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RODRIGUEZ REVISITED: FEDERALISM, MEANINGFUL ACCESS, AND THE RIGHT TO ADEQUATE EDUCATION

Penelope A. Preovolos*

INTRODUCTION

San Antonio Independent School District v. Rodriguez1 was widely viewed as a death blow to reform efforts in education, at least on the federal level. Certainly, it would be a mistake to pretend that Rodriguez was deeply sensitive to the needs of the poor in public education. Nevertheless, the thesis of this article is that it would be equally unfortunate to treat Rodriguez as a command from the High Court that education reformers abandon all hope.

The “unheld holding” of Rodriguez was that all Americans have a right to an adequate education;2 the Rodriguez plaintiffs, the Court asserted, simply never denied that they were being adequately educated.3 The existence of a right to a minimum level of education is quite consistent with certain of the Court’s decisions in other fields, which will be styled, for want of a more elegant appellation, the “access cases.” These decisions, in the areas of voting, access to the courts, and access to information and channels of communication, all share one or more characteristics with education: they implicate issues of group and individual wealth; they are in some way related to first amendment concerns, or concerns about access to the political system; they occupy a special place in, and are in some way a key to, the federal system; and they are characterized by extraordinary levels of state involvement.

Rodriguez was a federalism decision—a decision about the proper roles of the federal government and the states, the courts and the legislatures—and not a decision about the existence or non-existence of a right to education. Therefore, if it

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2. See text accompanying notes 6-26 infra.
can be demonstrated that recognizing a right to adequate education would not be inconsistent with the Court's federalism concerns, then education reform may not be far off. This article contends that such a demonstration is possible, and involves the following factors. First, education plays a key role in the federal system because state citizens are also federal citizens, and must be educated in order to function as such. Second, state citizens have political rights as national citizens, and must be educated in order to have meaningful access to these rights. Third, it is idle to posit that states bear no responsibility for their citizens' federal role; the states are already deeply enmeshed in education, and as they have chosen to act at all, they should not be allowed to act in a way inimical to their citizens' federal rights and responsibilities. Fourth, by recognizing a right to education in their constitutions, virtually all the states have participated in creating a national expectation of educational entitlement. Therefore, a federal decision to ensure that such justified expectations are met cannot be treated by the states as either unexpected or inappropriate.

This article will argue that an affirmative state obligation exists to provide an adequate level of education to all citizens, and that such an obligation is consistent with the federalism concerns expressed in Rodriguez. The first section considers the implications of the Rodriguez decision itself. The second examines the various analogies offered by the access cases and their implications for a right to adequate education. The third section considers in detail the federalism issue raised by Rodriguez. The fourth section examines the practical and legal content of a right to adequate education.

KEY ASPECTS OF THE RODRIGUEZ DECISION

On March 21, 1973, the United States Supreme Court handed down the Rodriguez decision, thereby provoking a well-nigh unparalleled wealth of critical commentary and reaction.4

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5. It is not possible to state the basic holding of Rodriguez, because the Court's conclusions are complex, interrelated, and often dependent on separate stated or unstated assumptions. A skeletal sketch of the decision, however, appears roughly as follows. The Rodriguez plaintiffs asserted that interdistrict inequalities of school funding violated the equal protection clause of the fourteenth amendment. They alleged that strict scrutiny of the Texas funding scheme was appropriate either because the program disadvantaged a suspect class, or because education was a fundamental right calling for heightened scrutiny.

In rejecting these claims, Justice Powell, writing for the Court, first concluded that the disadvantaged class could not be identified in traditional equal protection terms, 411 U.S. at 22-23; thus, the nature of the deprivation was unclear:

[A]ppellees have made no effort to demonstrate that [the system] operates to the peculiar disadvantage of any class fairly definable as indigent . . . there is no basis on the record in this case for assuming that the poorest people—defined by reference to any level of absolute impecuniosity—are concentrated in the poorest districts.

Id.

Second, no absolute deprivation had occurred; Justice Powell asserted that such a deprivation had characterized all previous "wealth discrimination" cases. Id. at 20-22. Plaintiffs had failed to allege that any child was deprived of an education, id. at 23, and no proof was offered "persuasively discredit[ing] or refuting the State's assertion" that "every child in every school district [was assured] an adequate education." Id. at 24. Further, it was not clear that issues of cost correlated to issues of quality. Id. Therefore, Justice Powell concluded, "the Texas system [did] not operate to the peculiar disadvantage of any suspect class." Id. at 28. Strict scrutiny was therefore inappropriate.

Justice Powell then turned to the fundamental interest issue, and concluded that education is not a fundamental interest. The fundamentality of an interest depends not on its "importance," id. at 30-31, but on whether it is "explicitly or implicitly guaranteed by the Constitution." Id. at 33-34. Powell then analogized education to other social welfare interests, and concluded that it was not so protected. Id. at 35. Again, strict scrutiny was inappropriate.

Further, highly deferential review was appropriate when examining state fiscal schemes because of their inherent complexity. Id. at 40-44. Educational policy also
be considered in some detail: the Court’s invocation of educational adequacy, and its concern with what may be styled issues of “federalism.”

The Adequacy Issue

The Court’s assertion that each Texas schoolchild received a basic or adequate education may well have been central to the holding of Rodriguez. Adequacy played a key role in both the Court’s determination that there was no suspect class6 and its determination that the right to education alleged in Rodriguez was not fundamental.7 The opinion was apparently required highly complex judgments and choices, and deference to the legislature was thus doubly appropriate.

The Court then examined the Texas funding system to determine if it bore a rational relationship to a legitimate state interest, and concluded in the affirmative. The concern of this portion of the decision was local control; the need for local control justified the heavy reliance on local property taxes for funding and the inequalities which resulted. Id. at 49-56. The state had struck a rational balance between the concern for assuring a basic education for every child in the state and providing a large measure of local control by relying on the combination of local property tax funds and the state Minimum Foundation School Program. Id. at 45-49.

Finally—and quite gratuitously—Justice Powell added what he referred to as a “cautionary postscript.” He warned that issues of financing and control of public education were complex, and that it was not clear that a change in the system would necessarily be beneficial; thus, deference to the legislature was appropriate. Id. at 58.

Justice Marshall entered a thorough and scathing dissent, id. at 70 (Marshall, J., dissenting), in which Justice Brennan joined, id. at 62 (Brennan, J., dissenting). Justice White also entered a dissent in which Justices Douglas and Brennan joined, id. at 63 (White, J., dissenting).

Justice Marshall first argued that equality, not adequacy, was the issue; the Court could not determine adequacy. Id. at 89 (Marshall, J., dissenting). Nor was the cost-quality issue relevant; unequal provision of educational services was the proper focus for constitutional inquiry. Id. at 84. Further, difficulty in identifying the disadvantaged group was irrelevant, because equal protection was violated whenever there was discrimination against individual interests; here, those of children living in poor districts. Id. at 92.

Marshall’s response to the Court’s “fundamental interest” analysis was two-fold. First, two-tier scrutiny was improper; “sliding scale” analysis which weighed the character of the classification in question, the relative importance to individuals in the class discriminated against of the governmental benefits they do not receive, and the asserted State interests in support of the classification was preferred. Id. at 99, quoting Dandridge v. Williams, 397 U.S. 471, 520-21 (Marshall, J., dissenting). Second, Marshall asserted, rather undeniably, that precedent did not bear out the majority’s claim that fundamental interests included only those implicitly or explicitly referred to in the Constitution. Education was fundamental. Id. at 111-17. Finally, there was a suspect, politically underrepresented class. Id. at 118-24. In sum, the state interests asserted could not justify the unequal educational opportunities provided to Texas schoolchildren.

6. 411 U.S. at 18-29.
7. Id. at 29-39.
influenced quite heavily by Professor Frank Michelman's seminal article arguing that equal protection envisions not actual equality, but an affirmative obligation on the part of the state to assure each individual a minimum, adequate amount of certain basic goods and services. The Court may well have concluded that only such an analysis could make the result of Rodriguez palatable, not only to civil rights' advocates, education reformers, and the public, but to the Justices themselves. Otherwise, it is difficult to understand the Court's emphasis on the adequacy issue.

In its initial description of the Texas scheme, the Court emphasized that aspect of the state system which allegedly guaranteed an adequate education for all Texas schoolchildren. Justice Powell described the Texas legislature's appointment, in 1947, of a committee to explore funding alternatives that would "guarantee a minimum or basic educational offering to each child," and noted:

The Committee's efforts led to the passage of the Gilman-Aikin bills, named for the Committee's co-chairmen, establishing the Texas Minimum Foundation Program. Today, this Program accounts for approximately half of the total educational expenditures in Texas.

The Court, in considering the suspect class issue, concluded that, unlike previous cases where wealth-related denials were found to be suspect, this case involved no "absolute deprivation;" each child had the opportunity to receive a public education, however unequal or inferior. The Court then launched into its discussion of the adequacy issue, a discussion that was unnecessary unless the previous wealth-related cases—and in any event the case at issue—required more than the absence of absolute deprivation.

The foregoing assertion is clarified by examining one of the cases to which the Court analogized, Douglas v. California. Douglas established an indigent criminal defendant's right to court-appointed counsel on direct appeal. Nothing in Douglas, however, required that adequate counsel be provided. If the

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10. Id. (citations omitted).
11. Id. at 18-29.
operative assumption of the *Douglas* Court was that all attorneys were "adequate," that conclusion was not suggested in the opinion. The analogy to education, then, requires only that public education be available to all; not that it be adequate. Nonetheless, the Court discussed the adequacy issue, implicitly adopting Professor Michelman's thesis that the state has an affirmative obligation to provide an adequate level of certain basic goods, here education and criminal process.

Moreover, the Court stated that "at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages." This language is far from an absolute deprivation analysis; it suggests that something between absolute deprivation and absolute equality is required for the Court to conclude that the wealth-based disadvantage at issue is not suspect. Adequate provision of relevant services was thus the basis for one of two rationales for the Court's determination that no suspect class was disadvantaged in violation of the Equal Protection Clause. The opinion continued:

[T]he Texas legislature has endeavored to "guarantee, for the welfare of the state as a whole, that all people shall have at least an adequate program of education" . . . The State repeatedly asserted in its briefs in this Court that it has fulfilled this desire and that it now assures "every child in every school district an adequate education." No proof was offered at trial persuasively discrediting or refuting the State's assertion.

The discussion of adequacy at this juncture also served another purpose. It permitted an analytic end-run around the cost-quality issue; that is, the notion that money spent is not directly related to the quality of education obtained. The Court's pronouncement in this context is worth setting out.

