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Judicial Enforcement of the Right to an Equal Education in Illinois

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A major factor in assuring the future success of the American Experiment is the quality of our system of public education.

In Brown v. Board of Education, the United States Supreme Court recognized that:

[education] is perhaps the most important function of state and local governments. . . . It is required in the performance of our most basic public responsibilities. . . . It is the very foundation of good citizenship. . . . 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. 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

Despite this declaration on the importance of education, the United States Supreme Court has generally backed away from playing a significant role in insuring that this right is available to all on equal terms.²

Also, despite the fact that we now have a cabinet-level Department of Education and a president who once proclaimed that he wanted to be known as “The Education President,” no federal policy

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insuring all students an equal education has been implemented. Such a policy would require long-term planning and implementation, but the short-term political benefits of such a policy presumably do not balance the tough choices required. Hence, we can probably expect no more than lip-service about this problem from the federal government at this time especially given the federal budget deficit.

Illinois politicians have also failed to rise to the challenge. Despite the occasional passage of "reform" legislation, the Illinois legislature has failed to address meaningfully the problem of inequality in the Illinois educational system.

In May of 1990, the Illinois Board of Education issued its 1989 "School Report Card." This report affirmed the findings of scholars who had contended for many years that disparities in per-pupil funding of public schools produced greater and greater inequities in the quality of education provided to students in Illinois. The report broke new ground by providing evidence of the direct relationship between the amount of per-pupil funding and student test scores. The

3. In April 1991, President Bush introduced his proposal to revive the American educational system. The program does not focus specifically on the inequalities of our present educational system. The program seeks to promote freedom of choice for students among public and private schools and encourage the setting of skills standards and the monitoring of student progress. It also focuses on the training and certification of teachers. Missing from the program is any massive increase in funding for education. The program proposes the development of 435 new schools by local communities. Congress is asked to provide a one-time one million dollar grant to each school and money will be sought from private donors to fund research to study new types of education and teaching. See Susan Chira, Bush School Plan Would Encourage Choice by Parents, N. Y. TIMES, April 19, 1991, at 1, Col. 5.

The same week that President Bush made his proposal it was disclosed that the Chicago Public School system faced a $300 million shortfall in its next year's budget. Karen Thomas, Cuts Loom for Chicago Schools, CH. TRIB., April 21, 1991, at 1, Col. 3.


report concluded that students who attended school in districts which had larger per-pupil funds available had much higher achievement scores in mathematics and reading and higher ACT test scores than students in districts with fewer per-pupil funds available.\footnote{Ward, supra n. 6, at 12-13. School districts in the top quarter of the scale as measured by the equalized assessed valuation per pupil (EAVPP) were defined as “rich” districts, while districts placed in the bottom quarter of the distribution were defined as “poor” districts. On average, local sources of revenue provide the largest proportion of Illinois school district revenues (54%) compared to revenues from state (38%) and federal (8%) sources. Id. at 11. There were vast differences in reading scores, mathematical scores, and composite scores between “rich” districts and “poor” districts. Id. at vi. The average IGAP (Illinois Goal Assessment Program) reading scores at Grade 3 were 292 in rich districts and 259 in poor districts; Grade 6, 282 in rich districts and 248 in poor districts; and Grade 8, 285 in rich districts and 252 in poor districts. The difference in favor of students in rich districts was at least 33 points at each grade level. (The IGAP reading scale score has a 1-500 range). Id. at vi. The average mathematics scores at Grade 3 were 294 in rich districts and 246 in poor districts; Grade 6, 294 in rich districts and 247 in poor districts; and Grade 8, 291 in rich districts and 242 in poor districts. The difference in favor of students in rich districts was at least 47 points at each grade level. (The IGAP mathematics score scale has a 1-800 range). Id. The average ACT composite score was 19.9 for rich districts and 18.2 for poor districts, a difference of 1.7. The average English score was 19.3 for rich districts compared to 18.1 for poor districts, a difference of 1.2 points; the average mathematics score was 19.1 for rich districts and 16.4 for poor districts, a difference of 2.7 points. (ACT scores run from 1 to a maximum of 36). Id. The report also revealed that poor districts with significantly higher proportions of students from low-income families had considerably fewer resources to help educate their students. Id. at vii. Finally, more money was spent to educate students in rich districts than in poor districts. At the elementary level, the operating expenditure per pupil was 31\% higher in rich districts than in poor districts and at the high school level, 68\% higher in rich districts than in poor districts. Id. In the 1988-89 school year, eight school districts spent more than $8,000 per pupil, while 100 districts spent less than $2,804 per pupil. Id. at vi. The average operating expenditure per pupil for the State in 1988 was $4,215. The source of these disparities in funding is due in great part to low property values in poor districts. The report revealed that in 1988 rich districts’ real property values per student were nearly six times that of poor districts at the elementary level and more than eight times that of poor districts at the high school level ($159,000 compared to $28,000 at the elementary level; $222,000 compared to $26,000 at the high school level). Id. at vii.}
Illinois violated the 1970 Illinois Constitution. The suit alleged that the statutory scheme violated three provisions of the Illinois Constitution:

1. Article Ten section one ("Education Article"). The Education Article requires the State to provide "an efficient system of high quality public educational institutions and services;"
2. Article one, section two (the "Equal Protection Clause"). The Equal Protection Clause provides that no person shall be denied equal protection of the law;
3. Article four, section thirteen ("No-Special-Law Article"). The No-Special-Law Article provides that the General Assembly shall pass no special or local law when a general law is or can be made applicable.

The suit asserted that the statutory scheme violated the education article because it failed to provide an adequate minimum education and therefore failed to establish "an efficient system of high quality public education for every child in Illinois public schools." The suit also alleged that the statutory scheme violated the equal protection clause and the no-special-law article because the distribution scheme imposed "unnecessary burdens upon the 'constitutionally suspect' class of children living in school districts with relatively lower property wealth and upon their fundamental right of education."

9. Id. at para. 2.
10. Id. at para. 5.
11. Id. at para. 4. The suit highlighted the State's responsibility for the alleged disparities of funding, as a result of the reliance of school districts on local property taxes, by pointing out that the taxing power rests with the State pursuant to Article IX, § 6 of the Illinois Constitution, and that without this authority, local school boards would have no power to create a tax base. Id. at para. 89. The suit further alleged that the General State Aid formula, relied upon to eliminate the gap in funding between property tax revenues raised by rich and poor school districts, is only successful in effectively equalizing poor districts with other poor districts, but that it does not effectively equalize the resources available to rich and poor districts. Id. at para. 103. Relying on data gathered from the 1986-87 school year, the suit alleged that even after the revenues supplied by General State Aid are added to local revenues, a 63% gap still existed between the revenues available to the richest 10% of elementary schools and the poorest 10% of elementary schools. Id. at para. 107.

This suit arises out of a movement over two decades old which has centered on the quest to achieve equity in expenditures per pupil in Illinois schools. See J. Ward, In Pursuit of Equity and Adequacy: Reforming School Finance in Illinois, J. EDUC.
This paper will go beyond the immediate concern of whether the Illinois Constitution requires equality of funding. The right to an equal education also concerns the right of various minority students, including those who are mentally, physically and socially disabled and those who are non-English-speaking, to secure an appropriate education. We will therefore examine the fundamental questions of what the right to an education really means and the nature of equality protected by Illinois law. We will see that federal law does not provide any ready answers to these questions. Therefore, we will analyze the education article in the Illinois Constitution and the Illinois equal protection clause. Finally and most fundamentally, we will examine the nature and the role of the Illinois courts and the distinction in Illinois between questions that are purely “political” and those that are justiciable.

While the immediate focus of this article is on the right to an equal education in Illinois, we see this article as serving a broader purpose. In this day and age when the federal courts are disclaiming their responsibility for protecting our basic liberties, the question remains whether the Illinois courts will erect the bulwarks necessary to protect persons in Illinois from the basic inequalities that affect their opportunity to participate in public life.

I. THE RIGHT TO AN EQUAL EDUCATION UNDER THE UNITED STATES CONSTITUTION

In Brown v. Board of Education, the United States Supreme Court held, in a unanimous decision, that under the equal protection clause of the Fourteenth Amendment states may no longer segregate public schools on the basis of race. In “overruling” Plessy v. Ferguson, the Court considered “public education in the light of its full...
development and its present place in American life throughout the Nation."14 However, despite the Court's recognition of the importance of education in Brown, the Court has backed away from its support of the constitutional right to an equal education in such decisions as San Antonio v. Rodriguez15 and Kadrmas v. Dickinson Public Schools.16

A. SAN ANTONIO V. RODRIGUEZ

In San Antonio v. Rodriguez,17 the plaintiffs, Mexican-American parents of children attending elementary and secondary schools in a school district with a low property tax base,18 contended that the Texas system of financing public education, with its heavy reliance on local property taxes,19 violated the equal protection clause of the United States Constitution. The plaintiffs based their contention on the substantial disparity in the amount of funds available, on a per-pupil basis, between school districts like theirs and other property-rich school districts. This disparity resulted in underfunded physical facilities, less experienced teachers, larger classes, and a narrower
range of courses than were provided at schools with substantially more funds.\\(^{20}\)

While conceding that the Texas school-financing scheme resulted in major disparities in amount of per-pupil revenue available among the various school districts, the Supreme Court, in a 5-4 decision, upheld the financing scheme at least in part on the basis\\(^{21}\) that education was not a "fundamental right" or "liberty" protected by the United States Constitution.\\(^{22}\)

Although the Court, citing *Brown v. Board of Education*,\\(^{23}\) recognized that education was of great importance in our democratic society, it stated that "'[t]he mere importance of a service performed by the State does not determine whether it must be regarded as fundamental for purposes of examination under the Equal Protection Clause.'"\\(^{24}\) While not denying the nexus between the right to an education and the right to the effective exercise of First Amendment and political and civic freedoms, the Court observed that it had never guaranteed the citizenry "the most *effective* speech or the most *informed* electoral choice."\\(^{25}\) The Court stated that no charge could

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20. *Id.* at 85. In evaluating this claim, the Court compared the funding received by the most affluent district in the San Antonio area, the Alamo Heights Independent School District, to the plaintiffs' school district, the Edgewood Independent School District, during the 1967-68 school year. In that year, Alamo received a total amount in revenues of $594 per pupil, while Edgewood received only $356 per pupil. *Id.* at 13-14.

21. The plaintiffs also alleged that the Texas school-financing scheme violated the equal protection clause by discriminating against them on the basis of wealth. The Court held, however, the plaintiffs did not qualify as a class discriminated on the basis of wealth. *Id.* at 26.

The Court held that the plaintiffs' had failed to show that the Texas school-financing scheme discriminated against a class of definably "poor" persons such as a class fairly definable as indigent persons, or composed of persons whose incomes are beneath any designated poverty level. Therefore, the Court concluded that the Texas financing scheme did not "operate to the peculiar disadvantage of any suspect class" and therefore, strict scrutiny could not be invoked. *Id.* at 29-30.

As pointed out by Justice Marshall in his dissent, the district court below had made the contrary conclusion that the Texas financing scheme drew a "distinction between groups of citizens depending upon the wealth of the district in which they live," and thus created a disadvantaged class composed of persons living in property-poor districts. *Id.* at 92. Justice Marshall called into question the majority's apparent conclusion that "precise identification of the particular individuals who compose the disadvantaged class" is a necessary predicate to equal protection analysis. *Id.* at 94.

