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THE WISDOM OF *PLYLER v. DOE*

STUART BIEGEL†

In the weeks and months following the voters' approval of California Proposition 187, much attention has been focused on the Fourteenth Amendment case of *Plyler v. Doe*,¹ the United States Supreme Court decision that is directly on point.

Plaintiffs in *Plyler* successfully challenged the constitutionality of a Texas statute that prohibited undocumented students from enrolling in public schools.² Throughout the campaign of 1994, opponents of Proposition 187 cited *Plyler* in support of the argument that the initiative's prospective exclusion of undocumented persons from all publicly funded educational institutions was unconstitutional. Supporters of 187 countered with a variety of contentions, including criticisms of the reasoning in the *Plyler* case itself.³ Key lines from then Chief Justice Warren Burger's dissent were quoted widely:

[*Plyler*] . . . rests on such a unique confluence of theories and rationales that it will likely stand for little beyond the results in these particular cases⁴ By patching together bits and pieces of what might be termed quasi-suspect-class and quasi-fundamental-rights analysis, the Court spins out a theory custom-tailored to the facts of these cases.⁵

This Article seeks to address these criticisms by revealing the wisdom of the *Plyler* decision and its potential applicability to the realities of the 1990's. Through an exploration of how the *Plyler* framework might be employed to assist disadvantaged children of poverty in a school choice context, the Article will

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1. 457 U.S. 202 (1982).

2. *See id.* at 205, 230.

3. Proponents also argued (and continue to argue) that the situation in California differed greatly from the situation in Texas fifteen years earlier. *See* Ron Prince, *Americans Want Illegal Immigrants Out*, L.A. TIMES, Sept. 6, 1994, at B7.

4. *Plyler v. Doe* consolidated a number of similar lower court cases that had been filed in the U.S. District Courts for the Eastern, Southern, Western, and Northern Districts of Texas. *Id.* at 206-9.

5. *Id.* at 243-44 (Burger, C.J., dissenting).

demonstrate the relevance and continued viability of *Plyler v. Doe*.⁶

The *Plyler* Court determined that a Texas law prohibiting undocumented children from attending public schools infringed upon the important interests of a burdened class. In doing so, the Court based its reasoning on the emerging heightened scrutiny jurisprudence in federal Equal Protection Clause cases.⁷ Writing for the majority, Justice Brennan first referenced the occasionally suspect nature of an alienage classification, and then proceeded to identify a poignant parallel between the undocumented students in this case and the illegitimate children of previous cases. Building on this discussion, he cited a wide variety of school-related cases in support of his assertion that education was not "merely some governmental 'benefit' indistinguishable from other forms of social welfare legislation," but an important interest that plays a "fundamental role in maintaining the fabric of our society."⁸

After identifying both a key interest in education and an implicated class of young people in the facts of the case,⁹ Brennan noted the continuing vitality of the right to equal educational opportunity.¹⁰ Because Brennan concluded that dire consequences would result from a denial of the right to education, he concluded that this deprivation should trigger heightened scrutiny

6. This discussion builds upon the author's analysis in a previous article and the conclusions of several other commentators. See Stuart Biegel, *Reassessing the Applicability of Fundamental Rights Analysis: The Fourteenth Amendment and the Shaping of Educational Policy after Kadrmas v. Dickinson Public Schools*, 74 CORNELL L. REV. 1078, 1086-99 (1989) [hereinafter *Fundamental Rights Analysis*]. See also Susan H. Bitensky, *Theoretical Foundations for a Right to Education under the U.S. Constitution: A Beginning to the End of the National Education Crisis*, 86 NW. U. L. REV. 550, 567-73 (1992); Dennis J. Hutchinson, *More Substantive Equal Protection*, 1982 SUP. CT. REV. 167; T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943, 970-71 (1987).

7. See *Fundamental Rights Analysis*, *supra* note 6:

Read together with . . . [Vlandis v. Kline, 412 U.S. 441 (1973), Regents of the Univ. of Michigan v. Ewing, 474 U.S. 214 (1985), Board of Educ. v. Rowley, 458 U.S. 176 (1982), and Honig v. Doe, 484 U.S. 305 (1988)] . . . Plyler v. Doe can be viewed as much more than simply an isolated, result-oriented decision. The heightened scrutiny employed by the *Plyler* Court, balancing a recognized student interest against the interests of the school district and the state, cannot simply be dismissed as a unique confluence of theories when other decisions have employed techniques of heightened review triggered at least in part by an express or implied denial of equal educational opportunity

Justice White's language in *Vlandis* continues to be an appropriate description of this framework. The greater the weight and value of the interest, the more difficult it is to justify state action that may infringe upon the interest.

Id. at 1095-97.

8. 457 U.S. at 220-21.

9. *Id.* at 218-21.

10. See *id.* at 221-23.

under the Equal Protection Clause.¹¹ Unlike many fundamental rights cases, where the interest is found to be fundamental and the level of scrutiny is therefore deemed to be "strict," the Court in *Plyler* labeled the interest "important" and stated that educational process plays a "fundamental" role.¹² This important interest, bolstered by the equal access guarantees and the identification of a disabling status, thus triggers a level of scrutiny that falls somewhere between the rational relationship standard and strict judicial review.¹³

Although the Court was unwilling to extend the rationale of *Plyler* to a different set of facts in 1988,¹⁴ prospective plaintiffs in a school choice context may find the federal courts much more receptive today. The gulf between the "haves" and the "have-nots" in America continues to widen, and federal judges may very well decide that it is time to step in and help reverse this dangerous trend.¹⁵ These educational inequities may be challenged through test cases, as described in the following two case studies.

I. CASE STUDY ONE: TUITION REQUIREMENTS AND OTHER EDUCATIONAL COSTS IN A SCHOOL CHOICE CONTEXT

School choice has moved to the center of the national stage.¹⁶ Fueled by tireless proponents and supported in growing numbers by an electorate that is increasingly fed up with the status quo,¹⁷ the school choice "movement" has already changed

11. See *id.* at 218-24.

12. See *id.* at 221.

13. While the rational relationship standard requires only that the state action "be shown to bear some rational relationship to legitimate state purposes," the strict scrutiny standard requires that the state action "further a compelling state interest." See *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 16, 40 (1973).

