez*, the Court rejected the rational relation standard and used instead the heightened scrutiny standard[9] to hold unconstitutional a Texas statute prohibiting illegal immigrant children from attending Texas public schools tuition-free.

This Comment will analyze the issues raised and the issues avoided in the *Kadrmas* decision, paying particular attention to the Court's varying equal protection educational standards from *Brown* to *Rodriguez* to *Plyler* to *Kadrmas*. These standards are particularly interesting in view of the recent state court decisions on the constitutionality of wealth-based discrimination in education and the status of education as a fundamental right.[10] Part I analyzes the equal protection educational standards the Court used in *Rodriguez*, *Plyler*, and *Kadrmas*. Part I also discusses the evolution of these standards of review for education. Part II focuses on the *Kadrmas* decision in detail, discussing why the Court's cursory review of the equal protection issues both avoided the Court's own precedent in *Plyler* and avoided a thorough analysis of the basic issues involved in the facts of the case. Part III discusses the standard of review applied in recent California state court cases in which California courts have held that education is a fundamental right under the California Constitution.[11] The Comment concludes that *Kadrmas* left unanswered questions about the relationship between poverty and education.

5. 108 S. Ct. 2481 (1988). Justice O'Connor wrote the majority opinion in *Kadrmas*, joined by Chief Justice Rehnquist and Justices White, Scalia, and Kennedy. Justice Marshall wrote a dissenting opinion, joined by Justice Brennan. Justice Stevens wrote a separate dissenting opinion, joined by Justice Blackmun.

6. *Rodriguez*, 411 U.S. at 18, 35.

7. In the traditional rational relation test, legislation meets the constitutional standard if it "bears a rational relationship to a legitimate state purpose." *Plyler*, 457 U.S. at 248 (Burger, C.J., dissenting); *see infra* notes 17, 56 and accompanying text.

8. *Rodriguez*, 411 U.S. at 44.

9. Heightened or intermediate scrutiny is justified in areas of "special constitutional sensitivity." *See id.* at 226. Heightened scrutiny raises the constitutional standard from the "legitimate state goal" of the basic rational relation test to the furtherance of a "substantial state interest." *Id.* at 225, 230. See also *infra* notes 37-39 and accompanying text for a discussion of heightened scrutiny.

10. *See infra* notes 119-133 and accompanying text.

11. *Id.*

I. Evolution of the Equal Protection Educational Standard

In *Kadrmas v. Dickinson Public Schools*, the Supreme Court reviewed an equal protection challenge to a North Dakota statute allowing the state to charge a bus fee in non-reorganized school districts.[12] The review was so cursory that it led Justice Marshall to comment, "[T]he Court's facile analysis suggests some perplexity as to why this case ever reached this Court."[13] One explanation appears to be the present Court's uneasiness with the implications of its 1982 holding in *Plyler v. Doe* and its desire to reaffirm broadly the 1973 holding of *San Antonio School District v. Rodriguez.*

Justice Powell wrote the *Rodriguez* majority opinion. In *Plyler*, he joined the majority and provided the decisive vote. Justice Powell did write a separate concurring opinion in *Plyler*, "to emphasize the unique character of the cases before us."[14] He justified his apparent switch from *Rodriguez* by saying, "These children . . . have been singled out for a lifelong penalty and stigma. A legislative classification that threatens the creation of an underclass of future citizens and residents cannot be reconciled with one of the fundamental purposes of the Fourteenth Amendment."[15] Justice Powell's replacement by Justice Kennedy, as well as the addition of Justice Scalia to the Court, left open questions about which standard the Court would apply to educational discrimination cases.

Justice O'Connor, a dissenter in *Plyler*, wrote the *Kadrmas* majority opinion. The Court did not directly overrule *Plyler*, but refused to extend the *Plyler* holding beyond its facts. The Court ignored the *Plyler* majority opinion written by Justice Brennan and relied exclusively upon Justice Powell's concurring opinion and then-Chief Justice Burger's dissenting opinion to support the *Kadrmas* holding.[16] The Court avoided the serious issues of wealth-based educational discrimination raised by *Kadrmas*, and used *Kadrmas* instead to limit *Plyler*. The Court rejected the heightened scrutiny standard that the Court adopted in *Plyler* and instead applied the rational relation test of *Rodriguez*.[17]

12. Small, independent school districts were encouraged to join other small districts by reorganizing into large districts to consolidate expenses and promote efficiency. Free public school bus transportation was provided as an incentive for the voters to vote for reorganization. *See* Brief Amicus Curiae of the State of North Dakota at 3-6, *Kadrmas*, 108 S. Ct. 2481 (No. 86-7113); *see also infra* notes 43-45 and accompanying text.

13. *Kadrmas*, 108 S. Ct. at 2491 (Marshall, J., dissenting).

14. *Plyler*, 457 U.S. at 236 (Powell, J., concurring).

15. *Id.* at 238-39.

16. In *Kadrmas*, Justice O'Connor cited *Plyler*, then said, "We have not extended this holding beyond the 'unique circumstances' [citing Justice Powell's concurrence in *Plyler*] that provoked its 'unique confluence of theories and rationales' [citing Chief Justice Burger's dissent in *Plyler*]. . . . The case before us does not resemble *Plyler*, and we decline to extend the rationale of that decision to cover this case." *Kadrmas*, 108 S. Ct. at 2487-88.

17. *Id.* at 2489.

Justice O'Connor, writing for the Court, also avoided the equal protection issues raised in *Brown v. Board of Education*.[18] *Brown* held that once a state had decided to provide a public education to students, it must provide it to all students equally.[19] The Court, in *Kadrmas*, avoided any definition of the word "equal" in relation to educational opportunity and instead focused fleetingly on traditional equal protection analysis. The reasons behind such a decision are far more complex than a desire merely to limit *Plyler* narrowly to its "unique circumstances." The very nature of a democratic society and the protection it gives to its more vulnerable members are at issue.

In *Plyler*, Justice Brennan, writing for the Court, raised the specter of a growing underclass[20] perpetuated by a society ostensibly opposed to such discrimination. The Court infrequently deals directly with controversial social problems. *Brown v. Board of Education* was one such courageous moment.[21] The Court would no longer tolerate segregation in public schools. *Plyler* was another such moment. The Court would not allow the state to deny children a free public education because of the legal status of their parents.

In *Rodriguez*, the Court swung the other way. As long as children received a minimum education, the Court ignored the obvious financial inequality in the education they received. *Kadrmas*, by raising the issue of wealth-based discrimination in public education, directly challenged *Rodriguez*.

Some say these are not and should never be issues the Court must face.[22] The legislature has the duty and responsibility[23] to define social change. The duty of the Court is to rule on the constitutionality of the legislature's decisions. This reasoning grossly underestimates the power

18. 347 U.S. 483 (1954).