22. *Id.* at 35-36. The Court held that the right to an education was neither implicit nor explicit in the Constitution.


25. 411 U.S. at 36 (emphasis in original).
fairly be made that the Texas financing scheme did not provide each child with an opportunity to acquire the "basic minimal skills" necessary for the enjoyment of the rights of free speech and full participation in the political process. Finally, the Court questioned the limitations of the plaintiffs’ nexus theory. The Court reasoned that the right to decent food and shelter was as significant (if not more so) to the likely participation of voters as the benefit of education.

Having determined that strict scrutiny was not the appropriate standard of review, the Court reviewed the Texas’ school financing scheme under the traditional standard of review: rational basis. The Court held that the financing scheme was rationally related to two identified state-objectives: 1) assuring a basic education for every child in the state; and 2) encouraging a large measure of local control over each district’s schools.

As Justice Marshall pointed out in his dissent, the Court’s reliance upon the Texas legislature’s determination of what a “basic education” embodies was fundamentally inconsistent with its own recognition that educational authorities were unable to agree upon what constitutes educational quality. In fact, by expressing its expertise in determining that particular levels of funding provided by the Program

26. 411 U.S. at 38.
27. Id.; see Dandridge v. Williams, 397 U.S. 471 (1979) (Constitution does not create a right to the necessities of life).
28. 411 U.S. at 40. Under the traditional standard of review, a state’s law must be shown to bear some rational relationship to legitimate state purposes. 411 U.S. at 40.
29. 411 U.S. at 49. The Court found that Texas provided a “basic education” to every child through the Minimum Foundation Program that was “designed to provide an adequate minimum educational offering in every school in the State.” 411 U.S. at 44-45. While acknowledging that the primary distinguishing attributes of schools in property - affluent districts was lower pupil-teacher ratios and higher salary schedules, the Court stated that the deleterious effects from these disparities, if any, on a child’s education were not proved to be significant. 411 U.S. at 46-47 n. 101.
30. 411 U.S. at 49. The Court determined that Texas’ school-financing scheme, with its heavy reliance upon local property taxes, provided a rational means to secure local control over each district’s schools. 411 U.S. at 47-55. The Court held that local control over decisions affecting the education of one’s child is a permissible, even vital, governmental objective. 411 U.S. at 49 (citing Wright v. Council of Emperia, 407 U.S. 451 (1972)). The Court stated that local control allowed parents the freedom to devote more money to their child’s education and to participate in the decision making process that determines how those local tax dollars will be spent. 411 U.S. at 49-51.
assured an adequate educational quality, it seemed that the majority itself was acting as a "super-legislature" which it cautioned the minority against being.\textsuperscript{32}

While ratifying the sufficiency of the State's provision of a "basic education," the Court acknowledged that it lacked specialized knowledge and experience in the area of education.\textsuperscript{33} Essentially, the Court seems to have thrown up its "hands" because it believed that certain social and philosophical problems were beyond the Court's comprehension.\textsuperscript{34} Whatever may have been the extent of knowledge of the requirements of an adequate education at the time that the Court decided \textit{Rodriguez}, there can be no doubt at this time that attractive salaries and low pupil-teacher ratios are necessary for a "basic education."\textsuperscript{35} It is only axiomatic that the more affluent school districts offering higher salaries will attract the most qualified teachers, if not the only qualified teachers.\textsuperscript{36}

Although the Court relied on local control as a justification for rejecting the plaintiffs' claim, the plaintiffs had attacked the Texas school-financing scheme precisely because, in their view, the statute

\begin{itemize}
  \item \textsuperscript{32} 411 U.S. at 31.
  \item \textsuperscript{33} 411 U.S. at 42-43.
  \item \textsuperscript{34} 411 U.S. at 42-43. \textit{But see} Brown \textit{v. Board of Education}, 347 U.S. 483 (1954). The Court relied upon modern psychological knowledge and authority in determining that separate educational facilities for blacks and whites were inherently unequal. The Court also determined that providing separate public school facilities for children based solely on race "generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely to ever be undone." \textit{Ibid.} at 494.
  \item \textsuperscript{35} See generally The National Commission on Excellence of Education, U.S. Department of Education, \textit{A Nation at Risk: The Imperative for Education Reform} (April 1983) [hereinafter \textit{Nation at Risk}]. This study concluded that severe shortages of certain types of teachers exist in the fields of mathematics, science, foreign languages and among specialists in education for the gifted and talented, language minority and handicapped students. \textit{Ibid.} at 23. The study attributes low teacher salaries as a main cause of this shortage. \textit{Ibid.} at 22-23, 30-31. See also U.S. Department of Education, \textit{American Education: Making It Work} 41-43 (April 1988). (The follow-up study to \textit{Nation at Risk} confirmed that while "moderate" progress had been relieved since 1983, we as a nation are still at risk as our students know too little, and their command of essential skills is too slight; good schools for the disadvantaged and minority children are much too rare, and the dropout rate among black and hispanic youth in many of our inner cities is perilously high.).
  \item \textsuperscript{36} \textit{See Rodriguez}, 411 U.S. at 86-87 (Marshall, J., dissenting) (In the 1968-1969 school year, the top salary of the property-poor Edgewood Independent School District was approximately 80\% of the property-rich Alamo Heights School District. Coincidentally, in that same school year, 100\% of Alamo Heights teachers had college degrees while only 80\% of the teachers in Edgewood had college degrees).}
\end{itemize}
did not provide the same level of local and fiscal flexibility to all school districts. In fact, the plaintiffs argued that local control could be preserved and promoted under other financing systems that would result in more equality in education expenditures. The Court, however, held that because strict scrutiny was not required, the state need not chose the least restrictive alternative to achieve its purpose. Moreover, the Court held that "some inequality" in the treatment of individuals was not alone a sufficient basis for striking down the entire system.

The Court's conclusion that the Texas financing scheme, with its heavy reliance on local property taxes, was rationally related to the purpose of local control over public schools is plainly illogical. As Justice Marshall pointed out in his dissent, in Texas statewide laws already regulated the most minute details of local education such as textbook selection, teacher qualifications and the length of the school day. In response to Justice Marshall's observation, the Court attempted to show that local school boards retained substantial control over schools by maintaining day-to-day authority over "management and control" of public schools, by exercising their authority to acquire land by eminent domain, by hiring and terminating teachers and other personnel, and by exercising various other functions. Yet, the Court failed to acknowledge that these powers, enumerated in the Texas Education Code, merely existed because the State delegated them to the local school boards. The Court also failed to articulate any reason why the State's increased financial contribution to local school boards would, by itself, cause the state to repeal such statutes. Furthermore, many of the duties of the local school boards such as hiring teachers and maintaining order and discipline were not likely to be discharged by the state due to its increased funding of local schools.

Justice Marshall chastised the Court for suggesting that because "some 'adequate' level of benefits is provided to all, discrimination in the provision of services is therefore constitutionally excusable." Justice Marshall stated that "[t]he Equal Protection Clause is not addressed to the minimal sufficiency but rather to the unjustifiable inequities of state action. It mandates that nothing less than that 'all

37. 411 U.S. at 50.
38. Id. at 51.
39. Id. at 52.
40. Id. at 51-52.
42. Id. at 52 n. 108.
43. 411 U.S. at 89-90 (Marshall, J., dissenting).
persons similarly circumstanced shall be treated alike.'" In Justice Marshall's view, it is inequality—not some notion of gross inadequacy—of educational opportunity that raises a question of denial of equal protection of the laws.

Justice Marshall further disagreed with the Court's holding that the determination of whether an interest is fundamental is always dependent on whether that interest is explicitly or implicitly guaranteed by the Constitution. He explained that certain interests, while not explicitly guaranteed under the Constitution, have been considered fundamental rights that are entitled to strict scrutiny because they are, to some extent, interrelated to constitutionally guaranteed rights. Thus, there are instances where, due to the interests at stake, the Court has accorded constitutional protection to the right to procreate, the right to vote in state elections and the right to an appeal from a criminal conviction.

While the Court proclaimed in San Antonio v. Rodriguez that its decision "in no way detracts from our historic dedication to public education," it would be difficult to interpret the Court's decision to mean anything else. Despite the Court's attempt to establish a framework by which certain interests can qualify as fundamental rights, it is clear that the Court's ruling was more influenced by its reluctance

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44. 411 U.S. at 90 (Marshall, J., dissenting).
45. 411 U.S. at 91 (Marshall, J., dissenting). As such, Justice Marshall found that the plaintiffs had "made a substantial showing of wide variations in educational funding and the resulting educational opportunity afforded to the schoolchildren of Texas." Moreover, he concluded that "this discrimination was, in large measure, attributable to significant disparities in the taxable wealth of local Texas school districts." Id.
46. 411 U.S. at 99 (Marshall, J., dissenting) (emphasis added).
47. 411 U.S. at 103 (Marshall, J., dissenting).
49. 411 U.S. at 30.
to take the bold step of striking down a school-financing scheme, which in the Court's own words, was "comparable to the systems employed in virtually every other State." The Court's failure to recognize education as a fundamental right did indeed constitute an abandonment of its "historic dedication to public education," which was motivated more by its fear to challenge state legislation, which would have had broad-ranging consequences to the nation as a whole, than by constitutional principles.

B. PLYLER V. DOE

In Plyler v. Doe, the Court was once again called upon to determine the constitutionally of a provision of Texas' education laws. In a 5-4 decision, the Court held that a Texas statute that denied a free education to school-age children, illegally admitted into this country, violated the equal protection clause of the Fourteenth Amendment.

In reviewing the legislation at issue, the Court applied an "intermediate" level of scrutiny, rather than the traditional level of scrutiny of mere rationality endorsed by the Court in Rodriguez. The Court held that the legislation violated the equal protection clause because it created a classification that failed to "further a substantial interest of the State." In determining that this level of scrutiny was appropriate, the Court considered the character of the classification, the importance of the governmental benefit, and the asserted state interest in support of the classification.

50. 411 U.S. at 47-48. The Court also stated that, "It would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us, in which we are urged to abrogate systems of financing public education presently in existence in virtually every State." 411 U.S. at 44.

51. In his concurring opinion, Justice Stewart also seemed to emphasize his concern that striking down Texas' school-financing scheme would have a significant impact upon other State's financing schemes. In the first sentence of his opinion he noted that "[t]he method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust." 411 U.S. at 58 (Stewart, J., concurring) (emphasis added).


53. 457 U.S. at 218 n.16. The Court noted that a middle-level of scrutiny was suitable for certain class-based denials of rights which, although not explicitly or implicitly guaranteed by the Constitution, "give rise to recurring constitutional difficulties." 457 U.S. at 217-18 nn. 15-16; see, e.g., Craig v. Boren, 429 U.S. 190 (1976) (gender); Lalli v. Lalli, 439 U.S. 259 (1978) (illegitimacy).