14. See *Kadrmas v. Dickinson Pub. Schs.*, 487 U.S. 450 (1988).

15. See generally Michael W. Kirst & Allan Odden, *National Initiatives and State Education Policy*, 4 STAN. L. & POL'Y REV. 99, 104-9 (1992-1993) (an overview of school finance policy issues triggered by recent reform efforts).

In California, for example, a conservative state supreme court recently embraced the right to equal educational opportunity and employed aggressive language that reminded many court observers of decisions written by former Chief Justice Rose Bird in the late 1970s. See *Butt v. State of California*, 842 P.2d 1240 (Cal. 1992). See generally Claire Cooper, *Rights, Remedies and Retreats*, CAL. LAW., Mar. 1993, at 31.

16. See, e.g., PETER W. COOKSON, *SCHOOL CHOICE: THE STRUGGLE FOR THE SOUL OF AMERICAN EDUCATION* (1994).

17. See generally Susan Chira, *Furor over 'Choice'*, N.Y. TIMES, Oct. 28, 1992, at A16; JAMES DAVISON HUNTER, *CULTURE WARS: THE STRUGGLE TO DEFINE AMERICA* (1991).

Visiting an election night gathering of school choice advocates in San Francisco on November 2, 1993, a reporter filed the following description:

the landscape of public education in the United States.¹⁸ Seeking to blunt the momentum of this bandwagon, state legislatures and local districts have instituted a variety of attractive choice options within the public schools.¹⁹ Choice advocates continue to move forward with a variety of proposals for using public money to fund K-12 education at *all* schools, private and public.

The Republican Party's sweeping victory in the 1994 mid-term elections represented a major turning point for the school choice movement. Prominent Republican leaders who had been supporters of school vouchers for years suddenly found themselves in positions of great power and influence.²⁰ And the

We are talking here about the foot soldiers, the people who turn out for rallies, troll supermarkets with clipboards, mail campaign flyers, call talk shows. Their issue now is vouchers, but before it was property taxes and government spending caps What to call them? Labels like conservative or libertarian don't quite hit the mark. Often, in the early going, they are dismissed as gadflies They tend to rally around ideas more than individuals. They are not the creation of the Perots and Limbaughs; quite the opposite is true. They don't move in lock-step, but come to politics with pet interests that can intersect. They are not a majority, but a base. As for policies, they gravitate toward blunt instruments, like term limits. One common belief transcends all others: If government is doing it, it must be wrong. To these people, the voucher debate is not quite about education policy. It is, more precisely, about taxes and bureaucrats. About how the money is spent They knew they were going down hard this time and consoled themselves by recalling how Howard Jarvis had waged the property tax crusade across 15 years and three defeats before Proposition 13 finally passed. They seemed prepared for a war of attrition

Peter H. King, *Readin' and Writin' and Revolution*, L.A. TIMES, Nov. 7, 1993, at A3.

One year later, these same "foot soldiers" nationwide helped fuel extensive Republican party victories. See, e.g., Charles V. Zehren, *The Value of the Vote: It Was a 'Cultural Revolution' That Swept the GOP to Power*, NEWSDAY, Nov. 15, 1994, at A06; Frank Luntz, *Rules of the Road*, WASH. POST, Nov. 11, 1994, at A31; John P. Walters, *The New Citizenship: A People's Manifesto*, WASH. TIMES, Nov. 11, 1994, at A25.

18. See Stuart Biegel, *School Choice Policy and Title VI: Maximizing Equal Access for K-12 Students in a Substantially Deregulated Educational Environment*, 46 HASTINGS L.J. 1533 (1995).

Not only do proponents proclaim that "the school-choice train has left the station . . . and it's not stopping for anything," but objective observers concede that "in the broad sense" school choice is "[not] . . . really a questionable concept anymore." And Ernest L. Boyer, the highly respected president of the Carnegie Foundation for the Advancement of Teaching, recently declared that today "[i]t's almost impossible to say 'no' to choice in the abstract It's almost un-American." See Lynn Olson, *Choice for the Long Haul*, EDUC. WEEK, Nov. 17, 1993, at 27. See generally James S. Liebman, *Voice, Not Choice*, 101 YALE L.J. 259 (1991).

19. See generally AMY STUART WELLS, *TIME TO CHOOSE: AMERICA AT THE CROSSROADS OF SCHOOL CHOICE POLICY 62-95* (1993). See also Mark Gladstone, *School Choice Initiative Boosts Other Reform Plans*, L.A. TIMES, June 1, 1993, at A1.

20. In addition to House Speaker Newt Gingrich, who has openly supported school vouchers, Jack Kemp, Rush Limbaugh, and William Bennett have been "called upon" by the pro-voucher group Save Our Schoolchildren for support. And among those who attended a Save Our Schoolchildren rally in Jersey City in late 1994 were former Secretary of Education Lamar Alexander and Republican National Committee Chair Haley Barbour. See Kimberly J. McLarin, *School Revolution Rages Under Miss Liberty's Eye*, N.Y. TIMES, Oct. 11, 1994, at § 1, at 42.

Christian Coalition, which played a central role in helping Republicans win key state and federal offices, has included school choice on its list of pivotal national goals.²¹

Choice proponents see the greatest potential for change at the state and local levels.²² As an example, they cite the 1994 election of George W. Bush, an outspoken supporter of voucher programs, as governor of Texas.²³ They point to New Jersey, where Governor Christine Todd Whitman has unveiled a state-wide pilot voucher program for first and ninth-grade students.²⁴ They also note a changing balance of power in the legislatures of such states as Illinois and North Carolina,²⁵ and Arizona, Florida and Georgia, where voucher supporters were elected to the office of state education chief.²⁶

In mid-1995, Ohio and Wisconsin took significant steps forward in this regard. Ohio provided funding for a pilot voucher program in the Cleveland area beginning with the 1996-1997 school year.²⁷ In Wisconsin, the legislature expanded Milwaukee's five year-old voucher program to include private religious schools for the first time.²⁸

21. See Derrick DePledge, *Religious Right Inherits Chance to Sway GOP*, SAN DIEGO UNION-TRIB., Nov. 19, 1994, at A1.

22. Education has in fact traditionally been seen as the "province" of the states. The word is not even mentioned in the federal constitution, and thus education became a "power" reserved to states under the Tenth Amendment. See, e.g., E. REUTER, *THE LAW OF PUBLIC EDUCATION* 2 (4th ed. 1994).