19. *Id.* at 493.

20. *Plyler*, 457 U.S. at 218-19. "The Equal Protection Clause was intended to work nothing less than the abolition of all caste-based and invidious class-based legislation." *Id.* at 213; *see also id.* at 241 ("But it hardly can be argued rationally that anyone benefits from the creation within our borders of a subclass of illiterate persons many of whom will remain in the State, adding to the problems and costs of both State and National Governments attendant upon unemployment, welfare, and crime." (Powell, J., concurring)).

21. *See generally* Wright, *The Judicial Right and the Rhetoric of Restraint: A Defense of Judicial Activism in an Age of Conservative Judges*, 14 HASTINGS CONST. L.Q. 487, 521 (1987).

22. Chief Justice Burger in his dissent in *Plyler* concluded that:

> The Constitution does not provide a cure for every social ill, nor does it vest judges with a mandate to try to remedy every social problem. Moreover, when this Court rushes in to remedy what it perceives to be the failings of the political processes, it deprives those processes of an opportunity to function. When the political institutions are not forced to exercise constitutionally allocated powers and responsibilities, those powers, like muscles not used, tend to atrophy. Today's cases, I regret to say, present yet another example of unwarranted judicial action which in the long run tends to contribute to the weakening of our political processes.

Plyler, 457 U.S. at 253 (Burger, C.J., dissenting) (citations omitted).

23. *Rodriguez*, 411 U.S. at 42.

of the Court. Decisions such as *Brown* and *Plyler* affect society in a profound way. Some would argue that these decisions also should have been avoided in deference to legislative function.[24] Others argue that cases such as *Brown* are some of the Court's finest moments.[25] Whatever one's point of view, the current Court apparently is not yet ready to deal substantively with the issues raised in *Kadrmas* and thus largely avoided them.

The Fourteenth Amendment of the United States Constitution states, in part, "No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."[26] Neither wealth nor education is a right specifically protected by the Constitution. A statute concerning education, or one having a different effect on the rich or the poor, is presumed constitutional if it has a rational relation to a legitimate state purpose.[27]

The Court will apply strict scrutiny to a "suspect" class or a "fundamental" right, even though the Constitution does not specifically protect such classes or rights.[28] In the Warren Court, race was a suspect classification and the Court applied strict scrutiny.[29] Some members of the Court were willing to go further: "Various majorities of the Warren Court were willing to join opinions which claimed that legislative classifications based on wealth, like those based on race, are 'suspect' classifications triggering strict judicial scrutiny."[30] Justice Douglas wrote, "Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored."[31] Even if lines drawn on the basis of wealth are not favored, they generally are not unconstitutional.[32]

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24. " ' "[T]he exercise of [the power of judicial review], even when unavoidable, is always attended with a serious evil, namely, that the correction of legislative mistakes comes from the outside, and the people thus lose the political experience, and the moral education and stimulus that comes from fighting the question out in the ordinary way, and correcting their own errors." ' " *Plyler*, 457 U.S. at 253 n.15 (Burger, C.J., dissenting) (quoting A. BICKEL, THE LEAST DANGEROUS BRANCH 22 (1962) (quoting J. B. THAYER, JOHN MARSHALL 106-07 (1901))).

25. See generally R. KLUGER, SIMPLE JUSTICE (1976) for a discussion of the history and the background of *Brown v. Board of Education*.

26. U.S. CONST. amend. XIV, § 1. This Comment will focus on the definitions of equal protection the Warren and Burger Courts used in the context of wealth-based discrimination and education. For a discussion of various models of equal protection, see L. TRIBE, CONSTITUTIONAL LAW 1436-1672 (2d ed. 1988).

27. *See supra* notes 4, 7.

28. *See infra* note 59 and accompanying text.

29. *See, e.g.*, Brown v. Board of Educ., 347 U.S. 483 (1954); Bolling v. Sharpe, 347 U.S. 497 (1954).

30. L. TRIBE, *supra* note 26, at 1625.

31. Harper v. Virginia Bd. of Elections, 383 U.S. 663, 668 (1966) (citation omitted).

32. In describing the Warren Court's attitude toward equal protection, Professor Tribe says:

> This sweeping language [describing J. Douglas in *Harper*] described a commitment to equal justice for rich and poor alike, a commitment that the Warren Court often

The most famous educational equal protection case of the Warren Court was *Brown v. Board of Education*,[33] written in 1954 by Chief Justice Warren soon after he became Chief Justice.[34] The most famous education case of the Burger Court was *San Antonio School District v. Rodriguez*. The Burger Court's use of a wealth classification has been far more restrained than that of the Warren Court and the expansion of heightened review of wealth classifications into any new areas has been halted.[35] Notably, *Plyler*, while written by the Burger Court, did use heightened scrutiny when neither a criminal nor a judicial basis for that standard of review existed.[36] While *Plyler* followed *Rodriguez* in holding that education is not a fundamental right under the Constitution,[37] the Court went further by stating that neither is education merely some governmental benefit indistinguishable from other forms of social welfare legislation,[38] referring to the famous passage in *Brown* in which Chief

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elaborated and occasionally fulfilled in cases respecting the rights and opportunities of the poor. The general proposition that wealth classifications are always suspect, however, never accurately reflected the law. Although its sensitivity to the poor was evident in a wide range of cases, the Warren Court had in fact employed the stricter tier of equal protection doctrine to strike down only two sorts of laws disadvantaging the poor: laws denying indigents or non-freeholders the franchise, and laws limiting the access of indigents to various levels of a state's system of criminal justice.

TRIBE, *supra* note 26, at 1625-26 (footnote omitted).

33. 347 U.S. 483 (1954).

34. One of the lawyers representing Brown was Thurgood Marshall, then counsel of the National Association for the Advancement of Colored People. Marshall was later appointed to the Court by President Johnson. Marshall wrote the strong dissent in *Rodriguez*, the major equal protection case of the Burger Court involving education and wealth as suspect classes. Marshall echoed the equal protection concerns of the Warren Court but expanded the scope of equal protection beyond judicial and criminal forums. Marshall echoes his *Rodriguez* dissent in *Kadrmas* 16 years later. *See infra* notes 108-119 and accompanying text.

35. Professor Tribe describes the different treatment of wealth classification in the Warren and Burger Courts:

> Significantly, the Court has abandoned the ardent rhetoric of equal justice for the poor, rhetoric which promised more than even the Warren Court had delivered, and far more than the Burger Court was prepared to deliver in the name of equal protection of the laws. In conjunction with its deflation of rhetoric, the court has recast what were originally equal protection and equal access cases in a new mold of "minimal protection" and minimal access. The remodeling, which purports to preserve the holdings of the Warren Court's decisions while cutting away only the exaggerated language in which these holdings were clothed, has occasionally accomplished radical sacrifices of both the spirit and letter of the Warren Court's equal protection decisions. Finally, the imaginative compassion for the plight of the poor, which at least informed and perhaps generated so many of the Warren Court's holdings in tangential areas, has been replaced with a determined reluctance to tell the states how to deal with the problems of their poor.