55. See 411 U.S. at 220-31. Although the Court did not acknowledge using this
While acknowledging that education is not a “right” granted to individuals by the Constitution, the Court stated that, “Neither is it merely some governmental ‘benefit’ indistinguishable from other forms of social welfare legislation.”\textsuperscript{56} The Court stated that, “Both the importance of education in maintaining our basic institutions, and the lasting impact of its deprivation on the life of the child, mark this distinction.”\textsuperscript{57} The Court also recognized that “the public schools are a vital civic institution necessary for the preservation of a democratic system of government,”\textsuperscript{58} and “the primary vehicle for transmitting the values on which our society rests.”\textsuperscript{59} In sum, the Court concluded that education has a fundamental role in maintaining the fabric of our society.

In dissent, Chief Justice Burger criticized the Court’s analysis of the proper level of review. He noted that while the Court held that illegitimate aliens are not a “suspect class,” and that education is not a “fundamental right,” the Court, by “patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis,” spun out a theory custom-tailored to the facts test in determining the appropriate level of scrutiny, in writing on behalf of the majority, Justice Brennan, made reference to each of these elements. See San Antonio v. Rodriguez, 411 U.S. 1, 99 (Marshall, J., dissenting) (citing Dandridge v. Williams, 397 U.S. 471, 519-20 (1970) (Marshall, J., dissenting)).

56. Plyler, 457 U.S. at 221.

57. Id. at 221. The Court stated that the stigma of illiteracy imposed upon this discrete class of children was of more importance than the abstract question of whether the Texas statute discriminated against a suspect class or whether education was a fundamental right. 457 U.S. at 223. The Court noted that “[b]y denying these children a basic education, we deny them the ability to live within the structure of our civic institutions, and foreclose any realistic possibility that they will contribute in even the smallest way to the progress of our Nation.” 457 U.S. at 224. In light of these “countervailing costs,” the Court determined that the Texas statute could “hardly be considered rational unless it furthers some substantial goal of the State.” 457 U.S. at 225.


The people of the United States need to know that individuals in our society who do not possess the level of skill, literacy, and training essential to the new era will be effectively disenfranchised, not simply from the material rewards that accompany competent performance, but also from the chance to participate fully in our national life. A high level of shared education is essential to a free, democratic society . . . For our country to function, citizens must be able to reach some common understanding on complex issues, often on short notice and on basis of conflicting or incomplete evidence.”

Id.

59. 457 U.S. at 221 (citing Ambach v. Norwich, 441 U.S. 68, 76 (1979)).
of this case. After concluding that strict scrutiny was not the appropriate standard of review, Chief Justice Burger reviewed the legislation under the rational basis level of scrutiny, and found it to be constitutional.

The inadequacy of the two-tiered approach to equal protection analysis has been evident in recent years by the Court's use of a middle-level of review for classifications such as illegitimacy and gender. In *Plyler*, the Court introduced a new formula for determining when intermediate-level scrutiny should be applied. Justice Brennan, writing for the Court, determined the appropriate standard by balancing a quasi-fundamental right—education—and a discrete, identifiable class—children of illegal aliens—which created the need for a heightened level of review. *Plyler* was an attempt by the Court to circumvent some of the damage done to the concept of a right to an equal education caused by the *Rodriquez* decision; however, the *Plyler* balancing approach has been undercut by more recent decisions.

C. *PAPASAN V. ALLAIN*

In *Papasan v. Allain*, the plaintiffs, school children and local school officials, brought an action against state officials challenging Mississippi's distribution of public land funds. The plaintiffs contended that the State's sale of lands, reserved by the federal government for the benefit of public schools in 23 counties, formerly held by the Chickasaw Indian Nation, resulted in a disparity in per-pupil funding which denied students living in those counties a "minimally adequate education." The plaintiffs asserted that this disparity violated the equal protection clause.

In a 6-3 decision, the Court held that the plaintiffs' equal protection claim properly stated a cause of action. The Court began
its analysis of the plaintiffs' equal protection claim by examining the meaning and effect of its decisions in *San Antonio v. Rodriguez* and *Plyler v. Doe.* While acknowledging that the Court declined to apply any measure of heightened scrutiny to the legislation at issue in *Rodriguez*, based on either wealth as a suspect class or education as a fundamental right, the Court stated that it had not foreclosed the "possibility that some identifiable quantum of education is a constitutionally protected prerequisite to the meaningful exercise of either [the right to speak or the right to vote.]" *7* Regarding *Plyler*, the Court explained that while it had not "measurably change[d] the approach articulated in *Rodriguez,*" it had nevertheless "concluded that the justifications for the discrimination offered by the State were 'wholly insubstantial in light of the costs involved to these children, the State, and the Nation.'" *7* The Court further stated that, "As *Rodriguez* and *Plyler* indicate, this Court has not yet definitively settled the questions [of] whether a minimally adequate education is a fundamental right and whether a statute alleged to discriminatorily infringe [upon] that right should be accorded heightened equal protection review." *7* The Court concluded, however, that this case did not "require resolution of these issues." *7*

The Court determined that based on the disparities that the complaint alleged and that were documented in the public record, the applicable standard of review was dictated by *Rodriguez.* *7* The Court asserted, however, that "this is a very different claim than the claim made in *Rodriguez.*" *7* In contrast to *Rodriguez*, the Court pointed out that the plaintiffs were not challenging the "overall organization of the Mississippi public school financing program," but rather, "their challenge [was] restricted to one aspect of that program." *7*

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The Court explained that in *Rodriquez*, funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control school funding; whereas, the differential financing in *Papasan* was traceable "to a state decision to divide state resources unequally among school districts." 79

Even so, the Court maintained that the question remained as to whether the variations in the benefits received by the school districts were rationally related to a legitimate state interest. 80 The Court declined to address this issue and remanded the case to the district court with the instruction that it should address the following question: "Given that the State has title to assets granted to it by the Federal Government for the use of the State’s schools, does the Equal Protection Clause permit it to distribute the benefit of these assets unequally among the school districts as it now does?" 81

D. KADRMA S V. DICKINSON PUBLIC SCHOOLS

In a 5-4 decision, the Supreme Court in *Kadrmas v. Dickinson Public Schools*, 82 held that an indigent child who lived sixteen miles from the nearest school and was assessed a fee for bus service was not denied equal protection. The plaintiffs contended that the user fee charged by the Dickinson Public Schools deprived those who could not afford to pay it "minimum access to education," 83 and that the state statute authorizing such fees should be subject to the standard of review of "heightened" scrutiny applied by the Court in *Plyler v. Doe*. 84

The Court explained, however, that this standard of review "has generally been applied only in cases that involved discriminatory classifications based on sex or illegitimacy." 85 While recognizing that it had applied a "heightened level of scrutiny" in *Plyler*, the Court stated that it "[had] not extended this holding beyond the "unique

79. 478 U.S. at 288 (emphasis added).
80. 478 U.S. at 289.
81. Id. Justice Powell dissented on the ground that "the Equal Protection Clause, at least in the context of state funding of schools, is concerned with substance, not with the de minimus variations of funding among the districts." 478 U.S. at 300.
83. 487 U.S. at 458. The Court noted that because the plaintiff, Sarita Kadrmas, was able to continue to attend school during the time she was denied access to the school bus, the plaintiffs must "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." Id.
84. 487 U.S. at 459.
85. Id. (citations omitted).
circumstances, that provoked its 'unique confluence of theories and rationales.'

The Court further distinguished Plyler by observing that unlike the children in that case, the plaintiff Sarita Kadarmas had not been penalized by the government for the illegal conduct of her parents. On the contrary, 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. 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, surely adding to the problems and costs of unemployment, welfare, and crime.'

The Court concluded, therefore, that "heightened" scrutiny was not the appropriate standard of review where the statute did not discriminate against a suspect class, nor interfere with a fundamental right. Upon reviewing the statute under the rational basis test, the Court concluded that the plaintiffs had "failed to carry the heavy burden of demonstrating that the statute [was] arbitrary and irrational."

In dissent, Justice Marshall disputed the Court's view of the statute at issue in this case as involving the provision of transportation, rather than the provision of educational services. In Justice Marshall's view, this case involved "state action that placed a special burden on poor families in their pursuit of education." "Children living far from school can receive a public education only if they have access to transportation; as the state court noted in this case, 'a child must reach the schoolhouse door as a prerequisite to receiving the educational opportunity offered therein.' Justice Marshall believed therefore that this case presented the question "whether a State may discriminate against the poor in providing access to education."

86. Id. (quoting Plyler v. Doe, 457 U.S. 202, 239 (1982) (Powell, J., concurring)).
87. Id. (quoting Plyler, 457 US. 202, 243 (Burger, C.J., dissenting)).
88. 487 U.S. at 459.
89. Id., (quoting Plyler, 457 U.S. at 230).
90. 487 U.S. at 465.
91. Id.
92. Id. at 466 (Marshall, J., dissenting).
93. 487 U.S. at 467.
94. Id. (citation omitted).
95. Id. Justice Marshall stated that while the Court had determined that classifications based on wealth were not automatically suspect, such classifications
Justice Marshall observed that "a statute that erects special obstacles to education in the path of the poor naturally tends to consign such persons to their current disadvantaged status."96 By denying an equal opportunity to exactly those who need it most, Justice Marshall opined that the law not only militates against the ability of each poor child to advance himself or herself, but also increases the likelihood of the creation of a discrete and permanent underclass.97 Since the State's rationale for this policy was based entirely on fiscal considerations,98 Justice Marshall concluded that its interest was insubstantial and did not begin to justify the discrimination challenged in this case.99

Beginning with its 1973 decision in Rodriguez, the United States Supreme Court has shown a great deal of indifference to its previously expressed commitment in Brown v. Board of Education to support the right to an equal education. While in its decisions such as Plyler v. Doe and Papasan v. Allain the Court has accorded the right to an equal education an elevated status by evaluating the subject legislation under a "heightened scrutiny" standard of review, the Court has also declined to apply this same standard most recently in Kadrmas v. Dickinson Public School. Having clearly abdicated its mandate as expressed in Brown to enforce the right to an equal education, the only hope of protecting this "most important function of state and local governments" lies with the judiciary of each individual state.

II. THE ROLE OF STATE CONSTITUTIONAL LAW

Education is today a national problem. Our national defense posture and our ability to compete in the world economic market are irretrievably tied into our educational system. Furthermore, our system of government and the exercise of our individual liberties are dependent upon an educated citizenry. However, the recent decisions of the United States Supreme Court signal that it is unlikely that the

96. 487 U.S. at 470.
97. Id.
98. Justice Marshall observed that the statute allowed Dickinson and other nonreorganized school districts to charge a flat fee for bus service so that these districts may recoup part of the costs of the service. 487 U.S. at 471.
99. Id.
Court will take a leading role, at least in the near future, in ensuring the right to an equal education.\(^{100}\) Also, neither the president nor congress show any real inclination to lead in this area. Unless this situation changes, millions of undereducated children will pass through the nation’s school systems and join the ranks of those who cannot fully compete in the technological society of the future.

Immediate attention will therefore have to be focused on the problem at the state level. The Illinois Constitution offers Illinois residents both a right to an education and protection against inequality.

Article X, section 1 of the 1970 Illinois Constitution provides that:

A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities.

The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law.