23. See Terrence Stutz, *School Reform in the Wind: Bush Win May Bring Most Change in Years*, DALLAS MORNING NEWS, Nov. 14, 1994, at 1A.

24. See Kimberly J. McLarin, *Voucher Plan Is Unveiled for Schools in Jersey City*, N.Y. TIMES, Oct. 6, 1994, at B8.

25. See Steve Neal, *Phillip, Daniels Ready to Take Control*, CHI. SUN-TIMES, Nov. 10, 1994, at 41 ("With the GOP in charge of the General Assembly, school choice and tuition tax credits are likely to be seriously considered."); Nancy H. McLaughlin, *Republicans May Revisit School of Choice Idea; School Leaders Worried*, GREENSBORO NEWS & REC., Nov. 12, 1994, at B1 ("Schools-of-choice advocates may have been the biggest winners in Raleigh this week, as Republicans gained control of the state House — and its agenda — for the next two years.")

26. See Hal Mattern, *Graham Is Elected Schools Chief; Backer of Vouchers, Choice*, ARIZ. REPUBLIC, Nov. 9, 1994, at A14 (Lisa Graham's election to the office of Arizona State Superintendent of Public Instruction); *New Education Chief Plans to Test School Vouchers*, N.Y. TIMES ABSTRACTS, Nov. 15, 1994 (Frank Brogan's election to the office of Florida Education Commissioner); Dick Williams, *The Lesson: Ideas Have Consequences*, ATLANTA J. & CONST., Nov. 15, 1994, at A18 (discussing, among other things, Linda Schrenko's election to the office of Georgia State School Superintendent).

27. See *Voinovich Signs Two-Year Budget Plan*, THE PLAIN DEALER, July 1, 1995, at 1A. Under the plan, between 1,000 and 2,500 public school students would be awarded vouchers of up to \$2,500 which could be used to attend private sectarian schools. See generally Drew Lindsay, *Wisconsin, Ohio Back Vouchers for Religious Schools*, EDUC. WK., July 12, 1995, at 1.

28. See Roger Worthington, *Milwaukee's Pioneering 'Choice' Voucher Program Nears Expansion*, CHI. TRIB., July 16, 1995, at 3. See Drew Lindsay, *Wisconsin, Ohio Back Vouchers For Religious Schools*, EDUC. WK., July 12, 1995, at 1. Under the new legislation, the number of students who would be eligible to participate was

A major barrier to equal access in school choice policy is the prospective requirement that families contribute additional out-of-pocket funds to help subsidize a "better" education. While public school choice programs do not generally require parents to expend additional financial resources, deregulated public charter schools may ask parents to help finance a variety of enrichment programs and activities. In addition, the parent involvement that may be built into local school charter proposals could constitute a hidden cost to mothers and fathers who are working long hours to make ends meet.²⁹

In the school voucher context, however, significant denials of equal educational opportunity are likely to result from additional financial imperatives. Consistent with free market principles, most private school choice proposals would allow schools to establish their own tuition requirements. While some schools might indeed decide to accept a voucher as full payment for tuition, other institutions could charge any additional fees that the market would bear.³⁰

Litigants seeking equal access in school choice settings can turn to the heightened scrutiny analysis articulated by the Supreme Court in *Plyler v. Doe*.³¹ Applying the framework set forth by the Court, poor families constituting a burdened class will argue that school choice programs with additional financial obligations amount to an unconstitutional infringement of their interest in equal educational opportunity.³²

increased from 1,500 to 15,000. See generally Kimberly J. McLarin, *In Test of School Voucher Idea, the Sky's Not Falling but Neither is Manna*, N.Y. TIMES, Apr. 19, 1995, at B10.

29. For example, according to Dr. Amanda Datnow (who studied the charter school movement in Los Angeles as a Ph.D. candidate at the UCLA Graduate School of Education & Information Studies), the Palisades High School "cluster" that recently gained charter school status had generated a good deal of controversy by stipulating in its proposal that parents had to commit to a certain level of involvement in school affairs. After informal intervention by both the Mexican American Legal Defense and Educational Fund and the NAACP, this requirement was deleted from the high school level guidelines. At the elementary level, however, a certain amount of parental involvement will be mandatory. Interview with Dr. Amanda Datnow, in Los Angeles, Cal. (Dec. 19, 1993).

In addition, the Palisades proposal included a community service requirement which may generate "hidden" costs for parents. *Id.*

30. In the generic plan set forth by John Chubb and Terry Moe: "Schools will set their own 'tuitions.' They may choose to do this explicitly — say, by publicly announcing the minimum scholarship they are willing to accept." See JOHN E. CHUBB & TERRY M. MOE, *POLITICS, MARKETS AND AMERICA'S SCHOOLS* 222 (1990).

31. 457 U.S. 202 (1982).

32. See LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* 1610-16 (2d ed. 1988). Plaintiffs challenging school voucher plans must first address the state action issue. Traditionally, the Fourteenth Amendment is deemed to control only the actions of the government or governmental entities. The Equal Protection Clause is therefore viewed as a guarantee that certain actions by the state will or will

A Fourteenth Amendment case can be built by employing *Plyler v. Doe*³³ and other recent cases where the Court covertly applied heightened scrutiny. Read together with these cases, *Plyler* stands for the proposition that the federal courts will apply an intermediate level of review under the Equal Protection Clause to protect burdened classes that have been denied important interests. The "fundamental rights" approach set forth by the Court identifies a disadvantaged class of children and documents the extent to which they have been deprived of an education. The extent and nature of the deprivation of equal education opportunity appears to determine whether heightened scrutiny applies.³⁴

A. *The Implicated Class: Children of Poverty*

The Fourteenth Amendment heightened scrutiny framework requires the identification of a disadvantaged class. To qualify as a group that has been burdened in this manner,³⁵ plaintiffs must be "a discrete class of children not accountable for their disabling status."³⁶

Poor families challenging tuition requirements, additional fees for educational services in a publicly funded choice program, or both, would be likely to qualify as a disadvantaged class for equal protection purposes. The existence of a growing underclass of students who are not accountable for their low socioeconomic status has been documented in great detail by the Panel

not take place. See GERALD GUNTHER, CONSTITUTIONAL LAW 889-925 (12th ed. 1991). The extent to which the state is required by the Constitution to act affirmatively continues to be the subject of much controversy. See, e.g., Laurence H. Tribe, *The Abortion Funding Conundrum: Inalienable Rights, Affirmative Duties, and the Dilemma of Dependence*, 99 HARV. L. REV. 330 (1985).