Apart from the unsettled and disputed question whether the quality of education may be determined by the amount of money expended for it, a sufficient answer to appellees' argument is that, at least where wealth is involved, the Equal Protection Clause does not require absolute equality or precisely equal advantages. Nor, indeed, in view of the

15. *Id.* (citations omitted).
infinite variables affecting the education process, can any system assure equal quality of education except in the most relative sense.\textsuperscript{16}

Clearly, the cost-quality issue was not ignored. Indeed, because of the cost-quality issue, even if equal education were constitutionally required it could not be provided, "except in the most relative sense." (Exegesis of this last phrase is not easy; it may mean that only equal facilities—dollars, teachers, classrooms, etc.—can be provided, not equal learning.) Thus, only adequate education could realistically be required.

Such a conclusion does not really follow, however. Lindquist and Wise argue that "the principle utility of applying the foundation or minimum-adequacy standard was to allow the Court to escape from making any determination on the quality of education received by poor children in Texas."\textsuperscript{17} However, a minimal-adequacy standard does not seem to offer an escape from the cost-quality dilemma. Lindquist and Wise assert:

To the extent that the adequacy or foundation standard of equal opportunity is not merely another example of "Holmesian deference" to state legislation, this standard will draw the Court into the same quandries it so assiduously attempted to avoid. . . . the adequacy standard places the Court at the vortex of issues where "the scholars and educators are divided . . . on even the most basic questions."\textsuperscript{18}

Therefore, it is argued, the real meaning of adequacy is deference; the Court simply will not question the adequacy of public education, since to do so will involve precisely the complex issues the Court seeks to avoid.\textsuperscript{19} Such cynicism on the Court's part need not be assumed, however.

As previously noted, the Court need not have included the adequacy analysis at all. It could merely have asserted that all individuals were afforded some public education, and that further inquiry would be inconsistent with the deference to the legislature which is appropriate on such complex issues of state fiscal and social policy. That the Court did not do this suggests that it meant something more by adequacy than mere defer-

\textsuperscript{16} Id. at 23-24.
\textsuperscript{17} Lindquist & Wise, \textit{supra} note 4, at 10.
\textsuperscript{18} Id. at 10 n.33.
\textsuperscript{19} See 411 U.S. at 88-90 (Marshall, J., dissenting).
ence. What, then, is the meaning of adequacy for the cost-quality dilemma?

The Court provided a clue to the answer later in its opinion, when it noted that “all would agree that there is a correlation [between expenditures and quality] up to the point of providing the recognized essentials in facilities and academic opportunities..."20 In fact, education and social science experts are sharply divided over the correlation between increased expenditures and increased learning. However, while their conflict suggests that increased expenditures are not sufficient to ensure increased (or adequate) learning, it is clear that a minimal level of expenditures is necessary for increased (or adequate) learning.

Thus, Rodriguez implies that if it could be demonstrated that a particular school district’s expenditures fell far short of the state average, and that its “learning outputs” were equally out of line,21 the Court might require increased spending as necessary for adequacy, despite the relativistic elements in the determination. Alternatively, a court concerned with adequacy might look solely to educational results such as the presence of a high proportion of functional illiterates among students in a particular district, in concluding that adequate education had not been provided, without considering the cost issue at all.22 What is important to note here is that the Court’s adequacy standard can be more than empty rhetoric.

The adequacy standard played its second pivotal role in the Court’s discussion of education as a fundamental right. The intimate relationship between education and the political rights of voting and speech was conceded: “We need not dispute any of these propositions.”23 But, Justice Powell concluded,

Whatever merit appellees’ argument might have if a state’s financing system occasioned an absolute denial of education to any of its children, that argument provides no basis for finding an interference with fundamental rights.

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20. Id. at 47 n.101.

Further, this article will suggest that it is possible to define a minimally adequate education without reference to expenditures, and thus without reference to the cost-quality issue. See text accompanying notes 175-99 infra.

21. See notes 175-80 and accompanying text infra.

22. See Gard, supra note 4, at 29-31. See also text accompanying notes 175-99 infra.

23. 411 U.S. at 36.
where only relative differences in spending levels are involved and where—as is true in the present case—no charge fairly could be made that the 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 process. 24

Thus, contrary to a popular misconception of the Rodriguez holding, the Court did not decide that education is not a fundamental right, but that the facts of Rodriguez did not violate that right. 25 Furthermore, there is no right to equal education per se, but there may be a right to whatever quantum of education is required for the meaningful exercise of other rights. For example, if plaintiffs in a similar suit could demonstrate that a significant number of persons in a district lacked the education necessary for meaningful exercise of political rights, the Court might well find that a fundamental interest in education had been infringed. 26

This analysis is buttressed by the fact that, as with the absolute deprivation issue, the Court need not have raised the adequacy issue at all. It could simply have held that the relationship between education and the relevant political rights, while significant, was too indirect to be constitutionally cognizable, and that education therefore was not a fundamental right. That the Court chose to rely on the adequacy issue, rather than on an unequivocal holding that education is not a fundamental right, is encouraging: a right to adequate education is in no sense foreclosed by Rodriguez.

The Federalism Theme

Federalism is a rather Delphic concept; it has meant different things to different courts. For the Rodriguez Court, it apparently referred to the deference owed state legislatures by federal courts and, by implication, the deference owed states by the federal government. 27 It is important to understand the

24. Id. at 37 (emphasis added).
25. See Gard, supra note 4, at 27.
27. The Burger Court has been notably solicitous of the rights of the states in the federal system; it has required considerably greater deference to the states than did its predecessor Court. See, e.g., Younger v. Harris, 401 U.S. 37 (1971). And c.f. National League of Cities v. Usery, 426 U.S. 833 (1976).

For an interpretation of National League of Cities particularly favorable to the notion of affirmative state obligations, see Tribe, Unraveling National League of Ci-
precise contours of the Court's federalism concerns in order to understand, first, why a right to adequate education is not necessarily inconsistent with this aspect of the Court's opinion, and second, to the extent that the Court would perceive inconsistencies, why such a perception would not be correct.

The Court was disturbed by the federalism implications of recognizing a fundamental right to education. Initially, the Justices conceded the historic importance of education. They quickly noted, however, that the importance of a state service was constitutionally irrelevant. Otherwise, the Court said, "We would have gone far toward making this Court a 'super-legislature.' We would, indeed, then be assuming a legislative role and one for which the Court lacks both authority and competence." Thus, the key to the constitutional status of a particular right was not its "importance," but whether it was "explicitly or implicitly guaranteed by the Constitution." The Court does not "create substantive constitutional rights in the name of guaranteeing equal protection of the laws." It is crucial to understand that federalism was the linchpin of this sweeping rhetoric in order to avoid overestimating its import. The Court's statements about limiting fundamental rights to those "implicitly or explicitly guaranteed by the Constitution" make little sense outside this context. Thus, Justice Marshall's stinging response to this portion of the Court's analysis seems virtually irrefutable: "I would like to know where the Constitution guarantees the right to procreate . . . or the right to vote in state elections . . . or the right to an appeal from a criminal conviction." Clearly, fundamental rights had not been limited prior to *Rodriguez* as Powell suggested. And if Justice Powell meant instead to limit fundamental rights to those already recognized when *Rodriguez* was decided, he offered no basis for doing so.

The *Rodriguez* Court's pronouncements on the "fundamental rights" issue must therefore be understood in light of its concern with federalism. The Court's real meaning...
must be that if the notion of fundamental rights is limited only by the importance of a particular right, then virtually all important state functions implicate fundamental rights. Such a result would be intolerable. Therefore, constitutionally protected fundamental rights have to be limited to those interests that are in some way unique.\textsuperscript{34}

The Court's language about interests "explicitly or implicitly" guaranteed by the Constitution is either meaningless, or cannot mean what it appears to mean. If "implicit" interests include procreation,\textsuperscript{35} voting in state elections,\textsuperscript{36} and state criminal appeals,\textsuperscript{37} then it is unclear why they do not include education. If not, the Court's pronouncements about fundamental interests are inconsistent with cases which it did not overrule. The Court's real meaning must be that fundamental interests will not be recognized unless they are sufficiently unique not to threaten massive incursions on state legislative prerogatives in the form of court suits alleging violations of other indistinguishable interests.

The federalism theme was repeated when the Court considered the argument that education should be constitutionally protected because it preserves other constitutional rights. While largely conceding the nexus between education and political rights, Justice Powell averred:

\begin{quote}
[T]he logical limitations on appellees' nexus theory are difficult to perceive. How, for instance, is education to be distinguished from the significant personal interests in the basics of decent food and shelter? Empirical examination might well buttress an assumption that the ill-fed, ill-clothed and ill-housed are the most ineffective participants in the political process, and that they derive the least enjoyment from the benefits of the First Amendment. If so, appellees' thesis would cast serious doubt on the authority of \textit{Dandridge v. Williams}, supra, and \textit{Lindsey v. Normet}, supra.\textsuperscript{38}
\end{quote}

Again the Court's opinion did not deny the close relationship between education and political rights. Rather, the Court's

\textsuperscript{34} See text accompanying notes 149-74 infra.
\textsuperscript{38} 411 U.S. at 37.
concern was that this nexus did not sufficiently distinguish education from other state services, and that recognition of education as a fundamental right would therefore threaten the concept of federalism.  

The Court's final discussion of federalism in the context of fundamental-interest analysis was its argument that because the Texas education system was "affirmative" and "reformatory," it should "be scrutinized under judicial principles sensitive to the nature of the State's efforts and to the rights reserved to the States under the Constitution." This distinction is not terribly persuasive. The Court argued that the challenge here went to failure to extend a right. It contrasted Shapiro v. Thompson, where, it argued, the right to travel was infringed. Shapiro, however, also could have been viewed as a state failure to extend welfare. Only its concern for federalism can explain the apparently illogical distinctions drawn by the Court.  

The Court explicitly turned to federalism in arguing the appropriateness of the rational basis or deferential standard of review. Justice Powell argued that the Court was being asked to intrude on state funding decisions, "an area where the Court has traditionally deferred to state legislatures." The logic of this distinction is less than clear since Court decisions requiring school desegregation or lawyers for indigents may have an even greater impact on the state fisc. The Court's federalism concerns became even more overt:  

It must be remembered, also, that every claim arising under the Equal Protection Clause has implications for the relationship between national and state power under our federal system. Questions of federalism are always inherent in the process of determining whether a State's laws are to be accorded the traditional presumption of constitutionality, or are to be subjected instead to rigorous judicial scrutiny . . . . [I]t would be difficult to imagine a case having a greater potential impact on our federal system than the one now before us . . . .  