TRIBE, *supra* note 26, at 1626.

36. *See infra* note 74 and accompanying text.

37. *Rodriguez*, 411 U.S. at 35.

38. Justice Blackmun supported the *Rodriguez* decision but he, like Justice Powell, found that a rigid application of the *Rodriguez* formula did not fit *Plyler*:

> I believe the Court's experience has demonstrated that the *Rodriguez* formulation does not settle every issue of "fundamental rights" arising under the Equal Protec-

Justice Warren stated that "education is perhaps the most important function of state and local governments."[39] While consistent with the rhetoric of the Warren Court, *Plyler* went far beyond the Warren Court's limiting factors of judicial or criminal forums[40] for application of heightened scrutiny. The Court stated, "But more is involved in these cases than the abstract question whether [the statute] discriminates against a suspect class, or whether education is a fundamental right. [The statute] imposes a lifetime hardship on a discrete class of children not accountable for their disabling status."[41] What the Warren Court did for race in *Brown*, and what the Burger Court did for alienage in *Plyler*, the Rehn-

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tion Clause. Only a pedant would insist that there are *no* meaningful distinctions among the multitude of social and political interests regulated by the States, and *Rodriguez* does not stand for quite so absolute a proposition. To the contrary, *Rodriguez* implicitly acknowledged that certain interests, though not constitutionally guaranteed, must be accorded a special place in equal protection analysis.

Plyler, 457 U.S. at 232-33 (Blackmun, J., concurring) (emphasis in original).

39. Justice Brennan did not specifically use either the words "heightened" or "intermediate scrutiny" to describe his test of a "substantial state interest." *Plyler*, 457 U.S. at 230. Justice Powell used the word "heightened" in his concurring opinion: "Our review in a case such as these [sic] is properly heightened. . . . [T]he Court properly may require that the State's interests be substantial and that the means bear a 'fair and substantial relation' to these interests." *Id.* at 238-39 (Powell, J., concurring) (citations omitted) (footnotes omitted) (quoting Lalli v. Lalli, 439 U.S. 259, 265 (1978)). Justice Powell distinguished the heightened scrutiny standard from the strict standard in a footnote: "[S]trict scrutiny is not appropriately applied to this classification. This exacting standard of review has been reserved for instances in which a 'fundamental' constitutional right or a 'suspect' classification is present. Neither is present in these cases . . . ." *Id.* at 238 n.2. Powell addressed Chief Justice Burger's dissent in note 3, where Powell repeated the phrase "heightened standard of review." *Id.* at 239 n.3.

40. For an interesting discussion of limiting factors in equal protection cases, see Taylor, Brown, *Equal Protection, and the Isolation of the Poor*, 95 YALE L.J. 1700 (1986). Taylor sees limiting factors as economic. In the right-to-vote cases and the criminal appeal transcript cases, in which heightened scrutiny was applied to wealth based classifications, the costs involved were relatively small. Taylor concludes that "once the courts faced claims that potentially involved much larger redistribution of resources, the decisions began to go the other way." *Id.* at 1727.

In interpreting *Rodriguez*, Taylor claims:

> [T]he majority was clearly troubled by the lack of limiting principles in the plaintiff's claim. The class of people disadvantaged in the view of the majority was not well-defined by income. And if education were deemed a fundamental right, could not similar claims be made about such matters as police and fire protection, nutrition, and housing?

Id. at 1727-28 (footnote omitted).

41. *Plyler*, 457 U.S. at 223. The Court continued, "[I]n the area of special consitutional sensitivity presented by these cases, and in the absence of any contrary indication fairly discernible in the present legislative record, we perceive no national policy that supports the State in denying these children an elementary education." *Id.* at 226. The Court raised the standard from the furtherance of a legitimate state interest of the rational relation test, to a substantial state interest. *Id.* at 224.

quist Court was definitely unwilling to do for poverty in *Kadrmas*.[42] All three cases involved access to education. Race was held to be a suspect class deserving strict scrutiny; but poverty, although *Plyler* opened the door to heightened scrutiny status, was not to be allowed the same protection.

II. The *Kadrmas* Decision

A. Facts of the Case

In 1979, the State of North Dakota passed a statute[43] authorizing non-reorganized school districts to charge a fee for the use of a public school bus. Reorganized school districts provided free bus service for all students farther than two miles from school. School districts were encouraged to reorganize to provide more efficient educational services to widely dispersed, small school districts.[44]

An obvious concern for parents in voting for reorganization was the increased distance their children would have to travel to school if their districts were reorganized. No longer, in many cases, could children walk to their neighborhood school. Thus, free bus service in the reorganized districts was used as an incentive for parents to accept school district reorganization.[45]

Several of the more populated districts, including Dickinson, chose not to reorganize. Prior to 1973, the Dickinson School District provided free bus transportation for all students living outside the city limits. After 1973, to ride the bus, a family would have to sign a contract obligating them to pay for the bus for the school year.[46]

For several years the Kadrmas family had signed a contract for their daughter Sarita's transportation to school.[47] At the time of the trial,

42. See also J. COONS, W. CLUNE & S. SUGARMAN, PRIVATE WEALTH AND PUBLIC EDUCATION 406-07 (1970) for a discussion of the Court's limitation of the *Brown* educational equality rhetoric to racial equality.

43. N.D. CENT. CODE § 15-34.2-06.1 (Supp. 1985):

> Charge for bus transportation optional. The school board of any school district which has not been reorganized may charge a fee for schoolbus service provided to anyone riding on buses provided by the school district. . . . Any districts that have not previously provided transportation for pupils may establish charges based on costs estimated by the school board during the first year that transportation is provided.

44. Brief for Amicus Curiae of the State of North Dakota at 3-6, 12-13, *Kadrmas*, 108 S. Ct. 2481 (No. 86-7113).

45. *Id.* at 5-6, 12-13. North Dakota's reorganization plan was a success; of the 311 districts in the state, 248 have reorganized. Thus, 80% of the school districts provide free transportation. *Id.*

46. Brief for Appellants at 8-9, *Kadrmas*, 108 S. Ct. 2481 (No. 86-7113). The fees were $97/year for one child, $150/year for two children, $205/year for three children, and up to $315/year for five or more children.

47. *Id.* at 5.