The State has the primary responsibility for financing the system of public education.\(^{101}\)

This provision differs from the provisions of the three earlier Illinois Constitutions. Neither the Constitution of 1818 nor the Constitution of 1848 contained an education article or any mention of a right to an education. Article VIII, section 1 of the 1870 Illinois Constitution provided that "[t]he general assembly shall provide a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education."\(^{102}\)

The Bill of Rights in the 1970 Illinois Constitution further provides that no person shall be denied the equal protection of the laws.\(^{103}\) The Constitutions of 1818, 1848, or 1870 did not contain equal protection clauses, although the Constitutions of 1848, 1870 and 1970 do prohibit the legislature from passing special legislation.\(^{104}\)

\(^{100}\) See supra part I.

\(^{101}\) ILL. CONST., art. X, § 1 (1970).

\(^{102}\) ILL. CONST., art. VIII, § 1 (1870).

\(^{103}\) ILL. CONST., art. I, § 2 (1970).

\(^{104}\) ILL. CONST., art. IV, § 13 (1970); ILL. CONST., art. IV, § 22 (1870); ILL. CONST., art. III, §§ 32, 36 (1848).
Unlike the Illinois Constitution, the United States Constitution does not contain any reference to education. However, the equal protection clause of the Fourteenth Amendment reads the same as Article 1, section 2 of the 1970 Illinois Constitution. Because recent United States Supreme Court decisions have involved only an interpretation of the Fourteenth Amendment, those decisions are not dispositive whether the Illinois Constitution independently protects the right to an equal education under Article X, section 1 or Article I, section 2. \footnote{105.}

The courts of a number of states have interpreted their state constitutions to require equal funding for public education. \footnote{106.} Some of these decisions have been based on independent interpretations of state equal protection clauses. \footnote{107.} Other decisions are grounded on the education articles contained in their respective state constitutions. \footnote{108.} Others rely on both provisions. \footnote{109.}

The Illinois Constitution may provide its residents with greater rights than are accorded by the United States Constitution and Illinois courts are obligated to protect those rights independently of those provided by the United States Constitution. \footnote{110.} Therefore, we will

\footnotetext[105]{105. There is no dispute that the state courts can interpret their state constitutions different from how the United States Supreme Court interprets the United States Constitution. See, e.g., Michigan v. Long, 463 U.S. 1032 (1983); Prune Yard Shopping Center v. Robins, 447 U.S. 74 (1980).} 
\footnotetext[110]{110. In Longress v. Board of Education, 101 Ill. 308, 316 (1882), the Illinois Supreme Court held that an Illinois school board had no authority to segregate black children in the public schools. The Court relied solely on Illinois law, noting that: Whether the fourteenth amendment would prohibit school directors or boards of education from excluding colored children from the public schools by the adoption}
independently examine both the right to an education under Article 10, Section 1 of the 1970 Illinois Constitution and the nature of equality under Article 1, Section 2 of the Illinois Constitution.

III. THE RIGHT TO AN EDUCATION UNDER ARTICLE X, SECTION 1 OF THE ILLINOIS CONSTITUTION

The 1970 Constitution, Article X, section 1, states that it is a fundamental goal to educate “all persons to the limits of their capacities.” To accomplish this goal, the State must provide for an efficient system of high quality education. This is not discretionary; the Constitution mandates that the State “shall” do it. Education must be free at least through the secondary level and the State has the primary responsibility to see that the system is financed.

The history of Article X, section 1 is instructive. Rather than expressing a goal, Article VIII, section 1 of the 1870 Constitution had stated that the General Assembly must provide “a thorough and efficient system of free schools, whereby all children of this state may receive a good common school education.” The change of wording in 1970 indicates a change in focus. As the wording indicates, in 1870 the focus was on having the General Assembly establish a public school system. The wording in the 1970 Constitution shifts the focus to the quality of the education provided to the individual student regardless of the school district in which the student is found. As discussed below, this new focus on individuals is reflected in the legislative history and case law interpreting Article X, section 1.

and enforcement of such rules as have been adopted in this case, is a question which we do not deem it necessary to determine here. We base our decision on the constitution and laws of the State. The people of the State have the right to make such a constitution, and enact such laws under it, as they deem for the best interests of the public, and so long as our laws do not conflict with the constitution of the United States they must be held valid and binding upon the people of the State. Under our law, aside from the fourteenth amendment, directors of schools and boards of education, like defendants in error, have no discretion to deny a pupil of the proper age admission to the public schools on account of nationality, color or religion.


112. Id.
113. Id.
A. THE GOAL OF EDUCATING ALL PERSONS TO THE LIMITS OF THEIR CAPACITIES

The Illinois Supreme Court had many occasions to construe Article VIII, section 1 of the 1870 Constitution. In People ex rel. Longress v. Board of Education, the Illinois Supreme Court stated that Article VIII, section 1 required the General Assembly to provide schools whereby "all children may receive a good public school education" and made "no distinction in regard to the race or color of the children of the State who are entitled to share in the benefits to be derived from our public schools." Relying on the Constitution and the statutes implementing it, the Court held that no pupil of proper age could be denied admission to a public school on account of race or color.

Similarly, the Illinois Supreme Court interpreted the Article VIII, section 1 requirement that all children receive a good common school education to require a school district to allow children residing in an orphan's home to attend, without paying tuition, the free schools of that district. The court noted that every child of school age in the State is entitled to attend the public school in the district in which he or she actually resides for the time being, whether that be the place of his or her legal domicile or the legal domicile of his or her parents or guardian or not.

114. 101 Ill. 308 (1882).
115. 101 Ill. at 313. The Illinois Supreme Court's liberal or literal reading of this constitutional provision compares favorably with the same interpretations given by other high state courts of their state constitutions which contained similar provisions. In Ohio v. McGann, 21 Ohio St. 198, 207 (1871), the court denied a writ of mandamus to a black youth seeking admission into an all white school where the state constitution provided that the "general assembly shall . . . secure a thorough and efficient system of common schools throughout the State." In essence, the court held that black children were not denied a "common school education" where they enjoyed substantially equal advantages in separate schools from white children. Id. See also Cory v. Carter, 48 Ind. 327, 362 (1874); Ward v. Flood, 48 Cal. 36, 50 (1874). Contra Clark v. Board of Directors, 24 Iowa 266, 271 (1868); Nevada v. Duffy, 7 Nev. 342, 346 (1872).
116. In an earlier case, the Illinois Supreme Court, without directly referring to Article VIII, section 1, stated that school directors "have no power to make class distinctions, neither can they discriminate between scholars on account of their color, race or social position." Chase v. Stephenson, 71 Ill. 383, 385 (1874).
118. Ashley, 114 N.E. at 21.
In *Department of Welfare v. Haas*, parents of a feebleminded child argued that they should not be responsible for paying the fees for educating their child in a State mental institution. The Illinois Supreme Court backed away from the commitment that all children in Illinois are entitled to receive an education. The Court held that Article VIII, section 1 did not require the State to provide a free educational program for those children who were unable to receive the training available in the regular common schools.

The cases interpreting Article VIII, section 1 of the 1870 Constitution thus established that all children residing in a district have a right to be educated on an equal basis, but that a district has no duty to provide facilities to accommodate special cases. The right to an education was only a right to "common schooling." The changed wording in the 1970 Constitution, which makes it a state goal to educate all persons to the limits of their capacities, shifts the focus from a "common school" education to the individual person. The emphasis has changed from that of setting up school districts where all children have an equal opportunity to be educated to that of providing educational opportunities for all persons in the state regardless of the school district where the child happens to be.

The 1970 Constitution goes beyond the 1870 Constitution and its case law with its new emphasis on educating all persons to the limits of their capacities. In introducing Article X, section 1 to the Convention, Delegate Paul Mathias emphasized that "We are pointing

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120. *Id.* at 220. The Court stated that existing legislation did not require the State to provide a free educational program, as a part of the common school system, for the feeble minded or mentally deficient children who, because of limited intelligence, were unable to receive a good common school education. *Id.*

The delegates to the 1970 Illinois Constitutional Convention revised the education article to require the legislature to create programs of instruction for those suffering from mental or physical handicaps. 2 RECORD OF PROCEEDINGS, SIXTH ILLINOIS CONSTITUTIONAL CONVENTION 764 (1970) [hereinafter "RECORD"]. In *Elliot v. Board of Educ.*, 380 N.E.2d 1137 (Ill. App. Ct. 1978), the court upheld the right of handicapped students to special education classes. The court held that the "present constitution establishes an entitlement broader than the former provision which mandated only free common school education." *Id.* at 1142. *But see* Gary B. v. Cronin, 542 F. Supp. 102, 113 (N.D. Ill. 1980); Max M. v. Thompson, 566 F. Supp. 1330, 1339 (N.D. Ill. 1983), modified on rehearing on other grounds, 585 F. Supp. 317 (N.D. Ill. 1984) (handicapped child's right to a free education under the Illinois Constitution did not include a provision for psychotherapy).

121. See *Elliot v. Board of Educ.*, 380 N.E.2d 1137, 1142 (Ill. App. Ct. 1978), where the Court found the 1970 Constitution to be broader than the 1870 Constitution in its mandate of free education.
out we want opportunities beyond the elementary and secondary schools—opportunities for the handicapped as well as the normal individual."  

In one sense, the first paragraph of Article X, section 1 of the 1970 Constitution is more limited than its 1870 counterpart in that it states a goal rather than a mandate, as does the 1870 Constitution, that the General Assembly "shall provide." However, the goal is more than a mere aspiration. It informs and determines the interpretation of the remaining paragraphs of Article X, section 1, and provides a rule of construction for state legislative enactments. The goal is thus similar to the statements of objectives found in other constitutions which provide standards for the courts to measure and interpret other constitutional provisions and ambiguous statutes.

Clearly, the drafters of the 1970 Constitution did not view the first clause of Article X, section 1 as purely hortatory. They intended it to be effectuated through the remaining provisions in Article X. In speaking for the Article, Delegate Sam Patch emphasized the relationship between the goal in paragraph 1 of section 1 and the duty in paragraph 2:

But we would be remiss if we did not provide, in our report for our article, a means for implementation of this transcendent goal. Therefore, the Committee states in paragraph 2 of section 1 of Article VIII, 'To achieve this goal, it shall be the duty of the state to provide for an efficient system of high quality public educational institutions and services.' The paramount goal is education; therefore, the duty is of the same status.

Again, in response to a question from Delegate Charles Coleman whether there was a mandate given to the executive branch or the General Assembly to provide for the goal, Delegate Patch emphasized:

Yes, Delegate Coleman, this is one thing that we deliberated on for quite a long period of time. That is why we indicated that the goal is paramount, and in our section paragraph we tried to state: 'to achieve this paramount goal, it shall be the

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122. RECORD, supra n. 120, at 762.

123. CONST. INDIA, pt. 4, §§ 45, 46 (1949); CONST. NIG., ch. 2 § 18 (1979).
Damisha v. Speaker, Benue State [1983] 4 N.C.L.R. 625, 631 (High Ct. Adikpo);
(Fed. Ct. App. Lagos); D. BASU, INTRODUCTION TO THE CONSTITUTION OF INDIA 137
(8th ed. 1980).