Defendants are likely to argue that private school choice does not amount to state action, contending that the impact of such programs is merely the result of private action, that is, the action of parents once government money is given to them, the action of private schools that establish their tuition rates, or both. Aggrieved families could successfully counter this assertion by explaining that the impact of school choice is the direct result of the government's central role in establishing a state-mandated program that allocates public money to families. It is this state action by the government that creates a new and unconstitutional educational system when schools are allowed to establish their own tuitions in a free market setting.

With the exception of the small number of privately funded choice plans, all choice programs are mandated and funded by state legislatures, local public school districts, or both. See generally WELLS, *supra* note 19.

33. 457 U.S. 202 (1982).

34. See *Fundamental Rights Analysis*, *supra* note 6, at 1096-97, 1100, 1103-08.

35. Under the hierarchy of Equal Protection Clause jurisprudence, burdened classes fall below both suspect classifications, which automatically trigger strict scrutiny, and quasi-suspect classifications, which automatically trigger heightened scrutiny when intentional discrimination can be shown. See TRIBE, *supra* note 32, at 1610-18.

36. See *Fundamental Rights Analysis*, *supra* note 6, at 1104-05.

on High-Risk Youth of the Commission on Behavioral and Social Sciences and Education.³⁷ Such young people would certainly not have the resources available to fund any part of their education in either a public school or a private school choice context.³⁸ These students would argue that by virtue of their disabling status they are denied equal access to quality education in a deregulated school setting.

B. Documenting the Deprivation of an Important Interest

Under the Equal Protection Clause, heightened scrutiny is triggered only if both a burdened class and an important interest have been identified.³⁹ The *Plyler* Court recognized unequivocally that education is an important interest.⁴⁰ Yet such recognition is merely the beginning of the analysis. Both the extent of the deprivation generally and the denial of equal educational opportunity specifically must be explored.⁴¹

1. The Extent of the Deprivation

Federal courts often ask whether the injury sustained by plaintiff in a Fourteenth Amendment education case is absolute or relative. In deciding *San Antonio Independent School District v. Rodriguez*,⁴² for example, the United States Supreme Court emphasized that plaintiff's argument provided "no basis for finding an interference with fundamental rights where only relative differences in spending levels. . . [were]. . . involved."⁴³ At the same time, Justice Powell suggested that plaintiffs' argument might have had "merit" if an "absolute denial of educational opportunities" had been shown.⁴⁴

In *Plyler*, Justice Brennan noted that one of the original cases consolidated by the Court had relied upon a determination

37. The panel's report focuses extensively on the contexts and settings that have deteriorated significantly in recent decades, resulting in a devastating impact on today's young people. See PANEL ON HIGH-RISK YOUTH, COMM'N ON BEHAV. & SOC. SCI. & EDUC., LOSING GENERATIONS: ADOLESCENTS IN HIGH-RISK SETTINGS, 13, 102, 236-37 (1993) [hereinafter LOSING GENERATIONS].

38. See generally Robert Pear, *Poverty 1993: Bigger, Deeper, Younger, Getting Worse*, N.Y. TIMES, Oct. 10, 1993, at E5; Sylvia Nasar, *Rich and Poor Likely to Remain So*, N.Y. TIMES, May 18, 1992, at D1; Leonard Silk, *Rich and Poor: The Gap Widens*, N.Y. TIMES, May 12, 1989, at D2.

39. See *Plyler*, 457 U.S. at 221-24.

40. *Id.* at 221.

41. After outlining the unique importance of the interest in education, the extent of the deprivation generally, and the nature of the denial of equal opportunity, the *Plyler* Court turned to a discussion of the appropriate level of judicial scrutiny. See *Plyler*, 457 U.S. at 218-23. See generally *Fundamental Rights Analysis*, *supra* note 6, at 1086-87.

42. 411 U.S. 1 (1973).

43. *Id.* at 36-7.

44. *Id.*

that an absolute deprivation had occurred.⁴⁵ Indeed, the Court spent much time inquiring into the nature and extent of the deprivation in this case.⁴⁶ Justice Blackmun, concurring, even declared that the majority's conclusion was "fully consistent with *Rodriguez*" because an "absolute denial of educational opportunities" had occurred.⁴⁷

An absolute deprivation of education is likely to result in a victory for the plaintiffs in a school choice lawsuit. It is unclear, however, whether tuition or other fee requirements are an absolute or a relative deprivation. Parents of disenfranchised children will argue that a deregulated choice system absolutely deprives them of education at the best schools when they are unable to attend because they cannot afford the balance of the tuition or come up with the additional fees. Defendants will contend, however, that the deprivation is only relative since the children can always attend some school.⁴⁸

Still, a relative deprivation will not automatically preclude victory in the federal courts.⁴⁹ Such an analysis is simply one fac-

45. See 457 U.S. at 209, citing *In Re Alien Children*, 501 F. Supp. 544, 582 (S.D. Tex. 1980). Indeed, another lower court lawsuit leading up to this case, *Doe v. Plyler*, addressed the distinction between absolute and relative deprivation on several occasions. See *Doe v. Plyler*, 458 F. Supp. 569, 580-81 (E.D. Tex. 1978). See also *Doe v. Plyler*, 628 F.2d 448, 456 (5th Cir. 1980).

46. *Plyler*, 457 U.S. at 222-23.

47. *Id.* at 235 (Blackmun, J., concurring) (citing *Rodriguez*, 411 U.S. at 37).