The Court's absorption with the federalism issue is also

39. For a discussion of why education is distinguishable from other state social welfare rights, see text accompanying notes 149-74 infra.  
40. 411 U.S. at 39.  
42. 411 U.S. at 40-41.  
43. Id. at 44.
illustrated by the fact that the Court added a final, apparently gratuitous section to its opinion. 44 This "postscript" 45 emphasized that the complexity of issues presented by the case illustrated the wisdom of a federalism approach. 46 Deference was therefore justified, even though the Court did not place its "judicial imprimatur" on the Texas system. 47

Without the lynchpin of federalism, many of the Court's conclusions defy explanation. Thus, if a right to education can be fashioned in such a way as to satisfactorily respond to the Court's federalism concerns, obstacles posed by Rodriguez to a right to education may be more apparent than real.

THE "MEANINGFUL ACCESS" ANALOGY

In recent years, several strands of cases have emerged which require that all individuals have what is variously defined as minimum, adequate, or meaningful access to particular rights or systems of rights. These cases have involved voting, access to information and to fora for self-expression, and access to the courts. While in the Warren Court era these strands of case law involved rather vague, general notions of equalization, the Burger Court has narrowed and focused the analysis so that a limited right of minimally adequate access has emerged. 48

The thesis of this section is that the analogy between these various strands of "access" case law and the suggested right to an adequate education is multifaceted and quite compelling. The analogy strongly suggests the existence of a right to adequate education. The suggested elements of this analogy are: 1) political rights are implicated; 2) "national" or "federal" interests are implicated; 3) there is a high level of government involvement; and 4) wealth classifications are implicated. Each of the current "adequate access" strands is characterized by all or most of these elements; all are true of education.

While these elements inevitably overlap, they will each be discussed separately in the interest of clarity. The analogy between existing access rights and the proposed right to an ade-

44. Id. at 56-59.
45. Id. at 56.
46. Id. at 58-59.
47. Id. at 58.
quate education will be considered in each of these four contexts.

The essence of two of the three lines of "access cases" is a concern with guaranteeing meaningful access to certain political rights and to the political system. These cases deal respectively with the right to vote and with the first amendment rights of access to information and to channels of communication. It is hardly a startling idea that meaningful access in either of these two areas is illusory unless there is a concomitant right to adequate education. Nor is it much more of a departure to argue that education is therefore not only linked to, but analogous to, these rights; this point will be analyzed in greater detail below. The voting cases and the access to information and communication cases will be considered separately, although the analogy to education in each instance corresponds rather precisely to the analogy in the others.

Voting. In order to understand either the nexus between education and voting or the analogy between education and voting, it is necessary to see the right to vote as a right of meaningful access to the political system.9 Thus, the precise context of the voting cases will initially be discussed in some detail; then, the relationship between voting and education will be considered.

The cases that deal with the right to vote and with reapportionment, both in federal and state elections, are traditionally viewed as cases about equal political power. But the "one man, one vote" standard0 can readily be understood as a way of giving each voter access to the political arena. That is, the standard is not an arbitrary proclamation that a vote of precisely equal weight is constitutionally guaranteed, but rather is the only effective way of guaranteeing that each individual has meaningful access to the franchise. This analysis is appropriate for one of two reasons. First, as Gerald Gunther suggests, "one man, one vote" may be the only judicially manageable standard available for ensuring meaningful access to the vote

9. See Schoettle, supra note 4, at 1366.
10. 376 U.S. 1 (1964) (holding that, understood in historical context, Article I, § 2 means that "as nearly as practicable one man's vote in a congressional election is to be worth as much as another's." Id. at 8); 372 U.S. 368 (1963) (striking down Georgia's county unit system in primary elections of statewide officers); 377 U.S. 533 (1964) (holding that the "Equal Protection Clause requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis." Id. at 568).
for all citizens. Second, voting is in a sense analogous to a zero-sum proposition; that is, one individual's vote is relevant only in relation to the votes of others. Therefore, meaningful access to the vote requires equal access to the vote; this seems to have been the Reynolds Court's suggestion:

The right to vote freely for the candidate of one's choice is of the essence of a democratic society and any restrictions on that right strike at the heart of representative government. And the right of suffrage can be denied by a debasement or dilution of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise. . . .

Similarly, Harper v. Virginia Board of Electors can be viewed as an access case. The focus of Harper was not invidious discrimination; the word discrimination seldom appeared in the opinion. Rather, the case focused on denial of access to the political process:

In a recent searching re-examination of the Equal Protection Clause, we held, as already noted, that "the opportunity for equal participation by all voters in the election of state legislators" is required. We decline to qualify that principle by sustaining the poll tax.

The nexus between education and voting is apparent. An individual who can read neither campaign literature nor his ballot, and who cannot comprehend media coverage of candidates and issues, has access to the ballot only in an absurd sense. He can, it is true, pull the lever or mark the card; but this is hardly what Reynolds or Harper sought to achieve.


See also Kurland, supra note 4, at 592-93. Professor Kurland suggests that the "one man, one vote" standard, because it was a simple, readily comprehensible principle, was the sine qua non of the reapportionment cases' success. However, it is implicit in his analysis that this standard was not required by the constitutional principle of the cases; Kurland notes that the earlier cases purported not to require precise mathematical equality. Id. at 585-86. Rather, "one man, one vote" was a particularly effective means of implementing the principle arrived at: meaningful access.

52. 377 U.S. at 555 (emphasis added).

53. 383 U.S. 663 (1966). In Harper, the Supreme Court held that Virginia's $1.50 poll tax violated the equal protection clause of the fourteenth amendment, and ordered that it be eliminated. Justice Douglas, writing for the Court, suggested in dicta that the right to vote in state elections might be "implicit, particularly by reason of the First Amendment. . . ." Id. at 665. In other words, the right to vote in state elections was part of political expression, of the citizen's right to participate in the political system.

54. Id. at 670 (citations omitted).
The *Rodriguez* Court never denied the nexus between voting and education. It set forth the nexus argument in some detail, and concluded that it "need not dispute . . . these propositions." However, the Court stated, "[W]e have never presumed to possess either the ability or the authority to guarantee the citizenry . . . the most informed electoral choice." But a meaningful electoral choice is guaranteed. The *Rodriguez* Court explicitly avoided this issue by assuming that Texas schoolchildren were being provided an adequate education, and therefore meaningful electoral participation. The Court cannot avoid the issue in this way for very long, however, in view of the mounting rate of functional illiteracy and general institutional failure of our schools.

The nexus between adequate education and meaningful exercise of the franchise, to the extent that functional illiteracy or something close to it is at issue, is so obvious that requiring a statistical or sociological demonstration would not be justified.

The more interesting analysis, however, is not the nexus between education and voting, but the analogy between education and voting. That is, the major point is not that education is necessary for the vote, but that it is analogous to the vote in a constitutional scheme. The *Rodriguez* Court did not consider this analysis.

The most rudimentary level of this argument is that, as Justice Marshall suggested, both education and voting are "preservative of other rights" such as first amendment freedoms and a democratic system. Thus, the right to adequate education should be understood as being analogous to the con-

55. 411 U.S. at 36.
56. Id.
57. Id. at 36-37.
58. See text accompanying notes 175-80 infra.
59. See Senate Select Comm. on Equal Educational Opportunity, 92d Cong., 2d Sess., The Costs to the Nation of Inadequate Education 46-47 (Comm. Print 1972); Lindquist & Wise, supra note 4, at 20 n.82.

Lindquist and Wise conclude:

Although the U.S. Supreme Court [in *Rodriguez*] was apparently unaware of much of this work, developmental psychologists have already provided initial answers to many of these questions. Based on developmental theories, these research conclusions have begun to support Justice Marshall's contention that there is a strong nexus between education and an understanding of legal and political rights.

Id. at 21 n.82.
60. 411 U.S. at 114 (Marshall, J., dissenting).
stitutional status of voting in state elections. Neither is expressed in the constitution, but adequate rights to both should be guaranteed.

A more subtle argument seems even more persuasive; it requires identification of what it is our constitutional purpose to protect. As discussed in some detail above, the point of the voting cases was not to protect the right to vote or to an equal vote, per se, but to ensure meaningful access to a federal political system. Adequate education should stand on the same level.

First amendment interests—access to information and to channels of communication. There is now a well-established right of access to information. Recent Court decisions have suggested that this right constitutes the primary content of first amendment free speech guarantees. The seminal decision in this area was Red Lion Broadcasting Co. v. FCC, where the Court stated: "It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences which is crucial here." The Supreme Court's decisions since Red Lion have emphasized this focus on a right of access. Thus, in First National Bank of Boston v. Bellotti, the Court concluded that the corporate nature of the speaker was irrelevant. The proper focus was on the public's interest in hearing the type of speech involved, which was, the Court concluded, "the type of speech indispensable to decision-making in a democracy." Buckley v. Valeo was influenced in large measure by the public's interest in an undiminished quantity of speech. Similarly, the recent commercial speech cases were largely predicated on the public's right of access to information. As the Bellotti Court observed, "A commercial advertisement is constitutionally protected not so much because it pertains to the seller's business as because it furthers the societal interest in the 'free flow

62. Id. at 390.
64. Id. at 778-77.
65. Id. at 777.
67. Id.
of commercial information." 69

As with voting, the nexus between education and speech is something of a cliché. Clearly, the functional illiterate or the individual with limited verbal skills lacks meaningful access to most channels of information. Rodriguez did not deny this proposition; it acknowledged the argument that "the corollary right to receive information becomes little more than a hollow privilege when the recipient has not been taught to read, assimilate, and utilize available knowledge." 70 However, the Court concluded, since Texas schoolchildren received adequate education, they presumably received adequate access to information. 71 No such easy escape would be offered the Court in a suit claiming the right to an adequate education for access to information purposes. Furthermore, the current social-science research regarding the effect of education on political attitudes also suggests the key role of education in shaping political understanding and interpretation. 72 Surely a right of access to information must comprehend the ability to analyze and form opinions about that information. But additional data about the relationship between access to information and education does not really seem necessary; it has become something of a truism, one which even the Rodriguez Court did not attempt to deny. 73

While the nexus between education and access to information is not in great dispute, the analogy between the right of access to information and the right to adequate education is prone to a number of objections. It is also of potentially greater constitutional significance because it does not subordinate education to the right of access to information or give it only indirect significance, as does the Rodriguez Court's nexus analysis. As in the voting context, what is contended for is an analogous, constitutional access right to adequate education; the significance of the nexus point is merely to show that education and access to information implicate similar concerns.