124. RECORD, supra note 120, at 764.
duty... Now it would have been redundant to say the duty is paramount in the language, but after a goal has been identified as being paramount, and you mandate a state to carry out this goal—therefore, we said the whole state, that is, the executive branch as well as the General Assembly.125

An amendment to delete section 1 and to substitute the language of the 1870 Constitution on the ground that section 1 put educational needs above all other needs of state government was defeated by the delegates.126 An amendment to change the original proposal from “the paramount goal” to “a fundamental goal” did carry.127 It was explained that, “fundamental” better expressed the intent of the education committee, which looked upon education as the basis for the exercise of all other rights of the individual.128

The initial approach of the Illinois Supreme Court in interpreting Article X, section 1 was cautious. In Pierce v. Board of Education,129 the Illinois Supreme Court refused to interpret Article X, section 1 to require a school board to place a specific child in a special education class. The parents of a child who suffered a learning disability sued for damages sustained by him when he was placed with students not suffering learning disabilities. The court explained that Article X, section 1 was not self-executing: “Its pronouncement of the laudable goal of ‘the educational development of all persons to the limits of their capacities’ is a statement of general philosophy, rather than a mandate that certain means be provided in any specific form.”130 The Court, therefore, found it necessary to examine state statutes and regulations implementing special education programs in Illinois. The Court held that under state law it was the State Board of Education and not the local school board that is responsible for determining eligibility for special education and, therefore, the plaintiff had failed to state a cause of action.131

The substance of the holding in Pierce was not that Article X, section 1, was inoperative. The Court accepted the “goal” that all

125. RECORD, supra note 120, at 766 (1970).
126. RECORD, supra note 120, at 792-93, 805.
127. RECORD, supra note 120, at 803.
128. It was explained that paramount means “chief, principal, top sawyer, first fiddle, biggest frog in the pond, king, prima donna, or star,” whereas fundamental means “substance, essential, center, kernel, the meat, the core, the heart, the soul.” RECORD, supra note 120, at 802.
130. Id. at 536.
131. Id. at 537.
persons should be educated to the limits of their capacities but held that the State has discretion in determining which agency will effectuate this goal. 132

B. THE DUTY TO ESTABLISH AN EFFICIENT SYSTEM OF HIGH QUALITY PUBLIC EDUCATIONAL INSTITUTIONS AND SERVICES

While paragraph one of Article X, section 1 is stated as a goal, paragraph two imposes a mandatory duty on the State. 133 In introducing this paragraph, Delegate Patch observed:

The state is mandated to provide a system that is thorough, complete, and useful to all the people of Illinois. To provide a total quality public education, the state shall institute an educational system of the highest quality that will not only meet the educational needs of today, but will be able to adjust to the educational demands in a progressive and ever changing and highly qualified society of tomorrow. As higher education and academic excellence is demanded by society, the state’s mandate for high-quality education will expand to meet its demand. 134

Paragraph two of Article X, section 1 of the 1970 Constitution is different from the 1870 Constitution. The 1870 Constitution required the State to provide a "thorough and efficient system of free schools" where all children could receive "a good common school education." 135 The Illinois Supreme Court interpreted Article XIII, section 1, to make it the duty of the legislature to establish "a thorough and efficient system of free schools" but interpreted "a good common school education" as "a limitation upon the power of the legislature as to the character of education to be afforded by the system of free schools to be established and maintained." 136

Difficulties arose in defining what was "a good common school education." In Richards v. Raymond, 137 it was argued that the clause "common school" did not include the power to establish high schools. However, the supreme court held that no definition of a common school was provided in the Constitution and hence it was left to the legislature to determine what constituted a good common school

133. Id.
134. RECORD, supra note 120, at 764.
135. ILL. CONST., art XIII, § 1 (1820).
137. 92 Ill. 612 (1879).
education. In later opinions the Court held that high schools were as much a part of our system of education as grade schools and that the state had a duty to maintain high schools.138

In People v. Graham,139 the supreme court relied upon the School Code of 1825 to define "a good common school education." The 1825 Code stated:

Believing that the advancement of literature always has been and ever will be the means of developing more fully the rights of man, that the mind of every citizen in the republic is the common property of society and constitutes the basis of its strength and happiness, it is therefore considered the peculiar duty of a free government like ours to encourage and extend the improvement and cultivation of the intellectual energies of the whole.140

Although the court consistently held that it was for the legislature and not for the courts to determine what was "a good common-school education,"141 the court recognized that the constitution did put two limitations on the legislature when implementing that concept: "The schools established, i.e., the system, must be free and must be open to all without discrimination."142

In 1958, the supreme court narrowly interpreted "common school education" to exclude special education for those of limited intelligence.143 The court held that the State had no duty to provide special facilities for a boy described as "mentally deficient or feeble minded." The court noted that the term "common school education" implies "the capacity, as well as the right, to receive the common training, otherwise the educational process cannot function."144

The 1970 Constitution removed the term "a good common school education." The Education Committee, which drafted the Article, wanted to insure that the mentally and physically handicapped as well as all other disadvantaged children would be given a free education "to the limits of their capacities."145 The Education Committee also

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138. People v. C. & N.W. Ry, 121 N.E. 731 (Ill. 1919); Cook v. Board of Directors, 107 N.E. 327 (Ill. 1914). In Powell v. Board of Education, 97 Ill. 375 (1881), the Court held that the legislature could properly determine that learning a foreign language was part of a common school education.
139. 134 N.E. 57 (Ill. 1922).
140. 134 N.E. at 59-61.
141. Fiedler v. Eckfeldt, 166 N.E. 504 (Ill. 1929); People v. Deatherage, 81 N.E.2d 581 (Ill. 1948).
142. People v. Deatherage, 81 N.E.2d 581 (Ill. 1948).
144. RECORD, supra note 120, at 232 (1970).
145. See RECORD, supra note 120, at 763-64 (1970). Elliot v. Board of Educ.,
felt that the term was imprecise and did not want to inhibit legislative determination that a junior college education or other advanced study was desirable to meet new needs. Thus, while the Constitution mandates that "education in public schools through the secondary level shall be free," it allows the General Assembly to provide such other free education as is deemed appropriate.

While the "common school" requirement may have been intended to limit the legislature under the 1870 Constitution, the requirement under the 1870 Constitution that the State provide "a thorough and efficient system of free schools" was held to be mandatory. However, the courts had an even harder time defining what was "thorough and efficient" than in defining a "common school education."

The Illinois Supreme Court held that to meet the requirements that a school system be "thorough and efficient," the state must be divided into districts that are sufficiently contiguous and compact to enable children to travel from their homes to school in reasonable time and with a reasonable degree of comfort. Normally the question of how school districts are drawn is left to the legislature; however, the court has intervened in particularly egregious cases.

The Illinois Supreme Court held that the legislature had no discretion to deprive any child of the opportunity to receive what the legislature determined to be a "good common school education." A "thorough and efficient" system thus meant that it must be free and open to all equally.

380 N.E.2d 1137 (Ill. App. 1978) (recognizing the right of handicapped children to receive free "special education" classes).

148. People v. Young, 133 N.E. 693 (Ill. 1922).
149. Fiedler v. Eckfeldt, 166 N.E. 504 (Ill. 1929); People v. Deatherage, 81 N.E.2d 581 (Ill. 1948); People v. Graham, 134 N.E. 57 (Ill. 1922); McLain v. Phelps, 100 N.E.2d 753 (Ill. 1951).
150. People v. Young, 133 N.E. 693 (Ill. 1922) (part of the district, which extended four miles in length and two miles in width from the main body of the district, was ten miles from where the school was to be located); People v. Suess, 143 N.E. 462 (Ill. 1924) (condition of roads and character of territory made it difficult for students to travel conveniently to school); People v. Price, 141 N.E. 409 (Ill. 1923) (bad roads and considerable distances affected accessibility of high schools); People v. Decatur Unit Sch. Dist., 203 N.E.2d 423 (Ill. 1965) (school district included three islands completely detached from each other).
151. Leighty v. Young, 139 N.E. 894, 895 (Ill. 1923).
152. People v. High School Dist., 71 N.E.2d 86, 89 (Ill. 1947); People v. Deatherage, 81 N.E.2d 581, 586 (Ill. 1948); Fiedler v. Eckfeldt, 166 N.E. 504, 509 (Ill. 1929).
The 1970 Constitution speaks of "an efficient system of high quality public educational institutions and services." The term "efficient" would appear to carry the meaning it had under the 1870 Constitution. The term "high quality" is informed by paragraph one's requirement that "all persons be educated to the limits of their capacities."

C. THE DUTY TO PROVIDE FOR A "FREE" EDUCATION

The 1970 Illinois Constitution specifically mandates that the State provide a system of free education through the secondary level. The General Assembly has discretion to provide such other free education as it deems appropriate. The State, and not local government, has the primary responsibility for financing public education.\(^{153}\)

The word "free" has been construed by the supreme court to mean financially free, meaning "no tuition," and to impose on the public the burden of financing education.\(^{154}\)

A major question which arose under the 1870 Constitution was whether the State was required to provide students with free textbooks. In *Segar v. Board of Education*,\(^ {155} \) a board of education required a deposit to be paid on all textbooks a pupil used. The deposit was to be refunded if the books were returned in reasonably good condition. The supreme court upheld the deposit requirement:

A system of schools, which permits all persons of school age residing in the district to attend classes and receive instruction in the subjects taught, without a tuition charge, provides free schools, and the fact that the parents of pupils financially able to do so are required to provide their children with textbooks, writing materials, and other supplies required for the personal use to such pupils does not change the character of the school.\(^ {156} \)

It was asked during the debates to the 1970 Constitution, whether the word "free" meant anything beyond free tuition.\(^ {157} \) The answer was ambiguous. Delegate William Fogal stated that the word "free" was to be interpreted as it had been. However, Delegate Anne Evans stated that school districts could go too far in charging "fees" which

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153. ILL. CONST., art. X, § 1 (1920).
155. 148 N.E. 289 (Ill. 1925).
157. RECORD, supra note 120, at 767.
in effect amounted to tuition. Moderate fees for institutional materials were permitted, but if a district charged excessive fees as a means of getting around the free tuition requirement, this would not be allowed. She did not explain what she meant by "excessive" but she did state that a "free education" was both a goal of the State and a protection to its citizens.9

D. THE DUTY OF THE STATE TO FINANCE EDUCATION

The third paragraph of Article X, section 1 of the 1970 Constitution which states that "the State has the primary responsibility for financing the system of public education," was new. The education committee's original proposal was more specific. It provided:

To meet the goals of section 1, substantially all funds for the operational costs of the free public schools shall be appropriated by the General Assembly for the benefit of the local school districts. No local governmental unit or school district may levy taxes or appropriate funds for the purposes of such educational operation except to the extent of ten percent (10%) of the amount received by that district from the General Assembly in that year.160

Under this proposal local districts would have been free to continue to control and implement programs, but funds for operational purposes would have come from the State.161 This proposal was prompted by concern about the inequality among districts with respect to their resources from local tax receipts.162 A dissent to the committee's report agreed that greater state support to decrease inequalities was required but argued that the proposed constitutional provision was unwise because it would lead to greater State control and might lower the overall quality of education.163

In presenting the education proposal to the delegates, Delegate Malcolm Kamin suggested that the paragraph was not merely hortatory but had legal force and effect.164 After vigorous debate, the proposal of the education committee was defeated.165