48. Although many would begin an analysis of a deprivation in a Fourteenth Amendment context by characterizing the injury as "absolute" or "relative," there is much disagreement over the legal impact of such a determination. See, e.g., Betsy Levin, *The Courts, Congress, and Educational Adequacy: The Equal Protection Precedent*, 39 MD. L. REV. 187, 205-7 (1979) [hereinafter *Educational Adequacy*]. For a cogent and highly relevant exploration of this issue from the pre-*Rodriguez* era, see Frank Michelman, *Foreword: On Protecting the Poor through the Fourteenth Amendment*, 83 HARV. L. REV. 7, 49-52 (1969).

49. See, e.g., *Knight v. Alabama*, 787 F. Supp. 1030, 1103 (1991) (ordering the desegregation of higher education in Alabama). There is no apparent consensus regarding the legal impact of a relative deprivation. Arguably the word *absolute* is itself a *relative* term. In *Honig v. Doe*, 484 U.S. 305 (1988), disabled plaintiffs successfully challenged 20 and 30-day suspensions. These suspensions could conceivably be characterized as absolute deprivations, since the students received no education during that time. Yet such suspensions might just as easily be deemed only relative, when compared to the absolute deprivation of being kept out of school altogether. In *Plyler*, for example, plaintiff students were "absolutely" deprived of a public school education, since they were actually prevented from attending. See *Plyler*, 457 U.S. at 205-6. Similarly, in *Board of Educ. v. Rowley*, 458 U.S. 176 (1982), the alleged failure to provide "appropriate" educational benefits could be interpreted as an "absolute" deprivation of an education "suited to [the individual disabled student's] needs." *Id.* at 184-86. The educational process, however, is undeniably inexact. See, e.g., *Peter W. v. San Francisco Unified Sch. Dist.*, 60 Cal. App. 3d 814, 824 (1976) ("Unlike the activity of the highway or the marketplace, classroom methodology affords no readily acceptable standards of care, or cause, or injury. The science of pedagogy itself is fraught with different and conflicting theories of how or what a child should be taught."). Thus a determination of whether the district was indeed meeting the student's needs could best be characterized as a rela-

tor that the court will consider when determining where on the sliding scale of heightened scrutiny the particular case will fall.⁵⁰

2. *The Denial of Equal Educational Opportunity*

Under *Plyler*, a two-part analysis is employed to ascertain the nature of the denial of equal opportunity. First, did the policy or practice constitute an unreasonable obstacle to advancement on the basis of individual merit? Second, what are the consequences of the deprivation for both the individual and society?⁵¹

a. Obstacles to Advancement

A denial of equal educational opportunity occurs when “barriers present[] unreasonable obstacles to advancement on the basis of individual merit.”⁵² Plaintiffs challenging voucher or charter school programs would argue that tuition requirements and other fees create unreasonable obstacles. Whether these “obstacles” are deemed unreasonable, however, may depend on

time analysis. See *Rowley*, 458 U.S. at 202 (where the Court did not attempt to “establish any one test for determining the adequacy of educational benefits conferred upon . . . [the] . . . children”).

See also MARK G. YUDOF ET AL., *EDUCATIONAL POLICY AND THE LAW* 624 (3d. ed. 1992), quoting from the brief of the appellees in *Rodriguez*:

To be sure, complete denial of all educational opportunity is more compelling than a relative denial. But in view of the magnitude of the differences in the capacity of state-created school districts in Texas to raise education dollars, and in light of the vast disparities in educational expenditures between districts, plaintiffs have surely been injured in a comparable way. A complete denial of all educational opportunity is not necessary to demonstrate an unconstitutional deprivation.

Id. (emphasis added).

It should be noted that although appellees lost *Rodriguez* by a 5-4 vote, they were eventually vindicated by the decision in *Edgewood Indep. Sch. Dist. v. Kirby*, 777 S.W. 2d 391 (1989). In addition, Justice Marshall's 67-page dissent in *Rodriguez* has come to be viewed as a more correct view of Fourteenth Amendment law. See *Fundamental Rights Analysis*, *supra* note 6, at 1088-89 n.81.

50. The traditional pattern of fundamental rights analysis begins with the identification of an important interest and an analysis of the deprivation, followed by a determination of the appropriate level of judicial scrutiny. See, e.g., *Boddie v. Connecticut*, 401 U.S. 371 (1971) (access to courts); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621 (1969) (right to vote). In *Plyler*, both an important interest and a burdened class were identified, the nature of the denial of equal opportunity was analyzed, and the Court then determined the “proper level of [judicial] deference” based on this identification and analysis. See *Plyler*, 457 U.S. at 218-23.

Indeed, a growing body of research has documented the Court's willingness to consider a combination of several classes and interests before determining the appropriate level of judicial review. See, e.g., David Gelfand, *The Constitutional Position of American Local Government: Retrospect for the Burger Court and Prospect for the Rehnquist Court*, 14 HASTINGS CONST. L.Q. 635, 642-644 (1987). See generally TRIBE, *supra* note 32, at 1610-18.

51. *Plyler*, 457 U.S. at 221-24. See also *Fundamental Rights Analysis*, *supra* note 6, at 1103-4, 1106-8.

52. *Plyler*, 457 U.S. at 221-22.

the existence of viable alternatives.⁵³ Plaintiff can explain at this point that other viable options may include either more equitable choice systems or a range of reform and restructuring efforts that could succeed in improving an entire educational system — with or without choice. The plan set forth by Professors John Coons and Stephen Sugarman, for example, focuses specifically on the rights of the poor, and on the inability of low income families to supplement vouchers with their own money.⁵⁴ “The provisions of any system of educational choice,” they argue, “must ‘tilt’ toward the poor to ensure they have both the opportunity to escape from schools that ill-serve them and fair access to schools they prefer.”⁵⁵

Defendants may contend that in an era of severe budgetary constraints society cannot afford the additional funds for a “pure” choice system, where any child can attend any school without additional cost, at government expense.⁵⁶ Yet plaintiffs can counter by explaining that in an era when the gulf between the “haves” and the “have-nots” continues to widen, particular care must be paid to the equal opportunity rights of *all* students in a publicly funded educational system.⁵⁷

b. Consequences of Deprivation to Individuals and Society

Under the heightened scrutiny framework set forth in *Plyler*, courts must consider both the effects on an individual and the costs to society.⁵⁸ Children of poverty, already consigned to a second-class education,⁵⁹ may fare even worse in a choice system

53. *Id.* at 223.