The primary objection to the analogy is, of course, that the speech cases did not require the government to finance an access right. Buckley, Bellotti and the commercial speech cases merely proscribed government action that would limit access to information. A right to adequate education, conversely,

69. 435 U.S. at 783 (citations omitted).
70. 411 U.S. at 35.
71. See Gard, supra note 4, at 36.
72. See note 59 supra.
73. 411 U.S. at 36.
would require an affirmative obligation on the government's part. However, there is more basis for the analogy than may be initially apparent.

The requirement that government affirmatively provide access to information is not nearly as startling as it may at first seem. Red Lion Broadcasting Co. v. FCC

upheld the fairness doctrine and a corollary right of reply doctrine which, while not court-imposed, fulfilled a very similar function, specifically identified as guaranteeing meaningful access to a broad spectrum of ideas. That function provided the Court with constitutional justification for the FCC's incursion upon the broadcasters' discretion.

The pivotal case in this area was CBS v. Democratic National Committee. CBS is in many ways a problematic decision. The Court's ultimate holding was that the first amendment did not require broadcasters to sell time for editorial advertisements. While at first blush the case appears a defeat for the access right, in fact it strongly supports the analogy between access to adequate education and access to information.

What the Court was relying upon in its decision was precisely a right to adequate, or minimal, access. The situation was not one where the Court concluded it was powerless to remedy a lack of access to information by requiring that the government assume affirmative obligations. Rather, the Court concluded that the FCC's enforcement of the fairness doctrine provided adequate access to information. The education analogy requires only that the Court insist upon provision of concomitant adequate access to education. The most encouraging aspect of CBS is the fact that four Justices concluded that if there were state action, then a right of access would obtain;
two Justices did not reach the question because they found no state action.\textsuperscript{79} The level of state involvement in education is patent. Thus, by analogy to CBS, the state should not be permitted to educate in such a way as to deny some students meaningful access to education, and therefore to information.\textsuperscript{80}

It may be argued that education is much farther removed from the right to information than the CBS situation. But, if the constitutional concern to be protected is meaningful access to information (and not just a right to speak or hear), then the remoteness distinction should be constitutionally irrelevant since the right is being denied by the state in either event. Furthermore, as it is the state that determines a child's ability to receive and assimilate information from an early age, it has a greater power over an individual's information right than that found in CBS.\textsuperscript{81}

The right to adequate education is also linked to another aspect of the first amendment: the individual's right to self-expression. As one commentator pointed out,

The protection of the right to an adequate education is supported by every consideration which has historically buttressed the first amendment guarantee of free speech.

\textsuperscript{79} Id. at 114-21 (Burger, C.J., joined on this issue by Stewart, J., and Rehnquist, J.).


An exhaustive listing of this literature can be found in Lange, The Role of the Access Doctrine in the Regulation of the Mass Media: A Critical Review and Assessment, 52 N.C. L. Rev. 1, 2 n.5 (1973).

\textsuperscript{80} Of course, the implication of CBS and of the literature surveyed in the preceding note is that, given sufficient state action, various speakers should be afforded an access right; education focuses on the listener's access. However, CBS and the commentators defend the access right on the basis of the listener's right to hear—the speaker is only the means to that end—so the analogy is not notably weakened by this distinction.

\textsuperscript{81} It should be noted that the first amendment access right is generally advocated only where, due to scarce resources, the government must allot access in some way in the first place. However, this does not affect the education analogy, since the government is controlling access to education there, as well. Indeed, for poor children, there is no alternate source of access; Professor Clune has concluded that private education is not feasible at income levels much under $12,000 a year. See Clune, School Finance, supra note 4, at 693.
The meaningful exercise of free speech is dependent upon the speaker's ability to speak intelligently and knowledgeably, i.e., is dependent on the level of the speaker's educational achievement. The right of free speech is meaningless unless the speaker is capable of articulating his thoughts knowingly and persuasively. Education is speech, just as speech is always a form of education.\(^82\)

In this area, as with voting and access to information, the Rodriguez Court never denied the existence of a strong nexus.\(^83\) Instead, it relied on the assertion that all Texas schoolchildren had received an education adequate for the exercise of first amendment rights\(^84\) and stated that the Court had never purported to guarantee "the most effective speech."\(^85\) However, such an argument is irrelevant for the individual who lacks literacy or the basic verbal skills to communicate. As in voting, the individual who lacks effective communication skills lacks meaningful access to the political system. Social science data regarding education and the development of political concepts and attitudes supports this conclusion.\(^86\) For the individual who lacks the education to meaningfully form or express political or personal preferences, our system of free expression is a political and personal irrelevancy.

The argument for a right to adequate education by way of an analogy to free speech guarantees is problematic. The government has not generally been required to provide channels of communication. Nevertheless, CBS and the "public forum" cases suggest such an analogy.\(^87\) The public forum cases held that once an area—usually governmentally owned—had been established as a public forum, only reasonable restrictions on access could be imposed, and such restrictions could not discriminate between speakers.\(^88\) The Justices who found an access right in CBS when state action was assumed were responding to a similar, "quasi-affirmative" sense of government obligation. Once the government provides a channel of communication to some individuals, denying that channel to other indi-

\(^{82}\) Gard, supra note 4, at 18.

\(^{83}\) 411 U.S. at 36.

\(^{84}\) Id. at 36-37.

\(^{85}\) Id. at 36.

\(^{86}\) See note 59 supra.

\(^{87}\) See, e.g., Canby, supra note 79, at 746-58; Johnson & Westen, supra note 79, at 609-20; Malone, supra note 79, at 219-52.

\(^{88}\) See, e.g., Johnson & Westen, supra note 79, at 609-20.
Individuals will be understood as an abridgement of the latter group's speech rights. By analogy, if the state does not provide education adequate for meaningful access to channels of communication to a portion of the student population, then the speech rights of this group have been abridged.

The "Federal" or "National" System Aspect

Education is analogous to all three strands of access cases in that it plays a key role in determining access to a national system of rights and concerns. In fact, when voting and speech interests are understood on their greatest level of generality, education and these other two interests can all be seen as elements of access to the federal or national political system. This is not necessary to the analogy, but makes it all the more compelling.

Free speech preserves the system. Free speech has been most often defended in the cases as necessary to preserve a "free marketplace of ideas," allowing the most deserving ideas to triumph. While this rubric does not adequately express the full range of first amendment concerns, it does suggest a crucial point. Once shorn of rhetoric, the focus of most cases in the first amendment area is systemic, not individualistic. That is, the individual's right to speak is significant in terms of the political system, not in terms of vague notions of the inalienable rights of each individual. Justice Brandeis concluded, in Whitney v. California, that "underlying the first amendment guarantee is the assumption that free expression is indispensable to the 'discovery and spread of political truth' and that the 'greatest menace to freedom is an inert people.'" When Brandeis went beyond the free-market concept and defended free speech in terms of individual dignity, his focus was still systemic. The essential tenet of the first amendment is that


90. See, e.g., L. Tribe, AMERICAN CONSTITUTIONAL LAW 576-79 (1978); Barron, supra note 79.

91. 274 U.S. 357, 375 (Brandeis, J., concurring).

92. Id. See Barron, supra note 79, at 1648.
it is hazardous to discourage thought, hope, and imagination; that fear breeds repression; that repression breeds hate; that hate menaces stable government; that the path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies . . . .93

The underlying significance of free speech guarantees, then, is preservation of the American political system.

Voting. Voting is also best understood in terms of the system. This is particularly clear in cases where the Court vindicated voting rights in the state context, with no explicit constitutional basis for doing so. Reynolds v. Sims,94 although it concerned state apportionment and state elections only, was conceived of as vindicating the national democratic system: "The right to vote freely for the candidate of one's choice is of the essence of a democratic society. . . ."95 Similarly, Reynolds spoke of the right to vote as "preservative of all rights."96 The right to an equal vote in state elections existed because voting is the essence of a democratic system; an interest of such national character could not be circumscribed by a state. Particularly in terms of citizens' expectations, a sharp division between state and federal voting systems was unrealistic; both were part of a larger democratic whole.

Access to state courts. The case conferring a right of access to state courts support the contention that the American system of justice is precisely that, a national system. These cases cannot be explained solely in terms of reliance on the express provisions of the due process clause of the fourteenth amendment; as Justice Rehnquist notes in Ross v. Moffitt,97 the Griffin v. Illinois98 and Douglas v. California99 line of cases did not clearly rely on the due process clause.100 Indeed, Ross v.
Moffitt chose to rest the right of adequate access to state criminal appeals exclusively on equal protection guarantees. Justice Rehnquist therefore must have identified this access right as a preferred interest, deserving of special solicitude, on some basis other than due process. That basis must be the special significance of fair access to the courts in a democratic system.

At the same time, the Constitution has undeniably guaranteed a federal—state and national—system of justice. The fifth, sixth and fourteenth amendments create federal guarantees that are not amenable to being arbitrarily limited to federal courts. Citizens develop legitimate expectations that courts must vindicate regardless of delicate distinctions between state and federal authority, because citizens correctly conceive of the system as a national one.

Education similarly implicates the federal system and federal guarantees. It does so in more complex ways than are usually elaborated. First, education, like the political rights of speech and voting, is seen as essential to the preservation of our national democracy because it is the *sine qua non* of meaningful political participation, an issue *Rodriguez* dodged by relying on the adequacy argument. Justice Frankfurter wrote, "The public school is at once the symbol of our democracy and the most persuasive means for promoting our common destiny;" Justice Brennan asserted that "Americans regard the public schools as a most vital institution for the preservation of the democratic system of government." More prosaic, but perhaps more illuminating, is the Court's statement in *Wisconsin v. Yoder* that "some degree of education is necessary to prepare citizens to participate effectively and intelligently in our open political system . . . ." If the essential concern is meaningful access to the political system, education should be regarded not as a mere conduit to voting and speech, but should stand on the same plane as these rights. Internalization of democratic ideals, understanding of political issues, and political knowledge and sophistication are as essential for

101. *Id.* at 611.
102. 411 U.S. at 36-37.
106. *Id.* at 221.
meaningful access to the political system as speech or the franchise. This may be the partial import of the Court's references to the classroom as the "marketplace of ideas." 107

Second, like first amendment rights, education may be key to the preservation of a stable society, but in a different way. As one commentator has expressed it, "education, by enabling an individual to compete economically . . . is essential to the free enterprise democracy America prizes and thus is vital to the economic survival of the nation in the world marketplace." 108 The Yoder Court declared that "education prepares individuals to be self-reliant and self-sufficient participants in society." 109

Third, as with voting and criminal justice, citizens conceive of education as a national right, quintessentially a part of the American conception of democracy. As one commentator noted, the American democratic ideal is "a society in which social class is not inherited and in which parents can enjoy the notion that their children have unlimited opportunity for professional achievement and financial reward." 110 A right to adequate education is thus implicit in democratic ideals of social mobility; while equal education may be partly at odds with the countervailing competitive ideal, adequate education is quite compatible with the Horatio Alger model. The fact that the overwhelming majority of states guarantee public education in their constitutions, and most provide it, gives considerable substance to citizens' expectation that all Americans are guaranteed an adequate education. 111 That the Supreme Court has never explicitly recognized a federal constitutional right to education is hardly an adequate response since this was equally true of the right to a meaningful state franchise until a little over a decade ago.