158. RECORD, supra note 120, at 768..  
159. Id.  
160. RECORD, supra note 120, at 295.  
161. RECORD, supra note 120, at 296.  
162. RECORD, supra note 120, at 297.  
163. RECORD, supra note 120, at 300-04.  
164. RECORD, supra note 120, at 3537. In proposing substitute language which provided in pertinent part that "the State shall provide substantial parity of educa-
Later in the convention, Delegate Dawn Clark Netsch moved that language substantially equivalent to that currently in paragraph 3 of section 1 be adopted.\textsuperscript{166} She conceded that the language was purely hortatory and did not state a legally enforceable duty.\textsuperscript{167} Delegate Louis Bottino immediately moved a substitute that he described as "more than a hortatory statement."\textsuperscript{168} The Bottino substitution failed, as did the Netsch amendment.\textsuperscript{169}

Eighteen days later Delegate Netsch again introduced her amendment and again emphasized that it was not "a legally obligatory command to the state legislature."\textsuperscript{170} However, Delegate Kamin, in supporting another substitute that did not pass, questioned whether the Netsch amendment really was without legal effect and suggested that it might be used to invalidate local school taxes.\textsuperscript{171} After further debate, the Netsch amendment finally carried.\textsuperscript{172}

Given these debates, it is not surprising that the Illinois Supreme Court would reject the contention that paragraph three of Article X, section 1 required the State to provide not less than 50 percent of the funds needed to operate the public and elementary school system.\textsuperscript{173} The Illinois Supreme Court also rejected a challenge to a reduction in funding to the Chicago Board of Education because the district had failed to comply with state minimum term requirements.\textsuperscript{174} The court held that the reduction did not violate the State's responsibility to finance education.\textsuperscript{175} Nor did the Court find that the reduction violated the State's duty to provide an "efficient system of high quality educational institutions and services" because the requirement of a minimum school term was "relevant to providing high quality, efficient education on a state-wide basis."\textsuperscript{176}
E. CONCLUSION

There can be no doubt that Article X, section 1 guarantees the right to an equal education in Illinois. This right is derived from the State's stated goal to educate all persons to the limits of their capacities and the State's duty to establish "an efficient system of high quality public educational institutions and services."\(^{177}\)

The focus on the person in the 1970 Constitution extends the concept of equality within a school district, as established under the 1870 Constitution, to the equal right of all persons in the State to receive an education.\(^{178}\)

The State's primary responsibility to fund public education stated in paragraph three of Article X, section 1\(^{179}\) may well be hortatory,\(^{180}\) but that provision is distinct from the obligation of the State contained in paragraphs one and two\(^{181}\) to provide all persons with equal educational opportunities.\(^{182}\) It may be that the legislature has the discretion to determine the financial formula for bringing that obligation about,\(^{183}\) but the courts have the antecedent obligation to insure that all persons in the State have an equal opportunity to be educated to the limits of their capacities.\(^{184}\)

The judiciary's obligation is not limited to determining whether individuals in the same district are being treated equally, as was the case under the 1870 Constitution. Under the 1970 Constitution equality is judged from a statewide perspective. A child in Cairo has the same right to be educated to the limit of her capacities as a child in Chicago or in Lake Forest. Assuming there is a correlation between funding and the quality of education received by individual students, the Illinois Constitution requires that disparities in funding that produce unequal educational opportunities be removed. The different

\(^{178}\) See, supra, notes 114-132 and accompanying text.
\(^{180}\) See, supra notes 160-76 and accompanying text.
\(^{182}\) See, supra notes 114-52 and accompanying text.
\(^{184}\) Cf. Longress v. Board of Educ., 101 Ill. 308 (1882) (right to be free from racial discrimination); Ashley v. Board of Educ., 114 N.E. 20 (Ill. 1916) (right of orphans to receive a free education); Elliot v. Board of Education, 380 N.E.2d 1137 (Ill. App. Ct. 1978) (right of disabled children to receive an equal education); People v. High Sch. Dist., 71 N.E.2d 86 (Ill. 1947) (schools must be "free and open to all equally"); Leighty v. Young, 139 N.E. 894 (Ill. 1923) (right of all children to convenient access to schools).
language used in the Illinois Constitution, together with the convention debates and prior Illinois court decisions construing the right to an equal education, distinguish the situation in Illinois from the United States Supreme Court decision in *San Antonio v. Rodriguez*, which held that there is no federal constitutional right to an education. *Rodrigues* relied solely on the federal equal protection clause, which affords only minimal protection when classifications involving non-fundamental rights are based on wealth or disability.\(^{185}\) Article X, section 1 of the 1970 Constitution recognizes education as a fundamental right and, therefore, discrimination against those who are denied an education due to poverty or disability, as well as race, nationality, gender, and religion, is illegal.

IV. **The Nature of Equality under Article I, Section 2 of the Illinois Constitution**

Article I, section 2 of the 1970 Illinois Constitution provides that "No person shall . . . be denied equal protection of the laws." Like the Fourteenth Amendment to the United States Constitution, the phrase is broad and inclusive but says little about the nature of equality.\(^{186}\)

Obviously the purpose of all legislation is to classify and make distinctions. Such classifications and distinctions will normally be upheld if they are rational.\(^{187}\) The courts themselves have given very little attention, however, as to the nature of the equality that is protected under either the federal or state constitutions.


\(^{186}\) In 1927, Justice Holmes stated that equal protection was "the usual last resort of constitutional arguments." *Buck v. Bell*, 274 U.S. 200, 208 (1927); See also *Weston, The Empty Idea of Equality*, 95 Harv. L. Rev. 537 (1982); For an historical account of the development of the concept of equality in the United States see *Pole, The Pursuit Of Equality In American History* (1978).

The Illinois Supreme Court has frequently compared the Article I, section 2 equal protection clause to the prohibition against special legislation in Article IV, section 13.

The court has stated that special legislation, which confers a special benefit or exclusive privilege on a person or a group of persons to the exclusion of others similarly situated, differs from a violation of equal protection, which consists of arbitrary and invidious discrimination against a person or class of persons. Under either approach the courts must decide whether the classification is unreasonable in that it preferentially and arbitrarily includes a class (special legislation) to the exclusion of all others, or improperly denies a benefit to a class (equal protection). *Illinois Polygraph Soc'y v. Pellicano*, 414 N.E.2d 458, 462-63 (Ill. 1980).

The federal constitutional protection of equality is generally discussed in the context of the scrutiny courts give to various types of legislative or administrative classifications. If the classification operates to the disadvantage of some suspect class, such as when lines are drawn on the basis of race, nationality or sex, or impinges upon a fundamental right explicitly or implicitly protected by the constitution, the courts will strictly scrutinize the classification to determine if the classification is required by a compelling governmental interest and if the means used are necessary to achieve that interest.\textsuperscript{188} If there is no suspect class or fundamental right involved, the courts will examine the classification only to determine if it rationally furthers some legitimate purpose.\textsuperscript{189} If the suspect classification does not appear on the face of the statute or regulation, it may still violate equal protection if the "purpose" of the classification was to produce a discriminatory effect.\textsuperscript{190}

While these standards specify how a court is to adjudicate an equal protection claim, they say very little about what the constitutional guarantee of equality really means. The United States Supreme Court has stated that, "a core purpose of the Fourteenth Amendment was to do away with all governmentally imposed discrimination based on race."\textsuperscript{191} But we are also reminded that the clause is not limited solely to racial discrimination.\textsuperscript{192}

An insight into what constitutes equality under the Fourteenth Amendment is provided by \textit{Brown v. Board of Education},\textsuperscript{193} where the Supreme Court observed the effects of segregation on Afro-American children in holding segregated schools unconstitutional. However, the \textit{Brown} focus on the effects of discrimination has been lost sight of in recent cases. For instance, in \textit{Personnel Administrator of Massachusetts v. Feeney},\textsuperscript{194} a veteran's preference law had the effect of excluding women from public employment, but the Court refused to strike the law, noting that "the Fourteenth Amendment

\textsuperscript{188} San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 16-17 (1973).
\textsuperscript{189} Id.
\textsuperscript{192} \textit{But see} Slaughter-House Cases, 83 U.S. (16 Wall.) 36, 81 (1872) ("We doubt very much whether any action of a state not directed by way of discrimination against the negroes as a class, or on account of their race, will ever be held to come within the purview of this provision.").
\textsuperscript{193} 347 U.S. 483 (1954).
\textsuperscript{194} 442 U.S. 256, 273 (1979).
guarantees equal laws, not equal results.’’ Feeney and similar cases\(^{195}\) which require a showing of ‘‘purposeful’’ discrimination where the discrimination is not apparent on the face of the statute make it difficult to determine what governmentally imposed discrimination is prohibited by the Fourteenth Amendment.\(^{196}\) 

Like the United States Supreme Court, the Illinois Supreme Court has set out a framework for equal protection analysis but has not defined what is meant by an equal education.\(^{197}\) The Illinois Supreme Court, like the United States Supreme Court, generally employs a two-stage analysis to determine whether a legislative classification deprives individuals of equal protection. When the statute under consideration affects a fundamental right or discriminates against a suspect class, Illinois courts are to subject the legislation to strict scrutiny and uphold it only if it serves a compelling state interest.\(^{198}\) When the classification does not affect a fundamental right or discriminate against a suspect class, the classification must bear a rational relationship to a valid legislative purpose and the classifications created by the statute will be set aside as violative of the equal protection clause only if based on reasons totally unrelated to the pursuit of a legitimate State goal.\(^{199}\)

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195. See supra note 190 and the cases cited therein.
197. The Illinois Supreme Court’s reliance on equal protection is of recent origin because until the Constitution of 1970, Illinois had no equal protection clause. Nonetheless, as early as 1882 the Illinois Supreme Court declared that segregated schools were illegal in Illinois without reference to equal protection. In Longress v. Board of Educ., 101 Ill. 308 (1882), the court relied upon a legislative enactment passed to implement art. VIII, § 1, of the 1870 Constitution to hold that a local school board could not exclude black children from a public school established for white children. See also Peair v. Board of Educ., 21 N.E. 187 (Ill. 1889); Bibb v. Mayor and Common Council of Alton, 61 N.E. 1077 (Ill. 1901).

One could argue that because the language of the Illinois Constitution is the same as the language in the federal Constitution that the two should be construed in the same manner. See, e.g., Fumarolo v. Chicago Bd. of Educ., 566 N.E.2d 1283, 1290 (Ill. 1991). However, in 1990, the Illinois Supreme Court, noting that the Illinois Constitution contains its own due process guarantee, held that while the Illinois courts may look to federal decisions to construe the due process clause, the final determination remains with the Illinois courts. Rollins v. Ellwood, 565 N.E.2d 1032 (1990); see also Hartigan v. Kennedy, 576 N.E.2d 107 (Ill. App. Ct. 1991). The same can be said about the equal protection clause.

199. Harris v. Manor Healthcare Corp., 489 N.E.2d 1374 (Ill. 1986); People v.
Because education is considered to be a fundamental right under Article X of the 1970 Illinois Constitution, the courts should strictly scrutinize the reasons offered by the State to justify why some persons are receiving an education inferior to that being received by others. This approach is similar to that used by the Illinois Supreme Court in Boynton v. Kusper, where the court invalidated a statute that raised marriage license fees and required county clerks to pass the increased money on to a fund to provide shelter to victims of domestic violence. The Court held that the tax singled out marriage as a special object of taxation and imposed “a direct impediment to the exercise of the fundamental right to marry.” The State had failed to demonstrate a “compelling State interest” to satisfy the strict scrutiny test.