Sarita was nine years old and in the fourth grade.[48] The Kadrmas family lived in New Hradec, North Dakota on a homestead farm. Previously, the town of New Hradec had its own schools, but in 1979 the schools closed and the New Hradec children began attending school in Dickinson, sixteen miles away.[49] Sarita lived with her mother, stepfather, and two younger siblings. Her stepfather worked in the oil fields of North Dakota. Because his employment was sporadic, the family lived on either a paycheck or unemployment benefits.[50]

The family was unable to pay the entire transportation fee and was already behind on their 1984 bus payments when the time came to sign a contract for the 1985 school year.[51] They asked the school district if they could make a partial payment for 1985, but the school district refused, saying that the contract had to be signed.[52] Families in nearby reorganized districts received the same service for free.[53] When Paula Kadrmas, Sarita's mother, refused to sign the contract,[54] the school bus no longer stopped for Sarita.[55]

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48. *Id.* at 3.

49. *Id.* at 9.

50. The briefs are in dispute as to whether the Kadrmas family was technically at the poverty level. Brief for Appellants, *supra* note 46, at 3-5; Brief for Amicus Curiae of the American Civil Liberties Union Foundation and the North Dakota Chapter of The American Civil Liberties Union Foundation in Support of Appellants at 4-5, *Kadrmas*, 108 S. Ct. 2481 (No. 86-7113); Brief for Appellees at 1-2, *Kadrmas*, 108 S. Ct. 2481 (No. 86-7113). There is also reference to Sarita's father not paying child support. This does not appear relevant. Whether the family actually was at the poverty level, their income was certainly low and the busing fee would have put a considerable strain on their limited resources. The fee also would have risen when Sarita's brother and sister began school.

51. Brief for Appellants, *supra* note 46, at 5.

52. *Id.*

53. *Id.* at 7.

54. The family thought the fee was unfair and wanted to contest it. They could have signed the contract but continued to fall behind on their payments. One family was sued by the school district for not paying the busing fee. The Bismark School District sued a Mr. Walker in small claims court for delinquent busing fees. When Walker defended himself by challenging the constitutionality of the busing fee, the North Dakota Supreme Court held that because he had voluntarily signed the contract, he had waived his rights both to object to the fee itself and to its constitutionality. Bismarck Pub. Schools v. Walker, 370 N.W.2d 565 (N.D. 1985).

55. *Hearings on House Bill No. 1444 Before the Senate Education Comm.*, 46th Ass., North Dakota (1979), *quoted* in Brief for Amicus Curiae for the State of North Dakota, *supra* note 44. State Senator Berube asked the Dickinson School Superintendent, Benzie, what would happen if a family did not pay the busing fee.

> Well, I think we'd have to handle it exactly the same as we do our school lunch program or any other program. If a family is destitute, not able to provide it, those children would be brought to school and nobody would know that they didn't pay the fee. I think if we had someone out there that was ornrey and had, you know, plenty of money to pay the fee, I guess we'd say you can, your children/child's not gonna get on the bus. Ya know, ya gotta have rules and you got to make them stick, ya know.

In September of 1985, Paula Kadrmas filed an action in Stark County District Court seeking to enjoin the Dickinson School District from collecting any fee for bus services. The action was dismissed. Mrs. Kadrmas then appealed to the Supreme Court of North Dakota. The court held that the school-bus-fee statute did not violate the Kadrmas's equal protection rights and was constitutional under both state law and the Fourteenth Amendment.[56] The United States Supreme Court affirmed the North Dakota Supreme Court and upheld the constitutionality of the statute.[57]

B. Analysis of the Decision

Justice O'Connor, writing for the Court in *Kadrmas*, began the discussion of the merits[58] of *Kadrmas* with a reference to the rational relation test in *Rodriguez*. "Unless a statute provokes 'strict judicial scrutiny' because it interferes with a 'fundamental right' or discriminates against a 'suspect class,' it will ordinarily survive an equal protection attack so long as the challenged classification is rationally related to a legitimate governmental purpose."[59] The Court then rejected the appellants' contention that "Dickinson's user fee for bus service unconstitutionally

Id. at 11. Although it might be kind to "[bring children] to school and nobody would know," such magnanimity is not a substitute for a more formal procedural waiver process.

56. Kadrmas v. Dickinson Pub. Schools, 402 N.W.2d 897 (N.D. 1987) *aff'd*, 108 S. Ct. 2481 (1988). The court characterized the 1979 statute as "purely economic legislation[, which] must be upheld unless it is patently arbitrary and fails to bear a rational relationship to any legitimate government purpose." *Id.* at 902. The court then concluded that "the charges authorized by [the statute] are rationally related to the legitimate governmental objective of allocating limited resources and that the statute does not discriminate on the basis of wealth so as to violate federal or state equal protection rights." *Id.* at 903.

57. Certiorari was granted and the case was argued on March 30, 1988, and decided on June 24, 1988. The American Civil Liberties Union Foundation and the North Dakota Chapter of the American Civil Liberties Union Foundation wrote an amicus curiae brief for the appellants, Paula Kadrmas and Sarita Kadrmas. The Attorney General of the State of North Dakota wrote an amicus curiae brief for the appellees: the Dickinson Public Schools, the Superintendent of the Dickinson Public Schools, members of the Dickinson School Board and the Transportation Supervisor of the Dickinson Public Schools.

58. After describing the facts of the case, Justice O'Connor dealt with two procedural issues: mootness and estoppel. The school district claimed the case was moot because in 1987 Sarita's mother signed the bus contract. Also, while the case was in litigation, Sarita had been riding the bus. O'Connor held that the controversy was not moot because if the case were decided in the Kadrmas's favor, they would have no future liability for bus payment. Sarita's younger brother and sister would also have been able to ride the bus free. The second procedural issue raised by the school district was that since the Kadrmases were receiving a benefit, they were estopped from contesting its constitutionality. The appellees cited Fahey v. Mallonee, 332 U.S. 245 (1947), saying, "[I]t is well established that one may not retain the benefits of an act while attacking the constitutionality of the same act." O'Connor distinguished *Fahey* and held that estoppel did not apply because the Kadrmases were not receiving a benefit, but were bearing a burden. Thus, they could contest the constitutionality while still participating in the service. *Kadrmas*, 108 S. Ct. at 2486.

59. *Kadrmas*, 108 S. Ct. at 2487 (quoting *Rodriguez*, 411 U.S. at 16-17).

deprives those who cannot afford to pay it of 'minimum access to education,' "[60] because Sarita Kadrmas continued to attend school during the time she was denied access to the school bus.[61] This point raises an important issue in the case. The fact that Sarita continued to attend school meant that any deprivation she experienced could only be relative. This distinction between relative and absolute deprivation helped set the standard of review in the majority opinion.