It is a characteristic of the adequate access cases, then, that they implicate strong national systemic concerns. Education may well serve as a paradigm for a right which implicates such concerns; thus, this aspect of the analogy to other access cases strongly supports recognition of a right to adequate education.

108. Gard, supra note 4, at 19.
109. 406 U.S. at 221.
110. Schoettle, supra note 4, at 1357.
111. See text accompanying notes 158-66 infra.
The Characteristic of State Involvement

It is hardly a revelation that voting, court systems, and the public forum aspect of first amendment access are all characterized by high levels of government involvement, and the point will not be belabored here. However, the constitutional implications of this aspect of the access cases, and their significance for the proposed right to adequate education, are worthy of some discussion.

Access to the courts. The cases dealing with access to state criminal appeals attached considerable significance to this issue. In *Griffin v. Illinois*, 112 the Court emphasized the intensity of state action involved—the state required a transcript for appeals, and the state required the defendant to pay for it.113 The level of state action in education is at least as great—education is compulsory; it has a great influence in shaping the individual’s character and his or her future, and the state determines, or delegates responsibility for determining, the kind of education the individual will receive.114

Apportionment cases. The analogy between education and the apportionment cases is also quite strong. *Reynolds v. Sims*115 emphasized that the state was responsible for the boundaries drawn, and hence the dilution of some individuals’ votes. Similarly, the state creates school districts and mandates reliance on property tax revenue; thus, it is the state which is largely responsible for the denial of adequate education to students in particular districts.116

Access to public fora. The Supreme Court’s analysis in *CBS v. Democratic National Committee*117 is also relevant. There, four of the Justices suggested that if broadcasting were imbued with state action, then the first amendment would require the extension of an access right to would-be speakers.118 It is probably fair to assume that the presence of state action

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114. See Coons, Clune & Sugarman, Educational Opportunity, supra note 4, at 388-89.
118. See note 78 supra.
RODRIGUEZ REVISITED

1980]

would also constitutionalize the fairness doctrine and its corollary right-of-reply doctrine, in order to vindicate the public interest in access to information (since all speakers could not be heard). The analogy to education is apparent—education is clearly state action. For the relatively poor, it is state action from which there is no escape. The only way to guarantee meaningful access to information, to channels of communication, and to the federal political system is to implement a right to adequate education. The public forum cases can be read to support this analogy as well.

In addition to these specific analogies, another element of the state's involvement in education should be highlighted. The compulsory nature of public education is important; it emphasizes the state's power over the individual in this context, and argues for a concomitant responsibility on the state's part to provide a meaningful return for the time and effort exacted.119

Wealth Classifications

All three strands of cases that identify rights of adequate access at one point or another implicate wealth classifications. This is clearly true of education as well. While wealth itself has never been held suspect for the purpose of equal protection analysis, it is clear that concern about unique disadvantages visited upon the poor has animated the Court's adequate access decisions. This may be so because the wealth aspect has made the unfairness of a given deprivation particularly patent, because of concerns about the political powerlessness of the poor, or, as seems most likely, a combination of the two. In any event, both lines of reasoning add considerable impetus to the claim for a right to adequate education.

Educational deprivation is connected to lack of wealth. Poor people tend to cluster together in poor districts. Poor districts often have less revenue to spend on education. While the cost-quality issue is disputed, it is clear that adequate dollars are necessary, although perhaps not sufficient, for adequate education.120 Poor people are therefore more likely to be deprived of adequate education.

119. See Coons, Clune & Sugarman, Educational Opportunity, supra note 4, at 388.

120. See Goldstein, supra note 4, at 520.
The *Rodriguez* Court rejected this argument, because it found that the affidavit primarily relied upon to demonstrate the relationship between individual and district wealth had employed faulty methodology. However, subsequent research has in turn revealed serious flaws in the study relied upon by the Court. Strong correlations have been found between district and individual wealth in recent, exhaustive studies undertaken in California, Texas and Illinois. Indeed, one commentator has gone so far as to suggest that this “firm factual basis for a finding of wealth suspectness offers a substantial incentive for bringing the *Rodriguez* cause before the Court again.”

The point here is far more modest; wealth suspectness is not contended for. Rather, as in the other access cases, the Court should simply be sensitive to the possibility of intensified deprivation and political powerlessness posed by the relative wealth issue. With this preliminary understanding established, the role of wealth issues in the adequate access context can now be examined in some detail.

*Speech is less free for the poor.* The Court has repeatedly flagged wealth concerns in the first amendment access cases. In *CBS*, the Court professed a reluctance to grant an access right to prospective editorial advertisers since

the public interest in providing access to the marketplace of “ideas and experience” would scarcely be served by a

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121. 411 U.S. at 23.
122. The Court relied heavily on the *Yale* Note, *supra* note 4, at 1328-29, which concluded that it was incorrect to assume that poor individuals lived in poor districts. The Note was based on a study of Connecticut school districts.

The Note has been criticized as incorrect both in its statistical inferences and in its theoretical analysis. Grubb & Michelson, *supra* note 4, at 552. After re-analysis of the statistical data on school financing in Connecticut, as well as data for Maryland, Massachusetts and South Carolina, Grubb and Michelson reached the opposite conclusion from the *Yale* Note; they found a high correlation between individual and district wealth. *Id.* at 559.

123. A study funded by the National Institute of Education, utilizing data on all Texas school districts and all California unified school districts found statistically significant correlations (.40 and .34, respectively). *Brischetto & Arciniega, Inequalities in Educational Resources: Their Impact on Minorities and the Poor in Texas and California* (NIE Grant No. NE-G-3-0062, Nov. 1974).

John Clune, using a somewhat more sophisticated methodology than had been employed in previous studies, combined property and finance in a single measure in his exhaustive study of school finance in Illinois. Clune found an almost perfect correlation between individual wealth and district expenditures. Clune, *School Finance, supra* note 4, at 684-95.

system so heavily weighted in favor of the financially affluent, or those with access to wealth.\textsuperscript{125}

The Court added that a right of free reply would not necessarily solve the problem, since the affluent would still be able to determine the issues to be discussed. Thus, the "public trustee" approach was a preferable means for securing adequate access to information for all interests.\textsuperscript{126} The analogy to education is not particularly elusive: Poor children are the least likely to enjoy an adequate education. Therefore, poor children are the least likely to have adequate access to information; the fairness doctrine is less accessible to listeners who are unable to comprehend the ideas communicated. Furthermore, to the extent that the poor would be likely to communicate unique ideas, if they are deprived of adequate education, they would be unable to communicate effectively, and the "marketplace of ideas" will be deprived of their ideas.

The so-called commercial speech cases demonstrated a particular solicitousness for the poor's interest in access to information. The Court's analysis was that advertising is particularly important to the poor, since they have a special need to learn where their basic needs (drugs or legal services, for example) can be economically satisfied.\textsuperscript{127} Thus, the limitations on advertising in \textit{Virginia Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.}\textsuperscript{128} or \textit{Bates v. State Bar of Arizona}\textsuperscript{129}


\textsuperscript{126} 412 U.S. at 125.

\textsuperscript{127} \textit{See} Note, \textit{Access of the Poor to Basic Economic Needs: A New Concern in Freedom of Speech Decisions}, 54 Ind. L.J. 83 (1978) [hereinafter cited as Note, \textit{Access of the Poor}].

\textsuperscript{128} 425 U.S. 748 (1976). Justice Blackmun wrote for the Court that [t]hose whom the suppression of prescription drug price information hits the hardest are the poor. . . . When drug prices vary as strikingly as they do, information as to who is charging what becomes more than a convenience. It could mean the alleviation of physical pain or the enjoyment of basic necessities. \textit{Id.} at 763-64.

\textsuperscript{129} 433 U.S. 350 (1977). The opinion noted: "Among the reasons for underutilization [of lawyers] is fear of the cost. . . . The disciplinary rule at issue likely has served to burden access to legal services, particularly for the not-quite-poor and the unknowledgeable." \textit{Id.} at 376-77.

As one commentator has noted, this reference to the "not-quite-poor" assumes that the truly poor have access to government-financed legal aid programs, an assumption which is not necessarily accurate. Note, \textit{Access of the Poor, supra} note 127, at 89 n.33. However, as this commentator notes, "Even assuming such access . . . the emphasis in the \textit{Bates} approach remains on how the least well-off potential clients of
had a particularly detrimental effect on poor people. Similarly, to the extent that poor individuals are denied adequate education, they often will not have effective access to the consumer information regarding the price and quality of basic services for which they have a particularly desperate need. They may be unable to comprehend the advertising which the Court protected.

Court access and the poor. The court access cases particularly emphasize wealth issues. Griffin v. Illinois and Douglas v. California are replete with language which seems to imply that wealth classifications are constitutionally suspect; there is little doubt that these are cases about poverty. While the Burger Court's decision in Ross v. Moffitt explicitly defines the right as one of adequate access, and rejects the suspectness suggestion, the focus on poverty remains: "The duty of the State . . . [is] to assure the indigent defendant an adequate opportunity to present his claims. . . ." John Clune has suggested that the pivotal significance of wealth in these cases was due to a sense that poor people, already disadvantaged by democratic society in various ways, and here subjected to the coercive power of the state, should not incur additional disadvantages in this context because of their poverty. Clune views the "centrality of fair criminal process to democratic institutions" and the "intensity of state action involved" as particularly

private legal offices stand to gain the most from price advertising." Id.

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130. See notes 128 & 129 supra. See Note, Access of the Poor, supra note 127.
133. Justice Black, writing for the Court in Griffin, declared:
In criminal trials a State can no more discriminate on account of poverty than on account of religion, race, or color. . . . There is no meaningful distinction between a rule which would deny the poor the right to defend themselves in a trial court and one which effectively denies the poor an adequate appellate review. . . .
351 U.S. at 17-18.