54. See, e.g., John E. Coons & Stephen D. Sugarman, *Scholarships for Children*, UC BERKELEY INST. OF GOV'T STUDIES PRESS 23-29 (1992) [hereinafter *Scholarships for Children*].

55. *Id.* at 3.

56. The unfortunate budgetary constraints faced by educators today have been documented in literally thousands of newspaper pieces, journal articles, and academic studies. See, e.g., Lonnie Harp, *Report Documents New Round of State Fiscal Lows*, EDUC. WEEK, Apr. 29, 1992, at 17.

57. See, e.g., William L. Taylor, *The Urban Crisis: The Kerner Commission Report Revisited: The Continuing Struggle for Equal Educational Opportunity*, 71 N.C. L. REV. 1693, 1695 (1993).

58. See *Plyler*, 457 U.S. at 221-24.

59. See LOSING GENERATIONS, *supra* note 37:

Economic and social stratification influence many key aspects of the educational system. The homogeneous composition of many schools stems directly from neighborhood stratification on the basis of family income, race, and ethnicity. Public expenditures for education, when dependent largely on local wealth, serve to further stratify the educational experiences of adolescents simply on the basis of their family background. Consequently . . . students from low-income families usually attend schools in poor neighborhoods where they confront conditions not experienced by students from more advantaged backgrounds. These conditions, such as a relative lack of safety and the lowest level curriculum and performance expectations, have independent effects on school achievement. As a result, many students

if they are denied equal access because of additional out-of-pocket expenses.

Researchers have presented extensive evidence documenting the free market principle which holds that those with the most resources always win.⁶⁰ Indeed, a small but growing body of research suggests that parents and students from lower socio-economic backgrounds behave differently when faced with educational choice.⁶¹ According to scholars in this area, it has become increasingly apparent that families in a choice system will invariably "arrange themselves on the basis of wealth."⁶² In schools containing ever-greater concentrations of students from the poorest, most embattled families, students in choice systems may receive a lower quality education than the one they receive in current school systems.

The Supreme Court warned in *Plyler* that "[w]e cannot ignore the significant social costs borne by our Nation when select groups are denied the means to absorb the values and skills upon which our social order rests."⁶³ Such costs include the adverse effects on the economy of a poorly trained work force,⁶⁴ and the breakdown of social order when angry, frustrated, and unsuccessful students leave school and turn increasingly to violence and crime.⁶⁵ All Americans are adversely affected when publicly funded schools fail to address the needs of today's young people. Therefore, the deprivation results in an enormous cost to society.

C. *Applying Heightened Judicial Review*

Even if the deprivation triggers heightened scrutiny under the Fourteenth Amendment, the school choice system may not be invalidated. Under traditional Equal Protection Clause jurisprudence, strict scrutiny typically led to a victory for the plaintiff, while rational basis review generally resulted in a decision for the

whose lives are rooted in family or neighborhood poverty simply do not have the kind of day-to-day experiences that would stimulate their intellectual development and complement the mission of schools.

Id. at 105-6.

60. See, e.g., Amy Stuart Wells, *Choice in Education: Examining the Evidence on Equity*, 93 TCHRS C. REC. 142-47 (1991).

61. See *id.* See also Michael A. Olivas, *Information Access Inequities: A Fatal Flaw in Educational Voucher Plans*, 10 J.L. & EDUC. 441 (1981).

62. See Liebman, *supra* note 18, at 284-87.

63. 457 U.S. at 221.

64. According to a four-year federal study of literacy in America released by the U.S. Department of Education in 1993, "[n]early half of the nation's 191 million adult citizens are not proficient enough in English to write a letter about a billing error or to calculate the length of a bus trip from a published schedule." William Celis 3d, *Study Says Half of Adults in U.S. Lack Reading and Math Abilities*, N.Y. TIMES, Sept. 9, 1993, at A1.

65. See LOSING GENERATIONS, *supra* note 37, at 13-23, 125-74.

defendant.⁶⁶ An intermediate level of review in education, however, allows for a case-by-case analysis, with the degree of scrutiny determined by the nature of the plaintiff's interests and the extent of the denial of education.⁶⁷

While several techniques of heightened judicial review have been identified,⁶⁸ the most prevalent technique employed by the courts is the "balancing of interests" approach.⁶⁹ In weighing the interests of the respective parties, courts may find that a particular choice plan does not rise to the level of an Equal Protection Clause violation. In certain communities, for example, a choice program may place reasonable restrictions on additional costs to families. Alternatively, the range of choices available in the relevant geographical area may provide quality options for even the poorest students. It appears unlikely, however, that choice in a substantially deregulated educational system would include such protections absent legislative or judicial intervention.

Plaintiffs who present compelling evidence documenting a denial of equal access because of their inability to pay additional out-of-pocket costs may very well prevail in this era under the federal Equal Protection Clause. Parents alleging a denial of equal access when they are required to pay additional fees to fund their child's education may also wish to rely on the precedents set forth in recent school finance cases. All school voucher programs, for example, ostensibly alter the statewide system of school finance. Families may therefore argue that restrictive tuition requirements under parental choice amount to an unconstitutional revision of the state's school finance structure.

After the Supreme Court in *Rodriguez* refused to find Texas' inequitable allocation of resources violative of the Fourteenth Amendment, school finance plaintiffs turned to the state courts and began winning major victories under state constitutional jurisprudence.⁷⁰ While prospective plaintiffs are not likely to prevail in the states that follow federal Equal Protection Clause jurisprudence without deviation, aggrieved families may

66. The rational relationship standard requires only that the state action "be shown to bear some rational relationship to legitimate state purposes." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 40 (1973). The strict scrutiny standard requires that the state action be "premised upon some compelling state interest." *Id.* at 16. *But see* *Adarand Constructors, Inc. v. Peña*, 115 S.Ct. 2097 (1995) (where the U.S. Supreme Court arguably identified a new "kinder and gentler" form of strict scrutiny).