Justice Powell, writing for the Court in *Rodriguez*, set two threshold questions for finding a "suspect" classification based upon wealth: "[1] the class of disadvantaged 'poor' [must] be identified or defined in customary equal protection terms, and [2] . . . the relative—rather than absolute—nature of the asserted deprivation [must be significant]."[62] *Rodriguez* and *Kadrmas*[63] were not able to pass the threshold test under this type of analysis. The "lack of personal resources [of the parents in *Rodriguez*] has not occasioned an absolute deprivation of the desired benefit [—education of their children]."[64] The class of "poor" people was also too large, diverse, and amorphous and had none of "the traditional indicia of suspectness."[65] The Court concluded in *Rodriguez*, "For these two reasons—the absence of any evidence that the financing system discriminates against any definable category of 'poor' people or that it results in the absolute deprivation of education—the disadvantaged class is not susceptible of identification in traditional terms."[66]

60. *Id.* (quoting Brief for Appellants, *supra* note 46, at i).

61. The total annual income of the Kadrmas family was $15,003.43. This included a gross income of $12,639.43 in wages and $2,194.00 in unemployment compensation benefits. The trial court found this to be at or near the poverty level as determined by the guidelines used in North Dakota for the purpose of determining eligibility for various social assistance programs. Brief for Appellants, *supra* note 46, at 4. Sarita's mother and her neighbor shared driving the children to school. The gasoline costs amounted to more than $1,000 for the year, a fact that the appellees tried to use to show that the family was not poor. Brief for Appellees, *supra* note 50, at 5-6. The cost of gasoline was also used to point out how much more economical it would have been for the Kadrmas family to sign the bus contract in the beginning and avoid the whole controversy. This avoids the problem. The Kadrmas family probably did not know how long the court case would take. They also did not know that they would lose on both the district and the state supreme court levels. In such a situation people tend to live day by day. When the Kadrmases realized the expense of driving Sarita to school, they did sign the contract and Sarita rode the bus thereby raising the procedural issues discussed in note 58. However, that they had to spend so much money and in the end were economically forced to sign the contract did not deny their right to challenge the constitutionality of the statute.

62. *Rodriguez*, 411 U.S. at 19.

63. *See infra* notes 67-71 and accompanying text.

64. *Rodriguez*, 411 U.S. at 23.

65. *Id.* at 28. Powell, writing for the Court, defined "traditional indicia of suspectness" as a class that is "saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *Id.*

66. *Id.* at 25.

Although the Court in *Kadrmas* did not specifically mention the *Rodriguez* threshold requirements, it applied them by emphasizing the fact that Sarita Kadrmas did attend school. It mentioned this fact twice. In both instances, the fact that there was only relative as opposed to absolute deprivation justified the rational relation standard. First,

> Sarita Kadrmas, however, continued to attend school during the time that she was denied access to the school bus. 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.[67]

The Court reasoned that a "greater obstacle" is not an absolute deprivation, thus failing one of Powell's threshold requirements. "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."[68] This failed the other *Rodriguez* threshold requirement; obviously free bus transportation is not a right specifically mentioned in the Constitution, and "some class of student" is not an easily definable category that is traditionally suspect.[69] The class is too broad and does not include specific limiting factors.[70] The Court in *Kadrmas* concluded,

> Under either interpretation of appellants' position, we are evidently being urged to apply a form of strict or "heightened" scrutiny to the North Dakota statute. Doing so would require us to extend the requirements of the Equal Protection Clause beyond the limits recognized in our cases, a step we decline to take.[71]

The second time that the Court mentioned that Sarita Kadrmas was able to attend school in spite of the hardship on her family was in the context of other cases cited in which wealth was not held to be a "suspect" classification. The Court compared the busing fee to the fees for voluntary bankruptcy in *United States v. Kras*[72] and a filing fee for appellate review of adverse welfare decisions in *Ortwein v. Schab*.[73] The Court rejected the comparison to the judicial and criminal cases cited by the appellants in which wealth was held to create a "suspect" class because of certain important services.[74] The Court failed to consider that

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

68. *Id.*

69. The two traditional characteristic of wealth as a suspect class are (1) "because of their impecunity they were completely unable to pay for some desired benefit," and (2) "as a consequence, they sustained an absolute deprivation of a meaningful opportunity to enjoy the benefit." *Rodriguez*, 411 U.S. at 20.

70. *See supra* note 40 on limiting factors.

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

72. 409 U.S. 434 (1973).

73. 410 U.S. 656 (1973).

74. The appellants compared the busing fee in *Kadrmas* to other cases in which fees violated equal protection: Griffin v. Illinois, 351 U.S. 12 (1956) (right to appellate review of a

although the method of transportation to school might be voluntary, attendance in school is compulsory.[75] Failure to attend school can bring civil and criminal penalties.[76]

To attend school one must get to the schoolhouse door. If Sarita's parents were not able to get her to the schoolhouse door, they faced possible civil penalties or even a possible jail term. On the basis of this analysis, the case appears closer to the judicial or quasi-criminal cases, cited by the appellants,[77] in which the court applied heightened scrutiny.

The Court saw the bus fee as a simple user fee not essential to education. "Sarita was denied access to the school bus only because her parents would not agree to pay the same user fee charged to all other families that took advantage of the service."[78]

The idea that the statute authorizing the busing fee is simple economic legislation[79] concerning a user fee for a service was emphasized when the busing fee was compared to a fee for a school lunch.[80] The local school superintendent said, "I think this is a service. I don't think there's anything educational about riding on a school bus. . . . Except what your rear end learns over 12 years, being a rural kid myself."[81] But the comparison to the school lunch program appears flawed.

A child will need to eat whether at home or at school. She does not need to eat the school lunch, but can bring a bag lunch from home to eat at school. Any additional costs imposed from brown paper bags and plastic wrap appear insignificant. The relative cost of eating lunch at home or school is minimal.

Transportation to school is not simple economic legislation, especially in rural states such as North Dakota where the schools are often

criminal conviction conditioned on the purchase of a trial transcript); Smith v. Bennett, 365 U.S. 708 (1961) (application for a writ of habeas corpus accepted only when accompanied by a filing fee); Boddie v. Connecticut, 401 U.S. 371 (1971) (action for dissolution of marriage could be pursued only on payment of court fees and cost of service of process); Lindsey v. Normet, 405 U.S. 56 (1972) (appeal from civil judgments in certain landlord tenant disputes conditioned on the posting of a bond for twice the amount of rent expected to accrue during the appellate process); Little v. Streater, 452 U.S. 1 (1981) (fee for blood test in quasi-criminal paternity action brought against the putative father of a child receiving public assistance).

75. North Dakota has a statute mandating a compulsory school attendance policy. N.D. CENT. CODE § 15-34.1-01 (1987).

76. N.D. CENT. CODE §§ 15-34.1-04, 15-34.1-05, 12.1-32-01 (1987). Conviction subjects a parent to a maximum fine of $500 for a first offense, and up to 30-days imprisonment and a $500 fine for a second offense within one year.