Similarly, Justice Douglas wrote for the Court in Douglas that:
There is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record . . . while the indigent . . . is forced to shift for himself. The indigent, where the record is unclear or the errors are hidden, has only the right to a meaningless ritual, while the rich man has a meaningful appeal.
372 U.S. at 357-58.
135. Id. at 616 (emphasis added).
signficant.\textsuperscript{137}

The analogy to education is suggestive. The state, presumably, has drawn districts and legislated educational financing plans which disadvantage the poor individual. Education is central to democratic processes in all the ways suggested above. For these same reasons, the poor lack meaningful access to the “democratic processes” which have determined the kind of education they will receive. And the coercive power of the state is great. Compulsory education laws, coupled with the inability of poor people to “opt out” of the public system, make the system mandatory as to the poor.\textsuperscript{138} As in the criminal process, all these factors support the state’s obligation to provide meaningful access to “fair,” adequate education.

\textit{The political franchise.} In many ways, the voting cases offer the most significant analogy to education in the poverty context. \textit{Harper v. Virginia Board of Electors}\textsuperscript{139} emphasized that poverty should be irrelevant to access to the franchise, and held Virginia’s poll tax unconstitutional.\textsuperscript{140} \textit{Harper} is important in rebutting one argument often advanced for the proposition that education does not implicate wealth issues: the argument that some poor children live in wealthy districts; some poor children receive adequate educations; and conversely, some non-poor children live in poor districts or are denied adequate education. This, however, precisely parallels \textit{Harper}. Some non-poor voters were undoubtedly disenfranchised by unwillingness to pay the poll tax although they were able to do so; these non-poor voters would be granted access to the ballot by the \textit{Harper} result. The significance of poverty was not to require enfranchisement of a suspect class, but to demonstrate the inappropriateness of permitting wealth to be implicated at all in a process so vital to the legitimacy of the democratic system as voting.\textsuperscript{141} Similarly, the impact of wealth on the individual’s likelihood of obtaining adequate education, and therefore on the individual’s likelihood of having meaningful access to the political system, should be profoundly disturbing.

Another voting case, \textit{Kramer v. Union Free School District No. 15},\textsuperscript{142} does not involve wealth issues but suggests a crucial

\begin{itemize}
  \item \textsuperscript{137} \textit{Id.} at 297.
  \item \textsuperscript{138} See \textit{Private Wealth}, supra note 4, at 388-89.
  \item \textsuperscript{139} 383 U.S. 663 (1966).
  \item \textsuperscript{140} See note 53 \textit{supra}.
  \item \textsuperscript{141} See text accompanying notes 53-54 \textit{supra}.
  \item \textsuperscript{142} 395 U.S. 621 (1969).
\end{itemize}
point about poverty, education, and the democratic system. In rejecting the traditional posture of deference to state legislatures, Chief Justice Warren wrote:

The presumption of constitutionality and the approval given "rational" classifications in other types of enactments are based on an assumption that the institutions of state government are structured so as to represent fairly all the people. However, when the challenge to the statute is in effect a challenge of this basic assumption, the assumption can no longer serve as the basis for presuming constitutionality."

For related reasons, the state legislative process does not adequately protect the educational interests of the poor. The argument is rather complex; it will be referred to, rather inelegantly, as "The Cycle of Non-Access." The first point is that the poor are a political minority, particularly in the education context. The relatively privileged are eager to perpetuate their privileged status into the next generation. Therefore, it is in their interest to perpetuate the educational deprivation of poor people. "Second, a variety of factors converge to deny the poor meaningful access to the political process to alter the educational distribution: because they have by and large been denied adequate education, they lack effective access to information about such things as the intricacies of current school finance laws or proposals. They are therefore unlikely to effectively use their vote to secure educational reform. Lack of education also undercuts their access to effective channels to communicate with others with parallel interests in educational reform efforts. Their very poverty inhibits access to channels of communication and ability to win elections, an effect which the Court's decisions in First National Bank of Boston v. Bellotti145 and Buckley v. Valeo146 can be expected to exacerbate.

143. Id. at 628. Kramer held that the vote in school district elections could not be limited to those who either owned property or had children enrolled in the schools. The argument quoted in the text is probably incorrect in this context, since voting for the legislature, which decided who should vote in school district elections, was not challenged. However, as a general principle, the argument seems quite logical.
144. See Clune, School Finance, supra note 4, at 667-68.
145. 435 U.S. 765 (1978). Bellotti held that the speech of corporate speakers could not be limited consistently with the first amendment. The exegesis of Bellotti may well be, therefore, that the speech of the relatively wealthy cannot be restrained in order to prevent "drowning out" of the relatively poor.
146. 424 U.S. 1 (1976). Buckley struck down certain contribution and expendi-
The effect of the foregoing is to create a cycle of deprivation. The children of the poor will, in their turn, be unable to secure an adequate education for their children through the political process. The injustice of such a cycle should be manifest.

**Equal education.** Several things should be noted about this article's analysis. Its logical force suggests equal education, not adequate education. The implication is that education, and for that matter, speech, are relevant largely in competitive terms: what is significant is the political influence of one individual relative to another; the earning power, and therefore the access to channels of communication of one individual relative to another; and so forth.\(^{147}\) To this extent, as with the vote, a meaningful education is an equal education. Yet, for the reasons discussed in the final section of this article, we are not yet in a position to guarantee equal education to all. The “Cycle of Non-Access” remains relevant because the issue is not absolute. A minimally adequate education can still be understood to have some content, and even some increase in the poor's access to the political process is significant. Education is not meaningful solely in the relative terms, but a full understanding of the contours of the problem does require appreciation of its relativistic aspects.

Awareness of the potentially relativistic nature of the problem, however, should not undercut the importance of adequate education to the “Cycle of Non-Access” problem. For the most immediate and appalling aspect of the problem is the denial of even adequate education, a denial that is rationalized on the basis of political access. Inequalities will be dealt with through legislative reform,\(^{148}\) but adequate education is a precondition for reform.

**The Federalism Issue**

Federalism concerns were at the heart of the Court’s decision limitations of the Federal Election Campaign Act of 1971 as violative of the first amendment. As with *Bellotti*, the implication is that the expenditures of the relatively wealthy for political activity cannot be limited in order to provide for effective political activity by the relatively poor.

The most disturbing facet of the two decisions may be, not their results, but their demonstrated insensitivity to the needs of the poor in the political process.

147. *See Lindquist & Wise, supra* note 4, at 32 n.150 (arguing that in a competitive society, equality, not adequacy, is necessary).

sion in *Rodriguez*, and the essence of these concerns was the fear that recognition of education as a preferred right and concomitant Court intervention in state educational systems would lead to similar court involvement in all state services. This would be true particularly in housing and welfare, because these services were considered indistinguishable from education. The thesis of this article is that, at least with regard to a right to adequate education, these concerns are unfounded; education stands on a constitutionally distinct plane from other state services.

There are several reasons for this assertion. First, there is sound historical basis for the argument that education occupies a special place in the constitutional plan. Second, the states recognized the primacy of the education right, and there is evidence that they do so on the basis of its significance in the federal democratic scheme. As the states themselves recognize education to be a federal right and a federal concern it is difficult to see federal protection of this right as an illegitimate encroachment on state sovereignty. Third, adequate education is perceived as a national right, particularly because of its significance in the federal system. Such citizen expectations should be vindicated. Fourth, since education is characterized by a unique level of state power over individuals, the state should not be allowed to act in a way which burdens its citizens' exercise of federal constitutional rights.

**Education and its historical context.** The Supreme Court has frequently recognized that there are elements inherent in the constitutional plan which are not explicitly mentioned; various aspects of sovereign immunity and of federalism itself are examples, as is the right to travel. There is historical, as well as logical, force to the argument that adequate education is such a right. The Confederate Congress declared its commitment to education in 1787 in the Northwest Ordinance, two years before the United States Constitution was

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149. See text accompanying notes 27-45 supra.


151. See, e.g., National League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating federal minimum wage for state employees as threatening states' "ability to function effectively in a federal system." Id. at 852)

152. See Shapiro v. Thompson, 394 U.S. 618 (1969). "[T]he nature of our Federal Union and our constitutional concepts of personal liberty unite to require that all citizens be free to travel. . . ." Id. at 629.
Rodriguez Revisited

There is no reason to believe that the failure to include a guarantee of public education in the Constitution evinced an abandonment of the earlier commitment. One commentator wrote:

Clearly the omission of this specific guarantee was due either to the belief that such a guarantee was unnecessary because of the popular support and approval of the Northwest Ordinance, or to the belief that such a right was assumed to be within a broader, more general constitutional guarantee.¹⁵⁴

The same commentator notes that such a view receives support from the fact that several of the founding fathers professed the belief that education was essential to the maintenance of a federal democracy.¹⁵⁵ The right to adequate education thus may have been thought to inhere in the constitutional blueprint.

Moreover, the significance of education to the federal system and the states' obligation to provide adequate education as part of their role in that system has been repeatedly recognized. Congress required that the Confederate states guarantee public education to all citizens as a precondition of those states' readmission to the Union.¹⁵⁶ The thirty-ninth Congress, which drafted the fourteenth amendment, referred to public education in various enactments as a fundamental tenet of Republicanism.¹⁵⁷ It is therefore possible to make a strong argument to the Court that a right to adequate education need not menace the federalism concerns of which the Court is so solicitous, and which underlay its decision in Rodriguez. It is appropriate that the Court reenter the education arena, recognizing and examining the content of an affirmative state obligation in education.

Education is part of the federal scheme. The position of the states with regard to the right to adequate education is also significant to the federalism issue, and to the constitutional uniqueness of education as compared to other state services. All the states have at one time guaranteed a right to public

¹⁵⁴. Gard, supra note 4, at 11.
¹⁵⁵. Id. at 11-12.
education in their constitutions, although three have added amendments to eliminate the mandatory provision for public education in an (unsuccessful) attempt to evade Brown v. Board of Education. Although the terminology varies, most of these state constitutional provisions imply a guarantee of adequate education. Significantly, less than a handful of state constitutions include guarantees related to public health, housing, or welfare.

A number of states explicitly predicate their education guarantees on the importance of education to a federal system of government, the maintenance of Republican rights and responsibilities, the rights and liberties of the people, and/or the stability of government.