But again, while this approach offers us a framework for analysis, it does not tell us what the Illinois Constitution means by the word “equal” and when the fundamental right to an education is being provided on an equal basis to all persons. The debates to the 1970 Illinois Constitution concerning Article I, section 2 do not help us in getting to the roots of what is an equal education in Illinois. A starting point might be to take a fresh look at the focus of Brown v. Board of Education on the affects of an unequal education. The Supreme Court went beyond a mere consideration of whether the physical facilities and other “tangible” factors in the all-black schools were equal and focused upon the psychological feelings of inferiority suffered by victims of racial segregation in determining that the right to an equal education had been violated. The end was that black children as well as white children were to be educated so that they

Esposito, 521 N.E.2d 873, 877 (Ill. 1988). The Illinois Supreme Court has stated that "the application of the equal protection clause of the Illinois Constitution is limited to instances of purposeful or invidious discrimination." People v. Anderson, 490 N.E.2d 1263, 1267 (Ill. 1986). The court has not specifically defined "purposeful" discrimination, but it defined invidious discrimination as occurring "when government withholds from a person or class of persons a right, benefit or privilege without a reasonable basis for the governmental action." Id.

201. 494 N.E.2d at 140-41.
202. 494 N.E.2d at 141.
203. In presenting the section to the delegates from the Bill of Rights Committee, Arthur T. Lennon observed that the clause would clearly announce the concept of fairness employed in equal protection. RECORD, supra note 20, at 1499.
205. 347 U.S. at 493.
206. 347 U.S. at 494.
could exercise the public responsibilities of good citizens.\textsuperscript{207} This was to be accomplished by "awakening the child to cultural values, [by] preparing him for later professional training, and [by] helping him to adjust normally to his environment."\textsuperscript{208} Equality as defined in \textit{Brown} would thus be achieved when all the vestiges of past discrimination had been removed,\textsuperscript{209} which seemed to imply when black children had the same educational opportunity "to succeed in life" as white children.\textsuperscript{210} More recent decisions focus less on the individual student and more on whether the state is operating a unitary school system.\textsuperscript{211} However, the Court has stressed in other recent cases that the focus of an equal protection case must be upon the individual.\textsuperscript{212} Therefore, the courts should not lose sight of the original focus in \textit{Brown} on the individual child and should concentrate on whether the system is providing each child with an equal opportunity to succeed in life.\textsuperscript{213}

Another useful case for measuring the right to an equal education is \textit{Lau v. Nichols}.\textsuperscript{214} Non-English-speaking Chinese students sued San Francisco school officials claiming that they were denied equal education opportunities because all teaching was done in English and non-English-speakers were given no special English instruction. The United States Supreme Court noted that under the California standards, "there is no equality of treatment merely by providing students with the same facilities, textbooks, teachers, and curriculum; for students who do not understand English are effectively foreclosed

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\item \textsuperscript{207} 347 U.S. at 493.
\item \textsuperscript{208} \textit{Id}.
\item \textsuperscript{209} Swann v. Charlotte-Mecklenburg Bd. of Educ., 402 U.S. 1, 15 (1971).
\item \textsuperscript{210} \textit{Brown}, 347 U.S. at 493.
\item \textsuperscript{213} The focus on the educational needs of the student was again explicitly recognized in Milliken v. Bradley, 433 U.S. 267 (1977). The Court’s holding in San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1 (1973), does not diminish this concern under the Illinois Constitution. The Court’s federalism concerns in Rodriguez lead it to deny that education alone was a fundamental right under the \textit{federal} Constitution. The Court specifically noted that “no charge fairly could be made that the [Texas] system fails to provide each child with an opportunity to acquire the basic minimal skills necessary for the enjoyment of the rights of speech and of full participation in the political process.” 411 U.S. at 37.
\item \textsuperscript{214} 414 U.S. 563 (1974).
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from any meaningful education." The Court held that the Chinese-speaking students received fewer benefits than the English-speaking majority by being denied a reasonable opportunity to participate in the educational program. The Court did not reach the equal protection argument, but instead relied solely on Section 601 of the Civil Rights Act of 1964 and the regulations adopted by the Department of Health, Education and Welfare (HEW) to implement Section 601 in finding that Chinese students had suffered discrimination. The Lau approach to what is meant by an equal education under federal regulations should be adopted by the Illinois Supreme Court as the proper approach to determine if the right to an equal education is being abridged in violation of the Illinois equal protection clause. Lau is consistent with the command in Article X, section 1 that all persons be educated "to the limits of their capacities." Whether discussing the rights of racial or ethnic minorities, or the rights of children residing in school districts with a low tax base, or the rights of mentally, physically, or socially disabled students, the concept of equal educational opportunity is not an empty vessel. The courts must

215. 414 U.S. at 566.
216. 414 U.S. at 568.
217. The equal protection claim was also avoided in Elliot v. Board of Education, 380 N.E.2d 1137 (Ill. App. 1978). The parents of a handicapped student sued the Chicago Board of Education claiming that the Board was liable to pay for the special education of handicapped students who had been excluded from the public schools. They relied upon Mills v. Board of Education, 348 F. Supp. 866 (D.D.C. 1972) and Pennsylvania Association for Retarded Children v. Pennsylvania, 334 F. Supp. 1257 (E.D. Pa. 1971), to establish that the classifications of handicapped students in such manner as to deny them a free public education violated equal protection. However, the court held that article X, section 1 of the 1970 Illinois Constitution required the state to provide a tuition-free education through the secondary level and, therefore, found it unnecessary to determine the equal protection claim. 380 N.E.2d at 411.
219. HEW’s regulations, 45 C.F.R. § 80.3(b)(1) (1970), specified that a recipient could not:
   (i) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program.
   (ii) Provide any service, financial aid, or other benefit to an individual which is different, or is provided in a different manner, from that provided to others under the program.
   (iv) Restrict an individual in any way in the enjoyment of any advantage or privilege enjoyed by others receiving any service, financial aid, or other benefit under the program.
220. In Regents of the University of California v. Bakke, 438 U.S. 265, 287 (1978), the Court held that section 601 proscribes only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment.
look to whether the individual student is being given the same opportunity to succeed in life as other children in the State. This does not require that all children achieve the same test scores, but it does require that the system be set up so that each child will be awakened to cultural values, will be prepared for some later professional training, and will be enabled to adjust normally to his environment.

These goals can be judged objectively with respect to the particular program at issue in each case. If per-pupil expenditures are unequal in different parts of the state and if as a result of this inequality students in some districts have less opportunity to be educated to "the limits of their capacities" than in other districts, the right to an equal education is violated.

In deciding whether per-pupil expenditures violate equal protection, the Illinois courts can refer to the reapportionment cases that establish the one person/one vote principle. In *Reynolds v. Sims*, the United States Supreme Court recognized that "[d]iluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." Similarly, diluting a student's education because of place of residence impairs the student's basic constitutional rights. Although this principle was repudiated by the United States Supreme Court in *Rodriguez*, that decision rested solely on federal constitution grounds. The principle applies in Illinois because of the different status accorded education under the 1970 Illinois Constitution.

What the courts state about mathematical equality in voting right cases is also relevant in determining whether differences in per-pupil expenditures violate equal protection. In voting cases the courts have recognized that some deviation from the one person/one vote principle is permissible. In *Gaffney v. Cummings*, the United States Supreme Court stated:

Fair and effective representation may be destroyed by gross population variations among districts, but it is apparent that such representation does not depend solely on mathematical

221. 377 U.S. 533, 566 (1964) (citations omitted).
222. In Mahan v. Howell, 410 U.S. 315, 329 (1973), the Supreme Court noted that, "Neither courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the exact mathematical formula that establishes what range of percentage deviations is permissible, and what is not."
223. 412 U.S. 735, 748-49 (1973) (citations omitted).
equality among district populations. There are other relevant factors to be taken into account and other important interests that States may legitimately be mindful of. An unrealistic overemphasis on raw population figures, a mere nose count in the districts, may submerge these other considerations and itself furnish a ready tool for ignoring factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement.

In a case involving per-pupil expenditures, the end is equal educational opportunity. An analysis of per-pupil expenditures is a starting point in determining equal educational opportunity but mathematical equality is not the sole relevant factor to be considered. Lau demonstrates that merely providing students with equal educational materials does not guarantee equal opportunity. For instance, the drafters of Article X, section 1 of the 1970 Illinois Constitution wanted to guarantee that handicapped students would be provided with special educational opportunities. Results were important to them. If inequalities in per-pupil expenditures result in students receiving grossly unequal educational opportunities then the inequalities must be remedied.

However, the mere fact that expenditures are equal does not guarantee that handicapped and other disadvantaged students are receiving equal educational opportunities. Ultimately it is the result that should determine if the promise of an equal education is being fulfilled in Illinois.\(^{224}\)

\(^{224}\) Thus, it can be argued that the Bush administration proposals to promote freedom of choice for students among public and private schools may not be sufficient to satisfy the demands of Article I, section 2 and Article X, section 1 of the Illinois Constitution. Freedom of choice would probably be implemented by providing students with vouchers so they could go to any public or private school they chose. To the extent that these vouchers would fail to reflect the added costs of educating handicapped and other disadvantaged students they would fail the Article X, section 1 goal of providing for the “educational development of all persons to the limits of their capacities.”

To the extent that public funds may be used to support education in private sectarian schools, serious problems arise under the Establishment Clause of the First Amendment. In this regard the 1970 Illinois Constitution, Article X, section 3, is even more specific than the First Amendment. It provides that:

Neither the General Assembly nor any county, city, town, township, school district, or other public corporation, shall ever make any appropriation or pay from any public fund whatever, anything in aid of any church or sectarian purpose, or to help support or sustain any school, academy, seminary, college, university, or other literary or scientific institution, con-
V. THE DISTINCTION BETWEEN "POLITICAL" AND JUSTICIABLE QUESTIONS

The Illinois courts have an obligation to hear cases involving educational equality, and they should not dismiss such cases on the ground that they present "political questions." The United States Supreme Court has regularly decided issues that impact on education, although a number of opinions do recognize that a federal court's role is not unlimited when it comes to restructuring an educational system. A number of state courts throughout the country have been asked to determine whether school finance schemes violate their state constitutions, and many of these courts have rejected the argument that such issues present non-justiciable political questions.

 controlled by any church or sectarian denomination whatever; nor shall any grant or donation of land, money, or other personal property ever be made by the State, or any such public operation, to any church, or for any sectarian purpose.


226. Although the Court has generally supported busing within a single school district, see supra note 225, the Court has expressed reluctance to order interdistrict remedies. In Milliken v. Bradley, 418 U.S. 717 (1974), the Court noted the deeply rooted tradition of "local control over the operation of schools" and the "array of other problems in financing and operating this new [consolidated, multi-district] system." In San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 40 (1973), the Court noted its reluctance to intrude into the area of how the state has chosen to raise and disburse state and local tax revenues, an area in which the federal courts have "traditionally deferred to state legislatures." It expressed similar reluctance to impose its views about the goals of public education. Id. at 43.