77. *See supra* note 74.

78. *Kadrmas*, 108 S. Ct. at 2488.

79. Brief for Amicus Curiae of the State of North Dakota, *supra* note 44, at 8, 17.

80. In the *Hearings on House Bill No. 1444 Before the Senate Educational Comm.*, *supra* note 55, the local school superintendent said, "We contend that busing is not an educational function. We contend busing is a service provided for the patrons much like the school lunch program. It is not educational." *Id.* at 27a.

81. *Id.* at 32a.

located long distances from students' homes. Sarita Kadrmas had a thirty-two mile round trip each day to attend fourth grade. If school attendance were optional, the analogy to the school lunch would be appropriate. A parent could choose for his or her child to go to school or to stay home, just as a parent could choose to buy a school lunch or bring a bag lunch from home. But a parent cannot choose whether to send his or her child to school. Since school attendance is compulsory, some form of transportation expense is compulsory for all those children who cannot easily walk to school.

The issue then becomes what level of scrutiny the Court applies to a compulsory fee that is applied inequitably between various geographical areas within a state.[82] By interpreting the school bus fee in *Kadrmas* as a user fee, the Court avoided the minimum access to education standard of *Rodriguez*.

The Court quoted *Rodriguez*, *Plyler*, and *Papasan v. Allain*[83] for the proposition that education is not a "fundamental right." This is the extent of the analysis of the access to education issue in *Kadrmas*.[84] It ignores the special place of education in American society stated in *Brown*.[85]

In *Papasan v. Allain*, decided two years before *Kadrmas*, the Court in dicta stated that unresolved issues in the application of equal protection standards to educational issues remained: "As *Rodriguez* and *Plyler* indicate, the Court has not definitively settled the questions whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe that right should be accorded heightened equal protection review."[86] The Court in *Papasan* concluded that the nature of the case before it did not require a resolution of the issue.[87]

The Court, in a footnote in *Rodriguez*, posited a situation in which heightened scrutiny might be applied to wealth classifications involving education:

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82. *See generally* Neuman, *Territorial Discrimination, Equal Protection, and Self Determination*, 135 U. PA. L. REV. 261, 372-82 (1987); *see also* J. COONS, W. CLUNE & S. SUGARMAN, *supra* note 42.

83. 478 U.S. 265 (1986).

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

85. *See supra* note 1 and accompanying text.

86. *Papasan*, 478 U.S. at 285; *see also Kadrmas*, 108 S. Ct. at 2491 n.1 (Marshall, J., dissenting). In *Kadrmas*:

> The Court therefore does not address the question whether a State constitutionally could deny a child access to a minimally adequate education. In prior cases, this Court explicitly has left open the question whether such a deprivation of access would violate a fundamental constitutional right [citing *Papasan* and *Rodriguez*.] That question remains open today.

Id.

87. *Papasan*, 478 U.S. at 286.

> An educational financing system might be hypothesized, however, in which the analogy to the wealth discrimination cases would be considerably closer. If elementary and secondary education were made available by the State only to those able to pay a tuition assessed against each pupil, there would be a clearly defined class of "poor" people—definable in terms of their inability to pay the prescribed sum—who would be absolutely precluded from receiving an education.[88]

That Powell faced this issue in *Plyler* probably explains why he joined the majority and concurred in *Plyler*. The *Kadrmas* appellants raised this issue when they compared the school transportation fee to the tuition fee in *Plyler*.[89] The bus fee was essential to a minimum access to education and would thus be entitled to the "heightened scrutiny" standard of *Plyler* rather than the "rational relation" standard of *Rodriguez*.[90]

In *Kadrmas*, the Court rejected this argument and adopted the appellees position that the fee is a simple user fee that the school district can waive if the parents are unable to pay.[91] Because the fee is potentially waivable the Court concluded, "Nor do we see any reason to suppose that this user fee will, 'promot[e] the creation and perpetuation of a sub-class of illiterates within our boundaries . . . .' "[92] On this basis, O'Connor concluded that, "The case before us does not resemble *Plyler*, and we decline to extend the rationale of that decision to cover this case."[93]

Justice O'Connor, writing for the Court, distinguished and narrowed *Plyler* again when she stated that Sarita Kadrmas, unlike the children in *Plyler*, was able to attend school.[94] By implication, a case

88. *Rodriguez*, 411 U.S. at 25 n.60. Powell continued to explain that such an issue was not before the court at that time:

> That case [see text above] would present a far more compelling set of circumstances for judicial assistance than the case before us today. After all, Texas has undertaken to do a good deal more than provide an education to those who can afford it. It has provided what it considers to be an adequate base education for all children and has attempted, though imperfectly, to ameliorate by state funding and by the local assessment program the disparities in local tax resources.

Id.

89. Brief for Appellants, *supra* note 46, at 16, 18, 25.

90. *Id.* at 17, 18.

91. *Kadrmas*, 108 S. Ct. at 2488. *See also* N.D. CENT. CODE § 15-43-11.2 (1981) "A [school] board may waive any fee if any pupil or his parent or guardian shall be unable to pay such fees. No pupil's rights or privileges, including the receipt of grades or diplomas, may be denied or abridged for the nonpayment of fees." This does not, however, resolve the issue of the busing fee. The issue in *Kadrmas* was not just not receiving grades or a diploma because of unpaid library fines or bills for gym clothes. The school bus no longer stopped for Sarita Kadrmas.

92. *Kadrmas*, 108 S. Ct. at 2488 (quoting and distinguishing *Plyler*, 457 U.S. at 230).

93. *Id.*

94. *Id.*

involving absolute deprivation, such as *Plyler*, would be entitled to heightened scrutiny, but a case involving relative deprivation, such as *Kadrmas*, would not. This distinction is flawed because the children in *Plyler* were not absolutely deprived of an education. They were absolutely deprived of a free education.[95] No statute prohibited them from attending school; they merely had to pay tuition to either the public school or a private school.

The *Plyler* Court considered economic factors in analyzing deprivation, and concluded that substantial deprivation (the assumption was that most illegal aliens have a low income or are poor) was equal to absolute deprivation, thus triggering "heightened scrutiny."[96] Thus, *Plyler* could also be considered a comparative deprivation case. The *Rodriguez* Court left the comparative deprivation issue unresolved.[97] In *Plyler*, the Court assumed there was absolute deprivation, so the issue did not arise. The Court, in *Kadrmas*, used comparative discrimination only as a part of the *Rodriguez* threshold test and avoided any analysis of its broader implications.[98]

> [T]he Kadrmas family could and did find a private alternative to the public school bus service for which Dickinson charged a fee. That alternative was more expensive, to be sure, and we have no reason to doubt that genuine hardships were endured by the Kadrmas family when Sarita was denied access to the bus. Such facts, however, do not imply that the Equal Protection Clause has been violated.[99]

Using the rational relation standard of *Rodriguez*, the Court in *Kadrmas* concluded that:

> Applying the appropriate test—under which a statute is upheld if it bears a rational relation to a legitimate government objective—we think it is quite clear that a State's decision to allow local school boards the option of charging patrons a user fee for bus service is constitutionally permissible. The Constitution does not require that such service be provided at all, and it is difficult to

95. *Plyler*, 457 U.S. at 206 n.2.