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158. See Ala. Const. art. XIV, § 256; Alaska Const. art. VII, § 1; Ariz. Const. art. XI, § 1; Ark. Const. art. XIV, § 1; Cal. Const. art. IX, § 5; Colo. Const. art. IX, § 2; Conn. Const. art. VIII, § 1; Del. Const. art. X, § 1; Fla. Const. art. XII, § 1; Ga. Const. art. VIII, § 2-6401; Hawa Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ill. Const. art. X, § 1; Ind. Const. art. VIII, § 1; Iowa Const. art. IX, § 12; Kan. Const. art. VI, § 1; Ky. Const. § 183; La. Const. art. XII, § 1; Me. Const. art. VIII, § 1; Md. Const. art. VIII, § 1; Mass. Const. pt. 2, ch. 5, § 2; Mich. Const. art. VIII, § 2; Minn. Const. art. VII, § 1; Miss. Const. art. VIII, § 201; Mo. Const. art. IX, § 1(a); Mont. Const. art. X, § 1; Neb. Const. art. VII, § 6; Nev. Const. art. XI, § 2; N.H. Const. pt. 2, art. 83; N.J. Const. art. VIII, § 4; N.M. Const. art. XII, § 1; N.Y. Const. art. XI, § 1; N.C. Const. art. IX, § 2; N.D. Const. art. VIII, § 147; Ohio Const. art. VI, § 3; Okla. Const. art. XIII, § 1; Ore. Const. art. VIII, § 3; Pa. Const. art. III, § 14; R.I. Const. art. XII, § 1; S. D. Const. art. VIII, § 1; Tenn. Const. art. XI, § 12; Tex. Const. art. VII, § 1; Utah Const. art. X, § 1; Vt. Const. ch. 2, § 64; Va. Const. art. VIII, § 1; Wash. Const. art. IX, § 1; W. Va. Const. art. XII, § 1; Wis. Const. art. X, § 3; Wyo. Const. art. VII, § 1.


The three states are Alabama, Mississippi and South Carolina. The Alabama Constitution, article XIV, § 256 provides for the establishment of free schools, but has been amended to specifically provide that there is “no right to education or training at public expense.” The Mississippi Constitution, article VIII, § 201 was amended in 1960 to provide that the legislature’s decision to provide public schools was discretionary. South Carolina has specifically eliminated the section of its constitution that provided for free public schools. S.C. Const. art. XI, § 5, eliminated by S.C. Code 2223 (1952) and S.C. Code 1695 (Cum. Supp. 1960).


161. See Alaska Const. art. VII, §§ 4, 5 (legislature shall provide for public health and welfare); N.Y. Const. art. XVII (special welfare), art. XVIII (housing).


163. N.H. Const. part 2, art. 83.

164. N.D. Const. art. VIII, § 147.

165. Minn. Const. art. XIII, § 1.

The eight other similar state constitutional provisions are: Ariz. Const. art. XI, § 1; Cal. Const. art. IX, § 1; Idaho Const. art. IX, § 1; Ind. Const. art. VIII, § 1; Me.
The essential point is that the states themselves do not regard education as a parochial state concern; rather, they accord it paramount importance because it is crucial to the federal system, to the preservation of a system of government of which the states are a part. It therefore seems anomalous to view federal constitutional protection of the right to education as an improper intrusion into state concerns, as did the Rodriguez Court.

An Expectation of Education

Justice Rehnquist, dissenting in *Hall v. Nevada*, argued,

Any document—particularly a constitution—is built on certain postulates or assumptions; it draws on shared experience and common understanding . . . when the Constitution is ambiguous or silent on a particular issue, this Court has often relied on notions of a constitutional plan—the implicit ordering of relationships within the federal system necessary to make the Constitution a workable governing charter. . . .

The fact that public education is guaranteed in virtually every state creates a common understanding that education is a national entitlement consistent with the democratic system of government. A number of states explicitly predicate this understanding on the importance of education to the national government. Interpretation of the United States Constitution should not be blind to such expectations, but should seek to vindicate them.

Furthermore, the Court has recognized the peoples' sense that education is an important national interest: "Americans regard the public schools as a most vital civic institution for the preservation of a democratic system of government." While housing and welfare interests are of crucial importance to the individual, they have never been deemed to have the significance in the federal system which the Court, the states and the American people accord education. This consensus sets education apart specifically with regard to its place in the federal

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**Notes:**


167. See notes 162-65 and accompanying text supra.

system and should allay the Rodriguez federalism concerns.

It can be argued that housing or welfare are as important to the federal system as education; that underfed, unsheltered or unclothed citizens are discouraged from effectively participating in the federal political system.\(^{169}\) In response, two things should be noted. First, the connection with federal concerns seems both less direct and less absolute; ill-fed, ill-sheltered or ill-clothed citizens may be politically apathetic, but they are not as incapable of meaningfully participating in the political system as the individual who cannot read. Second, the historical and constitutional basis for these other social welfare rights is not comparable to that supporting a right to education. Surely, regret that there is no clear constitutional basis for a right to housing or welfare should not lead us to abandon efforts to secure recognition of a right to education, for which there is a strong constitutional basis.

*Education is unique in the intensity of state action involved.*\(^{170}\) The implications of the state-action factor for the federal system are quite significant. First, unlike any other state service,\(^{171}\) education is compulsory. Many citizens have no alternative to the public education system. Second, the state determines what kind of education the individual who is locked into the system will get.\(^{172}\) Third, to the extent that poorer individuals living in poorer districts are less likely to receive adequate education, the legal apparatus of the state functions to perpetuate or exacerbate wealth inequalities.\(^{173}\) Lack of other social welfare goods, such as food or housing, also may be attributable to educational deprivation by the state. But unlike the lack of housing or food, which is only indirectly due to state action, if at all, educational deprivation is directly determined by the state. At least with regard to poor individuals, the state determines what kind of education the individual receives. These distinctions from other state services suggest that adequate education should be guaranteed by the federal courts.

There is also a fourth aspect to the state involvement


\(^{170}\) See text accompanying notes 112-19 supra.

\(^{171}\) See *Coons, Clune & Sugarman, Educational Opportunity*, supra note 4, at 388.


\(^{173}\) See *Coons, Clune & Sugarman, Educational Opportunity*, supra note 4, at 333.
issue. It directly implicates federal concerns and constitutes a particularly strong rationale for a federally guaranteed right to adequate education. As the above discussion suggests, it is entirely within the state’s power to determine what kind of education most individuals will receive. For the federal government to protect the constitutional rights and role of federal citizens in this context is not an intrusion into legitimate state prerogatives, but a vindication of the values implicit in the Supremacy Clause and the Privileges and Immunities Clause of the fourteenth amendment. Such a constitutional right is therefore fully consistent with—indeed, required by—principles of federalism.

The Rodriguez Court expressed a concern that enforcing a constitutional right to education might involve excessive interference with state legislative and administrative determinations about state education systems. The following section suggests a content for the right to adequate education that would not involve the degree of interference with state systems feared by the Court.

THE RIGHT TO ADEQUATE EDUCATION: ITS CONTENT

The Practical Content

Two possible contents for a right to adequate education will be suggested; the contrast between the two is intended to focus many of the tensions in this area. The first possibility to be explored, the “minimum output standard,” is formulated in such a way that the Court might be persuaded to recognize it today. The second, an “equalization principle,” suggests the potential evolution of the right.

The Minimum Output Standard

It is apparent that the “adequate education” presumed by Rodriguez is an illusion for many children in public schools. Functional illiteracy rates are soaring. “Social passing”—passing students in order to keep them with their grade level although they have failed to master the subject matter of the previous grade level—is accepted practice, and educational failure is compounded until the illiterate or semi-literate stu-

174. 411 U.S. at 40-44.
175. Functional illiteracy rates of twenty percent among high school graduates are commonplace. See S. Engelman, Preventing Failure in the Public Schools (1969); J. Holt, How Children Fail (1967); Gard, supra note 4, at 9.
dent is finally graduated from high school. Studies have found actual academic regression among students in the public schools.

The situation has become so dire that parents and students have resorted to suing the schools on various tort theories. A characteristic suit of this genre is *Peter W. v. San Francisco Unified School District.* The plaintiff was a nineteen-year-old graduate of Galileo High School who, although he suffered no educational disability and attended school regularly, was functionally illiterate; that is, he could not read at a sixth-grade level. A number of similar actions have been filed throughout the United States. While not notably successful in the courts, these suits emphasize the current crisis in public education.

The very least that an exegesis of the Court’s pronouncement in *Rodriguez* would seem to require is that every student acquire a reading level adequate for meaningful access to the political system. Clearly, no such guarantee is being provided; a large number of the nation’s schoolchildren lack even the minimal level of skills necessary for enjoyment of constitutional access rights.

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177. "The 1964 Haryow Report showed actual academic regression in New York City’s Harlem where ‘twenty-two per cent of the third grade students in that area were reading above grade level, while thirty per cent were reading below grade level. . . . By the sixth grade twelve per cent were reading above grade level, and eighty-one percent were reading below grade level!'" Gard, supra note 4, at 5, citing *New York: Harlem Youth Opportunities Unlimited, Inc., Youth in the Ghetto* 168-70 (1964). See also *R. Hurley, Poverty and Mental Retarding* (1969); *B. Bloom, A. Davis & R. Hess, Compensatory Education for Cultural Deprivation* 74 (1965).


180. See *Educational Malpractice*, supra note 179.


These cases are exhaustively surveyed in Note, *The Right to Education: A Constitutional Analysis*, 44 U. Cinn. L. Rev. 796 (1975).

181. See 411 U.S. at 36-37.

182. See Gard, supra note 4, at 3-10; *Educational Malpractice*, supra note 179, at 117.
Therefore, one possible content for the right to education would prescribe demonstrated achievement levels in certain basic skills sufficient for access to the political system. The narrowest definition of such skills would simply require basic literacy; reading ability on an eighth-grade level or above. The Court implied a definition of this sort in Wisconsin v. Yoder, where it suggested that education to an eighth-grade level would satisfy most governmental interests in education. A literacy standard would at least guarantee that all students would exercise their franchise with some minimum level of comprehension about the issues.

A somewhat broader standard would require that students be able to pass basic high school competency tests. This standard may be desirable for two reasons: First, it increases the probability that students will be able to secure employment and survive in our competitive economy, which may be necessary if they are to have any real political power beyond simple exercise of the franchise; second, it increases the probability that students will have been educated to some level of political sophistication. This standard, however, may go beyond the minimal level of meaningful access to political rights that the Court is willing to guarantee.

Either of the above definitions, but particularly the former, has significant advantages in terms of actually having the Court recognize a right to adequate education. Most obviously, of course, it responds to Rodriguez's point that only that level of education necessary for basic access to political rights is guaranteed; complicated social science data is hardly required for a court to recognize that literacy is necessary to secure these rights.