67. *See, e.g., Rodriguez*, 411 U.S. 1, 98-99 (Marshall, J., dissenting). *See Fundamental Rights Analysis, supra* note 6, at 1097.

68. *See* *TRIBE, supra* note 32, at 1601-10.

69. *See generally* Aleinikoff, *supra* note 6.

70. *See generally* William E. Thro, Note, *To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation*, 75 VA. L. REV. 1639, 1661-78 (1989).

present compelling arguments in most other jurisdictions under state equal protection guarantees. Such arguments would be based on the premise that children of poverty who cannot attend the best schools because of restrictive tuition requirements are deprived of their equal protection rights in the same manner as school finance plaintiffs who are denied access to a quality education because they reside in the poorer districts.

Perhaps the most often-cited example of an independent state analysis under a traditional federal framework is the California case of *Serrano v. Priest*.⁷¹ Such an analysis is available for other state courts under state equal protection guarantees. In *Serrano*, the California court determined that the state's school finance system amounted to an inequitable allocation of resources in violation of the state constitution's equal protection guarantees.⁷² Under the traditional Fourteenth Amendment framework as refined by the Burger Court in *Rodriguez*, education is not a fundamental right, wealth is not a suspect classification, and an inequitable allocation of resources in a school setting therefore triggers only the deferential rational basis review. California expressly rejected the *Rodriguez* approach, determining that under its own independent jurisprudence education is a fundamental right, wealth is a suspect classification, and thus an inequitable school finance system merits strict scrutiny.⁷³

Poor families challenging the free market tuition structure of a school voucher program would initially seek to establish that education is a fundamental right or that wealth is a suspect classification under the state's own equal protection guarantees. While it was unclear from the *Serrano* framework whether both requirements must be met, the California Supreme Court has recently declared that a higher level of scrutiny should be applied at the state level whenever the disfavored class is suspect or the disparate treatment has "a real and appreciable impact on a fundamental right or interest."⁷⁴

If plaintiffs are required to prove an infringement of the fundamental right to an education, they must be prepared to address the impact issue. Under both federal and state equal protection jurisprudence, acts must have a "real and appreciable" impact on fundamental rights to be subject to strict scrutiny. Acts having an "incidental or marginal effect" on a fundamental right are properly judged under the rational basis test.⁷⁵

71. 487 P.2d 1241 (Cal. 1971).

72. *Id.* at 1263.

73. *Id.* at 1259.

74. *Butt v. State of California*, 842 P.2d 1240, 1252 (Cal. 1992).

75. *See, e.g., Gould v. Grubb*, 536 P.2d 1337, 1343 (Cal. 1975). *See also In re Flodihrn*, 601 P.2d 559, 563 (Cal. 1979) (actions having an "incidental or marginal

Defenders of voucher programs will argue that even if poor families are denied access to certain schools which charge higher tuition, this denial would have no more than a marginal effect on a poor child's education. The defendants would seek to demonstrate that plaintiffs actually benefit from a voucher program by being able to choose from a much larger variety of educational options. Plaintiffs' ability to prevail on this issue would thus depend on the relative quality of the educational options that become available under school choice. If the free market model results in many new and superior opportunities for children of poverty at no additional cost, plaintiffs would have a difficult time proving an infringement of their fundamental right to an education. However, since the best schools would probably need to charge higher tuition to attract top teachers, maintain superior physical facilities, and provide the most effective instructional materials, poor families would probably find that their options are significantly limited in this context. Thus plaintiffs are likely to prevail by demonstrating a real and appreciable impact on their fundamental rights.

II. CASE STUDY TWO: ACADEMIC REQUIREMENTS FOR ADMISSION TO SECONDARY SCHOOLS

The admissions process in a deregulated school choice environment is perhaps the area with the greatest potential for abuse. Admissions committees at the more "desirable" secondary schools can be expected to make decisions based on traditional academic indicators,⁷⁶ and typical choice proposals say nothing about preventing these schools from establishing minimum grade point average ("GPA") requirements or other academic guidelines for students whose elementary schools do not issue grades.⁷⁷

Yet public schools have traditionally been built upon the key underlying assumption that *all* students must be admitted. School choice programs that cannot guarantee this basic level of equal access will undoubtedly be challenged by disenfranchised

effect" on a fundamental right are not subject to strict scrutiny). See generally *Zablocki v. Redhail*, 434 U.S. 374, 386 (1978) (regulations that do not "significantly interfere" with a fundamental right are not subject to strict scrutiny).

76. Not only do educators typically prefer working with people who have already demonstrated success in an academic setting, but "brighter" students will tend to give a school a stronger reputation and generate more applicants in a free market. See, e.g., Liebman, *supra* note 18, at 284-85.

77. The one prominent exception is the Coons-Sugarman plan. See *Scholarships for Children*, *supra* note 54 and accompanying text. Under this plan, 20 percent of each year's new admissions at "scholarship schools" must be reserved for timely applications from "low-income" children. See *Scholarships for Children*, *supra* note 54, at 10, 25-26.

families. These families can turn to the same “*Plyler*” framework outlined above in Part I, attempting to trigger heightened judicial review by identifying a disadvantaged class of children and documenting the extent to which their equal educational opportunity rights have been denied.⁷⁸

Litigants challenging academic requirements for admission to a secondary school in a school choice context must first demonstrate that the “injured” students are a “discrete class of children not accountable for their disabling status.”⁷⁹ Defendants can argue that if a student’s disenfranchisement is the result of a poor academic record, such a student has certainly been “accountable” for his or her “disabling status.” After all, a child’s academic record in elementary school is not an accidental occurrence — but the result of carefully monitored performance in classrooms over a period of seven to ten years.