96. *Id.* at 224, 226, 230.

97. Powell said:

> Appellees' [Rodriguez's] comparative-discrimination theory would still face serious unanswered questions, including whether a bare positive correlation or some higher degree of correlation is necessary to provide a basis for concluding that the financing system is designed to operate to the *peculiar disadvantage* of the *comparatively poor*, and whether a *class of this size* and diversity could ever claim the special protection accorded "suspect" classes. These questions need not be addressed in this case, however, since appellees' proof fails to support their allegations or the District Court's conclusion.

Rodriguez, 411 U.S. at 26 (emphasis added) (footnotes omitted). Note especially the word "disadvantaged" as opposed to deprivation, and the words "comparatively poor" as opposed to indigent. This is essentially the issue in *Kadrmas* and it is an issue that O'Connor avoided.

98. *Kadrmas*, 108 S. Ct. at 2487-88.

99. *Id.* at 2488.

imagine why choosing to offer the service should entail a constitutional obligation to offer it for free.[100]

By essentially avoiding the education issue and focusing on the user fee and local control, *Kadrmas* echoed *Rodriguez*'s deference to the legislature's role,[101] a concern that the *Plyler* dissent emphasized.[102]

Justice Stevens, joined by Justice Blackmun in his *Kadrmas* dissent, accepted the traditional rational relation test applied in *Rodriguez* when neither a suspect class nor a fundamental right exists and applied the test to *Kadrmas*.[103] Although he accepted the traditional test, he rejected any finding that there was a rational relation between North Dakota's state interest in reorganized school districts and the imposition of a busing fee in nonreorganized school districts.[104] Rational is defined as including " 'a requirement that an impartial lawmaker could logically believe that the classification would serve a legitimate public purpose that transcends the harm to the members of the disadvantaged class.' "[105] He accepted Justice Marshall's description, in his separate dissent, of the harm to the disadvantaged class of poor children.[106] Stevens then concluded that since the State's motive in encouraging district reorganization by allaying parental concern about transportation cost had been achieved, there was no longer a justification for imposing a special burden on those districts that decided not to reorganize:

> [A]fter the voters in a school district have had a fair opportunity to decide whether or not to reorganize, there is no longer any justification at all for allowing the nonreorganized districts to place an obstacle in the paths of poor children seeking an education in some parts of the State that has been removed in other parts of the

100. *Id.* at 2489.

101. *Rodriguez*, 411 U.S. at 42. "Education . . . presents a myriad of 'intractable economic, social, and even philosophical problems.' " (quoting Dandridge v. Williams, 397 U.S. 471, 487 (1970)). "The very complexity of the problems . . . suggests that 'there will be more than one constitutionally permissible method of solving them,' and that, within the limits of rationality, 'the legislature's efforts to tackle the problems' should be entitled to respect." (quoting Jefferson v. Hackney, 406 U.S. 535, 546-47 (1972)).

102. In his dissent, Chief Justice Burger stated:

> Denying a free education to illegal alien children is not a choice I would make were I a legislator. Apart from compassionate considerations, the long-range costs of excluding any children from the public schools may well outweigh the costs of educating them. But [the] fact that there are sound *policy* arguments against the Texas Legislature's choice does not render that choice an unconstitutional one.

Plyler, 457 U.S. at 252-53 (Burger, C.J., dissenting) (emphasis in the original). He continued that while the " 'specter of a permanent caste' of illegal Mexican residents of the United States is indeed a disturbing one . . . it is but one segment of a larger problem, which is for the political branches to solve." *Id.* at 254.

103. *Kadrmas*, 108 S. Ct. at 2494-95 (Stevens, J., dissenting).

104. *Id.*

105. *Id.* at 2494 (quoting Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 452 (1985) (Stevens, J., concurring)).

106. *Id.*

State.[107]

Justice Marshall's separate dissent in *Kadrmas* echoed his famous dissent in *Rodriguez*,[108] fifteen years earlier. He quoted *Brown v. Board of Education* to support the "extraordinary nature" of education and the "vital role of education in our society,"[109] and condemned the majority opinion as a "retreat from the promise of equal educational opportunity by holding that a school district's refusal to allow an indigent child who lives 16 miles from the nearest school to use a schoolbus service without paying a fee does not violate the Fourteenth Amendment's Equal Protection Clause."[110]

In *Brown* the suspect class was race; in *Kadrmas*, it was poverty. Marshall felt that the schoolchildren discriminated against in *Kadrmas* should be afforded the same equal protection rights as the children in *Brown*. "I do not believe that this Court should sanction discrimination against the poor with respect to 'perhaps the most important function of state and local governments' . . . ."[111] He continued, "The statute at issue here burdens a poor person's interest in an education."[112] He stressed that "[t]he extraordinary nature of this interest cannot be denied,"[113] and he concluded, "The Court's decision . . . 'demonstrates once again a "callous indifference to the realities of life for the poor." ' "[114]

Marshall also criticized the Court's avoidance of the basic issues in the case. "The Court's opinion suggests that this case does not concern state action that discriminates against the poor with regard to the provision of a basic education."[115] By defining the issue as the Court did, "this case presents [to the majority] no troublesome questions; indeed, the Court's facile analysis suggests some perplexity as to why this case ever reached this Court."[116]

He pointed out to the Court that "the Constitution is concerned with 'sophisticated as well as simple-minded modes of discrimination.' "[117] He admonished the Court for its failure to see the underlying issue. "These realities may not always be obvious from the Court's vantage point, but the Court fails in its constitutional duties when it refuses,

107. *Id.* at 2495 (Stevens, J., dissenting) (footnote omitted).
108. *Rodriguez*, 411 U.S. at 70 (Marshall, J., dissenting).
109. *Kadrmas*, 108 S. Ct. at 2493 (Marshall, J., dissenting).
110. *Id.* at 2491.
111. *Id.* at 2491 (quoting Brown v. Board of Educ., 347 U.S. 483, 493 (1954)).
112. *Id.* at 2493.
113. *Id.*
114. *Id.* at 2494 (quoting Selective Serv. Sys. v. Minnesota Pub. Interest Research Group, 468 U.S. 841, 876 (1984) (Marshall, J., dissenting) (quoting Flagg Bros., Inc. v. Brooks, 436 U.S. 149, 166 (1978) (Marshall, J., dissenting))).
115. *Id.* at 2491.
116. *Id.*
117. *Id.* at 2491-92 (quoting Lane v. Wilson, 307 U.S. 268, 275 (1939)).