In addition, either of these standards seems reasonably well-suited to judicial enforcement. The standards are simple and readily comprehensible. Most school systems already administer the tests necessary to monitor compliance, and intervention into state educational or fiscal policy making

184. Id. at 234.
185. See Gard, supra note 4, at 29-34.
186. See text accompanying notes 142-48 supra.
188. See Kurland, supra note 4, at 592. Kurland argues that simplicity and comprehensibility are the sine qua non of an effective constitutional principle, and of effective judicial action.
189. See Gard, supra note 4, at 32-33.
would be limited. The state would be free to fund and experiment as it wished, so long as compliance with the constitutional standard resulted. Obviously, some sort of "good-faith" hedge would be required; states could not be expected to educate the uneducable, or to otherwise work miracles. But states could be required to demonstrate an allocation of resources consistent with the constitutional standard, and progress towards its realization. Some conduct, such as "social passing" or failure to provide remedial reading programs would clearly be inconsistent with the standard. 190

The above approach is not so unprecedented as it may at first seem; Milliken v. Bradley (Milliken II) 191 upheld a court's power to do essentially what would be required to enforce the adequate education right. The Supreme Court held that federal courts could order remedial education programs as part of a school desegregation decree. The remedial education order that the Court upheld included four elements: remedial reading, in-service training of teachers, testing, and counseling. 192 Similarly, a court enforcing the right to adequate education could order remedial programs of various kinds, such as an end to social passing. Alternatively, the court could simply find that the state or school district was not behaving consistently with the constitutional principle, and order the state or the school district to formulate a remedial plan, as has been done in the school desegregation cases.

An output standard also avoids the cost-quality dilemma which has confounded other attempts to define adequate educ-

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Another area is that of enforcement of Executive Order 11246. The Executive Order requires government contractors to set "goals and time tables" for affirmative action. However, employers who fail to meet their goal are not automatically deemed to be in violation of the Executive Order; rather, the OFCC, and the courts on appeal, must determine if the employer has made a good-faith effort to meet his goal. See generally Contractors' Ass'n of E. Pa. v. Secretary of Labor, 442 F.2d 159 (3d Cir. 1971), cert. denied, 404 U.S. 854 (1971).


192. Id. at 278.

193. Id. at 275-77. Chief Justice Burger, writing for the majority, wrote that "the remedy does not 'exceed' the violation if the remedy is tailored to cure the 'condition that offends the Constitution.' Milliken I." (Citations omitted). Id. at 282.
cation. A majority of studies have indicated that there is no strong correlation between expenditures and educational quality.\textsuperscript{194} While there are persuasive arguments as to why these studies should not be regarded as definitive\textsuperscript{195} and the issue is anything but settled, the cost-quality issue as it has evolved to date creates significant difficulties for an equal resources (or “inputs”) standard of adequacy. Problems remain even if one accepts that dollars do matter—either because they are necessary, even if not sufficient, for adequate education, or because the insistence of parents and school districts on local control of funding, ratified by Rodriguez, is nonsensical in the absence of a cost-quality relationship.\textsuperscript{196}

Thus, the output standard provides a content for the right to adequate education which is judicially palatable, and which satisfies the implicit requirements and limitations of Rodriguez. It offers a possible basis on which to persuade courts to recognize that the state has an affirmative obligation to provide each individual with the basic education required for meaningful access to his or her federal political rights—rights which can later be broadened in light of increased understanding of complex issues of educational policy such as the relation of cost to quality. The standard offers promise that the adequate education presumed to exist in Rodriguez can become a reality.

\textsuperscript{194} A partial list of the major literature on the cost-quality issue includes: J. Coleman, supra note 4; J. Guthrie, Schools and Inequality (1971); C. Jencks, supra note 4; D. Moynihan & F. Mosteller, supra note 4; A. Wise, supra note 4; Billings & Leglar, supra note 4; McDermott & Klein, supra note 4.

\textsuperscript{195} See J. Guthrie, supra note 194; Billings & Leglar, supra note 4; McDermott & Klein, supra note 4.

Billings & Leglar argue that the Coleman and Jencks studies used national data and failed to control for problems inherent in such a data base, such as “noncomparable salary-teacher quality variations.” Billings & Leglar, supra note 4, at 633. Their study of Georgia school financing, controlling for cultural and teacher-salary variations, found positive cost-quality correlations. But see D. Moynihan & F. Mosteller, supra note 4 (controlling for alleged imperfections in Coleman’s methodology and reaching Coleman’s results).

McDermott & Klein make more far-reaching criticisms of current social science data on the cost-quality relationship. See McDermott & Klein, supra note 4, at 423. They have five basic criticisms. First, the data depends on achievement tests, which do not fully overlap with school program objectives. Second, the tests are culturally biased; they do not measure what they purport to measure. Third, the expenditure index does not properly match inputs and outputs, e.g., it includes spending not directly related to educational achievement. Fourth, the data analysis techniques confuse statistical correlation with causation. Fifth, current studies are all flawed by a variety of methodological defects. Id. at 423-35.

The Equalization Principle

Ultimately, adequate education can be attained only by striving for equal education, just as an adequate vote must be an equal vote. Only equal education can break the "Cycle of Non-Access" adverted to previously in this article. Political rights are competitive; the degree of political access or power enjoyed by one individual is only significant relative to that enjoyed by other individuals. Our economy is similarly competitive.197 Furthermore, access to political rights—lobbying, channels of communication—are significantly a function of economic power, and cases such as First National Bank of Boston v. Bellotti198 and Buckley v. Valeo199 suggest that this will continue to be unmitigatedly true. Thus, in the long run, adequate education and equal education become one.200

For the present, however, there are severe problems with the equal education principle. First, the data simply do not exist to support or fine-tune the theory. No one yet knows what educational "inputs" will produce desired educational outcomes. Still less can we demonstrate precise correlations between allocation of educational resources and effective exercise of political rights or successful competition in the market economy. In any case, it is futile to argue for any of the various formulas for equal inputs because Rodriguez clearly rejected any such formula, at least until it is based on something far more precise than this type of theoretical speculation. Even with judicial recognition of an equal education goal it is not clear that implementation would be possible.

Second, it seems futile to require equal expenditures if they are not related to educational quality. Professor Richards argues that providing equal "opportunity" is morally justified in itself;201 a related argument may be that equal funding is

197. A number of state courts have been willing to require school finance equalization, even in the absence of a clearly demonstrated cost-quality relationship. See, e.g. Serrano v. Priest, 18 Cal. 3d 728, 557 P.2d 929, 135 Cal. Rptr. 345 (1976); Horton v. Meskill, 175 Conn. 615 (1977); Robinson v. Cahill 62 N.J. 473, 303 A.2d 273 (1973).
200. See, e.g., Karst, Serrano v. Priest’s Inputs and Outputs, 38 LAW & CONTEMP. PROBS. 333, 393-95 (1974); Michelman, supra note 8, at 49-59 (arguing that in education, "the minimum is significantly a function of the maximum").
201. Richards, Equal Opportunity and School Financing: Towards a Moral Theory of Constitutional Adjudication, 41 U. CHI. L. REV. 32 (1973). Richards argues that society’s responsibility is to provide each individual with equal “opportunities” (education is so defined) to compete for all other goods. However, he does not discuss
necessary, although not sufficient, for equal education. However, both these arguments assume a correlation that the data do not yet support. And, again, the Court implicitly rejected this approach in *Rodriguez*.

Third, it is not mere equality that is desired, but quality as well; Professor Kurland argues that quality is the real goal.\(^{202}\) An equal-expenditures requirement does not guarantee even a minimally adequate education to anyone. But Coons, Clune and Sugarman assume that the affluent and politically powerful will guarantee that an adequate education is provided to all, once equality is forced upon them.\(^{203}\) Professor Kurland disagrees, arguing that the affluent will simply opt out of the public system and throw their support to other political goals, such as tax relief.\(^{204}\) Especially in this Proposition 13 era, an equal funding principle, then, may mean inadequate funding for all districts, because those with the economic and political power to support the schools will have no incentive to do so.

For now, minimally adequate education, defined in terms of outputs, is the best we can hope for. It at least establishes that there is a constitutional right to adequate education, against the day when we do have the means to prove that adequate education is equal education, and to guarantee that equal education will be provided for all.

**The Legal Content**

What is the constitutional basis for contending that where the state provides public education it is affirmatively obligated to provide adequate education to all its citizens? The obvious possibilities are substantive due process and equal protection. Substantive due process seems far more conducive to a right which requires that a limited, finite access to a particular service must be provided to each individual. Equal protection has a more relativistic focus. Moreover, to the extent that the

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204. See Kurland, *supra* note 4 at 591; Clune, *School Finance, supra* note 4 at 672.
Burger Court perceives equalization principles to be inconsistent with the basic competitive framework of the American system, it might be more comfortable with a right defined in substantive due process terms. The Court might view such a right as more clearly constrained to the narrow terms of "adequacy" than a right which, however narrowly defined, was lodged in the equal protection clause with all its equalizing implications.

Finally, doctrinal considerations may seem to militate against locating the adequate education right in the equal protection clause. The equalizing principle, it may be argued, has an important role to play in the constitutional scheme, a role that should not be diluted by semantic attempts to assimilate "minimum" to "equal." Two individuals, both of whom are "adequately" educated, may yet be unequally educated.

All these arguments have considerable force, and plaintiffs should certainly consider a substantive due process approach as a litigation strategy. Nevertheless, the right to adequate education should, if possible, be lodged in the equal protection clause.

Initially, whatever harm such an analysis could do to the equal protection clause has already been done; in *Ross v. Moffitt*, Justice Rehnquist firmly located the right of minimally adequate access to state criminal appeals in the equal protection clause. Furthermore, the Court's choosing to locate the right in the equal protection clause when there was a more-than-adequate basis for locating it in the due process clause suggests that the Court is not overly alarmed by the arguably more expansive potential of equal protection analysis.

An even stronger reason for using the equal protection clause is that the adequacy principle and the equal protection principle are not as distinct as they may seem. The voting cases offer an instance where adequacy and equality converged. That a similar convergence of adequacy and equality will one day occur in the educational sphere as well is argued in some detail above. Constitutional convergence of adequacy and equality will be facilitated if the right to adequate education is already identified with the equal protection guarantee.

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205. See generally L. Tribe, supra note 103, at 1132-34.
207. Id. at 611.
208. See text accompanying notes 200-207 supra.
209. See text accompanying notes 49-54 supra.
Conclusion

The subliminal holding of the Rodriguez decision may well have been that there is a right to adequate education. This right is closely analogous to those rights recognized in several other strands of “access cases;” it is identical in several key respects. In addition, adequate education is the sine qua non of the larger right, suggested by these cases, of meaningful access to the American political system. Furthermore, the right to adequate education is not only consistent with, but strongly supported by, the federalism concerns that were evident in the Rodriguez decision.

The adequate-education approach suggests a way in which the Supreme Court may be brought to recognize, however, tentatively at first, that states have an affirmative obligation to provide their citizens with the education necessary for meaningful access to the federal political system. This right, once established, is capable of evolution consistent with both the evolution of our social science capabilities and our evolution as a just and humane people.