In response, plaintiffs may contend that many factors not under the control of the child may cause a poor academic record. Research has shown, for example, that drug babies, homeless students, and children whose parents consistently fail to get them to school will perform at a much lower level in an academic setting.⁸⁰ Plaintiffs may also wish to analogize from the criminal law and contend that just as children of elementary school age are not typically held accountable for their crimes, so too these same children should not be held accountable for their poor grades.⁸¹

In the end, however, plaintiffs with the best chance of success under this framework may be those whose inability to perform at the same academic level as others is undeniably the result of factors not under their control. Such plaintiffs would include limited-English proficient (LEP) students and children with particular disabilities. LEP students are generally less successful in school because so much of their time and energy must go into first learning a new language.⁸² Many disabled students also tend

78. Whether and to what degree heightened scrutiny is triggered by this combination appears to depend on the extent of the deprivation and the nature of the denial of equal educational opportunity. See Part I, *supra*.

79. See *Plyler*, 457 U.S. at 221-24.

80. See LOSING GENERATIONS, *supra* note 37, at 41-124. See generally DAVID A. HAMBURG, *TODAY'S CHILDREN* (1992).

81. Under common law, a child under the age of seven has “no criminal capacity . . . while between the ages of seven and fourteen there is a rebuttable presumption of criminal incapacity.” See ROLLIN M. PERKINS, *CRIMINAL LAW* 837 (2d ed. 1969).

82. See, e.g., J. DAVID RAMIREZ ET AL., U.S. DEP'T OF EDUC., *LONGITUDINAL STUDY OF STRUCTURED ENGLISH IMMERSION STRATEGY, EARLY-EXIT AND LATE-EXIT TRANSITIONAL BILINGUAL EDUC. PROGRAMS FOR LANGUAGE-MINORITY CHILDREN* (1991); Amy Pyle, *Pressure Grows to Reform Bilingual Education in State*, L.A. TIMES, May 22, 1995, at A1. See generally Bill Ong Hing, *Beyond the Rhetoric of Assimilation and Cultural Pluralism: Addressing the Tension of Separatism and Conflict in an Immigration-Driven Multiracial Society*, 81 CAL. L. REV. 863

to achieve at a lower level academically because learning disabilities or other handicaps prevent them from processing or disseminating information in the same manner as others.⁸³ A federal court that may find nothing wrong with holding typical elementary students accountable for their academic performance would probably be much less willing to penalize LEP students and disabled children who are clearly not responsible for their disabling status. Such courts would not only be receptive to arguments under the Fourteenth Amendment, but also under Section 504 of The Rehabilitation Act and Section 1703 (f) of the Equal Educational Opportunity Act.⁸⁴

Once a burdened class and an important interest in education have been identified, plaintiffs employing the Fourteenth Amendment must address the nature of the denial of equal educational opportunity by employing the *Plyler* two-part analysis. First, did the policy or practice constitute an unreasonable obstacle to advancement on the basis of individual merit? Second, what are the consequences of the deprivation for both the individual and society?

Under *Plyler*, a denial of equal educational opportunity has occurred when "barriers present[] unreasonable obstacles to advancement on the basis of individual merit."⁸⁵ Plaintiffs challenging academic requirements of secondary schools in a choice program would argue that admissions decisions based on prior academic performance create unreasonable obstacles to achieving an education. Defendants would counter, however, that decisions based on performance in school are completely consistent with the apparent "right of advancement based on individual merit" set forth by Justice Brennan. Indeed, what better indicators of individual merit are there in a school setting?

Whether these "obstacles" are deemed unreasonable is likely to depend on the existence of viable alternatives.⁸⁶ Plaintiff may suggest that not all applicants to secondary schools should have to demonstrate ability or achievement. If the new choice system is to be fair and equitable, care must be taken to

(1993); George A. Martinez, *Legal Indeterminacy, Judicial Discretion and the Mexican-American Litigation Experience: 1930-1980*, 27 U.C. DAVIS L. REV. 555 (1994); Deborah Ramirez, *Multicultural Empowerment: It's Not Just Black and White Anymore*, 47 STAN. L. REV. 957 (1995).

83. See generally Jonathan C. Drimmer, Comment, *Cripples, Overcomers, and Civil Rights: Tracing the Evolution of Federal Legislation and Social Policy for People with Disabilities*, 40 UCLA L. REV. 1341 (1993).

84. Section 504 of The Rehabilitation Act, 29 U.S.C. 701-794; Section 1703(g) of the Equal Educational Opportunity Act, 20 U.S.C. 1703(g). The parameters of the frameworks for legal action in a school choice context under Sections 504 and 1703 (f) are beyond the scope of this Article.

85. *Plyler*, 457 U.S. at 221-22.

86. *Id.* at 223.

ensure that it does not become completely stratified.⁸⁷ Students who are not doing as well as others must be accommodated. Either a certain number of places should be reserved at every school for students who have not been successful, or admissions decisions should not be based on merit at all.

The consequences of deprivation of educational opportunity may range from the short-term effects of an inappropriate educational setting to the lasting, long-term impact of an inferior self-image and a mediocre education. The analysis set forth in Part I above is equally applicable in this context.

CONCLUSION

Most commentators believe that the current challenges to the constitutionality of Proposition 187 will ultimately be decided by the United States Supreme Court. While some believe that the controversy will ultimately turn on the issue of federalism, no one is discounting the prospect that the Court's analysis of *Plyler* and its applicability in the 1990s may be a central feature of the final decision.

As this Article has demonstrated, *Plyler* is much more than simply a unique confluence of theories that was cobbled together to fit the facts of the Texas litigation. Indeed, *Plyler* is not just pertinent to the current Proposition 187 challenges, but can serve as the framework for a variety of lawsuits that might be filed by economically disadvantaged plaintiffs in an education setting. The recent proliferation of school choice programs for both public and private school students presents only one possible avenue of litigation in this regard.

Plyler v. Doe sets forth a viable, principled approach for resolving constitutional disputes by balancing the interests of the plaintiffs against the interests of the public entities. After examining the *Plyler* decision in light of other major cases that have employed a similar approach, members of the federal judiciary must think twice before deciding that *Plyler* is no longer a controlling precedent in the bitter and divisive Proposition 187 litigation.

87. For examples of social stratification in the United States today, see David Spener, *Transitional Bilingual Education and the Socialization of Immigrants*, 58 HARV. EDUC. REV. 189, 190-96, 198-202 (1988). See also Liebman, *supra* note 18, at 290 ("[Q]uality competition . . . [in a school choice context] . . . is sure to stratify schools on the basis of student ability, if not family wealth.").