But see, Missouri v. Jenkins, ____U.S.____, 110 S.Ct. 1651 (1990) (approving a lower court order imposing an increase in the property taxes to be levied by a school district to fund a desegregation decree); Milliken v. Bradley (II), 433 U.S. 267 (1977) (affirming a lower court decree that required the state to provide a remedial program in the areas of reading, in-service teacher training, testing and counseling to remedy the effects of past racial segregation).

227. See supra, notes 106-09.

228. E.g., Rose v. Council for Better Educ., 790 S.W.2d 186 (Ky. 1989) (holding that a court decree that Kentucky's system of financing education is unconstitutional
A. FEDERAL COURTS

The leading case on what constitutes a political question in the federal courts is *Baker v. Carr*. The opinion bases the political question doctrine on separation of powers and notes that it is the responsibility of the Court to decide "whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed." The reapportionment claim presented in *Baker v. Carr* was grounded on the equal protection clause. Justice Brennan correctly noted that challenges on the basis of a constitutional deprivation of individual rights presents the classic justiciable question.

Once a case is found to present a justiciable case or controversy the federal courts cannot decline to hear the matter. The federal courts have carved out a narrow group of cases which they can abstain from hearing on policy grounds, but the rationale for the abstention doctrine is grounded in federal-state relations and not in separation of powers concerns as was the case in *Baker v. Carr*.

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230. *Id.* at 209 ("The mere fact that the suit seeks protection of a political right does not mean it represents a political question.").
231. *Id.* at 211.
232. *Id.* at 229.
233. *Cohens v. Virginia*, 19 U.S. (6 Wheat) 264, (1821) ("We have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.").
Difficult cases are sometimes avoided by resorting to the discretion traditionally available to chancellors in equity. A good example is *O'Shea v. Littleton*, where the Supreme Court was faced with the question whether civil rights plaintiffs could sue state trial judges for equitable relief on the ground that the judges had engaged in racial discrimination when they set bonds and imposed sentences in criminal cases. However, the Court again cited federalism concerns to avoid the issue:

'[R]ecognition of the need for a proper balance in the concurrent operation of state courts counsels restraint against the issuance of injunctions against state officers engaged in the administration of the state's criminal laws in the absence of a showing of irreparable injury which is "both great and immediate."'236

The policy reasons behind those restraints that are grounded on federalism have no relevance to the question whether a state court should enjoin state school officials from denying children an equal education. The concern is rather one of separation of powers as defined by state law.

B. ILLINOIS COURTS

Many of the early "political question" cases in Illinois turned on the archaic reasoning that a court of equity would not protect "political" as distinguished from "civil" rights.237 Other cases were more properly termed "political" because they presented issues that had been committed exclusively to another branch of the government.238

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236. Id. at 499. The Court recognized that resort to the criminal laws could be used to punish errant judges. Also, defendants could move for a substitution of judge, a change of venue, or they could seek review by direct appeal or post conviction collateral appeal. Id. at 502-03.
237. Fletcher v. Tuttle, 37 N.E. 683 (Ill. 1894) (right to vote); see also Malkin v. City of Chicago, 127 N.E.2d 145 (Ill. App. Ct. 1955) (the right to hold a public office); Daly v. Madison County, 38 N.E.2d 160 (Ill. 1941); Fletcher v. City of Paris, 35 N.E.2d 329 (Ill. 1941) (the right not to have public funds spent for an unlawful use); People v. McWeeney, 102 N.E. 233 (Ill. 1913) (the right to organize a political convention). These cases were all found to involve "political rights" so that a court of equity could not intervene to protect them by injunction.
238. See, e.g., Orme v. Northern Trust Co., 102 N.E.2d 335 (Ill. 1951) (the determination of when a war is terminated rests with Congress or the President and not with the courts); Village of Hyde Park v. Oakwoods Cemetery Ass'n, 7 N.E.2d 627 (Ill. 1886) (The determination of what is a public benefit for eminent domain purposes belongs exclusively to the legislature.).
More recent Illinois decisions follow *Baker v. Carr* and ground the "political question" doctrine on separation of powers concerns. The leading Illinois case is *Rock v. Thompson*. State senators petitioned for a writ of mandamus directing the Governor to convene the Senate so it could elect a presiding officer and for an injunction to restrain another senator from assuming the office of President of the Senate. The Illinois Supreme Court noted that the suit presented the narrow question whether the Governor had complied with the constitution, and found that the doctrine of separation of powers did not prevent "the court from ascertaining compliance with or mandating performance of constitutional duties."

The court emphasized "it is the duty of the judiciary to construe the constitution and determine whether its provisions have been disregarded by the actions of any of the branches of government."

The "political question" defense has generally not been a major issue in most Illinois cases involving the right to an education. The doctrine clearly does not apply when individual students claim a violation of their rights by school authorities. Thus, the Illinois courts have adjudicated claims involving racial segregation, claims about school prayer, claims that public funds are used to finance religious education, and claims that the state is failing to meet the needs of handicapped students.

The courts have applied the "political question" defense in a series of cases involving the power of the legislature to determine the

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239. 369 U.S. 186 (1962).

240. Kluk v. Lang, 531 N.E.2d 790, 797 (111. 1988) (holding that a statute providing a method for filling vacancies to the General Assembly was not unconstitutional); Rote v. Washington, 500 N.E.2d 463, 466 (Ill. App. Ct. 1986) (court could properly decide whether city council acted in accord with its rules); Murphy v. Collins, 312 N.E.2d 772 (Ill. App. Ct. 1974) (court can consider whether a legislative investigation can be delegated to a committee).


242. 426 N.E.2d at 896.

243. *Id.* (quoting *Harrod v. Illinois Court Comm'n*, 372 N.E.2d 53 (Ill. 1973)).


boundaries of school districts. A major question in these cases has been the meaning of the words "a thorough and efficient system of free schools, whereby all children of this State may receive a good common school education" found in Article VIII, section 1 of the 1870 Illinois Constitution.

In People ex rel. Leighty v. Young, Justice Cartwright articulated what is and is not justiciable under that clause. He noted that the legislature has discretion to determine what shall constitute a good common school education because there is not, and was not at the adoption of the constitution, any accepted definition of that term. However, he held that the legislature had no discretion to provide a system which deprives any children of the State of the opportunity to obtain a good common school education.

What Justice Cartwright said about Article VIII, section 1 of the 1870 Constitution is directly applicable to Article X, section 1 of the 1970 Constitution. The Illinois Supreme Court has held that the question whether Article X, section 1, paragraph 3 of the 1970 Illinois Constitution, which reads that, "The State has the primary responsibility for financing the system of public education," requires the State to provide not less than 50% of the funds needed to operate and maintain public elementary and secondary schools is justiciable. Justice Schaefer stated for the court:

> It is suggested that the cases do not present a justiciable question, that the court lacked jurisdiction because the issue presented is a 'political' one, and also that the actions should not have been entertained because 'specific relief through a decree of conclusive character' was not requested. It is apparent, however, that the controversy is real and that the substantial interests involved are practical and financial, rather

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248. People ex rel. Leighty v. Young, 139 N.E. 894 (Ill. 1923); People v. Deatherage, 81 N.E.2d 581 (Ill. 1948); People ex rel. McLain v. Gardner, 96 N.E.2d 551 (Ill. 1951).

249. The language of the 1970 Illinois Constitution is more specific: A fundamental goal of the People of the State is the educational development of all persons to the limits of their capacities. The State shall provide for an efficient system of high quality public educational institutions and services. Education in public schools through the secondary level shall be free. There may be such other free education as the General Assembly provides by law. Ill. Const., art. X, § 1 (1970).

250. 139 N.E. 894, 896-97 (Ill. 1923).

than 'political.' The claim of the plaintiffs is that the 1970 constitution requires that a portion of the burden of financing the State's educational system be shifted from one group of taxpayers to another. Contrary positions are asserted on the one hand by the property taxpayers, and on the other by the Superintendent of Public Instruction represented by the Attorney General. The relief prayed in both complaints is a declaration of the invalidity of those provisions of the School Code which relate to the furnishing of State funds to local school districts. We therefore conclude that the controversy is a justiciable one, of which the court had jurisdiction.

The court held on the merits that the section did not impose a specific obligation on the General Assembly, but rather stated a goal. These holdings strike the right balance between political and justiciable questions. It is the function of the courts to interpret the words of the constitution to determine if they impose specific obligations on the other branches of government and, if they do, to give them effect. The 1970 Illinois Constitution placed a more specific obligation on the State to provide all children with an education than had been the case previously. That all persons are to be educated to the limits of their capacities is stated as a goal, and this goal is to be effectuated by the specific requirement that, "The State shall provide for an efficient system of high quality public educational institutions and services." As Justice Cartwright articulated in construing the 1870 Constitution, this does not mean that courts are to decide what is a proper curriculum, but it does mean that the essential question whether the education being provided by the state allows all children an equal opportunity to develop to the limits of their capabilities is clearly justiciable.

VI. Conclusion

The drafters of the 1970 Illinois Constitution intended to make the principle embodied in Brown v. Board of Education that all children be educated to the limits of their capacities a primary goal.
in Illinois. They established a right to an education and further provided that this right must be equally available to all children. The enforcement of this right is not left to the sole discretion of the legislature. It is a right granted to each and every child in Illinois regardless of the school district where the child happens to be placed. The Illinois courts have a strong tradition in enforcing the right to an equal education. This tradition is consistent with the principle that the essence of American constitutionalism is that the courts provide a remedy when a person’s rights are violated.

The issue of current interest in Illinois is whether the disparity of funding between school districts is unconstitutional. As interpreted by the United States Supreme Court, the United States Constitution probably does not supply a remedy. However, the emphasis placed in the Illinois Constitution on the equal education of all persons does. If students in Cairo or Chicago do not have the same opportunity to “educational development to the limits of their capacities” as students in other parts of the State, the State has the duty under the Illinois Constitution to correct that disparity. If the disparity is caused by unequal funding, the Illinois legislature has an obligation to devise a plan that will remedy the problem. If the legislature fails to act, the courts may order it to do so.

While the Illinois Supreme Court has had few opportunities to interpret and enforce Article X of the 1970 Constitution, we believe that the court will take an activistic approach in reviewing state legislation to determine if individuals are being denied their right to an equal education. Given the court’s long history of support for the right to an equal education and the growing trend in this State and others, in support of the enforcement of provisions of state constitutions, this conclusion is clearly warranted. In this era of declining involvement of the United States Supreme Court on issues which it

257. In introducing the education article, Ill. Const., art. X, § 1 (1970), Delegate Patch commented:
No longer can educational development be for a certain people or a particular section of our society. We cannot close our eyes to the perceptual and exceptional child; the mentally or physically handicapped or the gifted; the under-privileged; the oppressed. No, we have realized on our committee—and we hope that you will realize—that they, too, are human beings with the same rights as everyone else. We, the people, the state, society can no longer hide from the fact that thousands and thousands and thousands of youngsters in our community are not being developed to the fullest of their capacity.

Record, supra note 120, at 763-64 (1970).
believes are best handled at the state or local level, state courts must show a greater commitment to enforcing the right of individuals to an equal education. Based on the broad powers and remedies available to the Illinois Supreme Court, we believe that the court will not shrink from its responsibility to enforce the right of all persons to an equal education.