as it does today, to make even the effort to see."[118]

Justice Marshall's earlier remedy to the problem of the Court's reluctance to extend equal protection to the poor was his suggestion in the last footnote in *Rodriguez*. He said there, "[N]othing in the Court's decision today should inhibit further review of state educational funding schemes under state constitutional provisions."[119]

III. California's Equal Protection Educational Standard

State constitutions can expand constitutional rights for their citizens beyond those rights granted by the Federal Constitution as long as the state law does not directly conflict with a federal constitutional provision.[120] In *Serrano v. Priest*,[121] the California Supreme Court held that education in California was a fundamental right[122] and that a state educational finance system that discriminated against poor districts in the State violated the Equal Protection Clause of the California Constitution.[123] California used the provisions of the California Constitution to declare education a fundamental right and to protect education by using the strict scrutiny standard.[124] California raised its standard despite the United States Supreme Court rejection of the strict scrutiny standard in *San Antonio School District v. Rodriguez*,[125] a case with facts similar to those of *Serrano*.[126] California extended the protection that the United States Supreme Court in *Brown* gave to race[127] to wealth based discrimination in education. California used a strict scrutiny test when a suspect classification (based on district wealth) and a fundamental interest (edu-

118. *Id.* at 2494. Justice Marshall continued:

> [F]or the poor, education is often the only route by which to become full participants in our society. In allowing a State to burden the access of poor persons to an education, the Court denies equal opportunity and discourages hope. I do not believe the Equal Protection Clause countenances such a result. I therefore dissent.

Id.

119. *Rodriguez*, 411 U.S. at 133 n.100 (Marshall, J., dissenting). Justice Marshall cited Milliken v. Green, 389 Mich. 1, 203 N.W.2d 457 (1972); Robinson v. Cahill, 118 N.J. Super. 223, 287 A.2d 187, 119 N.J. Super 40, 289 A.2d 569 (1972); Serrano v. Priest, 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971).

120. *See* Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 HARV. L. REV. 489 (1977).

121. 5 Cal. 3d 584, 487 P.2d 1241, 96 Cal. Rptr. 601 (1971), *later appeal*, 18 Cal.3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976), *cert. denied*, 432 U.S. 907 (1977).

122. Serrano v. Priest, 18 Cal. 3d 728, 761, 557 P.2d 929, 948, 135 Cal. Rptr. 345, 364 (1976).

123. *Id.* at 765-66, 557 P.2d at 951, 135 Cal. Rptr. at 367.

124. *Id.*

125. 411 U.S. 1 (1973).

126. *See supra* note 12.

127. *See supra* note 1 and accompanying text.

cation) existed.[128]

In *Salazar v. Honig*,[129] a case with facts similar to those of *Kadrmas*, a California appellate court applied the *Serrano* principle to find an education code section on school transportation unconstitutional.[130] The code section allowed public school districts to charge pupils a fee for transportation. The court held that the code section violated both the free school guarantee[131] and the Equal Protection Clause of the California Constitution.[132] The court analyzed the importance of transportation to education and concluded that "student transportation fees are invalid because pupil transportation is (1) a fundamental educational activity, (2) which is an integral part of California's system of free public education."[133]

Conclusion

Kadrmas raises important questions about the relationship between poverty and education. By implication, it raises important questions about all those governmental services that are not specifically enumerated for protection in the Constitution. Most people consider certain public services essential for life in a modern democratic society. Educa-

128. "[C]lassification[s] which [are] based on district wealth clearly affect the fundamental interest of the children of the state in education, and we hold here, as we held in *Serrano I* . . . *that this combination of factors* warrants strict judicial scrutiny under our state equal-protection provisions." Serrano v. Priest, 200 Cal. App. 3d 897, 931, 226 Cal. Rptr. 584, 605 (1986) (citation omitted) (emphasis in original).

129. Salazar v. Honig, 200 Cal. App. 3d 1576, 246 Cal. Rptr. 837 (1988).

130. CAL. EDUC. CODE § 39807.5 (West Supp. 1989).

131. CAL. CONST. art. IX, § 5 (West 1989). *See also Salazar*, 200 Cal. App. 3d at 1584, 246 Cal. Rptr. at 840.

132. CAL. CONST. art. 1, § 7(a)(b); art. IV(a) (West 1989); *see also Salazar*:

> A fee for a public education program or activity (1) touches upon a fundamental interest—education, and (2) classifies on the basis of a suspect classification—wealth . . . .
>
> Like extracurricular activities, student transportation promotes public education and, therefore, is encompassed within the concept of education as a fundamental interest. . . . Moreover, student transportation fees interfere with a student's right to enjoy the benefits of a fundamental right—free public education. Since some families who are not eligible for the fee-waiver, find transportation fees an economic hardship, it is evident that the fees impose disparate burdens on students according to their families' wealth. . . . "[A]t least where education is concerned—the protection afforded by the equal protection guarantee does not stop at the poverty line. It also addresses inequalities within the category of 'nonneedy' families."

Salazar, 200 Cal. App. 3d at 1587, 246 Cal. Rptr. at 843 (citations omitted).

133. *Salazar*, 200 Cal. App. 3d at 1584, 246 Cal. Rptr. at 840. The court continued:

> The particular educational benefits of transportation are considerable and varied. Transportation promotes the safety of schoolchildren . . . ; it has been employed to advance the cause of equal educational opportunity through busing plans; and it conserves public funds for education by allowing for the creation of centralized school districts, thus preventing the need to build schools in rural or sparsely populated areas.

Id. at 1585, 246 Cal. Rptr. at 841 (citations omitted).

tion is certainly such a service. Although the Court has applied either a strict or a heightened scrutiny standard to discrimination based on race and alienage, it has not extended such protection to the poor.

As the Court had to face the issue of race in the 1950s and 1960s it will have to face the issue of poverty in the 1990s. What *Brown v. Board of Education* did for the education of black children in America, Sarita Kadrmas's mother tried to do for the poor rural families of North Dakota. That she failed indicates only that the time was not yet ripe. The Court avoided the issue in *Kadrmas* and affirmed *Rodriguez*. Important, unanswered questions from *Rodriguez* remain unresolved. Where the Court will draw the line between absolute and relative deprivation of essential but unprotected governmental services such as education remains unclear. The Court had traditionally indicated that these basic policy decisions are the function of the legislature. What pressure state supreme court decisions in this area will have upon the United States Supreme Court remains an interesting, open question.

*By Michele Benson**

* B.A., University of California at Berkeley; M.A., Holy Names College; Member, Third Year Class.